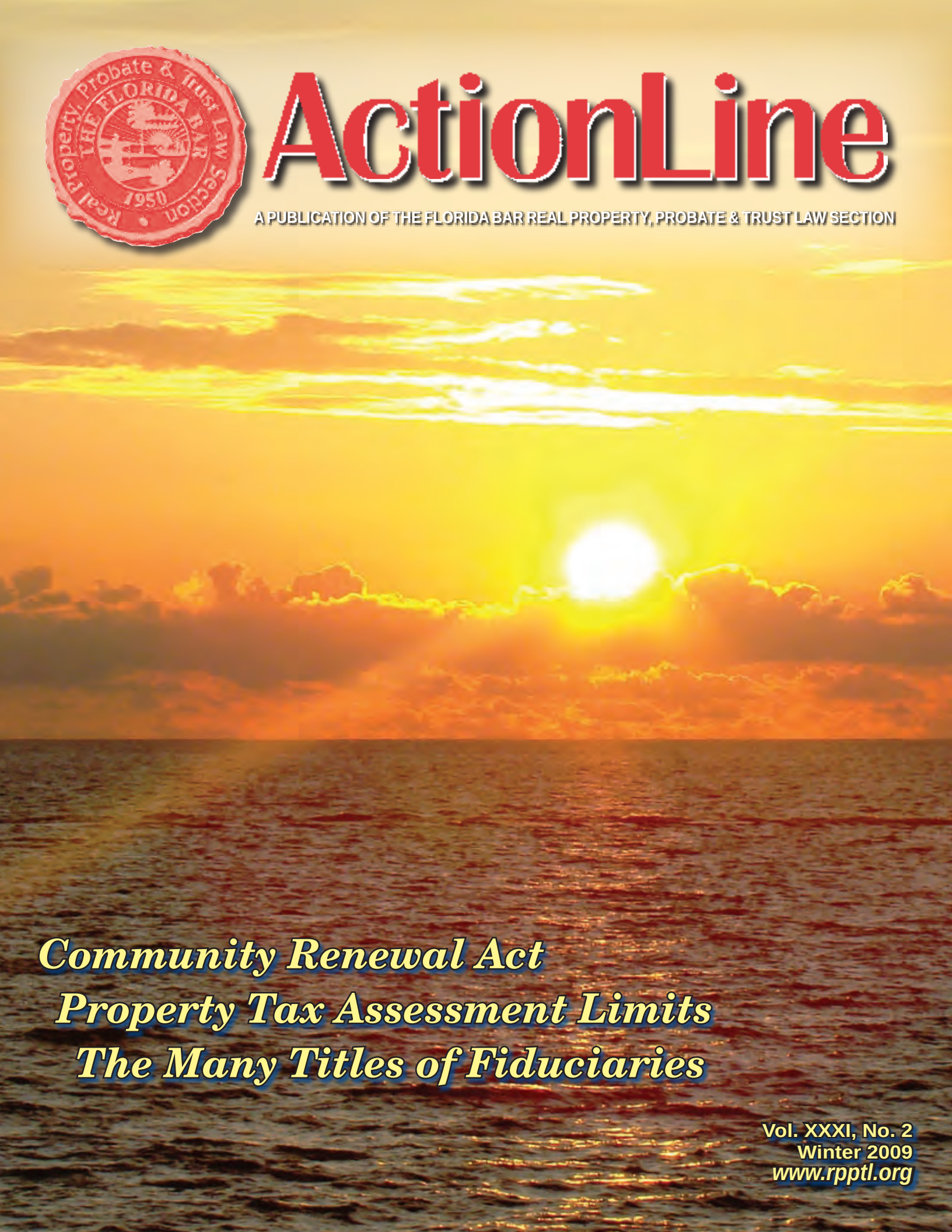

ActionLine

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

Community Renewal Act
Property Tax Assessment Limits
The Many Titles of Fiduciaries

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RPPTL Section Plans for New Term



By John B. Neukamm

Section Chair 2009 - 2010

Chair's Column

During these challenging times, many persons and businesses, including lawyers and law firms, are "tightening their belts" in an effort to reduce costs. Thus, it has become increasingly necessary to justify the expenditure of funds for "discretionary items." While it is mandatory that Florida Bar members pay dues to The Florida Bar in order to practice law, Section membership is optional, so it is appropriate to consider whether the benefits to be derived from Section membership justify the expenditure of those dues. There is no doubt in my mind that my RPPTL Section dues constitute one of my very best investments, and I am confident that, if you carefully consider this matter, you will wholeheartedly agree!

Our Section's dues have remained at a mere $50/year for over five years. As a dues-paying Section member, you are able to participate in committees addressing 34 different substantive areas of practice. Through Section committee meetings and ListServes, you are not only able to keep abreast of current legal developments; you'll actually be aware of upcoming changes in the law (or have to ability to affect such changes) through the Section's legislative review process (and, with increasing frequency, through amicus briefs filed with appellate courts). I have heard, time and again, from many Section members that participation in Section committees constitutes the very best continuing legal education they have ever received. In our competitive environment, our clients expect us to be the very best lawyers we can be, and active committee participation within our areas of practice is one of the best tools we can utilize in achieving that outcome.

Another benefit of committee participation is the access such participation provides to the "best and the brightest" lawyers in your practice area. The ability to post a query on a committee ListServe or to call one of the recognized experts in a particular substantive area is an invaluable resource. Of course, the referral opportunities arising from networking with other attorneys, as well as affiliated business and other groups with whom the Section has liaisons, cannot be overlooked. Thus, if you are a dues-paying Section member, I encourage you to take advantage of the most valuable aspect of Section membership and become active in one or more committees within your areas of practice.

As Section Chair, I frequently receive emails or telephone calls from Section members seeking information about becoming involved in the Section. It is really quite easy; in order to get involved with the RPPTL Section, you should first review the list of Section committees on the Section's website to determine which Section committees are of interest to you. You can review that list on the Section's website at *http://www.rpptl.org/Private/DrawCommittees.aspx*. You must first log onto the website at www.rpptl.org (and, if you don't already have a password, you will promptly receive one via email upon request). Once you determine which committees appeal to your interests and/or practice areas, you should contact the committee chair to become a member of that/those committees. If you wish to be considered for a future leadership position (or if you simply wish to obtain professional fulfillment), you should volunteer for committee projects as such opportunities arise.

