www. flabarrpptl.org

ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

Vol. XXVII, No. 4 **Summer 2006**

INSIDE:

Executive Council Meeting Schedule 3
Guardianship Gains Ground in Florida 5
How the Deficit Reduction Act of 2005 Affects Planning for All Seniors ... 6
FSU REALS Update 11
Laird A. Lile Elected To Florida Bar Board of Governors 13
Amelia Island Executive Council Meeting—Through The Eyes of a Student 15
Statistical Profile of the Section, 1971-2005 18
Seminar: 26th Annual Legislative and Recent Case Law Update 29
Real Estate Case Summaries 33
Probate & Guardianship Case Summaries 37
Bulletin Board 44

But I'm Not Qualified To Perform Brain Surgery!

By David M. Garten, Esq., West Palm Beach, FL

The purpose of this article is to discuss the estate planning lawyer's role in assessing the mental capacity of a borderline incapacitated client and the procedure to be followed in making that determination.

As life expectancies increase, lawyers can expect to see a substantial rise in borderline incapacitated clients. As a result, there exists a need for lawyers to understand how a client's incapacity can affect his ability to make informed decisions regarding his financial and health care objectives.

Failure to properly assess the capacity of a borderline incapacitated client may result in complications for the lawyer. Questions may be raised regarding the legitimacy of the lawyer's action or inaction. The end result may be a malpractice lawsuit or a complaint filed with The Florida Bar against the lawyer. At the very least, the lawyer may be required to testify as to his client's capacity at or before the time of signing the contested document(s). No lawyer wants to testify that his client was incapacitated at the time he signed the document in issue, especially if the lawyer charged a fee for his services. Such testimony could be embarrassing or be perceived by one's peers as morally improper.

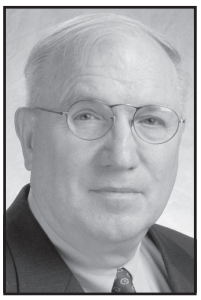
This article attempts to answer the following questions: Do lawyers have a duty to make sure that their clients have capacity at or before the time of execution of the testamentary document,

See "Brain Surgery" page 19

Message from the Chair:

Your Growing & Effective Section

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



The Real Property Probate & Trust Law Section continues to grow and expand its services and to become more effective in the many areas that it serves its members. The accomplishments of the Section during this Bar year are the results of hard and effective work of the officers and members of the Executive Council and those who serve on the 40 substantive and 27 general standing committees of the Section. In addition, the representatives of the twenty Circuits in Florida have contributed ideas and hard work to a number of projects, including the recruitment of new members for the Section, supporting the legislative program of the Section, and service to the substantive committees of the Section.

The Section has increased it membership by 803, largely due to the efforts of Mike Swaine, Steve Hearn, George Meyer and the Circuit Representatives. They were significantly aided in these efforts by our Program Administrator, Terry Hill. With the increase in membership has also come an increase in the participation of the members of our committees.

With the increased activity in our substantive committees has also come more and better attended CLE programs. Under the leadership of CLE Committee Chair Lee Weintraub and Vice-Chairs Peggy Rolando and Mike Dribin, our

See "Message From the Chair," page 3

Q: Who offers more ways to develop 20/20 foresight into the practice of Florida Estate Law?



A: NEW! LexisNexis® Practice Guide on Florida Estate Practice

Compared to other resources, you'll get more:
warning tips • strategic points • references to lead cases • judicial notes • forms

It's what a practice guide is meant to be.

www.lexisnexis.com/FLtrust
877.810.5324

TOTAL PRACTICE SOLUTIONS
Client Development | Research Solutions | Practice Management | Litigation Services

LexisNexis®

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license.
© 2006 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

AL8653

Message From the Chair

from page 1

CLE Committee has produced over 12 CLE programs, all of which have exceeded expectations in attendance and sales of tapes. Our CLE Programs, which are targeted to the needs of our members, are being well received by our members as evidenced by increased attendance and tape sales.

Our Legislative Program, under the leadership of Legislative Review Committee Chair Brian Felcoski, and Vice-Chairs Mike Dribin and Burt Bruton, has again reached new heights of success and effectiveness. Eleven of the Section's legislative initiatives were passed by the State Legislature. Included in these initiatives were the Florida Trust Code and the Land Trust Act. New legislation on condominium terminations was also included in response to needs created by the many hurricanes affecting Florida in 2005. In addition, over 20 initiatives of interest were reviewed and commented on. Our Governmental Affairs Representatives Pete Dunbar, Martha Edenfield and Marc Dunbar have been extremely effective in bringing about these positive legislative changes and alerting the Section to legislative initiatives of others that are of interest to the Section. All of the new legislation effecting real property and probate and trust issues will be reviewed at the Annual Legislative Update; I urge you to attend or to obtain tapes of this very important seminar.

The growth and effectiveness of our Section has not gone unnoticed by organizations which provide services to the real property and probate and trust lawyers. Our sponsorships have increased significantly; in addition, many of our committees are now being sponsored. I encourage everyone in our Section to thank the Section sponsors for their support of our Section's many undertakings. All of these accomplishments are the result of the hard work of Sponsors Committee Chair Charlie Nash and Vice-Chairs Peggy Rolando, Laura Sundberg, Kristen Lynch, Vickie Carter and Ellie Taft. All of these efforts have been supported very effectively by our Program Administrator Terry Hill.

A whole new round of real property and probate and trust reference books are being developed and again our substantive committees are providing authors for the many chapters of these new editions.

Attendance at all of our Executive Council Meetings has increased, and work accomplished at those meetings has increased including more committee meetings with greater attendance.

Our 2005 Legislative Update was very successful with a full house of attendees, and tape and material sales were off the charts, all thanks to Legislative Update Chair Silvia Rojas and Vice-Chairs Debbie Goodall and Sancha Whynot.

2005-2006 has been a great Bar year for the Real Property Probate and Trust Law Section. It has been a great honor for me to have served as your Section Chair with all of our outstanding Officers and Executive Council Members. Thank you to all of these wonderful people for their effective, hard work. Special thanks to Terry Hill, our Program Administrator, who in his first year of service has been both effective and innovative. But most of all, thanks to our membership; your support makes all of these and many other accomplishments possible. I encourage each and every one of you to continue that support by your attendance at CLE Seminars and by seeking out and joining the committees that serve in areas relevant to your practice. We look forward to another great year of accomplishments under the leadership of the incoming Chair Rohan Kelley and his officers.

2006-2007
RPPTL Executive Council Meeting Schedule

AUGUST 10 – AUGUST 13, 2006
The Breakers, Palm Beach
Executive Council Meeting & Leg Update
Reservation Phone # 561-655-6611
Room Rate $160.00 (Superior King)
$175.00 (Deluxe Double)
Cut-off date 07/19/2006

SEPTEMBER 28 – OCTOBER 1, 2006
Gaylord Palms Resort, Kissimmee
Executive Council Meeting
Reservation Phone # 407-586-0000
Room Rate $199.00
Cut-off date 08/28/2006

NOVEMBER 30 – DECEMBER 3, 2006
Gaylord Grand Ole Opry, Nashville, Tennessee
Out-of-State Executive Council Meeting
Reservation Phone # 615-883-2211
Room Rate $145.00
Cut-off Date 10/30/2006

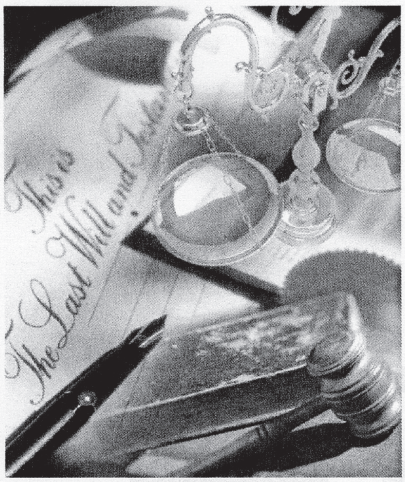
FEBRUARY 22 – FEBRUARY 25, 2007
St. Petersburg – (Venue To Be Determined)
Executive Council Meeting
(date may change)

MAY 24 – MAY 27, 2007
Westin Diplomat Resort, Fort Lauderdale
Section Convention & Executive Council Mtg.
Reservation Phone # 888-627-9057
Room Rate $199.00
Cut-off Date 04/23/2007

Other Section Meetings

JUNE 15 – JUNE 18, 2006
The Ritz-Carlton Golf Resort, Naples
Attorney / Trust Officer Liaison Conference
Reservation Phone # 800-241-3333
Room Rate $163.00
Cut-off date 05/14/2006

WRIGHT
INVESTORS' SERVICE



The Difference Is Discipline

For more than four decades, Wright has been managing assets for fiduciaries and others who serve in a position of trust. Wright's primary objective is quality investing. As an independent advisor, Wright provides investment management services to institutions, individual investors and professional fiduciaries. In addition, Wright is one of the leading providers of investment advisory services to bank trust departments, trust companies, registered investment advisors, and other multi-professional service organizations.

How Wright's Programs Benefit Your Business

- a new and profitable extension to your practice
- economical fees which accommodate your own fee schedule (special discounts for FL Bar members)
- delegation to a firm with the experience and expertise to promote compliance with Prudent Investor Act
- flexible and customized investment management with low minimum account size requirements
- consistent, prudent, disciplined process to help protect you against liability
- low-cost brokerage and custody arrangements with outside quality providers to ensure objectivity and to enhance returns
- individual security portfolios and/or mutual funds
- comprehensive service and communications to fit your needs

Client Commitment

Our most valued assets are our customers. Client Service is an integral part of Wright's culture and touches every aspect of our business.

For further information on Wright's services for fiduciaries, individuals and institutions, contact Diane Helena Timpany CFP, CEBS at 1-800-242-0013 (dtimpany@wisi.com)



Core Products

Equity Portfolios
U.S. Large Cap: Core • Growth • Value
U.S. Mid Cap: Core • Value
International Core & ADR

Fixed Income Portfolios
Total Return • Current Income • Tax Free

Balanced Portfolios
Various Portfolio Models –
Fully Discretionary or Customized

Diversification Opportunities:

All Cap Core • All Cap Growth • Hedge Strategies

OWNERSHIP: Wright is an independent investment advisor majority owned by its officers and employees. **The School for Ethical Education (SEE)** owns a substantial minority interest. SEE encourages learning experiences through programs in K-12 schools that foster positive character and advance responsible and caring communities. *www.ethicsed.org*

Our Independence Keeps Us Focused On Your Needs

Corporate Headquarters: 440 Wheelers Farms Road, Milford, Connecticut 06461 • www.wrightinvestors.com

Guardianship Gains Ground in Florida

By Senator Burt L. Saunders (R-Naples)



Recent news articles on guardianship imply that the Florida statutes governing guardianships are lacking and in need of revision. I wish to address this issue because I believe that Florida is on the cutting edge of guardianship issues and is leading the nation in protecting our most vulnerable citizens.

Guardianship is a complex and often misunderstood relationship. Often confused with the guardian ad litem program, guardianship is the process designed to protect and exercise the legal rights of individuals who lack the capacity to make their own decisions and have not made plans to address this possibility. Florida is a leader in protecting individuals who are declared incapacitated. The state needs to remain in the forefront of this effort by ensuring that our low-income citizens have access to public guardianship.

Generally, there are three types of guardians in Florida. If a court determines a person needs a guardian and that person has a family member or friend who can serve, then the court may appoint that person. These people are considered non-professional guardians. If the incapacitated person does not have a loved one willing and able to serve, but does have assets, the court may appoint a professional guardian. If the incapacitated person has no family or friends and is of limited financial means, the court may appoint a public guardian. Each of these types of guardians must meet specific registration, education and background checks as set forth in Chapter 744, Florida Statutes.

Many of the past legislative sessions have addressed public guardianship funding and other critical guardianship concerns. In 1999, the Legislature, recognizing a need for administrative oversight of public and professional guardians, created the Statewide Public Guardianship Office (SPGO). The SPGO may not be the most comprehensive name because the office is responsible for far more than public guardianship. SPGO not only appoints local public guardianship offices, but it is also responsible for the registration and education of professional guardians.

In 2003 I filed a bill that resulted in two significant milestones for Florida guardianship law. Florida became the first state in the country to require professional guardians to pass a competency examination. Because this requirement went into effect in July 2005, approximately 300 professional guardians have taken the exam, with an overall passage rate of 81%. The bill also created within the Department of Elder Affairs a Guardianship Task Force to examine guardianship and incapacity and to make recommendations to the Governor and the Legislature for the improvement of processes and procedures related to guardianship and incapacity.

The Guardianship Task Force quickly realized that Florida needs to examine more issues than just the number of persons who may require guardianship, including: uniform professional guardian education, funding for public guardianship, education of the persons responsible for determining incapacity, safeguarding minors' property, promoting advance directives, and much more. Public testimony provided the Task Force with real-life examples of the issues and gave the members insight into the differences among the counties and within judicial circuits. Recognizing the importance of the Task Force's recommendations, I have filed Senate Bill 472 for the 2006 Session, incorporating all these ideas.

Guardianship in Florida has grown tremendously in recent years. Florida has seen an increase in public and professional guardians alike, but we still have work ahead of us as we seek to ensure that each incapacitated person is cared for. One way we can all help is by taking the time to speak with our loved ones about our wishes for decision-making, should we lose that ability. Additionally, every person over 18 years of age should have an advance directive. Although we all hope we will never become incapacitated, a simple car accident, fall, or other misfortune can cause even the healthiest person to lose their ability to make informed decisions. Regardless of our age or current health, it is never too early to plan.

How the Deficit Reduction Act of 2005 Affects Planning for All Seniors

By Charlie Robinson, Elder Law Liaison to the Real Property, Probate and Trust Law Section, Clearwater, FL

On February 8, 2006, President Bush signed into law the Deficit Reduction Act of 2005 (DRA). This article will provide a basic understanding of key Medicaid provisions in the DRA. Although the act purports to be effective upon enactment, it is uncertain as to how Florida will adopt the DRA, what changes will be grandparented in, and what changes will be retroactive, if any. The Department of Children and Family Services (DCF) is waiting for implementation instruction from the Center for Medicare and Medicaid Services (CMS). No instructions have appeared as of mid-May, 2006. The author serves as a member of the Florida Elder Law Public Policy Task Force. DCF has asked for Task Force input as the new rules are promulgated.

The DRA has a cloudy legislative history. The original House version of the bill passed by six votes and the Senate passed the conference committee version of the bill 50-50 with Vice-President Cheney breaking the tie. The House passed the conference committee bill by two votes. There are at least three pending suits in federal court seeking to determine the constitutionality of the DRA as "technical corrections" were made to the bill between the time the House voted and the President signed the legislation. In spite of these issues it is important that every lawyer representing the middle class elderly develops a working understanding of this DRAconian legislation.

Major Change Provisions in the DRA

1. Longer look-back period for asset transfers

   a. For outright transfers of assets, look-back goes from 36 months to 60 months, whether outright or to a trust.

   b. The new look-back is effective on enactment. No one is certain when Florida will be ready to enforce the new law and figure out what current rules must be changed to accommodate DRA provisions.

2. Change in beginning date for period of ineligibility.

   a. The former law started time running when transfer was made.

   The ineligibility period is calculated by dividing the amount of the transfer by the amount the state determines as the average monthly cost of nursing care. Florida has not changed the number since 1995 so the current divisor is $3,300. The state has promised to update the divisor number in the near future.

   b. The new law delays the start of the ineligibility period until a person needs institutional care, is otherwise qualified, and applies for Medicaid. Thus the look-back under the new law is both a look-back and a "look-forward." The applicant who does not need institutional care for four years and 11 months could be hit with a penalty lasting nearly 10 years from the time of the transfer.

   c. Clients will be guided through the planning process to do everything possible to avoid this draconian penalty, but there will be many unsuspecting seniors and their families who will be caught in this penalty trap with no way to pay for their care.

   d. *Example.* The following example will help put the changes in perspective:

   Mildred's family and her faith have been her top priorities for all of her 84 years. She has been able to live and save even though her husband died leaving her only her house. In March 2006 (assuming DRA was in effect at that date) Mildred followed her usual habit of making a $3,000 annual gift to her church building fund to help repair some of the hurricane damage not covered by insurance. At the same time, Mildred gave her oldest grandchild $20,000 to help her through graduate school and $10,000 to her daughter to help her daughter purchase a modest condo. It did not bother Mildred to make those gifts because she felt good for her age and had been paying for her three year long term care policy for several years.

   In March 2007 Mildred had a stroke and ended up in a nursing home.

   After three years in the nursing home Mildred was out of money and long term care insurance coverage.

   In March 2010 Mildred applied for Medicaid to pay the difference between her retirement income and the cost of her care. Mildred's application was denied because of the transfers she made to church and family over four years in the past.

   Mildred's family sought the advice of a Florida board certified elder law attorney.

   The attorney explained that the Medicaid look-back

Attorney Helping Attorneys
1031 Exchanges & Replacements
www.US1031.com • www.1031replace.com
U.S. 1031
Exchange Services, Inc.
Help your Clients Sell Investment Property Tax Free

Jefferson F. Riddell, Esq.
President
(941) 366-1300
Fax: (941) 955-9380
jeff@us1031.com
CES 1031 Certified Exchange Specialist®

3400 South Tamiami Trail, Sarasota, Florida 34239

law had changed in February 2006. Under the law before that time, a transfer for less than value (Medicaid term for "gift") started a disqualification period from the date of the gift. The number of months of disqualification was divided by the state's figure for average monthly cost of nursing care. At the time of Mildred's gifts, the State of Florida pegged the average monthly cost of nursing care at $3,300 per month (a figure that the state didn't change for over 11 years). Therefore, Mildred's gifts totaling $33,000 would disqualify her for 10 months (33,000 divided by 3,300) including the month the gifts were made. Mildred's "penalty" would have expired in December 2006 under the old law.

The new law (DRA2005) imposes the penalty for any transfers made in the last five years when the applying individual is institutionalized and otherwise qualified for Medicaid. To qualify for Medicaid benefits Mildred must wait 10 months from her application in March 2010. In the meantime, who will pay for Mildred's care beyond her modest Social Security income? Her family does not have the resources to pay for 10 months of Mildred's care. Will the nursing home be able to evict Mildred?

Elder law attorneys are able to help folks like Mildred and her family protect some of her assets, and more importantly, her ability to get the care she and others like her deserve. Often the planning, under the guidance of an expert elder law attorney, will have to be done by the senior and family when there is no current likelihood of long term care.

