

ActionLine

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

RPPTL in Ecuador
Construction Lien Prevailing Party Fees
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Service, Structure and a Strategic Plan
Travel Abroad Gives Perspective at Home



By
Sandra F.
Diamond

Section Chair
2008 - 2009

Chair's Column

I am writing my *ActionLine* column from Quito, Ecuador, where more than 100 RPPTL Executive Council members and guests have trekked for our annual out of state trip.

We are en route to the Galapagos Islands, having stopped first in Ecuador's capital city for three days of meetings and a bit of sightseeing. Visiting in this small South American country which is struggling with the stability of its institutions and severe economic pressures has given us a renewed appreciation for our own democratic structure, the independence of our judiciary and the rule of law in America.

My husband and I have visited Ecuador many times in the past, primarily for his medical work and research. This past November we happened to be here on the night of the US presidential election. We had voted early at home and, as political junkies, were a bit disappointed to be unable to hold our normal election night TV vigil. But, since CNN is everywhere, we watched from Tony Roma's in downtown Quito, getting frequent text messages and an occasional call from home. We were surprised at how much interest there was in our election around the world. There was genuine excitement in Ecuador over the possibility of the first African-American President. We also heard grudging admiration over our political processes that allow a peaceful and orderly transfer of power.

Our group met this week with a young Ecuadorian lawyer who described the political turmoil which lead to the disbanding of the Ecuadorian Supreme Court, the institution of a new and, as yet, untried constitution that is more than 500 pages in length and a virtual lottery system for judicial selection. She described a legal system in which it takes 10-12 years to resolve commercial disputes but spoke with pride about the ability to form a corporation or LLC in just a couple of months. Our group was too polite to mention that in Florida we can go on-line and form these entities within hours.

At dinner, the United States Ambassador to Ecuador, Heather Hodges, spoke of our country's role in the region, including economic aid to the Charles Darwin Research Center in the Galapagos, the many projects of the Peace Corps volunteers and attempts to facilitate trade with US companies in the face of increasing restrictions imposed by the Ecuadorian government

Getting the Most from Your RPPTL Membership

As members of the Real Property, Probate and Trust Law Section of The Florida Bar, you have chosen to join with other Florida Bar members who also have an interest in our particular practice areas. Section membership is voluntary, as is Section participation. You check the box on your bar dues statement and at the very least you start receiving *ActionLine* and notices for RPPTL CLE programs, but, hopefully, you will take advantage of some of our other Section activities and services.

The RPPTL Section has 21 Real Property committees, 19 Probate and Trust committees and 20 General Standing committees. All of the committee members are volunteers. We invite you to join a committee by e-mailing the committee chair. All of our committees and their chairs are listed on our website at www.rpptl.org. Alternatively, you can simply review the minutes of those committees that interest you on-line. Our next full set of committee meetings will be held at the Annual Convention at The Vinoy in St. Petersburg on May 21 - 23, 2009, and we invite you to attend.

The Executive Council of the RPPTL Section is composed of the Section officers, the chairs and the vice chairs of each of its committees and circuit representatives from each of the judicial circuits. The Council holds four multi-day meetings each year throughout the state and one meeting out of state (hence the recent trip to Ecuador!). Most of the substantive law committees hold their meetings in conjunction with these Executive Council meetings. As a Section member, you are welcome to attend any committee meeting, as well as the Executive Council meeting. However, if time or cost prevents you from attending in person, you should take a look at our Executive Council agendas which are posted on the website about a week prior to each meeting. The agendas contain all of our Section's pending legislative proposals, legislative white papers, amicus briefs and other important materials which are considered at each of the Executive Council meetings. Reading one of the 150 page agenda packages is equivalent to attending a mini CLE presentation. The website lists the dates and the locations of all the Executive Council meetings. Come if you can in person, but, if you can't, keep up with what is being discussed by following the agendas and the minutes of the committees which interest you.

The general purpose of the RPPTL Section is to improve the implementation and application of laws, rules and regulations in the fields of real property, probate and trust law

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

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ABOUT THE COVER:

This South American reptile (a Galapagos land iguana) was among many to greet RPPTL Section members during the out-of-state Executive Council meeting in Ecuador. Photo by Dr. Sarah Diamond.

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Get Included in *ActionLine!*

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

Forward any proposed **ARTICLE OR NEWS OF NOTE** to J. Richard Caskey at jrcactionline@gmail.com.

For information on ADVERTISING, please contact Scott Pence at spence@carltonfields.com.

The deadlines for all submissions are as follows:

Issue	Deadline
Spring	January 31
Summer	April 30
Fall	July 31
Winter	October 31

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

Message From the Chair

from page 3

and to accomplish legislative objectives that provide for the administration of real property, probate and trust laws. We have a vigorous legislative program, an active *amicus* voice and a large number of continuing legal education courses. Almost all of this content and service to our members is generated through our Section committees.

The growth of the Section, now with almost 10,000 members, its three divisions and committee structure has served us well, but we want to ensure that we are using our volunteer resources wisely. Over the next several months, we will be meeting to develop a five year strategic plan. We are hopeful that we will be able to identify and refine the goals of the RPPTL Section to ensure that we provide the organizational stability and structure necessary to more successfully move forward. This strategic planning process will include the revision of our by-laws, a review of our finances, internal structure and publications, as well as our educational and advocacy efforts.

If you have comments or suggestions, we would like to hear them. Please let us know by e-mailing me at sdiamond@wdclaw.com or Chair-Elect , John Neukamm, at jbn@floridalandlaw.com. Once a draft of the strategic plan is completed, we will post it on the website for your review.

During his visit to the United States in the mid 1830's, Alexis de Tocqueville commented in *Democracy in America* on the importance of voluntary associations and the use that Americans make of them. The RPPTL Section continues this tradition, we welcome your membership and invite your active participation.

Nominees for May 2009 officer and representative elections

The RPPTL Section's election meeting will take place during the Section's Annual Convention on May 22, 2009, at the St. Petersburg Renaissance Vinoy Resort. The Section's Long Range Planning Committee has nominated the following RPPTL Section members to serve as the Section's officers, out-of-state representatives and circuit representatives for the 2009 - 2010 Section year commencing July 1, 2009:

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Helping Clients to Change Domicile Correctly– Avoiding the Tax Reach of "Former" States

By Michael P. Stafford, Farrell Fritz, P.C., New York, NY

The increase in the Federal estate tax exemption to $3.5 million has placed renewed focus on the high cost of dying for a resident of states like New York that have retained their estate tax at a much lower exemption threshold. It is not improbable that mass migrations to Florida and other non-estate tax states, like the ones in the early 1990s, will resume in earnest.

Most cold (cold hearted?) states in the northeast, such as New York, Connecticut, New Jersey and Massachusetts, impose their own, separate estate taxes that do not conform to the federal exemption increases. Thus, the estate of a New Yorker dying in 2008 (with a $2 million Federal exemption) must pay almost $100,000.00 in New York State estate tax just for the privilege of fully funding a $2 million Federal credit shelter trust. For New York residents dying in 2009 (with a $3.5 million Federal exemption), that number jumps to more than $229,000.00.

New York's top estate tax rate is 16%, so a New York resident with a taxable estate of $15 million would pay over $1.1 million more in total estate taxes than a Florida decedent, and the same would be true for residents of Massachusetts, New Jersey and Connecticut.

It's enough to make clients think seriously about moving to a warmer climate, particularly if they believe that Congress will pass a permanent exemption this year in the $3.5 million range.

If the client is coming to Florida from a State that has a "statutory residency" provision, an attempted domicile change can be doomed before it gets off the tarmac at JFK.

New York State's Department of Taxation and Finance has a special unit that concentrates on challenging the "change" of domicile of its former citizens through income and estate tax audits. The audits result in approximately $125 million annually in additional revenue to New York – and with the current economic situation, the audits will undoubtedly intensify over the next couple of years, at least.

Once a client establishes a domicile (a person can have several "residences" but only one "domicile" – the place demonstrated by the client's actions to be his or her true "home"), he or she must establish by "clear and convincing evidence" that the domicile has been abandoned and a new one established. This burden is not easily met, and estate planners should make clients aware of the major pitfalls, as well as the consequences of not being able to demonstrate the change. It's not just a matter of "counting days" where the client spends time, or of self serving declarations of where one's domicile is.

Having said that, the first issue to discuss with clients does in fact involve "counting days". If the client is coming to Florida from a State that has a "statutory residency" provision, an attempted domicile change can be doomed before it gets off the tarmac at JFK! As an example, New York Tax Law 605(b) states that if a taxpayer spends 184 days or more in New York and has a "permanent place of abode" in New York, the taxpayer is a New York resident for income tax purposes for the year in question. The taxpayer loses, despite what he or she can demonstrate to New York authorities about "intent" to change domicile.

But even if the client "wins" the battle of statutory residency, he or she can still "lose" the war of domicile. New York and other states have established audit guidelines to examine whether taxpayers have truly intended to abandon their current domicile in favor of another state. New York guidelines instruct auditors to look closely at five "primary" factors to determine intent:

1. The Home – It is okay to keep the New York home (retention not a "disqualifying factor" but "a factor to be considered", according to the guidelines). Auditors will look at the relative sizes of the New York and Florida homes, their value, the nature of use, the types of communities where the homes are located, and also will scrutinize the types of possessions in each location. Obviously, it would be better for clients to sell the New York residence and at least "scale down" to a smaller one, if feasible.

2. Active Business Involvement – The entrepreneur who "retires" from his or her business in New York and hands the business to younger family members is of particular interest to auditors, who won't be the least bit impressed that the newly-minted Floridian isn't physically present in New York to run the business. In addition to examining whether there is continuing substantial investment, auditors will look for active participation, supervision and the extent of a policy-making or management role. Constant phone calls, faxes and e-mails to the successor management team may help the auditors conclude that the client never really left the old job, but rather simply left the location where the job is being done. This factor is a major trap for the unwary.

3. Time – Even though the client has already passed the statutory residence test (less than 184 days a year in New York), auditors will look at the "quantity and quality" of time spent in New York to establish "overall living patterns" that will help them determine taxpayer intent. Auditors will examine diaries, appointment logs, calendars, credit card receipts, ATM records, telephone bills and anything else they think might assist them.

"Seasonal visits" back to New York to be with relatives and old friends are surely okay, but changing from 6 to 7 months a year in Florida may not be.

4. Items Near and Dear (Teddy Bear Rule) – Auditors look at where the taxpayer keeps items of "significant sentimental value", not necessarily expensive items, such as family heirlooms, important furniture, art works, book collections, family photo albums . . . and even pets! (tell your client to get a pet Gator as soon as he moves to Florida . . . then the auditor will surely conclude the taxpayer is really a Floridian!)

5. Family Connections – While this is listed as the last of the five "primary" factors, auditors are told not to consider it, unless no conclusion can be reached by an examination of the first four. This is because the factor is extremely intrusive and involves the taxpayer's "commitment" to be in New York for what would objectively be called "significant quality time" with children, grandchildren or friends, to the near exclusion of activities a Florida domiciliary would normally gravitate towards.

If auditors cannot reach a conclusion based on an examination of the primary factors, they are instructed to look at "other" factors, some of which are logical extensions of the primary factors. Drivers licenses and other licenses, auto and boat registrations, voting locations (not just November but local elections, etc.), social activities, listing of domicile on formal documents, tax filing locations etc., are some of them, but the self serving nature of many of these factors is why they are given little weight in and of themselves.

Two "non factors" . . . where charitable contributions are made and where volunteer activities are performed . . . "shall not be used in any manner" to determine domicile, according to New York State Tax Law. But logic suggests that clients who have truly changed domicile would be looking to charitable and volunteer outlets in their new community. Clients should be advised accordingly, to at least split the contributions and volunteer work between Florida and the former state.

New York commences its audit process with a fairly innocuous letter and a short questionnaire. Clients should be cautioned against responding to the letter without the assistance of counsel and/or their CPA. A properly prepared response to the short questionnaire will nip the audit process in the bud most of the time, but a casual answer or two could trigger the sending of the second questionnaire, which is much longer and significantly more intrusive then the first.

Leaving family, friends and memories in another state and moving to Florida can be a difficult decision for clients, but at least lawyers can help them make sure it's not an overly – taxing one.

Michael P. Stafford *is Counsel at Farrell Fritz, P.C. in New York. A member of the Florida Bar since 1976, he has been a member of the RPPTL Executive Council for the past 17 years. He served five years on the Board of Governors of The Florida Bar, including two years on the Bar's Executive Committee, and was also on the Board of Directors of the Florida Bar Foundation from 2002-2006.*

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WHEN WAS THE LAST TIME YOU ATTENDED THE *SECTION'S ANNUAL CONVENTION?*

Make Plans for this Year's

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Thursday, May 21 – Committee Meetings Too Numerous to List.

If you have an interest in RPPTL, we have a committee for you. For example: Title Insurance, Professionalism & Ethics, Trust, Probate, or Guardianship Law, Retirement Plans, Construction Law, Condominium Law. You name it; we discuss it. And we want YOU to join us.

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Saturday, May 23 – Morning Roundtables and Executive Council Meeting

Come meet your Section Officers; see the Committee Chairs report; watch the business of the Section.

Sunday, May 24 – Decompress

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Think You Know a Prevailing Party? Not So Fast, My Friend

By Tina L. Caraballo, Esq., Hayes & Caraballo, P.L., Orlando, FL

Florida's Construction Lien Law is purely a statutory creation and is required to be strictly construed.[1] Prior to 1977, the law was liberally construed in favor of lienors. Section 713.37, Florida Statutes, was enacted to prohibit liberal construction in favor of anyone.[2]

If followed, the lien law provides the procedure whereby the owner's real property may be sold by legal process to satisfy the payment claims of laborers, materialmen, and contractors.[3] The law sets forth notice requirements and time restrictions for recording, serving, and foreclosing a claim of lien.

Recently, the Florida Supreme Court interpreted a section of the lien law that authorizes the prevailing party to recover its attorney's fees, specifically:

> In any action brought to enforce a lien or to enforce a claim against a bond under this part, the prevailing party is entitled to recover a reasonable fee for the services of her or his attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions.[4]

Based on rules of construction and statutory language, it would be correct to assume that one party in a suit to enforce a lien or bond claim is going to be the prevailing party entitled to recover attorney's fees. However, that assumption is now wrong. Under the recent decision, *Trytek v. Gale Industries, Inc., No. SC07-1641, 2009 WL 465808 (Fla. Feb. 26, 2009)*, there exists a possibility that neither party will prevail, prohibiting recovery of attorney's fees.[5]

The Florida Supreme Court issued its February 26, 2009, opinion changing the landscape of prevailing party attorney's fees in an action where the contractor makes an affirmative recovery on its lien.

