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Lawyer Jokes Miss the Rest of the Story



By
Melissa Jay
Murphy

Section Chair
2007 - 2008

Chair's Column

Perhaps I am getting crotchety in my old age but I no longer find many lawyer jokes to be amusing. Occasionally there is a clever one in the New Yorker, but it is rare that I find the ones told by others to be humorous. I don't think it is a general diminution in my sense of humor; I still find that most things in life make me laugh. I think that the reason I have stopped "appreciating" these jokes is that there is not a corresponding number of stories of the good things that lawyers bring to the table.

One of the benefits of leadership in the Section is that you have an overview of all of the incredible work that you are doing. So many of you put much time and effort into making the practice of law more professional and into solving clients' problems. Legislation, Amicus, Pro Bono, Diversity, Mentoring... these are all efforts of the Section that go to the heart of what we are about. This list is not exhaustive but merely illustrative of all the things we do.

Through working on briefs, legislation, encouraging diversity in our Section, it is hard sometimes to experience the difference that we can make in people's lives. I recently got a phone call from the legal services office here in Gainesville. The case manager described a situation in which a woman, critically injured from a car accident, was presented with a deed at the hospital, which conveyed her home over to her three sons. She has now fully recovered and claims to have no memory of signing the deed. I was asked to evaluate her situation because the sons had reportedly refused to convey the property back. Of course I was thinking that I was crazy to take this on; I don't have time to deal with a situation like this, etc., etc. But since this type of thing falls squarely within my practice area, I couldn't refuse.

I met with the client and quickly realized that there was probably a lot more to the story: alcoholism, dysfunctional family, etc. I managed to contact one of the sons, who readily agreed that he and his brothers would convey the property back if I would arrange for a notary and witnesses. The son came close to tears when he told me that he only wanted to do what was best for his mother but he did not want to see or talk with her.

I've taken care of this situation and the woman now has clear title to her home. I know that my client is not perfect; she has caused great pain in her family. But she deserved to have her property back. I got great satisfaction out of knowing that I had the skills and knowledge to do this for her. I hope that she will mend her relationship with her family.

For every story like this one, I am confident that there are hundreds more that Section members deal with every day. How many of you sit on boards of community organizations and, whenever a thorny question of liability, policy, risk, etc., comes before the board, all eyes turn to you? It seems to me that people turn to us for the "answer" to so many situations. They may love telling or hearing a "good" lawyer joke, but who do they call when they don't know what to do?

It is my hope that each of you will remember to focus on the things that give you the most satisfaction out of being a lawyer and take the time to do those things as much as possible. For every lawyer joke, we should tell a story or two of the good things we do.

Oh, and by the way, have you heard this one? A lawyer, a priest and a rabbi walk into a bar….

Announcing the Arrival of the Newly Combined RPPTL Ethics and Professionalism Committee!



For information on joining, please call Adele Stone at (954) 925-5501 or Debbie Goodall at (954) 468-7832

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About the Cover: Mangroves and seagrapes are part of coastal Florida. Section member **Sylvia Rojas** took this picture at the John Lloyd State Park.

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The deadlines for all submissions are as follows:

Issue	**Deadline**
Winter 2007	Oct. 31, 2007
Spring 2008	Jan. 31, 2008

For GENERAL INQUIRIES about the RPPTL Section, contact Terry Hill at The Florida Bar at 800-342-8060 extension 5619, or at *thill@flabar.org*. Terry is the Section's program administrator and can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

A Tribute to Rohan Kelley, Esquire

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, FL

The members of the "Reptile" Section of The Florida Bar owe a great debt of gratitude to Rohan Kelley for his many years of service, but most especially for his most recent year as Chair of the Section.

Rohan's tenure as Chair of the Section has been a remarkably busy and productive one, including Section meetings throughout the state of Florida, a great out-of-state meeting at the Gaylord Grand Ole Opry in Nashville, and winding up in Rohan's own back yard at the Westin Diplomat on Hollywood Beach. The conferences, Convention and Executive Council meetings, held under Rohan's leadership, have offered Section members opportunities to tend to the good work of the Section and lots of opportunities for building professional relationships through social activity including food, drink, visits to local points of interest and sports. Intellectual stimulation was available through the highly successful seminars presented this year. On the Tallahassee side, with Rohan as Chair, the Section was successful in substantial and significant legislative leadership.

As part of my assignment for writing this article, I was asked to interview a number of members of the Section. Without exception, each of you agreed unanimously that Rohan led the Section with intensity, efficiency and precision. Several people also commented favorably on Rohan's ability to keep Section members focused and on track (including the infamous "back row") at both small group gatherings and large Executive Council meetings.

Rohan has acknowledged repeatedly that he was assisted through his year by his very capable daughter, Tae Kelley Bronner. His sons and his daughter follow in the family tradition of service to the Bar and the Section.

For those who don't know him well, Rohan is a proud Gator, having graduated in 1964. Rohan is very well known throughout the state and nationally for his many speaking engagements and publications. While his list of publications is far too extensive for this article, probably his best known is The Florida Bar book titled, "The Florida Bar Probate System."

Rohan has been a member of the Section for many years and has served on more committees than possible to mention. In 1993, the Real Property, Probate & Trust Law Section awarded Rohan the Robert C. Scott Award, the highest award available for service to our Bar and profession.

At the beginning of his term as Chairman of the Section,



Rohan Kelley sports the flight jacket presented to him as a gift for his service as Chair.

Rohan stated in his message on the RPPTL web site that the past years had established "an active, forward-looking and vibrant institution," and that his goals as the current Chair were for the Section "to enter its second 50 years with the same focus and dedication as was exhibited during our first 50 years."

The many accomplishments of the past year confirm that Rohan was extremely successful in providing the guidance and leadership to achieve that goal. Rohan deserves his revered position on the "back row," and we all look forward to his continuing comments and involvement. Thank you, Rohan, for a job well done.

When Is Homestead Not Homestead?

By Charles Ian Nash, Esq., Nash, Moule & Kromash, LLP, Melbourne, FL

In *Phillips v. Hirshon,* 32 Fla. L. Weekly D1151 (Fla. 3d DCA May 2, 2007), the Florida Third District Court of Appeal affirmed a trial court ruling which held that a cooperative apartment is not considered homestead property for purposes of applying the restrictions on devise contained in the Florida Constitution and Florida Statutes. That holding is in accord with the April 5, 1978 decision of the Florida Supreme Court in *In re Estate of Wartels v. Wartels,* 357 So.2d 708 (Fla. 1978), and contrary to the decision of the Florida Fifth District Court of Appeal in *Southern Walls, Inc. v. Stilwell Corp.,* 810 So.2d 566 (Fla. 5th DCA 2002). In its holding, the Third DCA cited to *Wartels* as well as several other Florida cases which supported its interpretation of Florida law as it applied to homestead status for cooperative apartments vis-à-vis the constitutional and statutory restrictions on devise.[1] Thus, unless this case is appealed to the Florida Supreme Court and ultimately reversed, cooperative apartments will escape the restrictions on devise applicable to condominiums, mobile and modular homes situated on lots owned by a decedent, and single family residences, at least in the Third District.

The conflicted statutory purpose and case law presented to the Third DCA appeared to handcuff the court to its institutional role....

In *Phillips,* the Will of Robert Levine provided for a devise of a life estate in his Key Biscayne penthouse, a high rise cooperative apartment, to his girlfriend Karen J. Orlin. Robert Levine died on April 1, 2003, survived by his girlfriend as well as his two children, his adult son, Joseph Levine, and his minor son, David Levine.

After their father's death, separate petitions were filed by Joseph and on behalf of David by David's mother as his guardian to determine the homestead status of real property *(i.e.*, the cooperative apartment). Each of the decedent's sons argued the cooperative apartment was homestead real property in the hands of their father at the time of his death, and, therefore, was not subject to devise by him under the provisions of Article X, Section 4(c) of the Florida Constitution which states that "homestead shall not be subject to devise if the owner is survived by a spouse or minor child."

Karen J. Orlin filed a motion to dismiss each of the petitions filed by the decedent's sons based on her position that the cooperative apartment was not homestead real property for purposes of Article X, Section 4(c) and Florida Statute Section 732.4015. Ms. Orlin's motion was granted by the trial court.

The Third DCA affirmed the decision of the trial court holding that a cooperative apartment was not homestead real property for purposes of Article X, Section 4(c) of the Florida Constitution and Florida Statute Section 732.4015. The Third DCA noted that homestead may have different meanings in different contexts, such as ad valorem taxation and exemption from forced sale and devise and descent, citing to *Snyder v. Davis,* 699 So.2d 999 (Fla. 1997), and *Cutler v. Cutler,* 32 Fla. L. Weekly D583 (Fla. 3d DCA February 28, 2007). The Third DCA recognized the legal parentage of the exemption from forced sale and the restrictions on devise and descent are set forth in Article X, Sections 4(a) and 4(c), respectively, of the Florida Constitution, but both have in common Article X, Section 4(a)(1) which defines the physical limitations of the benefit if allowable. The ad valorem tax exemption finds its legal parentage in Article VII, Section 6, of the Florida Constitution.

Observant of Florida's historical decisions on the treatment of cooperative apartments and the homestead protection, the Third DCA cited *Wartels* as a reminder of the Florida Supreme Court's sweeping opinion that a cooperative apartment may not be considered homestead property for the purpose of subjecting it to the Florida Statutes regulating the descent of homestead property.[2]

The decedent's sons recognized the existing legal precedent, but insisted that the cases were distinguishable because *Wartels* was decided before the Florida Legislature adopted a new Cooperative Act in 1976, which was effective January 1, 1977. The decedent's sons noted that the purpose of the Cooperative Act was "to give statutory recognition to the cooperative form of ownership of real property,"a previous shortfall of cooperatives in meeting the definition of homestead as "interests in realty"emphasized in *Wartels.*[3] The crux of the argument presented by the decedent's sons was that if condominiums, with a provision in the Condominium Act giving statutory recognition to the condominium form of ownership of real property, were recognized as homestead property subject to the restrictions set forth in Article X, Section 4, of the Florida Constitution, then cooperative apartments, with an identical provision in the Cooperative Act giving statutory recognition to the cooperative form of ownership of real property, should be property subject to the same rules and absolute protections under the Florida Constitution.[4]

The Third DCA agreed it is well recognized that a condominium is homestead property subject to the protection and restrictions under Article X, Section 4 of the Florida Constitution.[5] Notwithstanding the fact that the court was intrigued by the rationale contained in the argument presented by the decedent's sons, the Third DCA reverently acknowledged the court's institutional role to adhere to *Wartels* and affirmed the lower court's decision.[6]

The Third DCA re-acknowledged that homestead in Florida has been given different meanings depending upon the context in which it is used, but submitted that a better policy may be for the courts not to diverge when interpreting the same subsection of the Florida Constitution. For this reason, the Third DCA certified questions to the Florida Supreme Court requesting clarification on the vitality of *Wartels* in light of the Cooperative Act enacted by the Florida Legislature in 1976 and the resulting impact on cooperative apartments for purposes of the restrictions

of devise and descent contained in Article X, Section 4(c) of the Florida Constitution.

The conflicted statutory purpose and case law presented to the Third DCA appeared to handcuff the court to its institutional role, but the opinion in *Phillips* made it clear that the court felt the sons should have prevailed. With creditor protection and ad valorem tax exemption cases expanding the meaning of "real property" that can qualify for homestead purposes, it would seem the next step would be to extend to cooperative apartments the protections and restrictions applicable for purposes of devise and descent. Moreover, it is doubtful that the cooperative apartment would also receive the protection from the claims of the decedent's creditors under the reasoning of *Phillips* if the holding is not reversed because the legal parentage of the restriction on descent and devise of homestead is linked to the protection from forced sale, i.e., the definitional provisions set forth in Article X, Section 4(a)(1), of the Florida Constitution.

Hopefully, the Florida Supreme Court will take the opportunity to decide whether its prior decision in *Wartels* is wrong or at least whether it has been legislatively reversed as a result of the 1976 revisions to Chapter 719, and to remind us that the tenet of *stare decisis* is not invariable when inconsistencies and public policy concerns are so evident.

When framing homestead questions, it is critical to distinguish among: (1) creditor protection; (2) devise and descent issues; and (3) ad valorem tax exemptions. They each have separate statutory and case law treatment. It is vital to know that, as the law stands now, the "forced heirship" provided by Article X, Section 4(c), of the Florida Constitution does not apply to cooperative apartments.

Endnotes:

1 Fla. Const. Art. X, '4(c); *Fla. Stat.* ''732.401 and 732.4015.
2 *Wartels,* 357 So. 2d at 711.
3 *Fla. Stat.* Chapter 719; Fla. Stat. ' 719.102; *Wartels,* 357 So. 2d at 710 (The words contained in Article X, Section 4(a)(1)... have been repeatedly defined to mean that homestead property must consist of an interest in realty).
4 *See Fla. Stat.* Chapter 711.
5 *See Braswell v. Braswell,* 890 So. 2d 379 (Fla. 3d DCA 2004).
6 *See Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973).



Construction Law Institute and Certification Review Planned for March 2008 in Orlando

The CONSTRUCTION LAW INSTITUTE will be held March 7 & 8, 2008 at the Rosen Centre in Orlando, with a golf tournament and reception preceding it on March 6. The March 7th agenda will be a traditional seminar lecture format including such topics as Revisions to 2007 AIA A101 and AIA A201 Documents, Copyright and Ownership of Digital and Electronic Design Instruments of Service, Revisions to the 2007 AIA B141 and An Introduction to the New AIA B101 Contract, to name a few. The March 8th agenda will include a series of workshops, round table discussions and lectures with topics including Current Trends with Green Construction, Developing Legal Strategies for Prosecuting and Defending Unlicensed Contractors and Design Professionals and a Legislative Update and Case Law Update

The 4TH ANNUAL CONSTRUCTION LAW CERTIFICATION REVIEW COURSE will also be offered on March 7-8 at the Rosen Centre in Orlando in conjunction with the Construction Law Institute. This is an intermediate level course designed to cover the major legal topics the certification exam should cover. However, it is for ALL attorneys interested in improving their skills in the area of construction law.

Of the 140 attendees at the 2007 course, only 25% took the certification review examination, which is given in May each year. However, anyone interested in becoming board certified in Construction Law will need to apply to The Florida Bar by October. While the course will receive 15-18 CLE credit in construction, applicants for examination will have to already have earned 45 hours of CLE credit in the area of construction by the October, 2007 application deadline.

Annual Section Awards Presented at Convention in Hollywood, Fla.

By Tae Kelley Bronner, Esq., Tae Kelley Bronner, P.L., Tampa, FL and J. Richard Caskey, Esq., Steven L. Hearn, P.A., Tampa, FL

The RPPTL Section is able to accomplish its numerous goals and functions as one of the most successful (and largest) sections of The Florida Bar due to the dedicated work of it members. On May 25, 2007, at the Section's Annual Convention in Hollywood this year, Rohan Kelley, outgoing Section Chair, announced three awards to honor Section Members.

J. Craig Shaw received the **Robert C. Scott Memorial Award** for his devoted and valuable service to the Section. This award was established in 1985 in memory of Bob Scott, who was the past chair of the Section. The award is presented to Section members who best exemplify Bob's devotion and continued service to the Section and its membership. Craig, an attorney, has served as a member of The Florida Bar's Continuing Legal Education Publication Staff for 29 years and is currently the Associate Director. It is his diligent and effective work that has maintained the high quality of the Bar's publications in the estates and trusts area. He has also served as Bar staff liaison to the Probate Rules Committee for many years. His tireless work as editor of the Section publications and his faithful participation at the Probate Rules Committee meetings have advanced the objectives of the Section and provided invaluable service to the Bar and its members. Craig joins the very distinguished group of prior recipients of this award, which includes last year's recipient, J. Michael Swaine.



J. Craig Shaw receiving the Robert C. Scott Award.

S. Dresden Brunner received the Section's **Annual Service Award** for her significant efforts on behalf of the Section. The Section presents an Annual Service Award to a Section member who has rendered dedicated and significantly outstanding service to the Section and its varied programs throughout the current year. In selecting the recipient of this annual award, the Section considers both the character and magnitude of the service furnished by the nominee throughout the year and particular emphasis is given to the benefits which accrue to the Section and the lawyers of Florida as a result of such service. Dresden's dedication and commitment to the Section are well known, as she has served as Chair and Editor of *ActionLine* for many years. Her tireless efforts from one publication to the next are greatly responsible for the outstanding quality that has made *ActionLine* the comprehensive and professional magazine that enables the leadership and committees of the Section to communicate with over 10,000 members.



S. Dresden Brunner (center) receives the Service Award and roses.



Fletcher Belcher (center) receiving the William Belcher Lifetime Award and his wife, Gayla Belcher, is recognized.

To Dresden's great credit, *ActionLine* is a publication for which the Section is justifiably proud. Dresden is a trust and estate practitioner with her own firm in Naples, Florida. Last year's recipient was R. Norwood Gay**.**

William Fletcher Belcher received the **William S. Belcher Lifetime Professionalism Award** for his exemplary professionalism. This award was established in 2003 in memory of Bill Belcher, whose professional, civic, charitable, and personal conduct always reflected the highest standards of professionalism and devotion to his profession as an attorney. This award is presented, at the discretion of the Section, to an Executive Council member in recognition of his or her lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public in promoting the highest standards of ethics and professionalism.

Throughout his career, Fletcher Belcher has regularly shared his knowledge and expertise of the law through lecture presentations and numerous publications on a myriad of subjects related to probate, trust and fiduciary litigation. He is known as a leading fiduciary trial and appellate lawyer. He appears as counsel in 29 reported appellate opinions, many of which are regularly cited as the primary authority for various legal positions involving trusts and estates. He has also served as chair of the Section's Probate and Trust Litigation committee and Ad Hoc By-Laws committee, vice-chair of the Probate Law Committee, and member of the Ad Hoc Trust Code Revision committee and Ad Hoc Elective Share Committee in addition the thousands of hours of service he has dedicated to the Bar. His untiring efforts, his expertise and dedication to his profession and his leadership have enriched the Section and it members. This award was named in honor of Fletcher's cousin, William S. Belcher, and it is more than fitting that Fletcher Belcher joins the elite group of recipients who have been honored with this award, which includes last year's recipient, Bruce M. Stone. Fletcher is past Secretary and current Treasurer of the Section and practices trust and estate litigation in St. Petersburg, Florida with his own firm.

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



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Populist Passion in Hometown Democracy May Stifle More than Manage Land Use Development

By Jeffrey Kleeger, Esq., Palm Beach Gardens, FL,
Submitted on behalf of the Development and Governmental Regulation Committee

Citizens in Florida amended the state constitution by ballot measure in 2006 to require broader public support for future constitutional amendments and petitions.[1] This change makes it more difficult for amendments to achieve the status of ratification.[2] The sponsor seeking to restrict the amendment process was none other than the state legislature, taking this action in reaction to the public opinion perception that the amendment process has been too easily influenced and manipulated in recent years. Amendment No.3, ironically, would not have succeeded had the heightened support now required for ratification by Amendment No. 3, been required at the time of the vote on Amendment No.3. The amendment, having garnered only a mere 57.8% of the popular vote, would have failed for lack of sufficient voter support.[3]

State constitutional amendments are politically significant. Amendments permit direct citizen participation in government decision making, and statewide referenda send a strong signal to elected representatives on where public opinion now stands. Currently, on the capacity of Florida growth management policy to successfully achieve necessary objectives, public opinion holds that the approach now taken is failing. As they are now applied, government solutions appear inadequate to the task of addressing the negative effects of accelerated degrees of land use development. The stresses and strains that growth places upon environmental resources appear beyond the capacity of those resources to bear. Thus citizens suffer where supplies of water must be rationed; where roadways are constantly overflowing and congested; and where school class sizes remain (in the opinion of many) too large to allow for maximum-quality and highly efficient public education to be effectively offered.

Proponents of Hometown Democracy ("*HD*") believe that they have found a solution. *HD* requires citizen participation in local growth management policy decision making. In fact, *HD* proposes a state constitutional amendment for ratification in 2008 which would remove growth management decision-making control from local government officials and place that authority directly within the citizenry. This type of proposal is by no means novel, but it is certainly persuasive from a democratic and liberal political perspective. Whether such a proposal is good for Florida is another matter altogether. Land use attorneys ought to seriously consider this issue, and its implications, because no matter what resolution is ultimately reached in terms of accepting or rejecting the *HD* approach, land use business practices will be impacted, and attorneys can learn important lessons by that process.

Land use attorneys ought to seriously consider this issue, and its implications, because no matter what resolution is ultimately reached in terms of accepting or rejecting the HD approach, land use business practices will be impacted.

