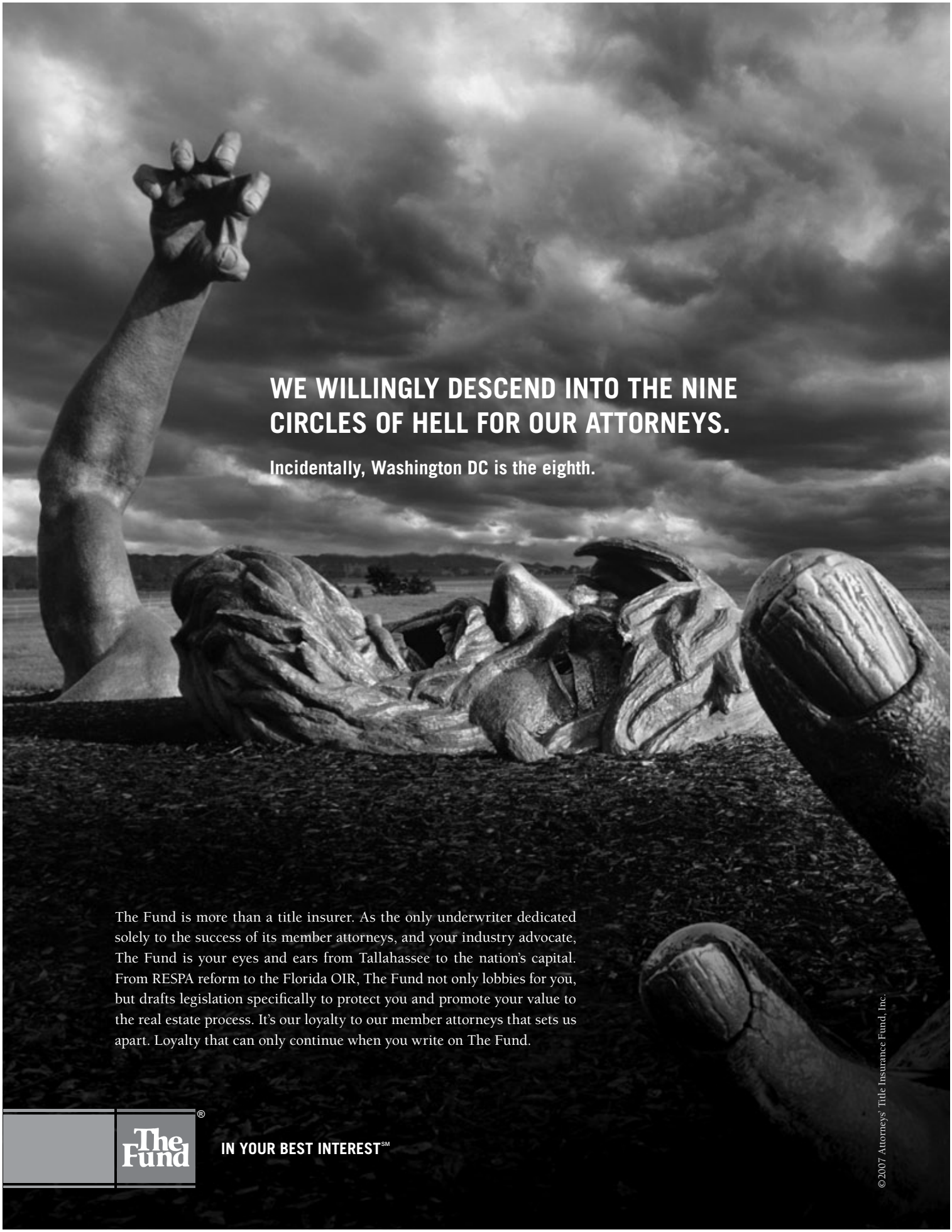


ActionLine

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

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Winter 2007

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Mentoring is Meaningful



By Melissa Jay Murphy
Section Chair
2007 - 2008

Chair's Column

As Chair of the RPPTL Section, I get phone calls of all types. They include lay people who have a legal problem, attorneys who have questions about the Section's programs, and attorneys who need some sort of assistance on a case. I usually refer lay people to an attorney in their geographic area, but the attorneys are a bit more of a challenge. Some of the most recent callers were young lawyers that just needed a bit of pointing in the right direction.

I have also had some recent experiences with a young lawyer in my circuit who, in my opinion, needs help with understanding what it means to "practice with professionalism."

All of this has caused me to really think about mentoring. There is such a need out there for experienced lawyers to share their knowledge of the law and real world. Just about every legal publication that you pick up has an article or two about mentoring. It's clearly something that is getting a lot of attention, and the RPPTL Section needs to play a role in the solution.

We do not have to re-create the wheel. Many other organizations have some sort of mentoring program in place. The Young Lawyer's Division has a program, "SCOPE" (Seek Counsel Of Professional Experience), that offers less experienced attorneys access to a more experienced attorney. This program has been around since 1992. I spoke with Nichole Murphy at The Florida Bar (she administers the program) and she explained the process. An attorney seeking help calls the Bar and Ms. Murphy gives them the names and phone numbers of two attorneys in their geographic area that have volunteered for the service. She says that the expectation is that the experienced attorney will spend approximately 30 minutes helping the caller. The volunteer attorneys must apply in order to be on "the list" and must have been in practice at least five years. There are close to 400 attorneys who have volunteered for the service, and Ms. Murphy says she gets 5 to 10 calls per DAY from people who need help. (If you are interested in volunteering, please email her at nmurphy@flabar.org.)

The Florida Bar has established a Joint Committee on Mentoring, a combined effort of the Commission on Professionalism, The Bar and the Standing Committee on Professionalism. This committee is researching ways in which The Florida Bar can address the needs of new lawyers through some sort of mentoring program.

The RPPTL Section is also tackling the issue of mentoring. Our own Mentoring Committee (Steve Hearn, Jerry Aron and Guy Emerich) is experimenting with a pilot program where we are pairing new lawyers identified through the recent series of seminars produced by the Diversity Committee with experienced practitioners. The hope is that this pilot program will work out all of the "bugs" and we can launch a full mentoring program in the near term.

I recently played a mentoring role with a young man who clerked in our office his third year of law school. He helped us out significantly during the summer when we had a large number of real estate transactions. He certainly learned a lot about the real world of mortgage brokers, real estate brokers, buyers and sellers! He continued to work with us after graduating and passing the bar and has moved on as an associate with a large firm in Tampa. During his time here, we would often spend time just talking about the practice of law, the challenges that it presents, and anything else that came to mind. When he left, he told me how much he appreciated the experience that he gained while in our office and the time I spent chatting with him. It was a nice feeling. I doubt I said anything that changed his life, but I think the fact that I would just take time with him was meaningful.

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About the Cover: While not the "official" state flower, orchids thrive and grow aplenty thoughout the state. RPPTL Section officer, John Neukamm, captured the beauty of a winter white bloom.

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Summer 2008	April 30, 2008
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For GENERAL INQUIRIES about the RPPTL Section, contact Carmalita Hawkins at The Florida Bar at 800-342-8060 extension 5619, or at *chawkins@flabar.org*. Carmalita 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.

Homesteads and Revocable Trusts: Another Nail in the *Bosonetto* Coffin?

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

In a recent Federal bankruptcy case, the debtors, John L. Cocke and Judy D. Cocke, filed their Chapter 7 bankruptcy petition on November 22, 2004. The debtors claimed as exempt the real property located at 6652 Cabello Drive, Jacksonville, Florida (the "Residence"). The debtors, along with their granddaughter, resided full-time at the Residence. The ownership of the Residence had been deeded to a trust which was created on July 30, 2003. The debtors and their minor granddaughter were the grantors of the trust, as well as the beneficiaries of the trust. Moreover, it appeared that the trust was a land trust, rather than a typical revocable *inter vivos* trust. One of the debtors, Judy D. Cocke, was the trustee. All three beneficiaries (the debtors and their minor granddaughter) had to act in concert to revoke the trust. The debtors were the court appointed guardians of their minor granddaughter.

At trial, U.S. Bankruptcy Court Judge George L. Proctor ruled that the debtors' interest in the Residence was an asset of the bankruptcy estate and not exempt from the claims of creditors under the provisions of Article X, §4(a) of the Florida Constitution. Judge Proctor based his holding that the Residence was not exempt on the language of the trust agreement, which stated that the debtors' interest in the trust was personal property, rather than real property. Thus, Judge Proctor appeared to have departed from his holding in *Bosonetto* which had denied the exemption to Mrs. Bosonetto merely because legal title to Mrs. Bonsonetto's residence was owned by a trust and not by a natural person. *See In re Bosonetto*, 271 B.R. 403 (Bankr. M.D. Fla. 2001).

In the appeal from the trial court ruling issued by Judge Proctor, U.S. District Court Judge Virginia M. Hernandez Covington issued an Order on March 14, 2007, reversing the order entered in the bankruptcy court proceeding by Judge Proctor and remanded the case to the bankruptcy court for further proceedings consistent with Judge Covington's opinion. *In re John L. Cocke and Judy D. Cocke*, Case No. 3:06-cv-106-J-33MMH (D.C. M.D. Fla. March 14, 2007). Judge Covington, *inter alia*, held that *Bosonetto* is not supported by Florida law. Rather, the bankruptcy cases decided after *Bosonetto* regarding the applicability of what is commonly referred to as the homestead exemption provided pursuant to the provisions of Article X, §4(a) of the Florida Constitution, i.e., *In Re: Merry Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006) and *In Re: Mary L. Edwards*, 356 B.R. 807 (Bankr. M.D. Fla. 2006), are reflective of applicable Florida law pertaining to the availability of the homestead exemption from forced sale under process of any court relative to the homestead real property (the "Homestead") of a Florida resident.

On remand from the U.S. District Court, the principal objection of the Trustee in bankruptcy was that the debtors did not ***alone*** possess the right to revoke the trust, thus, the debtors did not possess a sufficient interest in the Residence for it to be considered the Homestead of the debtors. The debtors countered that they retained the right to possess and use the Residence to the exclusion of all others, and they, in fact, have resided at the Residence for several years.

Judge Proctor, on remand, issued his order finding that the debtors satisfied the three requirements needed to avail themselves of the homestead exemption from forced sale provided in the Florida Constitution, notwithstanding the fact that legal title to the homestead was held in a revocable inter vivos trust, which appears to have been structured as what is commonly referred to as a land trust.

Judge Proctor, on remand, issued his order finding that the debtors, John L. Cocke and Judy D. Cocke, satisfied the three requirements needed to avail themselves of the homestead exemption from forced sale provided in Article X, §4(a) of the Florida Constitution, notwithstanding the fact that legal title to the Homestead was held in a revocable *inter vivos* trust, which appears to have been structured as what is commonly referred to as a land trust.

Judge Proctor followed the mandate of Judge Covington and examined whether the debtors have:

1. a legal or equitable interest in the Residence which provides them with the legal right to use and possess the Residence as a residence;
2. the intention to make the Residence their Homestead for purposes of Florida law; and
3. actually maintained the Residence as their principal residence.

Judge Proctor quickly determined, based on the evidence presented, that the debtors had the intention to make the Residence their Homestead and in fact had actually maintained the Residence as their principal residence. The remaining issue contested at the hearing held subsequent to Judge Covington's ruling was whether the debtors possessed a legal or equitable interest in the Residence which provided them with the legal right to use and possess the Residence as a residence. Judge Proctor summarily found that the debtors retained the right to revoke their interest in

continued, next page

Homesteads and Revocable Trusts

from preceding page

the trust and possessed the requisite interest in the Residence to satisfy the requirement that they had the legal right to use and possess the Residence as a residence. Judge Proctor based this legal principle on the position of Judge Covington that the grantor's power to revoke the trust is sufficient to satisfy the requirement of the legal right to use and possession based on *Engelke v. Estate of Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006).

In rejecting the argument of the Trustee in bankruptcy that the debtors lacked the power to revoke the trust due to the interest held by the debtors' minor granddaughter without obtaining the approval of the Florida circuit court having jurisdiction of the guardianship proceeding, Judge Proctor refused to deny the debtors the homestead exemption on what Judge Proctor termed "a legal technicality" and stated that the decision of the Florida Fourth District Court of Appeal in *Engelke* does not support the conclusion sought by the Trustee in bankruptcy.

In essence, Judge Proctor was of the opinion that the debtors should not be denied the protection provided by the homestead exemption provided pursuant to the provisions of Article X, §4(a) of the Florida Constitution, relative to the Residence, merely because the debtors would need to go through the process of obtaining the approval of the state guardianship court to effectuate a revocation of the trust. Such a denial "would produce neither a logical or equitable result, and could open Pandora's box regarding public policy concerns." In addition, Judge Proctor acknowledged the policy under Florida law to liberally construe the homestead exemption, as was contained in Judge Covington's opinion in citing to *Hill v. First Nat'l Bank of Marianna*, 84 So. 190 (Fla. 1920).