I. Pre Trytek Prevailing Party Cases

Before examining *Trytek*, it is necessary to understand the law as it existed previously in three circumstances relevant to prevailing party attorney's fees in construction cases.

A. Lienor Prevails Where it Recovers Some Amount

Section 713.29 Florida Statutes has been interpreted as mandatory, requiring a trial court to award fees to the prevailing lien claimant.[6] Even if the lien amount is disputed, a positive recovery has resulted in an award of prevailing party attorney's fees.[7]

The only exception is when the lienor fails to recover more than an amount offered by an owner pre-suit to settle the claim.[8] In *C.U. Associates, Inc.,* a subcontractor failed to recover more than the amount offered to resolve its lien pre-litigation. The Supreme Court reversed the affirmance of the trial court's award of prevailing party attorney's fees to the lienor because it rewarded the lienor for litigating when it could have recovered more in settlement, which contravened the goal of the lien law.[9] The *C.U. Associates, Inc.* Court found "in order to be a prevailing party entitled to the award of attorney's fees pursuant to section 713.29, a litigant must have recovered an amount exceeding that which was earlier offered in settlement of the claim."[10]

B. Significant Issues Test where there is only a Construction Contract Dispute and no Claim of Lien

When only a contract was at issue, the Florida Supreme Court held "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees."[11] In *Moritz,* the homeowners contracted for the purchase of a lot and construction of a luxury custom home, placing a deposit with the contractor.[12] Not happy with the construction, the homeowners repudiated the contract.[13] The contractor offered to return the homeowners' deposit minus damages flowing from their breach of the contract, a resolution the homeowners rebuffed.[14] The contractor retained the deposit, finished construction, and sold the home for $10,000.00 less than the homeowners' contract price.[15]

The homeowners sued for breach of the construction agreement and sought an equitable lien on the property for their deposit.[16] The contractor counterclaimed to recover damages suffered by the homeowners' breach.[17] At trial, the court determined the contractor had not breached and the homeowners were not excused from performance.[18] Judgment was in favor of the homeowners because the $57,877.45 deposit exceeded the $20,579.56 difference in value awarded to the contractor.[19]

Both parties moved for attorney's fees and the trial court granted the contractor's motion.[20] The Fourth District Court of Appeal affirmed based on the ruling that the homeowners were the party that breached the contract.[21] The Florida Supreme Court reviewed the decision based upon conflict with a decision of the Fifth District Court of Appeal, which had earlier found the "party who recovers the larger por-

continued, next page

tion of the sum in dispute should be the prevailing party for the purpose of awarding attorney's fees, even though that party breached the contract."[22]

The contractor cited the United States Supreme Court decision determining prevailing party status for an award of attorney's fees under the Civil Rights statute whereby "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[23] The Florida Supreme Court agreed, determining the "party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees."[24]

C. *Contractor Obtains Judgment under Contract, but not Claim of Lien*

The third state of affairs regarding prevailing party attorney's fees on construction cases is presented when a contractor's lien claim is rejected, but the contractor recovers on the construction contract. In *Prosperi,* the contractor sued to foreclose its lien for breach of contract, quantum meruit, and account stated.[25] The homeowner counterclaimed for breach of contract, failure to account, and incomplete or negligent performance.[26]

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The trial court rejected the lien claim due to false affidavits, but found the contractor was due money on its contract.[27]

The trial court denied both parties' attorney's fees under sections 713.29 and 713.31, Florida Statutes, and the net judgment rule prohibited the trial judge from declaring the owner as the prevailing party.[28]

The appellate court in *Prosperi* affirmed the trial court's ruling, certifying two questions based on *Moritz.*[29] Upon review, the Florida Supreme Court noted that, had the contractor's suit included only the lien claim, the owner would have clearly been entitled to prevailing party attorney's fees.[30]

The *Prosperi* Court recognized the constraint based on the net judgment rule applied because courts determined the legislature could not have intended to award fees to an owner in a lien foreclosure action when it successfully defended a lien, but was liable in contract damages.[31] Such result would defeat the purpose of the lien law in providing contractors a remedy.[32]

Because the net judgment rule is founded upon equitable principles, the *Prosperi* Court reversed and remanded the case for an award of attorney's fees to the owner, and stated: "in considering whether to apply the net judgment rule, the trial judge must have the discretion to consider the equities and determine which party has in fact prevailed on the significant issues tried before the court."[33]

II. *Trytek v. Gale Industries, Inc.*

The Florida Supreme Court issued its opinion changing the landscape of prevailing party attorney's fees in an action where the contractor makes an affirmative recovery on its lien.[34]

In *Trytek,* the homeowner contracted with Gale Industries, Inc. ("Gale") to install insulation.[35] During installation, Gale stapled through existing electrical wiring and agreed to set off repair costs from the amount owed.[36] The wiring repair was completed by a company owned by the homeowner.[37]

The parties disagreed regarding the homeowner's repair costs, and Gale recorded a claim of lien for $12,725.00.[38] During foreclosure, the homeowner counterclaimed for $18,630.00 for repairs.[39]

Following three years of litigation, Gale's motion for summary judgment was granted when the homeowner stipulated to the lien's form and amount, subject only to the counterclaim.[40] The trial court set the cost of repair at $11,200.00, resulting in a net judgment for Gale of $1,525.00.[41]

Both parties moved for attorney's fees and the trial court determined the homeowner as the prevailing party, applying the significant issues test from *Prosperi.*[42] The Fifth District Court of Appeal reversed and found, consistent with precedent, that a lienor that recovers something on its lien is the prevailing party.[43]

On rehearing, the appellate court certified this question of great public importance:

Where a lienor obtains a judgment against a prop-

erty owner in an action to enforce a construction lien brought pursuant to section 713.29, Florida Statutes (2005), are trial courts required to apply the 'significant issues' test articulated in *Prosperi*, in determining which party, *if any,* is the 'prevailing party' for the purpose of awarding attorneys' fees?[44]

The Florida Supreme Court answered affirmatively, holding "trial courts are required to apply the 'significant issues' test of *Prosperi* to evaluate entitlement to prevailing party attorneys' fees, even when the lienor obtains a judgment on the lien."[45] It was not mandatory for the trial court to determine that one party to a lien foreclosure is the prevailing party entitled to attorney's fees, according to *Trytek*.[46]

The Court reasoned the purpose of the lien law's prevailing party attorney's fee provision is to discourage needless litigation. By acknowledging the trial court's discretion to determine neither party prevailed "on the significant issues in litigation after a thorough examination of all factors," including issues litigated, claim amount, amount recovered, counterclaims, and settlement offers, the Court stated it was acting consistent with legislative goals.[47] *Trytek* was remanded for reconsideration of the issue of attorney's fees based on the Florida Supreme Court's opinion.[48]

III. Why *Trytek* is Wrong

A. Decision Deviates from United States Supreme Court Precedent

The United States Supreme Court has interpreted a prevailing party as "one who has been awarded some relief."[49] The Florida Supreme Court's adoption of the significant issue test in *Moritz* was patterned after federal precedent. However, subsequent decisions, including *Trytek,* have misapplied the test, producing unfair results.[50]

The Florida Supreme Court's decision in *Trytek* focuses only on the remaining issue at the time of trial, which was the amount of Trytek's counterclaim, because Trytek had belatedly stipulated to judgment on Gale's lien claim. This tunnel vision strips the significant issues concept of its intended result and fails to give consideration to means utilized by federal courts, i.e., reducing the attorney's fee award in protracted litigation.[51] The *Trytek* Court's concern with a perceived failure of the lawyers to get the case resolved sooner is addressed by federal precedent with adjustment to what constitutes a reasonable fee due a prevailing lienor.

B. Mechanism to Protect Owners Already in Place

The *Trytek* decision emasculates the Construction Lien Law without reason. There already exists a basis to disallow attorney's fees to a lienor that fails to recover an amount exceeding an owner's pre-suit offer.[52] Applying precedent from *C.U. Associates, Inc.,* the contractor in *Trytek* is the prevailing party.[53]

Pre-litigation, Gale endeavored to set-off reasonable repair costs against its unpaid balance and the homeowner offered $736.00 less than the amount Gale recovered.[54] When queried by the court during oral argument, counsel reportedly admitted it was the homeowner's tactical deci-

continued, next page

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sion not to make a better offer:[55]

> By declaring the owner the prevailing party without consideration of pre-suit offers, *Trytek* produces a result opposite to its stated intent, encouraging litigation instead of rewarding good faith efforts to resolve a lien. The decision ignores the goal of summary judgment to limit issues at trial and highlights the need to await trial before narrowing the issues to avoid being penalized.

Trytek punishes the contractor for insisting on its right to recover payment. The decision is a message that a contractor is not like other creditors but must barter for money due. There is no case authority where a mortgage company is denied attorney's fees because it refused to accept reduced payment in settlement.

C. Policy Considerations Militating Against Trytek

Numerous policy considerations are impacted by *Trytek*. Stability and predictability for business litigants, the ability to obtain counsel, and encouragement of litigation are all concerns.

The old rule offered flexibility in considering pre-suit offers, resulting in settlement where an offer hastily rejected may insure the offeror's recovery of legal fees. It assured a degree of predictability. After *Trytek*, attorneys cannot advise their clients with any confidence regarding the possibility of recovering attorney's fees in a contested lien foreclosure action.

The potential inability to recover attorney's fees after successfully foreclosing a lien claim will prevent contractors without sufficient resources from obtaining counsel. Attorneys will be unwilling to accept cases on a contingent fee basis. *Trytek* engenders protracted litigation where the numerosity of issues presented, regardless of their merit, may lead to denial of fees to all concerned.

Trytek underscores a general lack of understanding of the construction industry, which is likely attributed to the fact that virtually every judge is a homeowner but very few, if any, are contractors. The Supreme Court expressed concern as to how a lienor that recovers less than the full amount of its lien could be a prevailing party. Unfortunately, there was no opportunity to discuss the multitude of situations lienors encounter after recording a lien. Negotiated change orders, concessions, direct payment to subcontractors or suppliers, delayed payments, retainage reduction, etc., can alter lien amounts. Such occurrences should not defeat the lien, as they are normal and customary in the industry.

In addition to the lack of understanding of building trades and multi-tiered lienors, trial courts fail to appreciate that the cost to litigate $1.00 or $100,000.00 in damages can be comparable. A trial court's disapproval of the amount of fees in relation to the claim is no reason to deny a prevailing party attorney's fees altogether.

Trytek creates substantial probability of a second trial within a trial, on the issue of who is the prevailing party entitled to attorney's fees. Net recovery on a lien claim is no longer sufficient; lienors and their counsel must prove at the conclusion of the case the "significant issues" at trial. Lienors also run the risk of not recovering potentially substantial fees based on time spent establishing the quantum of fees recoverable.[56]

The *Trytek* decision encourages litigation, not settlement. Although the significant issue test adopted from the United States Supreme Court relates to the entire course of litigation, *Trytek* focuses solely on the issues at trial. The better course favors finding the contractor's net recovery entitles it to attorney's fees in a reduced amount upon consideration of the issues litigated.

IV. Protecting Lienors Going Forward

While many have proposed a contract clause that defines the term "prevailing party" in order to avoid the outcome of *Trytek*, such a provision would only serve to protect lienors in privity with the owner and would likely be unenforceable.[57]

The real solution is an unequivocal statement from the Florida legislature directing courts to apply the Construction Lien Law as written, including the mandate for awarding attorney's fees to a prevailing party lienor.

Endnotes:

1 *Home Elec. Of Dade County, Inc. v. Gonas,* 547 So. 2d 109, 110 (Fla. 1989).

2 *See* § 713.37, Fla. Stat. (1977); *Centex-Winston Corp. v. Crown Pain, Inc.,* 294 So. 2d 694, 695 (Fla. 3d DCA 1974).

3 Chapter 713, Fla. Stat.

4 § 713.29, Fla. Stat. (1997).

5 The Court's decision issued on December 11, 2008 at 997 So. 2d 365 (Fla. 2008) was withdrawn, however the Court's analysis and ultimate determination remain unchanged.

6 *Michael David Ivey, Inc. v. Salazar*, 903 So. 2d 329, 332 (Fla. 5th DCA 2005); *DCC Constructors, Inc. v. Yacht Club Southeastern, Inc.*, 839 So. 2d 731, 733 (Fla. 3d DCA 2003); *Kenmark Constr., Inc. v. Cronin*, 765 So. 2d 129, 130-31 (Fla. 2d DCA 2000); *K&M Elec. Supply, Inc. v. Moduplex Corp.,* 686 So. 2d 717, 718 (Fla. 4th DCA 1997); *American Insulation of Fort Walton Beach, Inc. v. Pruitt,* 378 So. 2d 839, 840 (Fla. 1st DCA 1979).

7 *See, e.g., Michael David Ivey, Inc.,* 903 So. 2d at 332.

8 *C.U. Assocs., Inc. v. R.B. Grove, Inc.,* 472 So. 2d 1177 (Fla. 1985).

9 *Id.* at 1178-79.

10 *Id.* at 1179.

11 *Moritz v. Hoyt Enters. Inc.,* 604 So. 2d 807, 810 (Fla. 1992).

12 *Id.* at 808.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 808-09.

17 *Id.* at 809.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983).

24 *Moritz,* 604 So. 2d at 810.

25 *Prosperi v. Code, Inc.,* 626 So. 2d 1360, 1361 (Fla. 1993).

26 *Id.*

27 *Id.*

28 *Id.* at n.1 (The net judgment rule applies when a contractor fails to foreclose its lien, but obtains a judgment for the underlying claim that exceeds any claim of the owner.)

298 *Id.* at 1361.

30 *Id.* at 1362.

31 *Id.*

32 *Id.*

33 *Id.* at 1363.

34 *Trytek v. Gale Indus. Inc.,* No. SC07-1641, 2008 WL 5170586 (Fla. Dec. 11, 2008).