Democracy: Formal or Substantive

The need to protect and preserve the predominance of consensus and compromise in the functioning of a liberal democracy was an essential aspect of the debate surrounding the writing of the United States Constitution. *The Federalist Paper No.10*, authored by James Madison, describes the powerful and potentially negative force of interest group influence and politics upon the machinations of government.[4] According to Madison, the problem with a pure democracy in general and interest group politics in particular ("the mischiefs of faction") is that interest groups have the capacity to create conflict among social classes, exaggerate and take advantage from emotion-laden issues, and co-opt government officials into decisions not necessarily in the best interest of the public. In fact, at times, interest groups may act even against the financial interests of particular individuals or groups in no less than a discriminatory fashion.[5] Thus a government which permits interest groups to dictate policy operates with nothing to restrain those interests, and is therefore tyrannical in practice. No democracy ought to be tyrannical in practice. What relevance might *The Federalist Paper No.10* have for our examination of the dynamics of the political system in Florida today? Significantly, the constitutional amendment process permits interest group politics to impact governance. The result of such interest group impacts may be negative social and economic consequence. As single interests may dominate and impose their will upon others, the resulting political entity can not successfully manage in a democratic framework. Based upon similar rationale, Madison concluded interest group politics ought to be avoided.

Proponents of *HD* nevertheless seek to institute a system of direct democracy in the name of solving the serious problem of growth management.[6] The *HD* approach demands that official decision making be taken by direct popular vote as opposed to the historical-based process of lobbying elected representatives to gain their support and to request that they promote particular interests within the representative government structure. Madison would be fearful of placing authority in so direct a process of democracy as plebiscite, believing that to do so would invite more difficulty in terms of threats to liberty, than generate benefit in terms of efficiency and effectiveness.

The Rule of Republican Principle

The Federalist No.10 describes a workable system

of government as one with capacity to manage minority authority by enabling the majority to defeat problematic minority positions. This relief is supplied by the "republican principle," permitting the defeat of "sinister views by regular vote." But where the majority is the "bad guy" how then is there to be proper protection for all the rest? The majority may sacrifice the public good and private rights to interest group policy within its own discretion. The solution to this problem is to institute a form of representative government. Yet, *HD* principles run counter to this solution, because what they seek is to reinstitute direct democracy, diluting the authority of a representative system.[7]

How would Madison analyze our current growth management dilemma? Surely he would take the position that the majority wants to protect the environment; the majority wants to reduce roadway and school class size congestion; and the majority wants to secure supplies of healthy and safe drinking water. But Madison would not leave it to the people to manage official government policy by direct popular vote. Instead, he would seek to avoid popular interest group tyranny by promoting a representative format in which policy may be formulated by a chosen select few group of citizen-experts "whose wisdom may best discern the true interest of their country, and . . . will be least likely to sacrifice it to temporary or partial considerations."[8] Therefore, according to Madison, the difficulty in interest group tyranny (majority rule) is resolved where popular vote on policy is replaced by a system which permits for the institution of a buffer zone for policy creation in which a popular vote is taken to elect representatives who are in turn selected for the purpose of making carefully considered policy decisions. In the almost 200 years since Madison actively participated in government, bureaucratic systems, comprised of experts in their respective fields, have been established to manage regulatory and policy decision making. That system has served us well over the centuries.

In practice, in the context of the administration of a growth management policy, the buffer zone alluded to above is enlarged considerably further. Politicians have already placed critical decision making authority at the local level in a complex system of comprehensive planning which even some attorneys find difficult to comprehend. Additionally, such decision making authority has been further and next delegated to those in possession of administrative expertise. While the negative downside risk to so complex a framework is likely to be bureaucratic inefficiency, the positive upside potential is that decision making is much improved simply because the decision makers are selected specifically for their expertise. Experts in turn formulate the most appropriate and effective policy decisions possible given the particular unique circumstances of the actual scenario. Within the framework of such a well-buffered and importantly flexible democratic system, decision makers are so far removed from the political process that they may take their policy decisions free of any of the negative inducements of interest-based politics. By this method, susceptibility to populist passion[9] is eliminated, which was precisely the purpose of the Madisonian model of representative governance.

An Introduction to What Is Hometown Democracy[10]

Land use attorneys may wonder just how the struggle between *HD* proponents and their opponents could have any practical impact upon their law practice. To the extent individuals who support *HD* are typically environmentalists and/or private property owners outraged by perceived abuses in the selective use of eminent domain for economic benefit, land use attorneys who represent those interests will have to adapt to the changes *HD* may bring to growth management regulatory processes. Similarly, to the extent adversaries of *HD* are typically land use developers motivated by the possibility of financial gain, land use attorneys who represent those interests must likewise be prepared to adapt to changes in the law. Land use attorneys who practice in so dynamic a field as real property law ought to remain ever-vigilant and sensitive to possible modifications in the legal system as applied to their body of law. The scope and focus of land use development law may experience fundamental change if the *HD* movement succeeds in the 2008 election. The question which arises next is in what manner will land use law practice change? This question will be briefly taken up here, and a more in-depth examination will be provided in a follow-up article.

The growth management system and the regulatory framework within which it is managed are well-established. There is a long history of how growth has been managed since land in Florida was first surveyed, parceled, bought, and sold. While that history is beyond the scope of this note, we may consider that the Growth Management Act of 1985 (the "GMA") as a critically important milestone in the application of a policy to manage growth in Florida.[11] The GMA aspires to ensure that as communities grow and are developed, managed growth will provide for adequate roads upon which to travel; sufficient water and sanitation systems to support added populations; and adequate quantity and quality of schools and recreation areas for the community to enjoy.[12] Growth management, simply put, requires due diligence and careful planning. By definition, growth management is planning to ease difficulties consequent to growth. Since all difficulties can not be eliminated immediately, or completely, it is difficult to satisfactorily ascertain what measure of success in growth management is sufficient. Resources in all respects are limited, and in fairness, must be allocated equitably. To achieve a sufficient measure of equity may be a legitimate measure of success, but the standards for success are by definition constantly shifting. Prior to deciding that the *HD* alternative, as distinguished from the status quo, is a viable alternative, one must first determine what measure of achievement will signify success.

In Florida, local governments today manage growth through their local comprehensive plans. There is oversight by Tallahassee, but in many respects the local government is free to formulate policy specific to regional and even local need, and in this manner the policy is responsive to local input. *HD*, if validated by public support in a 2008 constitutional amendment, will significantly alter the system because decision making will be removed from local government officials, in some respects, and placed into the hands of voters. The new policy would require that all comprehensive plan amendments be put to popular vote.[13] This modification would represent the most significant modification to the GMA since its inception. With so fundamental a structural transformation in land use law, specialist attorneys (to the degree one practices exclusively in this

continued, next page

area) will be busy in self-education efforts, in interpreting the new legal framework, and in advising their clients to achieve the required compliance.

Some environmental groups have announced their support for the *HD* movement.[14] Other environmental groups have remained neutral.[15] Arguments in support of the *HD* concept consistently point to the inadequacy of the current system in terms of its ability to successfully manage growth. To the extent *HD* is consistent with responsible growth management, operates within the parameters of Florida law, and encourages informed citizen participation; it is difficult to oppose because it clearly appears to have the very best of intentions for the citizenry and for the environment at the forefront of its objectives. The *HD* grass-roots movement bespeaks "Put[ting] People in Charge of the Places Where They Live!" offering a solution to the growth management problem which evidently needs solving, at a time when current policy appears inadequate, and asks only that citizens be afforded a voice and opportunity to be heard. How American! As many now recognize that growth management is a real problem in Florida, perhaps *HD* will succeed in achieving ratification of the amendment, only because it offers a change in strategy to combat an old problem that resists solution. There are environmental concerns of critical and imminent importance which need to be addressed; but the question remains as to whether the *HD* alternative is a practical option capable of realistic beneficial result, and whether or not hidden dangers lurk in its very implementation.

HD offers to its supporters the ability to resolve generally identified problems commonly associated with growth classified as "RSW"[16] which includes (1) congested roadways; (2) overcrowded schools and large class sizes; and (3) threatened overuse of limited groundwater capacities. As a point of departure in this analysis it is incumbent to acknowledge that Roads, Schools, and Water are the crux of what growth management proposes to fix. In order to attract more interest to the movement, and to gain greater popular support, *HD* inserts the financial twist of increases in property taxes to remind citizens that the threat of increases in such taxes is a negative by-product of growth. Finances are always a sensitive political and economic issue. Thus, *HD* cleverly capitalizes by taking the position that it vigorously opposes increases in property taxes. The opposition goes far to ingratiate *HD* with popular support. I would suggest that increases in property taxes may be a necessary evil within a realistic and responsible approach to managing diverse and highly complex growth and development issues and concerns. Someone will have to pay for new roads, new schools, and programs to safeguard and expand safe drinking water supplies. Perhaps funding for programs to best manage growth ought to be sourced in the growth itself. This position would reflect a popular "pay as you grow" concept.

When *HD* proponents suggest solutions to growth management concerns may be found in increasing the degree of citizen involvement in the political process, what proponents are truly saying between the lines is that current managers of the problem are failing at their charge. While this position may indeed contain some degree of validity as roads continue to be congested, schools continue to be overcrowded, and the drinking water supply continues to be endangered; it may in fact very well be that our government is simply doing the best job it can do, given its available resources, to manage a problem that in fact requires greater creativity in solutions, better use of technologically available alternatives, and greater levels of committed funding. Thus this author is not fully convinced that removing decision making authority from the hands of local government officials and placing absolute control into the hands of the public for referenda purposes is necessarily the most practical or useful or most efficient possible solution to resolve the problems we currently face. Certainly James Madison would not approve. He in fact warned us in *The Federalist Paper No.10* that there are limitations or boundaries with respect to those issues which may appropriately be addressed in referenda.[17] It is moreover unclear that the form of populist passion which *HD* is capable of releasing will be beneficial to the growth management objective. There are concerns with the integrity of the processes established to ensure full protection of constitutional rights in that very process of modifying the constitution.

Land use attorneys may note the powerful dynamic in the conflict between HD proponents and the construction industry.

Who Is Against Hometown Democracy?

Land use attorneys may note the powerful dynamic in the conflict between *HD* proponents and the construction industry. Clearly land developers provided financial and other support to ensure the passage of Amendment 3 in 2006, and have been aware of the *HD* movement since at least its first efforts at amending the constitution in 2003. Certainly developers are likely opponents to the proposed *HD* movement and agenda[18] whose openly stated goal it is to restrict land development. Developers are portrayed by the *HD* movement as the irresponsible party worthy of the blame for congested roads, overcrowded schools, diminished safe drinking water supplies, and increases in property taxes, which allegedly result from poorly managed growth. *HD* charges developers with responsibility for these problems and local government officials for their failure to solve the problem, suggesting that government officials and developers cooperate with one another for short-term financial gain. Certainly once the construction is completed the developers move on. It is the residents of the community who are left to struggle against the consequences of the growth, as the resources to do so are increasingly burdened.

Is this characterization fair? Are developers and government officials truly and fairly to be blamed for problems associated with overpopulation and development? Do not developers often "chip in" donating land for recreational purposes, setting aside funds for schools and roads, and

See "Hometown Democracy," page 33

1031 + TIC

By Jeff Riddell, Esq., Riddell Law Group and U.S. 1031 Exchange Services, Inc., Sarasota, FL

If you are an investment real estate owner who would prefer not to pay tax on sale, you need to know about 1031 + TIC. The process is simple— sell in a Section 1031 exchange and purchase TIC replacement property. A TIC (tenant-in-common) replacement property is a fractional interest in a large rental property such as an office building, shopping center, apartment complex, industrial property, senior housing, student housing or hotel—even golf courses have been offered. TICs are much like professionally-managed whole ownership rental properties. Most whole-ownership properties are too small for professional management but TIC properties justify professional management because the value of the property typically exceeds $20 million.

In addition to Section 1031 exchange tax deferral, TICs have all of the benefits of rental real estate ownership including cash flow from rents, depreciation deductions and potential profit on resale. Along with the benefits, TICs are subject to the standard risks of rental real estate ownership, but the risks are mitigated by professional acquisition analysis and evaluation (due diligence) at the sponsor, lender, broker-dealer and securities registered representative levels—and ongoing professional management.

TIC properties are not speculative to-be-built properties or properties for which tenants need to be found. Instead, TIC properties tend to be relatively new properties with tenants in place under typical length leases for the type of property involved. Of course some properties like hotels and golf courses are an exception because their "tenants" change daily. Since TICs are deeded interests in real estate, they are not as liquid as stock market investments so those who may have an immediate need for their funds should not buy TICs.

Each TIC investor is a co-owner of the property along with other investors (no more than a total of 35 under the current rules). Each TIC investor receives a deed and title insurance policy for the fractional interest in the property: 3%, 4%, 5.5% or whatever is needed to fill out the exchange. The typical first year cash-on-cash return for a TIC property investment (depending upon the particular property) is between 6% and 8%.

TIC investments are packaged by real estate companies called sponsors. There are about 80 active sponsors in the United States. The business plan of most sponsors anticipates resale of a TIC property within ten years, but some have sold earlier by vote of the TIC investors (vote of the TIC co-owner investors is required for any resale of the property).

The Tenant-In-Common Agreement signed by all of the TIC co-owners contains the rules governing the relationship among the co-owners. Although TICs may sound like partnerships, they are not—partnership interests do not qualify for 1031 exchange. Also, TICs (single properties) are not the same as REITs (multiple properties). Like partnership interests, REITs also do not qualify for 1031 exchange.

Any person or entity that can own real estate can own a TIC interest. Although they are designed as convenient replacement properties in 1031 exchanges, others may choose to purchase one or more TICs in order to add passive investment real estate to their investment portfolios.

Ethics Questions?

Call The Florida Bar's ETHICS HOTLINE: 1/800/235-8619

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Overview of Senate Bill 1088:

The New Office of Regional Conflict Counsel

By David R. Carlisle, Esq., Duane Morris LLP, Miami, FL

A new office of Regional Conflict Counsel has been created which will be responsible for representation of all indigent Floridians entitled to counsel (to the extent representation is not provided by the public defender). The legal areas are criminal, juvenile, dependency, termination of parental rights, and, most importantly to the RPPTL Section, civil mental health cases, including determinations of incapacity under Chapter 744, Florida Statutes, proceedings for adult protective services under Chapter 415, Baker Act proceedings, and Marchman Act proceedings.

The office of the Regional Conflict Counsel serves, essentially, as a super public defender, except that it is statutorily required to take indigent cases that the public defender does not presently handle, such as the civil mental health cases which have been traditionally handled by private attorneys who are compensated by the state. Private attorneys will be appointed to represent indigent persons only in the event of a conflict in the office of Regional Counsel.

There are five Regional Counsel offices whose geographical districts coincide with the boundaries of Florida's five appellate districts. The five regional counsel are nominated by the Supreme Court Judicial Nominating Commission, appointed by the Governor and confirmed by the state Senate. The regional counsel are given a budget and empowered to hire assistant regional counsel attorneys to carry out their mandate. The counties are expected to supply the regional counsels' offices with everything from office space, computers and staff to paperclips.

The five regional counsel were to be appointed by July 1, 2007. This did not happen. The statute targets October 1, 2007 as when the Regional Counsel's office is to begin taking cases. If the Regional Counsel cannot take cases as of that date, the statute allows an extension until January 1, 2008. In the interim, courts will continue to appoint private counsel from the Registry.

The office of Regional Conflict Counsel was a part of Senate Bill 1088. On May 24, 2007, Governor Crist signed it into law. This bill also contains amendments to Chapters 27, 28, 29 and 744, Florida Statutes.

The Circuit Court Indigent Services Committees, established as part of Article V, revision 7 legislation several years ago, are abolished. The Registry of private attorneys who have contracted with the state to provide representation to indigent persons will now be maintained by the Chief Judge of each Circuit and administered by the Clerk of Court.

By statute, the Clerk is to make a determination of indigency based upon an application of financial need that is to be signed by the person seeking the appointment of counsel. The impracticality of this procedure in civil mental health cases where the person is alleged to be incapacitated and entitled to appointment of counsel regardless of indigency is self evident. If it cannot be determined whether the person is indigent, then private counsel is appointed by default in proceedings to determine incapacity under Chapter 744. In all other cases, the office of Regional Counsel is to be appointed. Because Regional Counsel is authorized to represent only indigent persons, if it is learned that the person is not indigent, then the office of Regional Counsel is to withdraw from the representation and seek the appointment of private attorneys from the Registry.

Rates of compensation for private attorneys representing indigent persons will now be set each year by the legislature in the General Appropriations Act. The rates set by the Legislature for 2007 are dramatically lower across the board. (SB 2800)

For example, an attorney representing an alleged incapacitated person in guardianship proceedings is paid at the rate of $400 per case regardless of the hours spent. By way of comparison, this is the same rate as has been set for a misdemeanor or criminal traffic infraction. For Baker Act cases, the rate is $400 per case; for Marchman Act cases, the rate is $300 per case. Adult Protective Services cases are paid at the rate of $500 per case. One has to wonder whether private counsel will accept appointments at this level when the average case takes between 5 and 10 hours to handle competently.

The budgets for the offices of Regional Counsel also appear to be grossly inadequate. For example, in the Third District, which encompasses Miami-Dade and Monroe Counties, the budget for Regional Counsel to handle everything from capital cases to civil mental health cases is $4.1 million. The budget for the Fourth District which covers five counties, including Broward and Palm Beach Counties, is $5.9 million. The Second District which covers 14 counties, including Collier, Hillsborough and Pinellas Counties, is only budgeted at $6.8 million.

Your Section, including representatives of the Guardianship Law Committee together with representatives from the Elder Law Section, met with Senate staff and offered technical assistance and requested, among other things, that civil mental health cases be carved out from the bill, but to no avail. There were many people who worked behind the scenes, including members of the judiciary who cannot be named but deserve our thanks. Special thanks go out to Victoria Hubler and Twyla Sketchly from the Elder Law Section who were on the ground in Tallahassee and interfaced personally with Senate staff and others in presenting our common concerns and solutions.

The Use of Powers of Attorney and Health Care Surrogate Forms for College Students

Reprinted with permission from Barry A. Nelson, Esq. Nelson & Levine, P.A. as a sample letter that others may use. In light of the events at Virginia Tech University, Barry wanted to share an important planning idea on the use of Powers of Attorney and Health Care Surrogate forms for college students and family members in their 20s and 30s, which he is now implementing for his family.

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Mirlene E. Dubreuze
Office Manager

May 8, 2007

Dear Clients and Friends:

The Victory School sponsored its first annual Financial Planning Seminar on March 31 at Nova University. If you would like a copy of the seminar materials, please let us know.

In light of the recent events at Virginia Tech University, I wanted to share with you and your family an important planning idea on the use of Powers of Attorney and Health Care Surrogate forms for college students and family members in their 20s and 30s that I learned at the Victory School seminar; which I am now implementing for my family. The idea is to have your adult children over 18 years of age create a Durable Power of Attorney Form and a Health Care Surrogate Form. These documents are recommended because of the higher standards of patient privacy that hospitals and physicians are now being held to under the Health Insurance Portability and Accountability Act ("HIPAA"). Because of this, medical providers are often unable to provide medical information to anyone without the authority of the patient.

Section 1177 of HIPAA imposes strict penalties on anyone who violates the law by providing a patient's individually identifiable health information to another person. Specifically, the law states as follows:

(a) OFFENSE.--A person who knowingly and in violation of this part—

(1) uses or causes to be used a unique health identifier;

(2) obtains individually identifiable health information relating to an individual; or

(3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b).

(b) PENALTIES.--A person described in subsection (a) shall--

(1) be fined not more than $50,000, imprisoned not more than 1 year, or both;

(2) if the offense is committed under false pretenses, be fined not more than $100,000, imprisoned not more than 5 years, or both; and

(3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $250,000, imprisoned not more than 10 years, or both.

According to Section 1171, "individually identifiable health information" means any information, including demographic information collected from an individual, that:

(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and:

(i) identifies the individual; or

(ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

Because of these harsh penalties, many health care providers may be unwilling to disclose a patient's information to anyone else, even that patient's parents. Once a child turns 18, the natural parents no longer have authority over their child's financial or medical decisions. In fact, when distressed parents and family members of some of the students at Virginia Tech tried to discover information about their children, medical providers were unable to release information without the proper release form. Thus, I am preparing Powers of Attorney and Designations of Health Care Surrogate for my 19 and 22 year old children that designate my wife and me as their Attorneys-in-fact and Surrogates to make financial decisions and health care decisions should they not be unable to so themselves. In addition, I will ask them whether they want to execute Death with Dignity Agreements (Living Wills). Each of our clients typically executes these documents for themselves, but in the past, we haven't recommended these forms for their adult children.

Once your children do their own planning, they will decide on whether to designate their spouse (if any), friends or family as decision makers. However, generally a number of years go by between attaining 18 years of age and the time that a young adult considers estate planning issues. That is why we, as their parents, can offer an alternative to a situation that otherwise would require court action if the documents described above were not in place.

