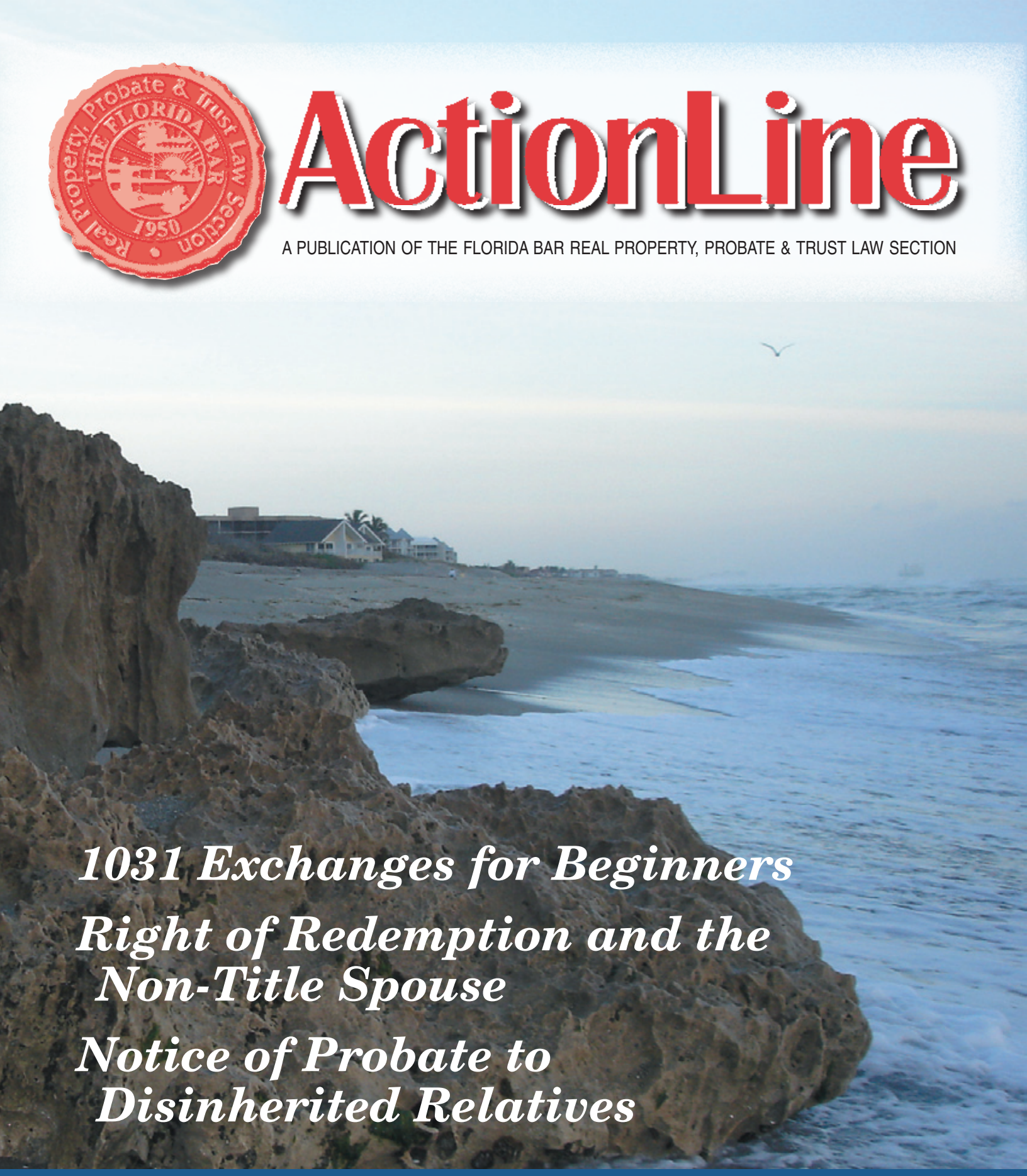
ActionLine

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



1031 Exchanges for Beginners

Right of Redemption and the Non-Title Spouse

Notice of Probate to Disinherited Relatives

Vol. XXVIII, No. 4
Summer 2007

www.rpptl.org

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Look Both Ways: Backward and Forward



By Rohan Kelley
Section Chair
2006 - 2007

Chair's Column

This is the 4th and final Chair's *ActionLine* column of my year as chair. It is written in the waning days of the Section's fiscal year which ends June 30, 2007. It is, therefore, an appropriate time to look both backward and forward.

In looking forward, the incoming Chair of the Section is Melissa Murphy, a dirt lawyer extraordinaire. She hails from Gainesville. Melissa and I see eye-to-eye on many of the important projects that the Section is involved in, and she will carry many of them forward. Of course, she will have projects of her own and will make you aware of the scope and direction of those projects in her first *ActionLine* column. We should all look forward next year to another-- even greater--year for our Section.

Looking retrospectively, your Section has been active this past year. Some of the highlights of that activity are:

1. **Section Committee Participation**. You responded to my call in my first *ActionLine* column of last year for greater participation in the Section's approximately 45 substantive law committees that are open to every Section member. The chairs of the various committees unanimously reported a substantial increase in committee membership and participation across the board. However, even with that great response, there is still a serious need for more of our silent majority members to step up elbow-to-elbow with the best and brightest lawyers in our Section. Help is needed to change the face of our practice with new legislation, amicus positions in the District Courts of Appeal and the Florida Supreme Court and "paying it forward" by participating in the Section's premier CLE programs, to name just a few.

Another change this year is that only a few committees previously applied for and received CLE credit for the committee meetings. Now, most of the Section's committees award CLE credit for meeting attendance. You know The Florida Bar doesn't just give CLE credit away, which speaks emphatically to the high level of knowledge and information which is exchanged and presented during our committee meetings. However, this differs from traditional CLE in that it is interactive. We all learn from the ideas and views of each other. Also, it wasn't lost on many of you that committee participation is a great networking opportunity. If there is business to be referred, who better to refer it to than

See "Look Both Ways," page 6

2007 - 2008
Executive Council Meeting Schedule

Executive Council Meeting &
Legislative Update
August 2 – 5, 2007
The Breakers, Palm Beach
Reservation Phone # 561-655-6611
Room Rate: $165.00 (Superior King)
$175.00 (Deluxe Double)
Cut-off date: July 2, 2007

Annual Out-of-State
Executive Council Meeting
*** * * *IRELAND* * * ***
October 17 – 21, 2007
The Ritz-Carlton, Powerscourt IRELAND
Reservation Phone # 011 353 (1) 274 01 01
Room Rate: 265 Euro per night Garden View
295 Euro per night Mountain View
355 Euro per night Club Level
Cut-off date: May 17, 2007
You may e-mail your reservation request to:
Jill O'Hare, Director of Sales & Marketing
"Jill O'Hare" <jill.ohare@ritzcarlton.com>

Executive Council Meeting
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
Reservation Phone # 800-233-1234
Room Rate: $189.00
Cut-off date: May 21, 2008



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

About the Cover: The beaches of Hutchinson Island, Florida can have the feel of a Northeast shoreline. Here, Section officer John Neukamm took some time at the end of the busy weekend schedule in February 2007 to view the real property along the beach.

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Get Included in *ActionLine!*

Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments. **We also accept paid advertising from outside vendors.**

Forward any proposed **ARTICLE OR NEWS OF NOTE** to Dresden Brunner at Dresden@comcast.net.

For information on ADVERTISING, please contact Diane Preston Moore at DMoore@fowlerwhite.com.

The deadlines for all submissions are as follows:

Issue	Deadline
Fall 2007	July 31, 2007
Winter 2007	October 31, 2007

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.

Look Both Ways

from page 3

someone who has enough interest and knowledge to be on the leading edge of the law and serves the Section.

I have encouraged greater telephone attendance at the committee meetings rather than requiring attendance in person. Certainly, in person participation is preferred, but sometimes that's just not possible.

I implemented recordkeeping requirements for our committees. In some instances, this was non-existent; in others, it was rudimentary. This wasn't especially popular with some committee chairs, because it meant more paperwork, but now for the first time each committee has an accurate committee roster with each member's name and contact information and attendance records. Each committee chair provides a comprehensive committee report to the officers at the end of the year.

I want to thank every committee chair and vice-chair and every committee member for the extraordinary contribution each of you has made toward another successful year for our Section. It could not have been done, and as a section, we would be greatly diminished in stature and results without strong and productive committees. I hope each of you who served on a Section committee received a signed Certificate of Appreciation that I provided to each committee chair, to recognize those efforts.

If you're interested in participating on a Section committee, take a look on our website (see below) under the link on the home page, "Committee Membership App." which is really mislabeled and may be changed by the time you read this to "Join a Section Committee." When you click on the link, you will receive a "Message from the Chair about Section Committee Service" which gives you all the information necessary to join a Section committee. If you'd just like to check it out, contact the committee chair about the time and location of the next committee meeting and sit in as a guest. Introduce yourself.

Many of you also responded to my call, in the most recent *ActionLine* column, to join us at the Convention in Hollywood over the Memorial Day weekend for great CLE, numerous committee meetings, displays from vendors who provide products specific to our practice and popular social events. In fact, the registration for some of the social events was increased nearly 100% over the same registration last year indicating a huge response to the call. The word is still "get involved in our Section." That means first join and participate on a committee. Then move upward in Section management to become a circuit representative or committee chair or vice chair, which makes you a member of the Section executive council.

2. Section Diversity. We have recognized that our Section is deficient in the ability to bring a diverse perspective to its members because we have so few members who are minority lawyers. That needs to change. I am personally proud to say that I appointed the Section's first Membership Diversity Committee (the first of any section of the Bar) whose task it was to study ways to significantly improve the diverse face of the Section and then to recommend ways to implement an aggressive diversity initiative. That committee has issued its report and has begun work on implementing the recommendations in that report. To view or download that report, go to www.rpptl.org, click "Committee Pages" (login with your bar number and last name, all lower case), then "Diversity Committee", then click the link "Pending Matters".

One of the recommendations in that report was to present "Introduction to…" CLE courses targeted at minority lawyers to interest them in entering our practice area, thereby interesting them in joining our Section. I am pleased to report that this column is being written the day after a most impressive start to that project. As a result of active liaison efforts with 10 South Florida voluntary minority bar associations, and the Equal Opportunities Law Section, an extremely successful seminar was presented as a proof of the concept of introductory practice courses for dirt and death law.

A sample of the comments received from that first effort are: "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 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."

One of the questions asked of the seminar attendees was "Would you consider joining the RPPTL Section?" Every one of the critique sheets indicated "Yes" to that question and one attendee handwrote "Immediately!"

3. Mentor Program. One of the comments received at the diversity seminar was "[If we're going to practice in this area] we need someone to call for advice." Another one of the recommendations of the Membership Diversity Committee report was that the Section create a mentor program. Florida Lawyer's Support Services, Inc. (FLSSI) has provided a grant to the Section to hire an employee to administer a mentor program for all Section members. This will not be limited to the diversity initiative, but will be a Section-wide program open to all Section members. It will be especially useful to minority lawyers as new Section members. I appointed a committee which has provided its report and is now in the implementation phase of getting this program started so it can soon be "open for business." You'll be getting an email when the program is activated indicating how you can participate.

4. Legislative Initiatives. The legislation originating in the Section committees was, once again, unprecedented. We keep three lobbyist busy during the entire session with our legislation and we're adding a fourth next year. An active program like the Section's needs the best and most professional lobbyists. We have that in Peter Dunbar, Martha J. Edenfield and Marc Dunbar. Our Section has, maintains, and builds on one of the highest credibility quotients of any "special interest" group in Florida because our special interest is the public interest.

An abbreviated list of this year's initiatives are: Non-resident title insurance agent regulation; Technical corrections to Elective Share to be sure that it complies with new IRS rulings related to a marital deduction; New provisions for

enforcing arbitration clauses in Will and Trust contests; Comprehensive new condominium termination provisions; Changes in conflict of interest standards for trustees and other fiduciaries; Community association (which include condo and co-op associations) legislation; New condo conversion disclosure requirements; Creation of pooled insurance and self insurance options for community associations; Elimination of the requirement for filing a Florida estate tax return; and others that are not mentioned here. These are the regular business of the Section's committees and a very important reason why your committee participation is needed and desired.

5. Section CLE. This continues to be one of this Section's finest high profile achievements. Lee Weintraub, our outgoing CLE committee chair, has built and shepherded this into a program which is the envy of every other Section of The Florida Bar. Jack Falk, our incoming CLE chair, will most certainly continue and improve on our past achievements. There's plenty of room for a few good men and women on this committee.

6. Executive Council Participation. I instituted more stringent participation requirements for Section Executive Council members, and the members have responded. We can no longer deal with this level of CLE, legislation and major Section undertakings without the members of our Executive Council participating consistently and actively. They have answered the call.

7. Circuit Representatives. The Section Executive Council is constituted to include one or more representatives from each judicial circuit in the state. One job of the circuit reps is to remain in contact with Section members in that circuit and the local bar association and to provide support and assistance to RPPTL members. The first implementation of the Section's formal mentoring program will provide a direct communication channel to the circuit reps. Until that program is formally rolled out during 2007, you may want to contact your circuit representative directly if you have a question or a Section-related issue. You can locate your circuit rep by going to the Section website (see below), then along the top bar, to "Cir. Reps." Then "By Circuit". The drop down menu lists all the circuits and will identify the circuit reps in your circuit. Listserves operated by the circuit reps are active in most circuits.

8. By-law Revision. Our Section Bylaws have not been revised since 1989. At that time, the RPPTL Section was a much smaller, but dedicated, group. Now we are massive, dedicated and universally influential. The RPPTL Section, with 10,000 members, has more members than the bar association of many states. This year, for the first time, total Section revenues exceeded $1,000,000. We need modern and practical governance provisions. Although this project

continued, next page



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Look Both Ways

from preceding page

was not completed during the year, it has progressed nearly to the stage where adoption will be on an Executive Council agenda in the near future.

9. Law School Liaison. The Section has had a law school liaison for many years. In the past, those activities sometimes were not substantial or productive. In the recent past, and especially this year, that has changed. Students at nine of the Florida law schools, with the assistance and encouragement of our Section, have student organizations that identify and solicit law students who have an interest in real property law or trusts and estates law, or both, as its members. There is then a state-wide umbrella organization that represents and guides the separate school-local organizations. That state-wide organization is under the guidance of our Law School Liaison committee. Also, please note comments under the webpage will explain how you can now tap this resource for special research projects, summer clerks, or hiring associates.

10. New Website. We have made the transition from our old and dated website to the new website. It is at a new address, www.rpptl.org. Login with your Florida Bar number and your password is your last name in lower case. Please drop by to explore the treasure trove which is there.

For example, one of the parts of the site most recently implemented is in the left panel on the home page under "Section Related Links". The link is "Human Resources." Our Section has certain resources, which we have developed or are developing to be of special utility to our members. Three current examples are: listing of minority Section members, listing of law students affiliated with the Section, and listing of members of our Section who practice outside of Florida in another state. How, you ask, will these be of use to me in my practice?

You have read above that the Section is involved in an active and extensive diversity initiative to interest minority member lawyers in joining our Section. You can help in this undertaking. These minority lawyers, in many instances (but not always), have had little experience in our practice areas. It does them no good to attend our "Introduction to…" seminars, join the Section, and attend other Section CLE, if they have no business in real estate or trusts and estates. As a part of the overall diversity plan to attract and maintain a solid base of minority lawyers, the report of the Membership Diversity Committee (see above for how to get a copy) suggests creation of a web listing where the RPPTL members who have business to refer can, if they wish, locate a minority lawyer to refer that business to. The referring lawyer may wish to help the minority lawyer by mentoring him or her through the matter, or he or she may simply wish to refer it and if there are any questions, the minority lawyer can get answers through the Section's mentor program (mentioned above.) Business referral of this type in support of the Section's diversity program is voluntary, but those members who want to help in this effort can do so using the Section's website minority listings in the Human Resources link. If you would like to help in this effort, or would like more information on the program, please contact either of the Co-chairs of the Membership Diversity Committee, Ken Walton II at Ken@WJBlegal.com or Tae Kelley Bronner at Tae@estatelaw.com.

The next Human Resource that is available to our members is a listing of Florida law students who have expressed a sufficient interest in our practice areas to join a Section-affiliated student organization. If you have a research project you need completed, or a summer clerk, or are looking for an associate, this is the place to start. Under "Human Resources", there is a link you can use to search on several criteria to locate the law student (or new graduate) you need to help you in your practice. At this writing, a search indicated there are 108 students listed, but by the time you read this, I believe that number will be over 200 and climbing rapidly.

The final "Human Resource" link on our site is a listing of out-of-state Florida RPPTL lawyers. If you have a matter with an issue or connection to New York, or Ohio, or Oregon, it may be useful to you to be able to contact a Florida RPPTL lawyer practicing in that state. As a condition of the free listing the Section provides, the out-of-state lawyer will agree to provide RPPTL members with a free ten-minute consultation on the real estate or trusts and estates laws or procedure in that state. You may want to refer the matter to that lawyer or associate that lawyer in your ongoing matter. Although it is in place, this out-of-state listing and search link is not yet populated and is the last of the three mentioned above to be implemented. However, it should be implemented soon.

With all that this Section does, it is necessarily very high profile. That means that you, as one of our members, are remembered and respected in the practice you do. The RPPTL Section (and thereby its members) is know and recognized throughout the practice, the judicial system, the legislature, and the leadership of The Florida Bar as a preeminent organization serving the needs of the public as well as the needs of its many members. I am proud to be a part of this Section and I'm pleased that you are also a member. I encourage you to solicit your friends and colleagues to join up. We are not the best section because we are the biggest; we are the biggest because we are the best.

The job of a Section Chair is to be certain that the important work of this great Section goes forward. I feel privileged to have been a part of all this. Now I'm turning the Chair's duties over to Melissa Murphy and she will have the opportunity to take our Section forward to even greater achievements. I ask that you support her in those efforts as you have provided support for me this past year. The basic resource of this Section is its volunteer members who make all this happen.

Finally, my special congratulations and thanks to the winners of this year's Section awards: S. Dresden Brunner (your *ActionLine* editor) winner of the Section's Annual Service Award; J. Craig Shaw, Esq., Florida Bar CLE senior editor, winner of the Robert C. Scott Memorial Award, which was first awarded in 1984 in recognition of untiring devotion and valuable service to the Section; and W. Fletcher Belcher, winner of the William S. Belcher Lifetime Professionalism Award. All three of these individuals are most deserving of these awards and are due the thanks of the Section and its members for their service and contributions. In ending, I am the grateful recipient of the Ayatollah award for management style, passed on to me by its first recipient, John Arthur Jones.

Fight Increased Housing Costs & Foreclosures By Sharing Equity

By Carol Miller on behalf of 1000 Friends of Florida, Tallahassee, FL

Traditionally, homeowners sell their homes for whatever price they can get and keep the appreciation, regardless of the cause of the increase in value. In market rate housing, the entire appreciation belongs to the homeowner. Florida programs to help make homeownership accessible to buyers with lower incomes have generally stayed with this seller-take-all equity distribution. The National Housing Institute's 2006 report titled, "Shared Equity Homeownership, The Changing Landscape of Resale-Restricted, Owner-Occupied Housing" by John E. Davis advocates balancing the interests of individual homeowners and the community. Socially-created equity may be wealth that the community needs to retain because the amount of subsidy necessary to accomplish homeownership has substantially increased.

With more people needing more subsidy dollars, housing advocates may wish to expand the methods used to make homeownership affordable. The increasing number of publicly-assisted homeowners that sell at market rate and keep the equity, or worse, lose the house and the equity in a foreclosure action, adversely affects the community's ability to provide affordable housing.

Rising housing costs and rising foreclosure rates spur housing advocates to explore new models for sharing equity to benefit both homeowners and the community ....

As discussed in Mr. Davis' National Housing Institute (NHI) report, subsidy at the time of purchase from a public grant, charitable donation or mandated concession from a private developer creates equity. After purchase, property values can increase because of public investment in infrastructure or private improvements in surrounding properties. The NHI report explains the value of public investment in homeownership by pointing to empirical evidence that shows homeowners are more likely than renters to participate in voluntary organizations and to engage in political activity. The report also suggests that neighborhoods with denser social networks and higher levels of civic engagement are more likely to have lower rates of instability, unemployment, crime and other social ills.

The need for more permanent affordability increases as more people are priced out of the housing market. Both low and average wage-earners cannot earn enough to pay the cost of housing. For at least the past decade, the cost of housing has outstripped the average home buyer's earning ability. Lower interest rates cannot offset the increased cost of housing. According to the Shimberg Center's 2004 housing report, housing prices for the preceding three years increased by 7% per year above the general rate of inflation. This dramatic increase in housing prices, without a corresponding increase in wages, has left many people without access to affordable housing. The *Housing News Network Journal* in Spring 2006 compared figures from HUD and the Florida Association of Realtors from 2002 to 2005, and showed that median sales prices for single-family homes increased 80 percent while median family income increased by only 1.4 percent. Consequently, buyers struggle to find enough public subsidy to close the gap between housing costs and the amount buyers can borrow to purchase homes.

The rising amount of subsidy has caused some nonprofits to question the wisdom of giving publicly-assisted home buyers the traditional ability to resell the home at whatever price the market will bear and to keep the appreciation accumulated from whatever source. Housing advocates are seeking better ways to balance individual rights with larger community goals. Shared equity homeownership aims to balance the goals of building wealth for individual families and recouping some of the public's investment to use for other families.

Shared equity homeownership restricts resale. The homebuyers receive ownership benefits: security, asset accumulation, homestead exemption and tax deductions, greater control over costs and improvements, and a legacy for their heirs. However, instead of selling on the private market, a nonprofit organization that represents the interests of the larger community shares control of conveying property with the homeowner. Homeowners may recoup their investment and perhaps some capital gain from selling their ownership interest for more than its initial price but the community retains its socially-created investment. Resale-restricted housing keeps homes affordable and so requires less public investment for the subsequent buyer of the resale-restricted home. For those having trouble holding onto homeownership, shared equity homeownership models have policies designed to help ensure their success.