35 *Id.* at *1.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Gale Indus., Inc. v. Trytek,* 960 So. 2d 805, 806 (Fla. 5th DCA 2007).

40 *Trytek, 2009 WL 465808 at *2; Respondent's Amended Reply Brief, page 3.*

41 *Trytek,* 2009 WL 4658086 at *2.

42 *Id.* at *2.

43 *Gale Indus., Inc.,* 960 So. 2d at 807 (citations omitted).

44 *Trytek,* 2009 WL 4658086 at *1.

45 *Id.*

46 *Id.* (emphasis in original).

47 *Id.* at *7.

48 *Id.* at *8.

49 *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.,* 532 U.S. 598, 603 (2001); *Farrar v. Hobby*, 506 U.S. 103, 111-14 (1992) ("to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim," even if it is nominal damages; however the results received are "the most crucial factor" in determining the amount of the fee award).

50 "[T]he fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court." *Prosperi,* 626 So. 2d at 1363 (emphasis supplied).

51 *Farrar,* 506 U.S. at 106, 114-15 (finding that plaintiff's civil rights were violated after 10 years of litigation but no damages awarded warranted a zero attorney fee award).

52 *C.U. Assocs., Inc.,* 472 So. 2d at 1179.

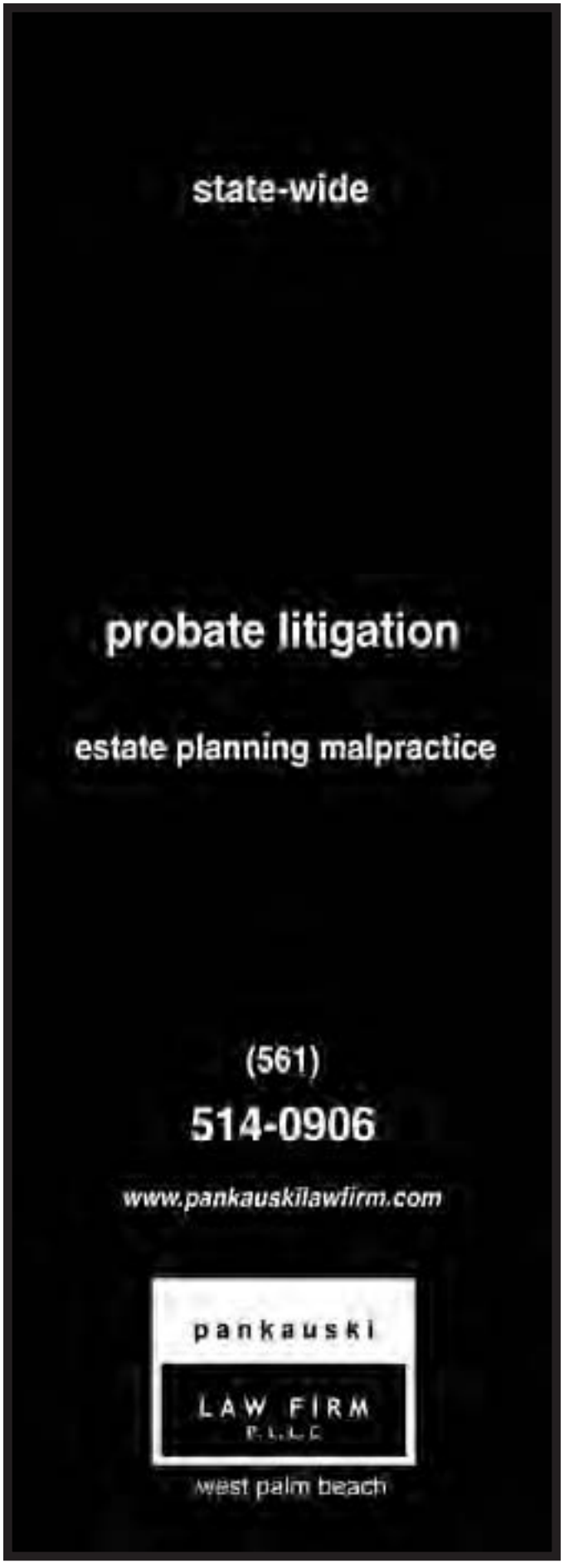
53 *See Id.*

54 *Trytek,* 2009 WL 465808 at *1.

55 Respondent's Amended Reply Brief at page 26.

56 *See, e.g., Mangel v. Bob Dance Dodge, Inc.,* 739 So. 2d 720, 723 (Fla. 5th DCA 1999) (no entitlement to recover fees for time spent litigating amount of fees).

57 *See Port A Weld v. Wadsworth,* 984 So. 2d 564, 570 (Fla. 4th DCA 2008) ("We conclude that the Florida Supreme Court's "significant issue" test for prevailing party attorney's fees cannot be contractually modified.").



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Homestead and Pay-on-Death Accounts: Two Completely Unrelated Cases of Interest

By J. Richard Caskey, Hines Norman Hines, PL, Tampa

"The Legal Chameleon"

In the case of *In re: Estate of Frank Shefner*, 34 Fla. L. Weekly D 328 (Fla. 3d DCA February 11, 2009), the legal chameleon known as homestead raised its camouflaged head once again. The decedent, who died as a result of a self-inflicted gunshot wound, left four surviving adult children. Due to the absence of a surviving spouse or minor children, there was no restriction on devise of the decedent's homestead (see Section 732.4015, Florida Statutes; Article X, Section 4, Florida Constitution). His last will and testament provided:

> "I give my son, FRANK SHEFNER, JR. my house at 3420 SW 2nd Street, Miami, Florida. If and when the house is sold by my son, he will divide the proceeds equally among my children. My son is not to be forced to sell the house against his will."

Frank proceeded to sell the house and placed the proceeds into an account for later distribution among the siblings (apparently, there was no dispute regarding whether Frank was obligated to share the proceeds with his siblings). Two of the children then filed a petition to determine homestead status of the sale proceeds, which the trial court granted.

On appeal, the Third DCA affirmed the lower court's ruling on that issue and agreed the proceeds from sale of the homestead were not available to pay creditors' claims or otherwise satisfy estate administration expenses. The Court of Appeals reasoned that when homestead property is devised to a qualified heir, the homestead is not part of the estate and passes directly to the devisee. That devisee's subsequent sale of the property does not alter its protected status, and the devisee is free to dispose of the property without regard to estate expenses or claims.

The Court acknowledged that when a testator expressly directs the homestead to be sold and the proceeds distributed, the homestead loses its protected status because the decedent is then devising money instead of the homestead property itself. The situation in *Shefner* was distinguishable, the Court explained, because the will directed that Frank *not* be forced to sell the homestead. As a result, the Court found the homestead passed directly to Frank and the proceeds could not be used to satisfy estate claims or expenses.

In some recent cases, courts have refused to find an implicit direction to sell homestead. In *Engelke v. Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006), where a trust provision required trust assets be used to satisfy estate claims and expenses, the court refused to treat that general provision as a direction to sell the homestead held in the trust to pay those amounts. In *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005), the Florida Supreme Court rejected an attempt to use homestead property devised through a residuary clause to satisfy general devises absent a specific direction to sell the homestead. More recently however, in *Cutler v. Cutler*, 994 So. 2d 341 (Fla. 3d DCA 2008), the Third DCA determined a will provision directing estate debts be paid equally from a devise of homestead property to one beneficiary and a devise of non-homestead property to another beneficiary was equivalent to a direction to sell the homestead, and therefore the homestead was available to satisfy creditors' claims.

Clearly in *Shefner*, the Court felt the provision directing division of homestead proceeds in the event of a sale did not rise to the level of a direction to sell the property. Of course, the *Cutler* opinion leaves open the possibility that courts may find implicit directions to sell homestead in the future.

"When is a Person not a Person?"

In *Belanger v. The Salvation Army*, 21 Fla. L. Weekly Fed. C 1437 (11th Cir. February 2, 2009), the 11th Circuit applied Florida law to determine whether a corporation qualified as a "person" permitted to be a beneficiary of a pay-on-death or in-trust-for account under Section 655.82, Florida Statutes. The decedent in *Belanger* had established a bank account titled in his own name "In Trust for The Salvation Army." As of the decedent's death, that account held over $100,000. A representative of The Salvation Army obtained the funds from the bank, and the decedent's personal representative thereafter filed suit to recover the funds on behalf of the estate.

The personal representative argued the definition of "beneficiary" under Section 655.82, Florida Statutes regarding pay-on-death accounts refers only to natural persons and does not include corporations (pursuant to Section 655.825, Florida Statutes, deposits in trust are classified as pay-on-death accounts and governed by Section 655.82). The statute defines beneficiary as "a *person* named as one to whom sums on deposit in an account are payable on request after death of all parties or for whom a party is named as trustee" (emphasis added). Because the term "person" is not defined in 655.82, the personal representative asserted various arguments in an attempt to persuade the Court to restrict the definition to include only natural persons.

The 11th Circuit, however, affirmed the district court's dismissal in favor of The Salvation Army. The 11th Circuit looked to Chapter 1 of the Florida Statutes. Section 1.01(3) states that, where the context permits, "the word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." Because the Court felt the context of 655.82 "plainly permits" the use of that definition of person, it held that a corporation may be a beneficiary of a pay-on-death account. As a result, The Salvation Army was a proper beneficiary.

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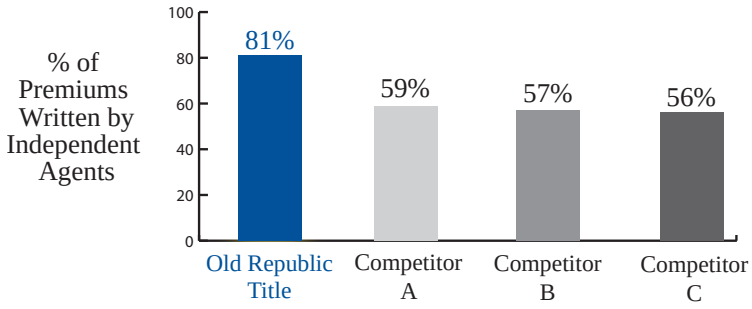

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Estate Planning Can Include Provisions for Organ Donation

By Ken Trachy, Director of Special Projects

Life Alliance Organ Recovery Agency, University of Miami Miller School of Medicine

The continuing critical shortage of organs and tissue in the U.S. has caused a relentless rise in the national transplantation waiting list and thousands of deaths each year. The persistent shortage also presents a paradox, since according to a 2005 Gallup survey, the vast majority of adults (97%) in the U.S. express support for the concept of organ donation and a large majority (78%) report they are likely to donate their own organs and tissue when they die. Furthermore, nine out of ten persons polled believe that donation engenders something positive after death and are likely to donate the organs and tissue of a family member if that person had discussed or documented a decision to be an organ donor.

However, due to a lack of available and accurate information, including the requirements of how to register to be a donor, as well as myths and misperceptions, more than 50% of individuals have failed to commit to being organ donors either by (i) not signing donor cards, (ii) not registering with the Department of Motor Vehicles, or (iii) not discussing donation with family members.

"Lawyers can contribute remarkably by including donation in the estate planning process."

Education is essential to resolving the donor shortage. Lawyers can contribute remarkably by including donation in the estate planning process and by providing encouragement and opportunities for clients to make informed decisions to designate themselves as organ and tissue donors.

Phenomenal advancements in transplantation, especially surgical skills and immunosuppressive drugs, have resulted in a steadily increasing number of individuals with life-threatening diseases successfully receiving new livers, kidneys, lungs, hearts, pancreases, intestines and multi-organ transplants. Last year alone, almost 29,000 transplants were performed in the U.S.

These recipients routinely experience the profound transition from near-death desperation to revitalized health and renewed hope in their lives. Their life expectancies are dramatically increased. Diabetics now can receive pancreas transplants and be free of insulin. Children who depended on intravenous feedings because of digestive disease now are able to receive new intestines and live normal lives. More than 90% of kidney transplants are successful for five years or more.

An Ever-Increasing Demand

Despite being a miracle of modern medicine, transplantation is tragically unavailable to a startling number of Americans. The national list of patients waiting for vital organs—now totaling more than 100,000—grows inexorably each year in dramatic counterpoint to the phenomenal advancements in transplant technology. In the last ten years, there has been more than a 90% increase in the number of individuals waiting for organs, yet only a 57% increase in the number of organ donors. Instead of returning to productive lives with their families and in the workplace, many wait indefinitely or die. Tens of thousands more individuals wait for tissue to restore sight, improve mobility and independence, and regain health through eye, bone, and skin transplants. *Eighteen people die every day while waiting for an organ. And every day 132 individuals with organ failure are added to the list—one every eleven minutes.*

Most organs for transplantation come from deceased individuals who experience sudden and traumatic head injury—car accidents, homicides, drowning, brain hemorrhages—and are subsequently declared brain dead by two physicians in the hospital after all efforts to save their lives have been exhausted. Florida Statutes Section 382.009 provides that brain death is the irreversible cessation of all brain and brain stem functions and is death of the individual. Brain death is a legal and moral warrant for withdrawing mechanical ventilation whether or not organs are being recovered.

Although the large majority of organ donors have suffered brain death, donation after cardiac death is also medically possible for terminal patients with catastrophic and irreversible brain injury. Even though the brain death criteria are not met, donation is possible for those individuals who are on a ventilator but for whom further treatment is deemed futile.

Eyes, bones, skin tissue, and heart valves, unlike vital organs, are viable for transplantation from individuals twelve to twenty-four hours after cardiac death. Tissue is routinely recovered in hospitals, funeral homes, and medical examiners' offices, as well as during the recovery of organs from brain dead donors. One tissue donor can enhance the lives of more than 50 individuals.

Once death is declared and consent for donation is given, bodily functions and organ viability are maintained by mechanical ventilation and medications for a brief period, making it possible to accomplish donation.

Legal Framework

The Uniform Anatomical Gift Act, proposed in 1968 and

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Organ Donation

from page 17

later adopted by all 50 states (the "Act"), established an adult individual's right to donate organs for transplantation, as well as the whole body for research and educational purposes. The Act created the uniform donor card, to be signed by the donor and witnessed by two adults, which legally documents an individual's donation decision. In addition, donors can execute anatomical gifts through a driver's license, a living will, or an advance health care directive.