In addition to committee involvement, RPPTL Section dues entitle you to attend many Section CLE programs at a reduced rate. Our Section's CLE seminars regularly receive the highest ratings, and the speakers are the experts in their areas of practice. In addition to "live" programs, RPPTL Section seminars were among the first to be broadcast as "webinars" to allow attendees to maximize the use of their limited time. If you wish, you may register for upcoming Section seminars at *http://www.rpptl.org/private/DrawCLE.aspx* .

Your RPPTL Section dues also allow the Section to seriously and effectively pursue its legislative advocacy program through the efforts of our substantive law committees, our Legislative Review Committee and our legislative consultants. As I noted in a prior column, our Section's legislative advocacy efforts have been extraordinarily successful over the past several years. In addition to the passage of nearly all of our Section's legislative initiatives, all bills opposed by the Section failed to pass last year. Our Section's expertise has been recognized by the Legislature and the courts, which continually seek guidance from our Section with respect to our areas of practice. Over the last year, representatives of our Section have ably served on legislative and judicially established committees addressing title insurance, mortgage foreclosure and electronic court filing issues, all of which will have a critical impact upon your practices.

One of the most tangible benefits of RPPTL Section membership is in your hands right now -- our impressive *ActionLine* publication that you receive each calendar quarter. This magazine provides up to date information and analyses of current legal issues and practices and is circulated to all Section members by both regular mail and e-mail. As a Section member, you are also able to access

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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:

The sun sets over the Gulf after another successful Executive Council Meeting in Naples.

Photo courtesy of John Neukamm.

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

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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.

Senate Bill 360 (The Community Renewal Act): *Creating Major Changes and Major Questions*

By Anne Q. Pollack, Esq.
Mechanik, Nuccio, Hearne & Wester P.A.

Submitted on behalf of the Development & Governmental Regulation of Real Estate Committee

In 2009, the Florida legislature passed Senate Bill 360 (Ch. 2009-96), a significant modification to Florida's growth management laws. Senate Bill 360 ("SB 360") was intended to rectify the defects in concurrency by attempting to focus development within infill areas. The law appears to have been quickly drafted and interpretations of some provisions have already been requested in an effort to determine the legal effect of those provisions. Complicating the matter further, a group of local governments led by the City of Weston has filed suit challenging SB 360 based on Florida constitutional and other grounds. With the possibility that SB 360 could be overturned, many local governments have been hesitant to spend time and money implementing it. This article highlights important growth management provisions in SB 360 and issues created by the new law which have yet to be resolved.

At the heart of the changes enacted by SB 360 is the establishment of a new term: "dense urban land area." SB 360 defines a dense urban land area as:

- A municipality with an average of at least 1,000 people per square mile and a minimum total population of 5,000 people;
- A county, including its municipalities, with an average of 1,000 people per square mile; or
- A county, including its municipalities, with a population of at least 1 million.

The Florida Legislature's Office of Economic and Demographic Research has issued the official list of jurisdictions that meet the total population and density criteria necessary for designation as a dense urban land area *http://www.dca.state.fl.us/fdcp/dcp/Legislation/2009/CountiesMunicipalities.cfm*. Eight counties and more than 230 municipalities are included within the definition. A link to this list can be also found on the RPPTL Section's Development & Governmental Regulation of Real Estate Committee's (the "Committee") website at *http://www.rpptl.org/Private/DrawCommittees.aspx*.

Using this new term (dense urban land area, which is now referred to as a "DULA"), SB 360 provides significant exemptions from concurrency requirements and from development of regional impact ("DRI") review for projects falling within a DULA.

Transportation Concurrency

SB 360 establishes transportation concurrency exception areas ("TCEA") for: municipalities designated as DULAs; urban service areas ("USA"), as defined in SB 360, which have been adopted into the local government's comprehensive plan and are located within a county designated as a DULA; and counties, including their municipalities, with a population of at least 900,000 and which qualify as DULAs, but which do not have an USA designation in the local comprehensive plan. SB 360 also provides additional areas in which local governments that are not designated as DULAs, are given the *option* of establishing TCEAs. Portions of Broward and Miami-Dade Counties, where particular concurrency districts and exemptions have already been enacted, are exempted from the new TCEA provisions.

The effect of being designated as a TCEA pursuant to SB 360 continues to be debated months after the new law went into effect. The greatest disputes related to whether the elimination of concurrency requirements in areas designated as TCEAs applies to all jurisdictions, state and local. Many, including State Senator Mike Bennett, the sponsor of SB 360, argue that the law automatically eliminated all concurrency requirements, state *and local*. As a result, if a local government wants to continue to regulate development using concurrency, it must proactively reapprove those requirements in its comprehensive plan and land development regulations. The Department of Community Affairs ("DCA") is taking a significantly different position. Secretary Tom Pelham has stated that the Department interprets SB 360 to have merely removed *state* regulation of concurrency within TCEAs. Thus, in order for a local government to remove its concurrency requirements approved pursuant to its home rule powers, it would have to proactively amend its comprehensive plan and land development regulations to eliminate the existing regulations. There is discussion as to whether the Florida Legislature will clarify this issue in its next session. In the meantime, assuming the DCA's position, the long term effect of these exemptions on individual projects may only be known once the particular local government decides if it will continue to regulate development based on concurrency, even though continuing in such a manner is no longer mandated by statute.

SB 360 also requires local governments, within two years from the designation of a TCEA, to adopt land use

continued, next page

and transportation strategies into their comprehensive plans which will support and fund mobility within the areas designated as TCEAs. Currently, the DCA and the Department of Transportation are studying the mobility issue and have been directed by the Legislature to establish a methodology for implementing a mobility fee to replace transportation concurrency and to provide recommended legislation. At this time, however, local governments do not know whether the state will propose a model mobility fee ordinance and whether the Legislature will require use of such a model or will allow local governments to propose their own process. As such, any impacts a mobility fee may have on developers and property owners will not likely be known until at least the next legislative session.