Some communities have chosen to use the shared equity homeownership model, also known as resale-restricted, owner-occupied housing. The goal is to balance the rights and responsibilities of homeownership between the home buyer and the community for the benefit of both. Consequently, advocates are considering options that lie somewhere between renting and owning.

Resale-restricted housing offers options beyond the usual choice between renting and buying that provide the benefits of home ownership while balancing access to affordable housing with a return on one's investment. The NHI report describes three established models of resale-restricted, owner-occupied housing:

1. Limited Equity Cooperatives (LECs)

In cooperative housing, a corporation owns the deed,

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Defer Your Capital Gain Taxes on the Sale of Investment Property

By Rich Behrle, Investment Property Exchange Services, Inc., Orlando, FL

For most of us, paying taxes is a necessary chore that we would like to put off until some time far in the future. It doesn't always have to be bad, however. Section 1031 of the Internal Revenue Code offers a method to avoid paying taxes on the sale of investment (rental) property and provides property owners one of the last great opportunities to save taxes and build wealth.

A §1031 exchange is essentially a typical sale and purchase transaction, except that by using a qualified intermediary to assign into the sale and purchase contracts and hold the sale proceeds, the owner may defer paying capital gain taxes and maximize purchasing power to buy a more expensive replacement property.

While most owners want to avoid paying any taxes by doing a §1031 exchange, the payment of some capital gain taxes on the transaction does not disqualify the entire exchange. Generally, if investors follow three basic rules they can avoid paying any capital gain taxes in the year of the exchange: 1) the purchase price of the new property must be equal to or greater than the sales price of the old property; 2) the total amount of the proceeds from the old property must be reinvested in the new property; and 3) the new mortgage must be at least equal to the old mortgage.

Generally, if investors follow three basic rules they can avoid paying any capital gain taxes in the year of the exchange...

Who Benefits

To be eligible for an exchange, the property to be sold must have been used by the owner for investment purposes and be exchanged for "like-kind" replacement property that will be used by the investor for similar purposes. (One's personal residence or second home is not "like-kind" to investment property and does not qualify for an exchange.)

Tax deferred exchanges can apply to a wide variety of other types of property, such as trucks, cars, boats or aircraft, but most investors are familiar with exchanges involving real estate. Some common examples of real estate that are "like-kind" and can be exchanged are vacant land, agricultural land, shopping centers, apartment buildings, single-family rentals and tenancy-in-common interests. It is also important to note that §1031 exchanges do not apply to such items as stocks, bonds, notes, inventory, dealer property or partnership interests.

For the transaction to qualify as an exchange, the investor must enter into an exchange agreement with a qualified intermediary *prior to* transferring the old property. The exchange must then be completed within strict time limits. Starting from the transfer of the old property, the investor has 45 days to identify possible replacement properties and the balance of 180 days to acquire all of his or her replacement property.

Trust a Professional

Today, most savvy investors utilize the services of a professional qualified intermediary company to facilitate their exchange. The qualified intermediary serves a dual purpose by providing the necessary exchange agreement to create the exchange of properties and controlling the exchange proceeds until it is time for the purchase of the replacement property.

It is critical for investors to exercise care in selecting an appropriate qualified intermediary company to ensure, among other things, that the exchange funds are safe and will be available for their replacement property. Since qualified intermediaries are generally not regulated by federal or state governments, investors should verify that the qualified intermediary company they select maintains an acceptable fiduciary bond and professional liability insurance coverage, has sufficient experience and staffing capacity to handle all types of exchange transactions, and is doing business as an entity, such as a corporation, to avoid the problems that can occur if an individual holds the investor's exchange funds.

It is always wise for investors to review their individual tax situations with their legal and tax advisors before entering into an exchange. If the investment property owner's sale and purchase qualify for a §1031 exchange, and if it is properly structured and administered, an exchange is a valuable tax saving tool.

2007 Annual Florida Bar Convention

June 27 - 30, Orlando World Center Marriott

See www.floridabar.org for details and registration forms.

What is Like-Kind Property Anyway?

By Rich Behrle, Investment Property Exchange Services, Inc., Orlando, FL

If a client asked you if they could do a like-kind exchange of their farmland for a shopping plaza, what would you say? No? If you did, you would be wrong. However, you would not be alone in your belief. Many people's real estate agents, attorneys, and accountants have an incorrect and overly restrictive opinion of what constitutes like-kind property in a §1031 exchange. This is because they have not kept current on the evolution of the law concerning §1031 exchanges.

When §1031 was originally enacted in 1954, it provided that no tax would be payable on the exchange of property if it was exchanged "for property of like-kind". However, the statute does not define the term like-kind. Therefore, if someone asked an advisor who was conservative, he or she would give a narrow definition of what is like-kind. Conversely, a more aggressive tax advisor probably would give a much broader definition.

Finally, in 1991, the Internal Revenue Service issued regulations concerning like-kind exchanges. These contained, among other things, a definition of "like-kind". The IRS stated that the words "like-kind" refer to the nature or character of property, not to its grade or quality. It stated, "[T]he fact that any real estate involved is improved or unimproved is not material, for that fact relates only to the grade or quality of the property and not to its kind or class." The regulations provided examples of like-kind property: city real estate is like-kind to a farm or a ranch; a leasehold, with 30 years or more remaining, is like-kind to a fee interest in real estate; and improved real estate is like-kind to unimproved real estate.

After the 1991 Regulations, there have been numerous Revenue Rulings and Private Letter Rulings as well as numerous court decisions. All of these have helped us to better define what is like-kind property. One of these cases is particularly interesting. In *R. & J. Furniture vs. C.I.R.,* the Tax Court held that a 5-year lease (with ten 5-year renewal options) was like-kind to a fee ownership in real property. The Court stated that the lessee had a right to use the property for up to 55 years.

Although there are a few exceptions, you could make the generalization that all real property is "like-kind" with all other real property. The following types of real property are considered to be like-kind and can be exchanged for each other:

Land, commercial buildings, stores, offices, warehouses, ranches, farms, rental homes, apartments, tenancy-in-common interests, easements, perpetual water rights (when real property under state law), leases of 30 years or more (including options), condominiums and timberland.

If these are all like-kind, then what types of real estate are not like-kind? Foreign real property is not like-kind to real property in the United States. In addition, if the property is acquired for the purpose of sale, it is considered inventory and is not like-kind. Therefore if your client is a developer or a builder and improves land or builds homes for the purpose of selling them, these items are inventory and not eligible for a §1031 exchange. Likewise if your client buys fixer-uppers and then rehabs them and sells them for a higher price, this is ordinary income and cannot be properly deferred through a §1031 exchange. These homes were acquired with the intent to sell them.

Although these are areas where these clients wish they could shelter income, as you can see the definition of what is like-kind, when it comes to real estate, is very, very broad. This breadth provides taxpayers with considerable flexibility in acquiring replacement investment property in a §1031 exchange. Now, the next time your client asks if they can exchange their farmland for a shopping plaza, you can say YES, with confidence!



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Ten Stupid Things Smart People Do To Mess Up Their Tax-Deferred Exchange

By Toija J. Beutler, Investment Property Exchange Services, Inc., Orlando, FL

Number 10: They fail to get "replacement" debt.

Good news for the IRS! All Exchangers understand that to get a complete tax deferral they need to reinvest the cash from the sale into the replacement property. Few Exchangers (or their tax advisors) know that they also have to "reinvest" their debt. For example, if they sell a property and pay off a mortgage of $75,000, they must acquire replacement property also encumbered by a mortgage of at least $75,000. If the Exchanger only reinvests the cash into a free and clear property, the IRS will tax them on the "debt relief" they experienced when they paid off the mortgage on the relinquished property. This is not a happy outcome for an Exchanger who thinks they have a perfect exchange because they spent all their cash, and paying that tax bill now poses a challenge. (There is one exception to this rule relating to cash "added" to the exchange.)

Number 9: They fail to meet the identification requirements.

Let me count the ways…there are so-o-o many ways to mess up the identification requirement. The requirements are quite simple. Most exchange companies provide a one-page form with three lines on it. The Exchanger simply fills in the lines with street addresses (including city and state) of three target properties and signs the form. Seems pretty easy.

Just a short list of common mistakes: they fail to have their vacationing spouse sign; they copy the wrong street number; they leave off the city and state; they fail to note that they are buying only a percentage of the property; they fail to provide floor plans for projects currently under construction; they squeeze six properties onto the three lines; etc.

Unfortunately, what would appear to be a minor procedural requirement has major implications for the exchange. After midnight of the 45th day there is no way to correct these errors. The IRS does not play nice with taxpayers who buy something that was not identified. A small mistake can result in complete failure of the exchange.

Number 8: They think they cannot do an exchange if they are buying a smaller property.

There will be a tax bill, but…. For example, the investor is selling a rental house in the city for $200,000 and has found a rental house in a resort location valued at $175,000. Sometimes "partial" exchanges can be beneficial. Yes, they will pay tax on the $25,000 differential. Still, depending on the gain in the relinquished property, there may be some tax-deferral (the whole point of §1031 exchanges) with the reinvestment into a smaller property. Investors must consult with tax advisors to determine if a partial exchange makes sense for them. (See Number 4, below)

Number 7: They think that exchanges only work if they are "swapping" properties.

Not since the Starker case! Historically this is the way all exchanges were structured. Ivan Investor owned a property in the city. Fred Farmer owned a property in the country. Ivan wanted Fred's property. Fred wanted Ivan's property. The two swapped deeds and each deferred payment of their capital gain taxes.

In *Starker v. U.S.* (602 F.2d 1341 (CA 9th 1979)), the Ninth Circuit ruled that there could be a delay between the time of the sale and the time the replacement property was acquired. Subsequent to *Starker*, Treasury Regulations were issued creating other acceptable exchange structures – including the use of Qualified Intermediaries (QI).

Now Ivan and Fred do not have to swap with one another. Using a QI, Ivan can sell his property at the best price to Betty Buyer and purchase from Fred. Fred, using the same, or a different, QI, will sell to Ivan and buy a better-priced property from Reasonable Ron. Tax deferral for everyone!

Number 6: They think if they sell a duplex they have to buy a duplex.

Not true! This is the best news! In exchanges of real property, all real property is considered like kind with all other real property. Exchangers can sell the duplex and buy any other real property that they intend to hold for investment purposes or for productive use in their trade or business. So, residential rental is like kind with commercial. Improved properties are like kind with bare land. Non-income producing is like kind with income producing. This flexibility allows investors to dramatically reconfigure their real estate portfolio and still get the tax deferral.

Number 5: They move into the replacement property right after the exchange.

Patience, please! Although all real property is like kind with all real property (See Number 6, above) this is not true when it comes to personal use of property. Tax-deferred exchanges are limited to investment and business properties.

If the Exchanger sells a rental house, buys a condo in Palm Desert and quickly begins to use that property for personal use (second or retirement home), the IRS will disallow the exchange for failure to have the appropriate "investment" intent. Patience is what is called for. After consulting with a tax advisor most Exchangers will understand that building a rental history (one to two years?) is a safer way to proceed.

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"Decanting" From One Trust to Another: Why a New Trust Code Section

By Barry F. Spivey, Esq., Chair, Trust Law Committee

In *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (Fla. 1940), the Florida Supreme Court made it clear that, to the extent a trustee has absolute discretion to invade trust principal for distribution to a beneficiary of the trust, the trustee may make that distribution to a second trust created by the trustee for the benefit of the same beneficiary. While the new Florida Trust Code ("FTC") preserved the *Phipps* rule (see Section 736.0106, Fla. Stat.), the Trust Law Committee believed that the rule could be more useful if the parameters for "decanting" from one trust to another were defined and some default procedures specified.

Section Member Diana Zeydel undertook the primary responsibility for drafting the new section and, parrying laser bolts like Obi-wan Kenobi, persevered through several drafts with the able assistance of Bruce "Chewbacca" Stone. The end product is the result of extensive discussion (and laser bolts) at several meetings of the Trust Law Committee and Diana's deft incorporation of new ideas into the statute. New Section 736.04117, Florida Statutes, was included in CS/HB 743 and was passed by the 2007 Florida legislature with an effective date of July 1, 2007. As with most provisions of the FTC, the new statute is a default rule that does not apply if the trust terms expressly provide to the contrary. If the trust does not provide to the contrary, the new section specifies that a trustee who has an "absolute power to invade trust principal" (i.e., a power that is not limited to specific or ascertainable purposes) for one or more persons may, by written instrument, exercise that power by appointing trust principal to a second trust for the benefit of one or more of those same persons. The statute requires that the trustee give the qualified beneficiaries of the first trust notice of the exercise of the power to appoint in further trust at least 60 days prior to the effective date of the exercise. However, the trust instrument may provide a different procedure for exercise of the power.

The new statute makes it clear that there is no *duty* of a trustee to exercise a power to invade principal by appointing in further trust and no inference of impropriety if a trustee does not exercise the power -- protections that were not afforded by the *Phipps* decision. The statute is a useful tool for adapting a trust to meet changing circumstances of beneficiaries who turn out to be profligate, who are disabled, or for whom it is appropriate to continue holding property in trust for any reason.

Ten Stupid Things

from preceding page

Number 4: They don't talk to their tax/legal advisor.

I know, I know, they cost money. Consultation with tax and legal advisors is essential in deciding whether an exchange is necessary or appropriate. What if the relinquished property has a small gain or perhaps even a loss? In this scenario there is rarely a need for an exchange. Or, what if the investor has losses in other business activities? The losses could eliminate the need for an exchange. Only their advisor knows.

Number 3: They call the exchange company after closing their sale.

Too late. Much too late. The IRS requirement is that the exchange intent be documented at the time of closing. The case law is quite clear. Once the sale closes, it is too late to put an exchange together. Short of rescinding the original sale, there is no way to "fix" the problem. Sorry, it's fraud, even if we aren't likely to get caught!

Number 2: They miss a deadline.

These deadlines are carved in stone. This is the hardest part of tax-deferred exchanges. If the Exchanger is unable to identify the replacement property within the 45-day identification period, the exchange fails and they must pay their capital gain tax. If the Exchanger is unable to close the purchase of replacement property within the 180-day exchange period, the exchange fails and they must pay their capital gain tax. Only in the event of a "Presidentially-declared emergency" (i.e., 9/11/01) does the Treasury Department have the authority to extend the deadlines. This is another situation where the IRS, backed by the Tax Court, has shown that they do not play nice with Taxpayers who try to get around these deadlines. (Note: I do not refer to them as "Exchangers.")

Number 1: They think exchanges are a do-it-yourself technique.

No, you can't do it yourself. Even in a beautiful "simultaneous" exchange the IRS rules require that there be exchange documentation and the Treasury Regulations prohibit the Exchanger from receiving, or having any right to receive, cash from the sale. Exchangers need a QI for two reasons. First, the QI must produce exchange documentation that meets some very specific legal requirements. Second, the QI must hold the cash or control the cash (i.e., give instructions to the closer to move the money to the escrow where the purchase is going to take place). Exchangers who try to do it themselves are called "Taxpayers."

New Opportunities with Reverse and Improvement §1031 Exchanges

By Patrice Viscuso, Florida Division Manager, Asset Preservation, Inc.

Tax-deferred exchanges under Section 1031, Internal Revenue Code, continue to increase in popularity as more real estate investors discover the flexibility and tremendous tax deferral benefits provided by this tax code section. The most common variation, the delayed exchange, allows for up to 180 calendar days from the sale of the relinquished property to purchase a replacement property. Recently, many Exchangers have wanted to proceed with more complex exchange alternatives such as a reverse or improvement exchange, where the Qualified Intermediary is "parked" on title to a property for the benefit of the Exchanger.

Benefits of a Reverse Exchange

Often Exchangers may need to perform a reverse exchange in a "seller's market" where recently listed properties are quickly under contract with a buyer. The need for a §1031 reverse exchange arises when circumstances require that the replacement property be acquired before closing on the relinquished property. This exchange variation is of great interest to real estate investors because it provides a fully tax deferred method when an excellent purchase opportunity presents itself.

Benefits of an Improvement Exchange

The improvement exchange allows an Exchanger, through the use of a Qualified Intermediary, to make improvements on a replacement property. The improvement exchange can be advantageous 1) when the Exchanger wants to eliminate a taxable situation by adding the cost of capital improvements to the replacement property's value, 2) when the Exchanger would like to build a new property from the ground up to maximize investment opportunities, and 3) when an Exchanger (such as an owner-user) wants to combine the improvement and reverse exchange variations and begin constructing their new building before selling their current business location.

An Overview of "Parked" Property Arrangements

Prior to the release of Revenue Procedure 2000-37 (the "Rev. Proc."), many Exchangers were reluctant to proceed with reverse or improvement exchange variations – both of which required the Qualified Intermediary to be "parked" on title to either the replacement or relinquished property. One of the primary concerns was the problem of "constructive ownership." Many tax and legal advisors were concerned that the Exchanger was both responsible for, and entitled to, the burdens and benefits of ownership while legal title was held by the Qualified Intermediary.

If the Exchanger retained all the benefits and burdens of ownership, and only legal title was "parked," the structure could be collapsed because the IRS would look at the Exchanger as actually owning both the relinquished property and replacement property at the same time. In addition, there were many potential problems such as the management of the "parked" property, loan arrangements, advances to fund the purchase of the replacement property, puts and calls, and which entity was entitled to receive the tax benefits of ownership while the property was "parked."

Revenue Procedure 2000-37: A Summary

In 2000, the IRS provided guidance for these "parked" arrangements. As a result, Exchangers can now work with an experienced Qualified Intermediary and confidently proceed with a wider array of exchange alternatives. Rev. Proc. 2000-37, enacted on September 15, 2000, applies to exchanges where title to either a relinquished or replacement property is "parked" with the Qualified Intermediary. The revenue procedure creates a "safe harbor" for transactions that are within the following parameters:

1) Title to either the relinquished or the replacement property must be parked with the "Exchange Accommodation Titleholder" (EAT);
2) The EAT must hold legal title, referred to as the "Qualified Indicia of Ownership" (QIO);
3) The Exchanger and the EAT must enter into a written agreement known as the "Qualified Exchange Accommodation Arrangement" (QEAA) within five days of the EAT's purchase of the "parked" property;
4) The Exchanger must have a "bona fide intent" that the parked property will either be the relinquished or replacement property in an exchange;
5) The EAT cannot be the Exchanger or a "disqualified person";
6) The EAT must report the property on its income tax return;
7) The Exchanger must identify the relinquished property within 45 calendar days; and
8) The Exchanger must complete the exchange within 180 calendar days from the date the property is transferred to the EAT.

Revenue Procedure 2000-37: Permissible Agreements

Rev. Proc. 2000-37 provided for the following permissible agreements regardless of whether or not they contain terms which may typically destroy an arm's-length relationship between the EAT and the Exchanger:

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New Opportunities

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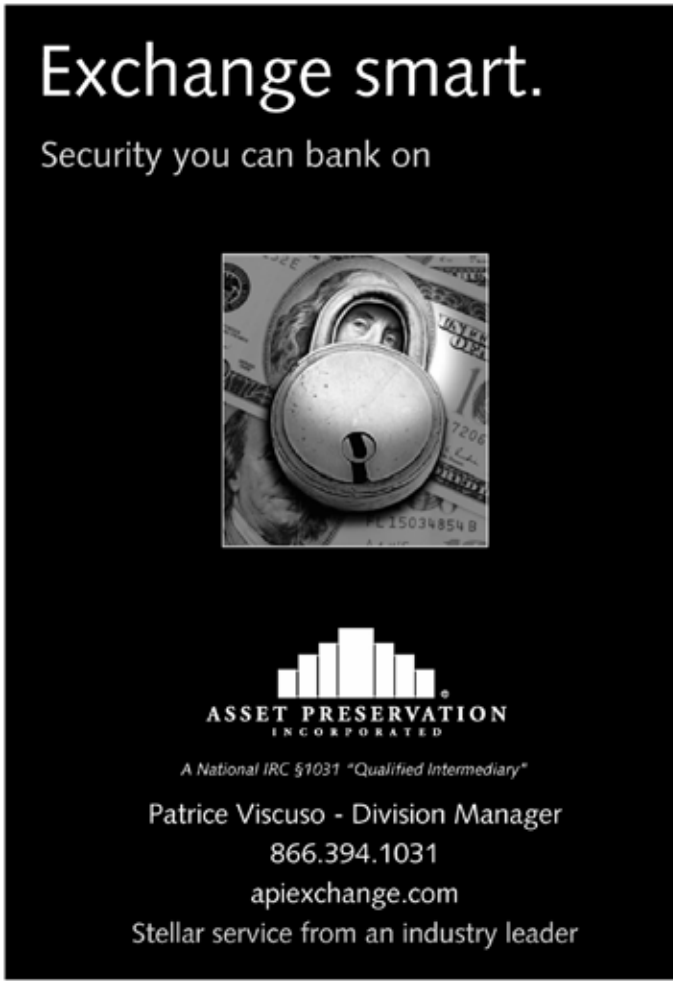
1) The EAT may act as both the Qualified Intermediary and the EAT provided the Exchanger may guarantee all or part of the obligations of the EAT including debt and incurred expenses;
2) The Exchanger may lend or advance funds to the EAT;
3) The EAT may lease the property to the Exchanger;
4) The EAT may enter into a management agreement with the Exchanger;
5) The Exchanger may act as contractor and/or supervisor with respect to the property;
6) The EAT and Exchanger may enter into agreements using puts and calls at fixed or formula prices for subsequent dispositions, provided that they satisfy the Qualified Intermediary safe harbor provisions in Reg. Section 1.1031(k)-1(g)(4).