3. The state will no longer round down transfers resulting in partial months of disqualification, eliminating the so-called "chipping" strategy. However, we are hopeful that the State of Florida will raise the figure for average monthly cost of care from $3,300 to a realistic number.

4. There are major changes in the treatment of immediate annuities for Medicaid purposes.

   a. The new law appears to require that the state be listed as a beneficiary of an immediate annuity purchased by a community spouse. Currently, the community spouse has no payback requirement on the death of either spouse.

   (i) We will be watching new regulations carefully to implement the beneficiary change to avoid overpaying the state.

   (ii) The author has always believed that the state's right to repayment as a creditor of the Medicaid recipient and the role as beneficiary makes no sense.

   b. DRA eliminates the use of balloon or "plus 10" annuities by requiring that the annuity must be irrevocable, non-assignable, actuarially sound, and pays out in equal installments during the term of the annuity.

5. Disqualification for long term care assistance for individuals with substantial home equity.

   a. $500,000 is the home equity limit.

   b. State may increase the equity amount up to $750,000.

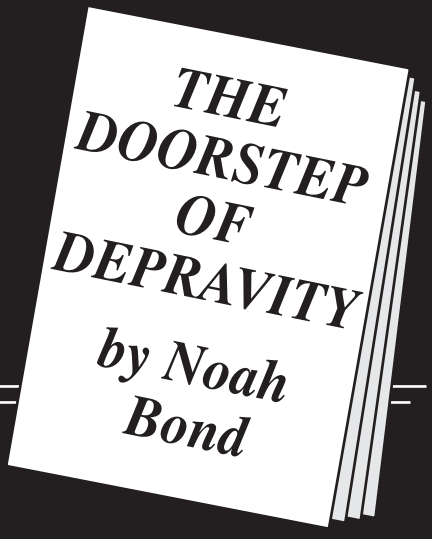
   c. It remains to be seen how this limitation will play against our reverence for Florida Homestead.

6. Florida has allowed either the Income-First Rule or the

continued, next page

WHO SAYS PROBATE IS DULL?

You're a solo attorney trying to help a poor graduate student claim her substantial inheritance. Her hostile cousins hire the best firm in town to thwart you. You go on the legal offensive. While you're scoring points in court, your client is waging her own battle. Just when it looks hopeful, people involved in the case start dying. Money vanishes. Then the unthinkable happens....



Welcome to...

Frighteningly credible fiction from a Florida attorney. The perfect gift for someone like you. Available from *amazon.com*, *atlasbooks.com* and most major booksellers. Or call 800.247.6553. ISBN 0-9673551-1-7.

Deficit Reduction Act

from page 7

Asset-First Rule when raising the Community Spouse Resource Allowance (CSRA) above the allowed amount (currently $99,540). DRA requires that the Income-First Rule be used exclusively. The author will deal with this more in a future article once this is a clear picture of the regulations.

7. Continuing Care Retirement Communities (CCRC) Entrance Fees

   DRA treats the entrance fees as countable assets to the extent that the fees are refundable. The author will provide more on this later as well.

8. A transfer of assets to purchase a life estate in a residence of another individual will be considered a disqualifying transfer unless the purchaser resides in the home for at least one year following the purchase.

9. There is some potential good news for planning clients in the new law. DRA provides for expansion of state Long-Term Care public-private partnerships that were suspended by OBRA 1993.

   a. If a person purchases qualified long term care insurance, she can protect a dollar for every dollar of insurance coverage if requirements are met.

   b. The 2006 legislature passed implementing legislation for Florida's partnership program with HB 947.

   (i) HB 947 directs the Agency for Health Care Administration to establish a qualified state Long-Term Care Insurance Partnership Program in Florida, in compliance with the requirements of the Social Security Act as amended by the federal Deficit Reduction Act of 2005, and in consultation with the Office of Insurance Regulation and the Department of Children and Family Services.

   (ii) In addition to providing certain program requirements, the bill also provides that, for purposes of determining Medicaid eligibility, assets in an amount equal to the insurance benefit payments made to, or on behalf of, an individual who is a beneficiary under a qualified state Long-Term Care Insurance Partnership Program in Florida shall be disregarded.

   (iii) Essentially, this enables Floridians to qualify for coverage of the substantial costs associated with provision of long-term care services under Medicaid without first being required to substantially exhaust – or "spend down" – assets and resources. The bill also requires the Office of Program Policy Analysis and Government Accountability to prepare a report on the implementation of a qualified state Long-Term Care Insurance Partnership Program in Florida. The report shall be provided to the Executive Office of the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 31, 2009.

   (iv) The bill also amends several laws governing long-term care insurance, including:

   (a) providing that a long-term care policy is incontestable after being in force for 2 years, except in instances of non-payment of premium;

   (b) prohibiting an insurer from imposing a new waiting period when a policy is replaced through an affiliated insurer;

   (c) eliminating the current minimum nursing home benefit of 24 months of coverage;



(d) requiring that any long-term care insurance policy or certificate issued or renewed, at the policyholder's option, shall make available to the insured the contingent benefit upon lapse as provided in the Long-Term Care Insurance Model Regulation adopted by the National Association of Insurance Commissioners;

(e) prohibiting existing policyholders from being charged premiums that exceed the premiums the insurer is charging to new policyholders; and

(f) requiring insurers to pool the claims experience of all affiliated carriers when calculating rates rather than only the policy forms providing similar benefits of the insured.

c. Subject to the Governor's veto powers, the effective date of this bill is upon becoming a law.

Further study on the DRA is strongly recommended. The National Academy of Elder Law Attorneys (NAELA) has produced a 72 page analysis available to NAELA members on its website naela.com. Also see the LexisNexis Special Legislative Alert "Elder Law and the Deficit Reduction Act of 2005".

DRA is full of land mines for the lawyer representing middle class seniors in their estate planning, particularly with gifting advice. Hopefully, this article will serve as a reminder to deal with the DRA changes and to maximize planning while avoiding the minefield created by this legislation.

Author's Note: The author may be contacted via email at CharlieR@Charlie-Robinson.com *or his website viewed at* www.Charlie-Robinson.com. *Copyright 2006*

Editor's Note: A list of Elder Law attorneys is included in the September issue of The Florida Bar Journal *and is sorted according to city.*

Be Part of the Process!

Join the 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

Member's Name: _____

Firm Name: _____

Address: _____

City _____ State _____ Zip Code: _____

Phone: (_____) _____ Fax: (_____) _____

DUES SCHEDULE:

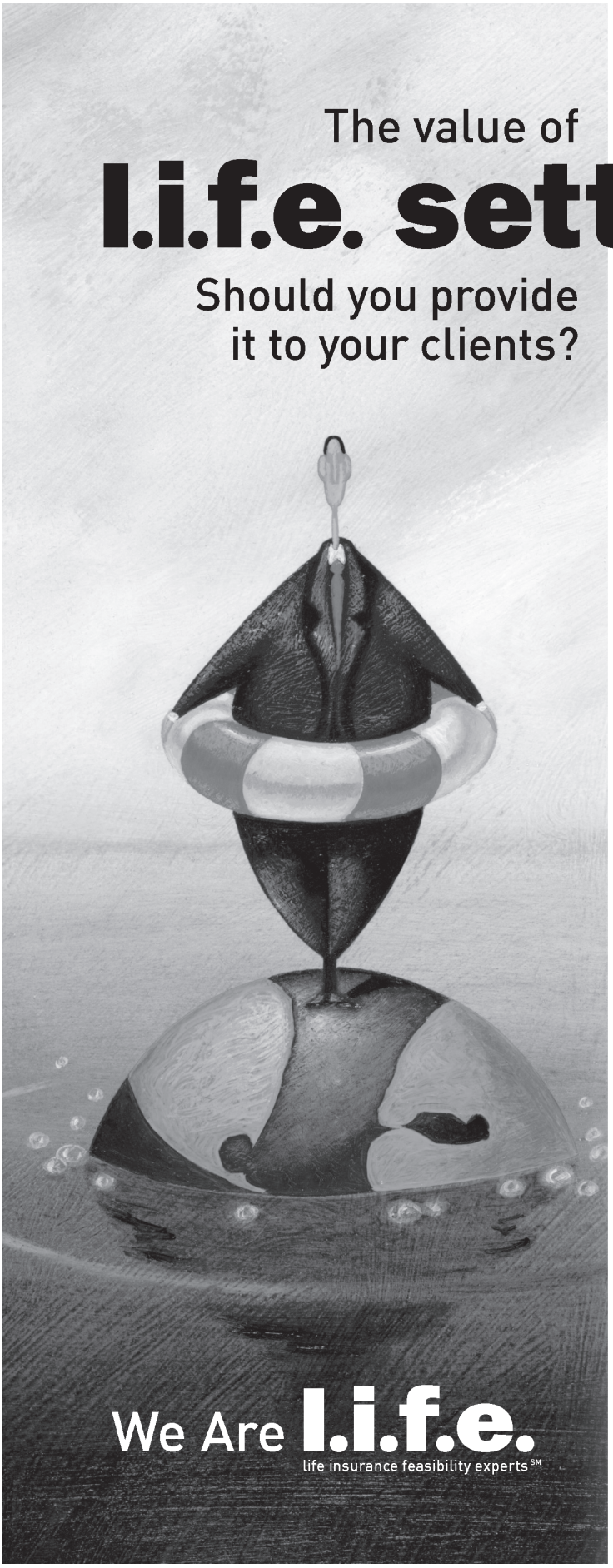
(Check your preference)

❑ Regular Member	$50
❑ Century Member	$100
❑ Silver Member	$250
❑ Executive Member	$500
❑ Millennium Member	$1,000
❑ Gold Member	$2,000
❑ Platinum Member	$5,000
❑ Double Platinum	$10,000

The value of

l.i.f.e. settlements

Should you provide it to your clients?



The answer is yes. In fact, **estate planning attorneys, fiduciaries, trust professionals, financial advisors and CPAs include a fair market valuation of their client's life insurance policies as a regular part of their annual evaluation of assets.**

Why? Because during the review of your client's life insurance you may discover that the policy is unwanted, unneeded or underperforming.

According to industry experts, **more than 85% of all life insurance policies never result in a claim.** Prior to the establishment of the secondary market, a policy owner had only two options: let the policy lapse or sell the policy back to the insurer for a predetermined cash surrender value. Now, **policy owners have a third option: Life Settlements.**

A Life Settlement is the legal sale or assignment of a life insurance policy to a financial institution. Selling the policy in the secondary market typically produces a **cash settlement offer that exceeds the cash surrender value by two to five times.**

While this definition may be simple, the realities encountered in the secondary market are a little more complex. Who is the right candidate for a Life Settlement? How can a policy owner be sure they are truly receiving a fair market valuation? What are the tax and regulatory implications of such a sale? This is where we provide value.

Ashar Group LLC is an independent, unbiased and comprehensive solution specialist in the Life Settlement market. We provide a non-binding valuation of life insurance policies in the secondary market and work with estate planning attorneys and other fiduciaries to provide their clients with the highest settlement possible.

ASHAR
GROUP, LLC
Life Settlement Specialists

800-384-8080 www.ashargroupllc.com

Ashar Group is fully licensed and provides E&O professional liability coverage.

Ashar Group LLC is an approved multi-year sponsor of both the Real Property Probate and Trust Law (RPPTL) and Tax sections of the Florida Bar. We look forward to serving as your resource within this market.

Please contact Jon Mendelsohn or Jason Mendelsohn for additional information.

FSU REALS Update

RPPTL Section Members Receive Awards from REALS

By Keith Halpern, President FSU Real Estate Law Society (REALS) 2005-2006, Tallahassee, FL

The Real Estate Law Society ("REALS") at the Florida State University School of Law had an outstanding presentation titled "Tricks and Traps of Buying and Investing in Real Estate." RPPTL member **Alan Fields** and **First American Title Insurance Company** were pivotal in helping the group with the presenters, example documents, and support.



Speaking Panel at "Tricks and Traps of Buying and Investing in Real Estate".

This presentation included Alan's coordination of an example closing, loan, inspection, and contract documents. These mechanisms help future Real Property attorneys (and first time homebuyers!) preview documents they'll encounter in practice. Much of this is chiefly experienced in **Senator Dudley**'s Land Transfer and Finance Course, but this presentation gave students an additional, practical boost for future transactions exposure. First American Title helped us package the documents in an easy-to-read, professional binder for students to study. It appears to have been another major event success for REALS as it is estimated that there were over 90 attendees. Students remarked that they felt more comfortable with the experience of knowing what would happen in closing or loan situations– an opportunity to exercise some REALS practical knowledge to compliment coursework.

The group would like to do the same thing with **Phil Baumann**'s expertise on the probate and trust side. REALS will be planning that next phase this summer and probably release that presentation in the Fall 2006. Phil has been incredibly enthusiastic about our efforts to grow and develop the REALS Mission.

Our Academic Committee with **Tom Chamberlain** will make further strides in completing our next phase of the Bert Harris Act Claims Database Project in the coming months. We're encouraging RPPTL Members to provide contact persons in all county governments so we can trigger more reporting of Bert Harris Act Claims. Our view is that this will enhance the awareness of an important set of private property rights not often experienced. That, of course, is being coordinated through **Susan Spurgeon,** Chair of the Property Rights Committee. Susan's committee has patiently guided us through what our future Bert Harris Claims Database should contain.

Phil Baumann's Alumni Liaison Committee has been a force in helping us to understand our law student/RPPTL role. We've learned more about how to structure law co-curricular education to promote and avail ourselves of RPPTL

continued, next page

John LaJoie (right) accepting his award from FSU REALs.



The Chief Justice John Marshall Medal is presented to Senator Fred Dudley (center).

FSU REALS

from preceding page

education and communication. Moreover, we have found many, willing attorneys in the Section ready to donate time or support to REALS. REALS promotes both real estate and trust and estates learning. Our next developmental phase, more recently, has included researching asset protection trust vehicles in the jurisdictions that have such statutes.

At our April 4 event, we took the opportunity to award **Sen. Fred Dudley, Mr. John LaJoie,** and **Mr. Alan Fields** with highest honors for support of FSU Real Estate Law Society. Sen. Dudley was presented with our highest award because of his extraordinary commitment, support, advice, and guidance (just to name a few points). Sen. Dudley was presented with our "Chief Justice John Marshall Medal for Highest Honors & Devotion to FSU REALS." The next time anyone will receive that will be 2011. John LaJoie received our "Highest Honors, Support & Devotion to FSU REALS"; and Alan Fields received our "FSU REALS Alumni Liaison Award for Highest Honors & Devotion to FSU REALS."

There are other RPPTL members the group wishes to recognize as we continue to develop and grow REALS. Frankly, there are a few other RPPTL members that have been additionally instrumental in support... but John, Fred, and Alan have clearly placed their hearts into helping us learn how we could become better future lawyers--above and beyond anyone's call of duty.

Moreover, the RPPTL Section has a depth of support for FSU REALS that has been our "NorthStar." Unquestionably, there are continued opportunities with RPPTL Committees that REALS can participate in learning both RPPTL and Bar mechanisms. REALS has encouraged other students to become involved with RPPTL as a result. Individual students have expressed concerted efforts to plan regular attendance in certain CLE courses.

Again, we are so humbled by what these RPPTL members have done--it gives us more than words can properly express.

Editor's Note: As of publication, Alan Fields had not been formally presented with his award.

This newsletter is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a SERVICE to the membership.

Julius J. Zschau, Clearwater, *Chair*
Rohan Kelley, Ft. Lauderdale, *Chair-Elect*
Sandra F. Diamond, Seminole, *Director, Probate & Trust Law Division*
Melissa Jay Murphy, Gainesville, *Director, Real Property Law Division*
George J. Meyer, Tampa, *Director, Circuit Representatives*
William F. Belcher, St. Petersburg, *Secretary*
John B. Neukamm, Tampa, *Treasurer*
Brian J. Felcoski, Coral Gables, *Chair, Legislation Committee*
S. Dresden Brunner, Naples, *Editor-in-Chief*
Patricia J. Hancock, Maitland, *Co-Editor, Real Property Law*
Keith S. Kromash, Melbourne, *Co-Editor, Probate & Trust Law*
Jo Claire Spear, St. Petersburg, *Co-Editor, Features*
Diane Preston Moore, Naples, *Advertising Coordinator*
Terry Hill, Tallahassee, *Program Administrator*
Lynn M. Brady, Tallahassee, *Layout*

Statements or expressions of opinion or comments appearing herein are those of the editors or contributors and not The Florida Bar or the Section.

Questions about RPPTL?



For general inquiries about the RPPTL Section, membership, the website, or other Section related matters, contact the Section's Program Administrator at The Florida Bar: TERRY HILL at (800) 342-8060, extension 5619.

Laird A. Lile Elected To Florida Bar Board of Governors

By Jo Claire Spear, Esq., Jo Claire Spear, P.A., St. Petersburg, FL



Immediate past chair of the RPPTL Section, Laird A. Lile, has been elected by fellow Bar members to The Florida Bar Board of Governors. Laird was the victor in a contested race for Seat 1 in the 20th Judicial Circuit (which encompasses five counties -- Charlotte, Lee, Collier, Hendry and Glades). His two-year term begins June 2006. The 52-member Board of Governors selects the executive director of the Bar, and meets bimonthly to formulate and adopt policies concerning the Bar. The Board's agenda includes matters of interest submitted by Bar sections, committees, and members.

In reflecting on the Board race, Laird states, "If I had not had opposition, I would not have had the opportunity to meet as many members from the 20th Judicial Circuit as I did. Meeting lawyers throughout the Circuit truly was a highlight and only deepened my desire to continue my service to the profession."

Laird's service to the Section was recognized when he received the Section's 1999 Annual Service Award. His leadership roles include: Chair of the Legislation Committee for four years, and Chair of the Liason with Corporate Fiduciaries Committee and the Strategic Planning Committee. In these positions, Laird became acquainted with many of the members of the Board, state legislators, and the senior staff at the Bar. He envisions those relationships will be beneficial to his Board work.

When current Bar President and former Board member, Alan B. Bookman, spoke at the Fund Assembly on May 12, 2006, he stressed the need for Bar membership to participate and be involved at the committee and section levels. Laird is exemplary when it comes to "involvement". Not only is Laird active in the state bar, Laird has also served on various committees in the American College of Trust and Estate Counsel and the ABA, and, is founding director of the Trusts and Estates Section of the Collier County Bar Association.

