ActionLine

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Property Taxes After Amendment 1

Real Estate in Trusts

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The Times Are A'Changin'



By
Melissa Jay
Murphy

Section Chair
2007 - 2008

Chair's Column

The times… they are a'changin'." I feel like this is my life theme at the moment and I suspect that is the case with many of you. The real estate market has presented challenges to many of us: fewer closings means reduced fee income, which in turn requires hard decisions about your staff; clients are facing foreclosure and possibly bankruptcy; changing your practice to take on more litigation cases… .The list goes on. Every day we learn more about the financial difficulties that people are facing as a result of increased interest rates. The way in which we are called upon to counsel our clients is changing, and we need to be up to the task.

Our clients are changing, too. Many of my clients have ended a marriage, are in a new relationship but do not want to be married and they want to buy a home with the new partner. Both may have children from a previous relationship and they want to make sure that, if something happens to them, their children get their fair share. One client has an elderly step-parent with significant health issues that he is dealing with.

Many of you say you are experiencing the same client situations. This year's RPPTL Convention in Bonita Springs is going to focus on changes. The seminar that we are planning includes various presentations on planning (real property and estate) for the 21st century family – unmarried people wishing to own homes together (with and without children), older people who wish to live together, children dealing with an elderly step-parent with health problems….. Please make plans to attend the Convention.

We are also gearing up for the 2008 legislative session, and change is always the result. With the passage of Amendment 1, many issues will be facing our elected officials and who knows what will come out of it. Be assured, however, that your Legislation Committee (chaired by Burt Bruton) is on top of all of the issues that are "within our purview". The Section is doing its best to make sure that legislation that is consistent with our interests and is well crafted to protect our clients is enacted.

I attended the February Board of Governors meeting in Tallahassee on your behalf and made my "State of the Section" speech to the Governors. Afterward, many people told me that they were very impressed with our Section and our activities! President Angones made a particular point to praise RPPTL for our efforts in the area of diversity. I am very pleased that the recent leadership of this Section has worked hard to establish a good working relationship with both the voluntary Bar leadership and Bar staff. Once again, "the times…they are a'changin'."

But the biggest change that I observe in our area of practice is the increased level of competition between attorneys. It seems that what we do is being turned into a product rather than viewing it as a service to our clients. Yes, we are paid for what we do but I believe there is a significant difference between paying for legal services and buying groceries. We are all free to choose how we earn our keep. I chose to be a lawyer because I wanted to help people. I wanted to be proud of what I did. I still believe that being a lawyer is a privilege and an honor and that I should treat what I do with a great deal of respect. I encourage all of you to step back and reflect on your own attitude toward our profession.

The Section is making a renewed effort to keep professionalism on the table as a topic for discussion. Our new and improved Professionalism and Ethics Committee will be presenting programs and writing articles about current issues in this area. But we must also act individually to encourage other lawyers (and particularly young lawyers) to appropriately deal with each other and with our clients.

So, yes, the times, they are changing… but this lady lawyer is going to go down fighting for the legal profession to continue the tradition of providing excellent service to our clients as their needs change, as their faces change, as the laws change, and as the profession changes. Thank you for all you do.

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ABOUT THE COVER:

THE SCALES OF JUSTICE ARE A METAPHOR EVEN FOR DIRT AND DEATH LAWYERS. THIS STATUE STANDS IN IRELAND, WHERE THE RPPTL SECTION HAD ITS OUT-OF-STATE MEETING. PHOTO COURTESY OF JOHN NEUKAMM

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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.

Florida's New Property Tax Landscape

By Victoria L. Weber, Hopping Green & Sams, P.A., Tallahassee, FL

On January 29, 2008, Florida voters approved Amendment One, the biggest change to Florida's property tax structure since the "Save Our Homes" ("SOH") assessment cap was adopted by the voters in 1992. It remains to be seen whether this action is: (1) the first step in comprehensive property tax reform and aids a flagging real estate market; (2) all we will get in the name of property tax reform; (3) the final straw that breaks Florida's existing property tax system; (4) as harmful to education and local government services as the opponents claimed; or, most likely, (5) some combination of these possibilities. The following summarizes the events leading up to the voters' decision, the tax reform efforts of the 2007 Florida Legislature, the specifics of the new laws, and issues and events on the horizon.

Florida's Property Tax Revolt

Florida voters approved a citizen's initiative establishing the SOH assessment cap in November of 1992. By doing so, they approved the most profound change ever to the 1968 constitutional requirement that real property in Florida generally be valued at "just value," or its fair market value, for ad valorem tax purposes. The SOH cap limits annual increases in property tax assessments for homestead properties to the lesser of three percent (3%) or the change in the Consumer Price Index. The stated rationale for the cap was to keep Florida residents from being taxed out of their homes. By 2006, the average SOH assessed value was approximately $150,000, compared to an average just value of nearly $243,000, reflecting an average SOH differential or benefit of $93,000 and a statewide annual tax savings for Florida residents of approximately $8 billion.[1] However, the value of the SOH benefit varies greatly depending upon the locale and value of the home. The SOH value as a percent of market value of a home ranges from a low of 49.9% in Monroe County (roughly 50% of the home value is taxed) to a high of 86.1% in Jackson County (86.1% of the home value is taxed).[2] Additionally, higher-priced homes have enjoyed a disproportionate share of the total SOH differential because they increased in value at rates faster than lower-priced homes.[3]

The mechanics of the cap called for re-valuing the homestead property at fair market value when it was sold. By 2004, with housing values escalating at unprecedented rates,[4] SOH was recast as the ball and chain tying residents to their homes. And those who did move were faced with property taxes wildly disparate from those of their neighbors. Citizens and lawmakers– particularly those in South Florida coastal areas-- began calling for "portability" of this valuable SOH benefit so Florida residents could take their preferred property tax status with them when they bought a new home.

Meanwhile, the impact of rising property values for non-homestead property, combined with the lack of homeowner participation in local government budget hearings and the Legislature's decision to establish school funding requirements in a manner that capitalized on these value increases, resulted in redistribution of significant tax increases onto non-homestead properties. A study undertaken for a Property Tax Study Commission established by former Governor Jeb Bush found that homestead property would be 45.5% of the tax base without SOH, and was 32.1% with SOH.[5] Meanwhile, non-homestead property would be 54.5% of the tax base without SOH, but was 67% with SOH. Unfettered by homeowner complaints, governmental bodies allowed taxes to ride up with the value increases. In 2005, local governments (and the Florida Legislature via the state-controlled school funding requirement) levied tax rates 11% above the "rolled-back rate" that is the rate calculated under law to produce the prior year's revenues. In other words, they increased property taxes 11%. In 2006, they increased taxes 14.4%.[6]

The property tax landscape has changed dramatically, and most provisions of Amendment One will take effect retroactively to apply to the tax year beginning January 1, 2008.

2007 Legislative Efforts

Against this backdrop, lawmakers began the 2007 session with property tax hearings across the state. They routinely heard the following complaints: businesses were experiencing property tax increases at rates far in excess of their revenue increases; rents charged by investment property owners (particularly those for affordable housing) could not support the tax increases; waterfront properties were seeing assessment increases that were forcing them out of business; first-time homebuyers could not gain entrance into the housing market as a result of home prices, insurance and taxes; homebuyers who moved were paying taxes at discriminatory levels; and homeowners wishing to upsize or downsize were "locked in their homes."

Governor Charlie Crist, elected in 2006 to succeed the term-limited Bush, started the bidding with a plan that looked very much like the final product approved by the voters. He proposed doubling the homestead exemption, portability of SOH benefits, a $25,000 tangible personal property tax exemption, and a 3% SOH-type cap on non-homestead property. The House Speaker proposed buying out school taxes on homestead property with a 2.5% increase in the sales tax and a rate rollback. The Senate

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proposed a mix of relief that included rate reductions and a multi-year phase-out of SOH and replacing it with an increased homestead exemption. However, efforts to reach agreement on a property tax package during the regular session failed.

Lawmakers returned for a Special Session "B" (the session following a session devoted to property insurance reform) and reached accord on a proposed constitutional amendment that would have swapped out the SOH benefit for a new super homestead exemption. Due to a flaw in the ballot wording, a Leon County Circuit Court judge struck the proposal from the ballot, but lawmakers decided not to simply fix the ballot language after constituent reaction and internal polling suggested that voters may not approve the proposal because they did not want to give up their SOH cap. However, Special Session B also produced significant legislation (discussed below) changing the way in which millage rates are computed under the Truth in Millage (TRIM) law.

Amendment One, the proposed constitutional amendment approved by the voters, was ultimately approved by lawmakers in Special Session "D" (which followed Session "C" devoted to budget reductions). Legislative negotiators reached tentative accord on this plan before the House leadership developed an alternative plan that many observers considered superior. The House plan would have injected more reform into the mix by creating a new homestead exemption equal to 40% of the median homestead value in the county and allowing taxpayers to enjoy the larger of their SOH value or the new super homestead exemption. It also would have imposed a 5% assessment cap on non-homestead properties and provided relief for affordable housing, working waterfronts, and taxpayers challenging their assessments. However, leadership in a politically divided Senate, forced to cobble together sufficient votes to pass something, refused to return to the negotiating table at the eleventh hour and thereby forced the House to either accept the amendment as tentatively agreed upon or fail again to adopt any property tax relief.

Rate Rollbacks and Caps

Chapter 2007-321, Laws of Florida (HB 1B), effective for 2007 property taxes, revised the manner in which millage rates are calculated for cities, counties and special districts, but not for schools, which constitute approximately 40% of the average property tax bill. This component of the property tax legislation provided across-the-board tax relief. It required local governments, but not schools, to reduce taxes in 2007 by 0-9%, depending upon how fiscally prudent the local governments had been over the past five years. Those who raised property taxes the most during this period had to suffer the largest rate rollbacks. Special districts (including dependent districts and municipal service taxing units for emergency medical and fire rescue purposes) were required to reduce taxes by 3%. Local governments were allowed to override the rate rollbacks by extraordinary vote, with the needed vote increasing as the rate increased.

Prospectively, city, county and special district tax rates will be capped at the rolled back rate (the rate that produces the same taxes as the prior year, exclusive of taxes from new construction), plus growth in personal income. These caps can be overridden by extraordinary vote of the governing board. Again, these caps are not applicable to school taxes, which are levied on a countywide basis with a minimum rate established by the Legislature each year under its complex school-funding formula. Language in HB 1B would have prohibited local governments from automatically increasing tax rates to offset tax base reductions resulting from the proposed constitutional amendment. However, this language was negated when a different constitutional amendment was proposed in Special Session D, thus the fear that many local governments will simply offset the Amendment One tax base reductions by increasing millage rates without the necessity of an extraordinary vote and thereby redistribute more of the tax burden onto non-homestead properties.

Amendment One

Voters surprised the pollsters and pundits, approving Amendment One 64% to 36%, with strong support in South Florida and in coastal areas of the state where property values have risen the fastest. Many believe that Governor Crist's enthusiastic support for the proposal engendered its success. Certainly, he was the central figure in the campaign that urged voters to approve Amendment One. In any event, the property tax landscape has changed dramatically, and most provisions of Amendment One will take effect retroactively to apply to the tax year beginning January 1, 2008. The following summarizes the changes. More detailed information on implementation of Amendment One can be found on the Department of Revenue's website: http://dor.myflorida.com/dor/property/sb4d.html.

Portability

Amendment One allows homestead owners to transfer (or, in legislative jargon, "port") the assessment benefit of SOH (the "differential") when moving from one home used as a permanent residence to another. This benefit applies with respect to homes sold in 2007 or later as long as the homeowner purchases a new home within two years. Unlike many other provisions in the package, portability is applicable to school taxes.

The SOH differential is calculated differently depending upon whether the homeowner is transferring to a more or less expensive home. The amount of differential that can be moved by a homeowner who is "upsizing is the difference between the old home's market value and its SOH assessed value, not to exceed a $500,000 differential. For a taxpayer moving from a $250,000 home with a SOH assessed value of $150,000, to a new $400,000 home, the differential to be transferred would equal $100,000 ($250,000-$150,000 = $100,000). For a taxpayer moving

from a $1,000,000 home with a SOH value of $400,000, to a new home valued at $2,000,000, the differential would not be the $600,000 difference between the old home's market and SOH assessed value, but instead would be capped at $500,000.

The amount of differential that can be transferred by a homeowner who is "downsizing" is a pro rata share of the differential of the old home based upon the just value of the new home as a percentage of the just value of the old home, not to exceed $500,000. For example, a taxpayer moving from a $500,000 home with a SOH value of $300,000, to a new $400,000 home would not be allowed to "port" the full $200,000 SOH differential, but would instead transfer $160,000, which is 80% of that $200,000 ($400,000 market value of new home divided by $500,000 market value of old home = 80%, multiplied by $200,000 differential on old home). Ironically, the mechanism for measuring the transferable tax benefits encourages a higher market value on the old home. As a result, following years of homeowners complaining about excessive assessments, property appraisers are reporting calls from homeowners complaining that their assigned market values are understated and should be increased.

Complications to portability arise when multiple owners of property do not all move simultaneously to a new home. Amendment One authorizes the Legislature to provide by general law for application of portability where there are multiple owners, and while the legislature attempted to address these situations in its implementing legislation in Chapter 2007-339, Laws of Florida (SB 4-D), additional work likely is needed. While some property appraisers disagree, the law appears to contemplate that no SOH differential can be transferred unless the old homestead is abandoned by all owners. Thus, the amount of the SOH differential is likely to become an asset in dissolution of marriage and similar proceedings. Where multiple owners abandon a single homestead and move to separate new homes, the law provides for a pro rata sharing of the SOH differential based upon the number of owners without regard to the value of the ownership interests of the various owners. When individuals move from different homesteads to a new shared homestead, the law calls for transferring

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New Property Tax Landscape

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only the highest of the various owners' SOH differentials– a result that has caused officials at the Department of Revenue to jokingly suggest that the question "what is your SOH differential?" be added to dating websites.

The Department of Revenue is in the process of developing an application form for portability, but is considering whether the application can simply be folded into the one used to establish a new homestead exemption. In any event, because the SOH differential can be transferred across counties, administration of portability is going to require significant intergovernmental coordination that has not been necessary in the past.