The safe harbor and permissible agreements cited above provide the Exchanger with much needed clarification and guidance on many issues that have concerned tax and legal advisors who have reviewed "parked" arrangements in the past. For the most part, the requirements of Rev. Proc. 2000-37 provide Exchangers great latitude in these transactions. However, the Rev. Proc. did narrow the time requirements considerably and this may create problems on larger commercial exchanges. Obtaining the necessary approvals and construction improvements within the 180-day time limit can be challenging when proceeding with an improvement exchange on commercial property.



Replacement Property "Parked" Options

There are two ways to adhere to the Rev. Proc. requirements. One alternative is "parking" title of the replacement property with the EAT (sometimes referred to as the "exchange last" option), which involves the following steps:

STEP 1 – "EAT" purchase of replacement property
1. A Exchanger advances/loans funds to the EAT.
1. B EAT purchases the replacement property.
1. C Seller deeds the replacement property to the EAT.
1. D EAT leases the replacement property to the Exchanger.

STEP 2 – Sale of relinquished property and exchange of the replacement property to the exchanger
2. A Relinquished property is deeded to the EAT in exchange for the replacement property to the Exchanger.
2. B Payoff of the original advance/loan from the Exchanger from sale proceeds.

Positives of the Replacement Property "Parked"
- Can proceed without advancing the amount equal to the equity in the relinquished property.
- A deferred exchange may follow this format.
- Allows for multiple relinquished properties.

Disadvantages of the Replacement Propery "Parked"
- Lender may have issues loaning to an EAT.
- Exchanger could have higher costs due to double transfer taxes.
- The note to the EAT will be non-recourse.

The second alternative is "parking" title to the relinquished property with the EAT (sometimes referred to as the "exchange first" option), which involves the following steps:

Step 1 – Exchange of Relinquished Property for the Replacement Property
1. A Exchanger deeds the relinquished property to the EAT according to the QEAA.
1. B Simultaneously, the Exchanger and the EAT enter into an Exchange Agreement.
1. C Exchanger advances/lends funds to the EAT for the acquisition of the replacement property.
1. D The replacement property is deeded directly to the Exchanger in compliance with the Exchange Agreement.

1. E EAT leases the relinquished property to the Exchanger.

STEP 2 – Sale of Relinquished Property

2. A Exchanger locates purchaser for replacement property and enters into a contract.
2. B Exchanger assigns contract to EAT and EAT sells relinquished property to Buyer.
2. C EAT receives proceeds from sale and pays off advance/loan from Exchanger.

Positives of the Relinquished Property "Parked"

- If conventional financing is involved in acquiring the replacement property, it is much easier to lend to the Exchanger since they will immediately be on title to the replacement property.
- Less expensive transfer taxes for the relinquished property transfer.

Negatives of the Relinquished Propery "Parked"

- The equity and debt in the replacement property need to match to avoid boot issues.
- The transfer to the EAT increases the county property tax valuation.
- There are potential lender issues with "Due on Sale" clauses and/or prepayment penalties with the relinquished property.

"Parked" Arrangements Outside the Revenue Procedure

One of the interesting opportunities, and potential confusion, created by the Rev. Proc. is that "parked" property exchanges may be structured outside the safe harbor. Most tax and legal advisors agree there is considerable uncertainty about what specifically is required for a "parked" exchange outside the safe harbor created by the Rev. Proc. to qualify for tax deferral.

DeCleene v. Commissioner, 115 T.C. 457 (2000), may provide some clues in this area. The *DeCleene* case dealt with an improvement exchange. In *DeCleene,* the Tax Court determined that the entity parked on title to the property did not possess the "benefits and burdens of ownership" of the property while the improvements were being constructed.

In Taxpayer Advice Memorandum, TAM 200039005, the determination was that without any safe harbor applying, the issue of the Qualified Intermediary's agency status was relevant. In this TAM, the IRS concluded that the Qualified Intermediary had no independent role in the transaction and was considered the Exchanger's agent. As a result, the Exchanger was deemed to have acquired the replacement property with the Qualified Intermediary's acquisition of title, thus not qualifying for tax deferral under IRC Section 1031.

Based upon the situations cited above, an Exchanger opting to perform a "parked" property exchange outside the safe harbor provided by Rev. Proc. 2000-37 should definitely seek the expertise of knowledgeable advisors. In addition, they should attempt to structure an exchange where the Qualified Intermediary possesses sufficient "benefits and burdens of ownership" to avoid being considered an agent of the Exchanger. Although not an exhaustive list, some issues to consider would be: 1) Does the Qualified Intermediary have risk of loss or gain associated with the transaction? 2) Does the Qualified Intermediary use some of their own funds in the transaction? 3) Can the Exchanger substantiate that the Qualified Intermediary is truly a fourth-party principal operating at an arm's-length distance?

Issues To Consider With Any "Parked" Exchange

Every reverse or improvement exchange involves an EAT "parking" title to either the relinquished or replacement property. As a result, the EAT incurs liability for being on the chain of title. It is essential that all parties to the transaction insulate themselves from any liability that might arise. For maximum liability protection, the EAT should create a separate special purpose entity such as a limited liability company (LLC) to isolate the Exchanger from liability issues. The EAT should make sure the LLC complies with state and federal registration and filing requirements. An Exchanger contemplating a "parked" property exchange should find out how many reverse or improvement exchanges the company has handled prior to the issuance of Rev. Proc. 2000-37, as it is important to verify that the staff handling these transactions thoroughly understands the many pitfalls to avoid. Lastly, it would be prudent for the EAT to provide the Exchanger with a written assurance regarding the property while it is being held under the QEAA.

The issuance of Rev. Proc. 2000-37 has made it much easier for an investor to proceed with either a reverse or improvement exchange that adheres to the parameters of this safe harbor. The rules offered a welcome clarification and have made these exchange alternatives a more popular and accepted variation throughout Florida!

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The Right to Know: Advice Regarding Notice of Probate to Disinherited Relatives

By Adrian Philip Thomas, J.D., LL.M., Fort Lauderdale, FL

With increasing frequency in Florida, family members of a decedent discover that they are the last to know of the completion of the probate administration of their relative's estate. They are usually informed by the attorney for the fiduciary that the estate is under no legal obligation to provide notice of the probate proceedings to persons who are not named in the will, even blood relatives.[1] Consequently, once the probate process is complete, the right to challenge a will is lost.

One school of thought believes that the deliberate failure to provide notice of probate to disinherited relatives gives priority to the stated intent of the decedent as reflected in his or her will, and discourages frivolous litigation initiated by disgruntled relatives. Alternatively, others take the position that the failure to notify disinherited relatives of the commencement of probate proceedings deprives the decedent's family the opportunity to challenge a fraudulently-procured will, while at the same time rewards the undue influencer(s) with the chance to probate an invalid will without being required to notify those family members who would most likely initiate an objection to probate.

The issue of whether it is constitutionally permissible to open an estate without ever giving notice to a person who would be an "heir" under Florida's laws of intestacy but who was disinherited under an allegedly invalid will has never been addressed by the Florida Supreme Court.

It is undisputed that the legislature has clearly issued a mandatory duty on the estate fiduciary to promptly make a diligent search of all known or reasonably ascertainable creditors.[2] Why then should the personal representative not have a duty to notify known family members who have been disinherited of the commencement of probate proceedings?

While the issue of whether it is constitutionally permissible to open an estate without ever giving notice to a person who would be an "heir" under Florida's laws of intestacy but who was disinherited under an allegedly invalid will has never been addressed by the Supreme Court, recent case law provides some prudent guidelines for practitioners to follow in helping their clients, who may likely be grieving family members, through the probate process.

After the probate process has been completed, practitioners may face litigation from disgruntled relatives who did not receive notice of the probate administration. Invariably, the litigation is an attempt to collaterally attack a will after the probate proceedings are concluded through bringing a tortious interference claim. The Restatement (Second) of Torts defines this cause of action as follows:

> § 774B Intentional Interference with Inheritance or Gift. One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

This general formulation of the tort allows claims under a variety of circumstances when the tortfeasor's conduct deprives another of a beneficial interest in a gift or inheritance, and includes, but is not limited to, interference with a testator's existing will. Florida and eleven other states have adopted this general formulation.[3]

Probate litigators usually can defend against an action for intentional interference with an inheritance by showing that the disgruntled family member at one time had an adequate probate remedy and that the remedy was lost through the plaintiff's own inaction. This defense was outlined by the Florida Supreme Court in answering a certified question from a federal district court in *DeWitt v. Duce*.[4]

In *DeWitt* the plaintiffs attempted to bring a claim for intentional interference more than two years following the probate of the decedent's will. The Florida Supreme Court stated that "[t]he rule is that if adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued."[5] The Court also noted that "[c]ases which allow the action for tortious interference with a testamentary expectancy are predicated on the inadequacy of probate remedies[.]"[6] The court further held:

> "In sum, we find that [plaintiffs] had an adequate remedy in probate with a fair opportunity to pursue it. Because they lacked assiduity in failing to avail themselves of this remedy, we interpret section 733.103(2) as barring [plaintiffs] from a subsequent action in tort for wrongful interference with a testamentary expectancy . . . ."[7]

The practice of purposefully not notifying a disinherited relative of the probate administration, and then relying on *DeWitt's* adequate probate remedy defense, was recently challenged in *Schilling v. Herrera*.[8] Mr. Schilling, the decedent's brother, was the only heir at law but had been disinherited by a will executed just months prior to the decedent's death. Mr. Schilling did not learn of his sister's death, or of the administration of her estate, until after a petition for discharge had been filed. Thereafter, Mr. Schilling filed a lawsuit against his deceased sister's former caregiver, requesting money damages and alleging that the caregiver had procured the will through fraud and

undue influence.

Further, Mr. Schilling alleged that the caregiver, who was also the estate fiduciary**,** *deliberately failed to notify him of his sister's death and the probate proceedings* as part of a "calculated scheme" to prevent Mr. Schilling from contesting the estate of his sister. However, the trial court, relying on *DeWitt v. Duce,* found that Mr. Schilling was barred from bringing an action for intentional interference with an expectancy because he failed to exhaust his probate remedies.

The Third District Court of Appeal reversed the trial court and distinguished *DeWitt* in a manner that gives some practical guidance for probate practitioners. The Third District held:

> "We find that *DeWitt* is factually distinguishable, and therefore inapplicable. A review of the amended complaint reflects that Mr. Schilling has alleged two separate frauds. The first alleged fraud stems from Ms. Herrera's undue influence over the deceased in procuring the will, whereas the second alleged fraud stems from Ms. Herrera's actions in preventing Mr. Schilling from contesting the will in probate court. We acknowledge that pursuant to *DeWitt*, if only the first type of fraud was involved, Mr. Schilling's collateral attack of the will would be barred. However, language contained in *DeWitt* clearly indicates that a subsequent action for intentional interference with an expectancy of inheritance may be permitted where the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court."[9]

The *Schilling* decision is critical because it creates a categorical exception to *DeWitt's* prohibition of tort claims when there has been a probate remedy available. It also suggests a break from the long standing rule in Florida that "[f]raud cannot be inferred or deduced from the nonperformance of acts which by law the accused is not required to do whatever may be his motive, design or purpose either in doing or not doing the acts complained of."[10] It also raises the question of whether, as simply a matter of prudence, probate practitioners should *always* notice family members, even those who have been disinherited, of the administration of the probate estate.[11]

Endnotes:

1 Fla.Prob.R. 5.240(a) requires the notice of administration to be served on the decedent's surviving spouse, the beneficiaries of the decedent's estate, the trustee of any trust described in Fla.Stat. Section 733.707(3) and persons who may be entitled to exempt property.

2 Fla.Stat.§733.2121(3)(a).

3 See *DeWitt v. Duce*, 408 So.2d 216 (Fla. 1981); *Minton v. Sackett*, 671 N.E.2d 160 (Ind.App. 1996); *Nemeth v. Banhalmi*, 99 Ill.App.3d 493, 425 N.E.2d 1187, 55 Ill. Dec. 14 (Ill. App. 1981); *Huffy v. Lea,* 491 N.W.2d 518 (Iowa 1992); *Plimpton v. Gerrard,* 668 A.2d 882 (Me. 1995); *Estate of Doyle v. Doyle*, 177 Mich. App. 546, 442 N.W.2d 642 (Mich.App. 1989); *Hammons v. Eisert*, 745 S.W.2d 253 (Mo.App.1988); *Doughty v. Morris,* 117 N.A. 284, 871 P.2d 380 (N.M. App. 1994); *King v. Acker*, 725 S.W.2d 750 (Tex. App. 1987); *Harris v. Kritzik*, 166 Wis. 2d 689, 480 N.W. 2d 514 (Wis.App. 1992). Five other states recognize a similar cause of action, however, unlike Restatement section 774B and *DeWitt*, the laws of those states do not provide grounds for recovery on the basis of *inter vivos* transfers alleged to diminish an eventual bequest. Rather, those states have limited the parameters of potential claims to instances involving demonstrable interference with the testamentary scheme the decedent had sought to create by making changes in an existing will.

4 408 So.2d 216 (Fla. 1981).

5 *Id.* at 218.

6 *Id.* at 219.

7 *Id.* at 221

8 32 Fla.L. Weekly D882 (Fla. 3rd DCA April 4, 2007)

9 *Id.* at D884.

10 *State Board of Medical Examiners v. Morlan*, 147 Fla. 695, 3 So.2d 402 (Fla. 1941)

11 The issue of whether a disinherited family member has due process rights under the Fourteenth Amendment of the United States Constitution and the Florida Constitution to receive notice of probate proceedings is beyond the scope of this article.

Clerkship Database Soon to be Operational

by Phyllis Harley, Esq., December 2006 graduate of Barry University School of Law, Orlando, FL

The Clerkship Database, the first major project undertaken by the Student RPPTL Committee, will soon be ready for use by all RPPTL Section members. The purpose of the Clerkship Database is to provide Section members with a list of law school students readily available for work on projects or as interns. Section members can use the list to sort through law students who are available in certain areas or at certain times. Then, Section members contact the students they are interested in interviewing for the available position using the contact information provided by the students.

The students who are listed in the Clerkship Database are those students involved in real property, probate, or trust law student organizations at their particular law school. All students involved in these organizations have been invited to list in the Clerkship Database their contact information, top two location preferences, top two law areas of interest, and availability times. Students included on the Clerkship Database have been encouraged to have resumes and cover letters available for submitting to any interested Section member.

The Clerkship Database will be updated at the beginning of each Summer, Fall, and Spring school semester so that Section members will have correct contact information for available students. Section members are encouraged to engage students for any length of time or project.

The current listings on the Clerkship Database are not complete due to the transition of information gathering from the different law schools. However, a consistent system has been created to gather uniform information for the summer update and all the following updates after that.

If you have comments or suggestions on how to improve the Clerkship Database to make it more accessible for RPPTL Section members or any questions, please contact Jason Ellison at jellison@law.stetson.edu or Phil Baumann, Chair of the Liaison with Law Schools committee, at pab@estatelawflorida.com.

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Looking for the Laughing Heir: Potential Expansion of Intestate Succession Laws

By J. Richard Caskey, Esq., Steven L. Hearn, P.A., Tampa, FL,
Submitted on Behalf of the Section's Probate Law and Procedures Committee

How far do our intestate succession statutes go to distribute a decedent's property to intestate heirs? If you attempt to round up the usual suspects, but find that a decedent has no living spouse, lineal descendants, parents, siblings, or descendants of deceased siblings, what do you do? Section 732.103, Florida Statutes, requires you to dig a little deeper.

At that point, the estate is divided into two equal shares and distributed one-half to the decedent's father's side of the family and one-half to the decedent's mother's side, to the kindred listed in subsection 732.103(4): First to the decedent's grandparents[1]; if there are no living grandparents, then to the decedent's uncles and aunts and descendants of deceased uncles and aunts[2]; and if there are none of those individuals on one side of the decedent's family, then to the kindred on the other side of the family in the same order[3]. Generally, this disposition leaves the estate with a person's grandparents or descendants of grandparents and prevents inheritance by remote heirs.[4]

Under proposals to amend the intestate succession statutes, the inquiry would not stop if there are no descendants of grandparents, but instead would back up another generation and look to distribute the estate to great-grandparents or descendants of great-grandparents.

In the past, the state legislature has considered revising Florida's intestate succession statutes at different times to expand the list of potential intestate heirs. The issue arose again early this year as the state House of Representatives considered House Bill 605, which proposed to amend subsection (4) of Section 732.103. In May 2007, that Bill died in the House Constitution & Civil Law Committee, and, although the proposed revisions appear dead for now (no pun intended), the proposal remains ripe for discussion. Because proposed legislation similar to HB 605 seems to pop up every few years or so, it is worth examining potential effects of expanding the list of intestate heirs.

Under the proposed revisions of HB 605 (as well as prior proposals to amend the intestate succession statutes), the inquiry would not stop if there are no descendants of grandparents, but instead would back up another generation and look to distribute the estate to great-grandparents or descendants of great-grandparents.

The proposed revisions provided that if a decedent leaves no uncles or aunts (and presumably no descendants of uncles or aunts[5]) on one side of the family, rather than be distributed to the kindred on the other side of the decedent's family, the applicable portion of the estate would pass to the decedent's great-grandparents. If there are no great-grandparents, then distribution would be to the brothers and sisters of the decedent's grandparents and the descendants of deceased brothers and sisters of grandparents[6]. This would open the estate to inheritance by distant cousins who are not contemplated under current intestate succession laws.

For example, assume a person dies leaving as his sole survivors two uncles on his mother's side of the family (i.e. his mother's brothers) and a far-removed cousin on his father's side - his grandfather's brother's great-grandson. Under the *current* statute, one half of the estate would pass to the maternal uncles under paragraph 732.103(4)(b), and the other half would pass to the maternal uncles by operation of paragraph 732.103(4)(c) due to the absence of any listed paternal kindred. As a result, the entire estate would pass to the two maternal uncles, thereby keeping the estate with descendants of the decedent's grandparents.

Under the *proposed revisions* to the statute, one-half of the estate would still pass to the maternal uncles under paragraph 732.103(4)(b). However, the other half would pass to the distant paternal cousin as a descendant of the decedent's grandfather's brother under proposed paragraph 732.103(4)(d). The result is that the distant cousin (who would receive one-half of the estate) would actually receive a greater share than each uncle (who would receive only one-fourth of the estate each).

It can be debated which distribution is more desirable as the default for intestacy, but our statutes have traditionally kept estates out of the hands of remote heirs (the so-called "laughing heirs"). The proposed bill (as well as the similar prior proposals to revise Florida's intestate succession laws) would expand the list of potential heirs by an extra level to include great-grandparents and their descendants, whereas the current statute keeps inheritances with grandparents and descendants of grandparents.[7]

If revisions similar to HB 605 are passed, the list of potential intestate heirs would expand profoundly, and in certain situations the shares of "closer" heirs could be dramatically altered as illustrated above. An expanded statute could certainly create more work for personal representatives as well as more opportunities for heir locator services. It could also create issues with respect to the homestead exemption, as the list of heirs to whom that exemption inures may likewise expand along with the intestacy statute.

The Probate Law and Procedures Committee of the Real Property, Probate & Trust Law Section has considered revision of the intestacy scheme under Section 732.103 in the past. Each time, the Committee decided not to recommend any changes, mostly for the reasons stated above. While

continued, next page

Spotlight on Probate Law and Procedure Committee

By Jane L. Cornett, Esq., Stuart, FL

Editor's Note: Jane is ActionLine's *new "Roving Reporter" and will highlight a Section committee in each issue. We want everyone to become more familiar with the good work that the committees are doing and, hopefully, you will want to become involved in one or more committees.*

I will confess that as a "dirt" lawyer, I have always thought that probate issues were boring, dull and dead. But after talking to the chair of the Section's Probate Law and Procedure Committee, I actually found myself becoming excited by some of their topics and looking forward to future developments in probate law and procedure.

The Section's Probate Law and Procedure Committee, with over 100 committee members, has been incredibly busy. Most recently, the committee was successful in its sponsorship of House Bill 311[1] (which was drafted in conjunction with the probate litigation committee. The chair is Charlie Nash of Melbourne, and the co-vice-chairs of the committee are Sam Boone of Gainesville and Anne Buzby of Jacksonville.)

Not being ones to rest on their laurels, the committee has a bunch of issues in the hopper, all of which were discussed at its meeting on May 24th at the Section's Convention in Hollywood.

Anne Buzby is chairing a subcommittee that is looking at the inter-relationship among paternity laws, the probate code and the statute of limitation. Also known as the "Anna Nicole" subcommittee, the members are examining the question of whether or not the statute of limitations prevents an action by a child to establish paternity after the death of the parent.

A subcommittee chaired by Phil Baumann is reviewing an issue brought to the committee by the Department of Financial Services. The Department made a presentation to the committee relative to the requirements of Florida Statute Section 735.206. The Department pointed out that there have been some possible misuses of this statute, which is a portion of the unclaimed property law. Phil Baumann's committee is considering possible minor modifications.

Another subcommitee, chaired by John Severson of Palm Beach, is looking at the law on a probate caveat to determine whether the current process is adequate to meet the needs of the claimants. The committee is considering some possible "tweaking" with the goal of making the process work better.

Angela Adams of St. Petersburg is chairing an ad-hoc committee on an upcoming hot issue concerning the relationship of non-probate assets (such as a bank account that passes outside the estate to the children) in the case of an insolvent estate. The question then becomes what rights, if any, the creditors have to those non-probate assets and whether the law should be clarified to better address that issue.

Another subcommittee of this very busy group has been working on possible revisions to the probate pamphlets distributed by The Florida Bar. Sam Boone of Gainesville is the chair of a subcommittee dealing with questions surrounding service of the notice of administration and possible conflicts with the rules of procedure. This committee is in its early stages and it is just getting "up and running."

The group also has a seminar committee, chaired by Deborah Russell of Naples. A probate seminar is planned for September 26th and 27th of this year.

The Probate and Procedure Committee is a very active, involved, and vibrant committee. The chairperson, Charlie Nash, encourages anyone involved in a probate practice to get involved. Charlie further encourages young members of the committee to not be shy and speak up, both at meetings and on the listserve.