When asked to comment on Laird's election to the Board, Mr. Bookman states, "Laird will be a tremendous asset to the Board of Governors. His commitment to our profession, experience, strong work ethic as well as his knowledge of Section activities, budgetary and CLE issues will allow him to be a strong voice when these issues come before the Board." Robert W. Goldman (RPPTL Section Chair 1996-97) adds, "With Laird, the 20th Circuit and the Florida lawyers in general, get a dedicated servant, committed to bettering the profession. I'm very proud of Laird and his tireless work for the Section and for all Florida lawyers."

Laird is excited about working with other Board members, and is willing to serve wherever the Board President feels he can be of greatest assistance. Board of Governors Committees include audit, budget, certification plans, disciplinary procedure and review, legislation, and strategic planning, among others. Of primary importance, Laird asserts, "It is essential for Board members to be accessible and responsive, and to be effective and active in representing lawyers in their circuits. I look forward to providing that kind of representation to lawyers in the 20th Circuit." As Goldman states, "Laird is a lawyer's lawyer!" Congratulations, Laird.

Laird has practiced law in Florida since 1984. He holds an LL.M. in Estate Planning from the University of Miami (1987) and is also a CPA. His office is located in Naples, Florida, where he concentrates on estate and trust matters, including planning, administration, and probate-related litigation. He is certified by The Florida Bar as a Wills, Trusts and Estates lawyer (since 1989).

2006 PROBATE & GUARDIANSHIP FORMS

Available Now

Florida Lawyers Support Services, Inc.
Post Office Box 568157
Orlando, Florida 32856-8157
407/ 515-1501
407/ 515-1504
www.flssi.org

Resolution

The Executive Council of the Real Property, Probate & Trust Law Section
of
The Florida Bar
Recognizing the Service and Contributions of

James Robert Hunkapiller

Whereas, James Robert Hunkapiller, of Winter Park, was a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar, who died on January 15, 2006, survived by his devoted and loving wife, Connie, and their son, William; and

Whereas, Bob served his country with distinction as a First Lieutenant in the United States Marine Corps, and was awarded the Purple Heart after he was severely wounded in Vietnam; and

Whereas, Bob, after receiving his undergraduate degree from the University of Florida and graduating cum laude from Cumberland School of Law, had a long and distinguished career as a real estate attorney, which included private practice in Orange and Seminole Counties, extensive involvement with Attorneys' Title Insurance Fund ("The Fund"), and dedicated service to the Real Property, Probate & Trust Law Section of The Florida Bar; and

Whereas, Bob's extensive relationship with The Fund began when he became a Fund Member Agent in 1975, progressed when he joined The Fund's Legal Services Division in 1987, and culminated when he became Senior Claims Counsel; and

Whereas, Bob was a distinguished Board Certified real estate attorney who was widely recognized and acknowledged as an authority on complex matters involving surveys, legal descriptions, easements, and the right of access to property; and

Whereas, Bob's long-standing and dedicated service to the Real Property, Probate & Trust Law Section included his membership and active participation on its Executive Council, where he occupied leadership positions by acting as liaison with the Florida Surveying & Mapping Society and serving as Chair of the Section's Survey Law and Real Estate Problems Study Committees, where he produced continuing legal education seminars and was instrumental in developing significant legislation to improve property owners' right of access to their property; and

Whereas, Bob also had a history of dedicated involvement with his community and its youth, which included serving as President of the Winter Park Sunrise Kiwanis Club and Scoutmaster of Boy Scouts of America Troop 62 in Winter Park for many years; and

Whereas, the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Bob has provided during his lifetime to the nation, his community, his family, and The Florida Bar, particularly its Real Property, Probate & Trust Law Section, and acknowledges that he will be sorely missed.

Now, Therefore, be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar, that the loss of James Robert Hunkapiller is mourned, and that his distinguished service and rich contributions to the practice of law, particularly to the practice of real estate law, are respected, appreciated and acknowledged, and will be remembered forever.

Unanimously Adopted by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar at Barcelona, Spain, this 21st day of April, 2006.

Julius James Zschau, Chair
Real Property, Probate & Trust Law Section
The Florida Bar

Amelia Island Executive Council Meeting—Through The Eyes of a Student

January 13 – 15, 2006

FSU Real Estate Law Society Joins RPPTL for Amelia Island Encounter

By Keith Halpern, President FSU Real Estate Law Society (REALS) 2005-2006, Tallahassee, FL

Over the last year, the FSU Real Estate Law Society ("REALS") established itself to enhance law academics through clinical contact. I noticed an overall, pressing need to make better contact with the real property industry and their supporters. We found out what the RPPTL Section was about when we visited the RPPTL Executive Council meeting at Amelia Island in January. We had one of the most rewarding experiences a law student could have.



Keith Halpern and Peggy Rolando at the Amelia Island meeting.

Four of us were accompanied by **Alan Fields, Fred Dudley** and **John LaJoie.** Our mission was to try to hit the highlights of everything we had done in our law school property events in eight minutes. The other mission was to have fun meeting people and figuring out where we fit in. I noticed a few things in these meetings. RPPTL Section members were dedicated to the profession—even as competitors—and they seemed to have a great sense of humor. The Amelia Island Ritz Carlton wasn't a bad place to hang out either.

One of the most enlightening experiences was to sit in on the Property Rights Committee meeting and watch the attorneys work through recent issues. In our first encounter with the Property Rights Committee, we were welcomed with open arms. **Susan Spurgeon** treated us FSU students like part of the team. I was encouraged and wanted to make a clear presentation on the work we've been doing on the Bert Harris Claims Tracking project. That seemed to go pretty well and we got the kind of input that will eventually lead to a good database for lawyers in this practice area. Sarah Purdy, 3L and Liaison Chair, did a nice job on the PowerPoint presentation.

Another experience was to watch attorneys in another meeting wade through recent title insurance issues. We don't really realize how many issues attorneys have to face in practicing property and probate law. Our team enjoyed meeting new attorneys and finding out what they did at the same time. After we finished the Property Rights Committee meeting, I gained an appreciation for how the Bar Sections and RPPTL Section help practicing attorneys and wondered how I could help RPPTLs. But first we had some required cocktail hours!

We saw some familiar faces: **Phil Baumann, Terry Hill,** and **Peggy Rolando.** I never knew Terry was the Section's Program Administration until long after he had graduated and I was still in my second year at FSU trying to get the Real Estate Law Society to run. Terry was the first person I spoke to about starting REALS when I was first at FSU. Terry has been a great guiding light for us and seems to be totally committed to RPPTL. How nice it was to see him at this event. There was an overwhelming sense that RPPTL Section Members were really happy to see law students participating. Matt Shaffer, 3L had the chance to talk about some new contacts we made also. (We hoped that while we did our presentation and watched other practice presentations that we might somehow cause ourselves to get hired by someone. But that wasn't the main idea…even though it was fun to talk about it and good to swap cards for the future.) We were having so much fun I forgot we were in a room full of lawyers…sorry, I don't tell good lawyer jokes.

At the dinner, we had additional opportunities to meet Section members. While we tried to figure out more of what RPPTL was doing, we got questions on what the Real Estate Law Society was doing. After a while, I realized that everyone was enjoying their role in making the practice of law a better thing to do. The food was pretty good also!

After dinner we had a chance to go to the Hospitality Suite. We really enjoyed that. Again, I felt welcome and wished that all I could do was work on the Real Estate Law Society. The chance to take the concept statewide came up with **Jay Zschau** and that was really exciting. That is the REAL mission for the coming year. It was at that moment that I couldn't imagine my legal education being complete without interaction with Section Members. How better to learn about what to learn than to speak to the practitioners. We had a great time that evening and got enough rest to make a short presentation to the Executive Council.

I remember having a script and then throwing it away. I figured that if I gave the Executive Council a good five minutes and quit…everyone would be happy (a feat not often done by me). The key to that presentation was to say THANK YOU. In fact, our hope is that we can learn more about the RPPTL Section and participate more on some of the CLE events. It's a great way to meet attorneys in areas of law we hope to explore. After that presentation before the Executive Council, I believe the appreciation FSU has towards the RPPTL Section was clear. What surprised me was that it seemed that other law schools hadn't yet taken advantage of what they could learn by spending time with the Section. At every turn, and maybe in every conversation, I learned something new. I had a chance to

continued, next page

Executive Council Meeting

from preceding page

observe four specific meetings; I could have done more if I had more time—and now I hope to participate in a trust and estates CLE program and look forward to the Legislative Update.

At times, it's quite difficult to get out of the law school and do these activities. I really have to tip my hat to Susan Spurgeon, Alan Fields, John LaJoie, Phil Baumann, Terry Hill and especially Sen. Fred Dudley: These RPPTL Section members made the effort to get us out and explore learning in a practical way. In all honesty, we only hope we can reciprocate half of what we are learning from RPPTL. And, we hope we are the beginning to ensuring a continued flow and fresh crop of new RPPTL members. FSU Real Estate Law Society is quite appreciative of your willingness to include us.

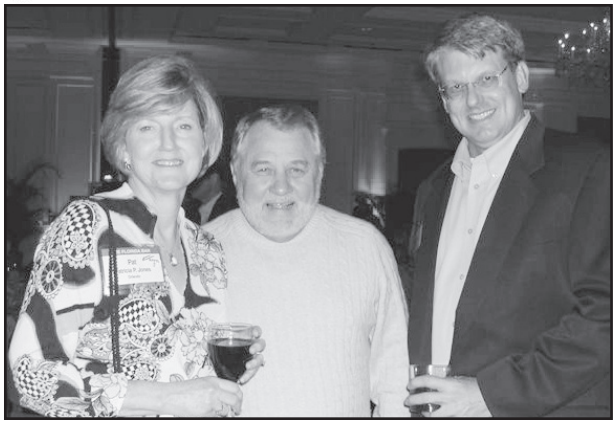
Amelia Island was an eye-opening journey and made us want to spend even more time exploring areas in RPPTL. Back at FSU we were the "buzz" for about two or three weeks afterwards. All we could do is talk about who we met and what we learned… now we realized we are part of the team and expected to participate. We realized we could be a valuable link between practicing law and learning how to practice. Yes– if that's what we've become… then let's practice how to practice. That is something we could get good at!

We hope there will be many other experiences like those at Amelia Island; and I'm certain this will engender more RPPTL growth and development earlier in our legal careers.

"Reptiles" in Amelia Island



Mary Swaine (left) and Sandy Carroll.



Pat Jones, Bill Haley and Alan Fields.

Special Thanks to Our Sponsors!

Executive Council Meeting Sponsors:

AmSouth Bank

Ashar Group LLC

Attorneys' Title Insurance Fund

Chicago Title Insurance Fund

First American Title Insurance Company

Howard Frazier Barker Elliott

LandAmerica

Management Planning, Inc

Old Republic National Title Insurance

Stewart Title Guaranty Company

Wright Investors' Service

Committee Meeting Sponsors:

Mellon United National Bank
[Guardianship Law and Procedure]

Grand Bank & Trust
[IRA & Employee Benefits]

Management Planning, Inc.
[Estate & Trust Tax Planning]

Northern Trust Bank of Florida
[Trust Law]

"Reptiles" in Amelia Island



Enjoying the dinner on Friday evening.



Peggy Rolando and Michael Gelfand enjoy the food and the entertainment.



At the welcome reception.



Burt Bruton has arrived at the Amelia Island meeting.



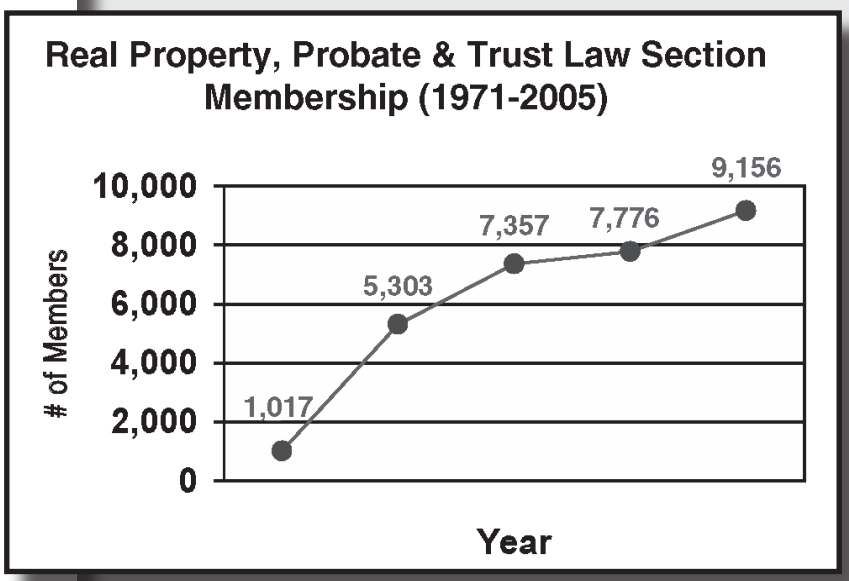
Another group enjoying the evening event.

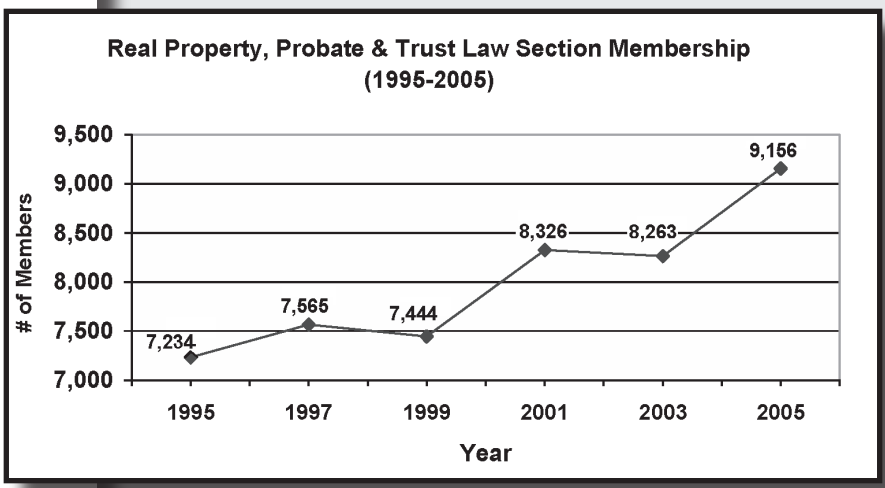
Photos courtesy of Michael Gelfand and Silvia Rojas

Statistical Profile of the Section, 1971-2005

Section Membership 1971-2005

Year	Members	Growth Rate
1971	1,017	----
1972	1,375	35%
1973	1,753	27%
1974	2,007	14%
1975	2,356	17%
1976	2,950	25%
1977	3,617	23%
1978	3,869	7%
1979	4,484	16%
1980	5,303	18%
1981	5,377	1%
1982	5,380	0%
1983	5,567	3%
1984	5,919	6%
1985	6,326	7%
1986	6,559	4%
1987	6,818	4%
1988	7,048	3%
1989	7,332	4%
1990	7,357	0%
1991	7,124	<-3>%
1992	7,223	1%
1993	7,405	3%
1994	7,507	1%
1995	7,234	<-4>%
1996	7,517	4%
1997	7,565	1%
1998	7,380	<-2>%
1999	7,444	1%
2000	7,776	4%%
2001	8,236	7%
2002	7,868	<-6>%
2003	8,263	5%
2004	8,767	6%
2005	9,156	4%





and if so, what test should be used to make that determination?

Does a Lawyer Have an Ethical Obligation to Determine the Client's Capacity?

Absolutely! The lawyer-client relationship is based in contract, i.e., the lawyer agrees to represent the client and the client agrees to compensate the lawyer for his services. It follows that the client must have sufficient capacity to enter into a contract with the lawyer for his services.

The Rules Regulating the Florida Bar 4-1.14 clearly places the responsibility of determining the client's capacity squarely on the lawyer's shoulders. Pursuant to Rule 4-1.14, the lawyer must determine whether it is reasonably possible to maintain a normal client-lawyer relationship with the client, i.e., whether the client is capable of making decisions about important matters.

If the lawyer determines: (a) that it is not reasonably possible to maintain a normal client-lawyer relationship and (b) that the client cannot adequately act in his own interest, the lawyer must decide whether it would be in the client's best interest to seek the appointment of a guardian.

Finally, if the lawyer determines: (a) that it is not reasonably possible to maintain a normal client-lawyer relationship, (b) that the client cannot adequately act in his own interest, and (c) that it would not be in the client's best interest to seek the appointment of a guardian, then the lawyer must determine whether he must act as de facto guardian for his client. See The Florida Bar Professional Ethics Committee, Opinion 85-4 (October 1, 1985).

As of the date of this article, there are no reported cases or Ethics Opinions wherein a lawyer has been reprimanded by the Florida Supreme Court for either failing to assess or improperly assessing his client's capacity.

Is There a Test for Capacity Under the Rules Regulating The Florida Bar?

There is no test for capacity under the Rules Regulating the Florida Bar. However, Opinion 85-4, citing to Michigan Opinion CI 1055 (October 19, 1984), implies that the test is whether "the lawyer has serious doubts about the mental stability and competency of his client." Additionally, The Florida Bar Professional Ethics Committee, Opinion 73-25 (April 18, 1974) implies that the test is whether the lawyer has "good cause to doubt the mental competency of a client."

Delaware has a similar test. There, a lawyer who drafts a will, particularly for an aged or infirm testator, should be satisfied concerning competence, and should make certain that the instrument as drafted represents the intentions of the testator. *Norton v. Norton (In re Will of Norton),* 672 A.2d 53 (Del. 1996).

In stark contrast with the aforementioned "intuitive" tests for incapacity, the American Bar Association (the "ABA") has created a more structured and interactive test for the lawyer. Comment [6] to the ABA Model Rule 1.14 reads:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors

continued, page 21

STATEWIDE
PROBATE LITIGATION &
INVESTMENT LOSSES

John Pankauski, J.D., LLM **West Palm Beach**

Beneficiary Rights vs. Fiduciary Wrongs

HELPING HEIRS
BENEFICAIRIES
INVESTORS

561-655-1556

john@panklaw.com

pankauski
LAW FIRM
P.L.L.C.