Doubled Homestead Exemption

Amendment One increases the $25,000 homestead exemption to $50,000, but does so by applying the additional $25,000 to exempt the value between $50,000 and $75,000. This approach was taken to provide some relief to smaller, poorer counties whose tax bases would have been seriously impacted by a straight doubling of the homestead exemption that exempted the first $50,000 of value. The increased exemption is not applicable to school taxes. Many have questioned the rationale for this relief since homestead properties have enjoyed the greatest benefits under the system. However, Governor Crist campaigned on this pledge, and it remains both simple to understand and popular with the voters.

Assessment Cap

Beginning in 2009, Amendment One provides for a new assessment cap on non-homestead real property. The assessment cap is not applicable to tangible personal property, meaning that manufacturing plants, power plants, telecommunications and cable systems do not receive this potential benefit. However, because the cap is set so high (10% a year), the run-up in values has already occurred for most taxpayers, and the cap is not applicable for school taxes, few business and investment properties will experience any real benefit from this cap. And, unlike the SOH cap, there is no portability of this tax benefit.

The implementing legislation (SB 4-D) differentiates between "non-homestead residential property" defined as nine or fewer dwelling units or vacant residential land, and "nonresidential property." For the former, a change in ownership or control of the property results in resetting the value to market value. For the latter, either a change in ownership or control or an improvement that increases the value of the property by at least 25% results in resetting the value to market value. A change of control means "the cumulative transfer of control or of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value."

Implementation of this cap portends administrative nightmares. SB 4-D requires any landowner seeking protection under the cap to file an application before March 1st of each year. Counties have the option of replacing the application with an automatic renewal process, similar to that used for homestead exemption, in subsequent years. Property appraisers have warned that the application requirement will result in a flood of applications that they are not equipped to handle. Because the cap is available without qualification to any class of property that does not otherwise receive the benefit of some special assessment rules, the only ostensible rationale for requiring an application is to ensure that there has been no change in ownership or control or qualifying improvement that triggers a resetting to fair market value in any given year. Yet

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large public corporations that own real property will find it difficult, if not impossible, to monitor the change in control condition because it requires monitoring over multiple years to ascertain whether 50% of the ownership of the entity owning the property has changed since the property was last valued at market value. Anyone seeking protection of the 10% cap who later is determined not to have been entitled to it is subject to a tax lien for ten years of back taxes, plus a penalty equal to 50% of those taxes and interest at the rate of 15% per year. In light of the minimal benefits afforded by the cap and the potential to incur substantial penalties for inadvertent violation of the change of control requirement, many taxpayers would be well-advised to forgo application for this benefit.

Tangible Personal Property Exemption

Amendment One provides some relief to small businesses via the $25,000 exemption for tangible personal property. This exemption was suggested initially by the Florida Association of Counties as a way to simplify administration of the tax for small businesses and property appraisers. Property appraisers, who deal with multiple small accounts that produce little revenue, and small business taxpayers who complained that they were paying more to have their annual returns prepared than the government was receiving in tax dollars, rallied around this proposed change and it was in every plan proposed during every session.

Because taxpayers must file annual returns for tangible personal property in every county and for every business location, the exemption was made applicable to each return for each county and each business location. As a result, the exemption could shield substantially more than $25,000 of an individual taxpayer's property. However, the legislature carved out certain "freestanding property" placed at multiple sites and required a single return per county for that property. Freestanding property includes vending and amusement machines, LP/propane tanks, utility and cable company property, billboards, leased equipment, and similar property not customarily located in the offices, stores or plants of the owner.

Looking Ahead

Many opponents of Amendment One, and those who supported it but without enthusiasm, complained that while it provided some tax relief, it did not constitute comprehensive tax reform. Homeowners in similar homes will still pay wildly disparate taxes; first-time homebuyers and newcomers to Florida are disadvantaged relative to long-time homeowners; rental properties and second homeowners and snowbirds received little relief; non-homestead waterfront properties are still hurting; and business taxpayers and investment properties face the possibility of picking up more of the tab if local governments increase millage rates to offset reductions to the tax base resulting from portability and an increased homestead exemption. Indeed, some of these shortcomings in the existing property tax system ultimately may be exacerbated by Amendment One. Suffice it to say, the need for property tax reform has not been satisfied.

Tax & Budget Reform Commission

Florida's Tax & Budget Reform Commission meets once every 20 years and is authorized under the Florida Constitution to place proposed constitutional amendments directly onto the ballot. They are meeting now and must have their work product to the Secretary of State by May 8th for the November 2008 ballot. Commissioners have identified "taxpayer fairness" issues as a subject that deserves their attention. Thus far they have discussed replacing property taxes with consumption taxes; relief for conservation lands; exemptions for improvements tied to renewable energy; relief for working waterfront property and affordable housing; and changes to the highest and best use requirements and the burden of proof in property tax challenges. Interested parties can monitor the efforts of this group at their website: www.floridatbrc.org/.

2008 Florida Legislature

The Governor and House leadership have publicly stated that Amendment One is the beginning, not the end, of property tax reform. Senate Republicans have sent mixed messages, while some Senate Democrats have publicly declared that they are done because schools and local governments cannot afford further cuts. Numerous pre-filed bills suggest that individual legislators are interested in continuing the conversation on property tax reform. At a minimum, lawmakers appear interested in dealing with procedural issues including the process for challenging property tax assessments, which many leading lawmakers view as unfairly skewed in favor of property appraisers at the expense of taxpayers.

Citizen Initiatives

Meanwhile, numerous citizens' initiatives have been filed and are in the process of securing signatures in an effort to make the ballot. The requirement for more than 600,000 signatures makes it highly unlikely that any of the pending proposals will make the 2008 ballot. However, House Speaker Marco Rubio has backed the efforts of one group to limit taxes to 1.35% of the value of property– a facially simple concept for voters to grasp and one that could gain traction in the future.

Legal Challenges

Passage of Amendment One means a pending legal challenge to SOH and portability is now ripe for consideration by the courts. Newcomers to Florida have filed a class action lawsuit in Leon County asserting that they, as permanent residents of Florida, are entitled to protection under numerous constitutional provisions, including the right to travel. Prior to passage of Amendment One, the Florida Legislature retained the services of Walter Hellerstein, one of the nation's foremost constitutional scholars in the area of state and local taxation. He warned that layering portability onto SOH could violate the constitutional right

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to travel.[7] While SOH standing alone has withstood challenges, it resulted in treating intrastate and interstate moves the same. However, layering portability onto SOH means that persons moving intrastate enjoy a benefit not afforded to persons moving interstate. This distinction threatens the viability of the entire system and we are likely to see some ruling on this issue in the near future. Of great concern to those watching this issue is the fact that the United States Supreme Court has ruled that states must provide "meaningful backward looking relief" to taxpayers who are required under duress to promptly pay taxes later declared to be unconstitutional.[8] Generally, this means that government must either recoup taxes from those who have enjoyed an unconstitutional advantage, or refund taxes to those who have been discriminated against. Thus an adverse ruling on portability could have far-reaching and costly ramifications.

Conclusion

The bottom line is that while much has changed with property taxation in Florida as a result of the work of the 2007 Florida Legislature and passage of Amendment One, the final chapter of this book remains unwritten. All eyes should remain on the Tax and Budget Reform Commission, the 2008 Florida Legislature, the citizens who are passionate about tax reform and are promoting various constitutional amendments, and the courts as they consider the legal challenges to Florida's existing property tax system and potential remedies to address the same.

Vicki Weber *is a shareholder with the Tallahassee law firm of Hopping Green & Sams, P.A. For thirty years she has practiced in the area of state and local tax, working in the Florida Legislature's Finance & Tax Committee, as General Counsel for the Florida Department of Revenue, and in private practice. She was actively involved in the 2007 property tax debate.*

Endnotes:

1 University of Florida, Final Report to the Florida Legislature Office of Economic and Demographic Research, Analytical Services Relating to Property Taxation, Part 1: Assessment Component, Page 21 (July 31, 2007) available at http://edr.state.fl.us/property%20tax%20study/property%20tax%20study.htm.
2 Id. at page 22.
3 Id. at page 29.
4 Annual house price appreciation in Florida was 16.81% in 2004 and 27.92% in 2005, following an average 5% increase during the period 1971 to 2000. Id. at page 19.
5 Florida Legislature, Legislative Office of Economic and Demographic Research, Florida's Property Tax Study, Interim Report, at page 29 (February 15, 2007), available at http://edr.state.fl.us/property%20tax%20study/property%20tax%20study.htm.
6 Id. at Appendix A, page 50.
7 Id. at Appendix B.
8 McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990).

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Second District Court of Appeal Upholds Constitutionality of Elective Share

By J. Richard Caskey, Steven L. Hearn, P.A., Tampa, FL

In the recent case of *In re Estate of Robert W. Magee*, 32 Fla. L. Weekly 2307a (Fla. 2d DCA Sept. 26, 2007), the Second District Court of Appeal reviewed an attack against the constitutionality of Florida's elective share statute. Based upon Florida Supreme Court precedent, the Court held that testamentary disposition of property is a constitutional property right, as opposed to a statutory right. However, finding that the state has a strong public policy concerning protection of the surviving spouse and that the elective share statutes serve a legitimate legislative purpose, the Court upheld the lower court's ruling that the statute is constitutional.

Although the historical origin of the right to devise property is statutory, and almost all states recognize it as a statutory right, Florida case law holds testamentary disposition is a constitutional right.

Approximately one year before his death, the decedent in *Magee* had amended his trust to disinherit his wife resulting in substantial benefit to his daughter. The surviving wife petitioned for and was awarded an elective share and the daughter appealed, arguing Florida's elective share statutes violate the Florida Constitution.[1] Her major argument was the elective share violates Article I, Section 2 of the Florida Constitution which provides all persons with "the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law."

The Florida Supreme Court previously interpreted Article I, Section 2 of the Florida Constitution in the case of *Shriners Hospital for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990). In *Zrillic*, the Supreme Court noted Florida and other jurisdictions historically recognized a distinction between traditional property rights versus testamentary rights, in that property rights are fundamental, natural rights, whereas testamentary rights are generally created by statute and did not exist at common law. However, the *Zrillic* Court (for the first time in Florida) rejected that historical distinction and concluded that testamentary disposition was a "specifically expressed constitutional property right."[2]

The daughter in *Magee* relied upon Article I, Section 2 of the Florida Constitution and argued that *Zrillic* recognized a fundamental, constitutional right to devise property, which cannot be curtailed except through a narrowly tailored law, reasonably necessary to secure public welfare. She further argued the elective share statutes are not sufficiently narrowly tailored to further the state's policy of protecting disinherited spouses, particularly because the current elective share laws apply regardless of the surviving spouse's financial needs.

The *Magee* Court agreed the right to devise property is a constitutional property right, but applied a "rational basis" analysis to test the constitutionality of the statute rather than the stricter standard for which the daughter argued. Under that test, the statute is upheld if it bears a rational relation to a legitimate legislative purpose.[3] The Court found the state has a strong public policy concerning protection of the surviving spouse, and the provisions of the elective share statutes serve a legitimate legislative purpose and are therefore constitutional.

Although the *Magee* opinion upheld the current elective share laws, it has raised a number of issues. As an initial matter, the historical origin of the right to devise property is statutory, and almost all of the states recognize it as a statutory right. However, in Florida under *Zrillic* and now under *Magee*, the right to devise has been determined to be constitutional, not statutory. Those holdings are contrary to the vast majority of other states and the common law, but now serve as apparently valid legal precedent in Florida. If the Florida Supreme Court again reviews this issue in the future, it will first have to decide whether it will maintain those rulings or recede from them to conform with mainstream jurisprudence.

Second, if testamentary disposition is not a statutory right but is rather a constitutional right, there may still be argument over the applicable standard to test the constitutionality of the elective share laws. Although the daughter in *Magee* argued for a more rigid "strict scrutiny" test, the Second DCA rejected that standard and applied the lesser "rational basis" test. However, if the right to devise property is in fact a "fundamental" right, perhaps another court might determine strict scrutiny should apply to laws restricting that right.

Finally, there may also be argument over whether the elective share laws meet the applicable standard. If the rational basis standard applies, there may be need to

revisit the issue of whether the statute serves a legitimate legislative purpose. Although the Second DCA found that test was met, its opinion did not include much discussion about the legislative purpose, referring only briefly to the public policy in protecting the surviving spouse. On the other hand, if strict scrutiny applies, it remains to be seen whether the elective share statutes can hold up under that more rigorous standard.

Although *Magee* was appealed to the Florida Supreme Court, the Court has declined to hear the case. As a result, further authoritative rulings on these issues will have to wait. In any event, the *Magee* opinion at least presents the opportunity for us to review these issues and ponder the possible implications should the Supreme Court address them in the future.

Endnotes:

1 The daughter also unsuccessfully argued the elective share statutes violate the Due Process Clause of the United States Constitution.

2 *Zrillic* at 67-68. The *Zrillic* Court ruled Florida's mortmain statute (which allowed a spouse or lineal descendant of a decedent to set aside certain testamentary charitable devises) was unconstitutional as it violated Article I, Section 2 of the Florida Constitution. Id. at 71.

3 See *Haire v. Fla. Dept. of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004).

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The Florida Department of Revenue Posts New Form DR-313

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

Thanks to the efforts of Elaine Bucher, a partner with the Proskauer Rose law firm in their Boca Raton office, the Florida Department of Revenue has created and published a new form, Form DR-313, titled Affidavit of No Florida Estate Tax Due When Federal Return is Required.

Form DR-313 is to be used relative to a decedent who died after December 31, 2004, and before January 1, 2011, under circumstances in which there is no Florida estate tax due and the decedent's estate is required to file either a United States Estate (and Generation-Skipping Transfer) Tax Return (IRS Form 706) or a United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of Nonresident Not a Citizen of the United States, (IRS Form 706-NA). Form DR-313, as well as the IRS Estate Tax Closing Document, should be recorded in each county in Florida in which the decedent owned an interest in real property. Furthermore, Form DR-313 would need to be filed in any probate proceeding being conducted in Florida, whether domiciliary or ancillary, along with the IRS Estate Tax Closing Document.

Form DR-313 is to be used under circumstances in which there is no Florida estate tax due and the decedent's estate is required to file a federal tax return.

With respect to estates in which no IRS Form 706 or IRS Form 706-NA is required to be filed, you should continue to use Florida Department of Revenue Form DR-312, Affidavit of No Florida Estate Tax Due.

Thus, it is no longer necessary to file a Florida Estate Tax Return (Form F-706) and a copy of either IRS Form 706 or IRS Form 706-NA with the Florida Department of Revenue, unless you are dealing with an estate relative to which the decedent died prior to January 1, 2005. Of course, it will be interesting to see what Congress ultimately does in the future vis-a-vis federal estate taxes and the state death tax credit.