Developments of Regional Impact

In addition to concurrency exemptions, SB 360 contains exemptions from DRI review. Automatic exemptions are provided for: 1) any proposed development in a municipality designated as a DULA; 2) any proposed development within a county qualifying as a DULA that is located within an USA as defined in SB 360 and has been adopted into the comprehensive plan; and 3) any proposed development within a county, including its municipalities, which has a population of at least 900,000 and which qualifies as a DULA, but does not have an USA designated in the comprehensive plan. As with the TCEA exemptions, SB 360 provides an option for local governments which are not DULAs to exempt other areas from DRI review through a designation in the local government's comprehensive plan. SB 360 also provides additional concurrency and DRI exemptions for projects which have entered into a funding agreement with the Office of Tourism, Trade and Economic Development.

Despite these exemptions, a local government must still submit a development order to the DCA if the project exceeds 120% of the DRI threshold of Section 380.06, F.S., and the Department may appeal the approval of such a development order if the project is found to be inconsistent with the comprehensive plan. Additionally, the DRI exemption does not apply within areas of critical state concern, the Wekiva Study Area, and within two miles of the Everglades Protection Area.

In providing these new exemptions, SB 360 provides answers to several "What if?" questions that may be raised in looking at the status of a particular project or DRI. *What if* a development is located partially outside of an exempted area? Then it must undergo DRI review. *What if* a previously approved DRI is within an exempted area? Then it remains in effect and may be completed pursuant to the DRI, but the developer has the option to request the local government to rescind the development order pursuant to Section 380.115(1), F.S. *What if* a developer has a pending but not approved DRI? Then the developer may remove the project from the DRI process pursuant to Section 380.115(2), F.S. If the developer has a pending application for a comprehensive plan amendment, the amendment is exempt from the twice per year limitation on plan amendments for the year following the effective date of the exemption. *What if* a local government no longer qualifies as a DULA? Then any development located within that area which has a complete, pending application may maintain the exemption if the developer is continuing the application process in good faith or the development is approved.

Permit and Development Order Extensions

SB 360 also provides for a 2 year extension of most permits and development orders which have an expiration date between September 1, 2008 and January 1, 2012. In order to use this extension, notification had to be provided to the permitting agency by December 31, 2009.

Unfortunately, the language of this provision is convoluted, and its applicability to particular permits has become subject to interpretation by individual local governments as well as the "DCA" and the Department of Environmental Protection ("DEP"). As a result, even though the extension provided in SB 360 was not intended to be discretionary, whether or not an extension is issued is dependent on the jurisdiction or agency who issued it. For instance, many local governments are issuing extensions on a wide variety of permits. Other local governments have taken the position that a building permit or development order may only be extended if it is related to a permit issued by a water management district or DEP. Still others are not issuing any extensions at this time, fearing that SB 360 will be overturned by the courts. DCA has taken the position that the extension applies to DRI build out dates regardless of whether there is a DEP or water management district permit. Both DCA and DEP have issued statements regarding SB 360. Links to these statements can be found at the Committee's website.

Conclusion

While there are many additional provisions within SB 360 which cannot be addressed in this brief article, including new provisions relating to comprehensive plan amendments, impact fees, and affordable housing, the few changes described above will clearly have a significant impact on development in Florida. Unfortunately, with so many of SB 360's provisions being disputed, as well as the possibility that the bill could be found unconstitutional or otherwise defective, developers and land owners are left with little certainty in the near future. Ideally, the provisions of SB 360 will be modified, or at least clarified, in the 2010 legislative session. In the meantime, property owners should have notified the applicable permitting agencies of the extension of any permits which expire between September 1, 2008 and January 1, 2012.

Ideas in Action:

When Good Policies Go Bad: Unintended Economic Consequences of Assessment Caps

By Todd D. Jones, Senior Manager, ONESOURCE Property Tax at Thomson Reuters

The 1992 Save Our Homes amendment to the Florida constitution was intended to prevent local governments from taxing people out of their homes by limiting annual assessment increases to three-percent or the percentage change in the CPI, whichever is lower, and is a noble public policy that has accomplished its goal. In hindsight, however, most Floridians today acknowledge that the Save Our Homes amendment has resulted in sometimes dramatically disproportionate tax burdens among home owners, which is clearly an unintended consequence of what has come to be regarded as a flawed policy.

In 2008, the voters expanded the policy to include non-homestead properties because business interests convinced the Tax and Budget Reform Commission that they carried a disproportionate share of the overall property tax burden; Constitutional Amendment 1 set an annual ten-percent assessment increase limit for non-homestead property. If approved by voters in November 2010, Amendment 3 will reduce that ten-percent limitation to five-percent, potentially crippling Florida's economic future in much the same way that Proposition 13 has contributed to the near bankrupting of the State of California.

In 2008, the Lincoln Institute of Land Policy released a report entitled *Property Tax Assessment Limits: Lessons from Thirty Years of Experience.* Authors Haveman and Sexton provide numerous examples of legislative actions and the resulting outcomes of property tax reform efforts nationwide. Their research demonstrates that setting limits on assessed values is a deeply flawed approach to offsetting rising property taxes. While assessment caps are proffered as a straightforward strategy for reducing tax bills and slowing the shift in tax burdens to residential property, they often result in higher taxes for the homeowners they are intended to assist, and they can cause unpredictable and unanticipated shifts in tax liabilities. As we already know from Florida's experience with Save Our Homes, by severing the connection between property values and property taxes, assessment limits impose disproportionate tax obligations on the owners of otherwise identical properties, reduce economic growth by distorting taxpayer decision making, and greatly reduce the transparency and accountability of the property tax system as a whole, which contributes to the public's continued ire.

Based on their research, Haveman and Sexton propose alternatives to assessment caps, most of which Florida already enjoys:

- Florida's TRIM notice is a truth-in-taxation measure which lowers the likelihood of unseen tax increases when property values rise but nominal tax rates stay the same.
- Florida law provides for partial exemptions on owner-occupied or homestead properties and classified tax rates benefit residential taxpayers without distorting the market value tax base.
- Florida law has some deferral options that allow taxpayers to delay property tax payments and remain in their homes.
- What Florida **needs** is a robust circuit breaker program to reduce taxes that rise above a certain level of affordability, thus targeting assistance to those whose tax liabilities are out of proportion to their ability to pay.