Footnote:

1 This Bill revises provisions relating to surviving spouse's claims, admitting wills to probate or appointing personal representatives, enforceability of required arbitration provisions, elective share trusts, elective estate, unenforceability of exculpatory provisions, & foreign personal representatives.

"Laughing Heirs"

from preceding page

HB 605 seems to be dead, we will have to wait and see whether its proposals are resurrected in similar legislation soon. For now at least, the laughing heir remains empty-handed.

Endnotes:

1 Fla. Stat. §732.103(4)(a).
2 Fla. Stat. §732.103(4)(b).
3 Fla. Stat. §732.103(4)(c).
4 See the brief discussion of the "laughing heir" rule in Section 2.30 of the intestate succession chapter of *Litigation Under Florida Probate Code* (Fla. Bar CLE 6th Edition 2006), which describes the current statute as eliminating inheritance by relatives so remotely related to the decedent that they experience no loss, only gain, upon hearing news of the decedent's death.
5 The proposed revision to paragraph (4)(c) of Section 732.103 under HB 605 stated: "If there are no uncles or aunts, to the great-grandfather and great-grandmother equally, or to the survivor of them." However, current paragraph (4)(b) requires distribution to the *descendants* of deceased uncles and aunts if there are no living uncles or aunts. Because proposed paragraph (4)(c) purported to require distribution to great-grandparents in the absence of living uncles or aunts (and was silent as to descendants of uncles and aunts) there was an apparent potential conflict in the proposed statute. The authors believe the provisions of HB 605 contained additional potential ambiguities, but because the bill is dead, this article does not address those ambiguities in detail.
6 See proposed paragraph 732.103(4)(d) in HB 605.
7 Except of course under the current law where, if there are no listed kindred from subsection 732.103(4) on either side of the family, the estate passes to the kindred of the last deceased spouse of the decedent under subsection 732.103(5), or under the time-limited circumstances of Section 732.103(6) where the estate passes to descendants of great-grandparents if any of the great-grandparents' descendants were Holocaust victims. If there are no persons entitled to an estate, the estate escheats to the state under Section 732.107.

Heter Iska: Does It Make a Loan Not a Loan?
An Introduction for Lenders and Borrowers

By Solomon Genet, Esq., National Title Insurance Company, Miami, FL
and Oren Lieber, Esq., Ritter, Zaretsky & Lieber, LLP, Miami, FL

Real estate/title professionals often become accustomed to seeing the standard collection of items in a lender's loan package. However, in recent years an increasing number of loan packages across the state of Florida have also included a one-page item entitled "Heter Iska".[1] In order to answer - - or at least to consider - - the multitude of rather interesting questions arising from the *Heter Iska*, this article discusses the following issues: (a) what is *Heter Iska* and where does it come from; (b) case law application and interpretation of *Heter Iska*, and (c) why more *Heter Iska* documents are being found in the marketplace.

Jewish Law Prohibition on Charging Interest

According to Orthodox Jewish interpretation of the Bible, on repeated occasions, God prohibited the charging of interest on a loan (the "Prohibition").[2] One such quote reads as follows:

> If your brother becomes destitute and his hand falters with you, you shall support him; [whether] a stranger or a resident, and he shall live with you. Do not take from him a loan charge or increasing [interest] …. You shall not give him your money with a loan charge, nor shall you give your food with increasing [interest].[3]

On its plain reading, this passage prohibits both the charging of interest by a lender and the payment of interest by a borrower.

The reasoning behind the Prohibition is multi-fold and varies based on the view of the specific commentator. Taking a heavenly view, one Biblical commentator states that charging interest removes the lender's faith in God, because it is not the interest that protects the loan from risk of loss, but God's will. Another commentator takes a more communal view, asserting that the lending of money between members of a community promotes peace and harmony among its members, tying them closer to one another. Accordingly, the charging of interest on such loans will limit - - and in some cases eliminate - - the individual relationships within society. A third position is based on the simple policy of promoting charity, that making a cash loan when someone requires it is an act of "loving kindness," and the charging of interest removes the associated charitable attributes.[4]

Actual Commercial Practice and the *Heter Iska*

While the Prohibition– preventing the charging of interest on a loan– is unambiguous, note that none of the rationales underlying it are based on a "financial" policy. In other words, the Rabbinic scholars do not utilize a commercial analysis, but a moral one, i.e., the charging of interest should only be prohibited if one is providing a loan as a charitable act.[5] As such, actual practice has permitted an end-around to the Prohibition, for monies loaned in a commercial transaction.

The *Heter Iska* is this end-around. It is a type of joint venture, originally developed in the 12th to 14th century, designed to avoid Jewish law's prohibition against charging interest.[6] Through this mechanism, parties to the transaction enter into a partnership/joint venture business relationship pursuant to which the monies are contributed to the business venture, rather than "lent." In exchange, the lender/venturer is entitled to an accounting and a fixed monthly return that corresponds to (but does not constitute) interest payments. Further, the lender/venturer is required to waive any further profits from the business venture.[7]

There is no single, standardized form to document a *Heter Iska* transaction. Some lenders use a single-page form that identifies the issue and states that the "interest" should be considered a "dividend," but does not require signatures of the parties to the transaction.[8] Others re-characterize the loan documents themselves, stating that the transaction is in the nature of a partnership/joint venture and not a loan with interest, and notwithstanding any other documents signed, interest shall neither be paid nor given.[9] This latter form often requires signatures by both parties to the transaction.

With the exponential growth of privately owned lending entities, the *Heter Iska* has become more widespread. Private institutional-style lenders make loans on their own warehouse lines (or other credit facilities), and post-closing, immediately re-sell the loan on the secondary market. In addition, "hard equity" lenders, private equity funds and other non-institutional entities have left a huge footprint in the lending market, providing tremendous capital to the marketplace. Accordingly, wherever a principal of one of these types of lenders is an individual compliant with the Prohibition, it is reasonable that she or he would require a *Heter Iska* as part of the loan package.[10]

Case Law Application of the *Heter Iska*

Many issues arise from the execution of a *Heter Iska*, such as, is the commercial loan now a joint venture? Can the commercial lender not foreclose post-default? With few exceptions, United States' courts, at both the Federal and State levels, have found that *Heter Iska* does not modify the loan documents for purposes of enforceability and is merely a form to abide by religious requirements that are inapplicable under American law. In *Anrav Industries, Inc. Employee Retirement Trust v. Westside Realty Assoc.,*[11] the defendant/borrower executed standard promissory note and mortgage documents but hand-wrote above his signature on the promissory note the phrase *"Al Pi Heter*

continued, next page

Iska" (Hebrew for "in accordance with *Heter Iska*"). The appellate court addressed the issue of whether this handwritten phrase created an ambiguity sufficient to prevent the award of a summary judgment of foreclosure.

The *Arnav* court, discussing the *Heter Iska* concept, reversed the trial court and granted summary judgment against the borrower. The *Arnav* court noted that the promissory note specifically stated that "[n]othing herein or in the Mortgage is intended to create a joint venture, partnership, tenancy-in-common, or joint tenancy relationship between the Borrower and the Lender." Therefore, the court reasoned, the lender-borrower relationship was unambiguously intended to be the governing one between the parties.

The United States Bankruptcy Court came to a similar conclusion in *In re Venture Mortgage Fund, L.P.*[12] The debtor, an Orthodox Jew, had borrowed money from two other Orthodox Jews, totaling in the millions of dollars. With each transaction, the parties executed a *Heter Iska* document as part of the closing documents, characterizing the monies transferred as something other than loans, and the payments made pursuant thereto as something other than interest. Nonetheless, when the borrower entered bankruptcy, the lenders each filed creditors' claims against the debtor estate, asserting an entitlement to repayment.

In response, the debtor asserted the defense of usury, arguing that since the interest rate on the loans exceeded the criminal usury rate of 25%, the creditors were entitled to neither interest nor repayment of principal. The *Venture Mortgage* court agreed with the debtor, finding that neither creditor was immune to the application of the usury laws. Indeed, in coming to this conclusion, the court distinguished between (a) the *Heter Iska* and (b) the New York State rules and regulations governing appropriate levels of interest. Specifically, the court stated that "[the borrowers'] overriding worry was the religious proscription against charging any interest, not the Penal Law's proscription against charging usurious interest."[13]

In a third decision, *Heimbinder v. Berkowitz,*[14] the individual owners of the corporate lender and corporate borrower signed a *Heter Iska*. Following non-payment of the debt, the corporate lender argued that the individual principal of the borrowing corporation, by signing the *Heter Iska,* had personally guaranteed the debt. The *Heimbinder* court rejected this argument, finding that the *Heter Iska* does not create a personal guarantee, and if the parties had agreed for the borrower to personally guarantee the debt, they could have documented exactly that. In conclusion, the court stated that *Heter Iska* was "merely a compliance with Hebraic law," and nothing more.

It is worth noting that the *Heimbinber* court cited but distinguished an unpublished decision entitled *Berger v. Baruch Ha'Levi Moskowitz.*[15] There, the sole document memorializing the "loan" transaction was the *Heter Iska*, which was between two individuals. The *Berger* court reviewed the *Heter Iska*, and apparently ruled that since the document was intended to be the defining document of the transaction, it therefore would be governing and enforceable.

Conclusion

Upon diligent research, no Florida case was found that has addressed the effect of a *Heter Iska* on a loan transaction. Jurisdictions that have addressed the topic have not provided a bright-line rule as to its enforceability. Nonetheless, as described above, the weight of the law appears to be that the *Heter Iska* is merely a "form over substance" technique, and therefore does not modify the essence of the transaction for enforceability purposes. Accordingly, its execution should not affect the nature of the transaction and a lender or borrower's substantive rights. That being said, and despite the court rulings to date, a reasonable argument can be made that the *Heter Iska* arrangement is an addendum to the loan documents; therefore, a good real estate/title professional should identify the document, explain its potential effect to its customer/client, and work towards ensuring a properly documented transaction.

Endnotes:

1 Also known as "Hetter Isske" or "Shtar Iska". For pronunciation purposes, "Heter Iska" sounds just as it reads. "Heter" rhymes with "letter," and "Iska" sounds like the second half of "Patricia", with a "k" instead of the phonetic "sh".

2 Most commentators limit the Prohibition to a transaction between a Jewish lender and a Jewish borrower, but in today's commercial world, where a lender often has no idea of the borrower's faith, some compliant lenders have made its use automatic.

3 Leviticus, 25:35-38; see also Deuteronomy, 23:20 ("Do not deduct interest from loans to your countrymen."); Exodus, 22:24 ("When you lend money to any of my people, to the poor among you, you shall not be to him a creditor, nor shall you impose upon him any interest.").

4 *See* "The Proscription Against Interest in the Light of Modern Credit Economies," Yaron Jacobs, Esq., (2006) (internal citations and quotations omitted), available at www.biu.ac.il/JH/Parasha/eng/mishpat/jac.html.

5 Indeed, the Talmud, Baba Metzia, pg. 75b, reads as follows: "Rabbi Shimon says: Those who lend with interest lose more than what they gain."

6 *Barclays Discount Bank, Ltd. v. Levy,* 743 F.2d 722, fn. 2 (9th Cir. 1984); *In re Venture Mortgage Fund, L.P.,* 245 BR 460 (Bankr. S.D.N.Y. 2000); *Wiesel v. Rubinstein,* 820 N.Y.S.2d 847 (Sup. 2006); *see also* 72 "Agreement to Share in Earnings," *N.Y.Jur. 2d Interest & Usury* §63 citing *Leibovici v. Rawicki,* 290 N.Y.S.2d 997 (Civ. Ct. 1968).

7 It is worth mentioning, although not the focus of this article, that under Islamic Jurisprudence [Shari'ah] there is a similar prohibition against charging and paying interest. Indeed, the Koran states this prohibition in a number of places, including as follows: "Those that live on [interest] shall rise up before God like men whom Satan has demented by his touch; for they claim that [interest] is like trading. But God has permitted trading and forbidden [interest]." Moreover, similar to the *Heter Iska,* a number of pragmatic "solutions" to the Islamic prohibition against interest have been put into effect, to enable commercial lending/borrowing practices. *See* Daniel Klein, "The Islamic and Jewish laws of Usury: A Bridge to Commercial Growth and Peace in the Middle East," *23 Denver J. Int'l L.* & P. 535 (1995).

8 A *Heter Iska* regularly utilized by a large lender with offices in New York City and South Florida is a single sheet of paper that simply states as follows: "Attention: According to Torah law we cannot take interest. We are therefore stating that wherever a document states the word interest, it actually means dividends, for this transaction is taking place under the rules of '*Heter Iska*'."

9 *See e.g., Heimbinder v. Berkovitz,* 670 N.Y.S. 2d 301 (Sup. 1998) modified on other grounds, 693 N.Y.S.2d 200 (App. Div. 2d Dep't 1999); www.jlaw.com/forms/iska_a.html.

10 Due to the large population of Orthodox Jews in the New York geographic area, most of the reported decisions arise from a New York jurisdiction. However, courts from a number of other states have also found it necessary to address the *Heter Iska* in a loan documentation context.

11 579 N.Y.S.2d 382 (App. Div. 1st Dep't 1992).

12 245 BR 460 (Bankr. S.D.N.Y. 2000).

13 *See also Bollag v. Dresdner,* 495 N.Y.S.2d 560 (Civ. Ct. 1985).

14 670 N.Y.S.2d 301 (Sup. 1998).

15 175 N.Y.S.2d at 307-08 citing Hon. Jules L. Spodek's decision in Kings

Where in Florida is Hutchinson Island?

Executive Council Meeting, February 23-25, 2007

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

On Saturday, February 24, 2007, the Real Property, Probate and Trust Law Section of The Florida Bar convened its quarterly Executive Council Meeting. The meeting was held at the Hutchinson Island Marriott Beach Resort in Stuart, Florida. This was the culmination of two days of extensive committee meetings. There were many subcommittee meetings held Thursday and Friday, too numerous to mention.



This was my first Executive Council Meeting weekend as a "Roving Reporter". Since I am fortunate enough to live in the lovely Stuart area, I popped in and out of many of the committee meetings. The work done and the issues being considered by the many different committees were extremely impressive and almost to the point of being overwhelming. And when I attended the Executive Committee Meeting on Saturday morning, I was amazed by the number of people in attendance. The Council has around 200 members. The level of support evidenced by the sponsors was equally impressive (and certainly important).

The Executive Council considered a number of action items proposed by the committees. The Executive Council approved support of the following proposed legislation:

Real Property Action Items

1. Revisions to Section 718.103 to authorize a "condo within a condo," permitting condominium unit owners to further subdivide the interest in the condominium common elements, subject to an additional declaration (Condominium & Planned Development Committee).
2. Amendment to Chapter 718 to incorporate language found in the administrative rules acknowledging that changes to a developer's estimated budget that are beyond the control of the developer, such as insurance or utility costs, do not trigger rescission rights pursuant to Section 718.305(1) (Condominium & Planned Development Committee).
3. Support of House Bill 111 permitting consumers to negotiate rates for title insurance services (Title Insurance Committee).
4. Oppose House Bill 817 and Senate Bill 2004 relative to title insurance, which would change the regulatory scheme for rate setting (Title Insurance Committee).

Probate and Trust Division Action Items

1. Support the creation of Section 736.04 to codify the decision in *Phipps v. Palm Beach Trust* concerning trustees' distribution of trust property.
2. Oppose changes to Section 732.103 to extend the intestacy statute beyond the current level of grandparents to the level of great-grandparents. (*See page 19 of this issue of* ActionLine*)*.

General Standing Committee Action Item

Oppose House Bill 743, which included revisions to Section 660.417(3), creation of directed trusts, enforceability of exculpatory clauses in trusts, creation of statute of repose for breaches of trust and the weakening of the trustee's duty of loyalty while reaffirming the Section's willingness to work with the Florida Bankers Association to address these issues.

While the reports and action items presented at the Executive Committee Meeting on Saturday were important culminations of the activities by the Committees, the really interesting and challenging discussions took place during the committee meetings themselves. If you have never attended any of these committee meetings, I encourage you to do so at your first opportunity.

Thank you, sponsors!

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Executive Council Visits Hutchison Island



The success of the meetings is due to a lot of hard work by Section Chair, Rohan Kelley, and Tae Kelley Bronner as well as sponsors such as ASHAR.



Where in Florida is Hutchinson Island?



The Executive Council meeting weekends have specifically been kid- and family-friendly.



Fletch Belcher and Martha Edenfield hard at work.



One of the many committee meetings during the Executive Council Meeting weekend.

Photos courtesy of John Neukamm



"Standing Room Only" at the Executive Council meeting.



John Arthur Jones at the Hutchinson Island meeting.



Enjoying the cocktail reception.



Mingling at the evening events.

The Right of Redemption and the Non-title Spouse in Florida

By Nicholas J. Weilhammer, Esq., Tallahassee, FL

Nationwide, foreclosure filings are increasing–jumping 42 percent from 2005 to 2006.[1] In Florida, there were 124,721 foreclosure filings in 2006, or one for every 59 households. In February of this year, Florida led the nation in foreclosure filings by a wide margin with 19,144.[2]

Surprisingly, despite the breadth of judicial experience with foreclosure filings, fundamental issues regarding standing and joinder of parties remain. While some of these issues are raised by the introduction of relatively new business models,[3] other well-established joinder rules in foreclosures are still being addressed by Florida courts.

In the past, title insurance underwriters have suggested that a non-title spouse (assumed herein to be the wife) who joins in the mortgage has only a possessory interest in the property to be foreclosed in a mortgage foreclosure, and, absent some evidence she is in actual possession, can be omitted from such an action.[4] This policy overlooks the rights conferred to the non-title spouse under the mortgage agreement between the parties, the powerful right of redemption, and common law regarding joinder of mortgagors to a foreclosure. Further, this policy has been rejected by a Florida appellate court in *Sudhoff v. Federal National Mortgage Ass'n*.[5] The *Sudhoff* court confirmed that such a mortgagor is "at the least" a necessary party to a foreclosure, and foreclosure on property without her inclusion is incorrect, depriving her of her equity of redemption.[6] For the Florida practitioner, *Sudhoff* highlights the importance of the often-overlooked equity of redemption, foreclosure procedure, mortgage drafting and underwriting issues, and poses additional unanswered questions for the practitioner.

This policy overlooks the rights conferred to the non-title spouse under the mortgage agreement between the parties, the powerful right of redemption, and common law regarding joinder of mortgagors to a foreclosure.

The Right of Redemption

Mortgages are foreclosed in equity.[7] Historically, the involvement of courts of equity in foreclosure has been "for the primary purpose of holding an umbrella over the head of a mortgagor, protecting him from the harsh rain of forfeiture, and allowing him the right of redemption under equitable principles.[8]

In foreclosure, the mortgagee enforces the mortgage lien against the title or the interests of the mortgagor and those claiming under her.[9] The mortgagee seeks to fix the amount due under the mortgage and obtain a final adjudication of money due.[10] Foreclosure terminates the mortgagor's right of redemption[11] and all possessory interests in the property as well.[12]

The right to redeem property before a final foreclosure sale is an old common law right.[13] At early common law, the mortgage was a conditional conveyance of legal title to land to the mortgagee.[14] The mortgagee assumed full ownership upon default of the mortgage, and the mortgagor had no further right or interest in the property.[15]

Naturally, courts of equity responded to this harsh result, looking beyond the terms of the mortgage agreement and focusing on the nature of the mortgage, which was of security and not of purchase.[16] Courts gave to the mortgagor a right to redeem or "buy back" the property from the mortgagee free and clear upon satisfying all indebtedness, costs and attorney's fees, and other charges within a reasonable period,[17] even after default of the obligation.[18] This right became known as the equity of redemption and was regarded as a real and beneficial estate in land.[19]

Corresponding to the mortgagor's equitable right of redemption was the mortgagee's right to insist upon the discharge of the debt by the mortgagor within a reasonable time or face relinquishment of the right to redeem.[20] This led to the rise of a suit by the mortgagee to foreclose the equity of redemption.[21]

Florida has adopted the lien theory of mortgages, which is now the prevailing theory in the United States.[22] Under the lien theory of mortgages, the mortgagee only holds a lien on the property.[23] Through the equitable remedy of foreclosure, the mortgagee enforces the lien and sells the mortgaged property to repay the debt.[24]

As with other lien theory states, Florida still recognizes the mortgagor's right of redemption, which is a powerful, substantive right.[25] It is incident to every mortgage and cannot be extinguished except by due process of law.[26] The mortgagor can exercise the right without court intervention or approval.[27]

While the term "equity of redemption" is still used, technically it is a misnomer since the mortgagor does not "buy back" the estate from the mortgagee in a lien theory state such as Florida.[28] Although, one could argue the mortgagor does "redeem" in the sense that the mortgagor is "cutting off" the mortgage lien from the land by paying all indebtedness on the property. By redeeming, the mortgagor is not purchasing a property interest since the mortgagee has none to buy; instead, the mortgagor removes the lien from the property and preserves all the property interests that exist at the time of redemption.

The Florida Legislature has codified the mortgagor's common law right of redemption in foreclosure proceedings.[29] By the statute's plain language, the right belongs to the mortgagor or the holder of any subordinate interest and unequivocally terminates upon the latter of the filing of the certificate of sale or the time specified in the foreclosure judgment.[30]

The enactment of Section 45.0315, Florida Statutes, displaces the common law as to the time and manner in which a mortgagor may exercise the substantive right to redeem.[31] However, it does not clearly state that it replaces the common law and must be strictly construed.[32]

While the right of redemption may be conveyed or assigned,[33] it can be extinguished only by due process of law.[34] Due process allows the mortgagor to ensure that any prospective purchasers are at the sale to reduce the mortgagor's indebtedness and the size of deficiency judgments.[35] Through due process, the mortgagor has a right to challenge the existence of the debt before the property is sold[36] and can otherwise substantively challenge the representations of the mortgagee and fight the termination of the mortgagor's interest.[37]

Due to the importance of the equity of redemption, and the finality of the foreclosure process on this right, case law is clear that the mortgagor is a necessary party to a foreclosure proceeding unless there is no deficiency judgment sought against her and she has conveyed her entire interest in the property.[38]

The Parties to a Mortgage

Title underwriters suggest that the mortgage document differentiate between "borrowers" and "mortgagors." While one would expect the former term to be used solely to describe the borrowers in a promissory note, the lender frequently defines the signatories to the mortgage agreement by default as "borrowers." The mortgage also usually makes it clear that if a signatory to the mortgage document did not execute the promissory note, she is mortgaging her interest in the subject property to secure the debt.