Please write, email or personally communicate your thanks to Elaine Bucher for her hard work in making this happen.

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Public Housing Authorities and the Private Sector

By Andrew M. Reed Esq., Lakeland, FL

On behalf of the Affordable Housing Committee of the Real Property Probate & Trust Law Section of The Florida Bar

In Florida, a public housing authority (PHA) is a statutory agency developed to address the "shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford."[1] This shortage of housing contributes to "an increase in and spread of disease and crime, and constitutes a nuisance to the health, safety, morals and welfare of the residents of the state,"[2] as well as impairing the economic value of surrounding properties. The legislature has rightly observed that these conditions cause "excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health, welfare and safety, fire and accident prevention, and other public services and facilities."[3] The PHA's primary function is to provide decent, safe and sanitary housing for those populations most in need of housing, such as low and very low income households, seniors and others who may, without such assistance, become homeless.

Chapters 421 (Public Housing), 422 (Housing Cooperation Law) and 423 (Tax Exemption of Housing Authorities), Florida Statutes, lay the state law foundation for the creation, existence and operation of the PHA. PHAs can be municipal, county-wide or regional in geographic reach, and regardless of size, are authorized to engage in a variety of endeavors supporting their purpose of providing safe and affordable housing. For example, PHAs have the powers to administer (or contract to administer) public housing projects,[4] to rent or own real property, to acquire property by eminent domain[5] to administer fair housing and other ordinances,[6] to engage in research, studies and experiments on the subject of housing[7] and to organize private for-profit or not-for-profit business entities.[8]

The public's need for low cost housing is evident, but in order to serve this need, PHAs are struggling to adapt to reduced government funding, a growing number of obsolete structures, and public distaste for the "traditional" low income housing project complex. While the intervention of private developers and private sources of financing provides needed expertise and capital to PHA development and redevelopment projects, the presence of these private parties raises additional concerns.

Projects administered by the PHA deteriorate just like their privately-owned counterparts, thus periodically presenting the PHA with the question of how to finance significant repairs, rehabilitation or redevelopment. Federal funding is often a significant part of the solution. For example, HOPE VI grants[9] are available to fund the replacement of severely distressed public housing stock. This program is specifically designed to assist in rehabilitation or replacement by funding capital costs such as construction of new facilities, substantial rehabilitation to existing facilities, demolition, site acquisition and relocation costs. However, appropriations for HOPE VI have declined in recent years.[10] The mixed-finance model,[11] which evolved from the HOPE VI model[12] in the early 1990s, allows parties other than the PHA to be involved in the transaction, and allows the PHA to play different roles in a development or redevelopment,[13] Mixed finance transactions involve a combination of public and private sources for the development of public housing units,[14] and may include capital funds, operating funds, debt, low income housing tax credits (LIHTCs) and state or local funding.

A public housing authority's primary function is to provide decent, safe, and sanitary housing for those populations most in need.

The relative complexity of a mixed-finance transaction, lack of adequate funding for PHAs and environmental factors drive PHAs to partner with private developers to accomplish needed development and redevelopment. The private developer brings to the table expertise in these complex transactions, the financial wherewithal to make guarantees which may be essential to secure private financing,[15] and relationships with banks, investors and law firms with mixed-finance experience, which contributes to the overall chance of success for a development or redevelopment project.

In a mixed finance context, the PHA may procure a development partner, and structure the transaction so the Owner Entity is private, and thus not subject to 24 C.F.R. part 85, saving the time and administrative expense of a public bidding process. However, the PHA may not exercise significant functions within the Owner Entity with respect to managing the development of the proposed units.[16] Inversely, the PHA cannot manage the development of the project without becoming subject to bid requirements which could add time to strict timelines inherent in this type of transaction.

There is a tension between the private developer's obligations[17] and the PHA's regulatory and public purpose[18] which creates a need for the PHA and its counsel to be particularly alert when negotiating the terms of guidance documents such as the master development agreement, ground lease, and partnership agreement. Careful drafting of these documents will ensure the PHA has clearly com-

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from preceding page

municated its priorities to the Developer, and ultimately provides the constraints by which the managing entity must operate. This is especially important when the PHA has conceded management control over construction, as noted above. Success in developing and redeveloping quality public housing stock may empower a more inexperienced PHA to take a more active role in future developments or redevelopments.

Construction Completion is not necessarily the end of the Owner Entity's relationship to a mixed-finance project.[19] There is no prohibition on the PHA delegating the tasks of applicant screening and selection, informal appeals for denial of admission, rent determinations, and other management functions, but the PHA is ultimately responsible if there is a violation of due process, a deprivation of rights afforded to tenants or any other practice which violates the agreements with HUD or applicable law. So even if the function is delegated, a careful oversight program is vital for the PHA. For instance, the manager of a mixed-finance project may be required to establish a grievance procedure which conforms with applicable law,[20] but also conforms to the procedure used by a PHA in its other projects. It is up to the PHA to make sure this requirement is satisfied.

As many PHAs move towards an asset management approach to public housing administration, there are clearly more opportunities to involve private sector businesses in carrying out the PHA mission. In circumstances where PHAs outsource the administration of various components of public housing, it is critically important, just as in development, for the PHA and its counsel to draft and negotiate documents such that private parties are put on notice of and obligated to support the PHA's public purpose.

Andrew M. Reed *recently opened the Law Office of Andrew M. Reed, Lakeland, Florida, and concentrates in the areas of real estate and local government law. He has represented a small public housing authority since 2005, first as associate counsel and currently as general counsel.*

Endnotes:

1 Sec. 421.02(1), Florida Statutes
2 Id.
3 Id.
4 Sec. 421.08(2), Florida Statutes
5 Sec. 421.08(3), Florida Statutes
6 Sec. 421.12, Florida Statutes
7 Sec. 421.08(6), Florida Statutes
8 Sec. 421.08(7), Florida Statutes
9 Housing Opportunities for People Everywhere. HUD's website has accessible and easy to understand information about the HOPE VI at http://www.hud.gov/offices/pih/programs/ph/hope6/about/#1
10 Appropriations during the period from 1993-2003 averaged $533 million, while 2007 appropriations were at $183 million. See Office of Management & Budget, Public Budget Database, available at http://www.whitehouse.gov/budget/fy2008/db.html (last accessed on January 30, 2008.) See also Mixed Finance Development of Public Housing in The Legal Guide to Affordable Housing Development, 332 (Tim Iglesias and Rochelle E. Lento, eds., 2006) for a good discussion and background information on HOPE VI and mixed finance programs.
11 See generally 24 C.F.R. Part 94, Subpart F.
12 Mixed Finance transactions may but need not involve HOPE VI funding. See 24 C.F.R. 941.610, setting forth evidentiary submission guidelines for deals involving HOPE VI.
13 24 C.F.R. 941.604 allows an Owner Entity to be the PHA, a lessee under a ground lease from the PHA and/or a partnership that includes the PHA. The Owner Entity owns the public housing units. See also 24 C.F.R. 941.102(4).
14 24 C.F.R. 941.604
15 The PHA cannot pledge public housing assets.
16 24 C.F.R. 941.602(d).
17 A private developer has to meet the expectations of its shareholders or owners in terms of profitability, risk, project cost and quality; in other words, has to behave like a business.
18 Throughout the negotiation and subsequent development process, the PHA must be focused on its mission of delivering housing and supportive services to low income persons, while complying with a bevy of regulations and agreements with HUD.
19 This statement is more obvious if the Owner Entity is the PHA.
20 24 CFR Part 966, Subpart B

Slate of Officer Nominations Announced

The nomination of Section Officers for the 2008-2009 year, as presented by the Long Range Planning Committee, is as follows:

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Michael Dribin

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Brian Felcoski

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Peggy Rolando

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Pamela B. Stuart

This slate of nominees will be voted upon by the Section Members at the Election Meeting at the Section's Convention, May 23-24, 2008 in Bonita Springs, Florida at the Hyatt Regency Coconut Point.

Answers to Five Common FIRPTA Questions

By Stacy O. Kalmanson, LandAmerica Financial Group, Inc., Orlando, FL and Shawn P. Wolf, Packman, Neuwahl & Rosenberg, P.A., Miami, FL

With the continued surge of foreign investors, the Foreign Investment in Real Property Tax Act of 1980 as amended ("FIRPTA") will likely become an increasingly common issue for practitioners when closing Florida residential and commercial real estate transactions. When dealing with FIRPTA, it is crucial that practitioners understand the basics.

FIRPTA, through Internal Revenue Code Section ("Code §") 897, generally imposes U.S. income tax on the disposition of a U.S. real property interest (a USRPI) by a U.S. income tax nonresident alien ("NRA") or a foreign entity (see the discussion below). Without this rule, USRPI related gains could avoid U.S. income taxation. In order to facilitate at least some level of tax compliance, FIRPTA, under Code §1445, generally provides that a transferee (buyer) must withhold 10% of the amount realized by the NRA or foreign entity transferor in the sale of a USRPI. U.S. real property generally includes real property located within the U.S. and U.S. Virgin Islands, as well as interests in certain U.S. entities that own U.S. real property. The amount realized by the NRA or foreign entity transferor includes not only cash paid and the fair market value of any other property transferred or to be transferred, but also the outstanding amount of any liability assumed by the transferee.

The amount of tax withheld under Code §1445 is payable to the Internal Revenue Service ("IRS") within 20 days of the transfer, unless certain steps are taken by no later than the closing date. For example, the 10% withholding rule can be modified if the NRA or foreign entity transferor or the transferee timely submits Form 8288-B (Application for Withholding Certificate for Disposition by Foreign Persons of U.S. Real Property Interests) to the IRS to request a reduction or elimination of the withholding tax (e.g., based on the maximum tax liability of the seller). In the case of an option to purchase, no withholding is required until the NRA transferee exercises the option. However, the sale of such an option by an NRA or foreign entity would be considered to be the taxable sale of a USRPI.

PLEASE NOTE: The 10% FIRPTA withholding does not alleviate the need for the NRA or foreign entity to file a U.S. income tax return to properly establish and pay the actual tax due or apply for a refund, as the case may be!

With the above being said, this article discusses the answers to five common FIRPTA questions that arise when a foreign person is selling a USRPI. This article is not intended to serve as tax advice, but rather is intended to discuss common FIRPTA questions that practitioners may encounter in connection with closing real estate transactions. Due to the complexity of FIRPTA and the tax laws, foreign persons should seek the assistance of an attorney or CPA who specializes in foreign taxation prior to making any investment in a USRPI.

1 To whom does FIRPTA apply?

FIRPTA applies to transfers by foreign persons. A foreign person includes, but is not limited to, an NRA, foreign business entity or foreign trust.

An NRA is a person who is neither a U.S. citizen nor a U.S. income tax resident alien ("RA"). In this regard, a person is an RA if either: (1) the U.S. Citizenship and Immigration Service has granted him or her Lawful Permanent Resident status through what is commonly known as a green card, which is actually something akin to beige in color; or (2) the person meets the substantial presence test for the calendar year in question. The substantial presence test requires that a person be physically present in the U.S. for more than 30 days in the current year and 183 or more days over a three year testing period ("the 183 day rule" as defined in Code §7701(b)(3) and the Regulations thereunder). This rule can be summarized by the following formula: (current year number of days x 1) + (first prior year number of days x 1/3) + (second prior year number of days x 1/6). However, practitioners should be cautious when applying this rule as there are special rules applicable to students, diplomats, persons with medical conditions arising in the U.S., and others. FIRPTA does not apply where the person certifies to the buyer that he or she is an RA. Purchasers and their counsel should take care when accepting certifications from sellers based on the substantial presence test.

FIRPTA generally imposes U.S. income tax on the disposition of a U.S. real property interest by a U.S. income tax nonresident alien or a foreign entity.

A business entity is considered to be a foreign entity if it is created or organized outside of the U.S. A foreign trust is any trust other than a domestic trust. Simply stated, a domestic trust is defined to include a trust where one or more U.S. persons have the authority to control all substantial trust decisions and where a court within the U.S. is able to exercise supervision over the administration of the trust. Consider this definition carefully where Florida land trusts are used!

It should be noted that FIRPTA does not apply where the property being acquired by the transferee is for use as a primary residence by the transferee or certain members of his or her family and the amount realized for that property is $300,000 or less. FIRPTA does not reference whether the property will be used as a primary or secondary

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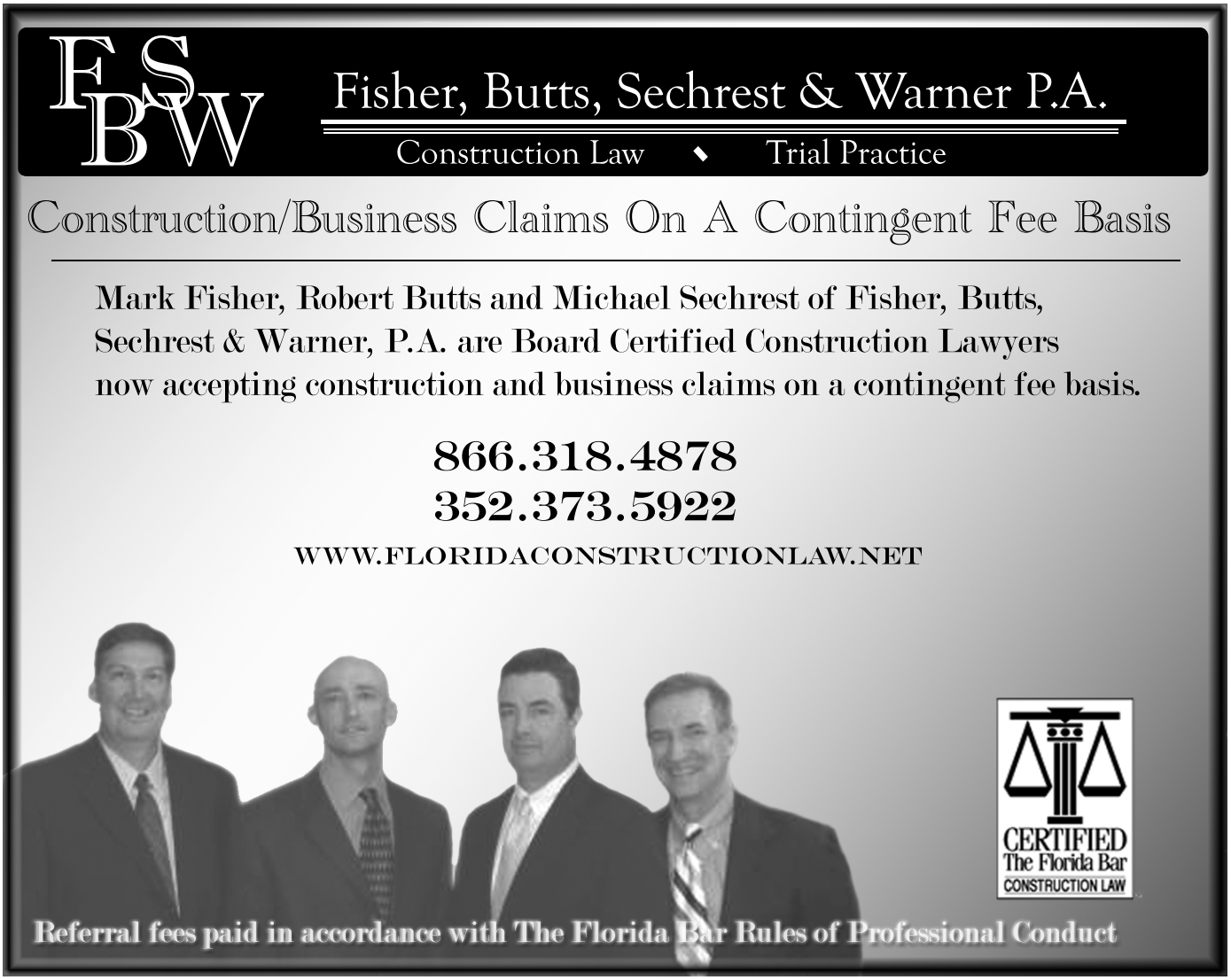
residence. However, FIRPTA does consider the amount of time that the transferee will be spending in the residence. Ultimately, the transferee will potentially be held liable for the withholding tax, interest and penalties if the transferee fails to reside on the property for the required amount of time, unless the transferee can establish that the failure was caused by an unanticipated change in circumstances following the closing.