In 2006, Standard & Poor's published two Public Finance reports on the potential credit rating implications for state and local government stemming from a similar property tax reform proposal in Texas. Some of the concerns expressed in the reports include: "Appraisal caps have the potential to negatively affect credit quality by impacting an issuer's ability to support their debt…"

We believe that tax caps will have an impact on the ability of state and local governments to finance capital programs and infrastructure needs and meet their day-to-day operations. Regarding capital improvement plans, municipalities could become more reactive rather than proactive in planning infrastructure and facility needs based on funding availability.

One of the main strengths of having a higher property appraisal cap is that there is a direct correlation between economic growth and a government's ability to benefit from that growth through taxation. Tax abatement is one of the main incentives that municipalities can offer companies in the region. If appraisal caps are put in place, municipalities won't be able to offer special incentives to keep existing businesses or attract new businesses to the region, as they will be constrained by their revenue sources.

Local governments have a limited ability to cut operating expenditures since they must provide basic services and infrastructure. If local governments want to meet their infrastructure and basic operational needs, their ability to reap the benefits of economic growth through taxation is

continued, next page

When Good Policies Go Bad

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perhaps the most important tool in their arsenal.

"Over the long term, limiting this ability could result in budgetary pressures and the accumulation of unmet infrastructure needs," said [S&P credit analyst] Ms. Smaardyk. "Unless alternative revenue sources are put in place to counter the effect of property appraisal caps, the potential for a significant budgetary mismatch remains."

Again, it is our belief that the implementation of a cap on the growth of property appraisals without a more comprehensive tax reform that addresses all sides of the budget equation could lead to fiscal stress and budgetary pressures that might potentially harm credit quality.

"As with other fiscal challenges, the effect on credit quality will be evaluated on a case-by-case basis," added Ms. Smaardyk. "The big question is whether or not local governments will be able to rise to the occasion and successfully address the budgetary challenges facing them."

In a 1998 paper entitled *The Continuing Redistribution of Fiscal Stress: The Long Run Consequences of Proposition 13*, prepared for the Lincoln Institute of Land Policy, professor Jeffrey Chapman of Arizona State University also demonstrates that local governments' fiscal autonomy is critical to ensure a vital local economy and that assessment limitations undermine that autonomy.

From a practical standpoint, all one needs to do is study California's economy to see Florida's potential future if assessment caps are maintained. The enactment of Proposition 13 in 1978 has forced California's state and local governments to enact and rely on some of the nation's highest sales and personal income tax rates to fund government operations. Sales and income taxes actually exacerbate the situation because they fluctuate in synch with the economic climate; in boom times, they generate large revenue surpluses, and in recessionary periods they dry up and huge deficits are experienced.

In Florida, what the proponents of Save Our Homes failed to understand was that, once homeowners accumulated a substantial portion of sheltered equity in their homesteads, they would become disinclined to sell. In economic science, this has come to be known as the "lock-in" effect. The lock-in effect was compounded over the last ten years by a dramatic escalation in residential property values. Many homeowners found that they could not afford to relocate, even to a smaller home, because the property tax burden was simply too great; it made the

The Impact of Assessment Caps

Year	Growth	Assessor's Market Value	Cap	Taxable Value	Sheltered	Pct	Tax Rate	Property Tax	Competitive Disadvantage	Per SF
1		$ 10,000,000		$ 10,000,000	$ -		2%	$ 200,000	$ -	$ -
2	10%	$ 11,000,000	5%	$ 10,500,000	$ 500,000	5%	2%	$ 210,000	$ 10,000	$ 0.10
3	10%	$ 12,100,000	5%	$ 11,025,000	$ 1,075,000	9%	2%	$ 220,500	$ 21,500	$ 0.22
4	10%	$ 13,310,000	5%	$ 11,576,250	$ 1,733,750	13%	2%	$ 231,525	$ 34,675	$ 0.35
5	10%	$ 14,641,000	5%	$ 12,155,063	$ 2,485,938	17%	2%	$ 243,101	$ 49,719	$ 0.50
6	10%	$ 16,105,100	5%	$ 12,762,816	$ 3,342,284	21%	2%	$ 255,256	$ 66,846	$ 0.67
7	10%	$ 17,715,610	5%	$ 13,400,956	$ 4,314,654	24%	2%	$ 268,019	$ 86,293	$ 0.86
8	10%	$ 19,487,171	5%	$ 14,071,004	$ 5,416,167	28%	2%	$ 281,420	$ 108,323	$ 1.08
9	10%	$ 21,435,888	5%	$ 14,774,554	$ 6,661,334	31%	2%	$ 295,491	$ 133,227	$ 1.33
10	10%	$ 23,579,477	5%	$ 15,513,282	$ 8,066,195	34%	2%	$ 310,266	$ 161,324	$ 1.61
11	10%	$ 25,937,425	5%	$ 16,288,946	$ 9,648,478	37%	2%	$ 325,779	$ 192,970	$ 1.93
12	10%	$ 28,531,167	5%	$ 17,103,394	$ 11,427,773	40%	2%	$ 342,068	$ 228,555	$ 2.29
13	10%	$ 31,384,284	5%	$ 17,958,563	$ 13,425,721	43%	2%	$ 359,171	$ 268,514	$ 2.69
14	10%	$ 34,522,712	5%	$ 18,856,491	$ 15,666,221	45%	2%	$ 377,130	$ 313,324	$ 3.13
15	10%	$ 37,974,983	5%	$ 19,799,316	$ 18,175,667	48%	2%	$ 395,986	$ 363,513	$ 3.64
16	10%	$ 41,772,482	5%	$ 20,789,282	$ 20,983,200	50%	2%	$ 415,786	$ 419,664	$ 4.20
17	10%	$ 45,949,730	5%	$ 21,828,746	$ 24,120,984	52%	2%	$ 436,575	$ 482,420	$ 4.82
18	10%	$ 50,544,703	5%	$ 22,920,183	$ 27,624,520	55%	2%	$ 458,404	$ 552,490	$ 5.52
19	10%	$ 55,599,173	5%	$ 24,066,192	$ 31,532,981	57%	2%	$ 481,324	$ 630,660	$ 6.31
20	10%	$ 61,159,090	5%	$ 25,269,502	$ 35,889,588	59%	2%	$ 505,390	$ 717,792	$ 7.18
21	10%	$ 67,274,999	5%	$ 26,532,977	$ 40,742,022	61%	2%	$ 530,660	$ 814,840	$ 8.15
22	10%	$ 74,002,499	5%	$ 27,859,626	$ 46,142,874	62%	2%	$ 557,193	$ 922,857	$ 9.23
23	10%	$ 81,402,749	5%	$ 29,252,607	$ 52,150,142	64%	2%	$ 585,052	$ 1,043,003	$ 10.43
24	10%	$ 89,543,024	5%	$ 30,715,238	$ 58,827,787	66%	2%	$ 614,305	$ 1,176,556	$ 11.77
25	10%	$ 98,497,327	5%	$ 32,250,999	$ 66,246,327	67%	2%	$ 645,020	$ 1,324,927	$ 13.25