The evidence presented in this case clearly established the debtors had the intention to make the Residence their Homestead for purposes of Florida law and had actually maintained the Residence as their principal residence. In order to satisfy the remaining requirement, the debtors must be able to establish that they possess the requisite legal or equitable interest in the Residence to provide them with the legal right to use and possess the Residence as a residence. If the debtors are found to be able to revoke the trust, this remaining requirement should be satisfied.

Note that at least one Florida appellate court has held a residence, even if held in an irrevocable trust, can constitute Homestead for purposes of the protection from forced sale under process of any court. *Cutler v. Cutler*, 32 Fla. L. Weekly D583 (Fla. 3d DCA February 28, 2007).

Although the decision in the *Cocke* case is comforting to practitioners and their clients relative to the issue addressed in this case, do not lose sight of the fact that there may be other reasons not to transfer ownership of homestead property to a revocable *inter vivos* trust during one's lifetime. Such issues may pertain to qualifying for medicaid benefits for the Institutional Care Program and the potential for losing certain ad valorem tax exemptions otherwise available for disabled veterans and their surviving spouses.



Construction Law Certification Review Planned for March 2008 in Orlando

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When Is The Right Time to Ask Your Clients About Long-Term Care Planning?

By Mitchell Dannenberg, CLTC, LTCi Marketplace, Bonita Springs, FL

Most of us have had a family member, friend, or business colleague who needed care as the result of an illness or accident. For many, that memory is of our parents caring for our grandparents. Many of the baby boomer generation are now lending a hand to help their moms or dads, and some may find themselves in a caregiver role for their spouses or partners.

The greatest misconception about planning for long term care is that those issues are better dealt with as we approach retirement. Having a plan for care is really about protection of lifestyle, wealth preservation, and the security and peace of mind knowing you've taken steps to shield your family and those you care about from the emotional, physical, and financial challenges needing care can present. None of us knows when we might experience a change of health. Of those individuals presently receiving care, 37% are between the ages of 18 and 64.[1] Actually, the best time to obtain insurance is when you are still working and vibrant, as obtaining coverage can become very difficult or impossible once an accident or illness has changed our good fortune.

For those who believe they can self insure, the question becomes one of spending pennies to protect dollars.

In my family, of the three grandparents I knew – all required care. In addition, my dad, who passed away at age 57, needed care. Two years ago, I suggested to my brother and his wife that they purchase a policy, and they determined that waiting to obtain coverage was a prudent decision based upon being in their early 50's. Unfortunately, my sister-in-law was diagnosed with MS earlier this year and now at age 53 finds she is uninsurable. Sadly, not only is she excluded from applying for long term care ("LTC") coverage, she cannot obtain any disability or life insurance either. Having this occur has forced my brother to re-think the importance of planning and he has obtained coverage for himself and both of his children. Within our practice, we have had clients as young as 22 turned down for coverage based upon specific health concerns and, conversely, helped clients as old as age 85 secure protection - which is the maximum age that any company offers coverage.

Sharon Treiser, M.B.A., Director of Development of BNY Mellon Wealth Management's Naples office shared, "Getting coverage is really about making sure clients have liquidity to cover those costs when or if a need for care arises. I've been witness to significant spend downs of portfolio assets - because families simply thought they should wait to obtain protection, or that they were in a position to self fund their needs for care." She adds, "Having a policy can help one to avoid entirely or postpone the need to make decisions about what assets must be sold, or what the tax ramifications might be from the sale of highly appreciated securities, or taking distributions from an IRA, and in the event of a market downturn, coverage can allow time for an investment portfolio to recover."

Many attorneys with whom I've met and who have historically not brought up the importance of considering at least some level of long term care coverage are now beginning to do so. The primary reason being that there is growing concern among financial advisors and accountants and even in some areas of the legal community that a family could commence a suit based upon a failure to have a client explore what the ramifications of failing to plan could be upon a portfolio or estate plan. Almost all clients, when asked about why they create a team of advisors, will share that they rely on their experts to help preserve, grow, and, ultimately, pass on their assets, whether that be to family members or for philanthropic purposes. While there has not been a lawsuit filed against an attorney of which I'm aware, at some point many believe there will be litigation over this matter.

Andy Krause, a Trusts and Estates attorney who is a member of the Naples office of Hahn Loeser & Parks LLP, believes that the topic should be addressed and adds, "There are reasons to consider long term care coverage and ways to potentially tax advantage the purchase in concert with a strategy that can reduce the size of a taxable estate, as well as preserve a client's wealth."

For those who believe they can self insure, the question becomes one of spending pennies to protect dollars. Many are surprised to learn there are options offered today that provide for full return of all premiums upon death of the insured - regardless of whether a claim was ever filed. The net effect in this scenario reduces the cost of care to the opportunity cost of the money to purchase a policy.

For business owners of a C corporation, long term care premiums are 100% tax deductible. Given this advantage, it is not uncommon to see purchase of insurance as an incentive to attract and retain talented members of a management team or to become part of a buy-sell agreement. Because companies are allowed to be selective with regard to who is eligible for coverage, we are seeing a growth in popularity of company-paid, executive carve-outs combined with a voluntary offering for the rank and file.

Coverage can be very affordable or more expensive

depending upon how a policy is designed and what a family wants to protect. As Florida has no state income tax, there are no deductions but federal tax laws do allow for deductions based upon meeting certain criteria. If your client happens to be a resident of another state that does have an income tax, there may be tax credits or deductions based upon annual premiums or there may be additional tax advantages depending upon each personal situation. As an example, New York residents receive a 20% income tax credit regardless of income, based upon ongoing annual premiums for long term care coverage.

You may find yourself meeting with a client who, when asked about long term care, shares they have coverage in place. In this situation, I would encourage asking them for a copy of the policy and then finding a professional to review the plan and make sure it provides appropriate benefits. We have found instances where people think they've purchased long term care coverage and actually have a disability or hospitalization plan, or a policy with a very small benefit, or perhaps the plan lacks inflation protection. Just as a good estate plan needs to be reviewed and updated from time to time, insurance policies should also be looked at to determine if coverage needs to be augmented or is meeting the needs of the family as it currently exists.

Someone who specializes in long term care insurance and understands the difference between company offerings, contract language, the underwriting process and representing a variety of insurers will be most adept at answering your questions and concerns. For example, one company may have a provision allowing for informal care to be delivered by a family member or friend and pay your entire benefit without restriction directly to your checking account, whereas another may require all care to be provided by a licensed healthcare agency and require receipts be turned in to obtain reimbursement. For all these reasons and more it makes sense to have this dialog with your clients and to note in their files that you have discussed the importance of long term care insurance.

LTCi Marketplace is a long term care insurance specialty house and can be contacted at mitchell@ltcimarketplace.com.

Endnote:
1 Who Needs Long Term Care? Georgetown University Long Term Care Financing Project Fact Sheet, May 2003

Section Welcomes New Administrator

The Florida Bar's new program administrator for the RPPTL Section is Ms. Carmalita Hawkins. Her e-mail address is *chawkins@flabar.org* and her phone number is 850-561-5619.

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Trust Law Decanting: It's Nothing to Wine About

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

Florida has a new Trust Code. And thus begins the story of Theodore Harson, small town Florida lawyer, and the Florida Trust Code.

Chapter 1: Another Day, Another Challenge

Theodore Harson just finished another client meeting. His assistant, Wanda, knows to hold his calls and not interrupt him. He is in one of those grooves. He needs time, she can tell. After all, she's been with him for nearly 20 years. The thoughtful look on his face, as he turns back from staring out at the live oak trees and the gathering clouds for the afternoon thunderstorm, says it all.

Theodore's client has a problem. And Theodore is well on his way to a solution.

John H. Phillips, Sr. left the office, no more than an hour ago. Senior, as he is known in the family, is the widower of Theodore's late client, Margaret. Margaret, a wealthy woman, at least by Ochopee standards, left a trust for the benefit of her son, John, Jr. Her husband and First National Bank are the co-trustees. The trust was drawn long before John, Jr. had married Sue. Sue has turned out to be such a great influence on John, Jr. Of course, John, Jr. hasn't accumulated much on his own. And Senior does not expect that to change. John, Jr. and Sue live a comfortable life off of the monthly distributions from Margaret's trust.

What, Senior has asked, will happen to Sue if John, Jr. dies before she does? How will she get by? Theodore reminded Senior that the trust provides liberally for John, Jr. and on John, Jr.'s death the remainder passes to John, Jr.'s brother and sister. Senior knows his other children to be well off in their own right (or at least as a result of their mother's largess). As Wanda knows from Theo's single spaced, three page file memo that now sits on her worn, tired printer, Senior would like for John, Jr. to be able to provide for Sue to live on the trust's distributions if John, Jr. dies before Sue dies.

Senior has the power to direct the trustees to distribute the trust property to John, Jr. right now. In fact, the trust says that "the trustees shall pay over and transfer all or any part of the rest, residue and remainder of the trust estate, both principal and income, which may at such time remain and be in the hands of the Trustees to John, Jr. or any of his siblings, in such shares and proportions as the said Individual Trustee, in his or her sole and absolute discretion, shall determine and fix even to the extent of directing the payment of the entire trust estate to one of said parties." So, Senior, as the Individual Trustee, could just direct First National and himself, as the Trustees, to distribute the trust property to John, Jr. Then John, Jr. could make whatever provision he wished for Sue if she survives him. But, Senior did not like *that* idea. Seems that John, Jr. may still have a bit of an imprudent streak. Something about those weekend trips to southeast Florida and the parking vouchers from the Gulfstream race track that makes Senior nervous about any distribution directly to John, Jr. And the trust property still includes some interests in Margaret's father's grove properties, so a distribution of those interests would be less than ideal.

So, Senior, as the Individual Trustee, could just direct First National and himself, as the Trustees, to distribute the trust property to John, Jr. Then John, Jr. could make whatever provision he wished for his wife, if she survives him. But, Senior did not like that idea…seems that John, Jr. may still have a bit of an imprudent streak. Something about those weekend trips to the Gulfstream race track that makes Senior nervous about any distribution directly to John, Jr.

Chapter 2: Old Law, Still Good Law

Theo dusts off his old research books. Soon, he found just what he was looking for. A 1940 Florida Supreme Court decision, *Phipps vs. Palm Beach Trust Company*, 196 So. 299 (Fla. 1940). Old Judge C.E. Chillingworth from Palm Beach County had gotten it right. That opinion predated the mysterious disappearance of Judge Chillingworth and his wife from their Manalapan residence by some 15 years. The Chillingworths were eventually declared dead, later determined to be victims of a hit ordered by Palm Beach Municipal Judge Peel.

In Florida, an individual trustee and a corporate trustee clothed with absolute power to administer a trust in the interest of designated beneficiaries may create a second trust, for the benefit of one or more of those beneficiaries, at such time and in the manner determined by the individual trustee. The particulars of the trust instrument and the breadth of the power granted the individual trustee would control. The general rule announced by the Supreme Court, in affirming Judge Chillingworth, is that the power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the settlor clearly indicates a contrary intent.

Theo was already drafting the new trust, the so-called

continued, next page

second trust. The only current beneficiary would be John, Jr. But John, Jr. would be given a new power, a right that was missing from the first trust. John, Jr. would have the power to appoint the income from the trust to Sue, or for her benefit, if she survives him. And in the second trust, Senior would continue to have the same distribution power he held in the original trust, thereby continuing *ad seriatim* the ability to transfer property to successive "second trusts" if other issues arose in the future. Wanda knew that Theo was on a roll when she saw him using Latin in the file memorandum.

If First National decided to be stubborn and not transfer the assets from the original trust to the second trust, Theo was ready. Ready to file a petition, based on the *Phipps* decision - the one from 1940! Cited few times, the precedent from *Phipps* seemed to stand. A court proceeding might give some added protection to all involved, Theo would admit to Wanda. Although others might consider laying the blame for the additional costs of a court proceeding on the corporate doorstep of First National, the thought does not even cross Theo's mind, at least not for long. That is simply not the way Theodore Harson, small town Florida trust lawyer, operates. Theo will simply express his usual cautious viewpoint to Senior and recommend a court proceeding. And when Theo makes a recommendation, his clients listen. At least if they want to continue to be a client. Senior will grouse briefly, but his rapid acquiescence is based on the his trust of Theo's judgment. So, Theo now longs for statutory authority to ease his task of convincing the bank's trust counsel and the local judge that his solution is achievable under current Florida trust law.

How absolute must this invasion power be? The end of the first subsection provides that a power to invade principal which is not limited to specific or ascertainable purposes is an absolute power. That is so even without the modifier "absolute." And, a power to invade principal for the best interests, welfare, comfort or happiness is an absolute power not limited to specific or ascertainable purposes. So, "absolute" may be a bit watered down, like a vodka drink from a second rate hotel bar.