Now that the Florida residential real estate market has cooled, practitioners may see more properties selling for less than $300,000 (and falling within the FIRPTA exemption). As a practical matter, practitioners may see more clients trying to play games with real and personal property allocations so that their real property falls within the exemption. For example, a client may try to allocate money from the sales price to tangible personal property such as furnishings and expensive artwork (if the property is being sold furnished). Nonetheless, the IRS is familiar with price allocations and allocation abuses used to qualify a property as exempt under FIRPTA. Thus, any allocations that are made should be justifiable based on the facts and circumstances of the specific case and items at issue.

Importantly, practitioners should be aware that FIRPTA compliance requires the taxpayer (whether an individual or an entity) to have a taxpayer identification number ("TIN"). In this regard, practitioners may want to encourage all foreign individuals or entities to discuss with tax counsel whether it is appropriate to obtain a TIN at the time a USRPI is being purchased, as obtaining a TIN at the last minute as part of a closing can cause complications. To apply for a TIN, the taxpayer should consider Forms W-7 and SS-4, as applicable (forms that can be obtained on the IRS website, www.irs.gov). As you can imagine, some foreign investors may not want to obtain a TIN because they do not want to be part of the U.S. tax system; however, practitioners may want to inform the client of the possible ramifications of failure to obtain a TIN or applying for a TIN at the last minute.

2 How does FIRPTA apply to property owned jointly by foreign and non-foreign sellers?

For purposes of calculating the withholding tax of U.S.



real property owned jointly by foreign and non-foreign persons (e.g., a foreign person and his or her U.S. citizen spouse who own property as tenants by the entirety), the amount realized will be allocated among the owners (based on capital contributions) or one-half to each when the transferors are husband and wife. PLEASE NOTE: joint U.S. income tax returns are generally (barring certain elections) not allowed to be filed in situations where one or both spouses are U.S. income tax NRAs.

3 What is the effect of not withholding payment of tax?

Assume that Augie Ausländer ("Augie") is an NRA. In 2007, Augie sold a parcel of commercial property to his friend, Elsa Extranjero ("Elsa"), who is also an NRA. In connection with the transaction, there was no FIRPTA withholding or payment of tax. Now, Elsa wants to sell the property to Doug Developer ("Doug"). Not surprisingly, several issues arise in this scenario:

1 How does the FIRPTA withholding issue impact Augie? It does not. Augie must file a U.S. income tax return and pay the related income tax.

2 Should Elsa be concerned about the failure to pay the withholding tax? Yes. The liability for failure to withhold tax is Elsa's responsibility, which can result in Elsa having to pay the withholding tax, interest and penalties!

3 What impact does the failure to pay the withholding tax have on the subsequent sale to Doug? Failure to withhold tax does not affect the subsequent sale to Doug (he still has to withhold as Elsa is an NRA). However, the failure to withhold tax remains a problem for Elsa. For example, Elsa has an issue with respect to her unsatisfied withholding liability under Code § 1445, which is clearly raised by Form 8288-B (a form used to apply for a withholding certificate).

4 Will Doug bear any tax liability when he takes ownership of the property? Assuming Doug was unaware of the first transaction, the failure to withhold tax from the transaction between Augie and Elsa should not affect Doug.

4 What about the foreign individual who dies with 3 adult U.S. citizen heirs?

Franz Foreigner ("Franz"), an NRA, dies in 2007 without a will. Franz owned a condominium in Florida worth $2,000,000. Franz has 3 adult heirs, all of whom are U.S. citizens. What now?

First, and to be clear, the RA/NRA definitions above are for U.S. income tax purposes only. In the U.S. estate tax context, domicile is the key determination for someone who is not a U.S. citizen. In this context, a person's domicile is based on such person having the relevant intent to establish his or her domicile in a certain place and taking the necessary overt actions in relation thereto. The bottom line is that a U.S. estate and gift tax nonresident alien domiciliary ("NRAD") is someone who is not a U.S. citizen with a domicile outside of the United States.

Assuming that Franz is an NRAD, the good news is that FIRPTA does not apply to transfers of a USRPI that arise at death. The bad news, however, is that U.S. estate tax rules are applicable to an NRAD with so-called U.S. situs assets (the clearest example of which are U.S. real property and stock of U.S. companies). As the property is worth $2,000,000 in this example, you may think that there is no U.S. estate tax due; however, an NRAD is only entitled to a $60,000 applicable exclusion amount (unlike U.S. citizens and resident alien domiciliaries who have a $2,000,000 applicable exclusion amount). Thus, in this case, U.S. estate tax would arise (unless certain planning through the use of a Qualified Domestic Trust is implemented or certain U.S. estate tax treaty benefits are available). In addition, practitioners should also be aware that gifts of U.S. real estate do not result in the application of FIRPTA but U.S. gift tax may be due!

The U.S. estate and gift tax issues relating to the ownership of U.S. real property are one of the main reasons that planning prior to the purchase of U.S. real property is of paramount importance! Because the maximum U.S. estate tax is currently 45% (based on date of death fair market value), a client should make an informed decision about how to make his or her investment, especially where there is a desire to obtain the beneficial long-term capital gains rates.

5 What if the seller is a domestic Limited Liability Company ("LLC") with a foreign person as its sole member?

For all U.S. tax purposes, a domestic LLC is treated (barring an election otherwise) as a disregarded entity. Thus, the disregarded entity is not considered the transferor. Instead, the person who owns the assets of the disregarded entity is treated as the transferor. Also, if the person who owned the domestic LLC passed away while owning the LLC interest, then the U.S. estate tax risks mentioned above are equally applicable. If a foreign LLC is used, the results may differ.

Conclusion

At first blush, FIRPTA may appear daunting to some practitioners. Ultimately, understanding the FIRPTA basics and the answers to the five common FIRPTA questions discussed above will assist practitioners in closing real estate transactions where foreign persons are involved. Again, as part of the planning process, foreign persons should discuss potential issues with tax counsel prior to purchasing a USRPI.

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Annual Out-of-State Meeting in Ireland Exceeds All Expectations

October 17 – 21, 2007

By Douglas E. Gonano, Esq., Gonano & Harrell, Fort Pierce, FL

The Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar held its annual out-of-state meeting in Ireland, which was not only beautifully conceived by Chair Melissa Murphy, but outstandingly organized and thoroughly enjoyed by all who attended. Based at the brand new Ritz Carlton-Powerscourt Resort located immediately adjacent to the historic Powerscourt Botanical Gardens, the venue was superb. The Powerscourt estate dates as far back as 1731 and contains many formal gardens and surrounding woodlands. The idiosyncrasies, however, of occupying a facility that had barely been open two weeks led many to conclude that there may not be gremlins in Ireland, but there are certainly some impish leprechauns.

Following the welcome luncheon on Wednesday, October 17, 2007, we were treated to an enlightening bus tour of the city of Dublin. The tour included Dublin Castle, St. Pats Cathedral and Trinity College and was highlighted by the consumption of a pint (or two) at the Guinness Brewery, which provided a 360° panoramic view of the city of Dublin and many of its significant landmarks. With that as a warm up, the evening concluded with an enjoyable meal and whisky tasting at the Old Jamison Distillery. The group enjoyed an expected performance by traditional Irish musicians supplemented by unexpected, but outstanding, Irish dancers that extracted some fancy footwork from a few of our group.

On Thursday, the members who elected to engage in golf learned about the challenges of a "steep" course at the "First International RPPTL Section Invitational Golf Tournament". The non-golfers toured the Ballyknocken House and Farm and attended the Ballyknocken Cookery School. Irish food has came a long way from boiled potatoes and cabbage. The art of creating an authentic Irish coffee for dessert provided a wonderful conclusion to that outing. A sheep herding demonstration was provided too.

On Friday, October 19, the Executive Council meeting was held in downtown Dublin and was preceded by a group tour of the Irish courts. The attendees were treated to some interesting intellectual banter between our own Florida Supreme Court Justice Bell and his Irish judicial counterpart. The balance of the morning and early afternoon were spent attending a detailed discussion on law and the practice of real property, probate and trust law in Ireland by two well qualified practitioners and an introduction to the educational requirements and training of solicitors and barristers. The day was followed by a lovely evening and memorable meal at the partially restored castle located at, and surrounded by, the Powerscourt gardens and some beautiful strolling weather.

On Saturday October 20, 2007, the group ventured to the medieval City of Kilkenny. Following the group's bus trip to and tour of Kilkenney Castle and Saint Canice's Cathedral, the farewell dinner was held. During the dinner, John Neukamm proved once again that a picture is worth one thousand words by presenting a slide show of the Executive Council events and activities for the week that was not only entertaining but at times quite touching.

We acknowledge that this spectacular event would not have been possible without the assistance and support of the Section's sponsors and that the quality of our events was and continues to be significantly enhanced by them.

Chair Melissa Murphy achieved her goal of giving the Section members a true Taste of Ireland.

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RPPTL in Ireland!



Trying out our skills at the Ballyknocken Cookery School.



At the Executive Council meeting with the Dublin Bar.



Melissa Murphy outside the restaurant, Peploe's.



Melissa Murphy and her husband, John McPherson.



Dinner and a tour at Old Jamison Distillery.

Center photo: Glendalough Woods Nature Reserve, Ireland.
Photos by John Neukamm and Michael Gelfand.

RPPTL in Ireland!



Chair Melissa Murphy at the Guinness brewery in Dublin, Ireland.



St. Patrick National Cathedral, Dublin.



The Executive Council meeting.







At Powerscourt Gardens.



Picturesque Ireland!





RPPTL in Ireland!





Trinity College Library, Dublin.

Various Courts Weigh In on Florida Homestead and Transfers of Real Estate to Trusts

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

This article will address several recent decisions from the Florida Supreme Court and from the federal bankruptcy arena which provide further insight to practitioners relative to the scope of the homestead provisions contained in Article X, §4(a) of the Florida Constitution. Additionally, this article will discuss a recent decision of the Florida Supreme Court with respect to the impact of a 2004 statutory amendment to Section 689.07(1), Florida Statutes.

Chames v. DeMayo

In the unanimous opinion of the Florida Supreme Court in *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007), the Court ruled on a waiver of the exemption from forced sale under process of any court afforded to homestead property pursuant to the provisions of Article X §4(a) of the Florida Constitution. Such a waiver is not legally effective or enforceable if contained in an unsecured agreement, rather than a mortgage.

In this case, the Respondent, Henry DeMayo, engaged the services of attorney Deborah Chames and the law firm, Heller & Chames, P.A., to represent him in his quest to modify his child support obligations and abate his alimony payments. Petitioners, Deborah Chames and the law firm Heller & Chames, P.A., had Respondent sign a retainer agreement which, among other things, provided that the Respondent (client) knowingly, voluntarily and intelligently waived his rights to assert his homestead exemption in the event that a charging lien was obtained by the Petitioners to secure the balance of attorneys' fees and costs. After the Petitioners ultimately withdrew from representing the Respondent in this family law matter, Petitioners obtained a charging lien and final judgment against the Respondent for approximately $33,000. The trial court applied the lien to the Respondent's homestead. The Respondent appealed the trial court's ruling to the Third District Court of Appeal, arguing that the waiver of the homestead exemption contained in the retainer agreement was invalid. Although the Third District Court of Appeal reversed the trial court's decision relative to the lien, the two judges who formed the majority of the panel noted that they would have ruled otherwise if not bound by the precedent of the Florida Supreme Court.

In holding that the waiver of the homestead exemption in an unsecured agreement is unenforceable, the Florida Supreme Court reiterated the public policy furthered by the homestead exemption, that is, to promote the stability and welfare of the State by securing the homeowner a home so that the homeowner and his or her heirs may live beyond the reach of financial misfortune under demands of creditors who have given credit. Although recognizing that the homestead exemption can be waived by formally mortgaging one's homestead, the Court reasoned that the nature of such a transaction implies the exercise of discretion and the contemplation of inevitable consequences. Thus, the sale under a mortgage is not a forced sale because it is a sale under consent given pursuant to an agreement where one irrevocably conveys an interest in the collateral described in the mortgage.

The Florida Supreme Court rejected the several grounds which the Petitioners suggested as justifying the enforceability of the homestead waiver in the unsecured agreement. The first ground consisted of the argument that the 1985 amendment to Article X, §4 of the Florida Constitution that substituted "a natural person" for "the head of family" changed the purpose of the homestead exemption from protecting the family home into a personal right that may be waived. The Court stated, in essence, that the 1985 amendment was intended to enlarge the homestead exemption to any natural person, rather than merely have it be enjoyed by a head of a family.