Save time, reduce errors, better serve your clients



Probate & Guardianship

Save time with ProDoc's:

- Automated forms
  More than 300 FLSSI* forms, automated by ProDoc for speed and accuracy.
- Probate Inventory and Accounting Software
  Fully integrated into a single system with our automated Probate forms.
- Probate Management System
  All your Probate data, deadlines, creditors, beneficiaries, and case status at your fingertips.

Call us at 800.759.5418 today and ask about our NO-RISK offer

ProDoc®
Click...Click. Documents done!

Estate Planning

Save time with 288 ProDoc automated...

- Wills and Revocable Trusts
  From simple to generation-skipping; joint trusts for husband and wife; individual trusts for husbands, wives, and unmarried clients.
- Irrevocable Trusts
  Including life insurance, investments, SNTs, Miller Trusts, QPRTs, GRATs, GRUTs, CRATs, and CRUTs.
- Family Limited Partnerships.
- Pre-Marital and Post-Marital Agreements.
- Buy and Sell Agreements.



...and everything else you need for your estate planning practice!

Automated systems for Estate Planning, Probate, Guardianship, Real Estate, Family Law, Criminal Defense, Federal Criminal Defense, Business Organizations, Small Estate Wills, Landlord/Tenant, Mortgage Foreclosure, and Homestead Exemption.

962 Coronado Boulevard • Universal City, Texas 78148-3228 • www.prodoc.com

*FLSSI is a non-profit corporation created by the Real Property, Probate and Trust Law section of the Florida Bar. These forms are created and maintained by leading experts in their field and recognized as the standard in probate courts throughout Florida.

MF51005

> as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

This test is consistent with the test used by medical professionals to determine whether their patients have capacity to make health care decisions. See Section VI. C. of this article.

In Florida, Do Lawyers Have a Legal (As Opposed to an Ethical) Duty to Determine Their Client's Capacity?

A. A Violation of an Ethical Duty Does Not Give Rise to a Private Cause of Action:

The Preamble to the Rules Regulating The Florida Bar, Chapter 4 reads in relevant part:

> *Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.* The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty. [Emphasis added].

The courts have consistently held that a violation of an ethical rule does not give rise to a private cause of action. See *Lee v. Florida Dept. of Ins. and Treasurer,* 586 So.2d 1185(Fla. 1st DCA 1991); *Rios v. McDermott, Will & Emery,* 613 So.2d 544 (Fla. 3rd DCA1993); *Smith v. Bateman Graham, P.A.*,680 So.2d 497 (Fla. 1st DCA 1996); and *Tew v. Arky, Freed, Stearns, et al.*, 655 F.Supp.1571 (S.D. Fla.1987).[2]

B. Attorney's Duty To The Client:

In Florida, does a lawyer owe a duty to the client (and possibly the client's surrogate and fiduciary) to determine his capacity at or before the time of execution of the testamentary document?

Not yet! The case of *Vignes v. Weiskopf,* 42 So. 2d 84 (Fla. 1949) is instructive in this regard. In *Vignes,* the Florida Supreme Court stated that a lawyer should comply as nearly as he can with his client's request (even if he has good cause to doubt the mental competency of a client), should expose the true situation to the court, and leave the matter to the court to decide whether in view of all facts surrounding the execution of testamentary document it should be admitted to probate.

In *Vignes,* the testator, on his death bed, feebly gave instructions to his secretary for a codicil to his last will and testament. When the attorney brought the codicil to decedent's house to be signed, the testator signed it without reading it or having it read to him. Following the testator's death, the County Court refused to admit the codicil to probate because there was no evidence that the testator had read it or knew its contents and the testator lacked testamentary capacity at the time he signed it. In addition, the judge noted that the witnesses had not signed the document in the testator's conscience presence.

The testator's attorney was severely criticized by opposing counsel for allowing his client to sign the codicil even though he believed that his client did not have testamentary capacity. In response, the Florida Supreme Court stated:

> Much has been said in the arguments and written in the briefs about the conduct of the attorney who drafted the codicil and who appears now as counsel for the appellees. The inference is left with us that he was guilty of some duplicity because he prepared the codicil for Daniel Weiskopf and now represents those who would have it declared invalid. We have seen what his activities were with reference to preparing the codicil, bringing it to the sickbed of the testator, and having it acknowledged and witnessed. When it was presented to the county judge for probate he joined the other two witnesses in an oath that they were present when the testator subscribed his name to the instrument; that the testator did not read it; that its contents were not read to him nor made known to him, although the attorney "asked him to read it or have its contents made known to him but the testator replied, 'I will read it later'"; that the codicil was immediately sealed; that the seal was not thereafter broken until its deposit with the court; that the attorney received no reply from the testator when he asked him if he wished three subscribing witnesses to attest his execution; that the witnesses thereupon signed the paper at the request of the attorney; "that they verily [believed] that the testator did not know the contents of what he was signing nor did he at the time of the signing thereof have testamentary capacity."
>
> Patently the purpose of this affidavit was to apprize the court at the first opportunity precisely what happened in the sickroom when the codicil was executed.
>
> When the attorney was interrogated about his securing the execution and attestation of the codicil, which he was later to state in the oath had been witnessed without a direct request of the testator, by one who at the time lacked testamentary capacity he gave an answer which seems to us to have been quite sensible. He said simply, "I did the best I knew how."
>
> It occurs to us that he would have been unfaithful to an old client had he not done his best to comply with the request to prepare the codicil and bring it to him. It is true that the information was incomplete, but there is evidence that he tried diligently at the time to have it clarified. When he reached his client's bedside there was good reason to believe, from the atmosphere there, that the client had not long to live and that he was probably not mentally alert, but these circumstances did not make it necessary that the attorney constitute himself a court to pass on the medical and

continued, page 23

Florida Lawyers Support Services, Inc.

Post Office Box 568157 Orlando, Florida 32856 407/515-1501 Fax 407/515-1504 www.flssi.org

Official FLSSI Forms

PROBATE, GUARDIANSHIP & FAR/BAR CONTRACT FOR SALE AND PURCHASE

Prepared by the Forms Committee of the Real Property, Probate and Trust Law Section and marketed through Florida Lawyers Support Services, Inc. {FLSSI (the Section's non-profit corporation)}. These forms are prepared by the same committee and practitioners who have been preparing and modifying the probate forms in excess of ten years. The committee consists of leading Florida probate & guardianship practitioners who are committed to a complete annual review (2006 forms available at www.flssi.org) as necessary. Revision of the forms and the copyrighted forms hereafter will contain evidence of their annual revision. The committee and the RPPTL Section will also continue to work with Probate Judges of Florida to assure them that the forms containing the FLSSI logo are the only forms officially sponsored by our Section.

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

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

Respectfully submitted,
Roger O. Isphording,
President

The companies listed below are the ONLY LICENSED VENDORS of Florida Lawyers Support Services, Inc.
For more information on their products, please call or visit their web sites:

**ALTA STAR SOFTWARE
305-279-8898
www.altastar.com

*AMERICAN LEGAL NET
800-293-2771
www.uscourtforms.com

*COLLYER'S LEGAL SOFTWARE
321-268-0627
www.collyerslegal.com

***DISPLAY SYSTEMS, INC.
863-763-5555
www.displaysoft.com

****ESTATEWORKS
978-461-1204
www.estateworks.com

FITZGERALD ENTERPRISES
772-589-8297
www.probatestepbystep.com

*MATTHEW BENDER/LEXIS NEXIS
404-215-5261
http://bookstore.lexis.com/bookstore/store_index

***PRODOC
800-759-5418
www.prodoc.com

*TECHSOFT SOLUTIONS
888-483-6195
www.techsoftsol.com

WEST GROUP, INC.
800-328-4880

* Probate & Guardianship ** FAR/BAR *** Probate, Guardianship & FAR/BAR **** Probate ONLY

> legal question whether he was in fact capable of executing a valid codicil. That the question is debatable is demonstrated by the procedure which has taken its course in the county judge's court, the circuit court, and this court.
>
> We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.
>
> Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted.

C. Attorney's Duty to Intended Beneficiaries:

In Florida, an intended third-party beneficiary of a testamentary document (i.e., a named beneficiary) has standing to bring an action for legal malpractice against the drafting attorney if he is able to show that the testator's intent as expressed in the will/trust is frustrated by the negligence of the testator's attorney. See *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner,* 612 So. 2d 1378 (Fla. 1993). However, based on the rationale in *Vignes v. Weiskopf*, it would appear that a lawyer does *not* owe a duty to intended beneficiaries to determine his client's capacity at or before the time of execution of the testamentary document.

D. Attorney's Duty to Disinherited, Intestate Heirs:

In Florida, based on the rationale in *Vignes v. Weiskopf,* it would appear that a lawyer does not owe a duty to disinherited, intestate heirs to determine his client's capacity at or before the time of execution of the testamentary document.

Compare *Chase v. Bowen,* 771 So. 2d 1181 (Fla. 5th DCA 2000). In *Chase,* the Plaintiff sued her deceased mother's lawyer for legal malpractice because he prepared her mother's revised will omitting Plaintiff as a beneficiary and instead making major bequests to her mother's business associates. The Plaintiff's claim was based on her allegation that the lawyer was the Plaintiff's lawyer as well as the lawyer for her mother and the business and that the lawyer was mandated by the ethical obligations imposed by his profession to notify her, her mother, and the associates of his irreconcilable conflict of interest in preparing her mother's rewrite of her will. Summary judgment for the lawyer was affirmed. The appellate court ruled that a lawyer who prepared a will owed no duty to any previous beneficiary, even a beneficiary he might have been representing in another matter, to oppose the testator or testatrix in changing his or her will; therefore, assistance in that change was not a conflict of interest. An attorney who drafted the will of one who changed her mind and excluded from a later will a beneficiary could not have been found to have intentionally interfered with the inheritance of such beneficiary. Drafting a will in accordance with the instruction of the testatrix was not tortious conduct.

Testamentary Capacity Defined:

Section 732.501, Fla. Stat. reads "[a]ny person who is of sound mind and who is either 18 or more years of age or an emancipated minor may make a will." Whether one has testamentary capacity is a question determinable only by the mental (as opposed to the physical) capacity of the testator at the time he executed his will. The making of a will does not depend upon a sound body but upon a sound mind. The term, "sound mind" means the ability of the testator "to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed." *In re Wilmott's Estate,* 66 So.2d 465 (Fla. 1953).

How does a lawyer know if his client mentally understands in a general way: (1) the nature and extent of his property to be disposed of, (2) his relation to those who would naturally claim a substantial benefit from the will, and (3) the practical effect of the will as executed?

The problem lies, not with (1) or (2), but with (3). With (1) and (2), the lawyer can question his client about his property and relatives. However, trying to determine whether the client understands the practical effect of the will can be a daunting task! To do this, the lawyer must decide whether the client has "decisional capacity."

Decisional Capacity:

A. Decisional Capacity Defined:

A starting definition of decisional capacity[3] is that "it involves the ability to understand and process information so that a decision can be made and communicated." The problem with this general statement is its generality. Decisional capacity is a flexible, elusive, and ultimately, undefinable concept. Like beauty, capacity or incapacity may exist only in the eye of the beholder. And without proper training, you may not know capacity when you see it.

B. Assessing Decisional Capacity:

Not only is each individual at some point on a capacity continuum, but an individual's capacity can vary over time and with the task or decision in question. Individuals can be fine in the morning but fuzzy by late afternoon, and most of us have a daily biological low point when we are not at our sharpest. Furthermore, what may look like permanent incapacity is often not permanent at all, but temporary delirium caused by improper medication, a vitamin deficiency, an infection, depression, or insomnia.

Additionally, decisional capacity is decision-specific, i.e., the level of capacity needed to perform a particular task varies with the complexity of understanding the practical affect of the act. For instance, the level of capacity and understanding that one must have to execute a trust is potentially greater than that required to execute a health care surrogate designation.

In a general sense, decisional capacity is based on the client's ability to:

(1) Understand, i.e., the ability to comprehend the

continued,next page

disclosed information about the nature and purpose of the legal matter at issue (will, trust, durable power of attorney, etc.) as well as the risks and benefits involved;

(2) Appreciate, i.e., the ability to appreciate the significance of the legal matter and the potential risks and benefits for one's own situation and others;

(3) Reason, i.e., the ability to engage in a reasoning process about the risks and benefits of the legal matter vs. alternatives to the suggested course of action proposed by the lawyer; and

(4) Choose, i.e.,the ability to express a choice about whether or not to pursue the suggested course of action proposed by the lawyer.

C. Assessing Decisional Capacity – Medical Perspective:

To fully understand the problems associated with assessing decisional capacity, it is helpful to understand decisional capacity from both a legal and medical perspective.

The vast majority of the research and articles on decisional capacity are in the medical field. From a medical perspective, decisional capacity is not an "all-or-nothing" concept. A patient has decisional capacity if he is capable of giving informed consent or refusal for the proposed intervention (i.e. medication, surgery, etc.). The informed consent process has three main elements: information, understanding and voluntary choice. These elements are the basis for the main standards for decisional capacity. General questions for assessing a patient's decisional capacity include:

- Can the patient make and communicate a choice?
- Does the patient understand the information that is relevant to the decision at hand?
- Can the patient recognize how this information applies to his own situation?
- Is the patient's decision consistent with his own values and goals?
- Is the decision the result of a delusion or distorted view of reality?
- What are the patient's reasons for the decision? Is the reasoning process logical? (Is the patient's rationale for the decision reflective, clear, and consistent with the patient's goals and decision?)

In order of increasing complexity, a person with decisional capacity should be able to:

- Receive, comprehend, and relate relevant information;
- Express his choice consistently. This can be accomplished even by a person with significant memory deficits, and would be a minimum requirement for appointing a healthcare proxy;
- Appreciate the nature of his condition, including diagnosis, prognosis, and treatment (i.e., insight);
- Balance the risks, benefits, and burdens of various choices, including the burdens to others of choices made;
- Apply a relatively stable set of values to the choice of available options; and
- Communicate the rationale behind the choices. For example, a person refusing a minor surgical procedure with clear benefit and minimal risk should be able to explain the rationale behind the refusal.

(a) Try to Eliminate the Physical or Emotional Barriers Interfering With the Patient's Decisional Capacity:

The beginning point is to assess the presence of either physical or emotional barriers to communication and to do whatever is necessary to eliminate or reduce those barriers. The reduction or elimination of any such barriers is vital to ensure that the patient can fully understand the nature of his or her condition and expressed choices. Physical barriers can include medications, physical pain or suffering, hearing impairments, the effects of a stroke, or symptoms such as fever or hyperte. Emotional barriers include treatable clinical depression, anxiety, mental illness, grief, or fear.

In his article "Determining Decisional Capacity: A Medical Perspective," Robert P. Roca discusses the problems encountered by medical professionals in trying to establish a patient's decisional capacity:

> Because of the variability of the prognosis of dementia depending upon the cause, it is critical to know the cause of the dementia before making any pronouncement about incapacity, particularly about its likely duration. This generally means that the patient should have seen a physician for a complete medical history, a thorough physical examination, and laboratory testing, including measurement of blood chemistries, thyroid hormone concentration, and blood counts. Blood testing for syphilis, an electrocardiogram, a chest x-ray, and urinalysis should be obtained. Many authorities would recommend some form of neuroimaging study (e.g., computed tomography or magnetic resonance imaging of the brain), although these tests often yield little of diagnostic or therapeutic importance, particularly when dementia has been chronic and slowly progressive. A mental status examination also should be performed.
>
> * * * *
>
> No diagnosis, in and of itself, invariably implies incompetency. Patients with dementia, delirium schizophrenia, bipolar affective disorder, and other psychiatric conditions may be capable of making responsible decisions. Establishing that a patient lacks decisional capacity requires more than making a psychiatric diagnosis; it also requires demonstrating that the specific symptoms of that disorder interfere with making or communicating responsible decisions about the matter at hand. Because it is this practical functional issue that is most critical, it might be argued that diagnosis is at best, irrelevant to judgments about capacity and, at worst, seriously misleading in that diagnosis might be taken as grounds for incompetence in the absence of evidence of impaired decision-making capacity.
>
> * * * *
>
> But sometimes the judgment is made with much less confidence. The patient has a mental disorder and shows some evidence of decisional impairment but also has

lucid intervals or at times gives somewhat reasonable explanations for the choices made. In such a case, do the psychiatric symptoms disable decision-making, or do they not? How does the examiner make a judgment in the face of substantial uncertainty?

In addition to physical or emotional barriers, there are many other factors that can affect a patient's decisional capacity either negatively or positively. Many elderly patients have diminished or fluctuating capacity. For example, patients who become confused at the end of the day (sundowning) can make health care decisions in the morning when they are lucid. Patients with short-term memory loss may still be able to judge the appropriateness of a suggested intervention, especially if they have shown a long-standing pattern of stable choices that can be corroborated. If, however, patients must retain current information to choose among treatment options, then short-term memory loss is relevant. In addition, hospitalization may scare, confuse, or intimidate the patient, and can compound common problems of aging such as poor eyesight or hearing loss.

Health care professionals should make a reasonable effort to maximize a patient's decisional capacity. One can enhance decisional capacity by:

- adjusting timing, treatment and medication regimens so assessment and discussions occur when the patient is most likely to be alert and oriented.
- trying to reduce fear, anxiety, anger, etc. which may interfere with good decision making.
- promoting trust and avoid coercion.
- presenting information in clearly, simply, repeatedly and in small amounts over time.
- considering whether the presence of family or friends might comfort and help the patient understand and focus on the important information.

Additionally, when in doubt about the ability to understand English, use an unbiased translator, and for those who can't speak, adjust the conversation to use yes/no questions, writing pads, or letter boards.

(b) Evaluate the Patient's Level of Capacity by Asking Specific Questions Designed to Elicit Interaction Between the Medical Professional and the Patient:

After assessing the presence of physical or emotional barriers to insight and communication, and attempting to reduce those barriers, the health care professional can begin to evaluate the patient's level of consciousness, attention, orientation, and ability to retain information and make a sustained informed decision by asking the patient specific questions.

Through the process of asking open-ended questions, soliciting responses in the patient's own words, and generally interacting in a nonthreatening, conversational way, the patient's decisional capacity can usually be determined. This process allows the health care professional to determine if there are areas of misinformation that can be clarified or lack of information that can be provided to further assist with the decision making. It also allows the health care professional to gain insight as to the values and goals of the patient that may have played a role in the

continued, next page

STATEWIDE
PROBATE LITIGATION &
INVESTMENT LOSSES

John Pankauski, J.D., LLM **West Palm Beach**

Bank Sales Goals vs. Fiduciary Duty

Personnel turnover? Investment Losses?
Admin issues?
Some bankers – even some portfolio managers– have sales goals. If your clients question their bank's objectivity, fees or performance, please call.