If we created your estate planning documents and you would like to proceed with planning for your children then please give us a call. If you have another advisor then share this with him or her and consider proceeding as well. To me there is little to lose and much to gain. If a child is not comfortable providing a financial Durable Power of Attorney we can have the document signed and held in escrow until the child authorizes its release or a physician indicates that the child is not capable at that time to make financial decisions due to medical conditions.

I hope this tip helps you and as we continue to get ideas we will continue to share them with you. Should you have any questions, please feel free to contact me.

Very truly yours,

BARRY A. NELSON

Rogue Stockbrokers and the Duty to Warn

By David A. Weintraub, Esq., David A. Weintraub P.A., Ft. Lauderdale, FL

Does an attorney have liability for the negligent referral of a client to a "rogue stockbroker"? If an attorney chooses to refer a client to a stockbroker[1], what are the best practices prior to making the referral?[2]

Given the absence of Florida case law regarding an attorney's liability for the negligent referral of a client to a "rogue stockbroker"[3], best practices dictate that at a minimum, an attorney should exercise reasonable care in investigating the stockbroker's background.[4] The attorney must also be extraordinarily careful regarding the nature of the referral to the stockbroker. While the tort of "negligent referral" arises most often in the context of an attorney's liability for a negligent referral to another attorney, it is conceivable that an attorney could be sued for referring a client to a "rogue stockbroker". The tort of "negligent referral" is thoroughly considered in the article, Temkin, *Can Negligent Referral to Another Attorney Constitute Legal Malpractice?,* 17 Touro L. Rev. 639 (2001). Given that the answer to this question is a definite "maybe", it only makes sense to engage in minimal due diligence to avoid referring to a "rogue stockbroker".

Best practices dictate that, at a minimum, an attorney should exercise reasonable care in investigating the stockbroker's background.

The Stockbroker's CRD

The easiest due diligence in which an attorney can engage is obtaining the stockbroker's regulatory record. Commonly known as the CRD, this document details the stockbroker's employment history, including all reportable events. Because a stockbroker's reportable events include customer complaints, arbitrations in which the stockbroker is individually named, regulatory investigations, bankruptcies, and certain criminal matters, the information is clearly valuable. In addition to reportable events, the CRD also identifies the broker's licenses, the dates that the broker passed or failed various exams, the broker's scores on exams, as well as the broker's "Z" record. The "Z" record includes events that at one time may have been regarded as reportable but are no longer considered publicly disclosable.

Obtaining the CRD

Obtaining a complete CRD is easy, and free. After obtaining the broker's CRD number from the Financial Industry Regulatory Authority's website, http://www.finra.org/InvestorInformation/InvestorProtection/p005882, you can send an email to the Florida Division of Securities. In the email, you should request the broker's entire CRD, including a full legacy report. The Florida Division of Securities will only provide the report if the broker is registered in Florida. Given that a high percentage of brokers are registered in Florida, Florida tends to be a useful resource. The email address is electronic_licensing@fldfs.com. It is recommend that you **not** obtain the CRD through the FINRA's website. The FINRA will provide you with a severely redacted version of the CRD. The unfiltered CRD will contain information regarding each customer complaint against the broker, including the nature of the claim, the name of the complaining customer, the complaint's final disposition, and the broker's contribution to any settlement or award.

Customer Complaints and Arbitrations

If a customer submits a complaint letter against a broker and the letter meets certain criteria, the letter will constitute a reportable event. The same is true if a customer initiates an arbitration proceeding *and* identifies the broker as a respondent in the case. Once deemed reportable, the event should appear on the CRD.

On the other hand, if a Statement of Claim is filed in arbitration and only the broker's employer is named as a respondent, the Statement of Claim does not create a reportable event. If the broker is not named as a respondent, he will not have a reportable event even if the broker is accused of fraud, churning or theft. If not deemed a reportable event, the event will not appear on the CRD.

Accordingly, it is impossible to determine with certainty the precise number of complaints in which the broker has been involved. When deciding whether to refer a client to a stockbroker, it would be prudent to ask the broker if he has been involved in any customer initiated arbitration proceeding, but where the broker was not named as a respondent. Hopefully, the broker will be truthful.

If the broker has several customer complaints or arbitration proceedings on his or her record, it may be difficult to make a good faith referral to that broker. One may even conclude that the individual is a "rogue stockbroker". Having numerous complaints is not as far fetched as one would think, even with first tier firms. However, before removing the broker from your referral list, there is no harm in discussing the events with the broker. Sometimes reasonable explanations exist. It is always possible that the claims brought against a particular broker were frivolous, the broker prevailed at arbitration, or the claims were settled for nuisance amounts. Regardless of one's decision whether to continue to refer to a particular individual, it is always better to be informed.

State Registration

The unfiltered CRD will also contain information regarding the states in which the broker has applied for registration. If the CRD states "T_NOREG", I view this as a "red flag". This information often means that a particular state has requested that the broker withdraw his or her application. Alternatively, a state may have requested additional information regarding a prior event and the broker would prefer not to provide the information. In these situations,

most brokers prefer that their application be withdrawn, as opposed to having it denied. The FINRA's redacted version of the CRD will not reflect any of the states where the broker was terminated without registration. The unfiltered version, available from the Florida Division of Securities, will contain this information.

Pending Regulatory Investigations

A pending regulatory investigation also represents a reportable event. A regulatory investigation is distinct from a regulatory inquiry, which is not reportable. An investigation is generally considered the second stage of an inquiry – the regulator has preliminarily determined that the broker's conduct warrants a more thorough look. Because an investigation may result in charges being brought against a broker, the event is considered reportable.

Bankruptcies

Bankruptcies are also reportable. While there are numerous reasons why a person may file for bankruptcy, an attorney may be reluctant to recommend a stockbroker when, arguably, the stockbroker could not manage his or her own finances. Bankruptcies are reflected on both the FINRA's redacted CRD and the unfiltered CRD's available from state regulators.

Education

Attorneys may also take note of a stockbroker's education. There is no requirement that stockbrokers graduate from college. Obtaining a Series 7 license requires approximately 6 weeks of reasonably intense studying, passing an exam, and submitting to a background check. That is all. The securities industry also has minimal continuing education requirements. Once an individual passes the Series 7, success or failure will depend in significant part upon one's salesmanship skills.

Obtaining employment at a first tier firm will likewise depend upon little more than a manager's belief that one can generate client assets (sell) and a reasonable presentation. Having a criminal background may block employment at some firms, but not all. Only certain felonies rise to the level of statutory disqualifications.

Employment History

Attorneys may also take note of a stockbroker's employment background. This information, not reflected on the FINRA's redacted CRD, may indicate that the 45 year old stockbroker who appears to be "seasoned" in the securities industry has actually been selling used cars for the past 20 years.

Is The Firm Genuinely Full Service?

In referring a valued client to a stockbroker, the attorney may also wish to consider the individual broker's sophistication and whether the brokerage firm under consideration offers the types of products that you may believe are appropriate for your client. If, for example, you are referring a client with a $10 million net worth consisting primarily of one concentrated stock position, it may be important to know whether the prospective stockbroker is permitted to offer or recommend hedging strategies. Some firms do not offer these products and services.

A firm may hold itself out as a "full service" firm. Brokers at a "full service" firm, however, may not be permitted to offer any type of hedging strategies. They may not be given access to exchange funds, prepaid variable forwards, collars, or other related products. Given that the brokers employed by such a firm are not likely to advise clients that these products exist elsewhere, the client has lost access to investments that might be appropriate. When a firm's advertising materials reflect that the firm is "full service", you may wish to inquire further.

Conclusion

Rather than focusing on whether Florida courts would recognize the tort of "negligent referral" in the stockbroker context, spend a few minutes investigating the background of the stockbroker under consideration. If the attorney is considering engaging in a more formal referral program with a stockbroker, such as those that are offered to many estate planning attorneys, it is that much more important to exercise due diligence before referring a client. This is especially important given the strong likelihood that our clients will use the professionals that we recommend.

Endnotes:

1 Under Florida's Securities and Investor Protection Act, Chapter 517, a stockbroker, or someone holding a Series 7 FINRA license, is referred to as an "associated person." *See* §517.021(2). The FINRA refers to the same Series 7 licensed individual as a "representative". See FINRA Rule 1031(b).

2 This article does not address an attorney's best practices when referring to certified financial planners, trust officers or bank investment departments. These entities are distinct and warrant different considerations.

3 The phrase "rogue stockbroker" is not defined. However, in a 1996 speech, Mary L. Schapiro, the current Chairman and CEO of the Financial Industry Regulatory Authority (hereafter "FINRA), stated, "we are focusing on innovative ways to deal with the problem of rogue brokers, heightened supervision of these brokers, and inadequate supervision of all brokers by firms." FINRA is the successor to the NASD. The FINRA's effort culminated in Notice to Members 03-49. Unfortunately, the proposed amendments to FINRA Rule 3010 were not enacted.

4 In *Noris vs. Silver,* 701 So.2d 1238, 1241 (Fla. 3d DCA 1997), the court affirmed the dismissal of a negligent referral claim where there was no suggestion that the referring attorney had knowledge of "facts that would indicate" that the negligent attorney would commit malpractice.

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Understanding Land Trusts and the Florida Land Trust Act

By S. Katherine Frazier, Esq., Hill, Ward & Henderson, P.A., Tampa, FL and Stacy Kalmanson, Esq., LandAmerica Financial Group, Inc., Orlando, FL

The Florida land trust is a popular vehicle used to hold and transfer real property. On October 1, 2006, the new Florida Land Trust Act (the "Act") took effect, making substantial changes and additions to Section 689.071, Florida Statutes (originally adopted on August 17, 1963 and formerly entitled "Land Trusts Transferring Interests in Real Estate; Ownership Vests in Trustee").

The Act's purpose was to clarify, improve and modernize the law regarding land trusts. In addition, on June 15, 2007, Governor Crist signed CS/HB 743, enacting Chapter 2007-153, Laws of Florida (the "Amendment Bill"). The Amendment Bill took effect on July 1, 2007 and further clarified some provisions of the Act and the new Florida Trust Code. The Amendment Bill also conformed the Act with the Florida Trust Code.

The changes not only resulted in a more comprehensive statute, but also clarified and simplified the use of land trusts for practitioners in Florida.

This article does not exhaustively describe all of the changes and additions to Florida law regarding land trusts, but highlights the following key topics of interest to practitioners: (1) Formation of Land Trusts; (2) Beneficiaries; (3) Trustees; and (4) Coordination with the Florida Trust Code.

Formation of Land Trusts

With a land trust, the trustee holds the legal and equitable title to the real property and acts, when directed, by either the beneficiary or the person granted the power of direction. The Act defines the "holder of the power of direction" as any person or entity having the authority to direct the trustee to convey property or interests, distribute proceeds or execute documents relating to land trusts. But for the Act, this type of trust would be considered a "dry" or "passive" trust, where, for example, a deed from the beneficiary and trustee would be required to convey. However, the Act grants a trustee named in the valid land trust instrument with full rights of ownership, making a deed from the beneficiary unnecessary.

Under the Act, as clarified by the Amendment Bill, the definition of "land trust" applies when the title to real property, both legal and equitable, is vested in a trustee by a recorded instrument that confers on the trustee the power and authority prescribed by Section 689.071(3). In particular, for the Act to apply, the following requirements must be met:

1. The recorded instrument must properly transfer an interest in real property, including, but not limited to, a leasehold interest or a mortgage interest, to a person, corporation, bank, trust company, or other entity duly formed under the laws of its state of qualification.
2. The grantee in the recorded instrument must be designated as "trustee" or "as trustee" whether or not reference is made in the recorded instrument to the beneficiaries of such trust. From a practitioner's standpoint, although not specified in the Act, the designation of "trustee" or "as trustee" should include the actual name of the applicable trust as well to avoid title vesting in the individual under Section 689.07, Florida Statutes and not vesting in the trustee of the land trust. For example, if title is vested as "Thomas Trustworthy, as trustee", then title would be considered as held in Thomas Trustworthy, individually. If, however, title is vested as "Thomas Trustworthy, as trustee of the Thomas Land Trust", then Section 689.07 will not apply and title would be considered as held in Thomas Trustworthy, as trustee of the Land Trust, provided the requirements of Section 689.071(3) have been met.
3. The recorded instrument must confer on the trustee "the power and authority to protect, to conserve, to sell, to lease, to encumber, or otherwise to manage and dispose of the real property"; or use similar language.

In addition to the definition of land trust set forth above, the Amendment Bill clarifies that the recorded instrument does not itself create an entity, regardless of whether the relationship among the beneficiaries and the trustee is deemed to be an entity under applicable law. An entity such as a common law trust or other business entity is therefore not precluded from vesting the trustee with the authority of a land trustee under the Act.

Beneficiaries

A "beneficiary" under a land trust means "any person or entity having a beneficial interest in a land trust." Under the Act, third parties dealing with the trustee are not required to inquire into the terms of the unrecorded trust agreement even if there is a document of record in which a beneficiary transfers or encumbers its beneficial interest in the trust, provided that the recorded instrument confers the Section 689.071(3) powers.

In addition, the Act provides that a beneficiary is not liable for the debts, obligations or other liabilities of the land trust solely as a result of its status as a beneficiary; provided, however, a beneficiary that affirmatively acts and assumes liability would not be protected by the Act.

The Act also delineates the beneficiary's control over the power of direction. Under the Act, the power of the direction under a land trust is held by a beneficiary or a beneficiary can place the power of direction in one or more

person or entities. The power is held in accordance with the percentage of ownership of beneficiaries unless the beneficiaries otherwise agree and the holders of the power of direction have fiduciary status with respect to the other beneficiaries.

Homestead status is addressed by the Act as well. A beneficiary's principal residence should be entitled to the homestead tax exemption even if the homestead is held by a trustee in a land trust, provided that the beneficiary qualifies for the homestead exemption under Florida Statutes Chapter 196. However, it should be noted, if the property held in a land trust is the trustee's homestead, then, for title purposes, to convey or mortgage the property, the trustee will still have to sign both individually and as trustee of the named land trust. Spousal joinder will also be required.

Trustees

Under existing Florida case law, common practice and the Act, a land trustee is the person or entity designated in a trust instrument with both "legal and equitable title" to the land trust property. Since the Amendment Bill narrows the definition of "land trust" to limit it to trust arrangements where the trustee is vested with "both legal and equitable title" by a recorded instrument complying with Section 689.071(3), the Amendment Bill further clarifies that land trustees are not only vested with "full rights of ownership" but with "legal and equitable title" as well.

The Act further specifies that a beneficiary can be the trustee of a land trust without causing a merger of title in the trustee. In addition, an individual or an entity that has been duly formed under the laws of its state of qualification can serve as trustee. The entity no longer has to be qualified to act as a fiduciary in Florida to serve as trustee. Further, the Act codifies that a trustee can be a creditor of the trust without affecting either relationship or breaching the trustee's fiduciary duty.

The Act (Section 689.071(9)) also provides the mechanism for resignation of trustees and appointment of successor trustees in the event of the death, incapacity, resignation or termination due to a trustee's dissolution or if the trustee is unable to serve. The Act addresses two specific situations in this regard: (1) Situation one - where the recorded land trust deed and the unrecorded land trust agreement are silent as to the appointment of a successor trustee; and (2) Situation two - where the recorded land trust deed is silent as to the appointment of a successor trustee, but the unrecorded land trust agreement provides for the appointment of a successor trustee.

With respect to Situation one, where the recorded land trust deed and the unrecorded land trust agreement are silent, one or more persons or entities having the power of direction may appoint a successor trustee by filing a declaration of appointment (the "Declaration") in the county where the property is located. The Declaration must be signed by at least one trust beneficiary and by each successor trustee and acknowledged in the same manner as a deed. The Declaration must contain: (1) legal description of the trust property; (2) name and address of former trustee; (3) name and address of each successor trustee; (4) statement that each successor trustee was appointed by at least one person or entity with power of direction; and (5) statement of acceptance of appointment by each successor trustee.

With respect to Situation two, where the recorded land trust deed is silent as to the appointment of a successor trustee, but the unrecorded land trust agreement provides for the appointment of a successor trustee, the Declaration must be signed by the former trustee and each successor trustee and must be acknowledged in the same manner as a deed. If the former trustee is deceased, then a copy of the death certificate should be attached to the Declaration. If the former trustee is incapacitated, then a statement that the former trustee is incapacitated must be attached to or included in the Declaration. The Declaration must also contain: (1) legal description of the trust property; (2) name and address of former trustee; (3) name and address of each successor trustee; (4) statement of resignation by the former trustee and statement of acceptance of appointment by each successor trustee; and (5) a statement that each successor trustee was duly appointed under the terms of the unrecorded land trust agreement.

Further, if the recorded land trust deed provides for the appointment of any successor trustee, a Declaration is not required. The Act provides that a successor trustee does not have the duty to inquire into the acts or omissions of a former trustee and is not liable for the acts or omissions of a former trustee.

From a best practices standpoint, if the beneficiaries desire to remain anonymous, then the practitioner should provide for the appointment of successor trustees in the recorded land trust deed.

Coordination with the Florida Trust Code

The Amendment Bill updates cross-references in the Act to conform to the new Florida Trust Code, which also took effect on July 1, 2007. In addition, the Amendment Bill corrects and clarifies existing language in the new Florida Trust Code, which excludes "land trusts under §689.05" to "land trusts under §689.071, except to the extent provided in §689.071(7)." Although the Florida Trust Code specifies that it will not apply to land trusts, consistent with existing law, Section 689.071(7) provides that the trustee liability provisions of the Florida Trust Code do apply to land trusts. Thus, the above-referenced change in the Amendment Bill rectifies inaccurate cross-references from "land trusts under §689.05" to "land trusts under §689.071". The additional language confirms that the Act is permitted in Section 689.071(7) to specify that the Florida Trust Code trustee liability provisions do apply to land trusts.

Conclusion

The Act and Amendment Bill codified existing case law and customary practices regarding land trusts. The changes not only resulted in a more comprehensive statute, but also clarified and simplified the use of land trusts for practitioners in Florida.

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Membership Diversity Committee:

Introduction to Will and Trust Drafting With Emphasis on "How To"

By Tae Kelley Bronner, Esq. and Ken Walton, Esq., Co-Chairs

The Membership Diversity Committee has developed a series of entry level low-cost seminars presented to minority lawyers throughout the state with the cooperation of local and statewide voluntary bar associations. The seminars are part of a pilot program to see, first, if the committee can attract minority lawyers to our practice areas and, secondly, if the committee could present information the attendees considered useful in their practice through the seminar format. The seminars do not fulfill the basic skills requirements of newly admitted attorneys and are designed to supplement, not compete with, the basic skills seminars put on by the Young Lawyers Division. Substantial effort was expended to involve the minority voluntary bar associations in the local areas. Eighteen local and statewide voluntary bar associations participated as co-sponsors by assisting the committee in marketing the seminar to their members.

The seminar was open to all members of the Florida Bar. A limited number of law students were also permitted to attend. The first seminar in Ft. Lauderdale was free to any member of the voluntary bar association, but due to the overwhelming interest, the charge was increased to $75 for members of the voluntary bar associations and $125 for non-members. The fees charged included a few dollars to cover the outline materials and notebooks, the costs of pizza and soda brought in for lunch and included payment of next year's dues for the RPPTL section. All attendees received CLE and ethics credits for the seminar.

The committee began with a presentation of Introduction to Will and Trust Drafting with Emphasis on "How To" on June 2, 2007, in Ft. Lauderdale at the Norman B. Howard Conference Center, Broward County Bar Association by Rohan Kelley, Tae Kelley Bronner, and Shane Kelley. The room could accommodate 50 attendees, so registration was capped at that figure. Preregistration was required. While originally projected to have 25 attendees, the registration quickly exceeded the space allowed, with a significant waiting list. A follow-up seminar was presented on July 28, 2007, at ArtServe in Ft. Lauderdale– a larger facility– and then again on August 11, 2007, at the USF Downtown Center in Tampa.

The program was written, produced, presented and the room cleaned up afterwards by Rohan Kelley and Tae Kelley Bronner. The Kelleys drafted fellow attorney and family member Shane Kelley to assist with the presentations and arrangements in Ft. Lauderdale and Sandra Diamond, chair elect of the RPPTL section, and Debra Boje, co-chair of the Legislative committee, to help in Tampa. Judge Mel Grossman, Alex Rieman and Judge Grossman's staff attorney, Christin Gallardo, attended the Ft. Lauderdale seminar to lend support to the project.

The seminars were intentionally presented in a "low key," hands-on, workshop atmosphere to allow the attendees to ask questions and learn from the experiences of the presenters.

Attendees were presented with lecture outlines, paper copies of practice forms and office forms, and a CD with electronic versions of the outlines and the forms. The seminar was originally planned from 10 am to 3pm, but was expanded after the first presentation to run from 9:30 am to 4 pm. All of the attendees at the seminars were asked to fill out critique sheets. Universally, they were complimentary. Several attendees followed up with an email thanking the speakers for presenting the seminar. Some of the comments include:

"Thank you for giving of your time and talents to provide such invaluable information to the various minority groups. . . . You have provided me the insight, tools and materials to get started. I am a member of the RPPTL and plan to become a more active member by joining a committee."