The second ground suggested by the Petitioners was that most states now permit waivers. In rejecting this argument, the Court found that most of the states which permit waivers do so in the context of a mortgage or a deed of trust.

The third ground suggested by the Petitioners was that permitting the waiver of the homestead exemption is consistent with other cases holding that various constitutional rights may be waived. While acknowledging that the Court has held that most personal constitutional rights may be waived, the Court distinguished the issue in this case on the basis that the homestead exemption is a right that is designed to protect both the individual and the public; i.e., the debtor, the debtor's family and the State. In essence, the Court was not willing to depart from 123 years of precedent which was initially established in *Carter's Adm'rs v. Carter*, 20 Fla. 558 (1884). The Court did not find a significant change in circumstances or any analytical error to cause the doctrine of *stare decisis* to yield. Note that the Real Property, Probate and Trust Law Section was an amicus in this case and filed an amicus brief supporting the concept that the purported waiver of the homestead exemption in an unsecured agreement should not be en-

continued, next page

forceable. Robert W. Goldman of Goldman, Felcoski and Stone, P.A. and John W. Little II of Brigham and Moore, LLP authored this brief on behalf of the Section, and they should be commended for their efforts.

In re Ensenat

In a case that examined the scope of improvements which would be considered to be homestead real property for purposes of Article X, §4(a) of the Florida Constitution, U.S. Bankruptcy Judge Laurel M. Isicoff, Southern District of Florida, Miami Division, ruled that two buildings situated on real estate located within the city limits of Miami constituted the homestead of the debtors. *In re Ensenat,* 20 Fla. L. Weekly Fed. B452 (Bankr. S.D. Fla. May 24, 2007). One building was the home in which the debtors actually lived. The second building contained two bedrooms, one bathroom, a living room and a kitchen, and was connected to the "main" home by a covered patio. The second building also had its own electric meter and water supply and had a separate gated entrance. The debtors' niece, as well as the niece's young son and boyfriend, resided in the second building. No rent was paid by the niece to the debtors.

In holding that both buildings constituted the homestead of the debtors, U.S. Bankruptcy Judge Isicoff found the second building to be within the "residence" of the debtors. Judge Isicoff acknowledged the public policy of Florida that the homestead protection is to be interpreted in a liberal and beneficial spirit in which the provisions were conceived and enacted in the interest in the family home. The court cited to several Florida cases, including *White v. Posick*, 150 So.2d 263 (Fla. 2d DCA 1963). In the *White* case, the court held that a separate structure consisting of a garage and overhead apartment used for storage and laundry, and an adjoining lot with a swimming pool and patio, were a part of the resident's homestead, and, thus, were not available to satisfy the claims of the resident's creditors. The court in *White* reasoned that the garage apartment, pool and patio were conventional residential appurtenances.

In re Reinhard

A recent federal bankruptcy case considered the issue of whether merely designating a residential property as one's residence constituted the acquisition of an interest in such real property within the limitations set forth in 11 U.S.C. Section 522(p). *In re Reinhard,* 377 B.R. 315 (Bankr. N.D. Fla. 2007). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), among other things, modified the federal bankruptcy law to limit the amount of the homestead exemption in a bankruptcy context to $125,000 (to be periodically adjusted for inflation) relative to any interest in the homestead acquired during the 1,215-day period (approximately 3 years and 4 months) immediately preceding the filing of the bankruptcy petition. This amount was recently adjusted to $136,875 due to inflation. In *Reinhard*, the debtor and his wife acquired ownership of a residential property in Seaside in 1995. The debtor and his wife, however, resided in Tallahassee, Florida until late June, 2005. Thereafter, the debtor and his wife moved into their Seaside, Florida home and designated it as their homestead under Florida law. The debtor filed a petition for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code on November 3, 2006, which was within 1,215 days of designating the Seaside home as their homestead.

In determining that merely designating residential real property as one's homestead within the 1,215-day period described in 11 U.S.C. Section 522(p) does not constitute acquiring an interest for purposes of the limitation on the homestead exemption, U.S. Bankruptcy Judge Lewis M. Killian, Jr., indicated that the acquisition of homestead status does not confer any additional property interest or rights in property. Judge Killian stated that homestead is simply a status, constitutionally defined, which exempts certain property from execution and limits its alienability. It is not a property interest under Florida law. When a Florida resident acquires homestead status relative to his or her real estate, the homeowner does not acquire any of the rights traditionally associated with property interest, such as, the right to possession, the right to use, or the right to transfer. Judge Killian analogized homestead status in Florida as being a protective safe in which the bundle of sticks constituting the property is put.

Judge Killian acknowledged that a bankruptcy court in Nevada had held to the contrary, but favored the holdings of bankruptcy court decisions rendered in Texas and Massachusetts.

Judge Killian also cited to *In re Rasmussen*, 349 B.R. 747 (Bankr. N.D. Fla. 2006) in which the bankruptcy court equated the phrase "any amount of interest" with the word "value," indicating that Congress intended to convey a monetary meaning in connection with the term "interest." Hopefully other bankruptcy courts that consider this issue will rule in accord with Judge Killian's decision in *Reinhard.*

Raborn v. Menotte

In a case that is not directly related to homestead, but pertaining to the effectiveness of a deed conveying real estate (which could be homestead, or not) to a trust, the Florida Supreme Court, in a unanimous decision, held that Section 689.07(1), Florida Statutes, as it existed prior to the 2004 statutory amendment thereto, would cause a deed which identified the trustee of an *inter vivos* trust by name and date to convey mere legal title to the grantee as trustee of the trust described in the deed. *Raborn v. Menotte,* 33 Fla. L. Weekly S21 (Fla. January 10, 2008). The Court in *Raborn* was asked by the United States Court of Appeals for the Eleventh Circuit to respond to two questions of

Florida law certified to the Florida Supreme Court, only one of which the Court determined needed to be addressed.

The salient facts in *Raborn* pertained to the effectiveness of the language contained in a deed which was signed by Mr. and Mrs. Raborn conveying certain real property owned by them to an *inter vivos* trust created by Mr. and Mrs. Raborn. The grantee under the deed was Douglas K. Raborn, as Trustee under the Raborn Farm Trust Agreement dated January 25, 1991 ("the Trust"). The deed acknowledged the broad powers of the trustee to deal with the property. Approximately 10 years after the deed was signed, Douglas Raborn, individually, filed for relief under Chapter 7 of the U.S. Bankruptcy Code. The bankruptcy trustee filed an adversary proceeding against the beneficiaries of the Trust alleging that the real property was a part of the bankruptcy estate. The position of the bankruptcy trustee was based on an interpretation of the provisions of Section 689.07(1), Florida Statutes, as in existence at that time, that the 1991 deed actually conveyed fee simple title to the grantee, Douglas K. Raborn, individually, rather than as trustee of the Trust.

The bankruptcy court ruled that the deed conveyed the real property to Douglas K. Raborn as trustee of the Trust, rather than individually. On appeal to the United States District Court, the decision of the bankruptcy court was reversed, and the United Stated District Court held that the deed did not meet the statutory conditions which would have made the deed a conveyance in trust. Therefore, the court concluded that the deed conveyed fee simple title to Douglas K. Raborn in his individual capacity.

In 2004, the Florida Legislature, responding to the recommendation of the Real Property, Probate and Trust Law Section of The Florida Bar, amended the provisions of Section 689.07(1), Florida Statutes, to clarify that a conveyance to a trust may identify the trust by either name or date. The legislative bill expressly provided that the amendment was intended to clarify existing law and was to apply retroactively.

Subsequent to the passage of the 2004 statutory amendment to Section 689.07(1), Florida Statutes, a second appeal was made from the bankruptcy court to the United States District Court. The United States District Court determined that the retroactive application of the 2004 statutory amendment would be unconstitutional. On appeal to the United States Court for the Eleventh Circuit, the federal appellate court was unable to determine under Florida law whether Douglas K. Raborn received fee simple title or mere legal title to the real property as trustee of the Trust. The court certified two questions to the Florida Supreme Court.

The first question certified by the court to the Florida Supreme Court was whether, under Section 689.07(1), Florida Statutes, as it existed before the amendment in 2004, the deed which is the subject matter of the case conveys only legal title to the property in trust to the grantee as trustee. The second question certified by the court to the Florida Supreme Court was whether, as a matter of Florida law, the 2004 statutory amendment to Section 689.07(1), Florida Statutes, applies retroactively to the deed in the case at bar and thus, in light of the 2004 statutory amendment, conveys only legal title to the grantee as trustee.

In reviewing the provisions of Section 689.07(1), Florida Statutes as it existed prior to the 2004 statutory amendment, the Florida Supreme Court held that a deed which clearly expresses the intent of the grantors to convey title to real property to the trustee of a trust falls under the *contrary intention* exception in Section 689.07(1), Florida Statutes, without regard to the modification made by the 2004 statutory amendment. Therefore, the Court did not find it necessary to address the second question certified by the United States Court of Appeals for the Eleventh Circuit.

The Court's holding in *Raborn* will provide comfort to those of us who prepare deeds which merely provide the name of the trust and the date of the trust agreement in describing the trust within the body of the deed. We should be thankful to the Florida Supreme Court for providing this clarification as well as to the Real Property, Probate and Trust Law Section for serving as an amicus in this case and the efforts of Robert W. Goldman and John W. Little, II for preparing the Amicus Brief which supported the position adopted by the Court.



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January 31, 2008 RPP&TL AL Spring 2008

Meet Carmalita L. Hawkins, RPPTL Section Program Administrator

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

On November 13, 2007, Carmalita L. Hawkins succeeded Terry Hill as Section Program Administrator. Carmalita joins the Section after attaining her J.D. degree last year from Florida A & M University College of Law. Carmalita is no stranger to Tallahassee, however. She is originally from Tallahassee and rejoins her family right in her own hometown.

Carmalita's background includes two years of active duty with the U.S. Army and four years with the U.S. Army Reserves. She holds a B.S. Degree from Florida State University in Criminology and initially worked as a Corrections Officer. She states, "Although I have also previously worked with the Department of Education as a Program Specialist and most recently with Florida Association of School Administrators (Tallahassee) as an Event Manager, Financial Assistant, and, worked with Business Partners in negotiating sponsorship contracts, . . . I have always had a love for the law and never wanted to be anything other than an attorney."



Carmelita Hawkins is excited and honored to assume the position of Section Program Administrator.

We asked Carmalita to tell us more about herself, and here is what we learned!

AL: What attracted you to the position of Section Program Administrator?

Carmalita: It is a great opportunity to work with top notch attorneys who are experts in their field. Also, it is a great way for me to pursue my passion for the law without the 80 hour work week since I am a single parent! In addition, my family is still here so it just made sense.

AL: Please describe your typical duties as Administrator.

Carmalita: My duties include the following:

- develop and administer meetings, conventions and retreats for sections and divisions
- administer continuing legal education seminars
- administer special projects adopted by sections and divisions
- publish sections and division newsletters, membership directories and various other publications
- prepare and administer section and division budgets
- respond to inquiries from Bar members
- conduct special projects as assigned by the Director

AL: What Section goals and objectives will you pursue in the coming year?

Carmalita: I will be pursuing a number of initiatives, including more community involvement, greater diversity within the Section, mentoring programs, and just continuing the great work already in progress. Terry Hill did a phenomenal job with this Section, and I know I have BIG shoes to fill.

AL: Will you share your initial impressions about the job?

Carmalita: Yes, I literally hit the ground running my first day on the job, meeting Terry at the airport and then heading to Tampa for a meeting. Honestly, my first impression was that I made the right decision. Work AND travel? I can do that!!! I never imagined that I would one day work for The Florida Bar! The staff here at The Bar is so welcoming and continues to be extremely helpful as I learn my new position. I have not only accepted a new opportunity but have accepted a dynamic family and I am honored to be here.

The Section is glad you're here too, Carmalita. We all say, Welcome Aboard!



Carmalita Hawkins is pictured here at the December 2007 tree-lighting ceremony held by Governor Charlie Crist for foster and adopted children. Carmalita is the founder of Chosen For A Purpose, Inc., a non-profit organization formed to mentor foster and adopted children, encourage their personal development, and build self-esteem.

Dear Fellow RPPTL Section Member:

We are the Circuit Representatives of the Real Property, Probate and Trust Law Section for the Twentieth Judicial Circuit. The purpose of this letter is to inform you about what Section Circuit Representatives do for the Section's members. The Representative for your judicial circuit is available to assist you in the areas of real property, probate and trust law.

Our job as Circuit Representatives is to serve as a link between you and the Section. We see this as working two ways. One, we want to keep you advised of some of the Section's activities and initiatives, particularly actions of the Executive Council and the Section's committees. Second, we want to be able to pass along to the Executive Council the recommendations, concerns and questions of our circuit's members. For example, the Section is very active in sponsoring (and opposing) legislation in the real property, probate and trust law areas. It is helpful for the Executive Council to be aware of members' concerns about needed legislation, as well as opposition to proposed legislation.

Our section is the largest practice section of The Florida Bar. Circuit Representatives are all members of the Section's Executive Council. The Executive Council engages in the review, revision and formulation of laws, rules and regulations which impact our areas of practice. In addition, we are actively engaged in the dissemination of information to our members, including our Section magazine ActionLine, case law reviews, statutory explanations, practice suggestions and forms, dialogue on areas of concern to our practitioners, and a host of other programs and services.

The Section's work is done through its committee structure. Each of our committees meets on a regular basis and is comprised of committee members from around the state, and, in some instances, from out of state. Differing viewpoints, discussions, articles, and suggestions concerning legal questions and issues confronting all of us become the basis for networking, and forming and continuing meaningful relationships among attorneys across Florida.

Working with other committee members has not only provided important "general" input in our own law practices, but has also assisted in both the delivery of legal services and the resolution of client based issues. Many of the Section's committees are responsible for our Continuing Legal Education seminars on subjects of concern and interest to Section members and those of the general Bar, as well. We ask that you review the committees listed on the Section's website, and if you would like to serve on a committee, please contact any one of us.

In order to access the Section's website, please go to www.rpptl.org and take the following steps:

1. Click on the link "Login" at the top of the page
2. Your Username is your Florida Bar number
3. Your password is your LAST NAME in SMALL letters and click "Submit"

Your participation in the Section is crucial to its continued success. We urge you to become involved and to stay involved.

We look forward to providing you with information and resources that will be helpful to you in your practice and sharing your recommendations and concerns with the Section's leaders.