If an individual executes an agreement regarding an anatomical gift, the document is legally sufficient informed consent and is legally binding. The Act includes language stating that an anatomical gift made by an adult is "irrevocable and does not require the consent or concurrence of any person after the donor's death." In addition, Florida's Nick Oelrich Gift of Life Act of 2003 prohibits "modification of a donor's intent, providing that appropriate legal documentation exists." Many states have so-called First Person Consent legislation that reaffirms the intent and language of the Act, assuring that an individual's documented wish to be a donor is honored. The federal government and most states, including Florida, also have adopted Required Request legislation which mandates that the legal next-of-kin of every person who dies in a hospital must be offered the option of organ and tissue donation, depending on medical eligibility, irrespective of the deceased having made a donor designation.

Life Alliance, one of the nation's 58 federally designated organ recovery agencies, is certified and regulated by the United Network for Organ Sharing, the non-profit organization that manages the national organ sharing system. Life Alliance, in close collaboration with all hospitals, is responsible for coordinating the organ recovery process throughout South Florida. Recognizing the rights of the individual to govern the disposition of his/her body, including the choice to be an organ donor, Life Alliance and other organ recovery agencies in Florida and across the country act on the autonomous wishes of the individual who has made a legal donor designation.

When a medically eligible patient dies in a hospital and has a donor designation, organ recovery and hospital staff inform the family of the steps necessary to carry out the loved one's wishes to be an organ donor and ask for the donor's medical and health history. Similarly, when the patient has not made a donor designation, the family is asked to authorize the steps necessary to accomplish donation and provide the donor's medical and health history. Irrespective of the family's donation decision, organ recovery and hospital staff respect the wishes and feelings of the family of the deceased individual and provide them with emotional and spiritual support.

Offering dying patients or their families the option of organ donation is understood to be a natural part of the dying and death process. It is essential and dignified end-of-life care once death has occurred. For families who donate, the experience provides them with a measure of solace, an opportunity to honor their loved ones, and the knowledge that they and their loved ones have made an immeasurable difference in the lives of strangers who will live longer and better lives because of their generosity.

Lawyers Have an Important Role to Play

Increasing the number of organs for transplantation requires a more knowledgeable, committed, and proactive American public. It requires actions to conform to expressed attitudes about donation. It is imperative to disseminate accurate information about organ donation, to dispel the myths and misperceptions, to allay unfounded fears, and to emphasize the importance of every individual making an informed and intentional decision about donation.

It is also desirable for individuals who wish to be organ donors to include the language of the uniform donor card in their living wills and advance health care directives. The documents should state not only which specific treatments are not wanted at end-of-life (mechanical ventilation, CPR, etc.), but also that the individual wants to prioritize organ donation over routine end-of-life care. Clarifying and documenting end-of-life decisions are important to resolve the potential conflict that arises when a medically eligible donor with an organ donor designation in place also has an advance health care directive that states that the individual does not wish to have life prolonged by the administration of life support systems. This conflict typically arises when there is an opportunity for donation after cardiac death. Once the family has made the decision for withdrawal of life support systems from their loved one, the local organ recovery agency will approach the family for consent for organ donation, which requires that life support systems are maintained while evaluation and other arrangements are made for the recovery of the organs.

Lawyers who practice estate planning can facilitate and enhance the educational process by presenting information about organ donation to clients who are considering issues related to property, end-of-life care, and death. The trust implicit in the lawyer-client relationship is likely to engender discussion, reflection, and intelligent decision-making.

Everyone has an interest in assuring timely access to transplantable organs and increasing their availability. To participate in organ donation is to demonstrate compassion and a sense of shared community. Becoming a donor by joining the Florida organ and tissue donor registry or signing a donor card and sharing the decision with family members will assist in reducing the organ shortage. The sickest of us depend on this generosity. It is a need, unpredictably, that each of us may have for our families or for ourselves.

For brochures / Florida Statewide Organ and Tissue Donor Registry forms visit www.DonateLifeFlorida or call 1-877-FlShare. In South Florida, contact Ken Trachy at 305-301-3480 or ktrachy@med.miami.edu.

Section Executive Council Meeting

Tallahassee, December 4-7, 2008

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

The December meeting of the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar was held at the DoubleTree Hotel in Downtown Tallahassee. The registration desk opened on Thursday, December 4, 2008, with a full slate of committee meetings starting at noon and running until 5:00 p.m. A number of the meetings on Thursday and Friday were held in the Capitol Building, which was pretty darn impressive. If you haven't been to the Capitol in recent years, it is really worth the trip. The Capitol and the adjacent House Office Buildings are full of all kinds of history although I confess, I found it a little distressing that I recognized folks in some of the "historical" photos hanging on the walls.

The Thursday evening social event was a reception at the lovely home of Pete and Susan Dunbar. The buses left the DoubleTree Hotel promptly at 6:00 p.m. and a very convivial crowd convened at Pete and Susan's spacious and gracious home.

Just like Thursday, Friday was chocked-full of meetings starting at 7:30 a.m. with the Executive Committee. Because it was the holiday season, the spouse-guest event was a tour of decorated homes in the area.

The Friday evening social event was a country dinner at Shiloh Farms where everyone could wear boots and jeans.

Saturday morning kicked off bright and early with the 8:00 a.m. Real Estate and Probate Roundtable Breakfasts. Sandy Diamond, our fearless Chair, called the meeting to order at noon in the Senate Chambers of the Old Capitol—a truly historic meeting location within easy walking distance from the DoubleTree Hotel. The many historic displays throughout the building can really make you appreciate our good ole State and Capitol. Andrew Edel treated the members present to a short discussion of the historic background of the restored Capitol building.

As is customary, the Real Property, Probate and Trust Divisions brought forward initiatives prepared by subcommittees. These included revisions to the Uniform Title Standards, Chapter 16 (Recording Notices and Priorities), approval of the legislative position on Brownfields development (Real Property), amendments to Chapter 731, Florida Statutes (definitions – "incompetent" replaced by "incapacitated person"), and two amendments to Chapter 736, Florida Statutes presented by the Trust Law Committee. The details of these initiatives can be reviewed at the section website at www.rpptl.org.

The Executive Council meeting at the Capitol wound up a little bit ahead of schedule and then everyone moved on to an excellent lunch at the Governor's Club. After lunch, the afternoon was open until a casual evening reception and dinner at a well known Tallahassee Restaurant, Chez Pierre.

Finally, Sunday morning, from 8:00 a.m. until 10:00 a.m., there was a farewell breakfast bringing another very productive meeting of the reptiles to a highly satisfactory conclusion.



(L-R): Phil Baumann, Mike Dribbin, and Sandy Diamond spend some time with RPPTL Fellowship recipient, Hung Nguyen. [Photo by John Neukamm]



The Executive Council holds court in Tallahassee. [Photo by John Neukamm]


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Reporting of Changes in Direct or Indirect Ownership of Non-Homestead Florida Real Estate Required

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



C. NASH

Whether you are primarily an estate planning attorney, a real estate attorney or more of a general practitioner, you need to be aware of this somewhat recent development that originated in a 2008 amendment to the Florida Constitution and subsequent amendments to several Florida Statutes.

On January 29, 2008 the voters of Florida approved an amendment to the Florida Constitution which places a ten percent (10%) cap on the amount of increase which can be assessed on non-homestead real estate. Therefore, starting in 2009 (with the 2008 value assessments representing the base year) owners of non-homestead Florida real estate will enjoy, to some degree, the benefit which has heretofore been enjoyed by Florida residents with respect to their homestead real property, albeit not quite as good. That is because a resident of Florida who applied for the general homestead exemption pursuant to the provisions of §196.031, Florida Statutes, will also receive the cap on the reassessment of the value of such homestead property for purposes of determining ad valorem taxes, from year to year, by virtue of the provisions of Florida Constitution, Article VII, Section 4, and §193.155, Florida Statutes. The amount of increase in assessed value allowed from year to year relative to the resident's homestead can not exceed the lesser of three percent (3%) or the increase in the consumer price index calculated in accordance with Florida law.

During its 2008 regular legislative session, the Florida Legislature enacted committee substitute for Senate Bill Number 1588, approved by Governor Charlie Christ on June 17, 2008, published as Chapter 2008 -173, Laws of Florida. That Bill, among other things, contained amendments to §193.1556, Florida Statutes. *Laws of Florida*, §6, 2008-173. Thus, as amended, §193.1556, Florida Statutes, requires that any person or entity that owns property assessed under §193.1554, Florida Statutes, or §193.1555, Florida Statutes, must notify the property appraiser of any change in ownership or control. The term "change of ownership or control" is defined in §193.1554(5) and 193.1555(5)(b), Florida Statutes.

Commencing in 2009, persons (including individuals and entities) who own real estate in Florida which is not, as to an individual, the primary personal residence of a Florida resident (customarily referred to as "homestead") must report a change in ownership or control of non-homestead real estate if such change equates to a cumulative change of more than 50%.

If a property owner fails to notify the property appraiser as required pursuant to the provisions of §193.1556, Florida Statutes, the property owner is subject to having to pay the taxes avoided as a result of such failure, as well as fifteen percent (15%) interest per annum on the unpaid taxes as well as a fifty percent (50%) penalty of the taxes avoided. The property appraiser can collect those sums for any taxes avoided for the ten (10) year period preceding such determination.

However, the property appraiser may record a note of its tax lien on a property of a property owner claiming the limitation cap which is now available due to the fact that the property subsequently becomes disqualified by a change of ownership or control that was not promptly reported to the property appraiser.

Sections 193.1554(5) and 193.1555(5)(b), Florida Statutes, defined the change of ownership or control as any sale, foreclosure, transfer of legal or beneficial title in equity to any person, or the cumulative transfer of control of more than fifty percent (50%) of the legal entity that owned the property when it was most recently assessed at just value. Certain transfers, however, are not considered in applying this definition: (1) a transfer which is correcting an error; (2) a transfer which is between legal and equitable title; and (3) a transfer between spouses, including a transfer to a surviving spouse or in connection with a dissolution of a marriage.

The Florida Department of Revenue has promulgated a new form, Form DR-430, Change of Ownership or Control Non-Homestead Property, which property owners are to use to report any such change of ownership. Therefore, a change of ownership would be viewed as occurring if a mother transferred her fifty-one percent (51%) interest in a limited liability company which owned a rental home to anyone other than her spouse or to a revocable trust of which she is the grantor and some current beneficiary. Form DR-430 can be found at the following site:

http://dor.myflorida.com/dor/forms/2009/dr430.pdf

If the deed instrument recorded with the Clerk of Court in the county where the real estate is situate documents the change of ownership (generally in a transaction in which there has been a direct change in ownership) no additional reporting need be made. However, with respect to transactions in which the change of ownership is indirect, such as

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Public Housing Authorities

from preceding page

when the owner of an entity (corporation, limited liability company, partnership, land trust, etc.) transfers an interest in the entity to somebody other than such owner's spouse, a Florida Department of Revenue Form (Form DR-430) must be filed with the Property Appraiser's Office for the county in which the real estate is located.

So when would these provisions come into play? Say, for example, your client was either gifting outright to his or her children and grandchildren, or to trusts for the benefit of one or more of them, interests in an entity (say a limited liability company - "LLC") that among other things, owns a commercial building or a rental condominium in Florida. If more than 50% of the equity is gifted by the original members of the LLC to someone other than their respective spouses, Form DR-430 would need to be filed with the Property Appraiser's Office in the county in which the real estate owned by the LLC is located. In my view, the same result would occur if the member sold more than 50% of his or her membership interests in the LLC to an intentionally defective irrevocable trust (i.e., the grantor of such trust is still treated as the owner for federal income tax purposes pursuant to the provisions of Sections 671-679 of the Internal Revenue Code of 1986, as amended.

Therefore, all lawyers, whether they be general practitioners, corporate and business attorneys, real estate attorneys and estate planning attorneys, need to be aware of these new laws and filing requirements, as well as the impact that a more than fifty percent (50%) change of ownership or control will have relative to the ad valorem taxes imposed on the Florida non-homestead real property.

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The RPPTL in Ecuador, The Land at the Middle of the World

By Silvia B. Rojas, Attorneys' Title Insurance Fund, Miami, FL

The annual out-of-state meeting of the Real Property, Probate and Trust Law Section of The Florida Bar from January 29th through February 6th, 2009, was held in beautiful and bio-diverse Ecuador starting with the ancestral city of the Quitus Indians and the renowned Incas, Quito. Ecuador is known for its 4 regions, Las Costa (Pacific Coast), La Sierra (high altitude Andes range), La Amazonia (the eastern part), and the Region Insular (Galapagos Islands). On this trip, we journeyed through 2 of the regions, La Sierra and the Region Insular. Quito lies as the base of the Pichincha volcano, in the Province of Pichincha, and is a UNESCO World Heritage site. Its elevation is between 8,000 and 9,000 feet above sea level, and some of the surrounding mountains we traveled through rise to 13,000 feet.

Arrival in Quito

Most of the RPPTL members were on the same plane to Quito for this meeting. Our trip got off to a rocky start due to some equipment malfunction. We changed planes after a 3-hour wait at Miami International Airport so most of us arrived in Quito close to midnight. Our RPPTL Chair, Sandy Diamond, and her husband, Frank Diamond, both of whom had arrived earlier, warmly greeted us as we stepped into the lobby of the Swissôtel. Delicious fruit drinks, hors d'oeuvres, local musicians, and our room keys awaited us at the hotel, and we settled in for a good night's rest.

Old Town

The day began on Friday, January 30th, with an early breakfast available from either the lobby restaurant or a small café on the 12th floor of the hotel with a splendid view of the town and surrounding mountains. Our guides that morning took us on several buses to the old town area of Quito. Pablo, the guide assigned to my bus group, was a wonderful resource for local information. We visited the old town's grand neo-classic cathedral and tallest church, the Basilica del Voto Nacional, with its politically correct carved Ecuadorian fauna instead of the usual mythical gargoyles; the Presidential Palace where neatly uniformed school children lined up for tours; a church built by the Jesuits (a/k/a the Society of Jesus or just "the Company") in the 1600s known as "La Iglesia de la Compañia de Quito" clearly outshining the cathedral in its wealth of 23 karat gold leaf used to guild the church, paintings, and statues; and the Plaza de la Independencia. There were many vendors and very young shoe shine boys that stopped us along the way. A number of us purchased goods and ended up with very shiny shoes by the time we left the area. Though we gazed at the Virgin of El Panecillo and the city below at another hillside, the road to El Panecillo was under construction and that part of the tour was cut short.