"This seminar was excellent . . . . It was presented in a basic enough format to allow me as an estates & trust novice to understand the material. I genuinely appreciate the RPPTL's section & the Kelley Law Firm's willingness to share your expertise, practice insights and forms."

"I am very excited that the RPPTL section is providing this great opportunity to minorities. . . . I am very much interested in any other seminar available."

"This seminar was truly unprecedented."

"This was a very valuable and most appreciated seminar."

"Thank you for reaching out."

"Very well organized, this is the best seminar I have ever attended."

"Offer more seminars like this. I am an African American lawyer interested in estate planning but could not find a way to break into the field. Thank you very much for doing this."

The committee has an additional seminar entitled "Introduction to Real Estate Closings and Title Insurance" planned for August 25, 2007, at Nova University in Ft. Lauderdale and September 14, 2007, at the USF Downtown Campus in Tampa. The seminars will be presented by Silvia Rojas, Senior Underwriting Counsel for Attorneys' Title Insurance Fund, Inc. (Ft. Lauderdale only), Sue Dutcher of First American Insurance Title Company, and Melissa Murphy, the current chair of the RPPTL Section (Tampa only.) Alexandria Rieman, co-chair of the Guardianship committee, has volunteered to prepare and present an

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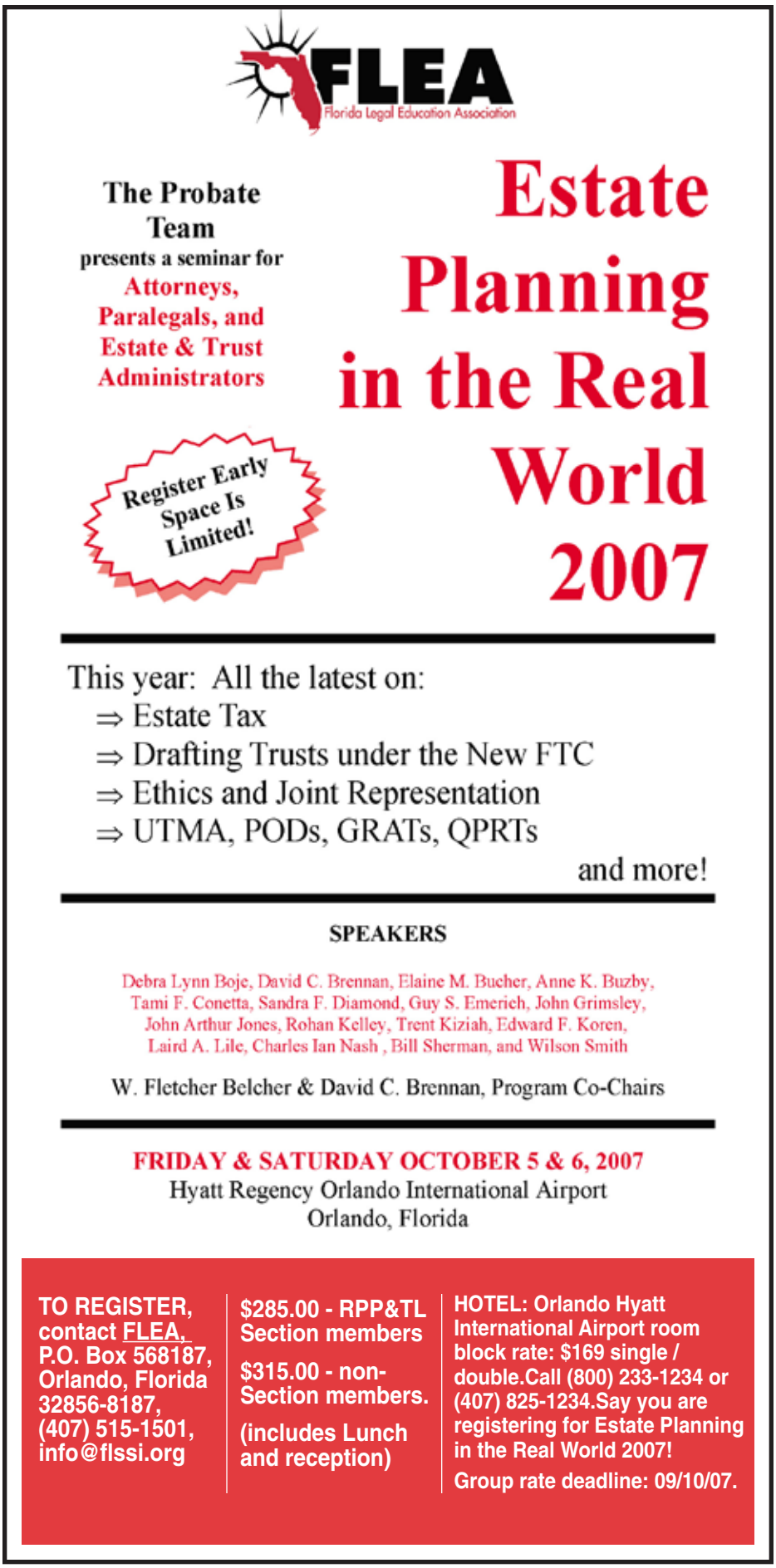

Will & Trust Drafting

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introduction to guardianship seminar (tentatively scheduled for early Spring 2008). The committee also hopes to host a probate administration seminar with a concentration on summary administration and simple probate sometime in Spring 2008. At the end of the seminar series, the committee hopes to have in excess of 250 new minority members to the RPPTL section and significantly increase the involvement of minority members in the RPPTL section committees.

The committee has also had substantial interest from law students in the seminars. However, because of attendance levels, they have not in the past been included in the marketing efforts. To see the interest level of students in programs, the real estate seminar at Nova Law School has been marketed to all Nova law students and will be open to them at no charge.

Seminars Co-sponsored by:

- Asian Pacific American Bar Association
- Broward County Hispanic Bar Association
- Caribbean Bar Assocation
- Cuban American Bar Association
- George Edgecomb Bar Association
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- Fred G. Minnis Sr. Bar Association
- Gwen S. Cherry Black Women's Lawyers Association
- Equal Opportunities Law Section of the Florida Bar
- Hillsborough County Bar Association-Diversity Committee
- Hispanic Bar Association of Central Florida
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- South Asian Bar Association of Florida
- Tampa Bay Hispanic Bar Association
- T.J. Reddick Bar Association
- Virgil Hawkins Florida Chapter National Bar Association
- Wilkie D. Ferguson Bar Association

Giving Advice on Charitable Giving

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

We find ourselves at the convergence of two forces in society today: (i) an enormous increase in wealth of our clients and (ii) a substantial concern for community.

In 2005, the number of households with investable assets of at least $1million reached nearly five million. At the same time, people from all economic backgrounds are giving back to the community in record numbers. Community-based philanthropy is in the front ranks of this movement. According to the Council on Foundations, gifts in 2005 to community foundations increased to more than $5.7 billion – up 60% from 1999.

What Does This Mean for Your Practice?

These trends affect your practice in at least two significant ways: (i) incorporating charitable planning for your clients and (ii) using the resources of your community foundation.

Last issue's article in *ActionLine* encouraged us to listen to our clients for indicators that some charitable planning may be appropriate. As part of our standard planning practice we should ask our clients, "Do you have charitable giving interests?" Charitable giving advice is a value-adding element in our portfolio of techniques and a service welcomed by clients who expect a holistic approach to wealth management.

If you are not using the resources of your community foundation in delivering charitable giving knowledge and opportunities to your clients, you are likely re-inventing the wheel. The staff of your community foundation can be a valuable resource in addressing the charitable objectives of your clients.

Is it Ethical to Refer Clients to Community Foundations?

A question may exist regarding referring clients to your community foundation. Some might assert that by doing so, you are advocating a particular charitable cause. Of course, the choice of a particular charity is your clients' to make. In advising your client, you will be pointing out a fundamental difference between community foundations and other charities.

Community foundations are established for donors to give through. The community foundations are not the end-users of charitable dollars. In 2005, Florida's community foundations distributed more than $69 million to charitable organizations, and most of those funds came from donor advised or donor designated funds.

Community foundations provide a great deal of flexibility as a community's needs change over time. The community foundation acts as a go-between for donors and the ultimate charity, and the client's direction can be narrow or broad. It is all about what works for the particular client.

Getting Help with Charitable Advice

For those of you who are involved with charitable planning issues on occasion, community foundations can help your clients and help you.

For your clients, your community foundation can:

- Assist with identifying your clients' charitable giving interests and motivations;
- Match your clients' charitable interests with tax planning needs;
- Assist with developing charitable plans integrated into your clients' business, personal and financial decisions;
- Facilitate deferred forms of giving (such as charitable remainder trusts);
- Provide information on community needs – and on the local agencies and programs that make a difference in the areas your clients care about most; and
- Deliver grantmaking expertise and a range of administrative services related to charitable giving.

Community foundations are also a resource for you. For example:

- Community foundations have expertise and technical information on a range of planned giving options to assist you in developing specific ideas for your clients.
- Community foundations have in-depth information on local needs and nonprofit organizations. Community foundations are in touch with local organizations and activities addressing the broad spectrum of community needs – from the environment, arts, education, and economic development to special programs for youth, families, and senior citizens.
- Community foundations can serve as the vehicle for your clients' charitable giving, including by establishing donor advised funds and area-of-needs funds. A donor advised fund is a popular mechanism through which your client can make a charitable gift and stay personally involved in suggesting uses for that gift over time. Community foundations are frequently named in bequests as stewards for estate assets that a client wishes to direct to address specific areas of community need in perpetuity.

For More Information

Log on to www.communityfoundationsfl.org for more information or to connect to a community foundation near you.



The opportunity of a lifetime to give the gift of a lifetime.

Qualified charitable IRA transfers to your community foundation are tax-free—through December 31.

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Attorneys now have a new giving option to offer clients.
Take advantage of tax-saving gifts to charity. For 2007 only, clients over age 70½ can transfer up to $100,000 from an individual retirement account (IRA) into a charitable fund without first paying federal income tax on that gift. By making the gift now, future estate and income taxes can also be avoided. So your clients can give more for less.

Get personalized service from your community foundation.
We'll work with you to establish the best vehicle for your client's gift. We can create a fund that meets ever-changing needs, addresses a personal cause or supports a specific agency—all in the name of your client. It's a great way to help your clients experience the joy of giving during their lifetime.

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Community Association Law Update

By Michael J. Gelfand, Esq., West Palm Beach, FL

The Florida Legislature enacted, the Governor signed, and new laws are now in effect. Whatever your take on community associations, if you do not live in one, then your clients and family members do!

Be prepared to at least spot the issues. Most changes have occurred in the area of corporate administration. A few laws address many issues; thus, this quick summary is organized by law and section.

FLORIDA LAWS 2007-80:
COMMUNITY ASSOCIATIONS

Insurance. Many provisions of the Condominium Insurance Code were amended to facilitate laws passed during the early 2007 special session intended to permit condominium associations to more easily fund skyrocketing insurance costs by entering into pooled risk arrangements. This statute expressly permits associations to levy assessments for this purpose, even if losses will be affecting other communities.

Property. §718.103(18) is created to allow a condominium to be declared in an existing condominium unit.

Conversion Reports. §718.616 extends third party beneficiary status to condominium unit owners relying upon reports of the condominium's condition which shall include as appropriate pilings, docks, irrigation systems and information on age and costs, each as of the date of the report, and providing for annual supplemental reports not anticipating developer changes.

Converter Reserves. §718.618 clarifies converter formulas, including a conspicuous disclosure of whether converter accounts were created.

Prospectus. §718.503 and .504 clarify a developer's ability to amend a condominium prospectus budget disclosure to avoid triggering buyer rescission rights when the budget was created in good faith and the change is beyond the developer's control.

FLORIDA LAWS 2007-160:
COMMUNITY DEVELOPMENT DISTRICTS

Developer counsel will be interested in the extensive amendments to the laws regulating the creation and administration of community development districts. Because of space limitations counsel involved in such projects are urged to directly refer to the changes in Chapter 190.

FLORIDA LAWS 2007-173:
COMMUNITY ASSOCIATIONS.

MRTA. §712.11 extends the covenant revitalization provisions in part IV of Chapter 720, intended to assist voluntary and not for profit homeowners' and property owners' associations efforts to restate covenants otherwise extinguished by the Marketable Record Title Act.

Governance. §720.302 authorizes for-profit Florida corporations to act as homeowners' associations.

Board Meetings. §720.303(2)(a) clarified homeowners' association meeting notice requirements for board of directors' meetings also applies to committees and similar bodies meeting to make a final decision concerning spending Association funds or with authority to approve or disapprove architectural decisions concerning parcels and lots.

Records. §720.303(5) approves of a homeowners' association volunteering to provide records to non-members with limited liability and charging up to $150.00.

Budgets. §720.303(6) requires homeowners' association budgets to specify operating expenses, including reserve accounts. If reserves are mandated by the developer or by members, then a formula for levying reserves is provided and a membership vote is required before reserves may be used for a purpose other than which collected. If reserves are not kept for capital items, then the budget must include a conspicuous warning of that fact.

Financial Reporting. §720.303(7) mandates that Association financial documents must be in compliance with board of accountancy regulations and provides a longer reporting period.

Alterations. §720.3035 is created to limit homeowners associations' regulation of parcel alterations only if the authority is specifically stated or reasonably inferred in the community's declaration of covenants. If the authority is not specific, then the association must publish guidelines as authorized by the declaration.

Attorneys' Fees. §720.305(1) allows a member prevailing in a lawsuit against the member's homeowners' association to recover not only their attorneys' fees, but also the pro-rata portion of that member's assessments utilized to pay the association's attorney as specified.

Developer Documentation. §720.307(3) requires developers to provide to a unit owner elected board of directors the source of financial documents of the association.

Guaranteed Assessments. §720.308(2) permits a developer a period of time to guarantee the level of assessments.

Mediation. §720.311 changes mandatory pre-suit mediation by removing the State of Florida's involvement. Parties may directly contract with private mediators.

Mortgages. §718.110(11) prohibits declarations of condominium recorded after October 1, 2007 to require joinder of mortgage holders to declaration amendments, except in very narrow circumstances that prejudice the mortgage holder. If a condominium association fails to obtain mortgage holder consents for declarations recorded before that date, then only mortgage holders have standing to challenge the amendment.

Clubs. §718.114 limits condominium association acquisition of club memberships twelve months beyond the

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recording of the declaration of condominium unless the club membership is approved as a material alteration or substantial addition to association property.

Mixed Condominiums. §718.404 clarifies that commercial unit owners cannot veto residential unit owner decisions.

FLORIDA LAWS 2007-183:
HOMEOWNERS' ASSOCIATION ASSESSMENTS

A homeowners' association's assessment authority is clarified. A homeowners' association must provide at least 45 days notice to an owner before recording a lien for delinquent assessments. In addition, the homeowners association must provide 45 days notice before foreclosing upon a lien. An owner may stay a foreclosure action for up to 60 days by extending an enforceable offer of settlement including all amounts due to the Association such as principal, interest, late charges, attorneys' fees and court costs.

FLORIDA LAWS 2007-226:
CONDOMINIUM TERMINATION

§718.117 is rewritten to provide for two methods of terminating a condominium. In case of economic waste of impossibility of operation, such as after a significant casualty loss, termination is by a majority of owners or the vote required in the declaration of condominium, if lower. An optional plan may be adopted by eighty percent of the owners. Proceeds are to be equitably distributed.

Spotlight on Condominium and Planned Development Committee

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, FL

The Section's Condominium and Planned Development Committee can claim great successes in the past and has a lot on its plate for the future.

The committee is chaired by Rob Freedman of Carlton Fields, P.A., Tampa, Florida. As Rob pointed out to me in a phone interview, one of the most interesting things about this committee is its divergent constituency. The committee has over 100 members, and about half are attorneys who represent real estate developers (and an occasional lender), while the other half represent condominium and homeowner associations that are controlled by unit owners and/or individuals who own property in those communities. What the rest of the Bar may not recognize is that the interests of those two groups are often quite at odds. Rob emphasizes, however, that even though our committee (I just happen to be a member) experiences great divergence of opinions, the committee has been able to work successfully through those differences. The public positions taken by the Committee are based upon consensus.

One of the major accomplishments of this committee over the past few years has been its very successful CLE programs. Rob reports that the seminars have an excellent history of being topical, informational and financially beneficial to the Section.

The committee meets six times a year, plus numerous subcommittee meetings on a vast variety of issues. All committee meetings are three hours long and involve very active and interesting discussions. Also, CLE credit is obtained for these meetings.

On the legislative front, the committee takes two approaches–proactive and reactive. On the proactive side, in the 2007 legislative session, with the assistance of Section lobbyist Pete Dunbar (also a member of the committee) and the Pennington law firm, the Section succeeded in seeing a number of bills passed that were this committee's initiatives. These bills included the condominium termination bill, amendments to authorize a "condominium in a condominium" development, and changes to Florida Statutes 718 and 719 relative to budget disclosures required by a developer.

On the reactive side, the committee was able to work with the Legislature to revise some proposed legislation and to defeat some items, where appropriate, as not being within the public interest. The committee and its members are often contacted by legislators seeking input and advice.

With an eye towards the future, the committee is working on issues such as hotel condominiums, emergency generators for high-rise condominiums, the Plaza East insurance debate, and the very thorny issue of the intent and application of Section 718.111(11) concerning mandatory hurricane coverage and deductibles within the context and realities of the current insurance market.

You are certainly invited to attend any committee meeting. The meetings are always lively, interesting and often entertaining.

Executive Council Goes to Hollywood

RPPTL Section Annual Convention, May 24 - 26, 2007, Hollywood, Florida

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, FL

The Annual Convention of the Real Property, Probate & Trust Law Section of The Florida Bar got off to a rousing start on Thursday morning, May 24th, 2007. There were more than 20 committee meetings on Thursday from eight in the morning until six at night.

One of the Thursday highlights was the Ethics Lunch and Learn Meeting, which was a free event. The speakers provided guidance on handling clients' property (as distinguished from the attorney's property). We all know how difficult those ethics credits can be to come by, so the attendees were very fortunate to get a delicious meal and ethics credits simultaneously. The full day ended with a well-attended, ocean front Welcome Reception.

Friday also kicked off bright and early with two superior seminars: Bankruptcy Issues for Real Estate Lawyers and the 2007 Trust and Estates Symposium which ran all day. Additionally, there were numerous meetings including Condo and Planned Development, Circuit Representatives, SRC Law Students, and the RPPTL-PAC.

After another full day of seminars and meetings, the annual Section banquet was held in a hotel ballroom. The election of the officers, circuit representatives, and out of state representatives took place at the banquet because the Friday lunch was limited to the seminar attendees.

The Saturday Roundtable breakfasts began at 8:00 a.m. All Section members are invited to attend the Roundtable breakfasts and also the Executive Council meeting. A very lively, three-hour meeting of the Section's Executive Council was convened at 10:00 a.m. With seating in the room for 198 people, it was a standing-room-only crowd. The meeting was attended by Executive Council members, sponsors and law students. The meeting started out with an important announcement by the incoming chair of the deadline for submission of limericks for the limerick contest in anticipation of the Executive Council's out-of-state meeting in Ireland.

The treasurer presented a very impressive financial statement. He described two unexpected revenue sources as being sponsorships, which were about $158,000 over budget, and CLE revenues which were explained as being "off the charts".

There were lots, and lots, and lots of committee reports. Peggy Rolando, Chairperson of the Circuit Rep Committee noted improved attendance at that meeting since the committee had starting serving libations.

The Real Property Litigation Committee presented a proposal for action concerning an amendment of Florida Statute 736.0802. This proposal sparked a very heated debate which concluded with support of the committee's recommendation.

Another committee report of note was from the Legislative Committee. Pete Dunbar summarized the recent regular legislative session by saying, "We kicked butt".

Another report that caught my attention was from the Law School Committee which has established a law clerk data base (sounds like a great resource to me). The law clerk data base can be accessed through the Real Property web site by clicking on the human resources link.

After three days of hard work, a fun, casual beach party was held at John Lloyd State Park. The party featured good food, dancing, live music, a bonfire and even a ranger to tell stories.

Sunday concluded the Convention with the traditional farewell breakfast. Each Executive Council member received a golf shirt with a special Convention logo. All in all, it was an extremely productive and interesting Executive Council meeting and Convention weekend.



Martha Edenfield (left) and incoming Chair, Melissa Murphy.



Enjoying the Saturday evening outdoor event at the state park.



A line of commentors awaiting their turn to speak at the Executive Council meeting.



Having a whole lot of fun on Saturday evening.



We appreciate our sponsors!