move unaffordable. The lock-in effect of Save Our Homes is what gave political impetus to Florida's relatively new homestead portability laws.

Understanding the lock-in effect on homestead property owners, it is not difficult to comprehend that prudent owners and operators of income producing properties subject to such a cap will adopt a new investment strategy, similar to the one adopted by the beneficiaries of Save Our Homes… long-term hold. The longer an investor holds his property, the greater his competitive advantage. To wit, the following table illustrates the benefits of such a strategy. By year ten, a property originally worth $10M could enjoy a 34% tax shelter resulting in a $1.61 per square foot competitive leasing advantage. *(See chart on preceding page)*

Assessment limitations create a significant inducement for property owners to invest for the long term, because they create a barrier to entry in an already extremely competitive marketplace.

By way of example, imagine two identical office buildings erected adjacent to one another in the very same year. Imagine also that they are fully tenanted at competitive lease terms with similar creditworthiness. Under these conditions, the taxable value should be the same for each.

Now assume ten years has passed and one of the buildings is sold for its current market value. The new owner is faced with an imposing competitive disadvantage. To account for this in underwriting the purchase, a prudent analyst would (1) decrease projected achievable rents by the amount of the competitive disadvantage on a per square foot basis, (2) factor in a higher vacancy and collections loss in anticipation of tenant turnover resulting from the associated increase in pass-through expenses, (3) increase the projected real estate tax liability expense as a result of the sale, and (4) increase the discount rate to reflect the additional market risk. All of this contributes to downward pressure on profit margins and therefore on the property's value.

These facts lead us to the inescapable second step that any prudent investor will undertake: the implementation of net leases. In order to maximize the income-producing asset's value, operators will pass through all expenses that the market will bear. While this is common practice in many markets, especially for office, retail, and industrial properties, multifamily apartment community operators would be inclined to convert what are traditionally gross leases to a net format. Like separately metered utilities, renters could become responsible for paying their *pro rata* share of the property taxes.

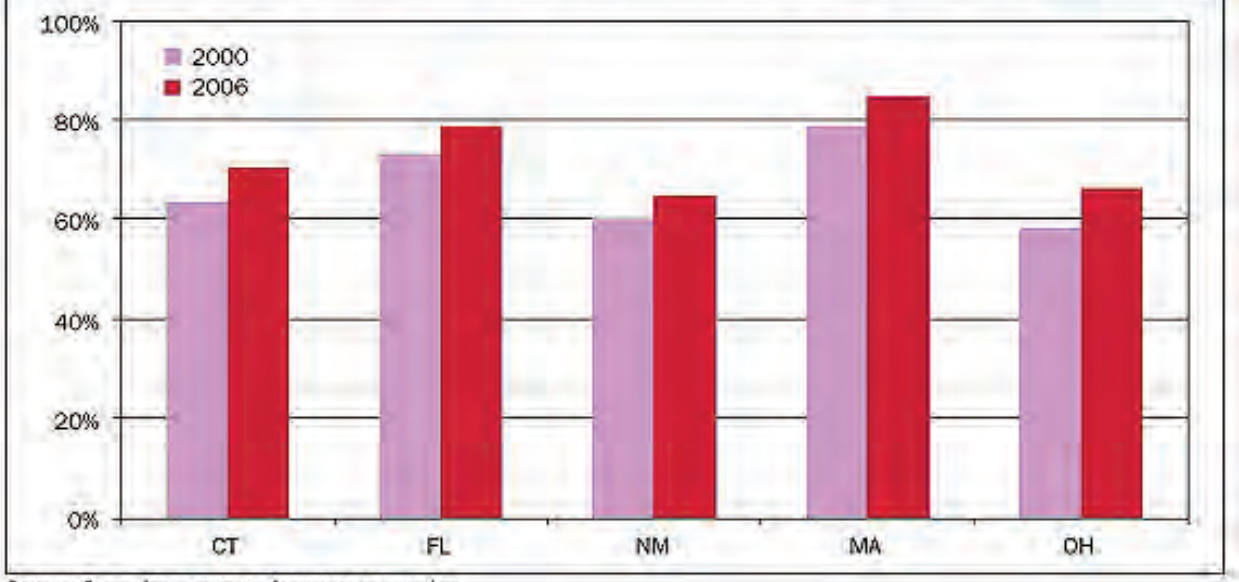
Preliminary comparative analyses based on Table 1 indicate that the impact on value will be considerable. Discounted cash flow models of gross rent properties (e.g. full service leases with no expense pass-through provisions, like apartments) evidence value declines of greater than eleven percent when underwritten in this manner. Otherwise comparable net leased property analyses reveal declines of over six percent of market value.

Such dramatic devaluation on ownership transfers also presents a threshold barrier to renovation and new construction and development activities. Significant renovation could subject a property to reassessment under current law. Any new product would be valued at its current market value in the year it came into service, yet it would have to compete for tenants against existing properties which could offer space at significantly lower rental rates. On the other hand, the five percent assessment cap could potentially solve Florida's historic overbuilding problem, because no new development will occur until demand exceeds supply

continued, next page

FIGURE 4

Residential Share of Total Assessed Value in Selected States, 2000–2006



Source: State departments of revenue or taxation.