Some title underwriters have suggested a third classification, drawing a distinction between "mortgagors" and non-title spouses who join in the mortgage. Since it is common for spouses to hold property in their individual names, the lender may require the non-title spouse to join in the mortgage, when, for example, it is necessary to ensure compliance with constitutional requirements regarding the alienation of homestead property.[39] Failure of the spouse to join in the mortgage results in an ineffectual lien until the spouse either joins in the alienation or the property loses its homestead status.[40]

While these classifications may be important in analyzing execution requirements and in determining the parties' enumerated rights and obligations in the mortgage agreement, they are of questionable significance when analyzing rights that are incident to mortgaging property.

The Non-Title Spouse

Even though it is current practice to require the signature and execution by the non-title spouse to effectuate the mortgage of homestead property, the legal requirements for joinder of a non-title spouse in the mortgaging of homestead property are not entirely clear.

The 1885 version of the homestead provision provided that the homestead was not alienable without the joint consent of husband and wife, and it could be alienated by deed or mortgage duly executed by husband and wife, if such relation existed.[41] Changes to the Florida Constitution in 1968 allow the owner of homestead real estate "joined by the spouse if married" to alienate the homestead by mortgage.[42] The constitutional policy of the homestead provision is to preserve the family homestead as a means of providing continued shelter to the family.[43]

Under the common law notion of joinder, parties with an interest in the subject matter consent to an agreement but do not become active parties to it. [44]

It could be argued under this principle that the non-title spouse in Florida need not execute the mortgage for homestead property or become an active party to it, but must otherwise join in the mortgage by consent. At least one court has suggested there may be spousal joinder to a mortgage agreement absent signature by the non-title spouse.[45]

Constitutional commentary to the 1968 constitution, cited favorably in case law, suggests that joinder may be accomplished absent signature and formal execution by a spouse for those transactions in which the spouse is a party.[46] For instance, it is argued that the signature and formal execution by a spouse may not be necessary in the conveyance of the homestead property from the title spouse to the non-title spouse in fee simple, or where the title spouse seeks to transfer the homestead property to an estate by the entireties with the spouse. [47] In such an instance, since the spouse is a grantee, she has effectively "joined" in the transaction by acquiescence and participation.[48]

The same constitutional commentary suggests that joinder may require due execution by the non-title spouse in transfers by mortgage but may simply not apply to transfers to estates by the entireties by virtue of the syntactical structure of the homestead provision.[49]

Regardless of whether the homestead provision requires due execution or merely consent, the better practice is to require the signature and execution of the non-title spouse in a mortgage agreement. Otherwise, the plaintiff may not meet the requirement of joinder since the non-title spouse is not a party to the mortgage transaction, being neither a mortgagor nor a mortgagee. Due to the varying nature and degrees of interest in property, execution of the mortgage ensures that the spouse pledges her legal and equitable interests in the property to secure satisfaction of the underlying debt.

Requiring execution comports with practices regarding conveyances of homestead property. Both parties as grantors execute the homestead deed, which clearly identifies that the spouses are conveying their interest; the title spouse does not convey his interest, followed by a separately executed consent by the non-title spouse.

Requiring the signature and execution of the non-title spouse on the mortgage clearly illustrates her consent and acquiescence to the alienation, and avoids the evidentiary problem of proving and recording the spouse's consent or acquiescence in the alienation of the homestead property.[50]

The Mortgagor

Courts broadly define a mortgagor as the party to a mortgage who gives a lien to the mortgagee to secure the mortgage loan.[51] There is no requirement that a mortgagor hold title, though the mortgagor is considered the "owner" of mortgaged property.[52]

Though title underwriters may be reluctant to recognize the non-title spouse as a mortgagor, the mortgage agree-

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ment frequently makes it clear that the non-title spouse is pledging whatever interest she has in the property.[53] The mortgage agreement also confers other rights and obligations upon the non-title spouse, including the right to notice before the mortgagee takes judicial action against the property.[54] There can be little question this language reflects an intent by the parties to treat the non-title spouse as a mortgagor, which gives rise to redemption rights, which are also frequently enumerated rights in the mortgage agreement.[55]

Even if the mortgage does not make it explicit the non-title spouse is pledging her interest, or if the non-title spouse does not execute the mortgage agreement, by agreeing to the mortgage the non-title spouse grants a lien on the property and should be treated as a mortgagor. If she does not agree to the mortgage, the mortgage will not be an effective lien until the property later loses its homestead status.[56]

If foreclosure becomes necessary, the foreclosing plaintiff should realize the non-title spouse holds the right of redemption. As the holder of the power to prevent a sale, the non-title spouse would have to be included if the mortgagee wishes to apply the property to the debt and sell the property free and clear.

Recognizing the non-title spouse's right of redemption also furthers the constitutional policy of preserving the family homestead as a means of providing continued shelter to the family and protecting the homestead wherever possible.[57]

Some lenders will have the non-title spouse execute the mortgage, but attempt to limit the rights of a non-title spouse in a mortgage by stating the mortgage is not conferring any rights upon the non-title spouse, who is merely joining the mortgage to satisfy the constitutional requirement for joinder in the mortgage of homestead property.

This drafting technique poses problems for the lender if it attempts to deprive the non-title mortgagor-spouse of her right of redemption while pledging the non-title spouse's interests in the property.

Ever since the inception of the mortgagor's right of redemption, courts have been leery of attempts by lenders to deprive the mortgagor of her valuable rights. As a result, once it is established that a mortgage exists, the equitable right of redemption attaches to the transaction as an inseparable incident.[58] Under the doctrine of clogging, the mortgagee is prevented from cutting off or surrendering the mortgagor's right to redeem, and no "contemporaneous understanding, however formally expressed or artfully concealed," can deprive the holder thereof.[59] The right of redemption can only be defeated by a subsequent agreement upon further consideration.[60] Therefore, one would expect a limitation on the redemption rights of a non-title spouse in the mortgage to fail.

Unanswered Questions Regarding the Non-Title Spouse

Indispensable or Necessary Party Status

In analyzing the rights of the omitted mortgagor, the *Sudhoff* court differentiated the "indispensable" party from the "necessary" party.[61] As to the latter, the court defined necessary parties as those with an interest in a suit that ought to be made parties but who do not have to be joined before a final decision may be rendered.[62] The court then stated the omitted mortgagor was "at the least" a necessary party, suggesting she may be indispensable, but allowed the foreclosure judgment "so far as it goes" to stand in foreclosing the interests of the included title spouse and the junior lienholder.[63] The court did not address early common law, which held the holder of the equity of redemption to be an indispensable party to a valid foreclosure.[64]

While it is true that an action can proceed without necessary parties, there must be a valid excuse for their nonjoinder.[65] As commentators note, in cases involving interests in land, state courts usually do not have to address the question of whether a party is "indispensable" or "necessary" since interested persons are known, and the court can easily obtain jurisdiction over them.[66]

The identity of the mortgagor in Florida is known to the public, especially the foreclosing plaintiff. In Florida counties that abstract instruments of writing affecting real estate, the legislature requires that counties give notice to the public of the mortgagor's interest.[67] Therefore, it is not clear how a foreclosing plaintiff can claim an excuse of inability to include the mortgagor in a foreclosure of the mortgage, and none was offered or analyzed by the *Sudhoff* court.[68]

By upholding part of the foreclosure judgment, the *Sudhoff* court suggests there is some purpose in conducting a foreclosure proceeding piecemeal without a mortgagor, since doing so will presumably have the "effect desired by the mortgagee."[69] Notably, it did not address whether the foreclosure sale could be upheld or why the plaintiff would be left without an adequate remedy if it had to conduct a foreclosure against the mortgagors.

The essential purpose of a foreclosure is to have the mortgaged property applied to the debt, together with such other relief as may be necessary to enforce the debt.[70] It fixes the amount due under the mortgage and acts as a final adjudication.[71]

The right of redemption is a powerful, substantive right that prevents the foreclosure sale of the property. A court cannot extinguish this right if the holder thereof is not a party to the foreclosure proceeding.[72] The omitted party's rights remain precisely as they were before the foreclosing plaintiff instituted foreclosure proceedings, being neither enlarged nor diminished by the defective foreclosure.[73]

It is unclear as to the purpose of a foreclosure judgment obtained without inclusion of the mortgagor, who holds the power to prevent the sale of the property and the application of the proceeds thereof against the debt. If one has the ability to prevent a foreclosure sale, failure to join such a person would surely prevent the clerk from issuing a certificate of sale, or if not, would prevent the foreclosure purchaser from obtaining marketable title to the property.[74] This cannot be the "effect desired" by the mortgagee. A foreclosure judgment obtained without a mortgagor would appear to be inadequate to accomplish anything other than perhaps terminate other rights of redemption in the property, since the omitted party/mortgagor, once properly before the foreclosure court, has historically been allowed to challenge the amount of the debt and the assessment of any fees against her interests in the property.

On the other hand, the joinder of all mortgagors produces exactly the effect desired by the mortgagee, since the mortgagee would prefer to have someone redeem the property and satisfy the debt than go through the time-consuming, costly, risky process of foreclosure. In addition, a properly conducted foreclosure will conclusively terminate all possessory interests, instead of relying on the mortgagee's unilateral determination that the non-title spouse relinquished such interests pursuant to abandonment.

Joinder of the non-title spouse is also accomplished with minimal effort, especially when the plaintiff relies on publication notice upon the title spouse and has to conduct a diligent search and inquiry upon the non-title spouse anyway before proceeding with the foreclosure.[75]

A Foreclosure Sale without the Mortgagor

After initially voiding the foreclosure judgment and sale, on rehearing, the *Sudhoff* court chose not to address the important issue of whether a foreclosure sale could be upheld without the holder of the right of redemption.[76]

At common law, if the holder of the right of redemption is omitted from the foreclosure and the foreclosure is allowed to proceed, the foreclosure buyer steps into the shoes of the mortgagee and is treated as an assignee against whom the holder of the equity of redemption can redeem the property.[77]

Florida takes a different approach. By the plain language of the statute governing the right of redemption, the purpose of a foreclosure proceeding is to have a single, definitive sale of the property that extinguishes all rights of redemption. [78] This procedure encourages foreclosure buyers to participate in the auction process, motivates the mortgagor to act promptly to protect her rights, encourages due diligence on the part of the mortgagee, and promotes judicial economy. Conducting a single proceeding also prevents the foreclosing plaintiff from depriving the non-title spouse's right to challenge the amount of the alleged deficiency, the amount of attorney's fees, and representations by the foreclosing plaintiff, or otherwise participating in the foreclosure process.[79]

Allowing the mortgagor to redeem the property after it has been sold to the foreclosure purchaser directly contradicts Section 45.0315 and raises additional due process concerns. If the mortgagor were allowed to redeem, the non-titlemortgagor would have to pay the amount specified in the final order of foreclosure, which was adjudicated without her.[80]

Upholding the foreclosure sale but recognizing redemption rights in the omitted mortgagor makes little conceptual sense in lien-theory states such as Florida where the mortgagee does not hold title. In title-theory states, the mortgagee holds title, and the foreclosure acts as a conveyance and assignment of title to the foreclosure purchaser. In Florida, since the mortgagee (or the court for that matter) does not hold title, and the mortgagor is considered the owner vis-à-vis the property, neither the mortgagee nor the court has the authority to conduct the foreclosure sale in the first place, much less transfer an interest to the foreclosure purchaser that gives rise to the issuance of a certificate of title.

Since there was no authority to conduct the sale, it would be procedurally correct to cancel the certificate of title and reinstate the interests in the property at the time the suit was instituted rather than force the foreclosure buyers to

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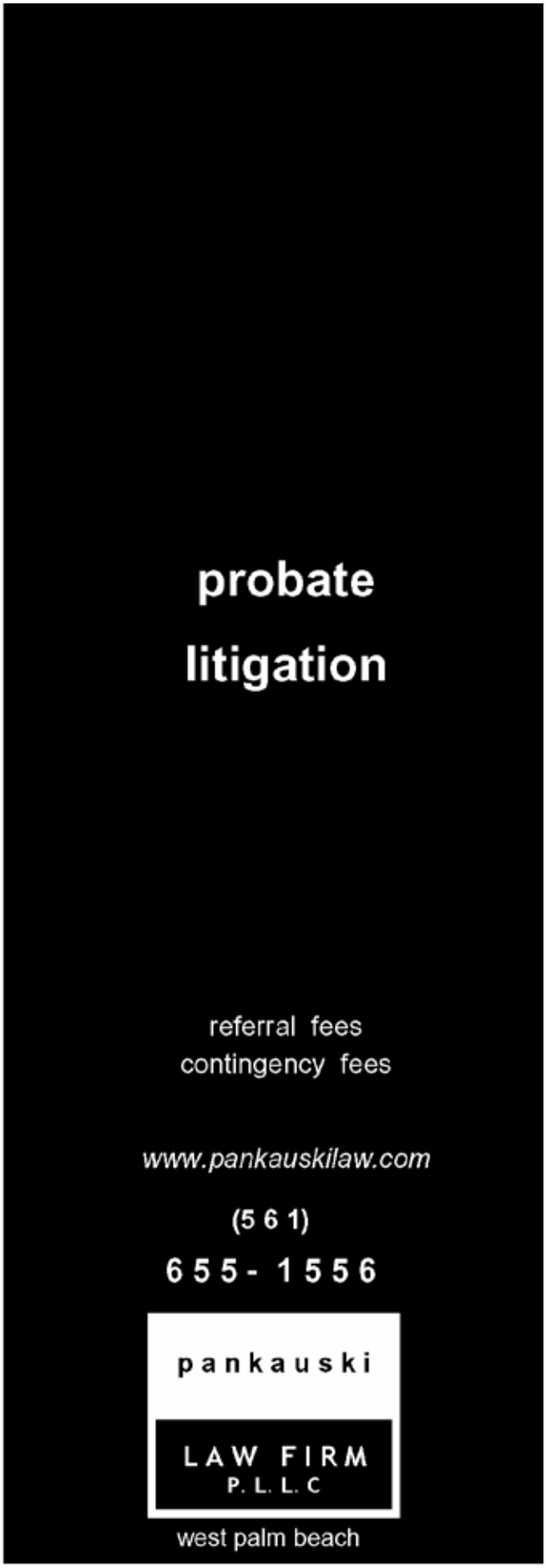

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step into the shoes of the mortgagee.[81]

The Role of Homestead Status in a Foreclosure

The homestead provision is silent on the right of redemption and foreclosure procedure, instead only requiring the spouse to join in the mortgage of homestead property for the lien to be effectual. The parties still retain the freedom to contract and confer upon each other rights and obligations so long as the mortgagor's right of redemption is not clogged.

Before *Sudhoff,* the sole method of extinguishing the mortgagor's right of redemption was by transfer or conveyance or by a judicial proceeding complying with due process. The *Sudhoff* court suggests, however, that the mortgagor's treatment of the property, after execution of the mortgage conferring rights and obligations upon the parties, may affect her substantive contractual and statutory rights to prevent a sale of property in a foreclosure. At the same time, the *Sudhoff* court recognizes that the mortgagor's rights are separate from any rights that may be conferred upon a non-title spouse under the homestead provision.[82] Case law supports this notion, since the right of redemption is an innate feature of every mortgage,[83] not a declaration or treatment of property as homestead.

The right of redemption is a powerful, substantive right that prevents the foreclosure sale of the property. A court cannot extinguish this right if the holder thereof is not a party to the foreclosure proceeding.

Moreover, a person expressly holds the right of redemption in her capacity as a mortgagor, not a homesteader.[84] The mortgagor would have the same rights of redemption if the mortgagor later treated the property as a vacation home not protected by homestead laws. Even if a mortgage requires the mortgagor to protect the property's homestead status in order for the parties to recognize her right of redemption, courts would undoubtedly view this provision as a restriction on the right of redemption, violating the doctrine against clogging.

Assuming a mortgagor is a willing redeemer, the mortgagee has no discernible interest in first determining whether the mortgagor treated the property as homestead, especially since redemption is accomplished without judicial intervention or approval. If the foreclosure plaintiff institutes foreclosure proceedings, it is also unclear what interest the court or the mortgagee would have in holding an evidentiary hearing as to the homestead treatment by the mortgagor of mortgaged property. The mortgagee seeks to have the loan satisfied. If the mortgagor redeems the mortgage, the mortgagee is paid and the mortgage is extinguished. After the mortgage is extinguished, it is not the mortgagee's concern, or the concern of the foreclosure court, what interest the mortgagor may have in the property, including whether the property is homestead.

The *Sudhoff* court may have been trying to articulate that the right of redemption may not be lost by virtue of the property's treatment as homestead, but that the omitted mortgagor could only acquire the interest she had in the property if she "redeems" the property from the lienholder. As discussed earlier, this concept mistakenly treats redemption as a "purchase" from the mortgagee, who in a lien-theory state holds only a lien.

The right of redemption is the power to prevent a sale and preserve the interests in the property, whatever they are. The non-title spouse clearly has an interest in preventing a foreclosure sale in order to preserve her possessory interests, homestead rights, and any vested[85] or equitable interests[86] in the property.

Conclusion

Given the rise of mortgage foreclosures, as noted in the first paragraph of this article, Florida has an interest in seeing that foreclosures are conducted properly to encourage foreclosure buyers to participate in the judicial sale process, to provide due process to mortgagors to protect their interests in property, to encourage due diligence on the part of the mortgagee, and to promote judicial economy. Canceling certificates of sale and expunging certificates of title issued to foreclosure buyers is a drastic, costly, and nightmarish result that courts would likely rather avoid.

After *Sudhoff,* title-underwriting guidelines may need to be revisited to ensure that the holder's right of redemption is extinguished by due process, specifically the right held by the non-title mortgagor-spouse. While questions remain, the safest course for a foreclosing plaintiff is to properly foreclose the interests and right of redemption of the non-title spouse by joinder since she may be indispensable, and any foreclosure sale without her joinder may be overturned.

Since the goal of the mortgagee is reimbursement, the mortgagee may just find that the non-title spouse is an additional (and perhaps surprising) source for payoff.

Endnotes:

1 See Jerry W. Jackson, Foreclosures Rise in Florida, Soar Nationwide, Orlando Sent., Jan. 26, 2007, at C3.

2 See Robert Trigaux, Foreclosure Rate a Sign of Market Imbalance, St. Pete Times, Apr. 2, 2007, at 1D.

3 See Mortgage Electronic Registration Systems, Inc. v. Azize, 32 Fla. L. Weekly D546 (Fla. 2d D.C.A. Feb. 21, 2007) (nominee of lender has standing as the alleged owner and holder of the note and mortgage to proceed with foreclosure); Mortgage Electronic Registration Systems, Inc. v. Revoredo, 32 Fla. L. Weekly D707 (Fla. 3d D.C.A. Mar. 14, 2007) (nominee of lender does not lack standing to foreclose if it was only the holder, by delivery, of the note, and not the owner).