Cary and Alison Wright with Pat Meyer (center) at the Welcome Reception.

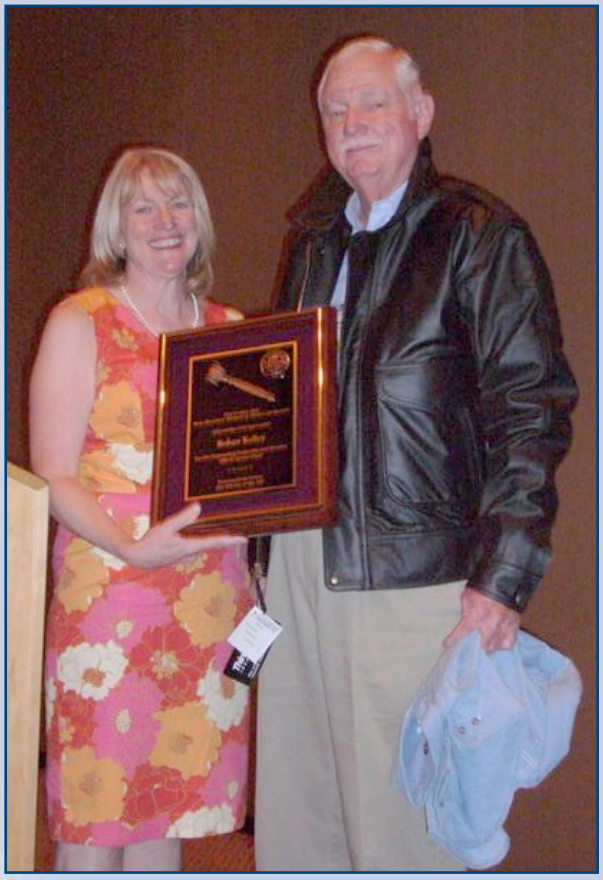
Photos by John Neukamm, George Meyer and Sylvia Rojas.



Rohan Kelley thanked the Section leadership for their commitment to the RPPTL Section.



Rohan Kelley and Michael Gelfand are winding down the Convention weekend.



Incoming Chair, Melissa Murphy, presents outgoing Chair, Rohan Kelley, with a plaque and many tokens of the Section's appreciation for his leadership.

The RPPTL Section would like to thank the following sponsor-supporters of the Hollywood meeting and activities:

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Cheswick Wright Wealth Management
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Management Planning, Inc.

27th Annual RPPTL Legislative and Case Law Update

AUDIO ORDER FORM

Presented August 3, 2007

Course Number: 0503R

TOPICS AND SPEAKERS:

Opening Remarks

Section Welcome
Melissa Murphy, Gainesville
RPPTL Section Chair

Introduction to RPPTL-PAC
Laird A. Lile, Naples
RPPTL-PAC Chair

Legislative Report & Storm Warning
Brian Felcoski, Coral Gables

Land Trust Statute – New Revisions
S. Katherine Frazier, Tampa

Trust Code – New Revisions – We've Only Just Begun…and Already We're Changing the Rules
Sandra Diamond, Seminole

Title Insurance Update
Patricia Hendricks Jones, Orlando

Providing Justice: The New Office of Criminal and Civil Regional Counsel and an Update on Key Challenges Facing the Courts
Honorable Kenneth Bell, Tallahassee

Condominium Termination
Margaret Rolando, Miami

Marrying, Dying or Disabled? We Have a New Law for You…
Charles Ian Nash, Melbourne

Condominium Insurance or Self-Insurance…Is That the Question?
Peter M. Dunbar, Tallahassee

DRA2005 – DRAconian Changes in Medicaid Law Every Estate Planner Needs to Know
Charles Robinson, Clearwater

CLER PROGRAM
(Maximum Credit: 7.5 hours)
General: 7.5 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Maximum Credit: 7.5 hours)
Business Litigation: 5.5
Construction Law: 7.5 hours
Elder Law: 5.5 hours
Real Estate: 5.5 hours
Tax: 5.5 hours
Wills, Trusts and Estates: 5.5 hours

Condominium Conversion, et. al.
Michael Gelfand, West Palm Beach

Probate Rules and Law Changes, Hey, It's Not All About the Trust Code
Debra Boje, Tampa

Trust Law Decanting – It's Nothing to Wine About
Laird A. Lile, Naples

Construction Law Update: King Kong Rides Again!
Frederick Dudley, Tallahassee

Real Property Ad Valorem Taxes
Burt Bruton, Miami

Electronic Recording Act
Barry Ansbacher, Jacksonville

Dirt Law Case Update
Patricia Hancock, Maitland

Update on Probate and Trust Law Cases
David Brennan, Orlando

27th Annual RPPTL Legislative & Case Law Update

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etc? Should developers receive all the blame? Let's face it – Florida is attractive. Attractive locales attract people. And people keep arriving. Currently, we do not impose immigration quotas upon Americans wishing to relocate to Florida. That aside, interestingly there are diverse other groups in opposition to the *HD* movement for specific purpose driven motivations, not necessarily directly linked to development. These groups include the League of Cities, the Association of Counties, and various county school boards. Some of the reasons why these groups may oppose *HD* are in part financially-based. Yet other reasons commonly offered in opposition include the potential for increased volume of litigation; increases in costs to implement land use decisions; the potential tyranny of the majority or minority; negativity associated with the coupling of passion and emotions in decision making; and the catch-all that *HD* spells chaos.[19]

What Is a Land Use Attorney To Do?

It is imagined that if successfully ratified, the *HD* constitutional amendment will produce the unintended consequence of increasing the costs of doing development. This is so specifically because each one of the multiplicity of zoning and comprehensive plan modifications will in theory have to be presented before the people for direct popular vote. Litigation, costs, and tyranny (threat to liberty) all increase as a result. Significantly in order to understand why there is such widespread opposition to the movement consider, for a moment exactly what are the goals *HD* seeks to accomplish. *HD* clearly seeks to shift the dynamic of land use decision making from control by local government officials to control by the public.[20] Thus the position taken is one in which democracy is to be expanded. Citizens are to have final decision making power over the rules and regulations governing land use policy because the status quo is unacceptable.[21] It would thus appear following the positions taken by both advocates and opponents that quality of life in Florida is threatened by either ratification of the *HD* amendment or by its defeat.

In order to accomplish the task at hand of successful growth management, proponents of Florida *HD* have initiated efforts to propose a state constitutional amendment which would empower voters to approve or disapprove of comprehensive plan amendments.[22] The proposed constitutional amendment would achieve for voters the right to decide whether their city or county comprehensive land use plan will be modified, adopted, or rejected. In effect the amendment proposes to take final decision making on local comprehensive plans out of the hands of local government officials and places that decision making power into the state-wide hands of the voting public as exercised in the voting booth. The objective is clearly one that is based upon liberal democratic principles, but whether the general population of voters will have the necessary information, expertise, and dedication of purpose required for self-education and therein effective and efficient land use policy decision making, is another matter altogether. Certainly the right to vote may be provided but whether it is exercised responsibly and effectively is at voter discretion.

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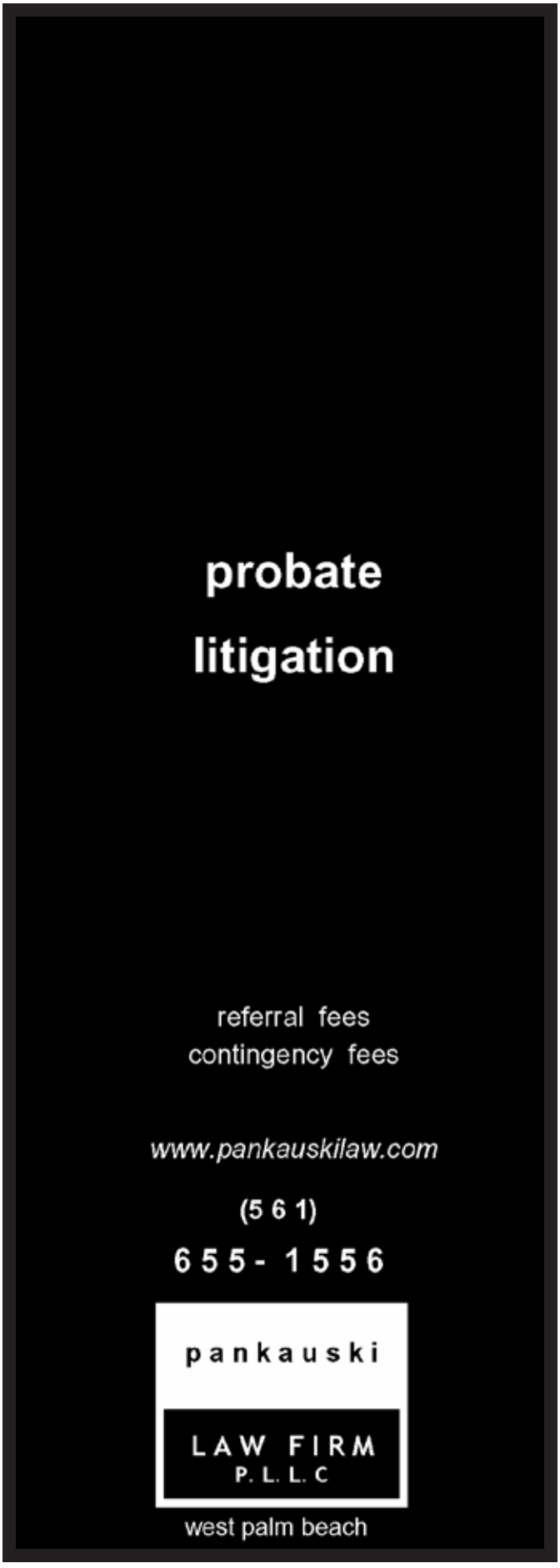

Hometown Democracy

from preceding page

Whether such an expansion of decision making authority into the hands of the general electorate will provide for a true opportunity to improve efforts to resolve the problems of growth management remains to be seen.

The battle-lines have now been drawn. There will be an interesting advertising blitz come November 2008. It will be more difficult for the proposed *HD* amendment to achieve ratification now that the amendment process has itself been amended since January 2007. Still, public opinion is susceptible to heavy advertising and persuasive discourse. Whether there is successful ratification or not, land use attorneys will benefit from the knowledge and information this public discourse will bring. Land use attorneys will do well to take that new knowledge and apply it, in order to best advise their clients in land use decision making within whatever circumstance the field is regulated. Not of least import is the matter of the framework for a system of checks and balances to be instituted to ensure that human rights and individual liberties remain protected by the constitution while the process of a large volume of referenda proceeds should the *HD* amendment successfully be instituted. Will businesses survive in a post *HD* ratification world?[23] Of course they will as long as they are provided with effective legal counsel, and so these and many other issues demand careful inquiry, investigation, and analysis to ensure that land use attorneys best advise their clients, and that our legal system may properly manage in the possible aftermath of ratification of the *HD* amendment.

Author's Note: A follow-up article concerning the practical implications of Hometown Democracy will be published by the Land Use Planning Sub-Committee of the Committee on Real Property sometime in the near future.

Endotes:

1 League of Women Voters of Florida Article on Constitutional Amendments (2006) 2 (*available at: http://www.lwvoc.org/articles/con_amends06.pdf).*

2 Prior to this change a simple majority vote was sufficient to amend the constitution. The required support now shifts from 50% plus 1 to 60%.

3 On November 7, 2006, by a vote of 57.8% to 42.2%, Amendment 3 was passed thereby modifying Article XI, Section 5(e) of the Florida Constitution.

4 Federalist Paper No.10 (*Available at:* http://www.constitution.org/fed/federa10.htm).

5 *Id.* (describing the negative aspects of interest group politics: the influence of the interests may cause "turbulence and contention" and take a form of passion and exert influence upon the government in such a manner as personal security "or the rights of property" of the "weaker party" may be sacrificed.)

6 *See* the International Council of Shopping Centers Growth Management Website *(available at: http://growthmanagement-icsc.org/);* (describing and defining many of the elements and aspects of growth management which include the use of terms such as "sprawl" and "smart growth" and "Big Box," with the ultimate objective being recognition of finding "local solutions that balance community needs for growth with the need for creating and maintaining economically vibrant and socially and environmentally satisfying communities.")

7 The Federalist No.10 (expressing the benefit of indirect over direct democracy: "A Republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking . . .[permitting government] to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.")

8 *Id.*

9 Populism is not necessarily a negative. Passion, properly channeled is an excellent motivator.

10 *See* Florida Hometown Democracy *(Available at:* ***www.floridahometowndemocracy.com****); see also http://www.savethemanatee.org/tahometowndemocracy.htm*).

11 Rebecca O'Hara and Wendy Grey FCCMA White Paper: Florida Hometown Democracy Initiative (March 31 2005); (discussing Floridian discontent with the perceived failure in current growth management policy while praising the system for the level of success it has achieved under difficult circumstances; the authors also suggest that local governments need to consider ways to improve citizen participation in growth management policy making); *See* F.S.163.3164 Local Government Comprehensive Planning and Land Development Regulation Act.

12 *See generally* F.S. chapter 163 Intergovernmental Programs for further information on Florida growth policy, land development regulation, and community redevelopment policies and programs; *See* FS 163.3164 for information on the local planning process and 163.3184 for information on the local comprehensive plan amendment process which sections would arguably be done away with should the constitutional amendment achieve ratification; *See also* FAC 9J-5 for additional guidance on the GMA.

13 Rebecca O'Hara at 6; (describing a parade of horribles, wherein informed expert determinations will possibly be overwritten by a public vote "based on headlines and sound bites.")

14 On January 14th 2007 the Florida Wildlife Federation issued a resolution in support of the Florida Hometown Democracy initiative. The resolution may be viewed at the Florida Wildlife Federation website, *(available at:*http://www.fwfonline.org/projects/FHD.htm); (noting the difficulty of the choice and the criticism that local governments would be forced to hold a referendum every time there is a proposed change in a local comprehensive land use plan but deciding nonetheless to support the constitutional amendment citing the need to ensure greater citizen review and participation respecting growth and concluding that while changes to the comprehensive plan would be required to go before popular vote for basic approval or rejection, county commissions would still vote on land-use matters.)

15 Charles Lee No Stand on "Hometown Democracy" Daytona Beach News-Journal (9 May 2007); (citing the Audubon position of neutrality on the Hometown Democracy initiative question: Audubon has simply elected not to join in support of "Hometown Democracy" because of too many unanswered questions about the effects and workability of the proposal.); (*available at:* http://www.newsjournalonline.com/NewsJournalOnline/Opinion/Editorials/opnOPN40050907.htm).

16 Growth management is not limited to roads, schools and water. Hospitals, recreational facilities, airports, employment in all industries, and other public and private services of all forms are factors in growth management analysis.

17 *See generally, The Federalist No.10.*

18 Mike Salinero, *Builders Back Rule-Changing Amendment* The Tampa Tribune (*available at: http://www.tampatrib.com) (sep 27th 2006).*

19 Rebecca O'Hara at 7, (describing the likely disruption that will follow a successful HD amendment: "There will be no balancing under the proposed amendment – only reaction. This will lead to chaos and confusion that will disrupt Florida's quality of life for years to come.")

20 *See: http://wwwfloridahometowndemocracy.com* (claiming the need to restore authority to the people: "[T]he power to decide land use changes has *always belonged to the voters*.")

21 *Id.* (claiming change is needed because "Floridians are tired of bad development that increases our taxes, ruins our communities and wrecks our quality of life.")

22 The initial effort was begun in 2003 and the original proposed constitutional amendment suffered attorney general review and a court challenge. The Supreme Court of Florida reviewed the ballot initiative and in 2006 rendered a decision which will permit the Hometown Democracy proponents to proceed with efforts to have their proposed amendment placed on the ballot for the 2008 election. *See Advisory Opinion To The Attorney General Re: Referenda Required For Adoption And Amendment Of Local Government Comprehensive Land Use Plans* No.SC06-161 (22 June 2006).

23 *See* information on the website of a pro-developer consultant who offers strategies for economic survival of developers in the face of the challenge of Hometown Democracy (*available at: http://www.slevingroup.com/).*

Condominium Safe Harbor Provisions Enacted (And Some Other Innovations Too!)

By Jennifer Fenn, Esq., Nicole C. Kibert, Esq., and Robert S. Freedman, Esq., Carlton Fields, P.A.
Submitted on behalf of the Condominium and Planned Development Committee

In the Florida Senate, Senators Margolis and Fasano introduced Bill 396 on December 15, 2006, which contained numerous changes to Chapters 718 (condominiums), 719 (cooperatives) and 720 (homeowners' associations) of the Florida Statutes. The House of Representatives companion bill, HB 7031, was unanimously passed on March 22, 2007. There were some consistency issues between the House and Senate versions, which were resolved on May 3, 2007 and Governor Crist subsequently signed the legislation into law as Laws of Florida 2007-80 on May 24, 2007. This Bill became effective immediately upon becoming law. Notable changes enacted with respect to Chapters 718, 719 and 720 are outlined below.

1. Budget Safe Harbor Provisions.

In no sale of real property other than with regard to a condominium or cooperative unit does a purchaser have an ongoing right to rescind their contract based upon a change in operational expenses that are out of the control of the Seller. The Bill contains new Chapters 718 and 719 disclosures which purport to provide developers with a safe harbor in the event that a condominium or cooperative association budget that is prepared in good faith increases due to factors beyond the developer's control, such as spiraling insurance costs. This is important because whenever a change occurs to the offering documents, an amendment must be submitted to the Bureau of Standards and Registration at the Division of Florida Land Sales, Condominiums, and Mobile Homes (the "Bureau"). These changes must also be given to purchasers under contract along with a statement notifying the purchaser that they have 15 days to review the changes and determine if the changes are material and adverse to them, in which case they can attempt to rescind their contract.

In light of rapidly increasing costs and anticipated expenses, some developers elect not to file amendments and make changes in order to avoid giving purchasers a potential rescission opportunity and then purchasers find out at or after closing about increased expenses that they have to pay. This can be quite significant in the event of a pre-construction contract when an association budget is created several years before the project is completed and ready for occupancy.

Alternately, if a developer files an amendment with an increased budget, the developer will inevitably have to deal with purchasers claiming that the increased budget is material and adverse to them. Therefore, these new disclosures will hopefully encourage developers to timely update their budgets and other budget-related disclosures in the offering documents without risk of purchaser rescission. It is unknown how these provisions will stand up in a litigation context and what the impact these new disclosures will have on ongoing litigation on this point.

(a) Budget Related Disclosure in Contract: A new conspicuous type of disclosure has been added at the end of the existing disclosures required in the contract by Sections 718.503(1)(a)1 and 719.503(1)(a)1 as set forth below:

> FIGURES CONTAINED IN ANY BUDGET DELIVERED TO THE BUYER PREPARED IN ACCORDANCE WITH THE CONDOMINIUM ACT [COOPERATIVE ACT IN THE CONTEXT OF CHAPTER 719] ARE ESTIMATES ONLY AND REPRESENT AN APPROXIMATION OF FUTURE EXPENSES BASED ON FACTS AND CIRCUMSTANCES EXISTING AT THE TIME OF THE PREPARATION OF THE BUDGET BY THE DEVELOPER. ACTUAL COSTS OF SUCH ITEMS MAY EXCEED THE ESTIMATED COSTS. SUCH CHANGES IN COST DO NOT CONSTITUTE MATERIAL ADVERSE CHANGES IN THE OFFERING.

(b) Budget Disclosure: A new conspicuous type disclosure is also now required to be included in both a condominium association and cooperative association estimated operating budget, as a result of the addition of language to Sections 718.504(21) and 719.504(20)(d):

> THE BUDGET CONTAINED IN THIS OFFERING CIRCULAR HAS BEEN PREPARED IN ACCORDANCE WITH THE CONDOMINIUM ACT [COOPERATIVE ACT IN THE CONTEXT OF CHAPTER 719] AND IS A GOOD FAITH ESTIMATE ONLY AND REPRESENTS AN APPROXIMATION OF FUTURE EXPENSES BASED ON FACTS AND CIRCUMSTANCES EXISTING AT THE TIME OF ITS PREPARATION. ACTUAL COSTS OF SUCH ITEMS MAY EXCEED THE ESTIMATED COSTS. SUCH CHANGES IN COST DO NOT CONSTITUTE MATERIAL ADVERSE CHANGES IN THE OFFERING.

(c) Current Budget Required. A developer is now required to provide a purchaser with the association's current estimated operating budget at closing in the event that the closing occurs more than 12 months after the filing of the offering documents with the Bureau, as a result of the addition of a new paragraph (1)(c) to Sections 718.503 and 719.503. This additional language also provides that neither the updated operating budget nor changes in the estimated operating budget for a master association, recreation association or club and similar budgets for entities other than the condominium association or cooperative association will be considered to be amendments that modify the offering.