Please feel free to contact any of us concerning Section activities and issues. To find your circuit's representative, log on to the Section's website, click on "Cir. Rep." on the top menu bar and search by county or circuit.

Circuit Representatives of the Real Property, Probate and Trust Law Section for the Twentieth Judicial Circuit

Jon Scuderi
jscuderi@gfsestatelaw.com

Dennis White
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The RPPTL Section Affordable Housing Committee Q&A

In each issue of *ActionLine* our committee will respond to frequently asked questions or any affordable housing question you care to ask. Just email your question to the Committee Chair jaimieross@aol.com.

Q: What is the Sadowski Act?

A: The **William E. Sadowski Affordable Housing Act** passed in 1992[1], creating a dedicated revenue source for funding state and local affordable housing programs. The funding source was an increase in the state documentary stamp tax. The monies collected are split between two trust funds administered by the Florida Housing Finance Corporation; approximately 70% of the funds are deposited into the local housing trust fund and approximately 30% of the funds are deposited to the state housing trust fund.[1]

The state housing trust funds are used for the competitive funding programs administered by the FHFC to subsidize the development of rental housing and provide down payment and closing cost assistance for homeownership housing.

The local housing trust funds are distributed to every county and entitlement city within the state for the local administration of the SHIP program (the State Housing Initiatives Partnership program). SHIP is not a competitive program; the monies are distributed based on population, with a minimum allocation of $350,000 annually to smaller counties.

SHIP monies are used by local governments to implement the housing elements of their comprehensive plans.[2] The monies are used in accordance with a locally adopted SHIP Housing Assistance Plan that follows certain statutory parameters in regard to the percentage of funds to be spent on homeownership activities (65%); the percentage of funds to be spent on construction related activities (75%); and the percentage to be spent on very low income (30%), low income (30%), and moderate income (up to 40%) persons.[3]

Q: What is the cap on the trust funds?

A: In 2005, the documentary stamp tax statute was amended to put a limit on the amount of monies distributed into the state and local housing trust funds beginning in July, 2007. [4] The "cap" was set at $243 million with a slight annual escalator. A strong movement to repeal the cap was launched, but ultimately failed and the cap went into effect. This means that all monies collected from the documentary stamp increase which was dedicated to affordable housing above the cap amount will automatically be swept into Florida's general revenue funds. To put the cap amount into perspective, the last time that the annual distribution into the trust funds was as low as $243 million was back in 2002, prior to the spike in the real estate market.

Q: What is the Sadowski Workforce Housing Coalition?

A: A nonpartisan coalition of extraordinarily diverse interests, including the Florida Home Builders Association, the Florida Association of Realtors, the Florida Chamber of Commerce, Associated Industries of Florida, Florida AARP, Florida Legal Services, 1000 Friends of Florida, the Florida Housing Coalition, Florida Catholic Conference, Florida Impact, the Florida Bankers Association, the Florida Homeless Coalition, the Florida League of Cities, and the Florida Association of Counties.

The Sadowski Workforce Housing Coalition is committed to repeal of the cap on the Sadowski funds and the full appropriation of housing monies for housing programs.

Endnotes:

1 Fla. HB 133-H (1992); Fla. SB 94-H (1992)
2 Fla. Stat. § 201.15
3 Fla. Stat. §§ 420.907-420.9079
4 Fla. HB 1889 (2005)

Visit the Section website: www.rpptl.org.



How can you recommend charity without recommending *a charity*?

Talk to your clients about giving through their local community foundation.

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Helping Your Clients with Charitable Giving:

Frequently Asked Questions About Community Foundations

By David Pratt, Esq., Proskauer Rose LLP, Boca Raton, FL

Many attorneys and advisors work with community foundations on a regular basis, consulting with their professional staff about charitable options for clients. Others may not have had this opportunity. Even for those advisors who have had experience with community foundations, questions arise. Here are some of the most frequently asked questions about community foundations:

Who handles the investments of community foundations?

Typically, community foundations employ a number of local banks, trust companies and investment firms to handle their investments. A volunteer "Investment Committee," consisting of business and civic leaders, monitors investment returns carefully and works with the investment advisors to ensure the continued growth of each permanent fund in the community foundation. The community foundation's board of directors provides fiscal oversight.

Are there tax advantages of a community foundation over a private (family) foundation?

Community foundations are public charities under the Internal Revenue Code. This classification offers some advantages to donors over private foundations. For example, gifts of cash and ordinary income property to a community foundation are generally deductible up to 50% of adjusted gross income (AGI). Gifts to private foundations are deductible only to up 30% of AGI. Similarly, gifts of appreciated property to community foundations can be deducted up to 30% compared with 20% for a private foundation. There are no excise taxes on community foundations as there are on private foundations, and community foundations do not have a requirement that a certain percentage must be distributed each year.

What kinds of charitable contributions can my clients use with community foundations?

- **Outright Gift.** Your client can make a gift of cash, stocks, bonds, real estate, or other assets to a community foundation. Such a gift qualifies for the maximum charitable deduction under the Internal Revenue Code.
- **Bequest.** Your client can designate a gift or portion of his or her estate to the local community foundation and, in most cases, receive an estate tax charitable deduction.
- **Gift Annuity.** Your client can make a gift of cash or property to the community foundation now, get immediate tax benefits, and ensure that he or she or a loved one receives fixed quarterly or annual income payments for life.
- **Charitable Remainder Trust.** Your client can contribute cash or property to a trust that pays income to him or her (or another named beneficiary) for life on an annual basis. After your client's death, the remainder of the trust transfers to the community foundation and is added to the charitable fund the client selected. The client receives income tax benefits the year he or she establishes the trust.
- **Charitable Lead Trust.** Your client can contribute cash or property to a trust that pays a fixed amount to the community foundation for a fixed term to support the charitable organization(s) of his or her choosing. At the expiration of the term, the assets held by the trust are transferred to the beneficiaries named by your client. The trust can be structured so that the client receives a charitable income tax deduction when he or she transfers the property to the trust. In addition, he or she will receive a transfer tax deduction.

Community foundations apply their funds to a wide range of community needs, unlike most charitable organizations that exist to support the needs of a single cause.

Is it ethical for me to refer clients to community foundations?

Sometimes attorneys and advisors question whether it is ethical for them to refer clients to community foundations. The issue is whether you are advocating a particular charitable cause. The answer is "no" because of the fundamental difference between community foundations and other charities.

Community foundations are established for people to give through them; they are not the "end-users" of charitable dollars. In 2005, Florida's community foundations distributed more than $69 million to charitable organizations. Most of those funds came from donor advised or donor designated funds. It was money which donors passed through the community foundations to other nonprofit organizations.

Community foundations act as "go-betweens" for donors

continued, next page

from preceding page

and nonprofits. They are organized to help people give effectively to improve quality of life. They work with your clients to help them give to charities and meet their tax planning goals, and do not dictate the type of gifts their donors can make. By making a referral to a community foundation, an advisor is not advocating a particular cause.

Does the community foundation compete with other charitable organizations?

Community foundations are unlike other charitable organizations. Community foundations seek substantial gifts from a limited number of individuals and businesses. They are not charities with an annual fund drive. Community foundations apply their funds to a wide range of community needs unlike most charitable organizations that exist to support the needs of a single cause. Most importantly, community foundations exist to enhance the ability of other nonprofit organizations to serve the changing needs of a community.

Questions about RPPTL?



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

Who decides how a community foundation's funds are distributed?

The professional staff and the "Grants Committee" of a community foundation review all grant applications. The Grants Committee is a group of highly respected community leaders who are knowledgeable about the charitable needs of the community. Individuals who have Donor Advised Funds can participate in the grantmaking process by "suggesting" grants from their named fund; such suggestions are typically followed.

What kinds of organizations receive grants from community foundations?

A portion of every community foundation's funds is restricted in use. The majority, however, are unrestricted and are used to respond to new programs, emergency needs and innovative services that might not be started if it were not for the community foundation. Community foundations apply their funds to a wide range of community needs, including arts and culture, children, youth and families, education, environment, health care, human services and scholarships, to name a few.

What is the difference between community foundations and the United Way?

The United Way raises money each year and distributes all that it collects to qualifying organizations (the charitable checkbook) that have been predesignated. Community foundations manage permanently endowed funds that, for the most part, only distribute a portion of income in grants each year (the charitable savings account).

Why should my client establish a fund with the foundation instead of giving directly to a favorite charity?

Donors who want to ensure that their gifts will do the most good in the community and support organizations over the long term, find that community foundations offer them the expertise, flexibility and financial resources to give more to the community while gaining the maximum tax advantages for each contribution. Some donors also prefer to be shielded from fundraisers by giving through the auspices of a community foundation.

Can my client give to organizations outside of the community where the community foundation is located?

Yes. Community foundations can channel donor distributions anywhere in the country, and, in some cases outside the U.S., as long as recipients are nonprofit organizations qualified under Section 501(C)(3) of the Internal Revenue Code.

For More Information

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

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Post-Occupancy by Seller
Pre-Occupancy by Buyer
Rezoning Contingency
Right to Inspection and Right to Cancel
Sale of Buyer's Property
Seller Financing
Seller's Attorney Approval

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

Firm:_____

Attn: _____ Attorney Bar #: _____

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

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

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

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)

FLSSI USE ONLY

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

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

Office October 24, 2007

Real Estate Case Summaries

By Stephen E. Silkowski, Esq., Jacksonville, FL and
Teresa R. Rodriguez-Albizu, Second Year Law Student,
University of Miami School of Law, Miami, FL

Homeowner cannot waive homestead protection on an unsecured contractual obligation that is outside the scope of the constitutional exceptions.

***Chames v. Demayo,* 972 So. 2d. 850 (Fla. 2007)**

The question here was whether a homeowner could waive his homestead exemption rights without formally mortgaging his property– that is, in promissory notes, retainer agreements, or other purportedly unsecured instruments. The public policy furthered by a homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.

When a person executes a mortgage or bill of sale upon certain specified property, the very nature of the transaction implies the exercise of discretion and the contemplation of inevitable consequences. Therefore, such contracts are upheld in respect to both real and personal property. The Supreme Court, in several cases, has held that a sale under a mortgage is not a forced sale, because it was a sale under consent given under seal and irrevocably conveying an interest in the thing described. Few people would mortgage their household goods and their children's clothes to a hard creditor with the inevitable result brought vividly to their understanding.

No policy of this state is more strongly expressed in its constitution, laws, and decisions than the policy of the exemption laws. The Florida constitutional exemption of homesteads protects the homestead against every type of claim and judgment except those specifically mentioned in the constitutional provision itself. An individual cannot waive a right designed to protect both the individual and the public. The courts have repeatedly recognized that the homestead exemption protects not only the debtor, but also the debtor's family and the state. Therefore, the constitutional right to the homestead exemption is not purely personal, as some others are.

The homestead-rights waiver in this case was contained on page four of a six-page, single-spaced contract, and at the end of a 118-word sentence. This was precisely the evil that prior cases had sought to avoid. Requiring that a waiver of the homestead exemption be made in the context of a mortgage assures that the waiver is made knowingly, intelligently, and voluntarily. In obtaining a mortgage, a homeowner is well aware that if the payments are not made, the home may be foreclosed upon. A mortgage assures that the waiver of the homestead exemption, like the waiver of other rights, is made with eyes wide open– not inadvertently, deep in the entrails of a retainer agreement.

If the court were to conclude otherwise, then the waiver of the homestead exemption would become an everyday part of contract language for everything. The average citizen, who is of course charged with reading the contracts he signs, often fails to read or understand boilerplate language detailed in consumer purchase contracts, language that the contracts themselves often permit to be modified upon no more than notification in a monthly statement or bill. Such consumers may lose their homes because of a "voluntary" divestiture of their homestead rights, for nothing more than failure to pay a telephone bill. This inevitably would result in whittling away this century-old constitutional exemption, until it becomes little more than a distant memory.

Foreclosure summary-judgment, notice of which did not reach party, is voidable, not void, even after sale, when party receives copy of judgment.

***Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n.*, 968 So. 2d. 658 (Fla. 2d DCA 2007)**

U.S. Bank served a notice of summary-judgment hearing on all parties to a foreclosure. That notice indicated it was served on Sterling, the second mortgagee, but the address on the certificate of service for Sterling's attorney was incorrect; it listed the proper street address but omitted the city, state, and zip code. The record did not establish with any certainty whether the envelope contained a similar error, or what actually happened to the notice that was supposed to be delivered to Sterling.

U.S. Bank obtained a summary final judgment. Sterling admitted that it received a copy of this summary final judgment shortly after it was entered and that it took no steps to seek rehearing or otherwise object. It did not appeal this judgment. The Meyers' mortgagors filed a motion to cancel the sale. Sterling served by facsimile a motion joining in their motion to cancel sale and an "emergency verified" motion to set aside the summary final judgment. The only ground pleaded in this motion was that the summary final judgment was void because Sterling had not received notice of the hearing on the motion for summary judgment, due to the defect in the certificate of service on the notice.

Without a transcript or a more detailed order, it was difficult to determine why the circuit court had denied the motion for relief from judgment. Section 702.07, Florida

Statutes, states:

The circuit courts "shall have jurisdiction, power, and authority to rescind, vacate, and set aside a decree of foreclosure of a mortgage of property at any time before the sale thereof has been actually made pursuant to the terms of such decree, and to dismiss the foreclosure proceeding upon the payment of all court costs." This statute was enacted in 1927 and has remained unchanged since that time. It appears to have been largely overlooked. The Florida Supreme Court has concluded that section 702.07 does not deprive a court of jurisdiction to set aside a foreclosure judgment once a foreclosure sale occurs. The chapter is silent concerning a rehearing after issuance of the certificate of title. The appellate courts in numerous cases have reviewed circuit court decisions granting rehearing after the foreclosure sale, without any indicia that the circuit courts might have acted without jurisdiction

Rule 1.540 permits a party against whom judgment is entered to seek relief based on a limited list of issues. A judgment can be set aside for "excusable neglect," but Sterling did not allege this ground. Sterling did not suggest that it had any newly discovered evidence or that U.S. Bank did anything that would constitute fraud, misrepresentation, or misconduct. It argues only that the judgment is "void." There is distinction between a judgment that is "void" and one that is "voidable." A void judgment is so defective that it is deemed never to have had legal force and effect. In contrast, a voidable judgment is a judgment that has been entered based upon some error in procedure that allows a party to have the judgment vacated, but the judgment has legal force and effect unless and until it is vacated. A voidable judgment can be challenged by motion for rehearing or appeal and may be subject to collateral attack under specific circumstances, but it cannot be challenged at any time as void.