Chapter 3: RPPTL to the Rescue

Theo turns to his computer. The flat screens (yes, more than one) line the outside of his custom designed workspace. He toggles to his window to the world--his internet access. Quickly, Theo is at the bookmarked page for the Real Property, Probate and Trust Law Section of The Florida Bar, www.RPPTL.org. Unquestionably the best $50 his small office spends each year -- for membership in this Section. He looks around for new postings and seminar offerings. The on-line editions to the Section's newsletter, *ActionLine*, are prominently displayed from a link on the homepage. Theo scrolls through the table of contents of the recent edition, Summer 2007. Nothing about the *Phipps* case. But, what is this? An article about one of his favorite subjects, decanting fine wine. Theo likes a good bottle of wine as much as the next trust lawyer. He does not often partake in libations of such a quality that deserve decanting, but he has heard stories of the process and hopes one day to be in *that* position.

No, wait - the article just has some clever title. The author is that Sarasota trust law scholar, Barry Spivey -- he would not be writing about wine. Theo's heart skips a beat, scanning down to page 14, as he looks more closely at the full title of the article "Decanting: From One Trust to Another: Why a New Trust Code Section." His palms break into a sweat as he reads the first words... a reference to the *Phipps* case. Theo flies through the article, fearful that *Phipps* has been overturned or statutorily repealed. Instead of a repeal, Mr. Spivey writes that the new Florida Trust Code preserved the general holding of *Phipps*. So far, so good. But wait, it gets better. Mr. Spivey writes of a new statute that codifies the process of transferring assets from one trust to another, referring to this process as "decanting."

Theo charges to the massive green wall on the far side of his office, looking for materials from the 2007 Legislative Update seminar. The Legislative Update materials and other Section seminar materials from more than 25 years form a facade of green. Green in different hues. Some light, some dark, as The Florida Bar has changed specifications from time to time. Many bleached by the intense Florida sunshine. And all bound in soft covers. Why Theo keeps these years of materials, many outdated and useless (or, worse, dangerous), is beyond rationalization. But he does. And he knows he is not alone. The Legislative Update materials end with 2006. Where could the 2007 edition be? Theo *knows* he ordered the materials. He always does when he can't attend in person. Where? Where? Then he spots it. Not in the traditional format, the 2007 materials are looseleaf in an oversized binder. So much for Section tradition. Leadership must have given into new ideas. Good for them for taking the risk of being innovative.

As Theo thumbs through the table of contents, smiling to himself ever so faintly at the cute titles of the presentations, he found the one that he was looking for.

"Trust Law Decanting - It's Nothing to Wine About"

Theo flips to that chapter in the bulky, yet handsome,

binder. He begins looking through the materials and, at first, is offended at the narrative style. Where is the substance? He wonders why the author has strayed from the time honored tradition of just copying the new legislation and submitting that new law as the course materials. Well, the new legislation is included in the materials as an appendix. In fact, the entire chapter 2007-153 of Florida Laws is included, which is not just the *Phipps* codification but other changes to the new Florida Trust Code. But this year, there is something more. An outline. Some analysis. Even, perhaps, a touch of humor.

Chapter 4: The New Law

Theo starts his usual practice of parsing through new legislation. The number for this new section, 736.04117, tells Theo the section is not derived from the Uniform Trust Code. The Uniform Trust Code-based provisions only have four digits to the right of the decimal. The sections with five digits nearly always are non-uniform trust code provisions and often from old Chapter 737. A glance at the correlation tables, providing cross-references between new Chapter 736 and old Chapter 737, which are available on the Section's website, confirms 737.04117 is new and has no counterpart in old Chapter 737.

Well, Theo is liking the codification of Phipps but wonders if some limitations might be inadvertently created. Does this new statutory addition take away anything that Judge Chillingworth and the Florida Supreme court gave us in 1940? The final section of the decanting statute answers this question: any common law rights and any authority under a trust to decant co-exists with this new alternative.

The provisions of this new section, which Theo has mentally nicknamed "Decanter," are only applicable if the trust instrument does not expressly provide to the contrary. Makes sense - like most of the Florida Trust Code, the settlor can override. Not a problem with the Margaret Phillips' trust.

The "Decanter" statute requires the trustee to have:

1. absolute power
2. under the terms of the trust (the "first trust")
3. to invade principal of the first trust
4. to make distributions to or for the benefit of one or more persons.

Theo wonders aloud, "How absolute must this invasion power be?" The end of the first subsection provides that a power to invade principal which is not limited to specific or ascertainable purposes is an absolute power. That is so even without the modifier "absolute." And, a power to invade principal for the best interests, welfare, comfort or happiness is an absolute power not limited to specific or ascertainable purposes. So, "absolute" may be a bit watered down, like a vodka drink from a second rate hotel bar.

So far, so good. The necessary power exists in Margaret's trust. Continuing with the statutory parsing, Theo realizes that with this power Senior may exercise the power:

1. by appointing all or part of the principal of the trust subject to the power
2. in favor of a trustee of another trust (the "second trust")
3. for the current benefit of one or more persons who could have received the distributions directly from the first trust
4. under the same trust instrument or a different trust instrument.

"This just keeps getting better," Theo gleefully realizes. Just the solution Theo had constructed to deal with Senior's concerns and now allowed by a new Florida statute. Theo thinks that perhaps the statute should end right there, but alas, not the case. This "decanting" is only allowed "provided:"

1. Only beneficiaries of the first trust are beneficiaries of the second trust. Not all of the beneficiaries of the first trust *need* to be beneficiaries of the second trust. A perfect use for a Venn diagram, Theo realizes, reflecting on his seventh grade son's recent math homework.

2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust. This requirement was not part of the *Phipps* holding but was determined to be an acceptable limitation.

3. If the first trust qualified for the marital or charitable deduction, the second trust shall not include any provision which, if included in the first trust, would have prevented the first trust from receiving the tax benefit.

Fla. Stat. §736.04117(1).

Other than these enumerated limitations, the second trust may have different terms than the first trust. For instance, the difference in terms may be reflected in administrative provisions, in the trustee's discretion to make distributions or in the timing of any right to receive distributions of principal.

Senior will be required to exercise the power with certain formalities. The exercise must be by an instrument in writing (as if there is any other kind), signed and acknowledged by the trustee, and filed with the records of the first trust. Fla. Stat. §736.04117(2).

The new law treats the power as a non-general power of appointment to ward off the bad tax karma that comes with

continued, next page

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unexpectedly having a general power of appointment. In addition, the new law also addresses possible rule against perpetuities issues. The rule against perpetuities period begins with reference to the first trust. Theo understands that allowing the second trust to begin the running of a new perpetuities period would essentially be a repeal of the rule. So far, as Theo well knows, Florida's public policy mandates a perpetuities period, even if it might be as long as 360 years. Fla. Stat. §736.04117(3).

Notice to all of the qualified beneficiaries of the first trust is required at least 60 days prior to the proposed exercise of the power to distribute property from the first trust to the second trust. Theo recognizes the new term "qualified beneficiary" and makes a note to consult the definitions, in Chapter 736, around subsection 14 of 736.0103, he thinks. The notice must include how the power is to be exercised; a copy of the second trust instrument will suffice. If all qualified beneficiaries waive the notice period, then the trustee's power to invade is immediately exercisable. The waiver must be in writing and delivered to the trustee. Implicitly, the transfer may not occur until after the notice period has expired, without the waivers from all of the qualified beneficiaries of the first trust. This notification process does not allow beneficiaries to block the decanting. Nor does the notice let the trustee off the hook. A beneficiary may later object, such as to an accounting that reflects the distribution. Theo muses that perhaps the notice will flush out any concerns from John, Jr.'s brother and sister now. And certainly even they are bright enough to calculate the price of Senior's wrath should one of them not sign a waiver. Fla. Stat. §736.04117(4).

Margaret's trust includes a spendthrift provision and it became irrevocable upon her death. Theo is pleased to see that a spendthrift provision won't impale this power nor does the irrevocable nature of Margaret's trust. Fla. Stat. §736.04117(5).

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Now, Theo begins thinking about some other client situations. He wonders if this new law creates some duty on his trustee-clients to pursue decanting from one trust to another. Much to his relief, he learns the new statute includes a relief provision on this point. No duty is created in any trustee. Fla. Stat. §736.04117(6).

Well, Theo is liking the codification of *Phipps* but wonders if some limitations might be inadvertently created. Does this new statutory addition take away anything that Judge Chillingworth and the Florida Supreme court gave us in 1940? The final section of the decanting statute answers this question: any common law rights and any authority under a trust to decant co-exists with this new alternative. Fla. Stat. §736.04117(7).

Now that Senior's problem is most certainly resolved, Theo takes a few minutes of his own time to consider when else this decanting provision might be useful.

4. Dividing a trust with multiple beneficiaries into separate trusts to simplify administration and minimize conflicts among the beneficiaries.
5. Qualifying for tax benefits by adding necessary administrative language, such as the ability to hold stock of an S corporation or to receive retirement benefits.
6. Adding investment powers that are missing from the first trust and which are now useful in light of changes in assets or other circumstances.

Theo knows that many of these objectives can be accomplished using other tools in the Florida Trust Code. But he also knows that another way to "skin the cat" can sure come in handy.

Chapter 5: The End, or Just the Beginning

Early the next afternoon, Theo works to finish his letter to Senior. One, two, three versions printed in hard copy and marked up at the worn, oak library table in the center of the small conference room, away from the temptation of email and the annoyances of the telephone. The letter, describing Senior's good fortune with the recent enactment of Florida Statutes §736.04117, and plotting a course of action by which Senior can achieve his goals, ends with a summary of the costs that Theo believes are reasonable for his humble servitude. A post script to the letter suggests that Senior may want to contribute to the RPPTL-PAC, a political action committee on whose board Theo serves. Theo knows well the critical importance this PAC has played in the development of real property, probate and trust law in Florida, benefitting folks just like Senior, and hopes Senior might become the RPPTL-PAC's first double platinum member.

Theo knocks off early for the day once the letter to Senior is in final form. Getting the letter out the door will be left in Wanda's able hands. Looks like Theo has time for a quiet walk home while he reflects on his future. Theo has not ventured out in the past with his musings and reflections. Should he recede back into the shadows? Or, should he get out more often, sharing his tribulations and discoveries? Perhaps he will ask his friends for their thoughts.

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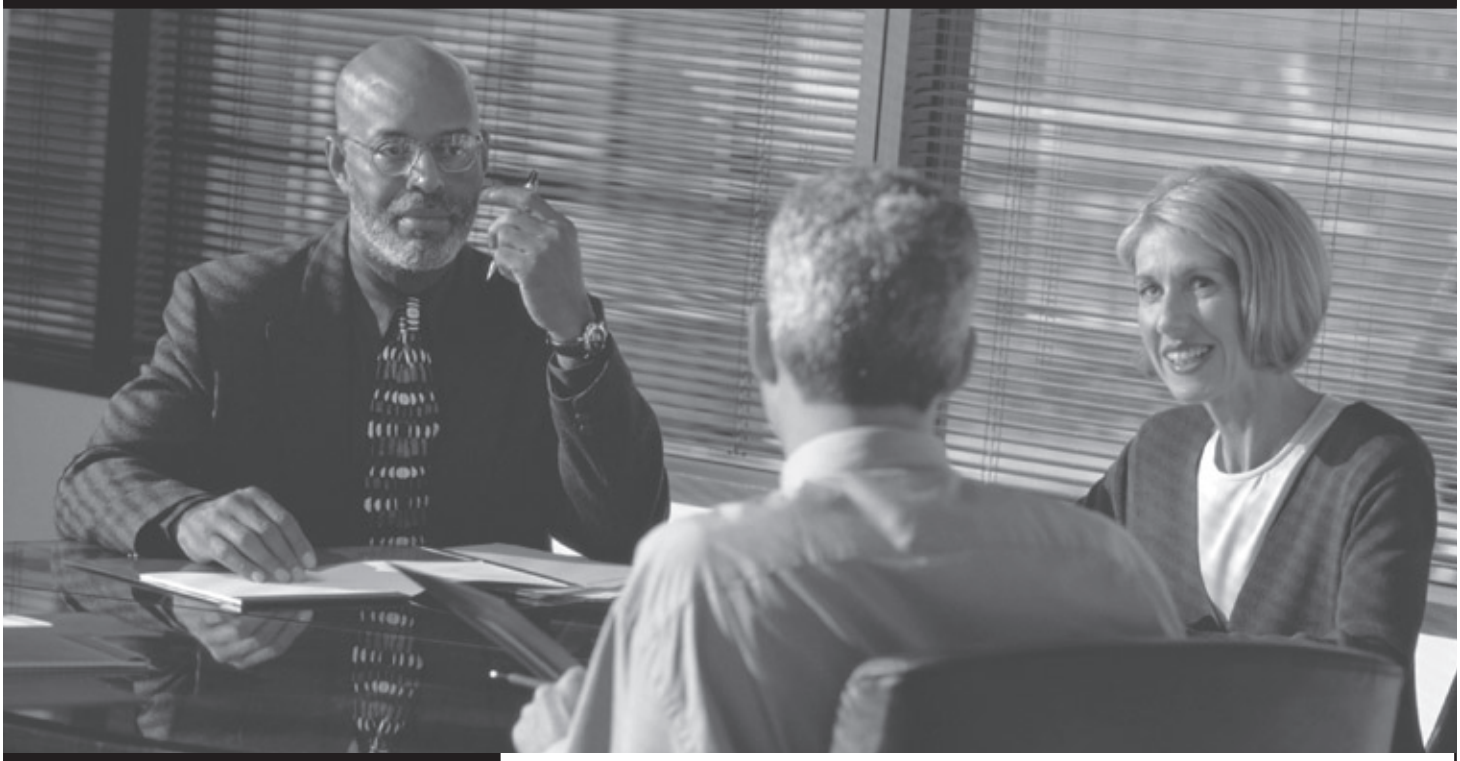


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Final Legislative Report
Numerical Index Summary of 2007 Legislative Issues

By Brian Felcoski, Esq., Legislative Committee Chair, and Peter M. Dunbar, Esq., Martha J. Edenfield, Esq., and Marc W. Dunbar, Esq., RPPTL Legislative Counsel

The 2007 Regular Session of the Florida Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. Those bills in the Section's package appear in the first part of the summary, followed by other items of interest that passed and items of interest to Section members that did not pass. The full text of each enrolled bill, as well as applicable legislative staff reports, is available on the legislative website (www.leg.state.fl.us). A summary of each measure that passed follows below in numerical bill order.