We had a buffet lunch at the picturesque La Ronda Restaurant while being serenaded by musicians, and then we went back to the hotel for the scheduled Executive Council meeting. Prior to the meeting, a most interesting seminar was presented by Attorney Ana Belen Posso de Serrano of the law firm of Quevedo & Ponce regarding the challenges of a court system that is currently in a state of flux. A 30-commission panel is currently drafting new laws under the new regime of Rafael Correa. She talked about the civil law system, taxation, asset disclosures, and inheritance and issues pertaining to the purchase of real property by locals and foreigners. After her presentation, the Executive Council meeting was held to update us on the current activities of the Section. Dinner that evening at La Choza Restaurant was preceded by the vibrant performances of the dancers and musicians of the Jacchigua Folklore Ballet. Back at the hotel, we were all treated to our choice of panama hats or colorful ladies' hats, compliments of Klein Tours.

Oltavalo, Hacienda Pinsaqui and Cotacachi

Saturday, bright and early, we set out over a twisting and turning path over the Andes on a 2 lane portion of the Pan American Highway to the Province of Imbabura also known as the "Land of the Awakening Sun." The Pan American highway, except for a short break between Panama and Colombia known as the Darien Gap, is a network of roads that provides approximately 29,800 miles of pavement from Canada to the lower reaches of South America. It is in the Guinness Book of World Records as the longest drivable road. As we headed towards the town of Oltovalo at the foot of the Imbabura volcano, we passed twice over the equator and took a few moments for photos next to cliffside viewing spots. We passed through the Valley of Guayabamba over cloud patches, the mountainsides covered with Acacia trees, and the blue agave plants that surrounded its tall thick stalks of flowers.

We arrived in the morning to the Fair of Oltavalo, a very busy marketplace on the weekends, extending for blocks in all directions where the aboriginal inhabitants sell their goods to tourists and locals alike. The wares are sought for their local flavor, artistic flair, and cash-only rock bottom prices. Some human statues scattered around the marketplace provided entertainment moving only upon the drop of a coin. We greeted one of the vendors who sold us some paintings the day before in Quito. Some in our group found rose petal paintings and chatted with local artists; others found intricately designed silver jewelry, hammocks, and beautifully embroidered peasant shirts. For one practical

continued, next page

Ecuador, Middle of the World

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person in our group, a bag of Fab detergent with instructions in Spanish constituted his precious find.

After leaving Oltavalo, we stopped at the lovely hacienda Pinsaqui for lunch and enjoyed a walk through its lush gardens. Before heading back to Quito, our buses stopped in Cotacachi, a small town lined with leather shops. We later traveled back to Quito in our comfortable air conditioned bus during rush hour. The thick smell of gas emissions was noticeable at the toll booths where the toll booth attendants sported gas masks.

After a small rest at the hotel, it was time for dinner. A splendid banquet that evening was sponsored by Old Republic National Title Insurance Company. We traveled to the Hotel Plaza Grande and dined in a magnificent ornate ballroom. The hotel was originally a colonial home built in the 1600s in the old town and has kept true to the sophistication and beauty of that architectural era. From its balconies, we could see impressive views of the old city. Towards the end of the meal, we enjoyed a presentation on U.S./Ecuador relations by one of our esteemed dinner guests, Heather Hodges, the U.S. Ambassador to Ecuador.

Middle of the Earth and Hacienda Hualilagua

On Sunday, our groups split into those that were going to visit the Middle of the Earth and those that were going up to the Cotopaxi volcano. At the Middle of the Earth monument and grounds, the museum guides did a show-and-tell regarding the magnetic forces existing between the 2 hemispheres. The equatorial line is drawn with extreme precision and its width is no greater than the width of a hand. One of the experiments performed showed how water drains in different directions on each side of the equatorial line and straight down on the line. All present were given the chance to stand an egg on a nail at the equator line without it breaking. Only one of our Section members completed the task successfully.

After the museum trip, they enjoyed a lunch at El Crater Restaurant overlooking spectacular views of the Pululahua volcano. I was a member of the second group scheduled to tour the Cotopaxi volcano but, due to circumstances beyond the control of the tour company, we had to jump ahead to visit the hacienda Hualilagua. After getting off the main highway and traveling over a very bumpy dirt road, we neared the hacienda. We stepped off the buses before entering the hacienda's stone gates inches away from each side of the tour bus. Our cumulative weight would have made more precarious fitting through the gates. We were warmly greeted by the owner's son, Jose, then the owner and later his daughter. The hacienda was built in the 1700s and was owned by his family for generations. After a brief walk up a hillside through a dense forest, we arrived at the area where we viewed a rodeo show presented by skilled and colorful chagras (Andean horsemen) riding beautiful Peruvian Paso horses. After the rodeo, some of the children in our group took a ride on a horse named ""Hee-How" through the hills of the hacienda. To finalize the event, colorful hot air balloons were released high into the atmosphere. Later Jose asked for a cigarette which was useful in lighting up several rockets.

After a walk back to the hacienda, the hacienda's owner treated us to very lively stories of the politics and culture of Ecuador while overlooking the surrounding green emerald mountains visible from the patio of the hacienda. The owner had first-hand knowledge of the cultural history of the country having previously been the Minister of Agriculture and currently serving in a foundation for nature conservancy. Later we enjoyed a buffet lunch back at the central courtyard of the main house. The hacienda owners raise cattle and horses and have an organic farm. Jose came by most of the tables to describe some of the ingredients used at the meal. After a most enjoyable lunch, we headed back to the hotel. Dinner was on our own Sunday night, not only to view Super Bowl 43 at the local sports bar but because we had a wake-up call the next morning at 4:00 a.m. to catch the plane to the Galapagos.

Arrival at the Galapagos

Monday morning we flew to Guayaquil for a short stop and then to the island of Baltra in the Galapagos Archipelago, another UNESCO World Heritage site. We hopped on buses to take us to the pier where we were greeted by sleepy sea lions. From the pier and wearing our life vests, which we faithfully wore every time we boarded a Zodiac inflatable dingy on all our trips ashore, small groups of about 15 persons travelled on each Zodiac to the Galapagos Legend waiting for us in deep water. The ship carries no more than 100 passengers so our Section members were the only guests of the ship for the 4 days, 3 nights. It carries a contingent of 70 employees. After the life vest drill, we were given an introductory presentation and divided into 7 groups: Albatros, Boobies, Cormoranes, Delfines, Fragatas, Gaviotas, and Iguanas. Each group boarded their designated Zodiac for the island excursions and was given one naturalist to guide the island tours. We all carried at least 1 water bottle and most of us took a walking stick to steady ourselves over the sand and boulders of each island. The tours started a couple of hours after we boarded the ship.

North Seymour

Tuesday afternoon, my group, the Cormoranes, were the third to board a Zodiac for a "dry landing" at North Seymour along with our guide, Jorge. This particular island is known for the sea lions and frigate birds, the male frigate sporting a large red inflatable pouch over its throat for the benefit of the female frigates. Though we were not allowed to touch or feed the fauna, if they made the first advance we could allow them to get close. Friendly as they were, we saw many birds, sea lions, and iguanas up close. Once back on board the ship, John Neukamm, a Boobies group member, retold his experience with a baby seal that found one of his shoe laces fun to stretch while he was still wearing the shoe. That evening, we enjoyed a hearty meal and were

given the itinerary for the next day, inclusive of a video presentation. Late that night, the whole sky lit up with an array of stars and galaxies brightly visible from the ship.

Cerro del Dragon, Santa Cruz Island

Tuesday, after breakfast, our island hopping started at 8:00 a.m. The Boobies were on the first Zodiac to leave the ship. While the Cormoranes' Zodiac was being boarded, hundreds of sardines crowded the side of the ship, and Pete Dunbar did a one-handed catch of one jumping sardine. After much fanfare, he quickly threw back the dazed sardine. We don't know if it eluded the hungry pelicans and blue footed boobies swooping down for their morning meal.

We had another dry landing over boulders in the island of Santa Cruz near the hill known as "Cerro del Dragon," and our groups walked for a couple of hours while the guides pointed out the fauna and flora of the island such as yellow tail flycatchers (unfortunately there were a lot of horseflies that followed us along most of the islands for these birds to munch on), Darwin finches, and Palo Santo trees which, when burned, are natural mosquito repellents. Most of the islands do not have mountains high enough to allow for the growth of lush vegetation, and we walked through paths of sand or boulders on all but one of the islands under little or no vegetation cover. On the way into the island, we spotted a pelican on a rock near the shore. This sentinel was still standing in the same place 2 hours later when we boarded the Zodiac back to the ship waiting to bid us goodbye.

Temperatures on the islands seemed to rise up to the 90's F. Laird Lile's family came well prepared with a portable fan and umbrella. Others later followed with some umbrellas for cover. Even SPF 50 was not enough of a blocker from the searing sun.

Cormorant Point, Santa Maria Island

After lunch on the ship, it was time for our first "wet landing" on the beach at Cormorant Point next to sea lions and brightly colored reddish crabs. We walked for about 40 minutes to and from a beach on another side of the island past the island's endemic iguanas and birds. We spotted a baby flamingo all alone at the beach and also large sea turtles and stingrays. Before boarding the Zodiac for the trip back to the ship, a number of us either took a cool swim or snorkeled by the coves nearby for about an hour to view the colorful fish and playful sea lions of the area. That evening, we were warned of the 3-hour hike over rough terrain for the next day at Suarez Point in the island of Española.

Suarez Point, Island of Española

Next morning some of us decided to stay at the ship but most ventured on the tour which turned out to really be only a little over 2 hours. This was a dry landing. Our path was covered with boulders so a lot of us spent more time looking down at our feet than up at the fauna and flora. The sunscreen, water bottle, umbrella or hat, and walking stick were a necessity for a lot of us as we hiked over the island. As we walked towards the cliff on the other side of the island, we heard a thunder and wondered whether it was going to storm. However, the sky showed no such indication. While skirting the cliffs covered with nesting birds, we saw that the "thunder" was coming from a watery blow hole that spurted up every time a large wave would enter the rocks.

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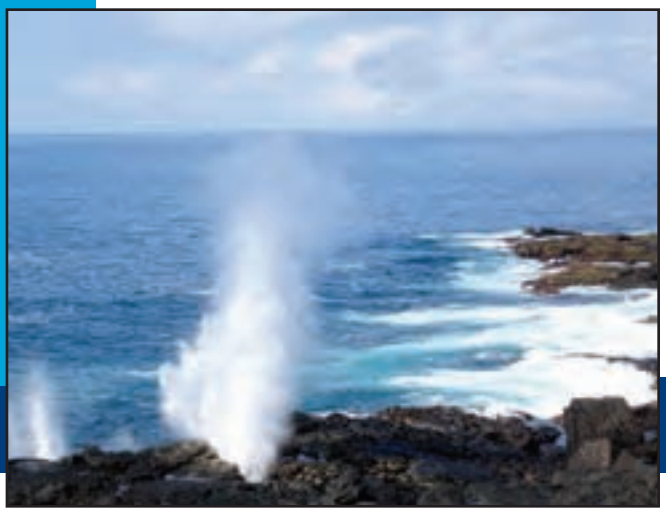
The RPPTL Section Galapagos Adventure



One of the huge tortoises that inhabit the islands.



A beautiful scene which has been repeated for generations.



All Section members in attendance gather for a group photo aboard their island transportation.



This blue-footed booby was unimpressed with the new batch of visitors.



Seals strike a pose for the visitors.



It may look like a scene from “LOST,” but these RPPTL members knew exactly where they were!



Resident reptile hurries to catch up with visiting RPPTL members.



Section members hold tight for their trip to the islands.



Section Chair Sandy Diamond's husband, Frank and daughter, Sarah take in the view at the Hacienda near Quito.



The city of Quito.



Section members take a scenic hike in the hills.



"Dude! Are those Americans gone yet?"

(Thank you to the many members who contributed photos for this article!)

Ecuador, Middle of the World

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San Cristobal Island

That afternoon we landed at San Cristobal, a large and lush island with a harbor, hotels, and shops. The buses took us up into the mountains to the Galapaguera de Cerro Colorado, a San Cristobal land tortoise reserve and breeding center. This species of tortoise live up to 200 years. Most Galapagos tortoises were on the endangered species list when the breeding stations were established in the late 1960s. They were hunted for their meat and their habitat was stripped by domesticated animals, but now they are making a comeback. We saw some juvenile tortoises and some 100+ year old adults at the reserve. Afterwards, we went back to town for some ice cream and a little shopping before boarding the Zodiacs back to the ship.

Carrion Point, Santa Cruz Island, and Flight Back to Quito

Thursday morning was our last time to enjoy the islands. Most of us went deep-water snorkeling and some of us, like me, went sight-seeing on a Zodiac near the cliffs at Carrion Point where we saw sea lions and birds and looked at colorful fish swimming beneath in the crystal clear waters. After a light lunch on the ship and a group photo, the Zodiacs took us back to the harbor of Baltra Island a/k/a South Seymour where we boarded the plane back to Quito. Most of us had one more night in Quito to either enjoy the nightlife or take a cozy rest in our rooms. Next morning at the crack of dawn, the buses took us back to the airport for our plane ride back to Miami.

Goodbye Ecuador

This was a trip of a lifetime which was made even more enjoyable sharing the fun and educational experiences with our RPPTL Section family. Thank you, Sandy and Frank Diamond, for choosing such a fascinating country to visit for our out-of-state (this time, out-of-country!) trip. A special thanks goes to all the sponsors of the trip and to Klein Tours for coordinating the events for us. The memories and the thousands of digital photos will last lifetimes and be shared for generations.

Membership Diversity Committee Hosts Booth at Minority Mentoring Picnic

By Fabienne E. Fahnestock, Esq., Gunster, Yoakley & Stewart, P.A.; Fort Lauderdale, FL

On November 1, 2008, the Membership Diversity Committee for the Real Property Probate and Trust Law Section again participated in the Fifth Annual Minority Mentoring Picnic. The Picnic is organized by John Kozyak of Kozyak Tropin & Throckmorton, P.A. The Picnic welcomes all minority law students from Florida law schools and affords them an opportunity to speak with attorneys from various firms and different backgrounds on a number of mentoring issues.



Chief Justice Peggy Quince, third from left, and picnic participants.