A trial court's lack of subject-matter jurisdiction makes its judgment void. So, too, a judgment that is entered against a defendant when the court has no personal jurisdiction over the defendant is generally regarded as a void judgment. In this case, of course, the trial court had subject-matter jurisdiction over the foreclosure and personal jurisdiction over Sterling, who had been properly served and had filed an answer. Thus, the narrow issue in this case was whether a judgment of foreclosure was void simply because a defect in a notice of hearing provided no actual notice of the final hearing to a defendant who was another lienholder over whom the court has established personal jurisdiction, if the final judgment was timely served on that defendant following the hearing. The court concluded that such a judgment was not void.

Generally, so long as a court has jurisdiction over the subject matter and a party, a procedural defect occurring before the entry of a judgment does not render a judgment void. This is particularly true when there is evidence that the party received actual notice of the proceedings generally and timely notice of the entry of any judgment against them. Procedural defects not affecting jurisdiction must be addressed by a timely motion for rehearing, an appeal, or a timely motion for relief from judgment.

In this case, Sterling did not have actual notice of the

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Washington Insider:

Updates on estate tax and private foundation legislation

The Charitable Organization and Philanthropic Planning Committee Invites You to Attend a Call-In Session with Andrew Schultz of the Council on Foundations.

The Charitable Organization and Philanthropic Planning Committee of the RPPTL is pleased to host a CLE call-in session with Andrew Schultz, Deputy General Counsel, Council on Foundations on Friday, April 4, 8:30 am at the Gainesville RPPTL Executive Council meeting.

This committee welcomes guests and new members interested in learning how to better serve their high net worth clients interested in philanthropy. Education and discussion covers a wide range of topics, including: set-up and management of private foundations, using philanthropy in estate plans, working with community foundations, current legislation affecting charitable organizations and national debates such as UPMIFA.

Our Mission Statement:

The purposes of the Charitable Organizations and Philanthropic Planning Committee are:

(1) to review Florida and federal law affecting charitable organizations and charitable donors, and recommend changes in Florida law as the committee deems helpful to charitable organizations and donors; and

(2) to encourage philanthropy through education and directing focus of Florida Bar members to the not-for-profit endeavors organized or operating in Florida.

Please contact Michael Fisher, Chair, for details at: mwf@fishertousey.com.

from preceding page

hearing, but it had actual notice of the judgment in time to resolve any problem by filing a motion for rehearing or a notice of appeal. Moreover, the property owner most affected by this proceeding had notice of the summary judgment hearing and failed to appear or object to the foreclosure. For purposes of due process, Sterling had a procedure to resolve any error in this judgment by way of motion for rehearing or filing a notice of appeal. It simply chose not to use those procedures. Further, if there were an error in the judgment arising from excusable neglect or fraud or misrepresentation, Sterling had the ability to correct that error, but Sterling made no such claim.

Postscript: the record suggested that Sterling was not named as a party in the initial complaint, because Sterling erroneously filed its mortgage in the property records of Lee County, rather than in the property records of Collier County where the property is located. Thus Sterling's note and mortgage were not of public record when U.S. Bank first filed its complaint for foreclosure. Furthermore, it is well established that a motion for relief from judgment cannot be used as a substitute for an untimely motion for new trial or rehearing. Sterling's choice to instead seek postjudgment relief limited Sterling to its argument that the judgment was void due to the defective address on the notice of hearing. Permitting any defendant to set aside a foreclosure judgment at any time for a procedural defect in the notice of hearing might call into serious question the title and legal ownership of any property affected by a foreclosure for an indefinite period.

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Sublessee cannot enforce lessee's rights against lessor, without explicit provision in the master lease.

***Leesburg Community Cancer Center v. Leesburg Reg. Med. Center, Inc.,* 972 So. 2d. 203 (Fla. 5th DCA 2007)**

Leesburg Regional entered a thirty-year ground lease with Real Estate Associates for the purpose of allowing Real Estate Associates to develop and operate an outpatient ambulatory cancer treatment center on the property. The lease contained an "exclusivity" clause prohibiting Leesburg Regional or Real Estate Associates from competing against one another by operating or supporting a competing cancer treatment center anywhere within Leesburg Regional's "primary service area" during the term of the lease. The lease also allowed Real Estate Associates to either assign all or part of its leasehold interest to another, or sublease all or part of the property to another, so long as its assignees or sublessees were made "subject to the terms and provisions of the ground lease." In conjunction with this obligation, the ground lease contained a sentence requiring Real Estate Associates to incorporate the terms of the ground lease into any assignment or sublease that it entered.

On the same day that Real Estate Associates leased the land from Leesburg Regional, it sublet the property to the Cancer Center, a limited partnership formed by the shareholders of Real Estate Associates. Several years later, Leesburg Regional approached Real Estate Associates about waiving the exclusivity clause, so that it could participate in a cancer treatment center in Lady Lake. When negotiations for a waiver were unsuccessful, Leesburg Regional proposed simply buying out the remainder of the lease term from Real Estate Associates. The parties were able to reach agreement on the buy-out, and Leesburg Regional purchased Real Estate Associates' leasehold interest, along with its rights and obligations under the sublease with the Cancer Center. Leesburg Regional then took the position that the exclusivity clause was a personal covenant between it and Real Estate Associates, that it extinguished or controlled when it purchased back all of Real Estate Associates' rights under the ground lease.

As a general rule, there is no privity of contract or estate between an original lessor and a sublessee, because there is no contractual relationship between the parties. Because of the lack of privity, the sublessee does not acquire, merely as a result of the sublease, any right to enforce the covenants or agreements of the lessor contained in the original lease. The sublease itself does not purport to assign Real Estate Associates' leasehold interest to the Cancer Center. Rather, it expressly states that "this Lease constitutes a sub-lease." No person or entity is bound by a contract absent the essential elements of offer and acceptance, i.e., its agreement to be bound to the contract terms, supported by consideration. Leesburg Regional was not a party to the sublease. Therefore, the sublease could not bind Leesburg Regional unless Leesburg Regional agreed in its original

ground lease that the covenant it made not to compete against Real Estate Associates could also inure to the benefit of any sublessee of Real Estate Associates. Again, any such agreement would be contrary to the general rule that a sublessee has no right to enforce the covenants or agreements of the lessor contained in the original lease.

Because the ground lease contained no express provision stating that Leesburg Regional agreed not to compete against any sublessee of Real Estate Associates, the Cancer Center argued that this promise was implied in the provision requiring Real Estate Associates to make any sublease subject to the terms and provisions of the lease, but this language simply means that any sublessee must agree to abide by all obligations of the ground lease. Taken in context, the court read the requirement that Real Estate Associates incorporate terms of the ground lease into any sublease as a means of assuring that any sublessee would be made subject to the ground lease, and made fully aware of all its obligations under that contract.

If the parties had intended to create a non-compete covenant between Leesburg Regional and any sublessee of Real Estate Associates, they could have easily said so in the ground lease. They did not. Courts should not interpret contracts in a manner that extends or enlarges the obligations of a contracting party beyond the plain meaning of the language used in the contract itself.

Certified mail/return-receipt notice of tax sale, when returned unclaimed, requires government to take further steps to ensure that property owner receive notice.

***Singleton v. Eli B. Inv. Corp.*, 968 So. 2d. 702 (Fla. 4th DCA 2007)**

William Singleton and Gwendolyn Singleton, whose real property was sold because of unpaid ad valorem taxes, appealed a summary final judgment quieting title in favor of the purchaser, Eli B. Investment Corp. The Singletons contended that notice of the impending tax deed sale was inadequate and that it failed to comport with constitutional due process requirements. The court agreed.

Eli B. Investment asserted that the applicable provisions of Chapter 197, Florida Statutes, had been strictly complied with. It attached an affidavit from its attorney, who stated that he examined title to the real property and determined the proper parties to join. He further swore that he verified the proper determination of the identity and addresses of the parties, ensured that notices in compliance with the statute were mailed, and ensured that notice was properly published.

The Singletons acknowledged that their home address was listed correctly, but asserted that they did not receive notice of the tax deed sale. Further, they alleged that Broward County had actual knowledge that they did not receive notice. Contending that these circumstances constituted a denial of due process, the Singletons counterclaimed to vacate and set aside the tax deed sale. The clerk of court had actual knowledge that they had not been notified because the notices, sealed and unopened, were still in the tax deed file; and the sheriff had failed to notify them by posting a copy of the notice in a conspicuous place at their home or otherwise failed to notify them of the tax deed sale.

The United States Supreme Court recently addressed the issue of adequate notice in *Jones v. Flowers,* 547 U.S. 220, 126 S. Ct. 1708 (2006). There, the plaintiff owned a house, but no longer resided there. His property taxes went unpaid and he was certified delinquent. The clerk sent certified letters to his house, but no one was home to sign for them and no one claimed the letters at the post office; they were returned to the clerk stamped "unclaimed." The Supreme Court held that, under those circumstances, the state should have taken additional steps to notify Jones. The Court stated that what additional steps "are reasonable in response to new information depends upon what the new information reveals." The Court reasoned that the return of the certified letters as "unclaimed" meant that Jones either still lived at the house, but was not home when it was delivered and did not retrieve it from the post office, or that he no longer lived there. The Court mentioned several reasonable steps that the state could have taken upon return of the unclaimed notice letter, including resending the letter by regular mail so that a signature was not required. The Court noted that the use of certified mail might make actual notice more difficult in some cases and that following up with regular mail might improve the chances of actual notice to a homeowner.

Court imposes constructive trust on a real property interest conveyed through fraud or abuse in confidence.

***Kuketz v. Bibona,* 971 So. 2d. 896 (Fla. 5th DCA 2007)**

Upon a promise to marry her, Bibona conveyed a one-half interest in her home to Kuketz. Bibona refinanced the property in both her and Kuketz's name to obtain a better interest rate. It was discovered that Kuketz possessed no marital intentions and accordingly, the trial court placed Kuketz's one-half interest in the property in a constructive trust.

The appellate court affirmed relying on *Saporta v. Saporta,* 766 So. 2d 379, 381-82 (Fla. 3d DCA 2000), which upheld an imposition of a constructive trust "where one, through actual fraud, abuse of confidence reposed and accepted, or through other questionable means gains something for himself which in equity and good conscience he should not be permitted to hold." Furthermore, the Court held that Kuketz should be relieved of his obligations under the new mortgage.

Nevertheless, on another issue presented upon appeal, the Court determined that because Bibona never requested attorney's fees in her pleadings, it was inappropriate for the trial court to reserve jurisdiction on the issue.

Probate Case Summaries

By Gerardo Rodriguez-Albizu, Third Year Law Student, and
Teresa R. Rodriguez-Albizu, Second Year Law Student,
University of Miami School of Law, Miami, FL

Estates

Trial court erred in denying personal representative's petition to authorize sale of property on ground that no cause of action or claim was timely filed by petitioner. Although probate documents filed were deficient as to form, they sufficiently stated the character and extent of claim.

***In re Estate of Koshuba*, 32 Fla. L. Weekly D2415a (Fla. 2d DCA Oct. 10, 2007).**

On September 12, 2003, the decedent, Mr. Koshuba, entered into an agreement to sell a parcel of real property located in Sarasota, Florida. Mr. Koshuba died on December 1, 2003, before the transaction was consummated. On September 16, 2005, the buyer filed a Petition for Administration of the estate of Mr. Koshuba in order to enforce his right to purchase the parcel under the agreement. The buyer also filed an Amended Petition for Appointment of Guardian ad Litem to represent the interests of any unidentified heirs wherein he alleged, inter alia, that he and the decedent had entered into the purchase and sale agreement for the real estate located in Sarasota.

In order to effectuate the sale of the property, the Personal Representative of the decedent's estate filed a Petition Authorizing Sale of Real Property. The court-appointed guardian ad litem objected in part because no claim had been timely filed by the buyer. In response, and relying on *May v. Illinois National Ins. Co.*, 771 So. 2d 1143 (Fla. 2000), the buyer argued he had in fact asserted his claim when he filed his Petition for Administration. The trial court, however, disagreed and found that "no cause of action was timely filed by the purchaser in accordance with F.S. 733.702(1), F.S. 733.702(6) and F.S. 733.710."

On appeal, the Court held that the buyer's "written statements, made within his Petition for Administration and the Amended Petition for a Guardian ad Litem, were substantially sufficient to place interested persons on notice of his claims." Thus, although the documents were defective as to form, they were not as to substance. Ultimately, the purpose of the statutes is simply to put persons on notice of a potential claim against the estate and such a result was adequately accomplished in this case.

Florida's elective share statutes are constitutional. Statutes serve a legitimate legislative purpose and are rationally related to that purpose.

***In re Estate of Magee*, 32 Fla. L. Weekly 2307a (Fla. 2d DCA Sept. 26, 2007).**

Robert Magee and Edna Magee married in early 1994, while both were in their seventies. Soon after, Mr. Magee created a revocable inter vivos trust naming Mrs. Magee as successor trustee, if able, upon Mr. Magee's death, and distributing the assets and income of the trust in equal thirds to Mrs. Magee, his daughter Judith, and another of Mr. Magee's children. For reasons unknown, in December 2001 Mr. Magee amended the trust to remove Mrs. Magee as successor trustee and beneficiary, leaving one-half of the trust assets and income to Judith with the remainder to be equally distributed between two of Mr. Magee's grandchildren. Notably, the Court observed that the trust instrument was amended well after substantial revisions were made to Florida's elective share statutes. The Court, therefore, assumed that the revisions made by Mr. Magee to his trust with the assistance of counsel were executed with full knowledge of the amended elective share statutes.

Upon Mr. Magee's death, his wife Edna filed a Petition for Administration of Mr. Magee's estate along with notice of her intent to take the elective share. Judith objected, arguing that the elective share statutes were unconstitutional under both the Florida and United States Constitutions. The probate court rejected Judith's assertions and awarded Edna her statutory elective share.

On appeal, the Second District Court of Appeal rejected any notion that the elective share statutes violated the Due Process Clause of the United States Constitution. The Court noted that despite the prevalence of elective share statutes throughout the country, Judith was unable to point to a single case declaring such statutes as unconstitutional. Moreover, the Court stated that the elective share statutes did not impair any contractual rights in the instant case as the trust was amended *after* the elective share statutes had been revised, and Mr. Magee should have been aware of their effect on his attempts to modify the trust instrument.