PRUDENT INVESTOR ACT ◆ BENEFICIARY RIGHTS
TRUST A/C ADMINISTRATION,
DISTRIBUTION, DELEGATION ◆ TAX INEFFICIENCY
NO SELL STRATEGY ◆ ASSET ALLOCATION
INDUSTRY CONCENTRATION ◆ FEES
PORTFOLIO RISK ◆ PROTECTION OF PRINCIPAL

561-655-1556
john@panklaw.com

pankauski
LAW FIRM
P.L.L.C.



decision making, as well as the reasoning process of the patient. The reasoning process, in view of the goals and values of the patient, is what is important in the evaluation process.

D. Assessing Decisional Capacity – Legal Perspective:

Lawyers are at a disadvantage in attempting to assess their client's capacity. A lawyer neither has the medical training nor the diagnostic tools used by medical professionals to assess capacity. Are the lawyer's gut instincts and his client's response to a few questions enough to properly assess capacity? As stated above, the medical professional's first step in determining capacity is to try to eliminate the physical and/or emotional barriers interfering with his patient's capacity. Although the lawyer can attempt to eliminate some of those barriers (see below), he can neither prescribe medication nor render a psychiatric diagnosis. As a result, the medical professional is in a much better position to determine the client's decisional capacity than the lawyer.

In her article "Determining Decisional Capacity and the Need for Adult Guardianship"[4], Rebecca J. O'Neill gave these insightful examples of some of the difficulties encountered in trying to communicate with a client to determine his decisional capacity:

> Sometimes clients have capacity to understand the documents but have difficulty communicating their understanding or desires. For example, some stroke victims have difficulty communicating, but completely understand the contents of the durable power of attorney. Sometimes, other impairments affect the person's ability to communicate, such as hearing or vision loss. Whenever there is a communication barrier, the attorney must attempt to find a way to overcome that barrier. Sometimes, it is as simple as printing the document in a larger font size or reading the document verbatim to the client. Sometimes, it means hiring an interpreter to do sign language. Sometimes, it means designing questions so the client can answer "yes" or "no." Sometimes, it means simply speaking in a very loud voice. Whatever the communication barrier, it often means being patient. Most communication barriers can be overcome.
>
> Sometimes communication barriers cannot be overcome. When this happens, the effect is the same as if the person does not have capacity to make decisions because the person cannot communicate his or her decisions. For example, once our legal clinic was asked to provide legal services to a gentleman in a nursing home. The nursing home administration had no documentation about the man's family history. No one ever visited the man. When I talked with the man his eyes were bright and he tried to respond to my questions. He could not write or speak. He could nod his head to indicate "yes" or "no." It was clear that he wanted a will. Yet, I could not figure out a way to ascertain to whom he wanted to bequeath his possessions or who he wanted to name as an agent in a durable power of attorney. In retrospect, I wonder if I had gone through the alphabet with him and had him answer "yes" or "no" to each letter of the alphabet, if I could have eventually spelled the names of each person. Communication barriers are very frustrating for both the client and the attorney.

Jan Ellen Rein, in her article, "SYMPOSIUM: Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say,"[5] discussed some of the problems lawyers face in attempting to determine their client's capacity. She wrote:

> Depending on the attorney's skill and sensitivity, a client may be competent with one lawyer and incompetent with another. Practitioners can enhance the existing capacity of their impaired elderly clients by paying attention to the environment they create for them. Specific examples of how to enhance a client's capacity by accommodating his or her special needs include (1) printing documents and communications in large, bold type with easy-to-read color background if eyesight is a problem; (2) sending materials for review before a meeting whenever possible; (3) keeping background noise and interruptions to a minimum for the hearing impaired and facing the client directly to facilitate lipreading or sitting on his or her better side for hearing; (4) eliminating glaring surfaces, glaring lights, and uncomfortable chairs; (5) speaking in plain language and avoiding legalese; (6) giving the client plenty of time and follow up communication to ensure mutual understanding; and (7) making house calls.



ActionLine Publication Schedule

Publication deadlines for upcoming issues of *ActionLine*:

***ACTIONLINE* ISSUE**	**PUBLICATION DEADLINE**
Fall 2006	July 31, 2006
Winter 2006	October 31, 2006
Spring 2007	January 31, 2007

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

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

The lawyer's goal should be to avoid snap judgments on capacity and do whatever can be done to increase the client's comfort level and ability to participate in the decision-making process. Not allowing sufficient time with an elderly client can silence the client's voice. Understanding a senior client's true voice, values, and motives requires patience, listening ability, and an ongoing dialogue. Professor Linda Smith describes this as "a process of gradual decision-making which will involve clarification, reflection, feedback, and further investigation."

At times the lawyer should ask whether doubts about the client's capacity arise "because the client's values are different from her own." Suppose, for example, a client who has always been active in directing what to do with his assets, when speaking with you alone, says, "Do whatever my children want me to do." Does that mean that the client has become incapable of deciding how to manage his assets, or does it simply mean that the client has reached a stage in life where he values his relationship with his children more than control over his assets and wants to keep the peace above all?

Pursuant to the recommendations of Professor Peter Margulies, the Fordham Conference Capacity Working Group and the delegates to the conference adopted guidelines for use by attorneys who question client capacity. In questioning client capacity for any specific purpose, the lawyer should balance the following factors: 1. The client's ability to articulate reasoning behind his or her decision; 2. The variability of the client's state of mind; 3. The client's ability to appreciate the consequences of his or her decision; 4. The irreversibility of any decision; 5. The substantive fairness of any decision; and 6. The consistency of any decision with lifetime commitments of the client.

Medical Capacity vs. Legal Capacity:

One of the differences between medical and legal capacity is the professional's approach to the assessment of capacity. In assessing legal capacity, the focus usually is on the transaction, i.e., contract, gift giving, or executing a will or trust. In contrast, in assessing medical capacity, the focus is on the patient's quality of life, which may include forgoing life-saving treatment such as surgery. Is there a difference between the decisional capacity needed for medical treatment and the decisional capacity needed to sign a legal document? Or stated differently, if the borderline incapacitated client has the ability to provide informed consent to medical treatment or to refuse medical treatment, is there a presumption of testamentary capacity?

Different levels of capacity may be required depending on the legal act to be performed. As a general rule, the more control or autonomy a client is willing to relinquish, or the more complex the act, the more capacity the client must possess. Additionally, if the action being requested is irreversible (i.e., execution of a funded irrevocable trust), then the client should have a higher level of capacity than if he were merely signing a revocable trust. Is the same true in the medical profession? Does a patient need a higher level of capacity if he is being asked to consent to surgery vs. being asked to take an aspirin? Probably.

Should Florida Adopt Comment [6] to the ABA Model Rule 1.14?

Should Florida adopt Comment [6] to the ABA Model Rule 1.14? Stated differently, do lawyers need a uniform test to assist them in making an initial determination of their client's capacity, or is the current "intuitive" test sufficient? Should lawyers be held accountable for assessing their client's capacity?

(A) Special Committee's Recommendations:

In February 2002, the President of The Florida Bar appointed a Special Committee (the "Committee") to review the ABA Model Rules 2002 ("Model Rules"), charging the Committee with the following mission statement:

The Special Committee to Review the ABA Model Rules 2002 has been created to study the changes to the ABA Model Rules of Professional Conduct adopted by the ABA House of Delegates in February 2002 from recommendations of the American Bar Association Ethics Commission 2000. Building on the work of the Ethics 2000 Review panel, this committee's charge is to analyze the changes to the ABA Model Rules of Professional Conduct, compare them with existing Rules Regulating The Florida Bar, and consider whether The Florida Bar should adopt the recommended changes. The primary concern in analyzing the changes to the ABA Model Rules of Professional Conduct should be protecting the public and maintaining the core values of the legal profession.

After a thorough analysis of the Model Rules, the Committee recommended that The Florida Bar adopt the majority of the Model Rules as revised by the committee. However, the Committee advised the Board that in light of the various comments to its proposed revisions to the Rules Regulating the Florida Bar 4-1.14 entitled "Client Under a Disability," this Rule should not be changed without further study.

Based on the Committee's recommendations, The Florida Bar has delayed formally revising Rule 4-1.14 pending

continued, next page

Advertise in *ActionLine* !!

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

further study. However, this window of opportunity to voice our objections to the proposed revisions is closing fast!

(B) Proposed Comments to Rule 4-1.14:

Both the ABA Model Rule 1.14 and the Committee's proposed revisions to Rule 4-1.14 contain nine separate Comments. Comment [6] reads:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

This Comment is intended to create a uniform test with an eye on predictability of outcome and accountability. It is an interactive test to be used by lawyers to determine their client's ability to make a lucid, rationale decision based on the standards traditionally used by medical professionals.

Comment [6] would be a substantial departure from the present "intuitive" test for capacity.

If a lawyer is required to make a threshold determination as to whether the client is capable of making decisions about important matters, isn't the lawyer rendering an opinion regarding his client's decisional/testamentary capacity? A client may have testamentary capacity even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, and vacillating judgment. Even an insane client can have testamentary capacity so long as he signs the will during a lucid interval. *In re Weihe's Estate,* 268 So. 2d 446 (Fla. 4th DCA 1972). Although a lawyer may have serious doubts about the mental stability and competency of his client, a physician may find that the client has decisional/testamentary capacity. Are the lawyer's gut instincts and his client's response to a few questions enough to properly assess capacity? Isn't a physician, with his training and diagnostic equipment, in a better position to make that determination?

Conclusion:

In Florida, there is a clear distinction between a lawyer's ethical duty to determine his client's capacity and his legal duty.

Ethically, the lawyer must determine: (a) whether it is reasonably possible to maintain a normal attorney-client relationship with the client; (b) whether the client can adequately act in his own interest; (c) whether it would be in the client's best interest to seek the appointment of a guardian; and (d) whether he must act as de facto guardian for his client.

In contrast, a lawyer has no legal duty to determine his client's capacity. When facing a borderline incapacitated client, *Vignes* tells us that a lawyer should:

- comply as nearly as he can with his client's request (even if he has good cause to doubt the mental competency of a client);
- expose the true situation to the court, and
- leave the matter to the court to decide whether in view of all facts surrounding the execution of testamentary document it should be admitted to probate.

Rule 4-1.14 requires a lawyer to make a threshold determination as to whether it is reasonably possible to maintain a normal attorney-client relationship with his client (i.e, whether the client is capable of making decisions about important matters). However, before a lawyer can properly make such a determination, the client's physical and emotional barriers to capacity must first be eliminated. As a result, it may be necessary for the client to consult with a physician prior to the initial attorney-client interview to ensure that these barriers have been eliminated. If not, the lawyer could be more of a detriment than a benefit to the client, especially in those situations where the incapacity is temporary and can be immediately corrected. Any unnecessary delay in executing a testamentary document could have a disastrous effect on the client's estate plan, especially if the client dies in the interim.

If the aforementioned procedure is followed, then there will be no need for the lawyer to make a subsequent determination of capacity – the determination will already have been made by the physician. What if the client refuses to be evaluated by a physician? Additionally, should the client be evaluated by a physician specializing in dementia or a general practitioner? Would an evaluation by a psychologist suffice?

If a lawyer is required to make a threshold determination as to whether the client is capable of making decisions about important matters, isn't the lawyer rendering an opinion regarding his client's decisional capacity? Are lawyers qualified to render an opinion regarding their client's decisional capacity? Should the Rules Regulating the Florida Bar require lawyers to test for decisional capacity? If Florida adopts the special committee's proposed revisions to 4-1.14, including Comment [6], lawyers will have an ethical duty to test for decisional capacity.

Author's Note: Throughout this article, for simplicity's sake, all references to the masculine gender will also apply to the feminine gender.

Endnotes:

1 This article is submitted on behalf of the Probate and Trust Professionalism Committee, Probate and Trust Law Division of the Real Property, Probate and Trust Law Section of the Florida Bar, David M. Garten, Esq., Chair

2 However, a violation of an ethical rule may be used as some evidence of negligence. Gomez v. Hawkins Concrete Construction, Inc., 623 F. Supp. 194 (N.D. Fla. 1985); Oberon Investments, N.V. v. Angel, Cohen and Rogovin, 492 So. 2d 1113,1114 n.2 (Fla.3rd DCA 1986), quashed on other grounds, 512 So.2d 192 (Fla. 1987); and Pressley v. Farley, 579 So.2d 160(Fla. 1st DCA 1991).

3 For purposes of this article, the terms "decisional capacity" and "capacity" are synonymous and are used interchangeably throughout this article.

4 DCBA Brief, Journal of the DuPage County Bar Association, April 1999.

5 SYMPOSIUM: Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say, by: Jan Ellen Rein, 9 Stan. L. & Pol'y Rev 241, Spring, 1998.

The Florida Bar Real Property, Probate & Trust Law Section and the RPPTL-PAC present

26th Annual Legislative and Recent Case Law Update

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

August 11th, 2006

THE BREAKERS • One South County Road • Palm Beach 33480

One Location – Limited Space

Course Number 0471R

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

8:30 a.m. – 8:35 a.m.
Introduction
Rohan Kelley, Fort Lauderdale

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

9:05 a.m. – 9:25 a.m.
New Land Trust Statute
Robert Stern, Tampa

9:25 a.m. – 9:50 a.m.
The End of Robin Hood (or Who Stole My Equity)
Jeff Sauer, Pensacola

9:50 a.m. – 10:00 a.m.
Break

10:00 a.m. – 10:30 a.m.
Highlights of Florida's New Trust Code – Part I
Brian Felcoski, Coral Gables

10:30 a.m. – 10:55 a.m.
Construction Law
Fred Dudley, Tallahassee

10:55 a.m. – 11:15 a.m.
New Homestead Laws, the Good, the Bad and the Ugly
Charles Ian Nash, Melbourne

11:15 a.m. – 11:30 a.m.
Contesting Revocable Trusts: Green Light for the Guardian
William Fletcher Belcher, St. Petersburg

11:30 a.m. – Noon
Guardianship – An Extreme Make-over – A View from the Bench
Judge Melvin Grossman and Alexandra Rieman, Fort Lauderdale

Noon – 12:15 p.m.
New Rules of Professional Conduct
Steven Hearn, Tampa

12:15 p.m. – 1:30 p.m.
Lunch

1:30 p.m. – 1:50 p.m.
The Great Society – Florida's New Eminent Domain Law
Susan Spurgeon, Tampa

1:50 p.m. – 2:15 p.m.
A Potpourri of Probate Code Clarifications and Revisions
Debra Boje, Tampa

2:15 p.m. – 2:45 p.m.
Highlights of Florida's New Trust Code – Part II
Laird Lile, Naples

2:45 p.m. – 3:00 p.m.
Condominiums
Peggy Rolando, Miami

3:00 p.m. – 3:25 p.m.
Does the Glove Fit? Morphing Condominium Law into Homeowners' Associations
Michael Gelfand, West Palm Beach

3:25 p.m. – 3:40 p.m.
Break

3:40 p.m. – 4:00 p.m.
Taking Title to Real Property in IRA's and Qualified Plans
Kristen Lynch, Boca Raton

4:00 p.m. – 4:30 p.m.
Case Law Update – Real Estate
Patricia Hancock, Maitland

4:30 p.m. – 5:00 p.m.
Case Law Update – Probate & Trust
David Brennan, Orlando

CLE CREDITS

CLER Program
(Maximum Credit: 8.0 hours)
General: 8.0 hours
Ethics: 0.0 hours

Certification Program
(Maximum Credit: 3.5 hours)
Construction Law: 2.5 hours
Elder Law: 3.5 hours
Real Estate: 2.5 hours
Tax: 2.5 hours
Wills, Trusts and Estates: 3.5 hours

Silvia B. Rojas, Miami – Program Chair
Deborah Goodall, Ft. Lauderdale – Program Vice Chair
Sancha Brennan Whynot, Orlando – Program Vice Chair
Rohan Kelley, Ft. Lauderdale – RPPTL Section Chair
Melissa Murphy, Gainesville – RPPTL Section Chair-Elect
E. Burt Bruton, Jr., Miami – RPPTL-PAC Chair
Sandra F. Diamond, Seminole – RPPTL-PAC Treasurer

The Florida Bar Real Property, Probate & Trust Law Section and the RPPTL-PAC present

26th Annual Legislative and Recent Case Law Update

REGISTRATION DEADLINE: August 2, 2006

REGISTRATION FORM — Course No. 0471R

(105) The Breakers Resort & Spa, August 11, 2006

Name_____ Florida Bar Number_____

Mailing Address _____

City/State/Zip _____

Email _____ Telephone _____

TLH: Course Number 0471R

- ❑ Real Property, Probate and Trust Law Section Member $150
- ❑ RPPTL-PAC Member $150
- ❑ Full-time law college faculty or full-time law student ..... $ 75
- ❑ Persons attending under The Florida Bar's policy of fee waivers (including judges) ..... $ 40
- ❑ Others $200

Lunch is provided at no additional charge to registered attendees

Send form and check payable to RPPTL-PAC* to:
RPPTL-PAC, P.O. Box 568157, Orlando, FL 32856-8157

We are unable to accommodate registrations by telephone or facsimile, or payment other than by check.

Registrations will be processed on a first-received, first-registered basis, until the facility's capacity has been reached.

If the facility's capacity has not been reached with advanced registrations, on site registration will be available, with an additional $25 charge.

The registration fee, less a $25 cancellation charge, will be refunded if the refund request is postmarked by August 4, 2006. There will be no refunds if request is not postmarked on or before August 4 and mailed directly to RPPTL-PAC.

Please mail your refund request to RPPTL-PAC at the above address. Do not mail refund requests to The Florida Bar. ***Refund requests mailed to The Florida Bar cannot be processed.***

*The seminar registration fee is payable to the RPPTL-PAC. The RPPTL-PAC is a political action committee, which is not affiliated with, or controlled by, The Florida Bar or the Real Property, Probate and Trust Law Section. This seminar is being held in conjunction with the Section's Executive Council Committee meetings on August 10th and the Executive Council meeting on August 12th, also at The Breakers Resort & Spa, Palm Beach. All RPPTL section members are invited to participate in the programs and receptions. For registration and pricing please call (850) 561-5619 or check out the RPPTL Section website at www.flabarrpptl.org.