The Committee's participation at the Picnic was a great success! It afforded Section members an opportunity to speak face to face with law students on the benefits of joining and actively participating in the Florida Bar sections early in their career. RPPTL members who came out to support the Committee included: Michael Dribin, Margaret Ann Rolando, Michael Schimmel and Adele Stone. Student Section members were also in attendance to help support the Committee's efforts, and were represented by: Erik Abrams, Katty Julca and Dani Lassiter.

Please contact Tae Kelly Bronner, Esq. or Fabienne Fahnestock, Esq. for more information about the Membership Diversity Committee.

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Following on the heels of a successful inaugural Construction Law Institute in 2008, RPPTL sponsored an equally successful Second Annual Construction Law Institute on March 5-7, 2009. 284 attendees, speakers, and exhibitors attended two programs conducted simultaneously as part of the Institute. First, the 2009 Construction Law Institute once again presented cutting edge, advanced and relevant presentations geared towards experienced construction practioners, while the Construction Law Certification Review Course was presented for attorneys preparing to take the certification exam or brushing up on their construction law expertise. Attendees at both courses came together throughout the weekend for a series of social events, including cocktail receptions, luncheons, networking receptions, and the annual Construction Law Institute Golf Tournament.

The Construction Law Institute and its companion certification review course were held at the Omni ChampionsGate Resort in Orlando, a beautiful facility with a championship golf course designed by Greg Norman. Throughout the weekend, attendees made and renewed acquaintances with their peers; interacted with industry sponsors, expert witnesses, and other groups that can facilitate and enhance legal practices, and became professionally enriched through the presentations delivered by thirty speakers on numerous and varied topics. As with last year's inaugural Construction Law Institute, the evaluations received from attendees were overwhelmingly positive and enthusiastic and the Construction Law Institute Committee has already begun planning next year's event. For those of you who attended this year, thank you for being part of the experience. For those of you who missed it, we hope to see you out there next year.

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Real Estate Case Summaries

Prepared by Meredith Freeman, Bush Ross, Tampa, FL

Acts of God, impossibility of performance, and frustration of purpose do not render the developer's obligation to complete construction within two years illusory. There is no private cause of action for seller's failure to disclose that property taxes may increase after purchase.

Mailloux v. Briella Townhomes, LLC, 4D08-430 34 Fla. L. Weekly D 269 (Fla. 4th DCA 2009).

Purchasers signed a contract to buy a condominium unit and later sought to terminate the contract, claiming the developer failed to comply with the Interstate Land Sales Full Disclosure Act ("ILSA") in that the contract did not unconditionally obligate the developer to complete construction within two years. The contract allowed delays due to acts of God, impossibility of performance and frustration of purpose. The Court held that acts of God, impossibility of performance and frustration of purpose are well recognized defenses to non-performance of a contract; and, therefore, did not render the developer's obligation to complete construction within two years illusory.

Florida Statutes §689.261(2006) provides that the seller or the purchase contract must disclose to the prospective purchaser that the property may be subject to higher property taxes after purchase. Although the developer admitted that it failed to provide the purchasers with the §689.261 disclosure, the statute fails to provide a private cause of action. The legislative history for §689.261 revealed that a purchaser's remedy was contemplated but ultimately not included in the statutory text. Accordingly, no private cause of action exists for non-compliance with §689.261.

When more than one property is used to secure a loan and the total value of all the properties more than satisfies the amount of the final judgment, the properties should not be sold at the foreclosure sale simultaneously.

Randall v. Bisbee-Baldwin Corporation, 995 So. 2d 1004 (Fla. 1st DCA 2008).

The issue was whether it was proper to sell four parcels of real estate at a foreclosure sale all at once. The First District Court of Appeal held that the trial court erred when it required that the sales occur all at once because the total value of the properties at issue more than satisfied the judgment. The Court ruled that selling the properties all at once could result in selling more property than necessary to satisfy the judgment. The Court reasoned that while the court has discretion in setting the terms of the foreclosure sale, foreclosure sales should be controlled by the court so that no injustice will be done to either party.

If the developer piggy backs two exemptions to the Interstate Land Sales Full Disclosure Act ("ILSA"), both exemptions must be in effect when the purchaser executes the contract.

200 East Partners, LLC v. Gold, 997 So. 2d 466 (Fla. 4th DCA 2009).

The developer sought and received approval to piggy back the improved lot exemption and the 100 lot exemption for a project that included 115 residential units. The developer conceded that at the time the purchasers signed their contract, the contract for the last 16 units failed to comply with the improved lot exemption, as it did not unconditionally obligate the developer to complete construction within two years. The developer was not exempt from ILSA because both the 100 lot exemption and the improved lot exemption had to be in effect and completely valid at the time the purchasers executed their contract.

In an action for partition, a cotenant was entitled to credit for all payments of his co-tenant's share of the property expenses from the proceeds of the sale.

McFall v. Trubey, 992 So. 2d 867 (Fla. 2d DCA 2008).

Between 1987 and 2002 one cotenant paid all the property taxes, condominium fees, utilities and insurance for real property owned by two tenants as tenants in common. The trial court incorrectly applied a four year statute of limitations under Florida Statutes §95.11(3)(k)(2003) reasoning that there was no written agreement setting forth who was responsible for the property expenses. The Court ruled that absent an agreement specifying otherwise, all owners contribute equally to the maintenance of the property when property is owned as tenants in common. The Court held that a cotenant paying all of the obligations of the property is entitled to a credit from the proceeds at the sale of the property.

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Probate Case Summaries

Prepared by: T. Raquel Rodriguez-Albizu,
Law Student, University of Miami School of Law, Miami, FL

ESTATES:

Absent consent or statutory authority, probate court may not apportion estate expenses among beneficiaries personally, because administration of an estate is an in rem proceeding. Court did not have authority to set aside terms of settlement agreement between beneficiaries, one of whom was personal representative and knew or should have known the existence and amount of estate expenses to be paid.

Brindle v. Brindle, 994 So. 2d 1174 (Fla. 3rd DCA 2008).

Circuit court judges from separate divisions issued conflicting orders regarding the payment of estate expenses and attorneys' fees relating to disputed devises and asset distribution under Dorothy Brindle's will. First, a civil division judge issued an order approving a written settlement agreement between Richard and Charles Brindle, the sons of the decedent, stipulating that each party shall bear his own attorneys' fees and costs associated with the will contest. Richard was a party and full participant in the settlement as the personal representative of his mother's estate. Almost two years later, upon discovering there remained insufficient assets to pay estate expenses, a probate division judge set aside the settlement agreement and ordered the sons, individually, to bear estate expenses equally. Charles appealed.

On appeal, the court reversed, stating, "absent consent or statutory authority, a probate court may not apportion the expenses of an estate among the beneficiaries of an estate personally." *See, e.g., Dayton v. Conger*, 448 So. 2d 609, 611-12 (Fla. 3d DCA 1984). Because the administration of an estate in probate is an in rem proceeding, the court generally has in personam jurisdiction only over the personal representative, not the beneficiaries. Furthermore, neither circuit court division possessed the authority to set aside the terms of the settlement agreement for any purpose. All the facts pertaining to the existence and amount of the expenses needed to be paid by the estate were known or knowable to Richard as personal representative when he began distribution of estate assets pursuant to the settlement agreement. Thus, the appellate court found his argument, that the agreement was no longer equitable, unpersuasive and reversed and remanded for further proceedings.

Testamentary trust beneficiary who successfully challenged extraordinary attorney's fees charged by trustee and his attorney is not entitled to attorney's fees from them without having requested them in a pleading.

Wintter & Associates, P.A. v. Kanowsky, 992 So. 2d 434 (Fla. 4th DCA 2008).

In the final accounting of his administration, the trustee of a testamentary trust included extraordinary attorney's fees and costs relating to work to clear title to real estate devised to him under the testator's will. The beneficiary objected to these fees and requested attorney's fees against the trustee and his attorney for the first time at the close of an evidentiary hearing. The trial court ordered the trustee and his attorney to repay the extraordinary fees to the estate and allowed the beneficiary to recover attorney's fees from the trustee and his attorney.

The law firm appealed the award against it on the ground that the fees were not pled as required by *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991), which held that "a claim for attorney's fees, whether based on statute or contract, must be pled. Failure to do so constitutes a waiver of the claim." The *Stockman* court based its decision on the need for appropriate notice and to prevent unfair surprise and reasoned that the existence or non-existence of a motion for attorney's fees may contribute to a party's decision whether to pursue a claim, dismiss it or settle. *Id.* at 837.

Pointing out that the beneficiary did not request attorney's fees until her written closing argument, the appellate court reversed the final judgment assessing fees against the law firm. Moreover, because the beneficiary requested the fees directly from the trustee and his attorney, rather than from the estate, the *Stockman* rationales of due process notice and prevention of surprise required her to reveal her intention to make such a claim. The exception to the *Stockman* rule does not apply because neither the law firm nor the trustee demonstrated acquiescence to the claim for fees. Had the beneficiary requested the fees from the estate, *Stockman* might not apply. *See In re Estate of Paris*, 699 So. 2d 301 (Fla. 2d DCA 1997).

Where husband and wife divorce and settle their affairs pursuant to a prenuptial agreement, the fully executed prenuptial agreement is discharged by performance and terminated. A provision for "separation and reconciliation" does not encompass "divorce and remarriage," and therefore the agreement has no legal or binding effect where the same husband and wife subsequently remarry.

continued, next page

Herpich v. Estate of Herpich, 994 So. 2d 1195 (Fla. 5th DCA 2008).

In February 2003, Svetlana Herpich married Howard Herpich. Prior to the marriage they entered into a prenuptial agreement waiving any right to property brought into the marriage by the other party or any property separately titled to the other party. The agreement also stated that "in the event of separation and reconciliation the parties understand that matters dealing with property division shall continue to be binding unless agreed to otherwise in writing." The couple separated one month later and divorced in 2005, executing a marital settlement agreement dividing all their marital assets. Six months later, the couple remarried.

Two years after re-marrying, Howard died intestate while still married to Svetlana. As personal representative of her husband's estate, Svetlana filed petitions to determine exempt property, to determine homestead status of real property and for family allowance. Howard's two adult children from a previous marriage objected to the petition for family allowance, arguing that the prenuptial agreement prevented Svetlana from receiving any part of Howard's estate. The trial court agreed, concluding that the prenuptial agreement remained valid because the terms "separation and reconciliation" encompass "divorce and remarriage."

On appeal, the court reversed, concluding that a prenuptial agreement generally does not survive divorce. Using a plain meaning analysis, the court determined that "separation and reconciliation" does not mean the same thing as "divorce and remarriage." Once the first marriage ended in divorce, the prenuptial agreement controlled the terms of the property distribution, which both parties fully performed in accordance with the agreement and judgment. Thus, the prenuptial agreement was discharged by performance and terminated.

Bequest of all decedent's household goods and automobiles to his son constituted a specific bequest, thus removing such property from statutorily exempt property which surviving spouse may claim.

Babcock v. Estate of Babcock, 995 So. 2d 1044 (Fla. 4th DCA 2008).

Bradford Babcock died leaving a will that devised all of his household goods and automobiles to his wife Tara, and then to his son Braxton should Tara predecease him. At the time of his death, Bradford was divorced from Tara and married to Tawn Babcock, from whom he was separated. Tawn was not mentioned in the will and thus constituted a pretermitted spouse. Because of the divorce, the provisions benefiting Tara are void under Fla. Stat. §732.507(2).

Tawn filed a motion to determine exempt property pursuant to Fla. Stat. §732.402(6), which provides that the surviving spouse has the right to a share of the "exempt property" of the estate, including certain household furniture, furnishings, appliances and automobiles. However under Fla. Stat. §732.402(5), property specifically devised by the decedent's will shall not be included in exempt property. The trial court determined that the household furnishings and automobiles had been specifically devised to Braxton and therefore could not be considered exempt property. Tawn appealed, claiming that the devise was general and not specific.

On appeal, the court concluded that the items devised to Braxton constituted specific bequests, as they could only be satisfied by the receipt of the particular property described. Citing *In re Estate of Udell*, 482 So. 2d 458, 460 (Fla. 4th DCA 1986), the court stated, "a specific legacy is a gift of a particular thing or of a specified part of the testator's estate so described as to be capable of distinguishment from all others of the same kind." On the other hand, "a general legacy or devise is one which does not direct the delivery of any particular property; is not limited to any particular asset; and may be satisfied out of the general assets belonging to the estate of testator and not otherwise disposed of in the will." Applying these definitions, the property devised to Braxton was properly removed from statutorily exempt property which Tawn could claim.

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8:00 a.m. – 8:50 a.m. **Late Registration**

8:50 a.m. – 9:00 a.m.
Introduction and Welcome
Steven H. Mezer, Tampa – Program Chair

9:00 a.m. – 10:00 a.m.
Case Law Update
Michael J. Gelfand, West Palm Beach

10:00 a.m. – 10:45 a.m.
Legislative Update Proposed and Pending Legislation – A Mid-Term Report
Joseph E. Adams, Ft. Myers

10:45 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 12:00 noon
Cable Television, Internet – State and Federal Considerations
David St. John, West Palm Beach

12:00 noon – 1:30 p.m. **Lunch (on your own)**

1:30 p.m. – 2:00 p.m.
Employment Law for Community Association Practitioners
Tishia Green, Tampa

2:00 p.m. – 3:00 p.m.
Face to Face – Various Topics – A Three Sided Round Table Discussion of Current Issues
William Sklar, West Palm Beach
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Michael J. Gelfand, West Palm Beach

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:00 p.m.
Association Loans: Authority, Procedures and Borrower Opinion Letters
Chad M. McClenathen, Sarasota

4:00 p.m. – 5:15 p.m.
The Florida Administrative Code – Decoded
Jay Steven Levine, Boca Raton

WEBCAST

Registrants will receive webcast connection instructions 2 days prior to the scheduled course date via e-mail. If you do not have an e-mail address, contact Order Entry Department at 850-561-5831, 2 days prior to the event for the instructions.

REAL PROPERTY, PROBATE AND TRUST LAW SECTION

Sandra Fascell Diamond, Seminole — Chair
John B. Neukamm, Tampa — Chair-elect
Jack A. Falk, Jr., Coral Gables — CLE Chair
Steven Mezer, Tampa — Program Chair

CLE CREDITS

CLER PROGRAM
(Max. Credit: 7.5 hours)

General: 7.5 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 7.5 hours)

Real Estate Law: 7.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

HOW TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form w/check	FAX: 850/561-5816 Form w/credit card info.