4 See 29 The Fund Concept 102 (July 1997).

5 See Sudhoff v. Federal National Mortgage Assn., 942 So. 2d 425 (Fla. 5th D.C.A. 2006).

6 Sudhoff v. Federal National Mortgage Assn., 942 So. 2d 425, 428 (Fla. 5th D.C.A. 2006).

7 See Fla. Stat. §702.01 (2007).

8 Watson v. Vafides, 212 So. 2d 358, 361 (Fla. 1st D.C.A. 1968).

9 See Brown v. Atlanta Nat'l Bldg. & Loan Ass'n, 35 So. 403, 404 (Fla. 1903).

10 See Etter v. State Bank of Florida, 79 So. 724, 726 (Fla. 1918); Bate

v. Cook, 103 So. 126, 128 (Fla. 1925).
11 See Saidi v. Wasko, 687 So. 2d 10, 12 (Fla. 5th D.C.A. 1996) (citation omitted).
12 See Redding v. Stockton, Whatley, Davin & Co., 488 So. 2d 548, 549 (Fla. 5th D.C.A. 1986) (holding that leasehold of joined party was terminated upon foreclosure, rendering the tenant a trespasser).
13 See Allstate Mortgage Corp. of Fla. v. Strasser, 286 So. 2d 201 (Fla. 1973); VOSR Indus. v. Martin Props., 919 So. 2d 554, 556 (Fla. 4th D.C.A. 2005).
14 See Watson v. Vafides, 212 So. 2d 358, 361 (Fla. 1st D.C.A. 1968).
15 See Hoffman v. Semet, 316 So. 2d 649, 652 (Fla. 4th D.C.A. 1975).
16 See Terrell v. Allison, 88 U.S. 289, 292-93 (1874).
17 See *id.*
18 See Watson v. Vafides, 212 So. 2d 358, 361 (Fla. 1st D.C.A. 1968); Emanuel v. Bankers Trust Co., N.A., 655 So. 2d 247, 250 (Fla. 3rd D.C.A. 1995).
19 See Hoffman v. Semet, 316 So. 2d 649, 652 (Fla. 4th D.C.A. 1975); Terrell v. Allison, 88 U.S. 289, 292-93 (1874).
20 See Terrell v. Allison, 88 U.S. 289, 292-93 (1874).
21 See *id.*
22 See Fla. Stat. §697.02 (2007) ("A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession.")
23 See Watson v. Vafides, 212 So. 2d 358, 361 (Fla. 1st D.C.A. 1968).
24 See *id.*
25 See Emanuel v. Bankers Trust Co., N.A., 655 So. 2d 247, 249 (Fla. 3rd D.C.A. 1995).
26 See Indian River Farms v. YBF Partners, 777 So. 2d 1096, 1099 (Fla. 4th D.C.A. 2001).
27 See Pierson v. Bill, 138 Fla. 104, 115 (Fla. 1939); Fla. Stat. §45.0315 (2007) (redemption "prevents a foreclosure sale."); Henry H. Fox, Manuel Kushner and Joey Grant, Florida Real Property Litigation §5.140 (Fla. Bar CLE 4th ed. 2005) ("When used with respect to the mortgagor, equity or right of redemption refers to the right of the mortgagor to satisfy the mortgage indebtedness encumbering the property before the right is extinguished by a foreclosure, and thereby prevent it from being foreclosed.").
28 See Hoffman v. Semet, 316 So. 2d 649, 651-52 (Fla. 4th D.C.A. 1975).
29 See Fla. Stat. §45.0315 (2007).
30 See *id.* ("Otherwise, there is no right of redemption.").
31 See Emanuel v. Bankers Trust Co., N.A., 655 So. 2d 247, 250 (Fla. 3d D.C.A. 1995).
32 See VOSR Indus. v. Martin Props., 919 So. 2d 554, 556 (Fla. 4th D.C.A. 2005); Saidi v. Wasko, 687 So. 2d 10, 11 (Fla. 5th D.C.A. 1996).
33 See VOSR Indus. v. Martin Props., 919 So. 2d 554, 556 (Fla. 4th D.C.A. 2005).
34 See Indian River Farms v. YBF Partners, 777 So. 2d 1096, 1099 (Fla. 4th D.C.A. 2001).
35 See Bennett v. Ward, 667 So. 2d 378, 382 (Fla. 1st D.C.A. 1995).
36 See Terrell v. Allison, 88 U.S. 289, 292-93 (1874).
37 See Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 52-53 (Fla. 2000) (holding foreclosure procedure under section 702.10(2), Florida Statutes (2005), constitutional since the mortgagor is afforded due process because she is given notice of the foreclosure proceeding and has the ability to file papers for relief).
38 See Dennis v. Ivey, 183 So. 624, 626 (Fla. 1938) (mortgagor was not a necessary party when he conveyed his interest in the property and no deficiency was sought against him); Hubbard v. Highland Realty & Inv. Co., 156 So. 322, 324-25 (Fla. 1934) (mortgagor who conveyed her interest and against whom no deficiency was sought was not a necessary party to foreclosure proceeding); Bate v. Cook, 103 So. 126, 128 (Fla. 1925) (husband-and-wife mortgagors who conveyed their interest in the property, and against whom a deficiency decree could be entered if the sale of the property was insufficient, were necessary parties to the appeal once they were added as defendants); Phifer v. Abbott, 74 So. 488, 492 (Fla. 1917) (deceased mortgagor who had quitclaimed her interest in property, and against whom a deficiency judgment was not sought, was not a necessary party); Hinson v. Gammon, 54 So. 374, 374-75 (Fla. 1911) (husband-and-wife mortgagors who conveyed their interest in the property, and against whom a deficiency judgment was not sought, were not necessary parties); Mitchell v. FNMA, 763 So. 2d 358, 358-59 (Fla. 4th D.C.A. 1998) (mortgage who conveyed his rights and interest in the property, and against whom a deficiency judgment was not sought was not a necessary party to the foreclosure); Sudhoff v. FNMA, 942 So. 2d 425, 428 (Fla. 5th D.C.A. 2006) (mortgagor who did not convey her interests in the property was at the least a necessary party to a foreclosure).
39 See Fla. Const. art. X, §4(c) ("The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage . . . .").
40 See Pitts v. Pastore, 561 So. 2d 297, 301 (Fla. 2d D.C.A. 1990).
41 See Fla. Const. art. X, §§1, 4 (1885).
42 Fla. Const. art. X, §4(c) (1968).
43 See Chase Federal Sav. & Loan Ass'n v. Schreiber, 479 So. 2d 90, 101 (Fla. 1985).
44 See Black's Law Dictionary 836 (6th ed. 1990).
45 See Pitts v. Pastore, 561 So. 2d 297, 299 (Fla. 2d D.C.A. 1990) (non-title spouse did not sign the mortgage or otherwise join in the mortgage).
46 See Jameson v. Jameson, 387 So. 2d 351, 353 (Fla. 1980) (citing Background Papers of 1978 Constitution Revision Commission).
47 See *id.*
48 See *id.*
49 See *id.*
50 See Taylor v. Maness, 941 So. 2d 559, 561 (Fla. 3d D.C.A. 2006) (non-title spouse's refusal to execute the deed transferring homestead constituted failure to join in a conveyance of the homestead to a third party).
51 See Black's Law Dictionary 1012 (6th ed. 1990).
52 Hoffman v. Semet, 316 So. 2d 649, 652 (Fla. 4th D.C.A. 1975); see also 2 R. Boyer, Florida Real Estate Transactions §32.20 (2005) (noting the "mortgagor is currently viewed as the legal owner of the mortgaged property").
53 See Sudhoff v. FNMA, 942 So. 2d 425, 427 (Fla. 5th D.C.A. 2006).
54 See *id.*
55 See *id.* at 429.
56 See Pitts v. Pastore, 561 So. 2d 297, 301 (Fla. 2d D.C.A. 1990).
57 See Tullis v. Tullis, 360 So. 2d 375, 378 (Fla. 1978).
58 See Stovall v. Stokes, 115 So. 828, 837 (Fla. 1927) (citation omitted); VOSR Indus. v. Martin Props., 919 So. 2d 554, 556 (Fla. 4th D.C.A. 2005) (holding the right of redemption is an innate feature of every mortgage.).
59 *Id.*; see also MacArthur v. North Palm Beach Utilities, Inc., 187 So. 2d 681, 683 (Fla. 4th D.C.A. 1966).
60 See Stovall v. Stokes, 115 So. 828, 837 (Fla. 1927) (citation omitted).
61 See Sudhoff v. FNMA, 942 So. 2d 425, 427 (Fla. 5th D.C.A. 2006).
62 See *id.*
63 See *id.*
64 See Terrell v. Allison, 88 U.S. 289, 292-93 (1874); John W. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 513 (1957); 4 Richard R. Powell, Powell on Real Property §37.37[8] (2006) ("The parties defendant must include all persons owning the whole or a part of the equity of redemption.").
65 See Betton v. Williams, 4 Fla. 11, 15 (1851); Juan Ramirez Jr., 1 Florida Civil Procedure §10-1(e) (3d ed. 2002); John W. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 483-84 (1957).
66 See John W. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 483-84, 513 (1957).
67 See Fla. Stat. §§703.01, .03 (2007).
68 See John W. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 483-84, 513 (1957).
69 Sudhoff v. FNMA, 942 So. 2d 425, 429 (Fla. 5th D.C.A. 2006).
70 See Watson v. Vafides, 212 So. 2d 358, 361 (Fla. 1st D.C.A. 1968); Fla. R. Civ. P. Form 1.996.
71 See Etter v. State Bank of Florida, 79 So. 724, 726 (Fla. 1918); Bate v. Cook, 103 So. 126, 128 (Fla. 1925).
72 See T-R Indian River Orange Co. v. Keene, 168 So. 408, 409 (Fla. 1936) (citations omitted) ("where different persons have rights or interests in specific land the foreclosure of a mortgage upon the land affects the rights and interests of only such persons as are made parties actually or constructively to the foreclosure proceeding.'").
73 See Quinn Plumbing Co. v. New Miami Shores Corp., 100 Fla. 413, 418 (Fla. 1930).
74 See Maniscalco v. Hollywood Fed. Sav. & Loan Ass'n, 397 So. 2d 453, 455 (Fla. 4th D.C.A. 1981) (holding defendant deprived of equity of redemption, reversing with direction to vacate default and final judgment and to set aside the sale).
75 See Dor Cha, Inc. v. Hollingsworth, 876 So. 2d 678, 680 (Fla. 4th D.C.A. 2004) (holding a diligent search for a defendant's whereabouts requires inquiry of persons likely or presumed to know the defendant's location.); Floyd v. FNMA, 704 So. 2d 1110, 1112 (Fla. 5th D.C.A. 1998) (conscientious effort is required to acquire the information necessary to accomplish personal service on the persons holding title or having possession of the mortgaged property so as to provide them with notice of

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Client-Centered Legacy Planning

By Jeff Louderback, Orlando, FL

"Legacy planning is all about recognizing that your wealth extends beyond your net worth. It allows you to pass on your values and ethics – and what is most important to you – to your children so that they use their wealth to lead fulfilling lives and make a difference in the community," explains Barb Culver, a national educator and speaker on the subject of client-centered legacy planning.

Ms. Culver's private practice is centered on the principles established in the Legacy Planning Pyramid that she created. The technical details of traditional financial planning are included. Added elements are communication between parents and their children about priorities and goals; discussion about the rights, roles and responsibilities of heirs; and the involvement of philanthropy.

"Initially, when I started my own company, we focused on insurance and investments. I found that traditional planning was not comprehensive enough," Ms. Culver said. "I saw a study which determined that 70 percent of estate plans failed within two generations. I felt that I could no longer continue to plan the same way, so I thoroughly studied what made the other 30 percent successful," Ms. Culver added. "I found that these people made it work by focusing on ongoing philanthropy and communication with their family's future generations. That is when I shifted the emphasis of our company to legacy planning."

"Our clients have the answers inside of them about what they want to do," Ms. Culver explained. "We just have to ask the questions that lead our clients to those answers instead of, as many of us were trained, telling people what to do."

Ms. Culver's clients begin the process with a detailed workbook called My Living Legacy, which explores their lives and their values. The questions require thought and contemplation: What kinds of messages did you get about money from your family and your faith? What are the five values most important to you? The five least important? Are you using money in a way that is congruent with your values?

After examining the workbook, Ms. Culver creates a personal or family mission statement, which the client reviews and edits. When the client agrees on the mission statement, the financial and estate-planning process begins.

"They are more clear and focused and we are more clear and focused on what they are trying to do," Ms. Culver explained. "What we hope to do is to lead people to make really wise decisions about their wealth. We don't think you can make the wise decisions if you're working unilaterally regarding your finances. You have to work holistically and comprehensively."

Ms. Culver was among the first financial planners to use the term "legacy planning." She has co-authored three books on the subject, edits a professional journal on the values-based form of estate planning, and speaks at engagements around the country about the topic. She also instructs advisors in the financial services industry about legacy planning and consults with non-profit organizations nationwide about building their endowments using client-centered legacy planning strategies.

To Ms. Culver, the subject is not a career, it is a passion. "Legacy planning is not solely about minimizing tax liabilities and maximizing the amount of money you provide to your heirs," she said. "It incorporates the values, beliefs and ethics that are important to you and your family." AL

Right of Redemption

from preceding page

the proceedings).
76 Sudhoff v. FNMA, 942 So. 2d 425 (Fla. 5th D.C.A. 2006)
77 See Grant S. Nelson, Real Estate Transfer, Finance and Development 600 (5th ed. 1998).
78 See Fla. Stat. §45.0315 (2007).
79 See Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 52-53 (Fla. 2000) (due process allows the mortgagor to substantively challenge the representations of the mortgagee in the foreclosure action, and otherwise fight the termination of her interest).
80 See Fla. Stat. §45.0315 (2007).
81 See Batchin v. Barnett Bank of Southwest Florida, 647 So. 2d 211, 213 (Fla. 2d D.C.A. 1994) (insufficient affidavit supporting service by publication rendered judgment of foreclosure invalid, requiring the certificate of title, if issued to the purchaser, to be cancelled); Gans v. Heathgate-Sunflower Homeowners Ass'n, 593 So. 2d 549, 552-53 (Fla. 4th D.C.A. 1992) (where service is void on its face a reversal of the order of sale will defeat the title of the non-party who purchases the property in good faith at the sale of the property).
82 See Sudhoff v. FNMA, 942 So. 2d 425, 429, 429 n.2 (Fla. 5th D.C.A. 2006) ("If the property was homestead, except as permitted by the constitution, it was exempt from forced sale, and the ability to convey the property or devise it by will was similarly limited. Clearly, too, Mrs. Sudhoff had a right of redemption in the property by virtue of the mortgage agreement."); ("Here, Mrs. Sudhoff has an independent contractual right of redemption.").
83 See VOSR Indus. v. Martin Props., 919 So. 2d 554, 556 (Fla. 4th D.C.A. 2005).
84 See Fla. Stat. §45.0315 (2007).
85 See Wallace v. Wallace, 922 So. 2d 1008, 1010 (Fla. 1st D.C.A. 2006) (holding as long as the spouse seeking a special equity in the other spouse's property is able to show that he or she contributed funds or services over and above normal marital duties with respect to that property, a special equity may be awarded, amounting to a vested ownership interest).
86 See Ballew v. Ballew, 683 So. 2d 1171, 1172 (Fla. 4th D.C.A. 1996) (land bought with marital funds but titled only in husband's name was a marital asset in which spouse had a one-half interest).

Listen! for Charitable Opportunities

By Dorothy L. Korszen, Esq., Farr Law Firm, Punta Gorda, FL

Philanthropy is a very personal decision. There are so many ways to give and so many worthwhile charitable purposes. Gifts to the community reflect the values and beliefs of an individual. Many clients may wish to be more charitable, but may be unaware of how to give. An advisor can help clients realize their charitable objectives by listening for charitable giving opportunities, explaining options, and suggesting solutions.

How do you know when you are hearing a charitable opportunity? Timing is key. Significant giving opportunities arise when clients are making major business, personal and financial decisions. Many clients want their professional advisors to help them plan charitable giving.

Often, professional advisors are reluctant to discuss charitable planning with their clients because they equate this area of planning with soliciting the client for a charitable gift. Some professional advisors feel uncomfortable talking about charitable giving unless the client raises the subject first.

This dilemma is resolved when charitable planning strategies are seen as a critical piece of the overall planning process. By not broaching the subject, a significant opportunity may be lost for your client and the community. In fact, many individuals expect their professional advisors to bring up the subject if appropriate … and may assume charitable giving is not an option if the subject is not raised. You may be surprised at your client's reaction when you ask if there are any charitable gifts they would like to make or causes they care about.

Your local community foundation can work with you and your client to answer these questions and help each client fulfill his or her charitable goals:

What are your client's…

- Personal motivations for charitable giving?
- Charitable interests in the community?
- Priorities when focusing on a few areas that make the greatest impact?
- Wishes for involvement in identifying charitable uses for his or her gift?
- Financial and tax situations and which gifting instrument is the best fit?

Charitable Opportunities

Community foundation staff can work with you and your client to recommend the best charitable solution. Here are several situations that lend themselves to charitable planning:

Year-end tax planning: Your client just earned a large bonus and wants to give a portion back to the community but has no time to decide on the most deserving charitable organizations. Recommend establishing a Donor Advised Fund through their community foundation for an immediate tax deduction and the ability to stay involved in recommending uses for the gift for years to come.

Preserving an estate: As the estate planner, you identify significant taxes going to the IRS, but your client wants to direct dollars for local benefit. The community foundation can work with you and your client to reduce his or her taxable estate through a charitable bequest or other planned gift. Your client's gift will create a legacy of caring in the community that benefits his or her charitable intent forever.

Retiring in comfort: Your client is concerned about running out of money during his or her lifetime but has always been charitable. Recommend establishing a life income gift (such as a charitable remainder trust) at the community foundation that pays income potentially for life. Upon your client's death, the gift can be distributed by the community foundation in accordance with the client's charitable interests.

Establishing a private foundation: Your client is thinking about establishing a private foundation but is looking for a simpler, more cost-efficient alternative. The community foundation can help you and your client analyze the pros and cons of creating a Donor Advised Fund or planned gift. Your client is eligible for a tax deduction measured by the fair market value of appreciated stock (less any planned gift value).

Closely held stock: Your client's personal net worth is primarily tied up in a closely held company, but it is important to him or her to give back to the community. Recommend establishing a Donor Advised Fund or planned gift. Your client is eligible for a tax deduction measured by the fair market value of appreciated stock (less any planned gift value).

Sale or disposition of highly appreciated stock: Your client has appreciated stock and wants to use a portion of the gains for charitable giving, but the identified charities are too small to accept direct stock gifts. Suggest establishing a fund at a community foundation with a gift of appreciated stock. Your client receives a tax deduction on the full market value while avoiding the capital gains tax that would otherwise arise from the sale of the stock. Your client can even be involved in recommending uses for the gift, including the organizations and programs he or she cares about most.

Sale of a business: Your client owns highly appreciated stock in a company that is about to be acquired. The community foundation can work with you to suggest several ways to structure a charitable gift (including the use of planned giving techniques) to help your client reduce capital gains tax and maximize impact to the community.

Strategic giving: Your client is passionate about helping meet a specific community need and wants to make a meaningful gift. You and your client can work with grant-making experts at your local community foundation to understand community needs and programs and then direct gift dollars to make the greatest impact.

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Charitable Opportunities

from preceding page

Substantial IRA/401(k) assets: Your client wants to leave his or her estate to community and family and has substantial assets in retirement accounts. The community foundation can help you and your client evaluate the most beneficial asset distribution to minimize taxes, giving more to his or her heirs and preserving charitable intent.

What This Means for Your Practice

Taking an active approach to charitable planning can build deeper client relationships, enhance client loyalty, and result in better service. It allows the advisor to be civic-minded. Indeed, as the "business" of philanthropy grows, if the advisor fails to relate charitable planning opportunities to the client, a competitor is sure to do so and the advisor may lose a client. Earning a reputation in the community as the advisor who cares about philanthropy benefits your client and is well worth doing. As an extra benefit, your practice will be more rewarding when you see how you can help your clients achieve their goals and benefit the community.

With the help of your community foundation, you can be knowledgeable about the many ways charitable planning options can help solve everyday tax, estate and financial planning problems while adding value to the client's family and the community. Community foundations can work with you to enhance the services clients seek from you and your firm – always respecting and working within the relationships you have developed with your clients. Log onto www.communityfoundationsfl.org for more information or to connect to a community foundation near you.

Shared Equity Homeownership

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holds the mortgage and pays all taxes and fees on the real estate. People who live in cooperative housing have bought shares in the corporation that owns their homes. They are voting members of the corporation and they lease their individual units. The formula for resale is found in three documents: the subscription agreement, the stock certificate, and the bylaws. There is a cap on the resale price and also on the equity that homeowners may claim when reselling their shares. Usually the corporation has the right to repurchase these shares for their restricted, formula-determined price.

Limited equity cooperatives are rare in Florida but are often used in urban areas such as New York and Washington, D.C. Any style of housing can use the cooperative model, from row houses to scattered site, single-family homes. Rural areas have used the model to preserve mobile home parks and develop farmworker housing. LECs are very common outside of the United States. According to Mr. Davis' 2006 report for the National Housing Institute, cooperatives are a large nonprofit housing provider in Canada and cooperatives make up fifteen percent of Sweden's housing stock and fourteen percent of Norway's housing.

2. Community Land Trusts (CLTs)

Community-controlled nonprofit corporations, Community Land Trusts are membership organizations that hold title to land. The CLT transfers title to buildings (the homes) while leasing but not selling the land. The person buying the home (but not the land) gains many of the benefits of homeownership without having to pay for a fee interest in the land. The ground lease has a resale provision which ensures the property will always be affordable. The formulas used to set the resale price of CLT housing vary. The ground lease usually gives the CLT the right to force repairs. Should owners default on their mortgages, the ground lease usually gives the CLT the right to step in and cure the default, forestalling foreclosure.

3. Deed Restricted Housing With Durable Covenants

Deed restrictions can apply to a variety of housing styles, from detached homes to condominiums. A restrictive covenant applies to a property's deed or mortgage by binding everyone who owns the property thereafter. David Abromowitz and Kirby White described deed restricted housing in the Spring 2006 Housing News Network article titled, "Deed Restrictions and Community Land Trust Ground Leases: Protecting Long Term Affordable Homeownership." To meet the NHI definition of shared equity homeownership, the deed restriction needs to preserve affordability for at least 30 years.

The three models described above have their drawbacks. Responsibility for monitoring and enforcing restrictions on the use and resale of owner-occupied housing tends to fall to the membership organizations of the CLTs and LECs. The Board of Directors of an organization typically controls the resale formula, designed to give departing homeowners a fair return. The homeowner/leaseholders on the board have an economic interest in swaying the board to remove or cut back on the restrictions on use and resale.

Deed restrictions rely on subsequent buyers and title insurance companies who want to maintain clear title to comply with the restrictions. However, sellers and buyers sometimes find ways around the deed restrictions with side deals. For example, if the restriction caps the price of a home, the buyer may agree to buy the furniture within the house at an unusually high cost. The shorter the deed restriction, the more likely that subsequent parties will comply. Deed restrictions have another disadvantage. As noted in the Abromowitz/Kirby article, the agency that imposed the deed restriction rarely has a continuing relationship with the homeowner. The agency does not monitor and enforce the restriction or provide support services to owners in financial trouble. A mortgage foreclosure would wipe out the typically subordinated deed restriction and both the homeowner and the public would lose their investment.

Despite the drawbacks of these three models, shared equity homeownership (with resale restrictions) provides more community benefits than shared equity financing. A

typical method of shared equity financing is for the government or a nonprofit agency to give a second mortgage by way of a deferred payment loan to lower the buyer's privately obtained first mortgage. At resale, the owner can sell the home at its highest market value and repay the principal of the loan, any outstanding interest and a percentage of any appreciation accruing to the home since the owner's purchase. This method shares equity but only between the homeowner and the lender.

The popular method for most counties in Florida does not share equity in financing or ownership. Most counties provide a subsidy without shared appreciation. In Florida, the government agency or nonprofit organization often forgives the second loan over a period of time if the homeowner continues to make payments on the first mortgage and remains in the home. Some nonprofit organizations reduce building costs with volunteer labor ("sweat equity") of buyers. The nonprofit lender, such as a local Habitat for Humanity organization, will hold the mortgage in its portfolio for a long period of time or sell the mortgage with recourse (meaning the lender buys the mortgage back if it goes into default). These methods do not recoup any public investment.