I. RPPTL Section Initiatives


GALVANO

HB 111 (Nonresident Title Insurance Agents) by Representative Galvano and SB 636 Senator Lawson is a Section initiative that provides additional requirements for non-resident title insurance agent licensure, revises the unlawful rebate specifications, and revises rate and rate deviation requirements. HB 111 also includes the Section's mortgage self-help initiative. (Chapter 2007-44, Laws of Florida.)


ARONBERG

SB 252 by Senator Aronberg (Uniform Commercial Code and LLC) is an initiative of the Business Law Section making numerous revisions to the UCC, including fixing of time frames by agreement, revising criteria for determining reasonable time, and specifying when notice becomes effective with the exercise of due diligence. Prior to passage, the Section's LLC initiative filed as HB 243 by Representative McKeel and SB 2148 by Senator Deutch was amended onto the bill. The initiative requires that a limited liability name must be distinguishable from all other limited liability companies as organized or registered with the Division of Corporations of the Department of State. (Chapter 2007-134, Laws of Florida.)


JOYNER

CS/HB 311 (Probate Code) HB 311 by Representative Hukill and SB 1936 by Senator Joyner: The bill amends Chapter 732 to make technical corrections to ensure that the elective share component complies with the Federal Tax Code; modifies Chapter 731 to insure that persons filing a caveat are properly noticed and codifies common law enforcing arbitration clauses; amends Chapter 733 to void exculpatory clauses in certain circumstances; and clarifies the term descendants in various parts of the Statutes. (Chapter 2007-74, Laws of Florida.)


GELLER

CS/SB 314 (Condominium Termination) by Senator Geller and HB 407 by Representative Schwartz: The bill is a Section initiative that amends s. 718.117 providing new and more practical methods for the termination of a condominium to ensure that the value of the condominium property is properly allocated among the unit owners. The bill provides for the following:

1. Plan of Termination: A plan of termination is required, valuing the individual units, the common elements and other assets of the condominium based upon market value. The plan must state the shares that each owner will receive and notice must be provided to all members before and after the vote on the plan. Eighty percent of the unit owners are required to approve the plan.
2. Termination Trustee: The association becomes the trustee of the property once the plan is approved and has authority to dispose of the property and disburse the proceeds according to the plan.
3. Optional Termination: In addition to the 80% threshold for plan approval, two optional methods are provided. After catastrophic damage, a majority of the owners may approve the plan if the costs to repair the property exceed the fair market value or if local land use restrictions do not permit the property to be restored to its original condition. The bill also permits unit owners to petition the circuit court to entertain a plan of termination when 80% was not achieved, but less than 20% opposed the plan of termination. (Chapter 2007-226, Laws of Florida.)

HB 743 (Trust Code) by Representative Hukill and SB 2218 by Senator Posey revises the 2006 Florida Trust Code, changing a corporate trustee's ability to engage in conflict of interest transactions with a trust and other items. The Section's initiatives contained in HB 1183 by Representative Hooper and SB 2606 by Senator Aronberg were included in the bill by amendment, and the amendment makes technical corrections and fixes unintended glitches in the 2006 Florida Trust Code. (Chapter 2007-153, Laws of Florida.)

CS/CS/B 902 (Community Associations) by Senator Jones and Representative Domino: The bill deals

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Legislative report

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with condominiums, cooperatives and homeowners associations and contains two provisions worked on by the Section's Condominium and Planned Development Committee, which include a simplified procedure for obtaining the consent of mortgagees when condominium documents are being amended and a provision moving the mediation of homeowners' association disputes out of the Division of Florida Land Sales, Condominiums, and Mobile Homes. The bill makes the following changes:

1. Condominiums: In addition to the simplified process for obtaining mortgagee consents, it clarifies the right of beach access to condominium unit owners and guests; permits unit owners to vote on mandatory membership agreements authorized by the declaration; and clarifies the rights of residential unit owners in a mixed-use condominium.
2. Cooperatives: The bill extends the non-discrimination provisions of s. 719.507 to non-residential cooperative equity facilities clubs and provides a definition for "equity facilities clubs."
3. Non-mandatory Associations: The bill provides that parcel owners in a residential community that does not have a mandatory homeowners association may revitalize expired covenants under the procedures in ss. 720.403 - 720.407.
4. Mandatory Homeowners Associations: In addition to removing the mediation procedures from the Division, the bill applies the open meeting requirements of Chapter 720 to committee meetings of the association; authorizes the association to charge up to $150 for information provided to prospective purchasers and mortgagees; creates a new section to govern architectural control decisions made by the association or a committee of the association; and provides that a parcel owner may recover fees from the association when the owner is a prevailing party in the dispute.
5. Mandatory Homeowners Associations/Accounting and Financial Standards: The bill creates new opt-in procedures for association reserves and conforms the accounting policies to those found in the Condominium Act. It also establishes uniform procedures for developer-guaranteed assessments; and requires a transition audit for associations created after December 31, 2006. (Chapter 2007-173, Laws of Florida.)

HB 1285 (Construction Lien Law) by Representative Altman is the Section's initiative that amends Chapter 713 to modify the construction lien law statutes to provide better clarity, correct misstatements and provide conformity to current case law. (Chapter 2007-221, Laws of Florida.)

CS/CS/SB 2482 (Estate Tax Return) by Senator Haridopolos is the comprehensive tax package and contains a Section initiative that eliminates a statutory requirement for filing of an estate tax return if the state tax credit is not allowable under the IRS Code as of the decedent's date of death. (Chapter 2007-106, Laws of Florida.)



MAHON



MARGOLIS

HB 7031 (Community Associations) by Representative Mahon and Senator Margolis makes modifications to Chapters 718, 719 and 720. The bill accomplishes the following:

1. Conversions: It revises Part VI of the Condominium Act to add additional disclosure requirements for condominium conversions and provides privity between the unit owners and the preparer of the Conversion Inspection Report.
2. Insurance Options: It provides implementing authority for "pooled-insurance" options authorized for condominium associations during the Special Session for cooperative associations created under Chapter 719 and homeowners' associations created 720.
3. Self Insurance Options: The legislation also implements the authority for associations created under Chapters 718, 719, and 720 to participate in self-insurance funds authorized by the Special Session by providing contingent assessment authority required to participate in an insurance product approved by the Office of Insurance Regulation.
4. Condo-in-a-Condo: The bill clarifies the definition provisions of Chapter 718 to permit a condo-in-a-condo.
5. Budget Disclosures: The bill clarifies the original intent of the prospectus and contract disclosure requirements in Chapters 718 and 719, requires budgets to be prepared based upon good faith estimates, and requires current budgets to be provided to purchasers at closing. (Chapter 2007-80, Laws of Florida.)

II. Initiatives of Interest

HB 9 (Trespass-Railroad) by Representative Mahon modifies the posting requirements for rails and roadbeds owned or leased by a railroad company. (Vetoed by the Governor.)



GELLER

SJR 166 (Property Ownership by Aliens) by Senator Geller is proposed constitutional amendment that would delete limitations on foreign aliens ineligible for citizenship from owning real property in Florida. (Referendum on the 2008 General Election Ballot.)



MAHON

CS/HB 229 (Guardian Ad Litem Program) by Representative Mahon creates a direct support organization for the Guardian Ad Litem Program, and it provides for the operation and organization of the program. (Chapter 2007-149, Laws of Florida.)

CS/HB 259 (Mobile Homes) by Representative Attkisson: The bill revises notice format to homeowners when a change of land use is being made by the mobile home park owner. It places new time requirements for payment to Mobile Home Relocation Trust Fund by the

park owner, and it makes other technical revisions to the procedures relating to the change in use of the mobile home park. (Chapter 2007-47, Laws of Florida.)


MARGOLIS

SB 400 (Landlord-Tenant) by Senator Margolis and HB 647 provide for a landlord's recovery of possession of a dwelling unit following the death of a tenant, if there has been no notice of probate, and at least 60 days have elapsed since the date of death. The bills were modified to accommodate the Section's concerns. (Chapter 2007-136, Laws of Florida.)

HB 405 (Timeshare Plans) by Representative Mealor modifies the filing requirements for marketing of out-of-state timeshare plan and advertising and disclosure requirements for timeshare resale service providers. It also provides regulation for resale service providers and revises the reserve funding formulas for timeshare properties. (Chapter 2007-75, Laws of Florida.)


ARONBERG

SB 624 (Uniform Premarital Agreements) by Senator Aronberg creates the "Uniform Premarital Agreement Act" and provides the statutory format for these agreements in Florida. The final version of the legislation includes the provision requested by the Section concerning the application and interpretation of the probate code in new Section 61.079 (10). (Chapter 2007-171, Laws of Florida.)

SB 978 by Senator Aronberg (Non-Binding Arbitration): This bill simplifies and clarifies the alternative dispute resolution forum for non-binding arbitration available under Chapter 44 of the Florida Statutes. (Chapter 2007-206, Laws of Florida.)

CS/CS/HB 985 (Timeshare Plans) by Representative Glorioso is the comprehensive transportation bill for this Session. There are 3 provisions that may be interest to real property practitioners in special circumstances. Sections 61 and 62 provide a new regulatory format for "wall murals" located on existing buildings; Section 11, 12, 42 and 50 provide new methods for addressing concurrency backlogs in transportation infrastructure, and the provisions create incentives for public-private partnerships, private toll roads, and right-of-way donations and physical improvements made by private land owners and developers. Section 30 of the bill restricts local government rezoning and moratoriums on the use of land that may involve the mining or extraction of construction aggregate materials based upon information from FDOT. (Chapter 2007-196, Laws of Florida.)

CS/CS/SB 1026 (Tax Exemption-Disabled Veterans) by Senator Haridopolos: The bill implements the constitutional amendment granting an additional homestead exemption for disabled veterans that was approved by the voters in November of 2006. (Chapter 2007-36, Laws of Florida.)


CRIST

CS/SB 1088 (Conflict Counsel-Dependency) by Senator Crist: The bill implements the office of criminal conflict and civil regional counsel, effective as of October 1, 2007. Section 4 of the bill brings proceedings under Chapters 743 and 744 of the Florida Statutes and provides for a determination of indigency to be made. Section 11 of the bill provides a fee schedule for dependency proceedings. (Chapter 2007-62, Laws of Florida.)

CS/HB 1185 (Trespass) by Representative Aubuchon: The bill provides new posting requirement for trespassing on construction sites and increases the penalties for trespassing on construction sites. The bill also provides that a "community association" may be the authorized agent for the owner for purposes of communicating an order to the leave the property in the case of a threat to public safety or welfare. (Chapter 2007-123, Laws of Florida.)

CS/HB 1277 (Landlord-Tenant) by Representative Patterson allows for an optional early termination fee or liquidated damages for cancellation of a residential lease prior to the end of the lease term if agreed to by the landlord and the tenant. (Vetoed by the Governor.)

CS/HB 1305 (Notary Public-Electronic Signature) by Representative Thompson authorizes electronic notary signatures and provides the criteria and requirements for the new electronic procedures. (Chapter 2007-257, Laws of Florida.)

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CS/HB 1491 (Community Development Districts) by Representative Attkisson makes a variety of changes in Chapter 190 relating to community development districts which include expanded definitions to CDD project costs; modification of filing procedures when a CDD is located within the jurisdictional boundaries of more than one local government; modification of special assessment procedures; clarification of board powers and new filing requirements for CDD disclosure documents in official records of the county where the CDD is located. (Chapter 2007-160, Laws of Florida.)

CS/CS/SB 1624 (Owner-Controlled Insurance Programs) by Senator Bennett revises the requirements for owner-controlled insurance programs for public agency capital improvement projects. (Chapter 2007-218, Laws of Florida.)