REFUND POLICY: Requests for refund or credit toward the purchase of the audio CD / DVD or course books for this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests.

HOTEL RESERVATIONS: A block of rooms has been reserved at the InterContinental Hotel, at the rate of $179 single/double occupancy. To make reservations, call the InterContinental Hotel directly at 1-813-286-4400. Reservations must be made by 04/01/09 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "Ins and Outs of Community Association Law" Seminar

ONE LOCATION: (047) INTERCONTINENTAL HOTEL, TAMPA, FL (APRIL 23, 2009)

TO REGISTER OR ORDER AUDIO CD / DVD OR COURSE BOOKS, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

LCS: Course No. 0724R

LOCATION (CHECK ONE):

- ❑ **Tampa** - April 23, 2009**
  (047) InterContinental Hotel
- ❑ **Live Webcast / Virtual Seminar* April 23, 2009**
  (317) Online

***Registrants who participate in the live webcast will receive an e-mail with a web-link and log-in credentials 2 days prior to the seminar to include access to the course materials.**

** Videotaping

❑ Check here if you require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Real Property, Probate and Trust Law Section: $215
- ❑ Non-section member: $240
- ❑ Full-time law college faculty or full-time law student: $120
- ❑ Persons attending under the policy of fee waivers: $0
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.) Fee waivers are only applicable for in-person attendees.

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.)
  ❑ MASTERCARD ❑ VISA ❑ DISCOVER ❑ AMEX CVV#_____*

Billing Zip Code: _____ Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____

Card No. _____

**** To aid in the prevention of fraudulent credit card use, we now require the 3 - 4 digit CVV (Credit Validation Verification) Code from the back of your Master Card, Discover or Visa credit card, or from the front of your American Express card.***

❑ Enclosed is my separate check in the amount of $50 to join the Real Property, Probate and Trust Law Section. Membership expires June 30, 2009.

COURSE BOOK – AUDIO CD – DVD – ONLINE – PUBLICATIONS

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 04/23/09. TO ORDER AUDIO CD / DVD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/ CD / DVD must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the

❑ **COURSE BOOK ONLY**
Cost $60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)
TOTAL $ _____

❑ **AUDIO CD**
(includes course book)
$215 plus tax (section member)
$240 plus tax (non-section member)
TOTAL $ _____

❑ **DVD**
(includes course book)
$295 plus tax (section member)
$320 plus tax (non-section member)
TOTAL $ _____

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

SPECIAL CLE SECTION

Issues Facing Today's Community Association Practitioner

• Live
• Live Webcast
• Audio CD
• Video DVD

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: April 24, 2009
InterContinental Hotel • 4860 West Kennedy Blvd. • Tampa, FL • 813- 286-4400

Course No. 0725R

Also attend "Ins and Outs of Community Association Law" Seminar on Thursday, April 23rd
Separate registration required – Course No. 0724R

This course will focus on the following topics: Insurance Developments for Condominium Association Practitioners, Ethics and Professionalism, etc., Four "C's" Every Association Practitioner Must Address, Conflict, Confidentiality, Counselor, and Communicating, Contract Writing and Enforcement of Contracts, Dealing with Difficult People – How Do You Deal With These People As Your Clients? Covenant Enforcement – Fat Dogs and Rowdy Tenants in Today's Administrative and Judicial Forums

8:00 a.m. – 8:35 a.m.
Late Registration

8:35 a.m. – 8:45 a.m.
Introduction and Welcome
Steven H. Mezer, Tampa – Program Chair

8:45 a.m. – 9:45 a.m.
Insurance Developments for Condominium Association Practitioners
Andrea Northrop, Jupiter
(Panel: Floyd Nichols and David Hendrick)

9:45 a.m. – 10:45 a.m.
Ethics and Professionalism, etc.
Mark B. Schorr, Fort Lauderdale

10:45 a.m. – 11:00 a.m.
Break

11:00 a.m. – 12:00 noon
Four "C's" Every Association Practitioner Must Address Conflict, Confidentiality, Counselor, and Communicating
Michael Bender, Fort Lauderdale
Deborah L. Ross, Stuart

12:00 noon – 1:30 p.m.
Lunch (included in registration fee)

1:30 p.m. – 2:30 p.m.
Contract Writing and Enforcement of Contracts
Eric Appleton, Tampa
Christopher J. Shields, Ft. Myers

2:30 p.m. – 3:00 p.m.
Dealing with Difficult People – How Do You Deal With These People As Your Clients?
David St. John, West Palm Beach

3:00 p.m. – 3:15 p.m.
Break

3:15 p.m. – 4:15 p.m.
Covenant Enforcement - Fat Dogs and Rowdy Tenants in Today's Administrative and Judicial Forums
John Sheppard, West Palm Beach

WEBCAST

Registrants will receive webcast connection instructions 2 days prior to the scheduled course date via e-mail. If you do not have an e-mail address, contact Order Entry Department at 850-561-5831, 2 days prior to the event for the instructions.

REAL PROPERTY, PROBATE AND TRUST LAW SECTION

Sandra Fascell Diamond, Seminole — Chair
John B. Neukamm, Tampa — Chair-elect
Jack A. Falk, Jr., Coral Gables — CLE Chair
Steven H. Mezer, Tampa — Program Chair

CLE CREDITS

CLER PROGRAM
(Max. Credit: 7.0 hours)

General: 7.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 7.0 hours)

Real Estate Law: 7.0 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

HOW TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form w/check	FAX: 850/561-5816 Form w/credit card info.

REFUND POLICY: Requests for refund or credit toward the purchase of the audio CD / DVD or course books for this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., April 17, 2009 that they will be unable to attend the seminar, will have an additional $25 retained. Persons attending under the policy of fee waivers will be required to pay $25.

HOTEL RESERVATIONS: A block of rooms has been reserved at the InterContinental Hotel, at the rate of $179 single/double occupancy. To make reservations, call the InterContinental Hotel directly at 813-286-4400. Reservations must be made by 04/01/09 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "Issues Facing Today's Community Association Practitioner" Seminar

ONE LOCATION: (047) INTERCONTINENTAL HOTEL, TAMPA, FL (APRIL 24, 2009)

TO REGISTER OR ORDER AUDIO CD / DVD OR COURSE BOOKS, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

LCS: Course No. 0725R

LOCATION (CHECK ONE):

- ❑ **Tampa** - April 24, 2009**
  (047) InterContinental Hotel
- ❑ **Live Webcast / Virtual Seminar* April 24, 2009**
  (317) Online

***Registrants who participate in the live webcast will receive an e-mail with a web-link and log-in credentials 2 days prior to the seminar to include access to the course materials.**

** Videotaping

❑ Check here if you require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Real Property, Probate and Trust Law Section: $230
- ❑ Non-section member: $255
- ❑ Full-time law college faculty or full-time law student: $130
- ❑ Persons attending under the policy of fee waivers: $25
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.) Fee waivers are only applicable for in-person attendees.

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.)
  ☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX CVV#_____*
  Billing Zip Code:_____ Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____

Card No. _____

**** To aid in the prevention of fraudulent credit card use, we now require the 3 - 4 digit CVV (Credit Validation Verification) Code from the back of your Master Card, Discover or Visa credit card, or from the front of your American Express card.***

COURSE BOOK – AUDIO CD – DVD – ONLINE – PUBLICATIONS

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 04/24/09. TO ORDER AUDIO CD / DVD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book / CD / DVD must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ COURSE BOOK ONLY
Cost $60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)
TOTAL $ _____

❑ AUDIO CD
(includes course book)
$230 plus tax (section member)
$255 plus tax (non-section member)
TOTAL $ _____

❑ DVD
(includes course book)
$310 plus tax (section member)
$335 plus tax (non-section member)
TOTAL $ _____

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

SPECIAL CLE SECTION

A Study in Fine Arts: Mixed Media of Real Estate, Probate and Taxes

• Live
• Live Webcast
• Audio CD
• Video DVD

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: Friday, May 22, 2009

Renaissance Vinoy Resort • 501 5th Ave. N.E. • St. Petersburg, FL 33701
1-888-303-4430

Course No. 0726R

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

8:30 a.m. – 8:35 a.m.
Introduction
Marilyn Polson, St. Petersburg – Program Chair

8:35 a.m. – 8:55 a.m.
Arrangement in Grey and Black: Documentary Stamp Taxes
Burt Bruton, Miami

8:55 a.m. – 9:15 a.m.
Mona Lisa and Taxing Authorities: Are They Looking At You Or Not?
Charlie Nash, Melbourne

9:15 a.m. – 9:35 a.m.
Straight from Picasso's Blue Period: Real Estate Taxes and Save Our Homes
Will Shepherd, Tampa

9:35 a.m. – 10:15 a.m.
A Guided Tour through the Louvre: Homestead and Trusts
Tae Kelley Bronner, Tampa

10:15 a.m. – 10:30 a.m.
Break

10:30 a.m. – 10:55 a.m.
Focus on Warhol's Campbell's Soup: Panel Discussion of Forced Life Estate in Homestead and How to Plan Around It
Shane Kelley, Tampa
(Panel: Jeff Baskies, Chip Waller, and Tim Flannagan)

10:55 a.m. – 11:10 a.m.
Did Van Gogh's Yellow House Have Title Insurance? Should Probate Estates?
W. Theodore Connor, Orlando

11:10 a.m. – 11:25 a.m.
Dali and Disclaimers of Real Estate: How to Understand the Surrealism
Rick Gans, Sarasota

11:25 a.m. – 12:10 p.m.
Pointillism, Probate, and Property: Question and Answer Session
Laird Lile, Naples
(Panel: W. Theodore Connor, Burt Bruton, and Rick Gans)

REAL PROPERTY, PROBATE & TRUST LAW SECTION

Sandra F. Diamond, Seminole — Chair
John B. Neukamm, Tampa — Chair-elect
Jack A. Falk, Coral Gables — CLE Coordinator
Marilyn Polson, St. Petersburg — Program Chair
Dresden Brunner, Naples — Program Chair

CLE COMMITTEE

Patrick L. Imhof, Tallahassee, Chair
Terry L. Hill, Director, Programs Division

WEBCAST

Registrants will receive dial-in/webcast connection instructions 2 days prior to the scheduled course date via e-mail. If you do not have an e-mail address, contact Order Entry Department at 850-561-5831, 2 days prior to the event for the instructions.

CLE CREDITS

CLER PROGRAM
(Max. Credit: 4.0 hours)

General: 4.0 hours
Ethics: 0.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 4.0 hours)

Real Estate: 4.0 hours
Tax Law: 3.0 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

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HOW TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form w/check	FAX: 850/561-5816 Form w/credit card info.

REFUND POLICY: Requests for refund or credit toward the purchase of the audio CD / DVD or course books of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests.

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Register me for the "A Study in Fine Arts: Mixed Media of Real Estate Probate and Taxes" Seminar

TO REGISTER OR ORDER AUDIO CD / DVD OR COURSE BOOKS, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. **ON-SITE REGISTRATION, ADD $25.00. On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

LCS: Course No. 0726R

LOCATIONS (CHECK ONE):

- ❑ **St. Petersburg*** - May 22, 2009**
  (031) Renaissance Vinoy Resort
- ❑ **Live Webcast / Virtual Seminar* - March 22, 2009**
  (317) Online

***Registrants who participate in the live webcast will receive an e-mail with a web-link and log-in credentials 2 days prior to the seminar to include access to the course materials.**

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Real Property, Probate and Trust Law Section: $185
- ❑ Non-section member: $210
- ❑ Full-time law college faculty or full-time law student: $105
- ❑ Persons attending under the policy of fee waivers: $0
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.) Fee waivers are only applicable for in-person attendees.

❑ Check here if you have a disability that may require special attention or services. Please attach a general description of your needs. We will contact you for further coordination.

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- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX CVV#_____ Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

**** To aid in the prevention of fraudulent credit card use, we now require the 3 - 4 digit CVV (Credit Validation Verification) Code from the back of your Master Card, Discover or Visa credit card, or from the front of your American Express card.***

COURSE BOOK – AUDIO CD – ON-LINE – PUBLICATIONS

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after 05/22/09. TO ORDER AUDIO CD / DVD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of CD or books. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book / CD / DVD must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **COURSE BOOK ONLY**	❑ **AUDIO CD** (includes course book)	❑ **DVD** (includes course book)
Cost $60 plus tax	$185 plus tax (section member)	$250 plus tax (section member)
(Certification/CLER credit is not awarded for the purchase of the course book only.)	$210 plus tax (non-section member)	$275 plus tax (non-section member)
TOTAL $ _____	**TOTAL $** _____	**TOTAL $** _____

Related Florida Bar Publications can be found at http://www.lexisnexis.com/flabar/

SPECIAL CLE SECTION

The Florida Bar CLE
Audio CD / DVD List & Order Form

TO ORDER

ONLINE www.floridabar.org/CLE Using the Audio/Video List, search 'By Course Number', 'By Sponsor' or 'By Title'.	**FAX** 850-561-5816 order form with credit card information for **MasterCard** or **Visa** *(We are unable to accept American Express at this time.)*	**MAIL** *completed form with check to*: The Florida Bar CLE Programs 651 East Jefferson Street Tallahassee, Florida 32399-2300

TURNAROUND TIME

- PLEASE ALLOW 4 WEEKS FOR DELIVERY.
- FLORIDA BAR COURSES ARE AVAILABLE FOR CREDIT ON-LINE 24/7 AT: www.floridabar.org/CLE
  Go to 'Online Courses'
- Attorneys with deadlines need to plan accordingly.

TO QUALIFY FOR THE SECTION MEMBER PRICE

- The attorney must be a member of the section sponsoring the course being purchased.
  Include the attorney's name and Florida bar number on the order form.
- Entities (government agencies, law firms, libraries, etc.) are **not** Section members and must pay the Non-Section member price. S = Section member, N = Non-Section member.

PLEASE INCLUDE SALES TAX WITH YOUR ORDER

- There is an automatic 6% sales tax in Florida + any surtax that your county may require.
  Example: Hillsborough = 7%, Lee Co. = 6%, Leon Co. = 7.5%, Miami-Dade = 7%, Orange Co. = 6.5%
- Out of state residents do not pay tax.