When Good Policies Go Bad

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by an amount sufficient to offset the competitive disadvantage that the new properties will face.

As a result, employment and compensation levels for all jobs that revolve around commercial real estate transactions will be negatively impacted. As transaction volume wanes, the demand for appraisers, attorneys, brokers, lenders, title agents and the like will vanish as well. Given Florida's historical reliance on real estate development and transactional activity for economic development, the five-percent cap could be the harbinger of Florida's economic demise.

As evidenced in a chart from the previously referenced Lincoln Institute of Land Policy report, the assessment limitations on non-homestead property shifts the tax burden back towards homeowners, who already shoulder the overwhelming majority of the load. *(See chart on preceding page.)*

Despite that Florida's income producing property owners actually write the checks, most economists would argue that the ultimate end user of the property actually pays the taxes. That means that the retail shopper and the clients of office or industrial tenants are the ones who pay the tax, because the costs are passed through to the ultimate end user. Although Florida's tourists contribute their fair share, most of the end users of non-homestead property in Florida are its residents. In the end, assessment limitations deliver:

- lower tax revenues for local government,
- lower municipal bond credit ratings,
- local governments that are hamstrung in adapting to changing economic conditions,
- greater reliance on other types of taxes,
- an unnecessarily complicated system for taxpayers,
- reduced real estate transaction activity,
- fewer jobs and lower compensation for transaction facilitators, and
- an impediment to a vibrant economy.

Message From the Chair

from page 3

the "private side" of the Section's website, which includes current Section information, committee meeting agendas, minutes and reports, as well as a wealth of other useful information, such as the Uniform Title Standards and the updated legal opinions standards.

As you can see, RPPTL Section membership clearly provides a significant "bang for your buck." Even the most passive Section member will find that the benefits of Section membership, such as the CLE programs, the ActionLine publication and access to the Section ListServes and website, justify the relatively low cost of such membership. However, like most activities in life, you will find that the more you get involved with the Section, the more you will receive from that involvement. Thus, I encourage each of you to remain a member of the Section, to encourage your colleagues to become members of the Section and, most importantly, to seek to become active participants in Section activities. Finally, on behalf of the RPPTL Section's Executive Committee, I would like to extend our best wishes to you and your families during 2010.

********Announcement of Date Change *******

29th Annual Attorney Trust Officer Conference

Ritz Carlton Golf Resort in Naples

The dates have been changed to

JUNE 24 – JUNE 27, 2010

(If you have already made a hotel reservation, it has automatically been moved to reflect this change)

Finding the Path to Legitimate Life Settlements

By Bill Clark, Regional Vice President, Ashar Group, LLC

Much of the confusion about life settlements is caused by erroneously putting Life Settlements, STOLI, Viaticals, and Investing in Life Settlements in the same bucket. This confusion can lead advisors to give the wrong advice to a client or to avoid a legitimate life policy exit strategy that is in the best interest of their client. Accurate knowledge is a powerful tool to help mitigate risk. As the market for life settlements matures and the opportunity for advisors to serve senior clients through legitimate life settlements becomes clearer, more advisors are finding the path to legitimate life settlements.

Life Settlements Defined

DEFINITION: A life settlement is an exit strategy, the sale of an unwanted or underperforming life insurance policy (asset) in the secondary market for its fair market value.

- New wealth is often created for senior clients because a life settlement can produce a lump sum cash payment to the client in excess of the policy's cash surrender value.

The financial institution purchasing the policy then owns the asset, pays future premiums, and receives the death benefit.

- A life settlement is an alternative exit strategy for an unwanted or underperforming life policy. Other commonly used policy exit strategies are policy lapse, surrender, 1035 exchange, or change of ownership to charity or family member.
- It's a way to provide your client additional liquidity at a time when raising cash can be very important to maintaining life style.

Life Settlement Legitimacy

Legitimate Life Settlements have been recognized by AALU, ACLI, NAIFA, The Internal Revenue Service, Legislators, and some life insurance companies.

- Legitimate Life Settlements have industry support. Quote from the STOLI Alert – March 2007 published by AALU, ACLI, and NAIFA: *"The life insurance community recognizes that many circumstances may lead the owner of a life insurance policy to explore a life insurance settlement. We have always supported and will continue to support legitimate life settlements."*
- Consumer friendly life settlement legislation recently passed in the states of Washington, Oregon and Maine that require life insurance companies to notify policy owners that there are alternatives to the standard policy exit strategies. Similar legislation is pending in several states.
- Some life insurance carriers recognize the role life settlements play in the financial planning process by approving life settlement brokerage firms that their agents are permitted to use for legitimate life settlements.
- The Internal Revenue Service recently released two revenue rulings (Rev. Rul. 2009-13 and Rev. Rul. 2009-14) dealing with the sale and purchase of a life insurance policy involving a third party. These rulings increase the importance of the life settlement discussion as a legitimate and recognized financial service product.

The Confusion

The history of the life settlement industry contributes to confusion for advisors desiring to serve their clients well. Terms are often used interchangeably when there are distinct differences among the definitions of the terms. A thorough understanding of the differences between life settlements and other products that are confused with life settlements is critical.

Stranger Originated Life Insurance (STOLI):

***DEFINITION* - A practice or plan to initiate a life insurance policy for the benefit of a third party investor who, at the time of policy origination, has no insurable interest in the insured.**

- Much of the confusion about life settlements has been caused by thinking STOLI is synonymous with life settlements. It's not. The "O" in STOLI stands for origination. STOLI is about the creation of a policy and lack of insurable interest before policy issuance. STOLI happens long before policy exit. A life settlement is an exit strategy for an existing life policy.
- Legislation, regulation, scrutiny by carriers, and provider diligence is thwarting STOLI. Both NCOIL (National Conference of Insurance Legislators) and NAIC (National Association of Insurance Commissioners) have proposed different models to deter Stranger Originated Life Insurance.
- STOLI is not a life settlement.