(d) Good Faith Estimated Budget Required. Language added as Sections 718.504(21)(e) and 719.504(20)(e) requires that the developer prepare association budgets in good faith and using accurate estimated amounts at the time of the filing of the offering documents with

continued, next page

the Bureau. This new language also provides that subsequent increases to the budget as a result of events which are out of the developer's control will not give rise to rescission rights, nor will they affect the developer's guarantee of assessments in any way.

2. "Condominium within a Condominium."

The definition of "Land" contained in Section 718.103(18) has been expanded to add a condominium unit as one of the real property interests that may be submitted to condominium ownership. While this change seems to be of a de minimis nature, it actually creates additional flexibility to create a condominium within a condominium unit. Previously, the Bureau took the position that it was not possible to create a new condominium regime within a condominium unit because it was not specifically authorized by Section 718.103(18). This statutory change will provide much-needed flexibility in complicated mixed-use projects where the ultimate division of space is not yet known.

3. Insurance Provisions.

The provisions of Section 718.111(11) relating to the acquisition and maintenance of adequate property insurance are now limited in application to residential condominiums. The modifications to this Section allow the board of directors to determine reasonable deductibles based on available funds or predetermined assessment authority at the time the insurance is obtained.

Associations created under Chapters 718, 719 and 720 are now permitted to participate in a self-insurance fund pursuant to amendments to Section 718.111(11), 719.104(3) and 720.303. No fewer than three associations must participate, and the coverage must be sufficient to cover the probable maximum loss to the communities for a 250-year windstorm event. The associations participating in the self-insurance fund do not all have to be the same type of association. Associations created under Chapter 718, Chapter 719, Chapter 720 or Chapter 721 can participate together.

The self-insurance fund must comply with Sections 624.460 - 624.488, the Commercial Self-Insurance Fund Act. The costs and contingent expenses required to participate in a self-insurance fund described in Section 718.111(11) are now included in the definition of "Common Expenses" contained in Section 718.115.

Modifications to Section 718.116 permit contingent special assessments to be levied in connection with a Section 718.111(11) insurance policy. Similarly, the board of directors of mandatory homeowners' associations will be permitted to make assessments in conjunction with these self-insurance funds pursuant to language added to Section 720.308. It is worth noting that Section 720.308 does not apply to a mandatory homeowners' association existing in a community that is included in an effective development of regional impact development order as of October 1, 1995.

While the concept of self-insurance may serve to lower premiums for owners, it comes with a corresponding economic risk in the event of a catastrophic event. For example, if a self-insurance fund consists of associations on both coasts of the state and a storm damages property on one coast but not the other, the costs are borne by all of the associations participating in the fund, regardless of the level of damage.

4. Changes to Documentation Required for Conversion Projects.

The proliferation of conversion projects in recent years has led Florida legislators, albeit perhaps belatedly from a market perspective, to add additional disclosures regarding the property to be converted to condominiums for purchasers by significant revisions to Part VI of Chapter 718, known as The Roth Act. These changes include additional required content in conversion inspection reports, addition of a requirement for developers to update conversion inspection reports annually, and developer disclosure in the contract regarding election of converter reserves, warranties, or surety bond. Below we have listed the major changes to The Roth Act:

(a) New Conspicuous Type Disclosure in Contract. With the addition of paragraph (10) to Section 718.618, the developer is required to include in the purchase contract a conspicuous-type disclosure indicating whether converter reserve accounts are established, whether a warranty of fitness and merchantability is provided, or if the developer has posted a surety bond.

(b) Conversion Inspection Reports. Section 718.616, as amended, requires that conversion reports (1) be dated, (2) now include the condition of pilings, docks, concrete roadways and walkways, and irrigation systems in their analysis; and (3) state the age, remaining useful life and estimated current replacement cost as of the date of the report. Additionally, each unit owner and the condominium association are now considered to be in privity with the engineer and/or architect that prepared the report as a result of the inclusion of new paragraph (3)(c) in Section 718.616, which specifically provides that the unit owner and association are third party beneficiaries of the report.

(c) Report Update Required After Renovation or Repair. Newly added Section 718.616(3)(d) requires that supplemental inspection reports be prepared regarding any structure or component that is renovated or repaired after completion of the original report and prior to the recording of the condominium declaration.

(d) Update Required if Condominium Not Created Within 1 Year. New Section 718.616(3)(d) requires the developer to update the conversion report annually if the condominium declaration is not recorded within one year of the date of the original report.

(e) Only Current Conditions May Be Disclosed. The conversion report is now prohibited from containing representations regarding future improvements and must only address the current conditions of the improvements as a result of the addition of Section 718.616(3)(e).

(**f) Calculation of Reserves.** Section 718.618(1)(b), as amended, requires that, in the calculation of a reserve account, the structure or component's age be determined based on the age disclosed in the conversion inspection report and rounded to the nearest whole year.

(g) Calculation of Developer Funding for Converter Reserves. Section 718.618(5), as modified, provides that if the developer desires to fund additional converter reserve accounts, the amount to be funded will be the product of the estimated current replacement cost determined in accordance with Section 718.616(3)(b) multiplied by a fraction having a numerator of the component's age in years and a denominator of the component's estimated life in years. Language added to Section 718.618(1)(d) provides that the vote to waive or reduce the funding of reserves required by Section 718.112(2)(f) does not negate the reserve obligations contained in Section 718.618.

(**h) Developer Warranties.** The list of components in Section 718.616(6) for which the developer was deemed to have given an implied warranty of fitness and merchantability in the event that converter reserves are not established has now been deleted.

New Statutory Amendments Will Require Changes in HUD-1 Preparation

By R. Norwood Gay III, Esq., Fund Senior Vice President and General Counsel

With the passage of HB 111 by the 2007 Florida legislature, a number of changes were made to the title insurance statutes, primarily to fix glitches, remove the regulator's authority to set rates for "related title services" decision and conform the statutes to the Florida Supreme Court's decision in *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210 (Fla. 2000). Other provisions dealt with non-resident title agents' requirements for passing licensure examinations and continuing education requirements. By consent, the Real Property, Probate & Trust Law Section tacked on to HB 111 their glitch bill repairing certain provisions of Sec. 701.041, F.S., dealing with the mortgage release certificate.

Amendments were made to Sec. 626.9541 (1)(h)3, F.S., to conform it to the *Butler* case and to clarify that agents could rebate a portion of their share of the premium or any other agent charge or fee, but only to the person responsible for paying that premium, charge, or fee, and never as consideration or inducement for the referral of title insurance business.

Attorney agents will be particularly interested in the amendments to Sec. 627.7711(1)(a) and (b), F.S. In (a), the defined term "related title services" has been stricken and in its place is the new term "closing services." Such services encompass those tasks that one would normally think of as doing a closing. "Examining title" and "preparing or obtaining a title search" are stricken from the definition of closing services. In (b), "primary title services" continues to be defined to mean determining insurability based upon the evaluation of a reasonable title search, but the reference to "examination of the title" has been stricken. The task of examining title has been subsumed within the more all-encompassing term "determining insurability." It also clarifies that primary title services do not include closing services or title searches, for which separate charges may be made. The remaining primary title services remain the same. Recall that the agent is paid for performing primary title services by receiving the agent's share of the premium as set by the regulator.

Changes to Sec. 627.782 (1), F.S., remove the [Financial Services] commission's authority to establish limitations on related title services charges. Thus, title agents are at liberty to charge market fees for closing services. Other sections of Ch. 627, Part XIII, F.S., have been amended to conform to the principal changes outlined above.

The big change in HUD-1 preparation for all Florida title agents is that on and after October 1, 2007, the effective date of the new law, you may no longer charge separately for examination of title.

The big change in HUD-1 preparation for all Florida title agents is that on and after October 1, 2007, the effective date of the new law, you may no longer charge separately for examination of title.

Title agents may still charge separately for title searches, although the regulator was strongly opposed to this provision and unsuccessfully sought an amendment to the bill that would have required agents to absorb the cost of searches within the agent's share of the premium. While on the subject of searches, it appears that many attorney agents mark up the third party charges they incur when ordering searches. Markups under RESPA remain a hot topic in the federal courts. There is a split among the circuits, but for Florida agents the controlling law is *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979 (11th CA 2003). You should be prepared to justify the portion of the marked up charge that you retain.

In summary, it was the intent of the bill drafters to clearly distinguish between the business of title insurance and the business of closing services; to continue the regulation of title insurance and rates by the regulator but not closing services or charges therefor; and to clarify what title insurance functions are performed by the title insurance agent in earning a share of the title insurance premium.

Real Estate Case Summaries

By Stephen E. Silkowski, Esq., Jacksonville, FL

Co-op apartment not homestead for descent purposes. Question certified to Florida Supreme Court, in conflict with Fifth DCA.
Phillips v. Hirshon, 32 Fla. L. Weekly D1151 (Fla. 3rd DCA May 2, 2007)

The Levine brothers urged the court that, because their father occupied a co-operative apartment under a long-term proprietary lease received in conjunction with his purchase of his interest in a cooperative apartment, the property was protected homestead property under Florida law. Applying the principle of stare decisis, the Third District Court of Appeal affirmed the decision of the trial court on authority of *In re Estate of Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978), that expressly held that a cooperative apartment may not be considered homestead property for the purpose of subjecting it to Florida Statutes regulating the descent of homestead property. At the same time, the court certified the question to the Florida Supreme Court as one of great public importance. The Third District Court of Appeal also found certifiable, direct conflict between its decision and that of the Fifth District Court of Appeal in *Southern Walls, Inc. v. Stilwell Corp.,* 810 So. 2d 566 (Fla. 5th DCA 2002).

The *Wartels* Court stated that the words contained in Florida Constitution Article X, Section 4(a)(1) "…one hundred sixty acres of contiguous land" and "…one-half acre of contiguous land" had been repeatedly defined to mean that homestead property must consist of an interest in realty. The brothers argued in this case that, following the date of the operative factual scenario under which *Wartels* was decided, the Florida Legislature adopted a new Cooperative Act, effective January 1, 1977, that places co-ops on equal footing with all other interests in realty, as defined by *Wartels*, that have long been eligible to be impressed with the character of homestead for purposes of devise and descent.

Although at common law the term "real property" was deemed "co-extensive with lands, tenements, and hereditaments," the meaning and application of the term can be varied by legislative action. Applying this principle, the brothers argued that, by adopting the Cooperative Act, the Legislature intended to separate out co-ops from the statute that had governed both condominiums and co-operative apartments. They further pointed out that the Cooperative Act has, since the date of adoption, defined a cooperative as a form of ownership of improved real property. It is well recognized that a condominium is homestead property, subject to protection under Article X, section 4 of the Florida Constitution. Furthermore, the public policy underlying the homestead exemption from forced sale is clearly more compelling than the public policy underlying the tax exemption, and the homestead exemption should ensure more protection from forced sale than it receives from the tax exemption.

Buyer need not file lis pendens to pursue specific performance. Seller who deprives Buyer of specific-performance right by selling property to third party holds profits thereof in constructive trust for buyer.
Schachter v. Krzynowek, 32 Fla. L. Weekly D1466 (Fla. 4th DCA June 13, 2007)

If a seller breaches a real estate sales contract, does the law require the buyer to file a lis pendens to protect the remedy of specific performance against the seller? The court held that, without such a filing, the buyer may pursue a timely filed specific performance action, and, if the seller frustrates the remedy by selling the property to another, the buyer may recover the profits the seller realized from the sale.

Under the contract here, the buyer's remedy upon the seller's default was either a return of deposit or specific performance. The Florida Statutes allowed the buyer one year from the time the cause of action accrued within which to bring an action for specific performance. This short statute of limitations serves a public policy that encourages the alienability of real property by requiring a buyer with the right to specific performance to file a lawsuit within one year.

The seller's sale of the property deprived the buyer of specific performance as a remedy. Under these circumstances, the Florida Supreme Court has ruled that where a vendor is unable to perform a prior contract for the sale of the lands because of a subsequent sale of the same land, he should be held, to the extent of any profit in the subsequent sale, to be a trustee for the prior vendee and accountable to such vendee for any profit.

Accordingly, the court here rejected the contention that the law placed an obligation on the buyer to file a lis pendens to prevent the seller from transferring the property to another and thereby frustrating the buyer's remedy. The purpose of a notice of lis pendens is not to notify a seller in breach; its purpose, rather, is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of real property is involved in litigation. Here, the buyer made no claim against the subsequent purchaser of the property.

Had the buyer here filed a lis pendens, the court might have required it to post a bond. An aggrieved buyer has the option of avoiding such potential costs by not filing a lis pendens. Instead, the buyer can press forward with a timely filed specific performance action and rely on the rule to force the seller in breach to disgorge any profits from a subsequent sale. A seller in breach does not have the power to deprive the buyer of specific performance as a remedy, by severely limiting the time period within which such an action could have been pursued. It follows that a buyer victimized by a seller's breach does not have the legal duty to take steps blocking a sale of the property to

protect the remedy of specific performance. It is the seller in breach who bears the risk of having to disgorge profits realized from a subsequent sale. The decision not to file a lis pendens is merely a tactical one that is not evidence of a failure to mitigate damages. It is the buyer, and not the seller in breach, who has the choice of remedies.

Having concluded that the buyer did not lose the right to pursue specific performance by failing to file a lis pendens, the court also held that the limitation of remedies in the parties' contract did not bar the cause of action that sought recovery through constructive trust. Although the contract limited the buyer to a return of his deposit or specific performance, the seller's conduct deprived the buyer of the specific performance remedy. The policy of constructive trust trumps the application of the limitation of remedies clause; the award of damages in this case was part and parcel of the specific performance remedy. A contract clause limiting a buyer to specific performance or refund of deposit does not preclude recovery of damages where the seller's sale of the property to another deprived the buyer of specific performance.

Third-party market-price option neither restraint on alienation nor violation of Rule Against Perpetuities. Certified conflict with First DCA.

Old Port Cove Condo. Ass'n. One, Inc. v. Old Port Cove Holdings, Inc., 32 Fla. L. Weekly D 1131 (Fla. 4th DCA May 2, 2007)

In 1977, the developers of a condominium entered into an agreement with the Condominium Association granting the Association a right of first refusal for the purchase of a parcel of real property adjoining the condominium. Owner, the rightful successor in interest to the developer, was using the parcel as the parking lot for an adjoining parcel owned by him. He said that the right of first refusal came to his attention in 1999 as he was preparing his properties for sale. Believing that the grant was invalid, Owner brought an action against the Association for declaratory relief and to quiet title. He alleged that the right of first refusal violated the common law rule against perpetuities and was therefore void from its very inception.

The trial court had decided this case under the common law rule against perpetuities, not considering whether the right given to the Association was instead properly characterized as a restraint on alienation. Thus the first issue on appeal was whether the grant violated the common law rule against perpetuities and, if so, whether the rule might be enforced in this case. If there was no common law perpetuities problem, then the issue would be whether any restraint on alienation was unreasonable and, if so, how the right might be reformed to comply with substantive law.

The common law rule against perpetuities is a rule of law, not of construction, and it applies to legal and equitable estates of both realty and personalty. It is not a rule that invalidates interests that last too long, but interests that vest too remotely. In other words, the rule is concerned not with the duration of estates but with the time of their vesting.

The right of first refusal in this case– a third party option to purchase with the price not fixed– would be more appropriately classified as a possible restraint on alienation, not as a violation of any common law rule against perpetuities—assuming there is any such thing applicable in Florida. In this case the text of this grant is clear that the right became vested from the moment of the agreement. It is exercisable only when Owner gives the Association written notice of the proposed sale. The right would then terminate if not exercised within 30 days of such notice.

To bring this case to a proper conclusion, the court also addressed whether, as a matter of law, Owner had established prima facie in the trial court that this purchase option unreasonably restrained alienation. Although the law is clear that a repurchase option at market or appraised value for unlimited duration is not an unreasonable restraint, the situation changes substantially when the price is fixed in the option. It is the generally accepted rule that a fixed price repurchase option of unlimited duration, independent of the lease, is an unreasonable restraint. An option for a fixed price clearly discourages any improvements of the land by the existing property owner because he could never recover the value of the improvements should the optionee exercise the option. Unreasonableness as a restraint on alienation for this kind of option turns on whether the price is fixed by the option itself, or is instead allowed to be determined by the relevant market when the sale is had. The option in this case was at market value. Obviously from its plain text, the option is triggered only when Owner proposes to sell the property. In offering to sell, Owner could either specify a price or let buyers make the offer. Either way, it is market value that is the basis for the option. Owner had produced no factors during the trial that would sustain a finding that it was unreasonable. The right of first refusal was not unreasonable, and it should be enforced.

The court certified conflict with *Fallschase Development Corp. v. Blakey*, 696 So.2d 833 (Fla. 1st DCA 1997) to the Florida Supreme Court.

Holder of equitable interest, who happens to hold for the benefit of a third-party equitable interest, is liable to imposition of constructive trust, if his conduct warrants such.

Demosthenes v. Girard, 955 So. 2d 1189 (Fla. 3rd DCA 2007)

This action centered on ownership of one of two duplex units. The warranty deed from Better Homes to Girard described the property, then believed by both Better Homes and Girard and Demosthenes to be a condominium unit. Some time thereafter, Better Homes discovered that a termination of condominium had been filed making its conveyance of these units as condominiums to Girard and Vega ineffectual. To rectify this mistake, Better Homes executed a corrective warranty deed conveying the entire property, Units A and B and the surrounding property (formerly the common elements), to Girard and Vega, who then filed a declaration of condominium and executed warranty deeds conveying Unit A, now denominated Unit 2, to Girard and Unit B, now denominated Unit 1, to Vega, thereby accomplishing the goal of the original transfers from Better Homes.

Girard did not, however, execute a new quitclaim deed evidencing Demosthenes' interest in his unit. Rather, he sold the unit and kept the proceeds for himself. When Demosthenes learned of the sale, she sued, among other things, for declaratory relief, to quiet title to, and to impose a constructive trust on, Unit 2. She also sued the attorneys involved in these transactions for negligence. Because the court found that Demosthenes could establish a beneficial

continued, next page

interest in the subject property, it reversed the summary judgment against her constructive trust claim.

This court has long recognized that a contract to sell real property establishes the vendee as the beneficial owner of the property, with the vendor retaining only naked legal title in trust for the vendee. Thus, when Better Homes contracted in 2002 to sell the unit at issue to Girard, and certainly when it accepted payment for that unit and issued the first, albeit defective, warranty deed to him, Girard became the beneficial or equitable owner of the unit. This is so even if legal title did not effectively pass to him by virtue of the first defective warranty deed. Consequently, when Girard, the beneficial owner of the unit, executed a quitclaim deed to himself and Demosthenes, he effectively conveyed a beneficial interest in the unit to Demosthenes. Although legal title may not have passed to Demosthenes at that time, her beneficial interest in this property was established by virtue of these deeds.

Girard's failure, after receiving the corrected deed, to either execute a new deed conveying Demosthenes' previously acknowledged interest in the unit to her or to share the proceeds from the sale of the unit with her, entitles Demosthenes to imposition of a constructive trust against the sales proceeds. It also entitles her to pursue an equitable lien against the property itself, because the defective warranty deed from Better Homes to Girard and the quitclaim deed from Girard to himself and Demosthenes appear to be in the chain of title of this property, and because the attorney who prepared these deeds is the same attorney who prepared the warranty deed from Girard to the buyers.

Where a person holding property in which another has a beneficial interest transfers title to the property in violation of his duty to the other, the transferee holds the property subject to the interest of the other, unless he is a bona fide purchaser. To be a bona fide purchaser three conditions must be satisfied: the purchaser must have (1) acquired the legal title to the property in question; (2) paid value therefor; and (3) been innocent of knowledge of the equity against the property at the time when he paid his value and acquired his title.

If the prospective purchaser of the trust property, or of other property subject to an equity, learns of facts personally or through an agent that, while not conclusively showing the existence of a trust or other equity, would lead an ordinarily prudent person to a belief that there was a possibility that an equity existed, the purchaser has a duty to make a reasonable inquiry concerning the existence and nature of the possible equity, and he will be charged with knowledge of the facts concerning the equity that a reasonable investigation would have brought to light.

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Beware of Personal Residence Held in Certain Trusts

By Charles W. Singer, Esq., Cornett, Googe & Associates, P.A., Stuart, FL

The Internal Revenue Service (the "Service") has taken the position that an individual, the sole trustee of a trust having the power to distribute income or principal to himself or herself subject to an ascertainable standard, is not the owner of the trust under Section 678(a)(1) of the Internal Revenue Code (the "Code") and is not entitled to the exclusion under Section 121 of the Code resulting from the gain on the sale of a principal residence of the trustee held by the trust.