The shared equity financing model and the deferred (and forgiven) loan model achieve the important goal of building wealth for lower-income households but they also favor the individual home buyer at the expense of the larger community. The deferred payment loan and the portfolio loan are useful tools for making homeownership affordable but only for one owner at a time. Despite the subsidy to the first buyer, the next buyer must still pay the market rate and will probably need even more subsidy. As Mr. Davis points out in his NHI report on shared equity homeownership, homeowners build wealth at the expense of the community when they receive the return of their own investment and the public's investment. Even if the owner repays the principal, any outstanding interest and a percentage of any appreciation accruing to the home between its initial purchase and eventual resale, the equity is shared between the homeowner and the lender but there is no attempt to maintain affordability for the next buyer. The nonprofit or government agency lender may recapture the subsidy and recycle the public investment to other home buyers but the new home buyers must purchase market-rate homes. The need for increased subsidy is a challenge. Some communities such as Orange County, Florida, deal with the problem by putting a cap on the amount of subsidy provided. Consequently, these programs are unable to serve families with lower incomes who need more subsidy than is available.

Another disadvantage of the lack of resale-restriction is that the programs provide little if any aid to ensure continued success for the home buyer. Even if people succeed in buying homes, some homeowners lose their homes in a foreclosure. Unexpected repairs, unstable income, fragile health, adjustable rate mortgages and predatory refinancing loans all make homeownership precarious for low-income homeowners. Rarely do homeownership-assistance programs protect homeowners from the real risks of homeownership.

On February 12, 2007, the Jacksonville Business Journal reported that nearly 12,000 foreclosures recorded in January in the state were up 13 percent from January 2006 and ranked Florida third in the country, according to RealtyTrac's U. S. Foreclosure Market Report for January. The rate of one property in some stage of foreclosure for every 624 household ranked Florida sixth in the country compared to a national foreclosure rate of one new foreclosure filing for every 886 U.S. households. Overall, foreclosures for this year increased 27 percent but last year's increase was even higher at 45 percent. The Center for Responsible Lending's December 2006 report called, "Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners," found that the foreclosure risk in the subprime market has escalated in recent years, despite the recent period of housing appreciation. As many as one in eight (13 percent) subprime home loans ended in foreclosure within five years of origination. The subprime market now represents roughly one quarter of all home loans made in the United States.

As the housing boom cools, fewer delinquent buyers will have the equity needed to refinance their loans or sell their homes to avoid foreclosure. If the homeowner loses the home in a foreclosure action, the home then returns to the private market and both the individual and the community lose wealth. Foreclosures could also affect the resale restricted models, especially those loans sold on the secondary market, if the resale restrictions disappear at foreclosure.

The loss of non-market rate housing and the increasing dangers of foreclosure have prompted housing advocates to consider resale restrictions. The NHI report says supporters of shared equity homeownership believe that a family's life is not transformed by the amount of equity but by the other benefits of homeownership such as security, control, social advantages (status), financial advantages (taxes, credit and collateral) and location advantages (better schools, services, and access to jobs). Shared equity homeownership also provides community improvement by rebuilding poor neighborhoods or maintaining diversity in neighborhoods that are beginning to gentrify.

Housing advocates continue to experiment with variations on the three models to better balance the interests of the homeowner and the community. Unfortunately, there is limited data on the number and effectiveness of shared equity homeownership. Nevertheless, housing advocates must continue to seek innovations that will provide and maintain affordable housing and strong neighborhoods. Shared equity homeownership offers a way to promote individual wealth, stability and engagement as well as building wealth and stability at the community level. Neither shared equity financing nor shared equity homeownership is a perfect solution, but shared equity homeownership has certain advantages that Florida housing advocates need to consider when choosing the best model for their particular project.

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

27th Annual Legislative and Recent Case Law Update

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

August 3, 2007 THE BREAKERS One South County Road Palm Beach, FL 33480

8:00 a.m. – 8:30 a.m.
Seminar Check-in & Late Registration*

8:30 a.m. – 8:35 a.m.
Opening Remarks

8:35 a.m. – 8:40 a.m.
Section Welcome
Melissa Murphy, Gainesville
RPPTL Section Chair

8:40 a.m. – 8:45 a.m.
Introduction to RPPTL-PAC
Laird A. Lile, Naples
RPPTL-PAC Chair

8:45 a.m. – 9:05 a.m.
Legislative Report & Storm Warning
Brian Felcoski, Coral Gables

9:05 a.m. – 9:20 a.m.
Land Trust Statute – New Revisions
S. Katherine Frazier, Tampa

9:20 a.m. – 9:40 a.m.
Trust Code – New Revisions "We've Only Just Begun… and Already We're Changing the Rules"
Sandra Diamond, Seminole

9:40 a.m. –9:55 a.m.
Title Insurance Update
Patricia Hendricks Jones, Orlando

9:55 a.m. – 10:10 a.m.
Conflict Counsel: Going Public With the New Office of Criminal and Civil Regional Counsel
Honorable Kenneth Bell, Tallahassee

10:10 a.m. – 10:30 a.m.
Break

10:30 a.m. – 10:55 a.m.
Condominium Termination
Margaret Rolando, Miami

10:55 a.m. – 11:20 a.m.
Marrying, Dying or Disabled? We Have a New Law For You…
Charles Ian Nash, Melbourne

11:20 a.m. – 11:45 a.m.
Condominium Insurance or Self-Insurance… Is That the Question?
Peter M. Dunbar, Tallahassee

11:45 a.m. – 12:05 p.m.
DRA2005 – DRAconian Changes in Medicaid Law Every Estate Planner Needs to Know
Charles Robinson, Clearwater

12:05 p.m. – 1:20 p.m.
Lunch (included in registration)

1:20 p.m. – 1:45 p.m.
Condominium Conversion, et. al.
Michael Gelfand, West Palm Beach

1:45 p.m. – 2:05 p.m.
Probate Rules and Law Changes, "Hey, It's Not All About the Trust Code"
Debra Boje, Tampa

2:05 p.m. – 2:25 p.m.
Trust Law Decanting – "It's Nothing to Wine About"
Laird A. Lile, Naples

2:25 p.m. – 2:45 p.m.
Construction Law Update: King Kong Rides Again!
Frederick Dudley, Tallahassee

2:45 p.m. – 3:05 p.m.
BREAK

3:05 p.m. – 3:30 p.m.
Real Property Ad Valorem Taxes
Burt Bruton, Miami

3:30 p.m. – 3:40 p.m.
Electronic Recording Act
Barry Ansbacher, Jacksonville

3:40 p.m. – 4:15 p.m.
Dirt Law Case Update
Patricia Hancock, Maitland

4:15 p.m. – 4:55 p.m.
Update on Probate and Trust Law Cases
David Brennan, Orlando

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Probate Case Summaries

By Leslie A. Peterson, Second Year Law Student, Washington College of Law, American University, Washington, D.C.

Decedent's wife had a constitutionally protected property interest in her husband's remains. For purposes of a section 1983 claim, however, constitutionally protected property interest in decedent's remains ends at point of burial or other lawful disposition. *City of Key West v. Knowles,* 948 So.2d 58 (3d DCA 2006).

Decedent's wife sued the city claiming deprivation of property interest in the decedent's buried remains without due process in violation of 42 U.S.C. § 1983. Decedent's wife claimed that a city cemetery worker placed a casket containing the body of decedent's cousin in the same vault with the decedent's urn, which was already interred in an above-ground burial vault in the city. The dual burial lasted two months before the casket was removed after complaints by decedent's wife. Evidence shows that the dual burial was directed by a cemetery worker on a day when the city's cemetery sexton and superintendent was out of town and was never consulted.

The Third District Court of Appeal held that the trial court should have granted the city's motion for directed verdict on the Section 1983 claim on the basis that Section 1983 imposes liability on any party that subjects a person to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws[.]" 42 U.S.C. § 1983 (2002). "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

In filing a Section 1983 action asserting a deprivation of procedural due process rights under the Fourteenth Amendment, decedent's wife "must first establish the existence of a constitutionally protected property or liberty interest that has been interfered with by the State." *Crocker v. Pleasant*, 778 So. 2d 978, 983 (Fla. 2001). The Third DCA focused on whether decedent's wife had a constitutionally protected property interest in the interred remains of her late husband, sufficient to raise a Section 1983 claim. Looking to state law, the Third DCA found that for purposes of a Section 1983 claim, a constitutionally protected property interest in decedent's remains ends at the point of burial or other lawful disposition. Any claims for events occurring thereafter must be pursued under traditional common law causes of action. Decedent's wife's complaint arose solely from events after the lawful burial of her husband. Hence, there is no constitutionally protected property interest on which she can rest her Section 1983 claim under the facts of this case.

In disputes between private parties regarding the right to determine the disposition of a decedent's remains, the common law is dispositive, and the wishes of the decedent are to be given priority. Moreover, where there is a finding that decedent's last ascertainable wish with respect to the disposition of her remains was to be buried at a location next to her deceased son, the guardian ad litem for decedent's child is directed to handle all respects of handling the remains consistent with the best interest of that child. *Arthur v. Milstein,* 949 So.2d 1163 (4th DCA 2007).

Natural mother and next of kin of decedent sought to quash trial court's order granting decedent's child sole right to determine the disposition of decedent's remains and the related ruling regarding direction of decedent's remains. Although the trial court found that the mother and the guardian ad litem on behalf of the child both qualified as a "legally authorized person" as that term is defined in Section 497.005(37), Section 732.103 directs that the lineal descendants of the decedent have priority. The mother of the decedent appealed and the Fourth DCA expedited relief accordingly.

The court of appeal rejected the trial court's analysis that Sections 497.005(37) and 406.50 control the outcome of this case, as the trial court was not being asked to consider whether a funeral home or medical examiner was liable for its decision with respect to the disposition of a decedent's remains. Rather, the Fourth DCA looked to common law as dispositive to determine whether decedent's child or decedent's mother had priority.

Standard procedure looks to the spouse or the clear and convincing evidence illustrating a decedent's intent to determine the disposition of decedent's body. The Fourth DCA acknowledged that courts vary in their rulings concerning whether a spouse's or testator's wishes are to prevail.

The Fourth DCA noted that even under Section 497.005(37), the first priority is to the wishes of the decedent "when written inter vivos authorizations and directions are provided" and that the remaining list of legally authorized persons are those who are most likely to know and follow those wishes. To the extent Sections 497.005(37) and 406.05(4) provide guidance, the priorities therein could set forth a presumption, rebuttable by clear and convincing evidence of the decedent's intent. Furthermore, the "tipsy coachman" doctrine allows an appellate court to affirm a trial court that "reaches the right result, but for the wrong reasons" so long as "there is any basis which would support the judgment in the record." Since the trial court found decedent's last ascertainable wish with respect to the disposition of her remains was that she be buried in the Bahamas next to her predeceased son, a finding not essentially disputed, coupled with the guardian ad litem's representation and commitment to a burial in the Bahamas, the Fourth DCA concluded that there is no need to remand and affirmed the trial court's holding.

continued, next page

Abuse of discretion to refuse to appoint decedent's son as personal representative of estate although he was named as personal representative in will, and instead, appoint an unrelated attorney as personal representative. Animosity between brothers does not constitute an exceptional circumstance justifying refusal to appoint personal representative named in will and refusal to appoint an otherwise qualified person named as personal representative in will. *Hernandez v. Lopez,* 32 Fla. L. Weekly D249a (5th DCA 2007).

Decedent died, naming one son as personal representative and the other son as alternative personal representative if the first son predeceased decedent. Each son claimed to be the personal representative of their father's estate. Instead of appointing the named son as personal representative, the trial court appointed an unrelated attorney as personal representative. Decedent's first named son and his mother appeal the trial court's order refusing to appoint him as personal representative of his father's estate, claiming abuse of discretion.

The Fifth DCA reviewed the trial court's order to determine if there was an abuse of discretion when it denied the first son's request to be named personal representative of the decedent's estate in an attempt to relieve family tension with regard to the personal representation of the estate. The general rule of law is that trial courts do not have discretion to refuse to appoint the personal representative named by the testator in the will unless that person is disqualified by law. Clearly, the testator's selection of a personal representative should be afforded great deference. Only in exceptional circumstances does a court have the discretion to refuse to appoint a person as personal representative who was named in the decedent's will.

The Fifth DCA held that the sons' dispute does not constitute exceptional circumstances. Exceptional circumstances may include those in which "unforeseen circumstances arise [that] clearly would have affected the testator's decision had he been aware of such circumstances, but the testator had no reasonable opportunity prior to his death to change the designation of the personal representative in his will." Although acrimonious, the said dispute is unremarkable, and no evidence exists to show that the first named son does not meet the statutory criteria to serve as the personal representative, as he is a licensed attorney who has been diligently determining the estate's assets and liabilities. His brother's allegation against him do not support a finding of exceptional circumstances necessary such as lack of character, ability, and experience to remove him from service as personal representative.

The court paid particular attention to the fact that the trial court failed to detail the facts that would support the denial of the first named son's petition for administration. The conflict between the sons does not constitute a sufficient reason to decline the appointment of an otherwise qualified person named as personal representative in the decedent's will. Although the Fifth DCA acknowledged circumstances where the totality of circumstances may permit the court to refuse to appoint the personal representative named in the will, they found no support for such a situation here.

Although production of declaration constituted rebuttable presumption that preneed guardian was entitled to serve as guardian, trial court found that presumption had been overcome and specifically found that it was contrary to ward's best interests to appoint sister as plenary guardian of ward's person and property. *Miller v. Goodell*, 32 Fla. L. Weekly D1084a (4th DCA 2007).

A daughter of the ward filed a petition seeking to have her mother declared a ward by the court and to be appointed as the ward's guardian. After the trial court appointed a temporary guardian, the ward's sister filed a petition seeking to be appointed guardian. The trial court denied the sister's petition and appointed the temporary guardian's attorney as plenary guardian of the person and property. The sister appealed the appointment, claiming that the trial court did not have personal jurisdiction over the ward, that it violated her right to due process, and that it erred when it did not honor the ward's preneed guardianship declaration.

Personal jurisdiction refers to whether a particular court has legal authority over the respondent or defendant. Personal jurisdiction is a personal right, and a respondent may consent to personal jurisdiction. The record reflects that both the ward and her temporary guardian consented to the jurisdiction of the court.

Regarding the trial court's refusal to appoint the ward's sister as plenary guardian despite her being named in the preneed guardian declaration, the sister contended that the standard for review on the issues is de novo. However, the appellate courts have consistently held the standard of review in guardianship proceedings is abuse of discretion. This discretion is abused when no reasonable person would take the view adopted by the trial court.

The Fourth DCA found that the ward's sister failed to establish that the trial court abused its discretion. Instead, the Fourth DCA upheld the trial court's refusal to appoint the sister as plenary guardian despite her designation in the preneed guardian declaration. First, both the ward and her temporary guardian consented to the trial court's jurisdiction. Second, the trial judge considered the evidence presented but found the rebuttable presumption of the appointment of the designated preneed guardian had been overcome. Thus, the Fourth DCA agreed with the trial court's finding that it was contrary to the ward's best interests to appoint the sister as plenary guardian of the person and property.

Competing claims of right to be appointed personal representative of a deceased minor's estate by man who was declared decedent's father by adjudication of paternity and judgment requiring child support and man who, according to posthumous DNA testing, was likely decedent's true biological father. *Glover v. Miller,* 947 So.2d 1254 (4th DCA 2006).

Decedent was one of twin boys born out of wedlock. He and his brother carried the name of their mother's boyfriend, Miller, with whom she continued to have a relationship over the course of 14 years. Miller believed he was the twins' natural father and served as the father figure in decedent's life, even after Miller left decedent's mother. After failing to answer a petition for a paternity action by the Department of Revenue, the court adjudicated Miller to be the decedent's

father and imposed a duty of support on him which he paid through deductions from his employment compensation.

Another man with whom decedent's mother was romantically involved, Glover, claimed decedent's mother had informed him that he was the biological father of the twins soon after their birth. However, he had no relationship with the decedent or his brother. Glover claims he only made his presence known to the twins at their mother's funeral.

Upon decedent's tragic death at age 16, Miller filed a petition for administration requesting his appointment as personal representative of the estate as decedent's closest relative. Glover filed his own petition for administration, alleging that he was decedent's biological father and requested paternity testing which confirmed that he was in fact decedent's biological father.

Faced with two claims of paternity and petitions for administration of decedent's estate, the trial court held that Glover was not entitled to appointment because Miller had a preexisting judgment of paternity. Glover had not moved to set aside that final judgment and had no right to appointment as administrator of the estate. Glover appealed.

Section 733.301(1)(b) governs the preference in appointment of personal representatives. If more than one person applies, the court may select the one best qualified. The term "heirs" is defined as "those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent." If the decedent has no spouse or lineal descendants, his heirs by intestate succession are his parents or the survivor of them. Further, where children are adopted or born out of wedlock, natural kinship is not necessarily recognized for purposes of establishing a decedent's heirs and thus intestate succession. Section 732.108(2)(b) provides that for the purposes of intestate succession, the intestate is a lineal descendent of his father when the paternity of the father is established by an adjudication before or after the death of the father. Under Section 732.101(2), decedent's date of death is the event vesting the heirs' rights to intestate property.

At the date of decedent's death, Glover was not considered the decedent's father for purposes of intestate succession, because he never married the decedent's mother, was never adjudicated to be his father, and never acknowledged in writing that he was the decedent's father. In contrast, Miller was decedent's father for purposes of intestate succession because he was adjudicated to be decedent's father. Thus, Miller's rights vested on decedent's death because he is decedent's father by a paternity judgment. Decedent was a lineal descendant of Miller within the meaning of Section 732.108(2)(b), so he is an heir for purposes of Section 733.301(1)(b)3.

Although it is possible to establish paternity in a probate proceeding, *see In re Estate of Smith*, 685 So. 2d 1206, 1208 (Fla. 1996), where a Chapter 742 paternity action had previously been brought, any resulting determination of paternity has the effect of determining the issue for intestate succession. Section 732.108(2)(b) does not create a separate independent cause of action to establish paternity. It merely explains the effect of an adjudication of paternity. Therefore, unless the adjudication of Miller's paternity is vacated, that adjudication must be given the effect of establishing Miller as the decedent's father for the purposes of intestate succession.

The Fourth DCA held that the legal father has substantial rights (in this case vested rights) which cannot be lightly dismissed, even by the discovery that the legal father is not the biological father. In fact, the Florida Supreme Court has held that the mere fact that biological testing shows that a man other than a legal father is the biological father of the child *without more* does not require the granting of a paternity petition. Because any determination of paternity will involve many other parties and have effects more far reaching than a mere adjudication of the biological connection between the decedent and Glover, the Fourth DCA was not convinced that such a determination can and should be made as part of the probate proceedings where the only issue to be determined is intestate succession. The Fourth DCA firmly held that a child cannot have two legally recognized fathers. Moreover, there is an existing *adjudication* of paternity and no need to *establish* paternity for the decedent. He has a father, Miller, who is his heir at law. Glover is not his heir and thus is not entitled to appointment as administrator.

FAR/BAR Committee Working on Contract

By Bill Haley, Esq., Brannon, Brown, Haley, & Bullock, P.A., Lake City, FL
Submitted on behalf of the FAR/BAR Committee

The Section's FAR/BAR Committee has held numerous meetings over the last 2½ years to revise the Contract. The new FAR/BAR revised Contract is scheduled to be printed in July 2007. A major change has been a revision of the finance clause, with other provisions bringing the Contract up to date. We will have a report in *ActionLine* of the changes in the Contract.

An exciting issue has come up with the FAR/BAR Committee in that the President of FAR has asked that the FAR/BAR Committee get with the committee that drafts the FAR contract to see if we could combine the two and have one contract. As of the first of May 2007, the subcommittee of the FAR/BAR Committee and of the FAR drafting committee have met for two full days to see what can be done on combining the two contracts. Although it is a ways from conclusion of the combination of the contracts, those on the subcommittee are optimistic that a contract can be done that will, if not make one contract out of the two for residential sales only, at least combine the clauses so there will not be a difference in most of the clauses of the contract.

Real Estate Case Summaries

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

Party exercising practical dominion over parcel on which his mobile home rests may apply for real property tax treatment. Owner of security interest in mobile home affixed to realty, to receive notice of any tax sale, must record lien thereon or request notice from Tax Collector. Listing security interest on certificate of title is insufficient.

Greentree Servicing, LLC v. Decanio, 948 So.2d 1033 (Fla. 5th DCA 2007).

This appeal concerned the effect of a tax deed on a security interest in a mobile home that is placed on the real property that was the subject of the deed. Greentree had a security interest in the mobile home. Grossman purchased the tax deed of the parcel on which the mobile home was affixed. The court decided in favor of Grossman because the mobile home had become a part of the real property, and because Greentree failed to take the available steps to protect its interest.

Greentree's predecessor in interest lent Decanio and Buran funds to purchase a mobile home. As security for its loan, Greentree received back an installment loan contract and security agreement. Greentree's interest was thereafter noted as a first lien on the certificate of title issued by the Department of Motor Vehicles to Decanio and Buran. The mobile home was placed on a parcel of land purchased by Decanio, without Buran, a few months before he received the loan from Greentree. The mobile home was connected to normal and usual utilities and was tied down. Decanio applied for and was granted homestead status on his property pursuant to Section 196.031, Florida Statutes, strongly suggesting that the mobile home was to be treated as part of the realty. In addition, the license plate for the mobile home was removed, and permanent RP stickers were issued and attached to the improvement. Buran subsequently died.