Viaticals

Viatical settlements of the 1990's were controversial and differed from present day life settlements in several ways:

- Many states consider it a viatical settlement if the insured has a life expectancy of two years or less. Viatical settlements are for the terminally ill. By contrast, Life Settlements serve senior clients with life expectancies between 25 months to 20 years.
- The Viatical market of the 90's sold to private investors and had little or no regulation at the time. Most of the

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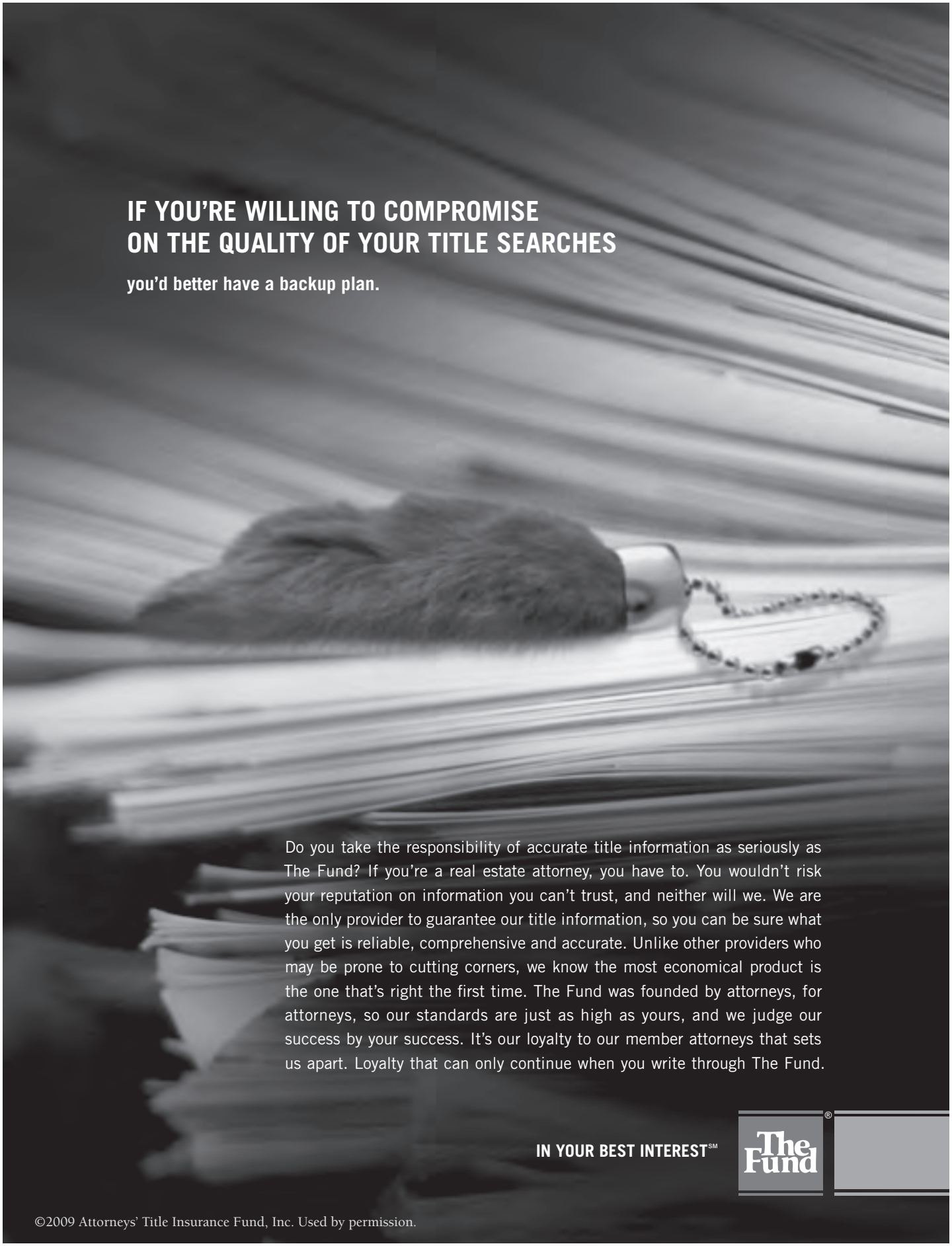
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Legitimate Life Settlements

from page 11

controversy was on the purchasing side of the transaction. By contrast, in a majority of states a Life Settlement involves institutional investors and is highly regulated.

- Viatical Settlements are for the terminally ill.

Investing in life settlements

Life settlements as an investment class are one of the fastest growing asset classes. It is a non-correlated asset with potential for a high rate of return. Many consider life settlements as one of the last safe harbor assets available for investment.

- Investing in life settlements happens on the purchasing side of the life settlement transaction. Depending on state regulation, investing in life settlements is offered to private and institutional investors.
- A life settlement, on the other hand, happens on the selling side of the transaction when a policy owner sells his policy on the secondary market.
- Investing in life settlements (purchasing side) is not a Life Settlement (selling side).

Due Diligence

Once you decide that a life settlement is in the best interest of your senior client you will find an unending variety of settlement firms available to offer help. Firms vary in their business models and expertise. You will want to carefully select a firm to partner with that is a good fit with your core values and practices. Your investigation could include questions such as:

Does the life settlement company represent investors vs. the policy owner and advisor?