This was ascertained through the author's filing with the Service a request for a letter ruling on behalf of an individual (the "Taxpayer") who was the sole trustee of a Family or Credit Shelter Trust (the "Trust") established under the Will of Taxpayer's deceased wife. The terms of that Trust provided that during Taxpayer's life the trustee shall distribute to Taxpayer the entire net income of the trust and so much or all of the principal of the Trust as the trustee may deem desirable for the health, education, maintenance and support of Taxpayer. The Trust held a single family residence acquired by the Taxpayer and his wife in 1979, subsequently transferred to his wife, allocated to the Trust in 1998 upon the death of Taxpayer's wife, and sold in 2005 at a gain over the date of death value. During this entire period, the residence was the principal residence of Taxpayer or Taxpayer and his wife.

Beware of a principal residence being held in typical Credit Shelter or QTIP Trusts or other trusts where the individual would not be considered the "owner" of the trust.

Section 678(a)(1) of the Code provides:

> **(a) General rule.** A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:
>
> (1) Such person has a power excisable solely by himself to vest the corpus or the income therefrom in himself.

The exclusion of Section 121 of the Code applies to the gain on the sale or exchange of property that has been "owned and used by the taxpayer as the taxpayer's principal residence" for periods aggregating 2 years or more during the 5 year period prior to the sale or exchange.

In the requested letter ruling, reference was made to various Court and Internal Revenue Service rulings dealing with the question. Principal reliance, however, was placed on a Private Letter Ruling in PLR8211057 involving an almost identical factual situation to that involved in Taxpayer's request. In PLR8211057, a widow sought a ruling concerning the consequences of her becoming the sole trustee of a testamentary trust established under her deceased husband's will, in which she would have the power to invade corpus at her sole discretion to provide for her "support, welfare and maintenance so long as the total net income and corpus paid to you does not exceed $100,000 in any accounting year." The Service concluded:

> "Based on the facts set forth above, when you become the sole trustee of the trust created under [the will], you will have the power exercisable solely by you to vest corpus in yourself. Accordingly, under Section 678(a) of the Code, you will be treated as the owner of that portion of the trust for any accounting year during which the net income to be paid to you is less than $100,000."

Following the submission of Taxpayer's request, the Service in conference advised PLR8211057 had been overruled by a later Private Letter Ruling in PLR9227037. While trusts involved in PLR9227037 allowed the surviving spouse as the sole trustee to apply to herself such sums out of the corpus of the trust as the trustee considers necessary for the "proper health, support and maintenance of spouse after considering any income or resources of spouse outside the trust and reasonably available for such purposes," the ruling appeared to involve primarily the question of whether a trust holding S Corporation Stock was a qualified Subchapter S trust under Section 1361(d)(3) of the Code making the trustee the "owner" of the trust under Section 678(a) of the Code. The only reference to the trustee's status as the "owner" of the trusts under Section 678(a) of the Code because of her power to apply corpus to herself was the following sentence:

> "Our examination of the trust agreement reveals none of the circumstances which would cause Spouse to be treated as the owner of Trusts 1 or 2 under section 678(a) of the Code."

Otherwise, there was no indication that PLR8211057 was being overruled, and there was no further explanation of the rationale of the later ruling.

When confronted in conference with the inconsistency between PLR9227037 and PLR8211057 and the failure to explain the basis for the later ruling, the service simply indicated it had changed positions. A request was made and granted to argue the merits of the earlier ruling and the Taxpayer's request.

In the rather lengthy submission, Taxpayer presented a number of arguments, including (1) the factual distinctions between PLR9227037 and the requested ruling, (i.e. the trustee in PLR9227037 having to consider the other income and resources of the spouse/trustee outside the trust), (2) the wording of Section 678(a)(1) being clear and unambigu-

Held in Certain Trusts

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ous and not containing exceptions relating to "standards" of the type contained in Sections 674(b)(5)(A) and (d), 2041 and 2514 of the Code, (3) the ascertainable standard of "health, education, maintenance and support" being extremely broad and embracing all of the normal needs of a surviving spouse, (4) the powers of the trustee contained in the Will and the State law also being extremely broad and allowing the trustee acting alone without consultation to make broad decisions concerning the trust, including the sale of the residence, and (5) basing a ruling under Section 678(a)(1) on the existence or non-existence of any types of standards, whether ascertainable or not, could create great anomalies between the income tax and estate and gift tax aspects of the Code.

Subsequent to the filing of the above response, the Service in conference advised that the Taxpayer's position had been presented to the highest legal levels of the Service and that, while the position was considered arguable, the Service had decided as a matter of policy that the ruling in PLR9227037 would stand. The Service indicated its position was garnered to a large extent from the decision in *Mallinckrodt v. Nunan,* 146 F.2d (8th Cir. 1945) in which the trustee of a trust was directed "to pay the residue of such annual trust income to petitioner during his life, upon his request." The Court found that because of petitioner's power to receive the remaining trust income of the trust, all such income was taxable to him. The concept of the *Mallinckrodt* case was incorporated into the Service's Regulation at the time and became the basis for Section 678(a) in the Internal Revenue Act of 1954 and the present position of the Service, namely that an individual would be considered the "owner" of a trust under Section 678(a)(i) only if the individual had the "unfettered" power to withdraw income and/or corpus from a trust. Reference was also made to the decision in *United States v. De Bonchamps,* 278 Fd.127 (9th Cir. 1960).

On the basis of the above and the apparent inability to change the position of the Service, the Taxpayer elected to withdraw his request for a letter ruling, leaving Private Letter Ruling PLR9227037 standing as the position of the Service.

It should be noted that ruling in PLR9227037 should have no effect on grantors of revocable trusts, holders of 5 and 5 powers, or the surviving spouse in power of appointment marital trusts being considered the "owner" under Section 678(a)(1) of the Code. Also, there appears to be no question that if an individual is treated as the "owner" of the trust under Section 678(a)(1), that individual will also be treated as having "owned" his or her principal residence held by the trust under Section 121 of the Code. Beware, however, of a principal residence being held in typical Credit Shelter or QTIP Trusts or other trusts where the individual would not be considered the "owner" of the trust.

Recognition for a Job Well Done...



The Condominium Committee presented **MICHAEL GELFAND** with this framed poster to thank him for his diligent efforts in leading the Committee for many years. Committee members present at both the Hollywood/ Westin and the Palm Beach /Breakers meetings wrote their well-wishes on the border. (The skiing reference was used because of Michael's love for the sport.)

Funding Trusts with Florida Homestead– Should You Trust a Chameleon?

By Jeffrey S. Goethe, Esq., Barnes Walker & Lakin, Chartered, Bradenton, FL

When asked if homestead real property should be conveyed to a revocable trust, a Florida attorney should not be afraid to respond, "It depends." Often, a client's primary residence makes up a large portion of their estate. Second marriage planning issues, estate tax considerations, and the clients' desire to avoid probate force the planner to address very complex issues that are tough to identify and resolve. Long referred to as the "legal chameleon"[1] because of its ability to change its character in different contexts, homestead issues continue to be a challenge. This article will address some of the questions that should be asked before using homestead real property to fund a revocable trust.

Is the Property Homestead?

Real property might be homestead under one category, but not another. For example, the Florida Supreme Court has ruled that a leasehold cooperative apartment does not constitute homestead for purposes of restrictions on devise and descent under Art. X, §4(c)[2], but a leasehold interest in a cooperative apartment is homestead for purposes of creditor protection under Art. X, §4(a).[3] The Third District Court of Appeal recently certified the conflict between the two homestead/cooperative rulings to the Florida Supreme Court.[4] Each of these cases involved the interpretation of the term "real property" as used in Art. X, §4, of the Florida Constitution. Qualification for the homestead property tax exemption is governed by Article VII, §6. The application and interpretation of each of these constitutional provisions and their statutory implementations has resulted in a wide range of rulings.

Long referred to as the "legal chameleon" because of its ability to change its character in different contexts, homestead issues continue to be a challenge.

The statutory implementation of Art. X, §4(a), is §222.05, Fla. Stat. (2006). The statute has broadened the constitutional protection against forced sale by extending protection for "real property" to include a "dwelling place." Houseboats,[5] motor homes,[6] and mobile homes on land occupied under a short-term lease[7] can qualify as homestead for creditor protection purposes. The cases reflect a liberal interpretation of homestead in the context of creditor protection.

The statutory implementation of Art. VII, §6, is §196.031, Fla. Stat. (2007). The ad valorem property tax exemption is also broad in that it grants homestead status to apartments and mobile homes on land owned in the cooperative form of ownership,[8] as well as vendees in possession under a land contract[9] and holders of a possessory interest for life[10].

With regard to devise and descent questions, the statutes provide less guidance. Section 732.401 does provide that property held as tenants by the entireties is not subject to the restrictions on devise, but does not otherwise define homestead. Section 732.201(32) defines "protected homestead" but simply refers to Art. X, §4(a)(1), without further defining the term. Art. X, §4, paragraph (c), of the Florida Constitution limits the devise of homestead property:

> (c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse….

Section 732.4015 provides that the limitations on devise apply to trusts. If a devise is not in compliance with the constitutional limitations, §732.401, Florida Statutes dictates the disposition of homestead property upon the owner's death. The statutory dictate may not be in accordance with the wishes of the decedent as expressed in their will or trust.

Is a Conveyance to a Revocable Trust Valid?

Some commentators have argued that a conveyance of homestead real property to a trust might not be valid.[11] A concurring opinion in *In re Estate of Johnson*[12] analyzed Art. X, §4, which permits "alienation" of homestead only by sale, gift, or mortgage. Since the conveyance to a trust was not a sale, gift, or mortgage, Judge Hersey concluded the conveyance was not valid. The Fund Title Notes address several factual variations involving the disposition of homestead real property upon a settlor's death.[13] Each situation shows a concern for the validity of the conveyance into the trust, echoing Judge Hersey's concerns.

A devise of homestead property under a pour-over will to a revocable trust was addressed in *In re Estate of Donovan*[14]. Mr. Donovan's daughter, hoping to claim a vested remainder interest, argued that the devise under her father's pour-over will to his trust was invalid. The trust devised the homestead in fee simple to Mr. Donovan's surviving spouse in compliance with Art. X, §4, so the court found the devise to be valid.

Will a Waiver Avoid the Restrictions On Devise?

If the settlor is married at the time of death, but is not survived by a minor child, the only valid devise is a fee simple interest to the surviving spouse, unless there is a valid agreement waiving homestead rights.[15] Such a waiver might be needed in cases where the homestead is needed to fund a QTIP trust, credit shelter trust, qualified domestic

trust, or other form of trust which does not give the surviving spouse a fee simple interest. Without a waiver, the attempted devise is invalid. A. Stephen Kotler authored an excellent article discussing the ethical and practical issues involved in representing a couple who wishes to waive homestead rights by agreement.[16] A thorough discussion of homestead waiver issues can also be found in Chapter 11 of *Administration of Trusts in Florida*, by Charles Ian Nash.[17]

Where the devise is invalid, §732.401 gives the surviving spouse a life estate. A QTIP election could be made, accomplishing the tax objectives, but the lineal descendants of the deceased spouse may not be the same persons as the remainder beneficiaries under the trust. This problem is very likely in cases involving second marriages or intentional disinheritance of one or more of the settlor's children.

A settlor survived by a minor child cannot devise homestead. An invalid devise of homestead results in a life estate for the surviving spouse and a vested remainder interest in the settlor's lineal descendants, including those who are not minors.[18]

Will Protection Against Creditor Claims be Lost?

Perhaps the biggest concern for estate planners in funding a trust with homestead has been the *Bosonetto*[19] decision, holding that homestead real property transferred to a revocable trust loses its creditor protection under Art. X, §4. Two recent Middle District decisions upheld creditor protection for homestead held in a revocable trust, as discussed in a prior *ActionLine* article by Charles Ian Nash.[20] The two recent bankruptcy court rulings are in line with several state court rulings.[21] Section 736.0505(1)(a), provides further argument that if property was exempt from creditor claims if owned directly by the trust settlor, it is exempt when titled in the trust, even if a trust has no spendthrift provisions. *Bosonetto* has not been overruled, so the risk should be discussed with the client.

What About Creditor Protection for Heirs?

Property held in the settlor's trust can still qualify as protected homestead, meaning the protection against creditor claims inures to trust beneficiaries who would be intestate heirs.[22] Although some have argued that the policy reasons for protecting the decedent's adult, non-dependent heirs from the decedent's creditors no longer exist[23], the Florida Supreme Court has actually expanded the class of persons who would qualify for such protection.[24] If real property is protected during the settlor's lifetime, Art. X, §4(a), Art X, §4(b) clearly states that "these exemptions shall inure to the surviving spouse or heirs of the owner".

Is Spousal Joinder Required?

Spousal joinder in a conveyance to the trust will be required if the trust settlor is married at the time of the conveyance and the property is homestead as defined by Art. X, §4.[25] The same considerations apply when the property is conveyed out of the trust.

What is the Appropriate Manner of Conveyance?

A warranty deed is the preferable manner of conveyance in funding a trust. The terms of the client's title policy should be reviewed to verify that coverage will continue. Generally, coverage will continue as long as the policy's insured retains an interest in the insured property. Also, those who take by inheritance or operation of law are generally covered as well. The warranty deed should also include the statutory trust powers.[26]

What are the Execution Requirements for the Trust?

All applicable statutory requirements, including Sections 737.111 and 736.0403, Florida Statutes, should be reviewed carefully to insure that the testamentary aspects of a trust are valid. A Florida will generally must be in writing, signed at the end by the testator, and signed by two attesting witnesses who sign in the testator's presence.[27] The rules vary slightly for wills of nonresidents.[28] Formalities required for amendments also differ slightly.[29] The date of the trust, the place of execution, and the residence status of the settlor must be considered. Out of state practitioners should consider the use of two attesting witnesses and a self-proving form in their trusts to avoid questions when the client becomes a Florida resident or purchases Florida real estate.

How Will Conveyance to the Trust Affect the Homestead Ad Valorem Tax Exemption?

As long as the settlor retains the beneficial title, the property will continue to be eligible for the homestead property tax exemption.[30] Section 689.071(8)(h) specifically provides that property held by the trustee of a land trust may qualify for the homestead property tax exemption. Local practices

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Trust a Chameleon?

from preceding page

vary, but some officials may require a copy of the trust to confirm the settlor's beneficial interest for life, approved language in the body of the deed, or a separate, recorded memorandum. Trusts should also be worded carefully to grant the surviving spouse sufficient interests to continue the homestead exemption and cap and other exemptions dependent upon the nature of ownership.

Will the Save Our Homes Cap be Lost?

A conveyance by the homestead owner to a revocable trust will not be considered a change of ownership as long as the settlor retains a beneficial interest for life, allowing the "Save Our Homes Cap" to continue.[31]

How is Post-Mortem Estate Tax Planning Affected?

Disclaimers and other post-mortem tax issues concerning homestead are complex and have been addressed in a prior Florida Bar Journal article which points out the complexities in electing the marital deduction elections, QTIP elections, and disclaimers.[32] Craig Harrison[33], Richard Gans[34] and Charles Ian Nash[35] have discussed the uncertainty of using disclaimers for post-mortem tax planning with homestead property.

Other Considerations.

There are many other considerations when funding a trust with homestead. The planner should consider capital gains,[36] documentary stamp taxes,[37] estate tax apportionment,[38] Medicaid eligibility,[39] homeowner's insurance coverage, mortgage "due on sale clauses,"[40] manufactured home titles, subdivision and condominium restrictions, gift and estate tax issues for non-citizen spouses, and other issues that may arise due to the client's unique circumstances.

Conclusion

It is hoped that the foregoing will provide estate planners, as well as general practitioners and real estate attorneys, with a starting point for reviewing conveyances involving revocable trusts and homestead real property. The statutes, constitutional provisions, articles and cases cited should be reviewed carefully. It is certain that the law will continue to change and the complicated combination of homestead, tax law, and trust law will never be an easy mix. As Bob Arnold of the Attorney's Title Insurance Fund recently noted,

> The Florida appellate cases need to be monitored constantly for the next significant sighting of "our legal chameleon" because it continues to change in size, shape, and color and gets on and into most areas of residential real property law. It is one of the most frequently litigated concepts, and a general knowledge of real property seldom helps in determining the application of current homestead law to a transaction.[41]

Endnotes:

1 Crosby and Miller, *Our Legal Chameleon, the Florida Homestead Exemption,* Vo. II U. Fla. L. Rev., Issues 1 and 2 (1949); G. Robert Arnold, *Recent Sightings of Florida's Legal Chameleon*, 39 The Fund Concept, 49 (May 2007).
2 *In re Estate of Wartels,* 357 So. 2d 708 (Fla. 1978).
3 *S. Walls, Inc. v. Stilwell Corp.,* 810 So. 2d 566 (Fla. 5th DCA 2002).
4 *Phillips v. Hirshon,* 958 So. 2d 425, (Fla. 3d DCA 2007).
5 *Miami Country Day Sch. v. Bakst.,* 641 So. 2d 467 (Fla. 3d DCA 1994); In re Hacker, 260 B.R. 542 (Bankr. M.D. Fla. 2000); *In re Walter,* 230 B.R. 200 (Bankr. S.D. Fla. 1999).
6 *In re Yettaw,* 316 B.R. 560 (Bankr. M.D. Fla. 2004); *In re Bubnak,* 176 B.R. 601 (Bankr. M.D. Fla. 1994).
7 In re Mead, 255 B.R. 80 (Bankr. S.D. Fla. 2000); *In re Meola,* 158 B.R. 881 (Bankr. S.D. Fla. 1994); 8 §196.031(1), Fla. Stat. (2007).
9 §196.041(1), Fla. Stat. (2007).
10 §196.041(2), Fla. Stat. (2007).
11 Andrew J. Krause and Richard S. Franklin, *The Homestead Devise Trap,* 64 Fla. B.J. 17 (Nov. 1990).
12 *In re Estate of Johnson,* 397 So. 2d 970, 972 (Fla. 4th DCA 1981).
13 The Attorneys Title Insurance Fund, Inc., *Fund Title Notes,* 31-23, Title Note 31.06.10 (2006), citing §744.301(2), Fla. Stat. (2007).
14 *In re Estate of Donovan,* 550 So. 2d 37 (Fla. 2d DCA 1989).
15 *City Nat'l Bank v. Tescher,* 578 So. 2d 701 (Fla. 1991); *Sun First Nat'l Bank Polk County v. Fry,* 589 So. 2d (Fla. 2d DCA 1991); *Engelke v. Estate of Engelke,* 921 So. 2d 693 (Fla. 4th DCA 2006). A waiver cannot be accomplished through a post-death disclaimer by the surviving spouse to defeat the vesting of a remainder interest in the decedent's lineal descendants. *In re Estate of Janien,* (Fla. 15th Cir. Ct. 2004), 12 Fla. Supp. 221, affirmed at 916 So. 2d 806 (Fla. 4th DCA 2005); see also, R. Craig Harrison, *Homestead – The Post-Death Spousal Disclaimer: A Cure for a Constitutionally Prohibited Devise?*, 70 Fla. B. J., 42 (Apr. 1996). However, a valid nuptial agreement during the decedent's lifetime can have the effect of cutting off the potential interest of the settlor's lineal descendants. *See Hartwell v. Blasingame,* 584 So. 2d 6 (Fla. 1991).
16 A. Stephen Kotler, *Simple homestead waivers. Is there such a thing?,* 15 *The Elder Law Advocate* 3, 16 (Spring 2007).
17 Charles Ian Nash, *Funding Trusts,* Administering Trusts in Florida, 5th Edition, Chapter 11 (The Florida Bar 2007).
18 Art. X, §4, Fla. Const.
19 *In re Bosonetto,* 271 B.R. 403 (Bankr. M.D. Fla. 2001).
20 *Is Bosonetto Dead – Or is it on Life Support?,* 29 Action Line 1 (2006).
21 *In re Alexander,* 346 B.R. 546 (Bankr. M.D. Fla. 2006) and *In re Edwards,* ___ B.R. ___, 2006 WL 3788803 (Bankr. M.D. Fla. 2006).
22 *Engelke v. Estate of Engelke,* 921 So. 2d 693 (Fla. 4th DCA 2004); Gregory Cook, *Fund Dispenses With Clearing Creditor Claims in Probate and Revocable Trusts,* 32 The Fund Concept 185, 190 (Dec. 2000).
23 Donna Litman Seiden, *There's No Place Like Home(Stead) in Florida - - Should it Stay That Way?*, 18 Nova L. Rev. 801, 885 (1994).
24 Snyder v. Davis, 699 So. 2d 999 (Fla. 1997); *Public Health Trust v. Lopez,* 531 So. 2d 946, 951(Fla. 1988).
25 Art. X, §4, Fla. Const.
26 §689.071(3), Fla. Stat. (2007).
27 §732.502, Fla. Stat. (2007).
28 §737.111(2), Fla. Stat. (2007). See §736.0403(2)(b), Fla. Stat. (2007) for trusts created after July 1, 2007.
29 §737.111(3), Fla. Stat. (2007).
30 §196.041(2), Fla. Stat. (2007).
31 §193.155(3)(a)1, Fla. Stat. (2007), provides that there is no "change of ownership" if a conveyance is a "transfer is between legal and equitable title." A change of ownership triggers a return to "just value," which ends the benefits of the Save Our Homes Cap.
32 Robinson and Fisher, *Florida Homestead: A Difficult Post-Mortem Estate Tax Planning Property,* 70 Fla. B. J. , 18 (Jan. 2002).
33 Harrison, *Homestead – the Post-Death Spousal Disclaimer: A Cure for a Constitutionally Prohibited Devise?,* 70 Fla. B. J., 42 (Apr. 1996).
34 Richard Gans, *Disclaimers: What's New in Chapter 739? Everything!,* 2006 Wills, Trusts and Estates Certification Review Course, 27 (The Fla. Bar CLE, Apr. 2006).
35 Charles Ian Nash, *I Have Just Found Me A Home; Now If I Can Just Do What I Want With It,* 2007 Wills, Trusts and Estates Certification Review Course, 1.23 (Fla. Bar CLE, Apr. 2007).
36 I.R.C. §121 (Gain on Sale of Principal Residence); §671 (Trust income, deductions, and credits attributable to grantors and others as substantial owners); Rev. Rul. 85-45.
37 Fla. Dept. Rev. Tech. Asst. Adv. 06B4002.
38 §731.201(32), Fla. Stat. (2007); §733.817(2), Fla. Stat. (2007).
39 §414.28, Fla. Stat. (2007).
40 12 U.S.C. §1701-j-3; 12 C.F.R. §34.4, §591.5(b)(1)(vi).
41 G. Robert Arnold, *Recent Sightings of Florida's Legal Chameleon,* 39 The Fund Concept, 49 (May 2007).