TO QUALIFY FOR TAX EXEMPT STATUS

- Include the tax exempt ID number on the order form or a copy of the tax exempt certificate.
- Include the entities complete name, street address, phone number, and indicate to whom the package should be shipped (Attn: John Doe).
- Pay the Non-Section member price.
- Do not use the attorney Florida Bar number – attorneys are not tax exempt.
- A tax exempt customer number has been or will be assigned to each entity. Please include this customer number when placing orders or for inquiries.

SHIPPING

- The Florida Bar uses UPS to ship. Please include a shipping address on this order form.
- If UPS is not a viable option, orders may be sent to a P.O. Box via U.S. Postal Service.
- Please indicate your preference on the order form.

CD's and Tapes come with a Course Book unless otherwise indicated on the AV Tapes List

Audio CD / DVD Order Form

Attorney's Name: _____ Florida Bar Number: _____

Firm Name:_____Phone Number: _____

Street Address: _____ Suite/Apt. #: _____

City: _____ State: _____ Zip Code: _____

CLER Deadline: _____ Certification Deadline: _____

OR:

Customer Number: _____ Tax Exempt ID#: _____

Entity Name: _____Attn: _____

Street Address: _____ Suite/Apt. #: _____

City: _____ State: _____ Zip Code: _____

Phone Number: _____ Purchase Order Number: _____

PLEASE ALLOW FOUR WEEKS FOR DELIVERY.
FLORIDA BAR COURSES ARE AVAILABLE FOR CREDIT ON-LINE 24/7 AT:

www.floridabar.org/CLE ➔ Go to 'Online Courses'

Course Title	Course #	Format CD = Audio CD V = Videotape (VHS) DVD = Video on DVD	Cost *(Include 6% sales tax + your County surtax)
1.			$
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
	Subtotal ➔		$
	***Sales Tax (FL Resident)** Include sales tax unless ordering party is tax-exempt		$
	TOTAL ➔		$

PAYMENT TYPE:

☐ **Check #** _____ **Check Amount $**_____

☐ **MasterCard** ☐ **Visa** ➔ **Fax #: 850-561-5816**

Signature: _____

Name of Cardholder: _____ Billing Zip Code: _____

Card #: _____CVV#_____* Expiration Date: ____–20____
Month Year

**** To aid in the prevention of fraudulent credit card use, we now require the 3 - 4 digit CVV (Credit Validation Verification) Code from the back of your Master Card, Discover or Visa credit card, or from the front of your American Express card.***

The Florida Bar CLE Audio/Video List

www.floridabar.org

850-561-5629

KEY TO ABBREVIATIONS - CERTIFICATION CREDIT HOURS

AD = Admiralty and Maritime
AG = State & Federal Government & Admin. Practice
AP = Appellate Practice
AT = Antitrust & Trust Regulation
AV = Aviation
BL = Business Litigation
CA = Criminal Appeal
CC = City, County, Local Government
CL = Construction Law
CR = Criminal Trial
CT = Civil Trial
ED = Elder Law
EP = Wills, Trusts, & Estates
FL = Marital & Family Law
HL = Health Law
IL = International Law
IP = Intellectual Property
IM = Immigration & Nationality
LE = Labor & Employment
RE = Real Estate
TX = Tax
WC = Workers' Compensation

PLEASE ALLOW FOUR WEEKS FOR DELIVERY.

Course No.	COURSE TITLE FORMAT AVAILABLE CD = AUDIO CD V = VIDEOTAPE (VHS) DVD = VIDEO ON DVD	CREDITS HOURS General	E = Ethics P = Professionalism S = Substance Abuse MIA = Mental Illness Awareness	Certification	Approval Period	COSTS S = Section Member N = Non-Section Member CD	Video or DVD
REAL PROPERTY, PROBATE & TRUST LAW SECTION							
0634	Creative Estate Planning Ideas You Should Be Thinking About When No One is Paying You to Think About Them **CD & V**	**6.0**	**0**	ED = 4.5 EP = 4.5 TX = 4.5	11/08/2007- 05/08/2009	**S = $175.00** **N = $200.00**	**S = $250.00** **N = $275.00**
0577	Environmental & Land Use Considerations for a Real Estate Transaction **CD & DVD**	**8.5**	**0**	AG = 6.5 CC = 8.5 RE = 6.5	01/25/2008- 07/25/2009	**S = $155.00** **N = $180.00**	**S = $250.00** **N = $275.00**
0581	Trust & Estate Symposium: Litigating Under Florida's New Trust Code **CD & DVD**	**6.0**	**1.0 E**	ED = 4.5 EP = 4.5 TX = 4.5	02/07/2008- 08/07/2009	**S = $145.00** **N = $170.00**	**S = $250.00** **N = $275.00**
0590	2008 Construction Law Certification Review Course **CD Only**	**20.0**	**1.0 E**	BL = 15.0 CC = 15.0 CL = 20.0 RE = 20.0	03/07/2008- 09/07/2009	**S = $350.00** **N = $375.00**	Not Available
0595	Ins and Outs of Florida Condominium Law – 2008 Edition **CD Only**	**7.0**	**0**	RE = 7.0	04/10/2008- 10/10/2009	**S = $160.00** **N = $185.00**	Not Available
0663	Current Issues in Community Association Law for Developers: What You Don't Know May Hurt You! **CD Only**	**7.0**	**0**	RE = 7.0	04/11/2008- 10/11/2009	**S = $190.00** **N = $215.00**	Not Available

Course No.	COURSE TITLE FORMAT AVAILABLE CD = AUDIO CD V = VIDEOTAPE (VHS) DVD = VIDEO ON DVD	CREDITS HOURS General	E = Ethics P = Professionalism S = Substance Abuse MIA = Mental Illness Awareness	Certification	Approval Period	COSTS S = Section Member N = Non-Section Member CD	Video or DVD
0605	Wills, Trusts & Estates Certification Review & Advanced Practice Update **CD Only**	**17.0**	**1.5 E**	ED = 13.0 EP = 13.0 RE = 3.5 TX = 7.0	04/18/2008- 10/18/2009	**S = $315.00** **N = $340.00**	Not Available
0606	Real Estate Certification Review Course **CD Only**	**15.5**	**1.0 E**	CC = 15.5 CL = 15.5 RE = 15.5	04/18/2008- 10/18/2009	**S = $340.00** **N = $365.00**	Not Available
0633	Planning for the Nontraditional Family in the 21st Century **CD Only**	**4.0**	**0.5 E**	ED = 3.0 EP = 3.0 FL = 3.0 RE = 3.0	05/23/2008- 11/23/2009	**S = $120.00** **N = $145.00**	Not Available
0668	28th Annual RPPTL Legislative & Case Law Update Seminar **CD & DVD**	**7.5**	**1.0 E**	CL = 7.5 EP = 5.5 RE = 7.5 TX = 5.5	07/25/2008- 01/25/2010	**$235.00**	**$235.00**
0715	Real Estate: Ethical Fraud & Other Fairy Tales **CD & DVD**	**6.5**	**5.0 E**	BL = 5.0 CR = 1.0 RE = 6.5	10/16/2008- 04/16/2010	**S = $225.00** **N = $250.00**	**S = $250.00** **N = $275.00**
0762	What Every Estate Planner Needs to Know About the Generation-Skipping Transfer Tax **CD & DVD**	**5.0**	**0**	ED = 4.0 EP = 4.0 TX = 4.0	10/24/2008- 04/24/2010	**S = $160.00** **N = $185.00**	**S = $250.00** **N = $275.00**
0714	Asset Protection in Florida **CD & DVD**	**6.0**	**0.5 E**	ED = 4.5 EP = 4.5 RE = 1.0 TX = 4.5	11/12/2008- 05/12/2010	**S = $225.00** **N = $250.00**	**S = $250.00** **N = $275.00**
0716	ABC's and XYZ's of Guardianship **CD & DVD**	**6.5**	**1.0 E**	ED = 5.0 EP = 5.0 FL = 5.0	11/06/2008- 05/06/2010	**S = $195.00** **N = $220.00**	**S = $250.00** **N = $275.00**
0799	Advising the Trustee **CD & DVD**	**3.5**	**0**	EP = 2.5	12/05/2008- 06/05/2010	**S = $115.00** **N = $140.00**	**S = $250.00** **N = $275.00**
0717	Hard Times: Foreclosures, Bankruptcy Offers of Judgment, MERS & Such **CD & DVD**	**5.0**	**1.0 E**	RE = 5.0	01/23/2009- 07/23/2010	**S = $145.00** **N = $170.00**	**S = $250.00** **N = $275.00**

The maximum amount of credit hours for each course is indicated under the Credits/General column. To be in compliance, you must have completed the Total Minimum Requirement of **thirty (30) General hours**, including **five (5) hours of Ethics, Professionalism, Substance Abuse or Mental Illness Awareness (any combination) during each CLER cycle.**

Hours can be reported/viewed on The Florida Bar web site: www.floridabar.org

Every member's Florida Bar News label reflects a CLER reporting date. To avoid suspension, return your completed CLER affidavit prior to that date (Rules Regulating The Florida Bar 6-10.5).

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, 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 list serves that discuss issues and current hot topics, available to committee members.

2009 SCHEDULE

INS AND OUTS OF COMMUNITY ASSOCIATION LAW
April 23, 2009
InterContinental Hotel, Tampa
Hotel Reservations: (813) 286-4400
Course Registration: (850) 561-5831

ISSUES FACING TODAY'S COMMUNITY ASSOCIATION PRACTITIONER
April 24, 2009
InterContinental Hotel, Tampa
Hotel Reservations: (813) 286-4400
Course Registration: (850) 561-5831

EXECUTIVE COUNCIL MEETING
May 21-24, 2009
Renaissance Vinoy Resort, St. Petersburg
Hotel Reservations: 727-894-1000
Room Rate $180.00
Cut-off Date: April 23, 2009

ATTORNEY/TRUST OFFICER LIAISON CONFERENCE
June 18 - 21, 2009
The Breakers, Palm Beach

EXECUTIVE COUNCIL MEETING AND LEGISLATIVE UPDATE SEMINAR
July 30, 2009 – August 2, 2009
The Breakers, Palm Beach
Hotel Reservations: 561-655-6611

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).

Real Property Probate & Trust Law Section 2007-2008 Year-End Financial Statement
YTD Actuals

Revenue		
31435	Admin Fee Adj	4,963
31431	Section Dues	469,368
31432	Affiliate Dues	1,800
31433	Admin Fee to TFB	(165,082)
Total Dues Income-Net		311,049
32191	CLE Courses	222,438
32293	Section Differential	28,078
34702	Actionline Subscript	0
34704	Actionline Advertise	17,929
35008	Spouse Program	1,860
35101	Exhibit Fees	4,250
35201	Sponsorships	162,500
36991	Allowances	(28)
38499	Investment Allocation	28,214
39202	Reimb Council Recreation	0
39998	Meeting Deposits	192,695
Other Income		**657,936**
Total Revenues		**968,985**
Expenses		
36998	Credit Card Fees	4,173
51101	Employee Travel	9,857
71002	Telephone Distribution	1,099
81411	Promotional Printing	910
84001	Postage	2,529
84002	Printing	914
84006	Newsletter	26,518
84009	Supplies	549
84010	Photocopying	447
84015	Officers Conference	1,375
84052	Meeting Travel Expense	1,620
84054	CLE Speaker Expense	1,007
84061	Reception	8,465
84062	Luncheons	14,715
84101	Committee Expenses	49,834
84106	Realtor Relations	2,150
84107	Diversity Initiative	1,974
84109	Spouse Program	325
84115	Entertainment	3,075
84201	Board or Council Meeting	393,656
84216	Strategic Planning Meeting	1,027
84238	Council Mtg Recreation	25,138
84239	Hospitality Suite	7,086
84241	Spouse Functions	8,830
84253	Sleeping Rooms	866
84270	Misc Seminars	12,577
84279	Council Members Hand	2,270
84301	Awards	2,892
84422	Website	53,802
84501	Legislative Consultant	100,000
84503	Legislative Travel	11,519
84524	Memorial Tributes	268
84701	Council of Sections	300
84999	Miscellaneous	314
88230	Speakers Expense	152
88262	Meeting Meals	8,510
88265	Refreshment Breaks	30
88269	Breakfast	895
Total Operating Expenses		**761,668**
86431	Meetings Administration	4,637
86543	Graphics & Art	7,814
Total TFB Support Services		**12,451**
Total Expenses		**774,119**
Net Operations		**194,866**
21001	Fund Balance	917,093
Total Current Fund Balance		**1,111,959**

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CLE RESOURCES FOR SECTION MEMBERS

RPPTL Members now have an exceptionally easy and convenient way to download a wide array of interesting and informative CLE Seminars produced by the RPPTL Section. Many RPPTL Section CLE Seminars are available for audio-download, video-download, CLEToGo or Podcast download 24 hours a day/7 days a week through The Florida Bar **LegalSpan link.** For a list of the currently available RPPTL Section CLE seminars available in these easy-to-use formats, please access the following links:

Real Estate / Real Property Courses:
http://tinyurl.com/RPPTLElectronicCLE

Probate & Trust Courses:
http://tinyurl.com/RPPTLElectronicProbateDivCLE

Other RPPTL Section CLE audio-CD, video DVD, course books and live registrations can be accessed at:
https://www.floridabar.org/FBWEB/CLEReg.nsf/By%20Sponsor?OpenView&Start=26&Expand=26#26

Download and print an **order form to order RPPTL Section audio-CDs, video-DVDs and course books** by accessing:
http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/D30FA7214A26649C8525755F004D3A2A/$FILE/RPPTL%20CLE%20Audio-CD%20and%20Video-DVD%20Order%20Form.pdf?OpenElement

The "Protecting Consumers from Housing Havoc" (foreclosure / mortgage fraud) audio-CD program is also available for purchase. For the outline and order form:
https://www.floridabar.org/FBWEB/CLEReg.nsf/89194632da1e6ec285256ce7006b56ea/36ee4df3d69cde86852574a30075ed62/$FILE/0803-CnsumerProtectLawCmt-08.pdf

DEADLINE
for submissions for the next issue of ActionLine is
APRIL 30, 2009.

Florida Bar CLE - Building a Better Practice.
CLE for the Bar, by the Bar