Hotel Reservation Information

THE BREAKERS, Palm Beach
561-655-6611

Suggested lodging alternatives:

The Four Seasons: 561-582-2800
The Brazilian Court: 561-655-7740
The Colony Palm Beach: 561-655-5430

26th Annual Legislative & Recent Case Law Update

Audiotape and/or Course Book
ORDER FORM ONLY

To order the audiotape and/or course book separately, please complete the form below and mail it, along with your check payable to "The Florida Bar" to the address at the bottom of the page.

~ Course date: August 11, 2006, The Breakers Resort & Spa, Palm Beach ~

Name: _____ Florida Bar # _____

Address: _____

City/State/Zip: _____ Phone #_____

FOR CREDIT CARD ORDERS COMPLETE THE FOLLOWING & FAX TO (850) 561-5825:

❑ MASTER CARD ❑ VISA

Name on Card: _____

Expiration Date: _____ / _____ (MO/YR)

Card Number: _____

Signature: _____

_____ COURSE BOOK ONLY (RP015)
Cost: $100 plus your local tax

_____ AUDIO CASSETTE TAPES and COURSE BOOK (RP010)
Cost: $225 plus your local tax

_____ AUDIO CD PROGRAM and COURSE BOOK (RP014)
Cost: $240 plus your local tax

Anticipated Shipping Date: October 6, 2006

Contact Information:

Terry Hill
Phone: 850-561-5619
The Florida Bar
RPPTL Section 2006 Legislative Update
651 East Jefferson Street
Tallahassee, Florida 32399-2300

THANK YOU!

*Seminar registration is on a separate order form
Course # 0471R

Florida Lawyers Support Services, Inc.
Post Office Box 568157 - Orlando, Florida - 32856-8157 (407) 515-1501 Fax (407) 515-1504 www.flssi.org

FAR/BAR CONTRACT FOR SALE AND PURCHASE FORMS

Approved by The Florida Bar, Real Property, Probate & Trust Law Section and The Florida Association of Realtors
(Revised July 2004)

_____ Pad(s) of 50 FAR/BAR Contracts - $25.00

_____ Pad(s) of 50 FAR/BAR "As Is" Contracts - $25.00

_____Set(s) FAR/BAR Comprehensive Rider - $7.00
(one copy of each rider/addenda listed below)

Riders/Addenda
Sold in pads of 25

_____ Condominium Association Disclosure - $8.00
_____ US Department of VA/FHA - $8.00
_____ Homeowners' Association/Community Disclosure - $8.00
_____ Foreign Investment in Real Property Tax Act ("FIRPTA") - $8.00
_____ Lead-Based Paint Disclosure - $8.00
_____ Coastal Construction Control Line - $8.00
_____ Insulation Disclosure for New Residence - $8.00
_____ "As Is" - $8.00
_____ Back-up Contract - $8.00
_____ Buyer's Attorney Approval - $8.00
_____ Seller's Attorney Approval - $8.00
_____ Sale of Buyer's Property - $8.00
_____ Kick Out Clause - $8.00
_____ Seller Financing - $8.00
_____ Assumption of Existing Mortgage (s) - $8.00
_____ Existing Tenant (s) - $8.00
_____ Pre-Occupancy by Buyer - $8.00
_____ Post-Occupancy by Seller - $8.00
_____ Rezoning Contingency - $8.00
_____ Right to Inspection & Right to Cancel - $8.00
_____ Evidence of Title (ABSTRACT) - $8.00
_____ Evidence of Title (S. FL Contracts) - $8.00

Order Sub-Total	$_____
Sales Tax 6.5%	$_____
Shipping & Handling	$ 8.00
TOTAL	$_____

Firm:_____

Attn: _____ Attorney Bar #: _____

Street Address:_____ (WILL NOT DELIVER TO P.O. BOX)

City/State/Zip:_____

PLEASE CHECK ONE: COMMERCIAL Address RESIDENTIAL Address

Phone: (_____)_____ Fax: (_____)_____

E-mail address: _____

METHOD OF PAYMENT

I have enclosed check #_____, in the amount of $_____, on _____ / _____ / _____
or
Please charge my Visa or Master Card Amount to be charged $_____

_____ _____/_____ _____
Card Number Exp. Date Signature of Cardholder (REQUIRED)

FLSSI USE ONLY

SHIP DATE _____/_____/_____ LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___

AUTHORIZATION DATE _____/_____/____ # ___ ___ ___ ___ ___ ___

Real Estate Case Summaries

By Stephen Edward Silkowski, Esq., Jacksonville, FL

Original Demayo holding that homestead protections may be waived in contract, is withdrawn; question certified to supreme court.

Demayo v. Chames, 31 Fla. L. Weekly D798 (Fla. 3rd DCA March 15, 2006).

Author's Note: This opinion is a continuation of the Demayo case annotated in the last issue. Here, the 3rd DCA sua sponte reheard the case, withdrew its prior opinion, and certified to the Supreme Court the question as one of great public importance. Justice Wells wrote the court's opinion, but Justices Shepherd and Green merely concurred in the result and certification. Accordingly, I treat their concurrence as the majority opinion.

Because the present case was factually indistinguishable from the Florida Supreme Court's opinion *Sherbill v. Miller Mfg. Co.,* 89 So. 2d 28 (Fla. 1956), the concurring judges were compelled to join the affirmance of the decision below. They felt, however, that *Sherbill,* and the much earlier decision on which it is grounded, *Carter's Adm'rs v. Carter,* 20 Fla. 558 (1884), are inconsistent with the modern view that a person's right to exempt his homestead property from the claims of a creditor is a personal right that may be waived by that person if he desires. For this reason, and because the people of this state in 1984 made a fundamental change in the text of their homestead provision that is, at a minimum, inharmonious with the policy pronouncement on which *Carter's Adm'rs* and hence *Sherbill* are moored, and also because they saw strong evidence that the Florida Supreme Court is tending toward the modern view in its consideration of other provisions of the Florida Constitution involving personal economic decision-making, citing *In Re: Amendment to the Rules Regulating the Florida Bar v. Rule 4-1.5(f)(4)(b) of the Rules of Professional Conduct,* (Docket Entry dated December 14, 2005, ordering The Florida Bar to submit a proposed rule allowing clients to waive the constitutional limit on the amount of attorney fees that contingent fee counsel can receive in medical malpractice matters), the judges agreed to certify the question of whether the policy pronouncement found in *Carter's Adm'rs* should be overruled.

While the judges agreed that adhering to precedent is usually the wise policy, nevertheless, the Florida Supreme Court has continually reaffirmed that although stare decisis is fundamentally important in our system of justice, it is not an ironclad and unwavering rule so that a court must bend to the voice of the past, however outmoded or meaningless that voice may have become.

For the foregoing reasons, the court certified the following question to the Florida Supreme Court as a matter of great public importance:

> WHETHER, IN LIGHT OF SUBSEQUENT PRECEDENT IN FLORIDA AND OTHER JURISDICTIONS, AND THE TEXTUAL CHANGES MADE BY THE PEOPLE OF THE STATE OF FLORIDA IN ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION IN THE GENERAL ELECTION OF NOVEMBER 1984, THE HOLDING IN *CARTER'S ADM'RS v. CARTER,* 20 Fla. 558 (1884), FOLLOWED *SHERBILL v. MILLER MFG. CO.,* 89 So. 2d 28 (Fla. 1956), THAT A WAIVER OF THE BENEFIT AND PROTECTION OF THE EXEMPTION FOUND IN ARTICLE X, SECTION 4(A) OF THE FLORIDA CONSTITUTION IS UNENFORECEABLE AGAINST THE CLAIM OF A GENERAL CREDITOR, SHOULD BE OVERRULED?

Lis Pendens not founded upon recorded instrument or construction lien does not automatically require a bond.

Santa Catalina Townhomes, Inc., v. Mirza, 2006 Fla. App. LEXIS 5999 (Fla. 4th DCA April 26, 2006).

The developer contended that because the lis pendens in this case was not founded on a recorded instrument or a construction lien, a bond was absolutely required. Following a hearing at which the developer did not seek to adduce any evidence of its likely damages (other than counsel's argument that the developer's damages would equal the purchase price of the property), the trial court denied the motion without prejudice, declining to set bond "at this time."

The District Court of Appeal concluded that the trial court had not departed from the essential requirements of law in denying bond "at this time." Florida's Supreme Court had rejected the contention that a bond is required in all cases in which the lis pendens is not founded on a recorded instrument or construction lien. Instead, the trial court is authorized to require a lis pendens bond, after affording the parties an evidentiary hearing on the issue of whether the holder of the property is likely to incur damage, and the amount thereof, if the lis pendens notice is unjustified.

The Fourth District Court of Appeal has adopted, as the proper method of measuring damages for wrongful filing of a lis pendens, the difference between the fair market value at the time of filing of the lis pendens and the fair market value at the time of its termination, plus any consequential damages, including the award of operating expenses if the property declined in value, prejudgment interest from the date of termination of the lis pendens, and attorney's fees.

In this case, no evidence was presented at the hearing from which the order on review emanated as to the amount of damages petitioner was likely to incur, under this measurement, in the event the lis pendens is ultimately determined to be unjustified. By denying bond "without prejudice," it appeared that the trial court would allow the petitioner a further opportunity to attempt to do so. Under the circumstances, its denial of the motion without prejudice

continued, next page

was not a departure.

Accordingly, the DCA denied the petition without prejudice to the developer's renewing its request for bond and for an evidentiary hearing on the issue of whether it is likely to incur damages as a result of the lis pendens and, if so, the amount.

Foreclosure plaintiff must follow up on information as to defendant's whereabouts as part of diligent search and inquiry. Majority concurrence: Bona fide purchaser should not be insulated from successful attack upon judicial sale

Godsell v. United Guaranty Residential Insurance, 31 Fla. L. Weekly D 812, 2006 Fla. App. LEXIS 3884 (Fla. 5th DCA March 17, 2006).

Author's note: This is another "Demayo 2" type opinion, in which one judge of the three-judge panel joined in the concurrence, thereby conferring majority-of-panel authority upon it.

United filed suit against Godsell to foreclose a second mortgage on real property. Godsell is a permanent resident of Canada, but her address shown on the mortgage was the Florida property that she used seasonally. After filing suit, United made two attempts to serve Godsell at the Florida address. The first attempt affidavit of service indicated "unoccupied at this time; owner lives in Canada, per neighbors".

Because service was unsuccessful, United employed a "skip trace" service to locate Godsell. The only known sources contacted by the skip trace service in an attempt to determine Godsell's address were: (1) the Florida Department of Motor Vehicles, (2) the Trans Union Social Security data bases, and (3) the U.S. Postal Service, for a forwarding address. These sources apparently came up with a second possible address for Godsell in Florida. A second attempt to serve Godsell at both addresses was unsuccessful.

Because service had been unsuccessful, United gave Godsell notice of the action by publication. United's affidavit of diligent search for service by publication stated in relevant part: "Diligent search and inquiry have been made to discover the identity and residence of Defendant GODSELL. Plaintiff hired an investigator to perform a skip trace to locate the defendants, but said investigator was unable to determine the residence address for the Defendant(s). Plaintiff has attempted service on the Defendant(s) at the [Florida] addresses. Directory assistance for these cities does not have a current listing for these Defendants. Plaintiff's investigator searched various databases, including the Florida Department of Motor Vehicles and the Trans Union Social Security databases, to obtain the current residence address for the Defendant(s), without success. Written inquiries have been made with the U.S. Postal Service for forwarding addresses, without response. The investigator has been unable to discover further information regarding the current residence of the Defendant(s) after diligent search and inquiry".

Apparently relying on this affidavit, the clerk of the court sent notice of the action to Godsell at the Florida addresses. Godsell never learned of the suit, and a final default judgment of foreclosure was entered against her. The judgment was sent to the Florida property address. The property was later sold to an unrelated third party, and the clerk issued a certificate of title.

Godsell learned of the foreclosure from a neighbor who had been caring for the property and, shortly thereafter, she filed a motion to vacate the final judgment, asserting that the sale was void because of United's failure to make a "diligent search" to determine her Canadian address.

Florida courts have recognized that there must be strict compliance with the requirements of service of process by publication. Failure to strictly comply renders a subsequent judgment voidable. Service by publication may be used only when alternative service cannot be effected. Godsell argued on appeal that service under section 48.194(2), Florida Statutes, could have been had, so that constructive service was not permitted because of the failure to make a diligent effort to obtain her Canadian address and serve her by mail there. Godsell did not dispute that her Canadian address was not actually "known" to United, but she asserted that it was so readily available as to be "known" if a minimally competent effort had been made.

The court had no trouble with this threshold question of whether the search for Godsell met the minimum requirements of "diligent search and inquiry." It did not. Having been informed at the time of the first attempt at service that Godsell lived in Canada, the only investigation done was a "skip trace" of Florida's Department of Motor Vehicles, the Social Security data base and the United States Post Office for a forwarding address. So far as the record reflected, no effort had been made to access any source calculated to discover Godsell's Canadian abode.

The determination that no diligent search had been made brought the court to the affidavit in support of the notice by publication. The affidavit had a number of facial defects, such as whether the person was over or under eighteen, whether the address was unknown to the affiant, and it also omitted any reference to the important fact of defendant's Canadian residence. Additionally, by including an extraneous address, known not to be the address of the defendant, mailed notices that Godsell might have gotten were misdirected. Thus, although the "diligent search and inquiry" claim was contained in the affidavit, it was otherwise not in compliance with the statute, and service by publication in this case was void.

CONCURRENCE, WITH ONE JUDGE JOINING:

Even if the judgment in this case had been merely voidable, the court would remand for consideration of whether the purchaser at the foreclosure sale was a "bona fide" purchaser for value so as to keep the title acquired at the foreclosure sale. Godsell logically argued that if the judgment against her was voidable at her instance because she had no notice of the proceedings and the statutory requirement of diligent search and inquiry to locate her had not been met, how could her rights in the property be completely divested simply because the successful purchaser in the judicial sale was not a party to the foreclosure suit? She suggested that such a deprivation would amount to a violation of due process. It did not seem either fair or logical that someone who participates in a judicial sale is insulated, based on a fiction of innocent ignorance, from defects in the judicial proceeding, especially one of this

magnitude.

Anyone who successfully bids on a foreclosure property ought to take subject to the undoing of the judgment giving rise to the sale. Besides, a landowner in the position of Godsell cannot be completely without a remedy. If the sale of her property without compliance with the statute cannot be undone because the purchaser is a BFP, she must have a remedy in damages against the plaintiff whose negligence or misconduct caused her loss.

Judgment creditor may garnish homestead sale proceeds only over and above amount used to purchase new homestead.

Rossano v. Britesmile, Inc., 2005 Fla. App. LEXIS 20241 (Fla. 3rd DCA 2005).

The appellee had secured a judgment against the appellant. While taking her deposition in aid of execution, the creditor learned that she planned to sell her homestead and to purchase a less expensive residence instead. The appellee served a writ of garnishment on a closing agent who held an account reaching the total of the proceeds of the sale of her first home. Because, before the closing, she had entered into a contract for the purchase of a new home, Rossano claimed an exemption, on the ground that her previous homestead exemption applied to the escrowed funds. Notwithstanding, after a hearing, the lower court awarded a garnishment judgment for the full amount of the judgment, plus costs.

The District Court of Appeal reversed on the holding that, in light of the evidence concerning the judgment-debtor's clear intention to devote all or part of the proceeds received from the sale of her previous home into a new homestead so as to qualify for continued exemption, it was error for the trial court to require garnishment of the entire amount claimed. Instead, the court should have awaited the closing on the new home and then ordered payment to the appellee judgment-creditor only of that amount, if any, which was not used in good faith for the new residence. The proceeds of a voluntary sale of a homestead are exempt from the claims of creditors just as the homestead itself is exempt if, and only if, the vendor shows, by a preponderance of the evidence, an abiding good faith intention prior to and at the time of the sale of the homestead to reinvest the proceeds thereof in another homestead within a reasonable time. Moreover, only so much of the proceeds of the sale as are intended to be reinvested in another homestead may be exempt under this holding. Any surplus over and above that amount should be treated as general assets of the debtor. The proceeds of the sale are not exempt if they are not reinvested in another homestead in a reasonable time or if they are held for the general purposes of the vendor.

In stipulation, "damages to the premises" does not include lost-rent damages.

Tiny Treasures Academy, Inc., v. Stirling Place, Inc., 2005 Fla. App. LEXIS 20276 (Fla. 4th DCA 2005).

During eviction proceedings, Stirling Place and Tiny Treasures entered into a Stipulation for Settlement that the trial court approved. Settlement Paragraph 13 provided that "in the event Defendant causes damages to the premises, Plaintiff may seek judgment against Defendant for same and the Court herein shall have jurisdiction regarding same." Tiny Treasures vacated the premises as agreed in the settlement, but removed items additional to those it was permitted to remove by the settlement, resulting in damage to the premises. Stirling Place claimed that the removal of these additional items caused damage to the premises and sought a final judgment for the same based on Paragraph 13 of the settlement. Tiny Treasures responded that it did not cause any damage, and that any damage to the premises resulted from Stirling Place's wrongdoing. Tiny Treasures asserted, however, that even if it were deemed to have committed the damage, any damages should be set-off from Tiny Treasures' security deposit.

The trial court held hearings on the Motion for Final Judgment. In addition to the amount of damages to the premises, Stirling Place requested an award for loss of rent due to the delayed occupancy of the tenant subsequent to Tiny Treasures. The subsequent tenant was unable to occupy the premises until the damage caused by Tiny Treasures' removal of the additional items from the premises was repaired. Tiny Treasures objected, arguing that lost rent was not part of the damages provided for in the settlement.

Settlement agreements are interpreted and governed by the law of contracts. The standard of review applicable to contract interpretation is de novo. Furthermore, it is axiomatic that where the language of a contract is clear and unambiguous, a trial court is not at liberty to modify the agreement and therefore must give effect to its express provisions. Tiny Treasures contended, nonetheless, that the trial court modified the plain language of the settlement by awarding lost rent. Under Tiny Treasures' interpretation, Paragraph 13 does not provide for damages such as lost rent, but rather for "physical" damages to the premises. Tiny Treasures suggested that these physical damages should be defined to include only those of similar kind to the other damages addressed in Paragraph 13. Stirling Place responded that including lost rent in the damages award did not amount to a modification of the terms of Paragraph 13, but rather was a permissible judicial determination that those terms encompass damages resulting from damages to the premises, such as lost rent.