FASANO

CS/CS/SB 1824 (Mortgage Fraud) by Senator Fasano provides greater consumer protections related to the mortgage loan application process and provides greater compliance and enforcement authority for the Office of Financial Regulation. The bill also makes mortgage fraud a 3rd degree felony, and the fraud is considered to have been committed in the county in which the property is located or in any county in which a material act was performed in furtherance of the fraud. (Chapter 2007-182, Laws of Florida.)

CS/SB 1844 (Community Associations-Over Due Fees) by Senator Ring creates new s. 720.3055 and provides procedures for collecting delinquent assessments due to a homeowners association. It provides for 45-day notice procedures prior to the filing of liens and prior to commencing foreclosure proceedings. It also permits the home owner to make a "qualified offer" for the repayment of the delinquent sums due the association. The Section opposed the bills in their original form and the objection language was deleted in its entirety prior to passage. (Chapter 2007-183, Laws of Florida.)

CS/SB 1920 (Commercial Property-Limitation of Activities) by Senator Fasano: The bill authorizes the owner of private property used for commercial purposes to exclude persons engaging in activity that supports or opposes initiative amendments to the Florida Constitution. (Chapter 2007-231, Laws of Florida.)



KING

SB 2038 (Electronic Recording) by Senator King is the initiative by the Florida Clerks Association that was worked out with members of the Section, and it creates the Florida Uniform Real Property Electronic Recording Act. (Chapter 2007-238, Laws of Florida.)



JOYNER

CS/SB 2118 (Debts and Debtors) by Senator Joyner: The bill exempts personal property of a debtor up $4,000 and makes revisions to the procedures for the administration of insolvent estates under Chapter 727 of the Florida Statutes. (Chapter 2007-185, Laws of Florida.)



WISE

CS/CS/CS/SB 2234 (Building Inspection Services) by Senator Wise: The bill creates a licensing and regulatory structure for home inspection services and mold-assessment services under the Department of Business and Professional Regulation in a new Part XV of Chapter 468 of the Florida Statutes. The bill also redefines "home warranty" agreements to include home inspection services and mold-assessment services under Chapter 634 of the Florida Statutes. (Chapter 2007-235, Laws of Florida.)

CS/HB 7057 (Windstorm Mitigation) by Representative Traveisa: The bill creates "My Safe Florida Home Program" to enhance the state's windstorm mitigation program and provide home inspections for up to 400,000 single-family homes and financial grants for at least 30,000 applicants to upgrade their homes to protect the structures from wind borne debris during a hurricane. (Chapter 2007-126, Laws of Florida.)



CANNON

HB 7203 (Growth Management) by Representative Cannon: The bill is the Session's comprehensive growth management package. It provides for financially feasible comprehensive plans for concurrency, adds airport facilities to transportation concurrency and creates a new program to address transportation concurrency backlogs. The bill also extends the terms of a DRI development agreement from 10 to 20 years, and it creates a pilot program in 2 counties and 4 cities to streamline the process for amending local government comprehensive plans. (Chapter 2007-204, Laws of Florida.)

Note from the Editor:

We wish to thank everyone who has contributed to *ActionLine!* Many people assist in many ways; we appreciate-- and need-- the articles, suggestions, advertisements, ideas, photographs, bulletin board items, design and layout, editing, printing and distribution, and all around support. Thanks!

--S. Dresden Brunner, Esq.

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History Repeats Itself: Another Great Meeting in Palm Beach

August 2 - 5, 2007

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, FL and Jon Scuderi, Esq., Goldman, Felcoski, & Stone, Naples, FL



The Executive Council meeting.

As has been its history, the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar held its end-of-summer meeting at The Breakers in Palm Beach. The historic Breakers, facing the Atlantic Ocean in Palm Beach County, as always, was a fabulous venue. This was the first meeting held under the auspices of the new chair, Melissa Murphy.

The meeting spanned three days during the first weekend in August. Thursday, August 2, was full of meetings of all the subcommittees, concluding with an outdoor welcome reception. Friday, August 3, was the outstanding Legislative and Case Law Update Seminar, with the largest number in attendance to date. The 27th Legislative and Case Law Update was absolutely packed. **Melissa Murphy** welcomed everyone at 8:35 a.m. and, with the exception of lunch, every minute of the day, until 4:55 p.m., was packed with outstanding speakers providing a wealth of information on interesting subjects.

Friday evening began with another, lovely outdoor welcome reception. For both receptions, the venues were absolutely breathtaking. Friday and Saturday nights saw congenial attendance at some very charming dinners. The Friday night dinner was at The Breakers. After the dinner, Melissa Murphy announced the winner of the Limerick Contest, held in anticipation of the out-of-state meeting in Ireland. To everyone's enjoyment, the two winning limericks were read (both written by **Dresden Brunner**):

Hearn, Guttmann, Smith, Zschau and Lile
On the back row with drinks and a smile.
They said, "Let's move to table
So Murphy's not able
To get anything done for awhile."

There once was a group of good lawyers
Who needed a great place to meet.
To Ireland they zoomed
Much Guiness was consumed.
The life of a Reptile is sweet.

On Saturday morning, the round table breakfast meetings for both Real Property and Probate were very well attended, perhaps due to the fact that the food was gratis. The Executive Council meeting, again under Melissa's guidance, opened promptly at 10:00 a.m. on Saturday.

A number of important action items were approved by the Council. On the real estate side, there was support for Florida Statute Section 689.28, providing that transfer fee covenants recorded after the effective statutory date will not run with the title to real property and are not binding

on successors, owners, purchasers or mortgagees. This was requested by the title insurance subcommittee.

The "death" subcommittees were very active and had five different issues that were approved by the Executive Council, including:

1. A legislative correction to Section 733.604 to treat inventories in appropriate proceeding in connection with spousal elective share the same as the estate inventories, by exempting them from public disclosure. The change will also modify existing law to provide that estate accountings are not open to public inspection.
2. Revisions to Chapter 765 concerning advance directives in integrating federal HIPAA privacy laws with Florida laws. (See also Spotlight on Advanced Care Directive and HIPAA Committee in this edition of ActionLine.)
3. Amendments to Chapter 739, the Florida Uniform Disclaimer of Property Interests Act, to further clarify the definition of "insolvent" as found in Florida Statute Section 739.102(8).
4. Revisions to Section 222.11 to change the title to clarify that the statute applies to earnings and is not limited to "wages", to provide an expanded definition of earnings, and to add deferred compensation to the exemptions.
5. Revisions to a number of various Florida Statutes including Sections 121.131, 121.091, 185.25 and 175.41. These changes would provide for alienation of plan benefits under the Florida retirement system, municipal police pensions and firefighter pensions as relating to dissolution proceedings.

All these items will now be ready to move forward for lobbying and consideration by the Florida Legislature in its next regular session.

The day on Saturday was concluded with a fun and delicious dinner at the Florida Culinary Institute, where the attendees were able to make their own dessert.

As always, thanks to the many sponsors for their assistance in making the weekend a successful and memorable event.

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Left: Justice Kenneth Bell and Melissa Murphy at the Thursday Welcome Reception. Above: The Real Estate Roundtable breakfast.



Enjoying Melissa Murphy's Irish-themed hospitality at the Hospitality Suite.



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Ireland, here we come!



A committee hard at work.

Executive Council Meeting Photos courtesy of John Neukamm.

Derby Delight on Reception Night

Executive Council Members "Get Their Irish On" in Preparation for the Ireland Meeting



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The Florida Civil-Law Notary

By Charles D. Wilder, Esq., Estate Planning and Legacy Law Center, PLC, Maitland, FL

Estate planners, do you ever do any estate planning or administration that involves clients from other countries, especially in the Caribbean, Mexico, Central or South America? Or do you ever represent clients who are inheriting from individuals from other countries?

Real estate practitioners, do you ever handle real estate transactions in Florida involving foreign nationals? Or clients in Florida involved in real estate transactions in civil law jurisdictions? Do you ever represent clients' transactions or estate matters where you travel with them or for them to foreign jurisdictions and need to have documents acknowledged that will be valid for filing or recording when you return to Florida?

If so, you may be interested in something I have discovered - the Florida Civil-law Notary. What is that, you say?

Most Florida attorneys, other than maybe international law attorneys, probably do not know what a Florida Civil-law Notary is, and I didn't either until recently. The purpose of this brief article is to alert you to the fact that the Florida Civil-law Notary exists or to make you aware of how it could be helpful in many estate planning, probate and real estate situations so that you can seek one out when the situation arises.

If you are familiar at all with civil law countries, you may know that civil law notaries (variously referred to as notarios, notaries, notaio or notariats depending on the country) are much different than notaries public here in the United States. Whereas almost any warm body can become a notary public in Florida, notaries in civil law jurisdictions are actually lawyers and quite often are the cream of the legal talent in their jurisdictions. A notary in a civil law jurisdiction has significant quasi-judicial powers to authenticate documents and matters of fact.

Florida passed a statute several years ago that creates a similar quasi-judicial appointment of a Florida Civil-law Notary by the Secretary of State. This appointment is for life and it gives a Florida Civil-law Notary many of the same types of powers that notaries in civil law countries have, including the ability to take acknowledgments anywhere in the world which are valid here in the State of Florida (similar to the old Commissioner of Deeds appointments) for recording documents and other purposes. The Florida Civil-law Notary is also able to act in an impartial capacity to review factual matters and issue documents, sometimes referred to as "authentic acts", which are presumed to be valid under state law.

With permission from one of the authors, J. Brock McClane, below are a few examples of practical application of the Florida Civil-law Notary statute from the Stetson Law Review article "The Florida Civil-Law Notary: A Practical New Tool for Doing Business With Latin America," Vol. 32, No. 4, Stetson Law Review pages 727-767, Summer 2003. Samples of what the authentic acts would be like under each set of facts described below are illustrated in the law review article.

1. A Florida decedent owned a parcel of beachfront land in St. Martin as tenants in common with his spouse and died intestate. A pending sale to a developer was being held up until title could be cleared by the St. Martin notaire handling the transaction. The notaire contends that because the decedent died in, and was a resident of, Florida the St. Martin choice-of-law rules dictate Florida law govern the devise and descent of the property. But the notaire indicates even a certified copy of a probate court order would be insufficient to clear title because the notaire could not be sure of the authority of the court. The establishment of the descent of the property could be established to the satisfaction of the notaire by an authentic act of a Florida Civil-law Notary who reviews the probate court order and other documentation leading up to it to confirm the validity of the probate court's authority and resulting court determination of the descent of the property. The authentic act would be prepared in the manner that foreign notaries would prepare such an authentic act with certified copies of all the substantiating documentation attached as exhibits.
2. An Italian notaio prepared a power of attorney for a client's signature to allow her brother residing in Italy to sell a piece of property she owned because she was now living in Florida and would not be able to attend the closing. However, if she signed the power of attorney in front of a notary public, an apostille from the secretary of State would only establish that the notary public was duly authorized to take the acknowledgment, but not necessarily establish the proper identity of the signer herself to the satisfaction of the closing agent. However, a Florida Civil-law Notary was able to perform an authentic act confirming the identity of the giver of the power through examination of her as well as the proper execution of the power of attorney.

The St. Martin notaire indicates even a certified copy of a probate court order would be insufficient to clear title because the notaire could not be sure of the authority of the court. The establishment of the descent of the property could be established to the satisfaction of the notaire by an authentic act of a Florida Civil-law Notary.

3. A trial in an Italian court dealt with an estate challenge. The trial established that the heirs-at-law of the decedent would receive the estate. It then became necessary for those lineal descendants to establish their status as heirs. A grandson of the decedent living in Florida whose father had died during the pendency of the litigation needed to submit proof to the court that he was in fact a grandson and heir of the decedent. An authentic act by a Florida Civil-law Notary who was able to examine the birth certificate of the grandson, the death certificate of his deceased father, and a passport to confirm identity (and attach appropriate copies of each of those documents) established to the satisfaction of the Italian court that the grandson was an appropriate heir.

Appointment as a Civil-law Notary is only available for members in good standing who have been members of The Florida Bar for at least five years. In addition to the requirements of bar membership, potential appointees must take a three-day class and pass a rigorous examination. The class covers various information necessary to understand the powers, duties and responsibilities of a Florida Civil-law Notary, including the statutes and administrative code governing Florida Civil-law Notaries, Florida law governing Notaries Public, practice by notaries in civil law jurisdictions, the Hague Convention XII (dealing with recognition of foreign public documents and apostilles), and the Rules of Professional Conduct relating to attorneys acting as intermediaries. The exam is no cream-puff, and I understand the pass rate is only about 70%, so paying attention in the class and studying to master the information is required. There are only about 150 Civil-law Notaries in Florida so far.