Issues regarding the Florida Constitution were not so easily dismissed. Article I, Section 2 of the Florida Constitution guarantees all persons "the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law." The Court initially noted that in *Shriners Hospital for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990), the Florida Supreme Court abolished the historical distinction between property rights and testamentary rights (i.e., property rights are inalienable rights granted by natural law while testamentary rights are purely a creation of statute), holding that testamentary rights possessed the same constitutional protections as other real property rights.

The *Zrillic* Court was faced with determining whether

Florida's mortmain statute (a statute that allowed lineal descendants and spouses to avoid testamentary devises to charitable organizations) violated Article I, Section 2 of the Florida Constitution by infringing on a decedent's testamentary rights. The Court ultimately held the mortmain statute unconstitutional because it was not "reasonably necessary" to accomplish the state's goals of protecting lineal descendents or spouses from a decedent's testamentary charitable devises. However, Judith argued *Zrillic* stood for the proposition that a decedent's right to devise property through testamentary devices may only be curtailed by the legislature through a narrowly tailored law that is "reasonably necessary to secure the health, safety, good order [and] general welfare." Thus, Judith urged the Court to declare Florida's elective share statutes unconstitutional because they were not narrowly tailored enough to further the state's policy of protecting disinherited spouses, especially considering that they applied regardless of the surviving spouse's perceived needs.

While recognizing that the language in *Zrillic* was expansive enough to support Judith's argument, the Florida Supreme Court in *Haire v. Florida Department of Agriculture & Consumer Services*, 870 So. 2d 774 (Fla. 2004), recently established that the "rational basis" or "reasonable relationship" standard, rather than the "least restrictive" test urged by Judith, applied to review a statute that potentially infringed on property or testamentary rights. Therefore, the court ruled that because the state possesses a strong public policy in protecting a surviving spouse in marriage at the time of the decedent's death, Florida's elective share statutes serve a legitimate legislative purpose and are constitutional.

Trust instruments and durable powers of attorney are to be strictly construed to the expressed terms provided in them.

***Gurfinkel v. Josi*, 972 So. 2d. 927 (Fla. 3d DCA 2007)**

The court reaffirmed its holding in *McFarlane v. First Nat'l Bank of Miami*, 203 So. 2d 57 (Fla. 3d DCA 1967), that a valid trust once created cannot be amended or revoked without an express power to do so. Moreover, the power to amend or revoke must be done in strict conformity with the trust instrument.

The revocable trust at issue expressly reserved to the grantor the right to amend, modify or withdraw trust assets. Furthermore, the trust expressly prohibited anyone from exercising these rights during the lifetime of the grantor. Relying on the First District Court of Appeal decision in *Mann v. Cooke*, 624 So. 2d 785 (Fla. 1st DCA 1993), the court concluded that such language in a trust unambiguously prevents a holder of a durable power of attorney from withdrawing trust funds during the grantor's lifetime.

The disgruntled beneficiary of the amended trust argued that the durable power of attorney provided the authority for the attempted amendment. The instrument provided the power to transfer and convey to the trustee any and all assets standing in the grantor's name. This included the power to transfer the same into the names of any nominee as such trustee shall direct. However, the court disagreed stating that just as powers to revoke or amend trusts must strictly conform with the expressed terms in the trust instrument, authorizations conferred through a power of attorney must also strictly conform. In the instant case, the language used in the power of attorney at most allowed for the transfer of assets into the trust, but not the removal.

Guardianship

Pursuant to the principle of priority and the doctrine of comity, Florida court abused its discretion in refusing to stay Florida proceedings while previously filed proceedings pending in foreign state court went forward where both courts had concurrent jurisdiction, and foreign court exercised jurisdiction first.

***In re Guardianship of Morrison*, 972 So. 2d. 905 (Fla. 2d DCA 2007)**

Where two state courts have concurrent jurisdiction over a dispute, the determination of which court should proceed is resolved by either legislation or the principle of comity. In absence of legislation, the principle of priority controls as a matter of comity. According to *Siegel v. Siegel*, 575 So. 2d 1267 (Fla. 1991), the purpose of applying the principle of priority is to avoid duplicative lawsuits that would be oppressive to the parties. Moreover, concurrent jurisdiction only requires substantial similarity of the parties and action.

However, *Siegel* did not resolve what was meant by the term "the court which first exercises its jurisdiction." In *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Ainsworth*, 630 So. 2d 1145 (Fla. 2d DCA 1993), the Second District Court of Appeal held that a court first "exercises jurisdiction" when it issues an order to show cause. The Court reasoned that when a court issues an order to show cause, it is demonstrating its intent to grant relief unless the opposing party can convince it otherwise. Thus, "the ball is rolling, so to speak, and will not be stopped until the court issues an order or the plaintiff dismisses the lawsuit."

Furthermore, the Court held that a trial court abuses its discretion to stay proceedings when it does not issue the stay based on the principle of priority, absent special circumstances. By way of example, a trial court may find special circumstances warrant against granting the stay when the foreign court exhibits undue delay in proceeding with the action.

Appointment of non-relative guardian of property and person of ward was appropriate even though there appeared to be at least one relative willing to serve as guardian.

***In re Guardianship of Stephens*, 965 So. 2d. 847 (Fla. 2d DCA 2007)**

The Second District Court of Appeal recognized that ordinarily, if qualified, family members should be appointed as guardians rather than strangers. However, the general magistrate in his report and recommendation to the trial court believed the ward's estate could become jeopardized due to family conflict and infighting. For example, the Court noted that some of the ward's children had set up irrevocable trusts containing questionable terms, siblings were engaging in "alliances" to the exclusion of others, and they were unable to come together on simple issues such as to best provide for their mother's care. Thus, appointing a family member as guardian could create a "tug-of-war" over the ward and her property.

The Court concluded that while naming a family member

continued, next page

to serve as guardian is preferred, such "preference" exists within certain discretionary bounds. Section 744.312(1), Florida Statutes, provides that "the court may appoint any person who is fit and proper and qualified to act as guardian, whether related to the ward or not." Moreover, as stated in *In re Guardianship of R.N.B.*, 429 So. 2d 796 (Fla. 4th DCA 1983), the Court determined that the guardianship statutes do not confer upon certain family members an absolute right to be appointed as guardians. The Court concluded by stating the interests of the ward come first while "[f]amily member preference in and of itself is secondary, regardless of how well qualified the members are."

Trial court erred in finding a woman's son in indirect criminal contempt for failing to disclose the woman's location where the son was not properly served; for revoking a woman's advance directive without support; in failing to determine the validity of the directive where statutory grounds exists for its revocation; and for relying upon insufficient evidence to find the woman incapacitated.

***Graham v. Florida Dept. of Children and Families,* 970 So. 2d. 438 (Fla. 4th DCA 2007)**

The Department of Children and Families ("DCF") filed two petitions on November 8, 2005, one for the appointment of plenary guardian to Betty Graham and the other for appointment of emergency temporary guardian. Both petitions alleged that due to Betty's incapacitation by mental illness, her sons, Laurence and Luke Graham, were trying to conceal Betty's whereabouts from each other in order to get her assets titled in their respective names. The trial court entered an order appointing Catholic Charities as Betty's emergency temporary plenary guardian and freezing Betty's accounts.

Laurence subsequently filed a petition for appointment as Betty's guardian, alleging he had a right to make health care decisions for Betty pursuant to her health care advance directive which designated Laurence as her health care surrogate. Catholic Church then filed a verified petition for an order compelling Laurence to disclose Betty's whereabouts and show cause why he should not be held in contempt of court. Luke Graham filed a petition to be appointed Betty's permanent plenary guardian, which the trial court ultimately granted.

The Court also ultimately entered a judgment of guilt on the order to show cause why Laurence should not be held in indirect criminal contempt of court based on "his participation in the removal and disappearance of Betty Pat Graham from this jurisdiction and his subsequent failure to immediately disclose her location."

Laurence appealed the orders on three grounds. First, Laurence argued that the notice of the contempt proceedings was not properly served upon him. Relying upon *Giles v. Renew*, 639 So. 2d 701 (Fla. 2d DCA 1994), the court held that Fla. R. Crim. P. 3.840(a) mandates strict compliance regarding personal service of process. Thus, because Laurence was not personally served, the Court reversed the order of criminal contempt.

Second, Laurence alleged the trial court erred by revoking Betty's Directive in appointing Luke as temporary plenary guardian without the necessary proof and without holding a hearing pursuant to Fla. Stat. §§ 765.105 and 744.3115, respectively. The Court agreed that by appointing Luke as Betty's temporary guardian and stating his authority "shall exist irrespective of any valid advanced [sic] directive executed by the Ward under Chapter 765 of the Florida Statutes," the trial court essentially revoked Betty's Directive without support, failing to comply with Section 744.3115. Moreover, the Court found that the trial court failed to establish whether the Directive was valid before appointing a guardian.

In response, Luke argued, without supporting authority, that the Court should interpret Section 744.3115(6)(b) as placing the burden on the health care surrogate to prove validity of the instrument. However, the Court rejected this argument, stating that Section 744.3115 does not mandate such requirement upon a finding that the Directive complies with Section 765.202. Thus, the Court reversed and remanded on the issue regarding the Directive's validity and to determine on what grounds Section 765.105 requires revocation.

Lastly, Laurence argued that the trial court erred in finding Betty's incapacity was established without sufficient evidence pursuant to Section 744.331. The Court agreed, relying upon *LeWinter v. Guardianship of LeWinter*, 606 So. 2d 387 (Fla. 3d DCA 1992). The trial court had based its decision regarding Betty's incapacity on three examining committee reports. However, the Court found that two of the three reports were filed two months or more before the hearing, and there was sufficient evidence in the record to support a finding that Betty's condition had improved in the meantime. Therefore, the Court reversed and remanded with directions to dismiss the guardianship proceeding.

Trusts

Trial court did not err in imposing a constructive trust on the former husband's Elected Officer's Retirement Trust ("EORT") as it was determined that the EORT is a marital asset subject to equitable distribution.

***Carollo v. Carollo*, 972 So. 2d. 930 (Fla. 3d DCA 2007)**

In November 2000, Maria Ledon Carollo petitioned for dissolution of her marriage to Joseph Carollo. In finalizing the assets, the trial court determined that Maria, as a former wife, had a property interest in Joseph's Elected Officer's Retirement Trust ("EORT") pursuant to Fla. Stat. § 61.075 (2003). The trial court thus imposed a constructive trust on a portion of the proceeds in order to effectuate an equitable distribution of those assets.

On appeal, Joseph maintained that the court was precluded from imposing a constructive trust because the decision in *Carollo v. Carollo*, 920 So. 2d 16 (Fla. 3d DCA 2004) ("*Carollo I*") determined his former wife did not have a property interest in the EORT.

The Court examined its prior decision in *Carollo I* and disagreed with that interpretation. Contrary to Joseph's contention, the Court reiterated the EORT is a marital asset. However, because the Court did not address the remedies available to the parities to effectuate this distribution, the trial court was free to impose its own remedy, including imposition of a constructive trust, "a device used to restore property to its rightful owner and to prevent unjust enrichment."

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

[Course Registration: (850) 561-5831]

Environmental and Land Use Considerations for a Real Estate Transaction
(Video Replays)
March 6 – West Palm Beach March 7 – Jacksonville
March 13 – Pensacola March 14 – Miami

Trust & Estate Symposium: Litigating Under Florida's New Trust Code
(Video Replays)
March 6 – St. Petersburg March 7 – Fort Pierce

March 13, 2008
Protecting Client's Real Estate Portfolio: Current Topics for Identifying And Qualifying Environmental Liabilities
(Telephonic Seminar)

April 17-18, 2008
Condominium & Planned Development

April 18-19, 2008
Wills, Trusts and Estates Certification Review
Hyatt Regency International Airport, Orlando, FL

April 18-19, 2008
Real Estate Certification Review Course
Hyatt Regency International Airport, Orlando, FL

May 15, 2008
Annual Wealth Protection Conference
Westin Diplomat, Fort Lauderdale, FL

May 16, 2008
2008 Environmental and Land Use Hot Topics, Projects & Cases
Fort Lauderdale, FL

May 22-25, 2008
RPPTL Section Convention
Hyatt Regency Coconut Point
Bonita Springs, FL

October 31 & November 1, 2008
The Probate Team 2008
Caribe Royale Resort
Orlando, FL
Reservation Phone No. (877) 784-6835
Queen Dbl $149 Std King $159
Cut-off Date: Sep. 25, 2008
Seminar brochure & registration
available August 2008 at www.flssi.org

Executive Council Meetings

April 3-6, 2008
EXECUTIVE COUNCIL MEETING
Hilton University of Florida, Gainesville
Reservation Phone No. (352) 371-3600
Room Rate: $145.00
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: $189.00
Cut-off date: May 21, 2008

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

KEEP APPRISED

Texts of bills can be swiftly obtained online through "Online Sunshine." A very accessible database is located at: www.flsenate.gov. In the left column, under "Jump to Bill" type in the bill number. Hit Enter, and bill history and a link to bill text appears.

–Michael J. Gelfand, Esq.
West Palm Beach

Amendment One FAQ.

The Florida Department of Revenue has provided answers to frequently asked questions regarding Amendment One: portability of the Florida homestead exemption for property tax purposes, the additional $25,000 homestead exemption, and the tangible personal property exemption, all recently approved by voters. See Current Topics on the DOR website: myflorida.com/dor.

–Dresden Brunner, Esq., Naples

Writing Competition for Lawyers

The deadline for the 7th Annual Legal Fiction Writing Competition for Lawyers is March 31, 2008. For more information, see www.seak.com.

–S. Dresden Brunner, Esq., Naples

The Florida Department of Revenue has posted **Form DR-313** on its website. This form should be filed with the Court in which a probate proceeding is being conducted when an IRS Form 706 has been filed, but a FDOR Form F-706 is not required to be filed. The link to the DR-313 is http://dor.myflorida.com/dor/forms/2008/dr313.pdf .

–Elaine Bucher, Esq., Boca Raton

Editor's Note: See article inside this issue elaborating on this development.

RPPTL CONVENTION

The Section's Annual Convention will be May 22 – 25, 2008 in Bonita Springs, Florida. In addition to the meetings of Section Committees and Executive Council, there will be CLE Seminars—one for real estate practitioners and one for trust and probate practitioners. Details to follow soon.

DEADLINE

for submissions for the next issue of ActionLine is

APRIL 30, 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.)

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