This issue centered on the meaning of the term "damages to the premises." "To" is a preposition and "the premises" is a noun phrase that is the object of the preposition. As such, the prepositional phrase "to the premises" modifies the noun "damages" and defines the location of the damages. With this understanding, the question became whether lost rent was a damage to the premises, meaning that the location of the injury stemming from the lost rent was the premises. It seemed that what was damaged by lost rent was not the premises, in the sense that the premises would not be rendered physically imperfect by the loss of rent, but rather the bank account of the corporation owning the premises.

This interpretation was further bolstered by the rule of ejusdem generis, which provides that where the enumeration of specific things is followed by a more general word or phrase, the general phrase is construed to refer to a thing of the same nature as the preceding specific things. Paragraph 13 lists existing damages that are exempt from liability, including stains on the carpet, inoperable cabinets/sinks, and broken water fountains, prior to stating that Tiny Treasures would be liable for "damages to the premises." Thus, the specific damages excluded should be read to modify the general damages included, and the damages contemplated by Paragraph 13 encompass only similar

Florida Legal Education Association
Post Office Box 568187 - Orlando, Florida - 32856-8187 (407) 515-1501 Fax (407) 515-1504 www.flsi.org

FLORIDA COMMERCIAL REAL ESTATE COMMISSION LIEN ACT

CLE DVD

Florida Bar Course Number #6367 5

2 General CLER Credits
1.5 Real Estate Certification

$99.00 for RPP&TL Members
$150.00 for non Section Members

PRICES INCLUDE SHIPPING

Firm: _____

Attn: _____ Attorney Bar #: _____

Street Address: _____
(WILL NOT DELIVER TO P.O. BOX)

City/State/Zip: _____

PLEASE CHECK ONE: ☐ COMMERCIAL Address ☐ RESIDENTIAL Address

Phone: (_____)_____ Fax: (_____)_____

E-mail address: _____

PAYMENT

I have enclosed check #_____, in the amount of $_____, on _____ / _____ / _____

FLEA USE ONLY

SHIP _____/_____/_____ LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___



Probate & Guardianship Case Summaries

By Leslie A. Peterson, First Year Law Student, University of Miami, Miami, FL

The Second District Court of Appeal overruled the probate court's decision granting ownership of disputed funds without holding a hearing on the Personal Representative's request to determine rightful ownership of the disputed funds. The probate court failed to provide Decedent's niece, who remained an interested party, with an opportunity to be heard on the unresolved issue of ownership.

Fleming v. Demps, 918 So. 2d 982 (Fla. 2d DCA 2005).

Prior to her death, the Decedent resided in a nursing home and designated her sister-in-law, Demps, as a beneficiary of her bank account. After the Decedent's death, the Personal Representative, the Decedent's brother, began administration of the estate and subsequently learned that funds from the Decedent's account had been transferred to an account belonging to the Decedent's niece. The Personal Representative subsequently obtained an order from the court directing the bank to freeze the transferred funds pending further court order.

Fleming, the Decedent's niece, filed a motion to dissolve the injunction. At an evidentiary hearing, a bank officer testified that she went to the nursing home and, at the Decedent's request the day before the Decedent's death, transferred the funds from Decedent's account to Fleming's account. The bank officer testified that this was done so that Fleming could divide the funds among the family "according to family size." Although the court found a discrepancy in the bank officer's testimony, as Fleming transferred the funds to her own account after the Decedent's death, this discrepancy did not impact the court's decision. The court concluded that the evidence did not establish that the Decedent had made an absolute gift or gift causa mortis of the funds to Fleming or that Fleming had the authority to distribute the funds to family members in an amount based solely upon her discretion. The court upheld the injunction, granted the Personal Representative's motion to compel production of estate funds, and ordered the parties to direct the bank to place the monies in an estate account.

Approximately two years later, the Personal Representative filed a motion to determine ownership of the disputed funds among the interested parties and served Fleming with the same. Without a hearing, the probate court entered a final judgment nearly identical to its earlier order, finding the disputed funds as estate property to be administered as estate funds.

The Second DCA agreed with Fleming in that the probate court erred in entering the final judgment without providing her an opportunity to be heard on the motion to determine ownership of the disputed funds.

The Second DCA stated that due process requires that a party be given the opportunity to be heard and to testify and to call witnesses on his or her behalf. The denial of the opportunity to be heard prior to final judgment of this right is fundamental error. The Second DCA held that the prior order and hearing did not concern the issue of ownership among interested parties but only established that the Decedent did not make a gift or grant Fleming the power to distribute funds. Since Fleming still remained an interested party, the Second DCA held that pursuant to Section 731.201(21), Florida Statutes, it would be error to deny Fleming the opportunity to litigate and to be heard concerning the ownership issue.

The Second District Court of Appeals concluded that a trust amendment to a trust agreement executed by husband and wife as "Grantors," which provided that the trust could be amended by the "Grantors," was valid. Because the trust agreement contained a provision stating that the singular and plural may be construed interchangeably, both grantors were not required to sign any amendment to the trust agreement, and the wife could amend the trust after her husband's death.

Roberts v. McNeill, 920 So. 2d 193 (Fla. 2d DCA 2005).

Husband and wife, as Grantors and Co-Trustees, entered into a joint revocable trust agreement (the "Trust" or "Trust Agreement," as applicable). Pursuant to Article II of the Trust Agreement, following the death of the last to die of the Grantors, the trust estate would be distributed equally between the couple's son and daughter and their respective issue, per stirpes. Article XV of the Trust Agreement concerned amendments and revocations, and Article XII of the Trust Agreement, dealing with the construction of the trust instrument, stated that "unless the context require otherwise, masculine person pronouns include the feminine, and the singular and plural may be construed interchangeably."

The Grantors' son, who was survived by his children, predeceased the Grantors. When the husband died, his daughter accepted her appointment as the Successor Trustee. A couple of weeks after the daughter's acceptance, the wife amended the Trust Agreement to provide that the entire trust estate would be distributed to the daughter upon the wife's death, thereby eliminating her deceased son's children from any distribution from the Trust upon the wife's death. After the wife's death, the grandchildren sought distribution of the Trust according to its original terms. Construing "Grantors" in Article XV of the Trust Agreement to require both Grantors' signatures to amend the Trust Agreement, the trial court declared the trust amendment to be invalid. The Grantors' daughter, as the sole Successor Trustee, appealed.

The Second DCA found that neither *L'Argent v. Barnett Bank,* N.A., 730 So. 2d 395 (Fla. 2d DCA 1999) nor *Rollins v. Alvarez,* 792 So. 2d 695 (Fla. 5th DCA 2001) controlled

continued, next page

the referenced Trust as *L'Argent* did not have a singular/plural clause and *Rollins* specifically stated "signed by both of us." The Second DCA found that Article XV, which stated that "this trust is subject to revocation, change or amendment, in writing, by the Grantors from time to time," was qualified by the "singular/plural" language of Article XII. Thus, either one or both of the Grantors were permitted to amend the Trust.

In reaching its decision, the Second DCA relied on the rules of contract construction in that "no word or part of an agreement is to be treated as a redundancy or surplusage if any meaning reasonable and consistent with other parts, can be given to it." *Singer v. Singer*, 706 So. 2d 914 (Fla. 4th DCA 1998). Additionally, the Second DCA held that failure to apply the singular/plural clause would produce absurd results. If "Grantors" were required to mean both husband and wife, then the surviving grantor would not receive income from the trust after the death of the first grantor and would have no access to the principle of the trust which was set up to provide care for the Grantor.

The Fourth District Court of Appeal concluded that the trial court erred when it departed from the essential requirements of law by denying the Trustee's motion to stay to establish constructive trusts, for surcharge, and removal of a Trustee pending outcome of probate proceedings where proceedings in both probate action and present civil action involved the same parties and at least one material issue.

Bergman v. Kaplan, 922 So. 2d 982 (Fla. 4th DCA 2006).

In 2003, Respondent filed a petition in the probate court seeking an accounting. The probate court entered final summary judgment requiring Petitioner to provide an accounting. However, the court barred Respondent from amending her original complaint in the probate court. On motion for rehearing, the court vacated its earlier ruling on the time limitation, but continued to deny the motion to amend. Petitioner appealed that order. Respondent subsequently filed a civil action to impose constructive trusts, for surcharge, and to remove the Trustee which raised some of the same issues from the probate proceeding as in the civil action.

The Fourth DCA held that both the probate action and the present civil action proceedings involved some of the same parties as well as the material issue regarding the timeliness of respondent's claims under Section 737.307, Florida Statutes. Acknowledging that the risk of multiple conflicting orders and the trial court's potential for undermining the issues currently on appeal was real, the Fourth DCA reversed the trial court's decision and granted the Trustee's request for a stay of the civil action against it to prevent interference with the jurisdiction of the courts of appeal relative to the issues then pending before them. Under that reasoning, the Fourth DCA granted the petition, quashed the order of the trial court, and remanded the case for entry of a stay pending the outcome of the probate proceedings.

The Fifth District Court of Appeal rejected the contention that conflicts in expert evidence regarding the capacity of a ward did not preclude the finding that the evidence of incapacity was clear and convincing.

Smith v. Smith, 917 So. 2d 400 (Fla. 5th DCA 2005).

The stepson of Smith, an elderly woman, who had been handling her finances under a power of attorney, claimed that his stepmother was incapacitated and petitioned for appointment as Smith's guardian. Smith had been living with her step-granddaughter for whom Smith had purchased a car. Upon receiving a recommendation for appointment of a plenary guardian from the three member examination committee that examined Smith, the trial court appointed a professional guardian to serve as Smith's temporary guardian. The committee, along with an additional member, testified at a hearing as to Smith's lack of capacity where Smith's own confusion during direct examination corroborated their findings.

At the hearing, two additional health experts were called to testify as to their examination of Smith and both came to the conclusion that Smith was capable of making her own decision given her age, cultural factors, and her limited education. Both experts also commented on the fact that Smith was not pleased with her stepson's behavior and felt more comfortable with her step-granddaughter. The trial court found Smith lacked capacity and entered an order appointing a limited guardian. Smith contended on appeal that the information presented in the case was "insufficient to support a finding by clear and convincing evidence." *In re: Bryan,* 550 So. 2d 447 (Fla. 1989).

The Fifth DCA found that, although there were inconsistencies in the testimony of the examiners, the inconsistencies did not preclude a finding that the evidence of incapacity was clear and convincing. In citing to *Masnassa v. Manassa,* 738 So. 2d 997 (Fla. 1st DCA 1999), the Fifth DCA held that the trial court could properly find clear and convincing evidence of incapacity where that trial court weighed the evidence and decided whether to accept or reject the findings of the examining committee.

The Fifth District Court of Appeal agreed that probate court erred in failing to find that a nephew's claim to entitlement of the family business was not only reasonably ascertainable by the personal representative, but it was in fact actually known to the personal representative. Under the applicable statute, the merits of the claim should have been determined in an independent action.

Simpson v. Simpson, 31 Fla. L. Weekly D527 (Fla. 5th DCA February 17, 2006)

The nephew of the decedent petitioned the probate court to allow him to file a late claim against the decedent's estate on the grounds of fraud, estoppel, and insufficient notice. At an evidentiary hearing, the probate court concluded that the nephew was not an "ascertainable creditor" of the estate because the claim was that of a potential donee of an unexecuted gift rather than one entitled to shares held in trust. When the personal representative was discharged, the nephew appealed.

Section 733.701, Florida Statutes requires the Personal Representative to serve Notice to Creditors on known or reasonably ascertainable creditors to give them notice of commencement of the probate proceedings under the right of due process. Because it is undisputed that the nephew's identity was reasonably ascertainable, the true issue before

the probate court was whether the nephew's claim was reasonably ascertainable.

The Fifth DCA held that not only was the claim reasonably ascertainable, it was actually known to the Personal Representative. The Fifth DCA found that the nephew had the right to fully litigate his claim in an independent action and remanded with directions to accept the nephew's claim and proceed accordingly.

The Fifth District Court of Appeal concluded that the trial court did not depart from the essential requirements of law by disqualifying an attorney from representing a will contestant when it was likely that the attorney would be a potential witness on behalf of his client.

Eccles v. Nelson, 919 So. 2d 658 (Fla. 5th DCA 2006).

A discrepancy existed between Decedent's wills dated 2001 and 2004 whereby different bequeaths were asserted. In the 2001 will, Nelson was named Personal Representative while in the 2004 will, a different person was named Personal Representative. Eccles was a witness to the 2004 will that her attorney, with whom she worked and had a 14 year relationship with, prepared, presented and notarized. Nelson moved to disqualify the attorney from representing Eccles on the grounds that (1) his involvement in the 2004 will execution would call him to be a witness to the event and (2) the relationship he had with Eccles presented a conflict of interest.

The Fifth DCA found support for the trial court determination that the attorney's involvement in the 2004 will execution disqualified him from representing Eccles at trial only, not pretrial or post-trial. The Fifth DCA cited Rule 4-3.7, Florida Rules of Professional Conduct, finding that the issues of mental incapacity, undue influence and genuineness of the signature are obviously contested matters of substance putting the attorney's testimony beyond a mere formality.

With regard to Eccles' claim that Rule 4-3.7 violated the First Amendment right to association, the Fifth DCA did not agree. The Fifth DCA clarified that the right to freedom of association is not absolute and can be impinged upon by the states as in discrimination cases such *Roberts v. United States,* 468 U.S. 609 (1984). Rule 4-3.7 does not offend the constitutional freedom of association as state courts have a valid governmental interest in protecting the integrity of litigation taking place within it and may, within the exercise of that interest, enact rules governing when and how lawyers may act vis-a-vis that litigation.

The disqualification of a party's lawyer "should only be resorted to sparingly." *Singer Island Ltd., Inc. v. Budget Constr. Co., Inc.,* 714 So 2d 651, 652 (Fla. 4th DCA 1998). However, the Fifth DCA found that the disqualification here was appropriate as there has been no departure from the essential requirements of law.

The Second District Court of Appeal concluded that although the victim in a criminal sexual abuse case who filed a claim against the estate of the decedent was an ascertainable creditor, the trial court erred in granting the victim an extension of time to file claim. When there is no evidence presented to support the granting of the extension of time to file a claim, a court cannot conclude that the claimant was a reasonably ascertainable creditor.

Faerber v. Goodman, 31 Fla. L. Weekly D399 (Fla. 2d DCA February 8, 2006).

Decedent, who committed suicide, allegedly informed his children that he expected civil litigation to follow the charges against him for sexual activity with a child prior to his death. After the suicide, the Personal Representative published a notice to creditors pursuant to Section 733.2121, Florida Statutes, which required a published notice in the county of the estate administration once a week, for two consecutive weeks.

The victim claimed that the Personal Representative did not comply with Section 733.2121(3)(a), Florida Statutes, which states that a "Personal Representative shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated, and shall promptly serve a copy of the

continued, next page

Committee seeks members to work with nonprofit sector

The Section's Charitable Organizations and Planning Committee is seeking Section members who wish to participate in working with the nonprofit sector. The purposes of the Charitable Organizations and Planning Committee are: (1) to review Florida law and federal law affecting charitable organizations and charitable donors and recommend changes in Florida law as the committee deems helpful to charitable organizations and donors; and (2) to encourage philanthropy through education and directing focus of Florida Bar members to the not-for-profit endeavors organized or operating in Florida."

Current committee activities include planning for a 2007 seminar and reviewing possible gift annuity legislation and investment standards for charitable trustees and directors of not-for-profit corporations. Our next meeting will be in Palm Beach at the Section meeting August 10-13. (The specific date/time for our meeting has not yet been determined.) If you would like to participate, please e-mail the committee chair, Michael W. Fisher, at mwf@fishertousey.com

notice on those creditors." The trial court agreed with the victim's claim that the victim was a reasonably ascertainable creditor who should have received actual notice from the Personal Representative.

However, the Fifth DCA held that the trial court erred because no evidence was introduced by either party to prove whether the victim's status as a reasonably ascertainable creditor was known to the Personal Representative. The Fifth DCA stated that to base a conclusion on the assertions of counsel is an abuse of court discretion.

The Second District Court of Appeal rejected an order precluding the Personal Representative from expending Estate funds to prosecute pending appeals unless the Personal Representative showed the monetary benefit to the Estate. Should a trial court determine that the appeals were not taken in good faith or were frivolous, then there are other remedies available to the probate court.

MacDonald v. Mauiello, 920 So. 2d 190 (Fla. 2d DCA 2006).

The Personal Representative of the Decedent appealed the damages awarded in a wrongful death action brought by the Personal Representative of the Decedent's victim. The victim's Personal Representative claimed the appeal was frivolous, and the appeal was only initiated to waste Estate assets and to reduce the ability of the Estate to pay damages to the victim. The trial court ordered the Decedent's Personal Representative to not expend Estate funds for prosecution of the appeal and precluded appellate attorney's fees and costs.

The Second DCA disagreed with the trial court's order to require the Personal Representative to show a monetary benefit to the Estate in order to receive reimbursement for appellate expenses as it narrowed the benefit to the Estate "to an unworkable level." The Second DCA held that payment of appellate fees and costs cannot be contingent upon prevailing on appeal because neither party can guarantee the outcome. Rather, the true benefit to an Estate provided by an appellate attorney is the presentation of a good-faith appeal and its ultimate resolution.

In reaching its decision, the Second DCA stated that Section 733.612(19), Florida Statutes authorizes the Personal Representative to hire attorneys and others to aid him or her in his or her duties to protect the Estate. The Second DCA acknowledged the trial court's caution in requiring pre-approval for expending Estate monies. However, rather than conditioning the Personal Representative's exercise of authority, the Second DCA proposed that the trial court to not take any action until necessary.

The Third District Court of Appeal held that where a prenuptial agreement was ambiguous, the trial court properly admitted parol evidence to shed light on the intent of the parties at the time that they entered into the agreement. By reviewing the Decedent's wife's testimony, the trial court properly found that the wife waived her right to her elective share because the wife's understanding of the prenuptial agreement was that when she passed away, her son would inherit all of her property and that when her husband passed away, his children would inherit all of his property.

Weisfeld-Ladd v. Ladd, 920 So. 2d 1148 (Fla. 3d DCA 2006).