For more information, check out the following web links:

The State of Florida web page: http://notaries.dos.state.fl.us/civil.html

The National Association of Civil-law Notaries: http://www.nacln.org/index.html

Elimination of Requirement to File Florida Estate Tax Return for Certain Estates

By Elaine M. Bucher, Esq., Proskauer Rose LLP, Boca Raton, FL

Most practitioners are aware that the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") repealed the state death tax credit provided under Section 2011 of the Internal Revenue Code of 1986, as amended (the "Code"). Prior to EGTRRA, a credit was allowed against the federal estate tax for any estate or inheritance taxes actually paid to any state or the District of Columbia with respect to any property included in a decedent's gross estate. Pursuant to EGTRRA, the state death tax credit was phased out and eventually repealed in 2005. It was replaced with a deduction under Code Section 2058 for state death taxes that may be taken on a federal estate tax return (a "706").

A personal representative of an estate is no longer required to file a F-706 for estates of decedents dying on or after January 1, 2005.

Florida imposes an estate tax that is equal to the state death tax credit amount which is allowed to offset the federal estate tax. As a result of the repeal of the state death tax credit and the imposition of a deduction for state death taxes, no Florida estate tax is imposed in connection with estates of decedents dying on or after January 1, 2005.

Until recently, Section 198.13 of the Florida Statutes provided that a Florida estate tax return (a "F-706") was required to be filed with the Florida Department of Revenue if a 706 was required to be filed with the IRS, regardless of whether a state death tax credit was allowable under Section 2011 of the Code. On June 12, 2007, Governor Crist signed legislation eliminating the requirement under Section 198.13 for a personal representative of an estate to file a F-706 with the Department if a state death tax credit is not allowable pursuant to the Code as of the decedent's date of death. In other words, a personal representative of an estate is no longer required to file a F-706 for estates of decedents dying on or after January 1, 2005. Note that the elimination of the requirement to file a F-706 "sunsets" on January 1, 2011; in other words, for estates of decedents dying on or after January 1, 2011, a F-706 *is* required to be filed, regardless of whether a state death tax credit is allowable under the Code.

If a F-706 is not filed, the Florida Department of Revenue does not issue a Nontaxable Certificate and Receipt for Estate Tax (a "Nontaxable Certificate"). Practitioners should be aware that, in general, for estates where a 706 has been filed with the IRS, the courts still require a Nontaxable Certificate to be filed before an estate can be closed. Certain title companies require a Nontaxable Certificate to be recorded in order to clear title to the real property owned by the Estate. In order to address this issue, the Florida Department of Revenue is working towards promulgating a new form, similar to the Affidavit of No Florida Estate Tax Due (Form DR-312), that can be filed with the court when a 706 has been filed but no F-706 is required to be filed.

Resolution

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

James J. Altman

Whereas, James J. Altman of New Port Richey, Florida, a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar, passed away on July 30, 2007, survived by his devoted and loving wife, Mildred, seven children, several grandchildren and great-grandchildren, one great-great-grandchild, two stepchildren, and many friends and colleagues; and

Whereas, Jim, after receiving his law degree from the University of Florida and being admitted to The Florida Bar in 1950, had a long and distinguished career as an estate planning and probate attorney in Pasco County, where he became only the second attorney to practice in New Port Richey, later served as City Attorney for that City, became President of the West Pasco Bar Association, served as one of the original Fellows of The Florida Bar Foundation, and earned the distinction of having the Allgood-Altman Inns of Court named in his honor; and

Whereas, Jim also had a history of dedicated involvement with his church, his community and its youth, which included his substantial involvement in the West Pasco Little League for many years, his direct participation in the planning and development of a community recreation center and swimming pool in New Port Richey, as well as the Hospital now known as Morton Plant North Bay, and his induction into the Hall of Fame of the West Pasco Chamber of Commerce; and

Whereas, Jim's long-standing and dedicated service to the Real Property, Probate & Trust Law Section of The Florida Bar included his invaluable leadership on its Executive Council, where he was instrumental in the promulgation of new probate rules following the adoption of the Florida Probate Code in 1974, the formation of the Florida Legal Education Association (FLEA) and Florida Lawyers Support Services, Inc. (FLSSI), and the development of the Section's probate forms; and

Whereas, Jim served as Chair of the Real Property, Probate & Trust Law Section of The Florida Bar in 1982-1983, and it is widely acknowledged that the Section benefitted greatly from his many contributions, as well as his stature and reputation; and

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

Now, Therefore, be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar, that the loss of James J. Altman is mourned, and that his distinguished service and rich contributions to his family, his community and his profession are deeply respected, appreciated and acknowledged, and will be remembered forever.

Unanimously Adopted, by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar at Palm Beach, Florida, this 4th day of August, 2007.

Melissa J. Murphy, Chair
Real Property, Probate & Trust Law Section
The Florida Bar

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and the Construction Law Committee of
The Florida Bar Real Property, Probate and Trust Law Section
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Lee A. Weintraub, Fort Lauderdale

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Course No. 0638R

Construction Law Institute 2008 Program Outline

Course No. 0638R

DAY 1 (optional) - Thursday, March 6, 2008

1:00 p.m. – 6:00 p.m. **Golf Tournament at Grand Cypress Golf Club**

7:00 p.m. – 8:30 p.m. **Welcome Reception**

DAY 2 - Friday, March 7, 2008

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

8:30 a.m. – 8:45 a.m.
Opening Remarks
Lee A. Weintraub, Fort Lauderdale
John B. Neukamm, Tampa

8:45 a.m. – 10:15 a.m.
The New 2007 AIA A101 and A201 Contracts
Steven B. Lesser, Fort Lauderdale

10:15 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:30 a.m.
Copyright and Ownership of Digital and Electronic Design Instruments of Service
Robert E. Pershes, Boca Raton

11:30 a.m. – 1:30 p.m.
Panel Presentation on the State of the Florida Complex Business Court Program (Lunch included in registration)
Honorable Renee A. Roche, Orlando
Honorable Richard A. Nielsen, Tampa
Honorable Gill S. Freeman, Miami

1:30 p.m. – 2:30 p.m.
Meet the New AIA B101 Contract
George J. Meyer, Tampa

2:30 p.m. – 3:45 p.m.
Why Standard Construction Insurance Policies and Bonds Don't Work the Way You Think
Bruce G. Alexander, West Palm Beach

3:45 p.m. – 4:00 p.m. **Break**

4:00 p.m. – 4:50 p.m.
Establishing Effective Client Management and Communication Procedures and The Top 10 Ethical Traps for Construction Lawyers
Robert Emmanuel, Pensacola

5:30 p.m. – 7:00 p.m. **Reception**

DAY 3 - Saturday, March 8, 2008

8:30 a.m. – 8:45 a.m.
Opening Remarks
Lee A. Weintraub, Fort Lauderdale

8:45 a.m. – 10:15 a.m. **Workshops:**

Option 1 – Recommended Changes to 2007 AIA Contracts
Stacy Bercun Bohm, Fort Lauderdale

Option 2 – Building Code Interpretation Declaratory Opinions and Pros and Cons of Private Plan Review & Special Inspectors
Randall L. Gilbert, Miami

10:15 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:30 a.m.
Panel Discussion – A View From Behind the Scenes of an Arbitration Panel
Larry R. Leiby, Fort Lauderdale
Christi L. Underwood, Orlando
Jorge Cibran, Miami

11:30 a.m. – 1:30 p.m.
Bankruptcy Pre-Packs and Other Key Bankruptcy Issues for the Construction Industry (Lunch included in registration)
Kimberly A. Ashby, Orlando
Denise D. Dell-Powell, Orlando

Presentation of the Inaugural Construction Lawyer Honor Roll Award

1:30 p.m. – 2:30 p.m. **Workshops:**

Option 1 – Current Trends in Green Construction
David Odem, Zellwood

Option 2 – Developing Legal Strategies for Prosecuting and Defending Unlicensed Contractors and Design Professionals
Frederick R. Dudley, Tallahassee

2:30 p.m. – 3:30 p.m. **Workshops:**

Option 1 – Advanced Delay Claims
Michael K. Wilson, Orlando

Option 2 – Continuing Liability for Defects After Completion and Turnover of a Project
Christopher J. Weiss, Orlando

3:30 p.m. – 3:45 p.m. **Break**

3:45 p.m. – 4:15 p.m.
Legislative Update
Kimberly A. Ashby, Orlando
Bruce G. Alexander, West Palm Beach

4:15 p.m. – 5:00 p.m.
Case Law Update
Larry R. Leiby, Fort Lauderdale

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To reserve a sleeping room with the Rosen Centre Hotel, Orlando, please call toll free 1-800-204-7234. The Florida Bar group rate of $159/night is guaranteed until February 4, 2008, or until the room block is sold out. If the room block is sold out you may be able to get on a wait list pending any cancellations.

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Advance Directive & HIPAA Committee:

Spotlight on Advance Directive & HIPAA

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

While HIPPA is a federal law that has been on the books for quite a few years, major changes about four years ago caused the birth of the Advance Directive & HIPAA Committee, currently chaired by Rex E. Moule. The committee focused, for the last several years, on the conflict between Florida Statute Chapter 765, the health care surrogate law, and the power of attorney law found in Florida Statute Section 709.08. This young committee, with about ten full-time members (but lots of folks providing input) set about the interesting, but fairly arduous, task of developing an addition to Chapter 765 that will provide more flexibility for estate planning attorneys and their clients. Chairman Moule advises that this process took a number of years in order to build consensus and to coordinate with other committees, such as the power of attorney committee.

The focus of the amendments drafted by this committee is to authorize and create a new designation of "health care representative". The current health care surrogate law only takes effect if the client is incapacitated. The current power of attorney law (which is also under review for amendment by another committee), in some very brief language, does currently allow dealing with health care issues by a client, even while the client is not incapacitated. But, in the process of review, both by the power of attorney committee and by the advance directive and HIPAA committee, the philosophical conclusion was reached that the power of attorney law really ought to address financial and property issues, whereas, the health care surrogate law should be the applicable statute for all health care related issues.

If approved in 2008 by the Florida Legislature, the new health care representative amendments would allow a client to designate to his or her health care representative, limited powers, lots of powers or unlimited powers, including access to medical and billing records, as well as assisting the client in making decisions about medical care. The health care representative's powers and actions are not constrained by the need for a determination of incapacity. The new health care representative designation gives to the attorney a new, improved tool to help the client in the difficult process of planning for an unknown future.

The proposed changes to Chapter 765, creating the health care representative, have been approved by the Executive Council and authorized for expenditure of funds to support it. The HIPAA Committee has also developed a white paper to accompany the proposed legislation. The committee is now waiting for the legislature to make a good decision and adopt the proposed amendments.

The committee's next meeting is in January and, at that time, the members will consider its future. The committee is rightfully proud of its success in drafting amendments to Chapter 765 to create this new vehicle to give clients and elder law attorneys more planning tools but is not satisfied to rest on its laurels. There are a number of other issues that could be tackled by the committee, such as the living will statute and the health care proxies. So, stay tuned for more developments from Chairman Moule and his merry band!

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IRAs and Estate Planning: Creative Ways To Address the Tax Challenges

By Matthew T. McClintock, J.D., Director of Continuous Improvement and Member Collaboration at WealthCounsel, LLC

When individual retirement accounts were first introduced in 1974 with the enactment of the Employee Retirement Income Security Act (ERISA), the oldest baby boomers were 28 years old. This year those baby boomers are turning 61, and the amount of money sitting in IRAs and other qualified retirement accounts is estimated at more than 25 trillion dollars. Because the account balances will be included in the owners' estates when they die, and because withdrawals will be income taxed to the beneficiaries as income in respect of a decedent ("IRD"), estate planners must find creative ways to minimize the tax hit and protect account balances from beneficiaries' creditors.

Over the past decade we have seen a marked increase in the number of clients with substantial assets in income-tax advantaged accounts. Often these assets comprise a significant portion of clients' overall estates. Because these accounts generally constitute IRD, they pose additional planning challenges. Not only is the account value includable in the client's taxable estate, amounts distributed to the beneficiaries after the client dies are subject to income tax. The conscientious planner must be familiar with the multifaceted tax issues, as well as traditional aspects of trust-oriented estate planning, to comprehensively meet clients' needs.

What prevents the beneficiary from withdrawing the entire balance and walking away, triggering substantial income tax liability? If the beneficiary has creditor problems, how are account proceeds protected?

Because account distributions are income taxed, the longer the account remains intact for the beneficiary, the more the account can grow, and the longer the income tax is deferred. Assuming the account beneficiary qualifies as a "Designated Beneficiary" under the Regulations, the beneficiary may stretch the account distributions over the beneficiary's life expectancy.[1]

But what assurances does the client have that the distributions will indeed be stretched out? What prevents the beneficiary from withdrawing the entire balance and walking away, triggering substantial income tax liability? If the beneficiary has creditor problems, how are account proceeds protected? If the client's spouse is the beneficiary and the client has kids from a prior marriage, how can planning ensure that those children ultimately receive the leftovers when the spouse dies?[2]

Considering the severity of the implications, it is essential to understand and balance not only the tax considerations that affect retirement accounts, but also the broader estate planning implications involved with getting the right property to the right beneficiaries the right way. Proper planning maximizes the total benefit for the beneficiaries, combining the financial benefits of the stretch with the protection of careful trust planning.