Because real property taxes were not paid on the Decanio parcel, tax sale certificates were issued and sold to Grossman in accordance with Section 197.432, Florida Statutes. Grossman paid $38,200 to the county and acquired the title to the parcel by tax deed. Greentree brought suit against Decanio for replevin of the mobile home on which it held a lien. Grossman learned of the suit and was granted authority to intervene by the court. He cross-claimed for declaratory relief against Greentree and to seek to quiet his title in the parcel. Specifically, Grossman sought to be declared the fee simple owner of the land, as improved by the mobile home, and sought to cancel the Greentree lien as a cloud on his title. The trial court granted summary judgment in favor of Grossman, holding that the mobile home had become affixed to the land and was part of the realty. Although Greentree argued that it had not received proper notice prior to issuance of the tax deed, the trial court rejected its position, finding that because it had not taken the statutory steps to protect itself, it was not entitled to notice of the issuance of the deed. The District Court of Appeal affirmed.

The legislature has provided guidance on how mobile homes are to be taxed. Sections 193.075(1) and (2), Florida Statutes, state that a mobile home is taxed as real property if the owner of the mobile home also owns the land on which the mobile home is permanently affixed (i.e. if it is tied down and connected to the normal and usual utilities). "A mobile home that is taxed as real property shall be issued an "RP" series sticker." Conversely, a mobile home that is not taxed as real property has a current license plate properly affixed. A mobile home without a current license plate properly affixed is presumed to be tangible personal property.

Section 320.015, Florida Statutes, also addresses whether a mobile home is to be considered real or personal property and does so in language similar to that found in Section 193.075. Section 320.015 states that a mobile home, regardless of its actual use, is subject only to a license tax if classified and taxed as real property. Any mobile home classified by a seller or a lender as personal property at the time a security interest was granted therein to secure an obligation shall continue to be so classified for all purposes relating to the loan and security interest, at least as long as any part of such obligation remains outstanding. Classification of a mobile home as personal property by a seller or a lender shall not prohibit the owner from having the mobile home classified and taxed as real property.

A tax deed issued with respect to a parcel of land on which was located a mobile home extinguished an otherwise valid security interest held by a creditor. Once the owner permanently affixed the mobile home to his lot in accordance with Section 320.015, it became subject to real property tax treatment. That applies, however, where the owner of the land and the owner of the mobile home were the same individual. The one question remaining with respect to the issue of whether the mobile home was to be treated as part of the real estate for real property tax purposes in the present case was whether the owner of the mobile home was also the owner of the land on which the mobile home was permanently affixed. Both pertinent statutes make reference to this requirement. Decanio owned the land individually, but Decanio and the now deceased Buran owned the mobile home. The court concluded, however, that the ownership requirements of the statutes were nevertheless satisfied.

In interpreting these statutory provisions, the concept of "owner" is not to be so narrowly defined as to include

only legal titleholders. For example, mobile homes could be taxed as real property because the homes were permanently affixed to the land and each member of an "ownership club" has practical dominion over his designated site that is essentially equivalent to ownership.

Here, Decanio was an owner of the mobile home and was the sole owner of the real estate upon which it was affixed. He had at the very least practical dominion over the land and mobile home. Decanio could choose to have the mobile home treated as part of the real estate and the fact that he and Buran gave a security interest in the mobile home to Greentree would not prohibit him from having the mobile home classified and taxed as real property. Thus, the parcel, as improved, was properly classified and taxed as real property, and that it was, therefore, subject to the tax certificate and tax deed procedures articulated in Chapter 193.

Greentree was not entitled to notice of the tax deed process. Greentree asserts that it was denied due process because it was not given notice of the tax deed sale, even though it had a valid and reasonably identifiable security interest in the mobile home. Greentree centers its argument on Section 197.522, Florida Statutes, but *Greentree* did not take the required statutory steps to put the tax assessor or clerk on notice of its interest, and these county officials were not required to use exhaustive measures to find any and all interested parties prior to a tax sale.

The legislature has the authority to determine the extent and character of notice required to be provided prior to the sale of land for nonpayment of taxes. *Greentree* was required to be notified of the tax sale if it fit within one of the lienholder categories listed in section 197.502(4). Although Greentree was listed as the first lienholder on the certificate of title to the mobile home, it never recorded its lien in accordance with subsections (4)(b) or (g) of the statute, nor requested notice of a tax sale in accordance with subsection (4)(e). Although Greentree argued that it should have received notice because its interest was readily ascertainable by a search of the records of the Department of Motor Vehicles, the clerk is not required to search all public records available to determine the actual status of ownership. The clerk did exactly what was required by the statute. As Greentree failed to take the steps necessary for it to obtain notice of the statutory issuance of a tax deed, its assertion of a due process violation was ineffective. Compare *Rosado v. Vosilla*, 909 So. 2d 505 (Fla. 5th DCA 2005), affirmed, 944 So. 2d 289 (Fla. 2006) (relief granted where the failure of the owners of real property to receive the notice of sale was entirely the fault of the taxing agencies) [annotated in previous issues].

Year of improvements' substantial completion is base year of occupancy when interpreting build-to-suit lease.

Wellington Realty Co. Limited Partnership v. ColorAll Technologies International, Inc., No. 4D06-1597 (Fla. 4th DCA February 21, 2007).

On March 24, 2000, ColorAll and Wellington executed a letter of understanding stating that they intended to enter into a build-to-suit lease, whereby Wellington would construct a new building for ColorAll to occupy. The letter of understanding stated, in pertinent part, that ColorAll would pay all increases in real estate taxes after the "base year of occupancy." About four months later, the parties executed the actual lease that expressly incorporated the letter of understanding. In November 2002, Wellington, under the impression that the base year of occupancy was 2001 and that ColorAll therefore owed it the increase in real estate taxes from 2001 to 2002, placed ColorAll on notice that it was to pay that amount. The trial court found, at the summary-judgment hearing, that the "base year of occupancy" was not the same as the date of first possession and concluded that the "base year of occupancy" was 2002.

Wellington argued on appeal that the trial court erred, because the lease unambiguously provided that the "base year of occupancy" was that in which ColorAll first took possession--2001. A grant of summary judgment based upon construction of a written instrument is reviewed de novo. Where the language of a contract is clear and unambiguous, the court can give to it no meaning other than that expressed. In this appeal, both parties agreed that there were no genuine issues of material fact regarding the correct "base year of occupancy." Both Wellington and ColorAll were also of the same opinion that there are no ambiguities in the language of the lease. The trial court, however, was wrong.

Prior appellate reasoning in build-to-suit lease cases involved parcels that had been unimproved at the beginning of the lease and also emphasized that the parties did not contract to lease a vacant parcel of real property; they contracted for the lease of a structure situated on improved real estate. Until the landlord completed the structure, no basis existed for computation of the ad valorem taxes on the demised property. Therefore, to use ad valorem taxes assessed on the unimproved property in the year prior to the placement of the demised premises on the tax rolls would be inconsistent and illogical.

The improvements in this case, however, were "substantially completed" in 2001, prior to ColorAll taking possession, and, therefore, the parcel was assessed for taxing purposes on January 1, 2002 based on the 2001 improvements. The completeness of the property as of January 1, 2002 was not only evidenced by the large increase in real estate taxes from 2001 to 2002, but also by the fact that ColorAll had begun using the facilities on December 20, 2001 and had paid a pro-rated rent for the remaining eleven days of that year, during which time it occupied and presumably utilized the buildings for business purposes. Furthermore, a city building official awarded Wellington a temporary certificate of occupancy on November 19, 2001. Perhaps even more telling of the property's suitability for occupancy in 2001 was the punch list drafted by ColorAll on November 27, 2001, in which ColorAll walked through the improved property. Notably, the punch list listed only minor problems such as windows and floors that needed cleaning and walls that required repainting. Therefore, the property at issue in this case was substantially completed during the year of first possession (2001), thus making that year the proper basis for computation of ad valorem taxes.

Parcel held by testatrix for life in irrevocable trust is homestead exempt from claims of estate creditors, even though testatrix directed that parcel be sold, if necessary, to pay creditors.

Cutler v. Cutler, No. 3D04-3070 (Fla. 3rd DCA February 28, 2007).

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Real Property Case Summaries

from preceding page

The question presented in this case was whether a testatrix' specific devise of protected homestead under the "inuring clause" of Florida's homestead law, Article X, Section 4(b) of the Florida Constitution, trumps her residuary direction that the property participate in the satisfaction of estate debts, if necessary, to pay those expenses. The less difficult question was whether the fact that legal title to the homestead property lay in an irrevocable trust at the time of the decedent's death would moot any homestead-related arguments. In this case, the specific devise was protected homestead property not subject to invasion for the payment of estate expenses. There were insufficient funds in the residue of the estate to pay all of the testatrix' creditors. Edward, a beneficiary, contended that, in accordance with his mother's wishes, the two devised parcels, one homestead, one not, must abate "equally" to satisfy the remaining creditors. Cynthia, another beneficiary, argued the devise to her was constitutionally protected from such an invasion.

There are three kinds of homestead with one purpose: preserving the family home for its owner and heirs. The first kind, unrelated to this case, provides homestead with an exemption from taxes. The second protects homestead from forced sale by creditors. The third delineates the restrictions a homestead owner faces when attempting to alienate or devise homestead property. This case involved the second of these protections. The specific homestead protection at issue in this case is protection against forced transfer for use by an estate after the death of a decedent. To clearly distinguish this particular protection in the Florida Probate Code from other forms of homestead, the Legislature has denominated it as "protected homestead." See § 731.201 (29), Fla. Stat.

Edward contested Cynthia's claim that her mother's residence was "protected homestead" under Article X, Section 4(b), because, at the time of her death, title resided in an irrevocable trust. Edward further contended that even if the property was homestead in his mother when she died, nevertheless her residuary direction that the homestead abate equally with a non-homestead parcel, if necessary, to pay estate expenses, controlled.

For Cynthia to prevail on her claim that the devise of her mother's residence to her was "protected homestead" exempt from forced sale for the payment of creditors' claims after her mother's death, she would have to demonstrate that: (1) the property in question had been devised by the decedent to her; (2) she was an heir within the meaning of the constitutional provision; and (3) at the time of the testatrix's death, the residence had been homestead property of the testatrix.

Although the Legislature has labeled homestead in the hands of a qualified devisee under the "inuring clause" of Article X, Section 4(b) as "protected homestead," neither the Legislature nor the Florida Constitution has provided a definition of what is homestead property for purposes of Florida's homestead law. From the text of the constitutional provision and applicable case law interpreting it, however, the following requirements must be satisfied for property to be determined as homestead property under Florida law:

1. The property must be owned by a "natural person."
2. The person claiming the exemption must be a Florida resident who establishes that she made, or intended to make, the real property her permanent "residence."
3. The person claiming the exemption must establish that she is the "owner" of the property.
4. The property claimed as the homestead must satisfy the "size and contiguity" requirements of the constitution.

Although the Florida Constitution places size limits on real property that can qualify for homestead status, it does not limit the types of estates eligible for homestead status. A life estate, the property interest concededly held by the testatrix at the time of her death, has been expressly found to be among the property interests eligible for homestead status. Because the testatrix both had a life estate in the residence property and occupied it continuously before her

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death pursuant to the right provided to her in the irrevocable land trust--and had, indeed, resided on the property for many years prior thereto--she was an "owner" of her residence for purposes of devising the homestead protection on that residence on her death.

Despite this, Edward further contended that the property was not homestead property at the time of his mother's death, because legal title was held during her lifetime in an irrevocable trust. The court also rejected this contention: district courts of appeal consistently have found that properties held in trust can be impressed, legally speaking, with the character of homestead. Although prior cases involved revocable trusts, the court here found no reason to limit the holdings to revocable trusts. Accordingly, the court found it immaterial that legal title to the residence in this case was held in an irrevocable trust during the testatrix' lifetime. The conveyance to Cynthia fulfills all of the legal requirements entitling her to claim that it is "protected homestead."

Having concluded that the testatrix' residence is "protected homestead," the court then addressed Edward's contention that, even in the face of this finding, it was legally required to accede to his mother's wish that both parcels abate equally, if necessary, to pay her final expenses. The court again disagreed.

While it is a cardinal rule of testamentary construction that the primary objective in construing a will is the intent of the testatrix, it is likewise an elementary principle of law that a person cannot dispose of her property as she pleases if contrary to law or public policy. Here, the court was confronted with two specific devises of property, that, in the general residuary clause of her will, the testatrix directed should be contingently available to her personal representative, if necessary, to pay the expenses of her estate. In the case of the specific devise of the vacant land to Edward, there is no question but that the testatrix had the legal right to subject this devise to the debts of the estate if she so desired. The devise to Cynthia, however, was followed by a constitutional exemption from forced sale of her devise to satisfy the expenses of the decedent's estate. This constitutionally created benefit is personal to Cynthia and hers to assert.

Upon the death of a decedent, protected homestead passes outside the estate. Furthermore, creditors in this state have been on notice for many years that the plain language of the constitution protects homestead property from most creditors and is construed liberally to achieve that purpose whatever may be the equities of the individual circumstance. Similarly, to the extent that a rule of testamentary construction may be deemed here to conflict with a constitutionally afforded benefit, the rule of testamentary construction must yield.

DISSENT: When there is no surviving spouse or minor child, as in this case, the decedent's homestead may be freely transferred, gifted, or devised, without limitation.

Use of way with owner's tacit consent insufficient to establish prescriptive easement.

Dan v. BSJ Realty, LLC, No. 3D05-438 (Fla. 3rd DCA March 28, 2007).

The parties owned abutting commercial real estate property comprising a warehouse development. The dispute concerns a private roadway located in the rear of the warehouses that was used for over thirty years by the abutting warehouse owners and tenants, including the parties and their predecessors in title, to gain access to the rear of their respective properties. Sometime in 2002, BSJ built a fence and gate at the rear of its property, thereby restricting the plaintiffs' use of the private roadway to access the rear of their warehouses. Prior to that time, the plaintiffs and their predecessors in title used the private roadway across the defendants' property without any objection and with no express permission from the lawful owners.

The plaintiffs filed suit against the defendants asserting that they were entitled to a prescriptive easement over the disputed strip of land, based upon their and their predecessors' continuous use of the private roadway for the prescriptive period. Following a bench trial, the trial court entered a final judgment in favor of the defendants, finding that the plaintiffs failed to prove all the elements necessary for a prescriptive easement, specifically, that the plaintiffs failed to establish that their predecessors' use during the prescriptive period was adverse, under claim of right, and inconsistent with the owners' use and enjoyment. The court of appeal agreed.

In order to establish a prescriptive easement, the claimant thereof must, by clear and positive proof, prove (1) actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of twenty years; (2) that during the whole prescribed period the use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use is imputed to the owner; (3) that the use related to a certain limited and defined area of land or, if for a right-of-way, the use was of a definite route with a reasonably certain line and width and termini; and (4) that during the whole prescribed period the use has been adverse to the lawful owner; that is, (a) the use has been made without the permission of the owner and under some claim of right other than permission from the owner, (b) the use has been either exclusive of the owner or inconsistent with the rights of the owner of the land to its use and enjoyment, and (c) the use has been such that, during the whole prescribed period, the owner had a cause of action against the user for the use being made.

Because the law does not favor the acquisition of prescriptive rights, use or possession of another's land is presumed to be subordinate to the owner's title and with the owner's permission. Thus, the burden is on the claimant to prove that such use or possession is adverse to the true owner. Further, all doubts as to the adverse character of a claimant's pattern of use must be resolved in favor of the lawful owner of the property.

The plaintiffs and their predecessors in title continuously used the private roadway for the required prescriptive period of twenty years. Such use was of a definite route with a reasonably certain line, width, and termini. The dispute centers on whether the plaintiffs' predecessors in title used the private roadway in a manner adverse to the lawful owners. The plaintiffs, however, failed to establish that their predecessors' use during the prescriptive period was adverse, under claim of right, and inconsistent with the lawful owners' use and enjoyment.

The defendants' predecessors allowed the plaintiffs and their predecessors to freely use the private roadway and both the defendants' predecessors and the plaintiffs' predecessors used the private roadway for the same common

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purpose--to access the rear of their respective warehouses. This use in common with the owner is presumed to be in subordination of the owner's title and with his permission. Further, there was no evidence indicating that the defendants' predecessors attempted to restrict access to the private roadway, or that the plaintiffs or their predecessors ever asked for or received permission to use the private roadway. The use of the private roadway by the plaintiffs and their predecessors in title was consistent with the lawful owners' use and enjoyment of the private roadway. Consequently, the plaintiffs failed to overcome the strong presumption in favor of permissive use and accordingly, the court of appeal affirmed the trial court's finding of no prescriptive easement.

Presence of relevant title issue requires hearing to determine whether eviction tenant must deposit rent monies into court registry.

Minalla v. Equinamics Corp., No. 3D06-2880 (Fla. 3rd DCA March 21, 2007).

Ordinarily, the identity of the owner or landlord of the leased property is readily apparent. Here, however, Minalla alleged she had been tricked into conveying her home to Equinamics in a transaction that was impressed with characteristics of a sale, but in reality was a disguised loan secured by her home. If this were accurate, then Equinamics would not be an owner of Minalla's residence, but rather a lender who would have to proceed to oust Minalla via a foreclosure action.

Equinamics was the record owner of the residence under an agreement executed between the parties. Minalla executed a special warranty deed conveying her residence to Equinamics, in return for a one-year lease back of the residence to Minalla with an option for her to re-purchase it later. As part of the transaction, Minalla received $10,000 in cash. Equinamics reduced Minalla's monthly lease payments by half to meet her economic needs. She also executed an Assignment of Escrow, Bill of Sale, and Name Affidavit in connection with the transaction. There was, however, no settlement statement, title insurance, or tax or insurance proration. The first mortgage on the property remained undisturbed.

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A month later, Equinamics borrowed $65,000 on the residence and paid the first mortgage on the property through a combination of those funds and Minalla's reduced payments, until Minalla stopped the payments. Since that time, Minalla made the payments on the first mortgage to stave off foreclosure by the first mortgagee. In addition, Minalla maintained the interior and exterior of her home, the structure, the electrical, plumbing, as well as all major appliances. By her assessment, Equinamics had not reached into its own pocket to pay a single debt or expense relating to the property since it obtained title. Minalla apparently could not borrow on the equity in the residence herself, because of creditworthiness issues of her own.

Minalla asserted that Equinamics impressed the transaction upon her as a result of a business practice by which it surfs the public real estate records via Internet, locates distressed residential property owners at risk of losing their homes--preferably ones with equity unreachable by the owner--and offers them interim assistance in the form of transactions of this nature. In this case, Equinamics contacted Minalla approximately sixty days after she and the first mortgagee entered into a stipulation of record in a pending foreclosure action brought against her by the first mortgagee whereby she waived all defenses, consented to amounts due, and was given six months to refinance and pay off the entire mortgage, failing which the mortgagee could obtain a foreclosure judgment against her ex parte upon the filing of an affidavit of default. In this predicament, Minalla averred that Equinamics had been her only realistic option.

Based upon the facts of this case, it was apparent to the court that the transaction by which Equinamics received title to the Minalla residence was not an ordinary real estate transaction. Likewise, the circumstances under which Minalla continued to remain on the property after she executed the special warranty deed to Equimanics was not possessed of the trappings of a usual landlord-tenant relationship.

While not seriously disputing the proposition that the substance of a transaction controls over form when considering the legal effect of a real estate transaction or any other business transaction, Equinamics nevertheless insisted that as holder of record title to the property, it was entitled to require Minalla to pay rent into the court registry so long as she continued to live on the property. Like the trial court, Equinamics said this was necessary to maintain the status quo, until the issue of title finally was resolved. In this argument, the court of appeal disagreed.

Although a landlord generally is entitled to require a tenant in possession to deposit rents into the court registry during the course of any landlord-tenant dispute where the tenant interposes any defense other than payment, the rule yields where title is in issue. There was a factual dispute in this case concerning who was the true owner of the property. Because the trial court's order requiring payments by Minalla of money into the registry was made without conducting an evidentiary hearing regarding the nature of the transaction and who was the true owner of the residence, the court erred in imposing the payment requirement upon her.

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 who 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 courses. Members have access to a wealth of information on the RPPTL Section website, 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.

April 12 – June 14, 2007
Video Replays of "Eviction Nuts & Bolts" CLE (Multiple Locations)
Course Registration: (850) 561-5831

June 14 – 17, 2007
Attorney/Trust Officer Liaison Conference CLE -- The Breakers, Palm Beach
Hotel Reservations: (561) 655-6611

August 2 – 5, 2007
Executive Council Meeting & Legislative Update – The Breakers, Palm Beach

Estate and Trust Tax Planning Committee Meeting--Discussion on QPRT and a 98-year lease

Asset Preservation Committee Meeting--Discussion on Domestic Asset Preservation proposal (based upon Utah model)

Insurance Committee Meeting--Demystifying insurance

Hotel Reservations: (561) 655-6611

August 3, 2007
27th Annual Legislative & Recent Case Law Update – The Breakers, Palm Beach
Hotel Reservations: (561) 655-6611

September 26 and 27, 2007
Probate Law Committee Seminar--Assets in the Probate Estate Because of Good Planning and Because of No Planning – Location TBA

October 17 – 21, 2007
Annual Out-of-State Executive Council Meeting – IRELAND!!!
E-mail reservation request to Jill O'Hare, Director of Sales & Marketing at jill.ohare@ritzcarlton.com
Hotel Reservations: 011 353 (1) 274 01 01

For the most up-to-date information on Section activities, visit the Section website (www.rpptl.org) or The Florida Bar's website (www.floridabar.org).

ACTIONLINE BULLETIN BOARD

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.

LIMERICK CONTEST:

Submit a Section-related limerick to Melissam@salterlaw.net by July 15. Winner announced at August 4, 2007 Executive Council meeting.

There are now RPPTL-Affilliated law student groups at 9 of Florida's 10 law schools. (All except St. Thomas.)

— Alan B. Fields, Esq.

DEADLINE

for submissions for the next issue of ActionLine is

July 31, 2007.

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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