Under the prenuptial agreement entered into by Decedent and Wife, all Decedent's property, both real and personal, that was titled in Decedent's name alone would remain the sole and separate property of Decedent through the marriage, and at the time of Decedent's death, such separate property would be given to his children. The following paragraph of the prenuptial agreement was basically the same, except that it referred to the Wife's separate property, and it provided that in the event of her death, such separate property would be given to her son.

After Decedent's death, Wife filed her Election to Take Elective Share. Decedent's children claimed that pursuant to Section 732.702, Florida Statutes, the Prenuptial Agreement operated as a waiver of Wife's elective share rights. Wife argued that the language of the prenuptial agreement was insufficient to waive her right to an elective share because the prenuptial agreement merely set forth the parties' "intent." Finding the language of the prenuptial agreement to be ambiguous, the trial court allowed the wife to testify as to her intent when entering into the valid Prenuptial Agreement. Based on this parol evidence, the trial court denied her Petition for Order Determining Spouse's Entitlement to Elective Share.

Under de novo review, the Third DCA agreed with the trial court's determination that the Prenuptial Agreement was ambiguous. The Third DCA held that the trial court properly admitted the parol evidence to interpret the intent of the Wife and Decedent at the time they entered into the prenuptial agreement. Wife's testimony clarified the intent of the parties when she stated it was her understanding that if she would have passed away, her son would have inherited all of her separate property, and that upon her husband's death, his children would inherit all of his separate property.

The Third DCA affirmed the trial court's finding that petitioner waived her rights to an elective share of her husband's estate. To permit the surviving spouse to receive an elective share would have been to defeat the Decedent's intention.

The Second District Court of Appeal held that the trial court erred in concluding that one-half of an estate is unclaimed property that may be subject to escheat to the state when the paternal relatives of decedent were established but the maternal heirs of the decedent were not established. In intestate succession when there are no lineal descendants, the state has the burden of showing that there were no lawful heirs in order for any portion of estate to escheat to state.

Faskowitz v. Department of Legal Affairs, 31 Fla. L. Weekly D965 (Fla. 2d DCA March 31, 2006.)

Petitioner filed a petition on behalf of himself and his sisters asserting that they were all the paternal heirs of the Decedent and the intestate heirs entitled to receive his intestate property after the lapse of the devise to decedent's sole beneficiary, his wife, who had predeceased him. Since the court found no evidence that maternal heirs of the decedent existed, the probate court directed that one-half of the

property of the estate be distributed to the paternal heirs. The remaining one-half of the property was to be held by the clerk of court in accordance with Section 733.816, Florida Statutes for the unknown maternal kindred, and the property eventually will escheat to the State if no maternal heirs are located. Petitioner appealed that portion of the order.

The Second DCA did not agree with the trial court's conclusion that one-half of the Estate is unclaimed property that may be subjected to escheat to the State stating that this point is inconsistent with the provisions of Section 732.103, Florida Statutes concerning the descent of an intestate estate. Section 732.103(4)(c), Florida Statutes states in pertinent part that "if there is no paternal kindred or if there is no maternal kindred, the estate shall go to such of the kindred as shall survive." Under this reasoning, the Second DCA found that the whole estate should be inherited by the paternal heirs.

The Second DCA relied on two specific provisions of the Florida Probate Code governing the escheat of estate property, Sections 732.107 and 733.816, which do not in any way displace the rule of descent set forth in Section 732.103(4)(c). Because the paternal heirs had established their status as lawful heirs, Section 732.107(1), stating that a person who dies without being survived by any person entitled to it, does not apply. Additionally, Section 733.816(1) requires that no unclaimed property be distributed by the Personal Representative when no lawful owner is known does not apply here either as the paternal heirs are known. The Second DCA held that there is nothing in the statutory scheme suggesting that once claimants have established their status as lawful heirs, the State is entitled to escheat a portion of the estate simply because there is uncertainty concerning whether there may be other lawful heirs.

The Second DCA also held that escheat was available only where it has been shown that after diligent search and inquiry, the State was unable to find any of the decedent's ascertainable heirs. This placed the burden of establishing that there were no lawful heirs on the State. The Second DCA stated that it was the paternal heirs, not the State, who established through a genealogist their undisputed status as the only lawful heirs, and the trial court erred in granting an order for disposition in accordance with section 733.816.

The Second District Court of Appeal rejected the trial court's order requiring an executor of an estate to demonstrate a monetary benefit before allowing the expenditure of estate funds. Only after full review of the completed appellate proceedings, can the probate court remedy appeals that were not taken in good faith or were frivolous.

In re Estate of Wejanowski, 920 So. 2d 190 (Fla. 2d DCA 2006).

In an unfortunate turn of events, the Decedent, a terminally ill man, killed the woman with whom he was in a relationship for 20 years before turning the gun on himself. The victim's Personal Representative prevailed in the wrongful death suit against the Decedent's estate, which Decedent's Personal Representative appealed. The victim's Personal Representative claimed that the appeal was frivolous and Decedent's Personal Representative was just wasting estate assets to reduce the estate's ability to pay her judgment. Decedent's Personal Representative responded by filing a motion in the trial court to approve costs and fees associated with appeal. The trial court denied his motion without prejudice to resubmit the request at the conclusion of the appeal upon a showing of monetary benefit to the estate and prohibited expending estate funds for prosecution of the appeal and disallowed attorney's fees and costs

The Second DCA found that the requiring Decedent's Personal Representative to show a monetary benefit to the Estate before he is entitled to reimbursement for appellate expenses narrowed the definition of "benefit to the estate" to an unworkable level in the appellate context. In that regard, appellate attorneys had an ethical duty not to prosecute baseless or frivolous appeals. Further, because neither party could guarantee the outcome, payment of attorney's fees and costs could not be contingent upon prevailing on appeal. Appeals safeguarded trial decisions and afforded litigants the right to resolve disputes with due process.

The Second DCA held that Section 733.602(2), Florida Statutes, removed liability for any act of administration if the act was authorized at the time. Personal Representatives often attempt to protect themselves from future liability by obtaining pre-approval from the probate court for actions they intend to undertake that do not need court approval. However, Section 733.602(1), Florida Statutes provides that if the Personal Representative breaches his or her fiduciary duty, he or she might be liable to the interested persons for damage or loss resulting from that breach. Therefore, despite the possibility of immunity of action by the probate court, if a Personal Representative did breach his or her fiduciary duties, he or she may nevertheless be liable.

The Second DCA ruled that given the circumstances surrounding the couple's deaths and the victim's Personal Representative's objections, the trial court should be cautious to give the Decedent's Personal Representative preapproval to expend estate monies to prosecute the appeal. However, the Second DCA stated that it would have been a better course of action for the trial court to neither give nor withhold permission to expend estate monies for this appeal, rather than to give permission with conditions that unduly hampered the Personal Representative in the exercise of his authority. The Second DCA stated that if it is later determined that the appeal was not taken in good faith or was frivolous, the Decedent's Personal Representative can be held accountable and the probate court has other remedies available to it.

The Fourth District Court of Appeal rejected the trial court's finding that a Personal Representative of Decedent's Estate could not bring a legal malpractice action against an attorney and a law firm for negligence in estate planning services. The Decedent's intent could be established by resorting to extrinsic evidence, and thus, the Personal Representative could establish a malpractice claim on behalf of the Estate.

Gallo v. Brady, Fla. L. Weekly D673 (Fla. 4th DCA March 1, 2006).

During her lifetime, the Decedent hired an attorney and his law firm to perform estate planning services that resulted in the creation of a charitable remainder trust. The Decedent's Personal Representative brought a legal

continued, next page

malpractice claim against the attorney, alleging that (1) the purpose of establishing the charitable trust was to minimize federal estate taxes, (2) the trust failed to comply with mandatory requirements set forth by the Internal Revenue Code and related regulations, and (3) as a consequence of the trust's deficiencies, a tax deduction was not available to the estate and the estate paid estate taxes that could have been avoided but for Brady's negligence.

The Fourth DCA reversed the trial court's holding that the instrument itself did not contain language reflecting that its purpose was federal estate tax savings since the grantor's intent could not legally be established by resorting to extrinsic evidence which prevented the Personal Representative from establishing any malpractice. Instead, the Fourth DCA held that a jury could look at the facts alleged by the Personal Representative and, without resort to extrinsic evidence, reasonably infer that one of the Decedent's purposes for setting up the charitable remainder trust was to effectuate federal tax savings.

With regard to the privity requirement of a legal malpractice claim, the Fourth DCA distinguished the present case from *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner,* 612 So.2d 1378 (Fla.1993), which stands for the proposition that a would-be beneficiary may not establish that he or she was intended to benefit from a will by resorting to extrinsic evidence. The Fourth DCA further held that nothing in the language of *Espinosa* suggested that the introduction of extrinsic evidence of the testator's intent is prohibited when a Personal Representative initiates a legal malpractice claim on behalf of an estate.

In reviewing a possible breach of fiduciary duty and negligence in a guardianship, the Second District Court of Appeal held that a guardian and an attorney can be required to produce documents for in camera inspection. However, a guardian and an attorney cannot be precluded from raising attorney-client privilege at deposition.

Tripp v. Salkovitz, 919 So. 2d 716 (Fla. 2d DCA 2006).



Following the death of the Ward, the Ward's daughter opened an estate and was appointed Personal Representative. The Personal Representative and the Ward's widow brought suit against the deceased Ward's Plenary Guardian alleging improper management of financial affairs and failure to protect the Ward's residence from foreclosure.

The trial court ordered the Guardian to produce documentation from the confidential communications between the Guardian and the Guardian's attorney during the time of the guardianship for an in camera inspection of the documents so that the court could determine whether the attorney-client privilege relative to such documents could be legally asserted by the estate. The trial court found that the documents had been produced to the Personal Representative thereby precluding the Guardian from invoking the attorney-client privilege for communications with its attorney.

The trial court based its decision on *Jacob v. Barton,* 877 So. 2d 935 (Fla. 2d DCA 2004), finding its reasoning persuasive in the context of fiduciary relationships notwithstanding the fact that *Jacob* addressed a trust situation instead of a guardianship. On the first issue presented, the trial court ruled that the privilege belonged to the estate as the Ward's successor in interest, implying that at deposition, the Guardian could not invoke the attorney-client privilege to protect private communications it had with its attorney. On the second issue presented, the trial court required that the written documents representing such communications be presented for an in camera inspection to determine which documents must be produced to the Personal Representative, implying that some communications may be protected from disclosure by the guardian's attorney-client privilege, while others may not. The attorney-client privilege is dependent on who the "real client" is – the beneficiary or the trustee or, as applied to the current case, the Ward or the guardian.

Regarding the first issue presented, the Second DCA affirmed the trial court's order requiring production of documents relating to the Ward's interest, finding that an in camera inspection necessary to determine which documents are specifically related to the representation of the Ward's interest and are thus discoverable because the privilege now belongs to the estate as the Ward's successor in interest. However, the Second DCA held that the same differentiation must be made regarding the second issue presented concerning the questions that would be asked of the attorney regarding the Guardian at deposition. The finding that the estate holds the privilege as to all communications is contrary to the holding in *Jacob* and was overly broad.

The Third District Court of Appeal affirmed the lower court's order granting the Guardian's request to change the Ward's residence to a non-adjacent county. The requirements of the statute were met when the exigent circumstances of immediate nursing care were present.

Vargas v. Acosta, 31 Fla. Law Weekly D219 (Fla. 3d DCA January 18, 2006).

Until March 1, 2005, the Ward was living in a Miami-Dade County rehabilitation center. On February 28, 2005, the Ward's appointed Guardian was notified that the Ward was to be discharged from the center the following day.

With one day to work, the Guardian secured a place for the Ward at a nursing facility in Lee County, where she resides. As Guardian of the Ward, she had the right to determine the ward's residence.

Pursuant to Section 744.2025, Florida Statutes, court approval is required before a guardian may change the ward's residence from one county to a non-adjacent county and requires that the court "shall, at minimum, consider the reason for such relocation and the longevity of such relocation." The Ward's wife's, who lived in Miami-Dade County, filed an Emergency Motion to Prevent Change of Ward's Residence which was denied by the trial court. The wife of the Ward appealed.

The Third DCA stated that given the circumstances, that is, the need for next day placement in a nursing facility and the fact that the wife previously would not permit the Ward to reside within his own home, the Ward's needs would be best met by living in a facility close to the Guardian's home.

The dissenting opinion points out that Section 744.2025, Florida Statutes does not give any guidance as to what the minimum a court should do before making the decision approve a change in the Ward's residence. The dissenting opinion states that the trial court erred in approving the change the Ward's residence without providing a hearing and without giving the Ward's wife notice and an opportunity to be heard. Because there was no hearing, the Ward's wife was prevented from presenting any evidence regarding her husband's needs, the availability of local facilities that could meet his needs, as well as any other evidence that would assist the trial court in making an informed decision on what would be in the Ward's best interest. Denying the Ward's wife such is a denial of due process, which cannot be ignored.

The Fourth District Court of Appeal held that Decedent's sons, who were beneficiaries of Decedent's revocable trust, had the right to challenge distributions from the trust under the law of the state that bears the most significant relationship to the trust. Under New York law, beneficiaries of a revocable trust have standing to challenge pre-death withdrawals from the trust which are outside the purposes of the trust and were not ratified by the Settlor personally or through a method contemplated through the trust instrument.

Siegel v. Novak, 920 So.2d 89 (Fla. 4th DCA 2006).

Prior to Decedent's death, Decedent's daughter, who was also serving as Decedent's Attorney-in-Fact, made large withdrawals from Decedent's trust as Attorney-in-Fact, by signing a series of revocation letters. Although the trust instrument specifically stated that revocation powers "be personal to the settlor and shall not be vested in or be exercisable by any persons… including, without limitation, the settlor's attorney-in-fact," the withdrawals were nevertheless approved by Trustee. At her death, the Trustee of Decedent's revocable trust and the Decedent's daughter, became the Co-Personal Representative of the Decedent's estate.

When the Trustee filed a complaint seeking a judicial accounting pursuant to Chapter 737, Florida Statutes seeking discharge from liability for any and all trustee actions during the period of accounting, Decedent's sons, who were beneficiaries of the revocable trust, complained that the accounting attached to the complaint did not contain sufficient information detailing the various distributions to allow them to determine the propriety of such distributions. They also alleged that some distributions may not have been made for the purposes specified in the trust -- for the "support, maintenance, health, comfort or general welfare."

The Fourth DCA reversed the trial court's finding that Decedent's sons had no standing to challenge any distributions made prior to their mother's death on the ground that they had no present interest in the trust during the time that the Decedent was alive. The Fourth DCA held that New York law controls because New York was the situs of the trust during the time period at issue. The Fourth DCA held that standing is analogous to a statute of limitations matter favoring the classification of a substantive issue where Florida decides the choice of law pursuant to a significant relationship test. Because New York bore the most significant relationship to the trust, the trust distribution should be decided under New York law.

Looking at New York law, the Fourth DCA held that when a person or entity different from the Settlor removes property or money from a revocable trust, those withdrawals could conceivably be made without the Settlor's knowledge or consent. Therefore, the beneficiaries of a revocable trust have standing to challenge such pre-death withdrawals from the trust.

The Fourth DCA adopted the New York Surrogate's Court Procedure Act's broad view of standing. Under this view, a Trustee who voluntarily requests judicial settlement of an account must notify all persons entitled absolutely or contingently and may be compelled by the court to produce an accounting after the petition of "a person interested." Section 103(39) of the Act defines a "person interested" as "any person entitled or allegedly entitled to share as beneficiary in the estate. With an interest in the corpus of the trust after the death of their mother, the decedent's son are persons of interest who have standing to challenge the disbursements as they have alleged a concrete and immediate injury, which can be redressed by the circuit court.

Check out YOUR RPPTL Section website:

flabarrpptl.org

ACTIONLINE BULLETIN BOARD

The Florida Guardianship Ethics Project has been created as a collaboration among the Florida Bioethics Network, the Florida State Guardianship Association and the University of Miami Ethics Programs. This initiative is supported by a grant from the Statewide Public Guardianship Office. To view the Case Studies in Ethics and Guardianship, visit www.miami.edu/ethics

--Michelle R. Hollister, Esq.

HOMESTEAD WAIVER: *DeMayo v Chames,* reported in Real Property Case Summaries, *ActionLine* Spring 2006, has been withdrawn and a new opinion substituted in lieu thereof. On the 3rd DCA's own motion, the court granted rehearing en banc. It held that the homestead protection cannot be waived, except for the purposes specifically mentioned in the Constitutional provision itself (e.g., for taxes and assessments on the home, or contracts for the purchase, improvement or repair of the home). A concurring opinion certified the question of great public importance.

– Jerome J. Kavulich, Esq.

(See the Real Estate Case Law Summaries inside for further review.)

The Section's Property Rights Committee needs technology assistance with its Bert Harris Act project. We need a data entry screen designed in "MySQL" format. We also need assistance converting Lotus Notes data to "MySQL" format. Our goal is to make the data accessible and searchable through the Section's website. If you can assist, please contact Susan K. Spurgeon, Esq.; Phone: 813-639-9599; E-mail susan@penningtonlaw.com.

TWO ENROLLED HOUSE BILLS TO WATCH (pending Governor's review):

FORECLOSURE JUDGMENTS: HB 65, effective 7/1/06, amends foreclosure procedures contained in Fla. Stat. §§ 45.031-.035. The final judgment must contain language regarding property owner and subordinate lienholder rights to surplus funds arising from the foreclosure sale. The bill adds new language to the Certificate of Disbursements form, and provides a 60-day window for the filing of claims to surplus funds. In the event no claim is timely filed, the Clerk shall appoint a "surplus trustee," whose job is to locate the owner of record (owner as of the date of lis pendens) within one year from date of appointment.

CONSTRUCTION DEFECTS: HB 1139, effective 10/1/06, amends Fla. Stat. Ch. 558 to expand its applicability from residential property to any real property with improvements. This chapter applies to actions asserting a claim for damage to real or personal property caused by a construction defect. It requires the claimant to first serve written notice of the claim on the contractor or design professional describing the alleged defect in reasonable detail and thereafter permit inspection. A court action on the claim may be abated until the claimant has complied with the requirements.

– Jo Claire Spear, Esq.

If you are working on an interesting case or memo of law that you'd be willing to turn into an article for ActionLine, we would love to publish it for you. No article is too small or too large. (Submission information inside.)

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43