Trusts can ensure the stretch and provide protection

There is little need to extol the protections trusts generally afford beneficiaries. No doubt trusts created for beneficiaries can provide greater protections for the beneficiaries than the beneficiaries can provide for themselves. Let us examine the spectrum of options available for structuring trusts that will not only ensure the stretch of retirement account distributions but also provide significant protections for the beneficiaries.

Conduit trust – Low/ No perceived need for protection

A "conduit" trust mandates that the trustee withdraw a required minimum distribution ("RMD") from the retirement account based on the primary beneficiary's life expectancy and immediately distribute that amount to the beneficiary. No amounts withdrawn from the account are accumulated in trust. The trustee may withdraw additional amounts from the account to the beneficiary, if necessary. A conduit trust qualifies as a designated beneficiary under the Treasury Regulations, permitting the trustee to calculate the annual RMD based on the life expectancy of the trust's primary beneficiary.[3]

Although a conduit trust is eligible to stretch benefits over the beneficiary's life expectancy, we cannot ignore some important factors. Because the amounts withdrawn from the account cannot be retained in trust but must be distributed to the beneficiary, there is no hedge of protection for a beneficiary with poor spending habits, a bevy of creditors, or unsavory vices. Risk is compounded by the size of the account and by the age of the beneficiary. The older the beneficiary, the shorter the beneficiary's life expectancy is, and the greater the divisor for determining the RMD.

Because only the primary beneficiary's life expectancy matters for determining the RMD divisor, conduit trusts are appropriate when the trust benefits both charitable and individual beneficiaries. But because the RMDs cannot accumulate, conduits make sense only where asset protection is not a concern. A conduit guarantees the stretch, but works best for "perfect" beneficiaries with no creditor

problems or when clients want the stretch with minimal trust administration.

Accumulation trust – High need for preservation/protection

Unlike a conduit trust, an accumulation trust does not automatically distribute account withdrawals to the beneficiary.[4] All distributions from the trust, including RMD withdrawals, are subject to the trustee's discretion. Because the trust is a discretionary trust, the beneficiary enjoys protection from the claims of judgment creditors or the influence of bad friends or bad decisions. Accumulation trusts can also be structured for special needs beneficiaries.

The accumulation trust is harder to qualify as a designated beneficiary under the Regs than the conduit trust. Instead of looking only at the age of the primary beneficiary to determine the RMD divisor, we must consider all trust beneficiaries and use the oldest beneficiary's life expectancy to determine the divisor.

This process can be more complicated than it appears. We must look beyond the named beneficiaries and consider contingent remainder beneficiaries, too. We must consider the scope of the beneficiary's powers of appointment, if any. If the trust contains a charitable or other non-identifiable beneficiary – even as a remote contingent beneficiary – or if a named beneficiary holds a testamentary general power of appointment over the trust then the stretch is blown; the entire balance of the retirement account must be withdrawn within five years of the account owner's death.

If any contingent beneficiary is older than the primary beneficiary, the trust is stuck with the life expectancy of the oldest beneficiary, even if that beneficiary's interest is quite remote. But a carefully structured accumulation trust can still qualify as a designated beneficiary eligible to stretch distributions from the retirement account. And, the trust affords the general protections that discretionary trust planning provides.

It is possible to structure different types of subtrusts within a single trust instrument. Depending on the beneficiaries' needs and the trustmaker's desire to provide protection, one trust instrument can contain a mix of conduit and accumulation subtrusts. This allows the trustmaker to customize the beneficiaries' protection as needed and ensure the stretch.

Mixing Techniques – Converting from Conduit to Accumulation Trusts

A final strategy worth examining is illustrated in PLR 200537044. Under this technique, all of the subtrusts begin as conduits, ensuring "safe harbor" qualification for the stretch. But the trust also appoints a trust protector with carefully-designed powers to modify the trust. If the trust protector believes it is in the best interests of the beneficiaries, the trust protector may convert any conduit subtrust to an accumulation subtrust.

This power can be tremendously effective when wielded by a skilled trust protector. If the protector believes that a beneficiary's trust interest may become exposed to creditors' claims or the wiles of predators, the protector strips away the conduit provisions in the affected subtrust and any other provisions that would otherwise prevent the trust from qualifying as a designated beneficiary under the Regs. The trust gets stretch treatment for the retirement account, and the affected beneficiaries enjoy discretionary trust protection. Best of all, the availability of the trust protector's switch option allows custom-tailored flexibility when needed.[5]

It's worth remembering that the IRS is not bound to the effect of a PLR to anyone other than the taxpayer who obtained the ruling. Although the ruling may give an indication on how the IRS might rule in similar situations, it cannot be relied upon as binding precedent.[6]

Estate planners with a solid understanding of the options clients have when planning with retirement accounts will be well-positioned to set themselves apart from their colleagues.

Endnotes:

1 Treas.Reg. §1.401(a)(9)-5, A-5(c)(1)

2 Much more can be written on the implications of naming the client's spouse as the primary beneficiary under a retirement account than room allows here. The implications of effectuating a spousal rollover, structuring an inherited IRA for a spouse, or structuring a QTIP or bypass trust for the benefit of the spouse with IRA money are all essential issues for the planner to understand, but are beyond the scope of this article.

3 Because the conduit trust meets the IRS' "safe harbor" requirement to qualify as a designated beneficiary, we need only look at the life expectancy of the primary beneficiary of the trust for purposes of calculating the RMD; no other beneficiary matters. For a checklist of what is required for a trust to qualify as a "Designated Beneficiary" under the Regs, see Treas.Reg. § 1.401(a)(9)-4, A-5(b).

4 By definition, any trust that is not a "conduit" trust is an "accumulation" trust, granting the trustee discretion in whether or not a distribution will be made from the trust.

5 Under the PLR, the trust protector converted a conduit trust to an accumulation trust within nine months of the account owner's death and before September 30 of the year following the owner's death. Although not directly stated, the IRS suggests that the trust protector's action was analogous to the exercise of a disclaimer under applicable state law, rather than as a power to modify. It is therefore recommended that if the protector plans to convert a conduit trust to an accumulation trust, it should be done within the time permitted by state law for exercising a disclaimer (typically within nine months from the owner's death).

6 IRC §6110(k)(3).

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Order Sub-Total	$_____
Sales Tax 6.5%	$_____
Shipping & Handling	$_____8.00
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Firm:_____

Attn: _____ Attorney Bar #: _____

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E-mail address: _____

METHOD OF PAYMENT

I have enclosed check #_____, in the amount of $_____, on _____ / _____ / _____
or
Please Circle One: VISA or MASTER CARD Amount to be charged $_____

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

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SHIP DATE _____/_____/_____ **LB**_____ **$**_____ **#** ___ ___ ___ ___ ___ ___ ___ ___

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

Office October 24, 2007

A Salute to Terry Hill, Adminstrator *Extraordinaire*

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

When Terry Hill joined the RPPTL Section as Program Administrator over two years ago, he brought fresh ideas and a contagious enthusiasm. Described as a tireless proponent of the Section's agenda, Terry stepped into the first RPPTL meeting ". . . armed with a clipboard and a notebook, and immediately went to work. During his tenure, he administered the Section with good judgment and a dose of humor," stated Sandra Diamond, Section Chair-Elect. Dwight D. Eisenhower has said "A sense of humor is part of the art of leadership, of getting along with people, of getting things done." There must be some truth to that! According to Melissa Jay Murphy, Section Chair, "Terry was not only upbeat and positive; he worked hard at finding a solution to every situation we threw at him."

You've seen Terry in action, as he worked the registration desks at various RPPTL Continuing Legal Education programs throughout the state. Didn't he impress *you* as having it all under control, too? Efficient. Thorough. Those are just a few other adjectives that Section leadership use to describe Terry.

Laird A. Lile was Section Chair when Terry joined RPPTL as Program Administrator. He recalls, "Terry came to the Section at a critical time. He accepted his new responsibilities with style and grace. He delivered fresh ideas in a cooperative manner, working tirelessly for his constituents."

One of Terry's focuses was cross-marketing CLE programs to organizations outside The Florida Bar. An example is the cross-marketing of the Trust Officers Symposium

continued, next page



Terry Hill

from preceding page

and condominium seminars to Florida bankers. He notes, "Cross-marketing benefits the attorneys who are attending those seminars because there is a great potential for networking, and, it also drives up attendance and program revenues."

As Terry Hill steps into his new position as the Division Director of Programs, Terry's role expands to supervising six departments: Meetings and Convention, Professional Development, Legal Specialization and Education, Legal Publications, Law Office Management Assistance Service, and Member Services. Terry expects that CLE will continue to be a significant part of his responsibilities. He is working to make The Florida Bar the "front-runner" in the delivery of CLE programs. He envisions more options in CLE delivery systems, including simultaneous broadcasts with enhanced abilities for participants to link "in real time" to program moderators from areas throughout the state. (One can't help but wonder how program revenues may increase as a result of these potential attendees, too!)

The RPPTL Section is sorry to see Terry move on, but we support him in his new role; and, as Laird remarks, "Section members will continue to be among the many benefiting from Terry's service in his new position. As a member of the Board of Governors, I am elated to know he will be overseeing so many important areas." The Section extends its best wishes and congratulations to you, Terry, and to your family!

Editor's Note: Ms. Carmalita Hawkins has assumed the RPPTL Program Administrator position. Her e-mail address is chawkins@flabar.org and her phone number is 850-561-5619 (Terry's old extension).

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27th Annual RPPTL Legislative and Case Law Update

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Presented August 3, 2007

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Melissa Murphy, Gainesville
RPPTL Section Chair

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

Legislative Report & Storm Warning
Brian Felcoski, Coral Gables

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

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

Title Insurance Update
Patricia Hendricks Jones, Orlando

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

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

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

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

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

Real Property Ad Valorem Taxes
Burt Bruton, Miami

Electronic Recording Act
Barry Ansbacher, Jacksonville

Dirt Law Case Update
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Real Estate Case Summaries

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

Municipality holding code-enforcement liens is entitled to share of homestead foreclosure sale surplus proceeds.
Town of Lake Park v. Grimes, 4D06-4591 (Fla. 4th DCA Sept. 5, 2007).

The Town appealed an order that awarded a foreclosure sale surplus to the Grimeses, the former owners of the property. The Town claimed it was entitled to the surplus for payment towards code enforcement liens against the property. The appellate court agreed and reversed.

The mortgagee filed its mortgage foreclosure complaint against the subject property, naming the Grimeses and the Town as defendants. The Town answered, alleging the priority of its liens. The parties stipulated that the property was, in fact, the Grimeses' homestead.

The homestead exemption must be liberally construed in the interest of protecting the family home, but it is not to be liberally construed so as to make it an instrument of fraud or imposition on creditors. Section 162.09 authorizes county or municipal code enforcement boards to levy fines. Upon recording a certified copy of an order imposing a fine, the same constitutes a lien upon the deficient property and upon any other real or personal property owned by the violator. The governing body may foreclose its lien or sue to recover a money judgment for the lien amount plus accrued interest. Section 162.09 also provides that no such lien may be foreclosed on a homestead, nor shall the money judgment provisions therein apply to real or personal property which is exempt under Art. X, §4(a), Fla. Const. The lender thus argued that the Town's liens were void and never existed as to the foreclosed homestead. The Court disagreed. The Court noted that the constitutional and statutory provisions do not invalidate the debt or lien, they merely preclude enforcement against homestead property so long as the property retains its homestead status.

The critical issue in this case was whether the surplus retained homestead status. The Florida Supreme Court has stated that the proceeds of a voluntary sale of a homestead are exempt from the claims of creditors just as the homestead itself is exempt if, and only if, the vendor shows, by a preponderance of the evidence an abiding good faith intention prior to and at the time of the sale of the homestead to reinvest the proceeds thereof in another homestead within a reasonable time. Moreover, only so much of the proceeds of the sale as are intended to be reinvested in another homestead may be exempt under this holding. Any surplus over and above that amount should be treated as general assets of the debtor. In order to satisfy the requirements of the exemption, the funds must not be commingled with other monies of the vendor, but must be kept separate and apart, while held for the sole purpose of acquiring another home. The proceeds of the sale are not exempt if they are not reinvested in another homestead in a reasonable time or if they are held for the general purposes of the vendor. This reasoning applies to both voluntary and forced sales.

Arbitrator in new-home warranty dispute determines arbitrability of post-closing personal-injury claim, even though warranty excludes negligence claims.
Mercedes Homes, Inc., v. Colon, 5D05-4292 (Fla. 5th DCA Aug. 10, 2007).