Concurrency and DRI Reforms of House Bill 7203: A Legislative Update

By Timothy M. Hughes, Esq., Akerman Senterfitt, Tampa, FL, Submitted on behalf of the Section's Development & Governmental Regulation of Real Estate Committee

Picture This: Sitting dead-stop in a traffic jam on a routine, but unpredictable (in terms of travel time) commute to work; in the next lane over is a school bus loaded with kids; the car bumper staring straight ahead has Michigan plates; the billboard just ahead on the right is advertising a new community where one cannot only live, but also work and play; and the shoulder of the road is peppered with lemonade stand-style signs promising to rescue distressed properties. One might ask (another might yell): What is the legislature doing to address Florida's growth management amidst the current real estate market conditions? Well, H.B. 7203, which was recently enacted into law and is effective July 1, 2007, makes numerous changes to Florida's growth management program.[1] The changes are wide in scope: covering the areas of concurrency, local government comprehensive plans, tax increment financing and developments of regional impact (DRI's). Those having the most immediate impact on the regulation and development of real estate, and which are the focus of this article, are the concurrency and DRI related reforms.

What is the legislature doing to address Florida's growth management amidst the current real estate market conditions?

- *Redefining and Satisfying Financial Feasibility* – The major premise of concurrency is that "public facilities will be provided in order to achieve and maintain the adopted level-of-service standard."[2] To ensure that this requirement will be met, the current structure of Florida's growth management program requires the capital improvements element of a local government's comprehensive plan to be "financially feasible". H.B. 7203 modifies this term to clarify that comprehensive plans for school and transportation facilities need to be "financially feasible" for the appropriate planning period, which may be the five-year minimum required for the capital improvements element under Section 163.3177(3)(b)(1), Florida Statutes, or a long-term concurrency management system that covers 10 or 15 years, as provided under Section 163.3177(3)(d).[3] Under either time period, the comprehensive plan will be deemed financially feasible if the plan demonstrates that the level-of-service standards will be met and maintained by the end of the applicable planning period. In addition, H.B. 7203 amends Section 163.3177(2) to clarify that the determination of financial feasibility applies to the 5-year planning period as required by Section163.3177 (3)(a)(1), except that it may also apply to long-term transportation concurrency management systems that cover 10 or 15 years.[4] The deadline for a local government to amend its capital improvements element to demonstrate a financially feasible 5-year schedule of capital improvements was extended from December 1, 2007 to December 1, 2008.[5] After this new deadline, local governments are prohibited from amending their future land use map (FLUM) until it has adopted the required annual capital improvement plan update.[6] The bill also authorizes a local government to consider a FLUM amendment to be financially feasible and achieve and maintain the level-of-service standards applicable to transportation facilities under two new instances. The first is where the amendment is supported by a DRI development order condition or a binding agreement that addresses *proportionate share* mitigation consistent with Section 163.3180(12). The second is where a binding agreement addresses *proportionate fair-share* mitigation consistent with Section 163.3180(16)(f) *and* the subject property "is located within an area designated in a comprehensive plan for urban infill, urban development, downtown revitalization, urban infill and development, or an urban service area."[7]

- *Proportionate Share Mitigation in DRI's* – Under the existing proportionate share provisions of Section 163.3180(12) certain *multiuse* DRI's are eligible to satisfy the transportation concurrency requirements by paying a statutorily calculated proportionate share contribution that mitigates the traffic impacts of the proposed development.[8] This form of mitigation has been used to allow collected funds "to be 'pipelined' or used to make a single improvement that mitigates the impact of the development".[9] In some cases, such pipelining is considered "the best option where there are insufficient funds to improve all of the impacted roadways".[10] H.B. 7203 revises Section 163.3180(12) to expand the use of proportionate share mitigation to *all* DRI's, Florida Quality Developments, and detailed specific area plans that implement optional sector plans pursuant to Section 163.3245.[11] The bill also broadens the type of improvements that may qualify for proportionate share funds by referring to "mobility" improvements that benefit a regionally significant transportation facility.[12] However, H.B. 7203 also clarifies that proportionate share funds are not to be used towards the cost of reducing or eliminating existing transportation facility backlogs. This is expected to cause closer scrutiny of proportionate share amounts to ensure that the costs necessary to fix existing backlogs are not included as part of a developer's required contribution. The bill presumably makes it easier to implement proportionate share mitigation by deleting the previous requirement that a local comprehensive plan must first authorize the use of proportionate share mitigation before it may be utilized as a means to satisfy transportation concurrency requirements. Whether local governments will be required to accept this form of mitigation, and whether

continued, next page

developers will be able to immediately take advantage of proportionate share mitigation even where a local government's comprehensive plan does not authorize its use, remains to be seen.

- *Proportionate Fair-Share Mitigation* (*Non-DRI's*) – H.B. 7203 amends Section 163.3180(16) to allow for the same type of "pipelining" permitted under proportionate share mitigation for DRI's by allowing funds to be directed toward specific transportation improvements that are "reasonably related to the mobility demands created by the development".[13] The bill specifies that the funding of transportation improvements (which may focus on one or more modes of travel) that "significantly benefit" the overall impacted transportation system will satisfy concurrency requirements regardless of a failure of concurrency on other impacted transportation facilities.[14] As with proportionate share mitigation, the bill clarifies that proportionate fair-share mitigation is not to be used for reducing or eliminating backlogs.
- *Transportation Concurrency Backlogs* – H.B. 7203 establishes a new tax increment financing program that allows local governments to establish transportation concurrency backlog areas ("TCBA's") that use tax increment financing to fund the construction of transportation improvements designed to resolve existing transportation deficiencies.[15] Under H.B. 7203, the governing body acts as a transportation concurrency backlog authority. If the TCBA lies within the corporate boundaries of a municipality, it must be established pursuant to an interlocal agreement between the county, the municipality and any other affected taxing authorities. However, several public bodies and taxing authorities are exempt from the act.[16] The bill vests the backlog authority with several enumerated powers[17] and specifies the obligations of the authority once it is formed. Generally, within 6 months after formation of the transportation concurrency backlog authority, the authority must adopt a transportation concurrency backlog plan as part of its local comprehensive plan. At a minimum, the plan, which is exempt from the twice-per-year limitation on comprehensive plan amendments, must:

  - Identify all transportation facilities designated as deficient and requiring the expenditure of moneys to resolve the deficiency.
  - Provide a prioritized list of all transportation facilities designated as deficient and that do not meet the concurrency requirements of Section 163.3180, and the local government's comprehensive plan.
  - Establish a financing and construction schedule for transportation concurrency backlog projects that will have the effect of eliminating transportation concurrency backlogs within 10 years after adoption of the transportation concurrency backlog plan. Such schedule must be adopted as part of the local government's comprehensive plan.

  Upon creation of the transportation concurrency backlog authority, the authority must establish a trust fund, to be funded by the proceeds of ad valorem tax increment funds "equal to 25 percent of the difference between the ad valorem taxes collected in a given year and the ad valorem taxes which would have been collected using the same rate in effect when the authority is created".[18] All backlogs addressed by an adopted plan are deemed to achieve and maintain transportation level-of-service standards and are considered financially feasible for purposes of determining transportation concurrency. In addition, with respect to proposed development transportation concurrency is deemed satisfied.[19] With these effects on transportation concurrency, adopted backlog plans will no doubt promote development in areas that would otherwise not have even been contemplated because of failing transportation facilities.

Student RPPTL Committee Launches Database

By Caitlin Sirico, Third-Year Law Student, Stetson University College of Law

The Student RPPTL Committee "SRC" of the RPPTL Section of The Florida Bar is proud to announce the roll-out of the Student Clerk Project. This Project created the Law Clerk Database, which allows RPPTL members to quickly and conveniently find Florida law students available for legal research projects or to fill law clerk and associate positions at your firm. Student information may be accessed using general search terms similar to a Boolean or Google search.

All of those listed in the Clerk Database are members of student RPPTL groups at their respective law schools, meaning they have demonstrated an independent interest in Real Property, Probate or Trust Law.

To access this convenient resource, simply go to the main home page for the RPPTL Section (www.rpptl.org), select Human Resources on the lower left-hand corner, and click on the Student Clerk "Search" link.

With the start of the 2007 school year, we expect to greatly expand the participation in the Law Clerk Database. Questions can be emailed to the SRC Chair, Caitlin Sirico at csirico@law.stetson.edu.

- *School Concurrency* – The existing "availability standard" applicable to mandatory school concurrency requires that adequate school facilities be in place or under actual construction within 3 years after the issuance of final subdivision approval or site plan approval, otherwise the proposed residential development may not commence.[20] H.B. 7203 establishes two new methods that enable residential developers to satisfy this availability standard and proceed with development even if the 3-year availability standard is not met and a lack of adequate classroom school capacity exists.[21] The first method allows development to proceed if the local government's capital improvement element contains accelerated school facilities scheduled for construction in year four or later and when built, the facility will mitigate the impacts of the proposed development. The second method allows development to proceed if the local government's next annual update of its capital improvement element contains accelerated school facilities *and* "the developer enters into a binding, financially guaranteed agreement with the school district" which provides for the construction of an accelerated school facility within 3 years of an approved capital improvement plan.[22] In such event, the cost of the school facility must be "equal to or greater than the development's proportionate share."[23] After the school facility is completed and conveyed to the school district under this second method, the developer is entitled to receive impact fee credits "usable within the zone where the facility is constructed or any attendance zone contiguous with or adjacent to the zone where the facility is constructed".[24]
- *Transportation Concurrency Exception Areas* – The bill amends Section 163.3180(5)(b) to allow local governments to create Transportation Concurrency Exception Areas (TCEA's) in urban service areas. To qualify, the urban service area must be "specifically designated as a TCEA which includes lands appropriate for compact, contiguous urban development."[25] The specified urban service area must not exceed the necessary amount of land needed to accommodate the projected population growth at densities consistent with the local government's adopted comprehensive plan within the plan's 10-year planning period and the urban service area must be served or planned to be served with public facilities and services as provided by the local government's capital improvements element. In addition, the bill amends Section 163.3180(5)(e) to require local governments to formulate and adopt "long-term" strategies into their comprehensive plans that will serve to support and fund mobility within designated TCEA's.[26] State agency review is broadened to require Department of Community Affairs (DCA) consultation prior to the establishment of a TCEA. Prior law only required a local government to consult the Florida Department of Transportation (FDOT). The expansion of TCEA's to urban service areas, which are excepted from the concurrency requirements for transportation facilities, should help local governments to entice infill projects.
- *DRI Extensions* – Citing 2007 real estate market conditions as the impetus, the bill amends Section 380.06(19)(c) to automatically extend all DRI phase, buildout and expiration dates for 3 years, regardless of any prior extension.[27] The 3-year extension applies to DRI's under active construction as of July 1, 2007. The extension is not considered a substantial deviation, is not subject to further DRI review nor is to be considered a factor when determining whether any subsequent extension is a substantial deviation. Although the extension is automatic, the DCA has established a couple of parameters that a DRI must fall into in order to qualify for the extension. First, the DRI cannot already have exceeded any deadlines within in its development order with respect to phasing, buildout and termination. Second, to be considered under "active construction" there must be (i) a valid local government permit that authorizes physical development consistent with the DRI's development order, and (ii) physical construction pursuant to such permit. In addition, the DCA is recommending developers to immediately provide notice of the extension and supporting documentation as to the status of construction to the applicable local government, regional planning council and the DCA. The DCA is further recommending that DRI developers submit a notice of proposed change to formally revise DRI development orders to reflect the extension.[28] At least one area of concern with this automatic extension is whether it will have the effect of extending concurrency reservations within a DRI development order that are based on current phase, buildout and expiration dates. In other words, does the DRI still have to meet concurrency requirements in the extra three years? This remains to be seen, but it will be an important issue especially where concurrency conditions have changed substantially during the 3-year extension period.
- *Development Agreement Extension* – The bill extends the length of time that a development agreement (governed by the Florida Local Government Development Agreement Act of Chapter 163, F.S.) may remain effective from 10 to 20 years.[29]
- *Public Transit Facilities* – The bill revises Section 163.3180(4)(b) and the term "public transit facilities" to

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House Bill 7203

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exclude airport passenger terminals and concourses, air cargo facilities and aircraft maintenance and storage hangars from the concurrency requirements of Section 163.180.[30]

Conclusion

While local governments, school boards, state agencies and the development community figure out how H.B. 7203 will be implemented, it is expected that the DCA will be meeting throughout the remainder of 2007 to further reassess Florida's growth management policies. It is projected that the DCA will be focused on even bigger-picture changes – perhaps a restructuring of the way in which transportation concurrency is administered.

This article comprises a portion of the author's article entitled "H.B. 7203: Growth Management Reform: Fixing the Glitches, Pipelining, Streamlining and Other Evolutional Changes" originally published in The Florida Bar Journal *(upcoming) Vol. 81, No. 9, Oct. 2007. This article is a modification of that original article.*

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.

Endnotes:

1 The bill was enacted into law as Chapter 2007-204, Laws of Florida. The changes to Florida's growth management program under H.B. 7203 fall into five categories. The first two categories – a glitch package and concurrency reforms – essentially address S.B. 360 (2005) and the implementation issues of that bill. Two more – comprehensive planning reforms and tax increment financing for acquiring conservation lands – enhance and update the program. The fifth category provides time extensions for Developments of Regional Impact (DRIs) and Development Agreements, to account for current real estate conditions.
2 *See* Fla. Stat. §163.3180(13)(d) (2005).
3 Fla. Laws Ch. 2007-204 at §1 and Fla. H.R. Staff Analysis, Fla. H.R., Economic Expansion & Infrastructure Council, at 3 (Apr. 23, 2007).
4 Fla. Laws Ch. 2007-204 at §2.
5 *Id.*
6 *Id.* The exception for plan amendments to meet new requirements and for emergency amendments pursuant to §163.3187(1)(a), F.S. still applies.
7 *See Id* (emphasis added).
8 Professional Staff Analysis & Economic Impact Statement, Fla. S., Community Affairs Comm., at 3 (Apr. 15, 2007).
9 *See id.*
10 *See id.*
11 Fla. Laws Ch. 2007-204 at § 3.
12 *See id.*
13 *See id.*
14 *See id.*
15 *Id.* at §10 and Summary of Legislation Passed, 2007 Reg. Sess., Fla. S., Community Affairs Comm., at 74.
16 Those exempted from the Transportation Concurrency Backlog Act are: (1) special districts that levy ad valorem taxes on taxable real property in more than one county; (2) special districts whose sole available source of revenue the district has the authority to levy (at the time an ordinance under this Act is adopted) is ad valorem taxes provided, that, revenues or aid distributed to a district as defined in §388.011, F.S. from another entity other than such special district must not be available; (3)library districts; (4) neighborhood improvement districts created under the Safe Neighborhood Act; (5) metropolitan transportation authorities, and (6) community redevelopment agencies. Fla. Laws Ch. 2007-204 at §10.
17 Such powers include: (i) to make and execute contracts and other instruments that are necessary or convenient to carry out the authority's powers; (ii) the ability to undertake and complete transportation backlog projects; (iii) to invest transportation concurrency backlog funds; (iv) to borrow money and accept loans, grants and contributions from the Federal Government, the state, county or other public or private sources, and to give security as may be required from such sources; (v) to make or cause to be made all necessary surveys and plans necessary to carry out the purposes of the Act; and (vi) to appropriate transportation backlog funds and make expenditures necessary to carry out the purposes of the act, and to enter into agreements with other public bodies. Fla. Laws Ch. 2007-204 at §10.
18 *See* Summary of Legislation Passed, 2007 Reg. Sess., Fla. S., Community Affairs Comm., at 74 and Fla. Laws Ch. 2007-204 at §10.
19 The provisions regarding the satisfaction of level-of-service requirements, financial feasibility requirements for transportation facilities, and transportation requirements with respect to proposed developed are all actually part of Fla. Laws Ch. 2007-196 §12, which was enacted this year along with H.B. 7203 and is known as "The Transportation Bill". Like H.B. 7203, the Transportation Bill also contains the Transportation Concurrency Backlog Act, but for some unexplained reason these provisions were left out of H.B. 7203.
20 Fla. Stat. §163.3180(13).
21 *See* Summary of Legislation Passed, 2007 Reg. Sess., Fla. S., Community Affairs Comm., at 73.
22 *See* Fla. Laws Ch. 2007-204 at § 3.
23 *See id.*
24 *See id.*
25 *See id.*
26 *See id.*
27 *Id.* at § 6.
28 *2007 Growth Management Legislation*, Florida Department of Community Affairs, Division of Community Planning at http://www.dca.state.fl.us/fdcp/dcp/legislation/2007/sum.cfm.
29 Fla. Laws Ch. 2007-204 at § 5.
30 *Id.* at § 3

What's Happening Within the Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys that practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website (www.rpptl.org) including, up-to-date news and articles regarding case law and legislative changes, other publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses, and a whole host of relevant links to other real property and probate & trust law websites.

Additionally, the Section is working on human resources pages where searches can be done for out-of-state licensed Section members, law students available for clerkships or special project assistance, and other classifications. Further, Section committees each have their own list serves that discuss issues and current hot topics, available to committee members.

CLE Course Schedule

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Estate Administration Issues Resulting from Good Planning, Bad Planning or No Planning (Miami – Hyatt Regency)
(Multiple Video Replays Oct. 12–25, 2007)
Course Registration (850) 561-5831

September 27, 2007
Special Topics in Eminent Domain (Tampa Airport Marriott)
(Multiple Video Replays Oct. 11 – Nov. 8, 2007)
Course Registration (850) 561-5831

October 5 - 6, 2007
FLEA: Estate Planning in the Real World 2007 (Orlando Airport Hyatt Regency)
Course Registration (407) 515-1501

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Executive Council Meeting Schedule

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January 10 – 13, 2008
Casa Marina Resort & Beach Club, Key West
Reservation Phone # 866-397-6342
Room Rate: $189.00
Cut-off date: December 10, 2007

Executive Council Meeting
April 3 – 6, 2008
Hilton University of Florida, Gainesville
Reservation Phone # 352-371-3600
Room Rate: $145.00
Cut-off date: March 3, 2008

Section Convention & Executive Council Meeting
May 22 – 25, 2008
Hyatt Regency Coconut Point, Bonita Springs
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Room Rate: $189.00
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Florida Form DR-312:

In light of the statutory changes to Section 198.13, Fla. Stat., for decedents who die before 1/1/05 and for decedents who die after 12/31/10, a Form DR-312 is needed. For decedents who die during the period 1/1/05 through 12/31/10 no form would be necessary. However, an estate may file the form if it chooses or if a title company insists. The same is true for form DR-308.

-- Sandra Fascell Diamond, Seminole, FL

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Correction Noted: The article on Shared Equity Home Ownership published in the Summer 2007 *ActionLine* was authored by Carol Miller, attorney with Jacksonville Legal Aid, and submitted on behalf of the Affordable Housing Committee of the Real Property Probate & Trust Law Section. Ms. Miller serves on the Affordable Housing Committee. We incorrectly stated that Ms. Miller had submitted the article on behalf of 1000 Friends of Florida.

COVER SHOOT:

The editorial board of *ActionLine* would like always to feature on the cover a photograph taken by a RPPTL Section member. Email your photo that captures the spirit of Florida real property, probate, trust, and guardianship lawyers to Dresden@comcast.net.

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.)

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