Colon entered into a contract with Mercedes for the construction of a home. The contract included a provision requiring Mercedes to install sod on Colon's yard. Eleven days after closing on his home, Colon fell while walking in his yard. He thereafter filed suit against Mercedes, alleging negligent installation of the sod. Mercedes responded by filing a motion to compel arbitration, based on an arbitration agreement entered into between the parties in connection with a home warranty purchased by Colon from Mercedes. Colon simply argued that his negligence claim was beyond the scope of the arbitration agreement, because the home warranty agreement that contained the arbitration agreement excluded claims for negligence.

The arbitration agreement required the arbitrator, not the trial court, to determine the scope of arbitrable issues. The language of the arbitration agreement is clear. By the terms of the arbitration agreement, the parties agreed to submit claims to arbitration that were far broader than claims made under the warranty agreement, as long as those claims related to the subject home or the real property

The United States Supreme Court has set forth the following standard for considering who should decide the arbitrability of a dispute: a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration. Here, the language of the arbitration agreement clearly and unmistakably requires the arbitrator to decide, in the first instance, the scope of the arbitration provision and the enforceability of any purported limitation of Mr. Colon's right to pursue a claim for personal injuries.

Only a good-faith, viable claim can support a lis pendens.
Nu-Vision, LLC v. Corporate Convenience, Inc., 5D06-3815 (Fla. 5th DCA Sept. 7, 2007).

Convenience owns commercial real estate. Nu-Vision

tendered a letter to Convenience proposing a thirty-six-month commercial lease and purchase agreement, setting forth a scaled purchase price, depending upon when during the lease period the transaction occurred. Additional terms for the purchase were not included in the letter. Rather, it stated that a contract would follow, if both parties signed the letter.

Both parties signed the letter, and subsequently executed a nineteen-page commercial lease agreement. The lease contained a standard integration clause, reciting that it included all promises, agreements and understandings between the parties. Later, Convenience filed a suit for eviction, alleging that Nu-Vision had breached its lease by failing to pay rent, and that Convenience had exercised its right to terminate the lease agreement. In response, Nu-Vision filed an answer and counterclaim, alleging that it had attempted to exercise its purchase option, and had met several times with Convenience in an attempt to work out additional terms and conditions for the sale. According to Nu-Vision's pleading, Convenience orally agreed to certain terms for the sale and represented that it would discuss the terms and conditions of the sale with its attorney and provide a contract to Nu-Vision. According to the counterclaim, however, Nu-Vision never heard back from Convenience and then received the eviction complaint.

In connection with its specific performance claim, Nu-Vision filed a notice of lis pendens to protect its interest in the property and to put others, including potential purchasers, on notice that its claim clouds the property's title. This is the appropriate use for a lis pendens notice under the statute governing lis pendens in Florida. A lis pendens should not be dissolved if the proponent can establish a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit. Establishing a fair nexus between a claim in litigation and the property's title, however, requires a little more than simply pleading a theoretical nexus. To establish a fair nexus requires the showing of a good faith, viable claim. In this case, Nu-Vision cannot make that showing, because the letter cannot support an action for specific performance as a matter of law.

For a real estate purchase contract to be enforceable through specific performance, it must first be embodied in one or more written documents or memoranda signed by the party against whom enforcement is sought. Additionally, the writings must include all of the essential terms of the purchase and sale, and those terms may not be provided by resort to parol evidence. In this case, the letter relied upon by Nu-Vision contains nothing more than an address for the property, the names of the parties, and a sliding scale for the purchase price. A document containing only these terms is insufficient to support a claim for specific performance of a commercial real estate sale.

Additionally, where it appears that the parties are continuing to negotiate as to essential terms of an agreement, there can be no meeting of the minds. Convenience never executed a document memorializing whatever oral agreement the parties purportedly reached. Therefore, it is clear from Nu-Vision's own allegations that the parties did not consummate a written agreement that contained elements both parties deemed to be essential. The court noted that a lesser degree of certainty is required to afford relief for damages than is necessary to decree specific performance and made no comment as to the viability of Nu-Vision's claim for damages. With respect to the specific performance count, however, the court found that the complaint failed to state a cause of action, and, therefore, could not support a finding of a fair nexus, as a matter of law.

It would be contrary to sound public policy to allow a lis pendens proponent to tie up real property belonging to another person when the proponent cannot even make a minimal showing that there is at least some basis for the underlying claim. The court saw no danger that trial courts would be dissolving lis pendens that are necessary to put others on notice that a claim of possible merit clouds title to property.

To be included in trust, real property must be deeded to the trust.

Vaughan v. Boerckel, 4D06-1127 (Fla. 4th DCA Aug. 29, 2007).

Decedent's will contained a pour-over provision that devised the residue of his estate to his trust. At the time of his death, Decedent owned 100% of the corporate stock of Eloise, a corporation, and was also its sole officer. Eloise's primary assets were real properties. After the trust was signed, Decedent's estate-planning attorney prepared deeds and advised Decedent that the failure to sign the deeds would defeat the purpose of the rest of the trust. Decedent refused to sign the deeds. The properties were owned by Eloise, and the Eloise stock was owned 100% by the Decedent. Thus, it was the Eloise stock– not the properties– that passed to the trust from the residue of the Decedent's Estate. In other words, the properties did not become a part of the

continued, next page

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corpus of the trust through the pour-over provision because Decedent failed to execute the deeds necessary to result in the properties funding the trust.

An express trust cannot exist unless there is an expression of intent by the parties to create a trust and a transfer of legal ownership in the subject property to the trustee. It is essential that a trust have corpus or there can be no valid present trust. The failure to provide trust corpus would negate the existence of a trust. The decedent's execution of a trust was insufficient to transfer title to the real estate described, because the settlor did not, as is required, also execute a deed that conveyed the realty to the trustees. The trust documents themselves plainly cannot be regarded as such a deed for the obvious reason that, although they comply with the necessary formalities of two witnesses and an adequate legal description, they contain no expression that purports to convey, grant or transfer the real estate. Any language in Decedent's will was clearly insufficient to manifest an intention to incorporate the provisions of the trust for the disposition of the assets after the settlor's death into the will, so as to render them, in effect, testamentary in nature. The corporate existence cannot be disregarded.

RPPTL 2006-2007 Financial Summary

REVENUE	2006-2007 End of Year	2007-2008 Budget
Admin Fee Adjustment	32,535	0
Section Dues	451,660	450,000
Affiliate Dues	240	0
Admin Fee to TFB	-158,285	-157,500
Registrations	118,537	90,000
Sct Share Online CLE	1,870	0
CLE Courses	333,180	100,000
Audio Tape-Section Service	18,050	8,550
Compact Disc-Section Service	31,566	28,800
Section Differential	50,945	0
Book Sales	5,945	3,700
Actionline Subscription	0	300
Spouse Program	2,660	10,000
Exhibit Fees	38,500	30,000
Sponsorships	301,100	195,000
Meals	1,947	50,000
Misc Seminars	0	10,000
Allowances	-156	0
Investment Allocation	65,560	33,095
Reimbursement Council Rec	384	4,500
Meeting Deposits	143,059	90,000
Total Revenues	**1,439,297**	**946,445**

EXPENSES	2006-2007 End of Year	2007-2008 Budget
Credit Card Fees	5,565	5,550
Employee Travel	8,627	14,361
Equipment Rental	19,128	13,300
Meeting Room Rental	5,000	5,000
1st Class & Misc Mail	9	300
Express Mail	609	0
Bank Fees	70	0
Promotional Printing	3,218	2,000
Promotional Mailing	11,152	14,000
Postage	4,537	14,000
Printing	7,856	7,400
Newsletter	38,544	28,000
Supplies	97	500
Photocopying	513	500
Officers Conference	819	1,200
Scrivener	500	0
Meeting Travel Expense	706	5,000
CLE Speaker Expense	1,599	3,000
Reception	76,028	50,000
Luncheons	72,447	56,500
Golf Tournament Expense	11,259	6,500
Committee Expenses	45,985	31,000
Public Info & Website	946	0
Realtor Relations	1,650	4,000
Diversity Initiative	0	15,000
Spouse Program	3,500	4,000
Exhibitor Fees	1,256	250
Entertainment	12,976	10,000
Board or Council Meeting	275,617	200,000
Strategic Planning Meeting	10,845	10,000
Council Mtg Recreation	26,718	20,000
Hospitality Suite	19,977	20,000
Spouse Functions	7,763	10,000
Sleeping Rooms	4,396	5,000
Speaker Gifts	0	1,500
Misc Seminars	3,959	8,000
Council Mbrs Handbook	3,341	3,500
Awards	5,916	5,000
Law School Liaison	2,617	5,000
Binders	0	1,000
Website	43,285	50,000
Legislative Consultants	60,000	60,000
Legislative Travel	7,465	9,000
Legis Coordinator	0	0
Memorial Tributes	233	500
Council of Sections	0	0
Operating Reserve	0	51,849
Miscellaneous	80	500
Steering Committee	0	1,200
Speaker Workshops	171	0
Speakers Expense	10,086	6,000
Speakers Travel	140	0
Speakers Meals	340	0
Speakers Hotel	3,360	3,500
Speakers Other Exp	1,343	0
Outline Print-Inhouse	8,656	13,000
Outline Print-Contract	5,746	6,000
Course Credit Fee	450	450
Meeting Meals	68,768	70,000
Refreshment Breaks	11,009	13,000
Breakfast	31,588	38,000
Meetings Administration	4,737	9,117
Advertising News	340	5,158
Graphics & Art	11,963	16,036
Registrars	4,780	0
Total Expenses	**970,285**	**933,671**
Net Operations	**469,021**	**12,774**
Beginning Fund Balance	**448,073**	**472,791**
Total Current Fund Balance	**917,094**	**485,565**

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 course. 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.

CLE Course Schedule

March 6-8, 2008

FIRST ANNUAL CONSTRUCTION LAW INSTITUTE

(Rosen Centre Hotel)

9840 International Drive
Orlando, Florida 32819
407-996-9840
Course Registration: (850) 561-5831

March 7-8, 2008

CONSTRUCTION LAW CERTIFICATION REVIEW COURSE

(Rosen Centre Hotel)

9840 International Drive
Orlando, Florida 32819
407-996-9840
Course Registration: (850) 561-5831

Executive Council Meeting Schedule

January 10-13, 2008

EXECUTIVE COUNCIL MEETING

(Casa Marina Resort & Beach Club Key West)

Reservation Phone No. (866) 397-6342
Room Rate: $189 • Cut-off date: Dec. 10, 2007

April 3-6, 2008

EXECUTIVE COUNCIL MEETING

(Hilton University of Florida, Gainesville)

Reservation Phone No. (352) 371-3600
Room Rate: $145 • Cut-off date: March 3, 2008

May 22-25, 2008

SECTION CONVENTION & EXECUTIVE COUNCIL MEETING

(Hyatt Regency Coconut Point, Bonita Springs)

Reservation Phone No. (800) 233-1234
Room Rate: $189 • Cut-off date: May 21,2008

June 2008

ATTORNEY/TRUST OFFICER LIAISON CONFERENCE

(Location: TBD, Naples)

July 25-28, 2008

EXECUTIVE COUNCIL MEETING AND LEGISLATIVE UPDATE SEMINAR

(The Breakers, Palm Beach)

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

BEWARE – FRAUDULENT CASHIER'S CHECKS

The Federal Deposit Insurance Corporation (FDIC) maintains a list of banks reporting counterfeit or stolen cashier's checks. Before you decide to accept a cashier's check, you may want to verity it using the FDIC's website. Go to www.FDIC.gov/news/news/SpecialAlert/2007/index.htm.

– Pat Hancock, Esq., Maitland, FL

BULK CABLE CONTRACTS AND HOA

On November 13, 2007, the Federal Communications Commission issued a 34-page "Report and Order" which struck down exclusivity clauses in bulk cable contracts as harmful to competition and consumers. As many condominium and HOA communities have such contracts, this Order will be of interest to attorneys who represent unit owners, associations and developers. The order is FCC 07-189 and can be viewed at the Commission web site.

– Jane L. Cornett, Esq., Stuart, FL

AIA CONTRACTS

The American Institute of Architects (AIA) recently released the 2007 update to its standard AIA contract documents. More information about the newly released 2007 update may be obtained at www.aiacontractdocuments.org.

– Scott Pence, Esq., Tampa, FL

CONSTRUCTION CONTRACTS

A new set of construction contract documents has been released by a newly formed organization known as ConsensusDOCS, a consortium of Designers, Owners, Contractors and Surety, including the Associated General Contractors of America (AGC), the Construction Owners Association of America (COAA) and the Associated Builders and Contractors, Inc. (ABC). More information about the newly released ConsensusDOCS may be obtained at www.consensusdocs.org.

– Scott Pence, Esq., Tampa, FL

EDUCATE HOME BUYERS

Home buyers, especially first-time buyers, are unfamiliar with a real estate closing process. The American Land Title Association has created a website for such consumers to learn about the closing process and to explain the purpose and role of title insurance. The website is www.homeclosing101.org.

– Pat Hancock, Esq., Maitland, FL

DEADLINE

for submissions for the next issue of ActionLine is

JANUARY 31, 2008.

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

The Florida Bar
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