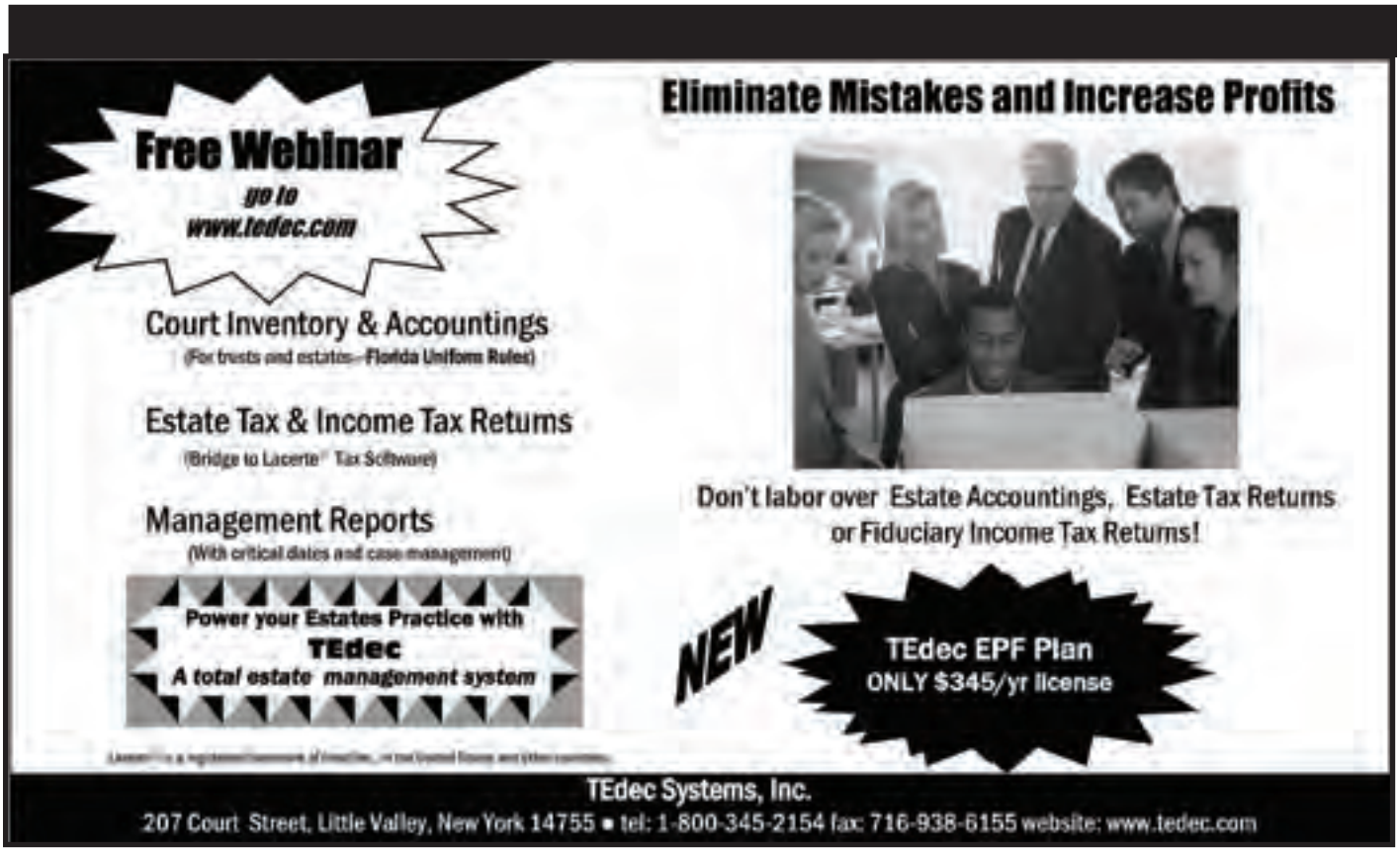
This is probably the most important question because it reveals who really represents your client.

- Life Settlement Providers represent the institutions purchasing the life insurance policies. Their business model is to purchase the policy for the least amount and secure the highest IRR for the fund.
- Life Settlement Brokers represent the owner of the life insurance policy. Their job is to negotiate with all of the providers licensed in the state where the life insurance policy is domiciled to secure the most competitive offer for the client.

Does the settlement company practice transparency, disclosing the entire offer including commissions?

- Lack of transparency has been a major issue in the life settlement market.
- All gross offers should be disclosed to you before completing a transaction.
- Ask for the official sheet the broker receives from the provider.

continued, page 15



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The attorneys at Stokes McMillan Maracini & Antúnez P.A. have extensive experience representing clients in contested probate and trust matters. Contact us today for experienced, principled legal representation. Referrals and co-counsel arrangements are welcomed and honored.

Contact: Juan C. Antúnez / 305-379-4008 / jantunez@smpalaw.com

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Life Settlements

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Have any legal or disciplinary actions been taken against the company or any individual associated with the company?

- It takes years to earn your good reputation. Protect that reputation by knowing who you are working with as a settlement partner.
- Due diligence on your part is essential. Google is a powerful tool!

Is the settlement company licensed in all states that require licensing?

- Ask the life settlement company you are considering for a copy of their license in the state the policy is domiciled.
- If they cannot produce it, they may be using another firm's license.
- Your client's privacy must be protected by only working directly with a licensed company.

Does the settlement company sell life insurance or any other products that could compete with you?

- Find out if the life settlement partner you are considering has other lines of business. This may or may not be what you are looking for. Why bring a competitor directly to your client?
- It could be very important for you to work with a life settlement company that is focused entirely on the life settlement market without the distraction of other lines of business… they're on top of the life settlement business.

Summary

A Life Settlement is one of many exit strategies that should be explored when your senior client no longer wants his/her life insurance policy. The secondary market for life insurance is regulated in a majority of states and is supported by institutional funds. As an advisor, it's important to protect your reputation by having a clear understanding of the differences between legitimate Life Settlements, STOLI, Viatical Settlements, and Investing in Life Settlements. Confusion surrounding the differences can lead advisors to give the wrong advice to a client or to avoid a legitimate life policy exit strategy that is in the best interest of their client. Investigate life settlements so you are informed of the potential and can advise and service your clients appropriately. Select a life settlement company that is in position to meet your and your clients' expectations while enhancing your reputation in the financial services market.

Bill Clark *is a Regional Vice-President for the Ashar Group, LLC, a nationally recognized life settlement brokerage firm. The Ashar Group is an independently owned and operated firm that represents advisors of policy owners who seek to sell their policies on the secondary market. Advisors interested in learning more about Life Settlements should contact Bill at 800-384-8080 or* bill@ashargroup.com. *Additional information can be found on the Ashar website at* www.ashargroup.com.

EXECUTIVE COUNCIL MEETINGS

***

March 16 - 21, 2010

The Ritz-Carlton, Kapalua
Lahaina, Maui Hawaii

***

May 27 – 30, 2010

Tampa Marriott –
Waterside Hotel & Marina,
Tampa, Florida

Full meeting and CLE listing on page 43.

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New Fellowship Program Open to All Young RPPTL Attorneys!

The Real Property, Probate and Trust Law Section of The Florida Bar is now accepting applications for its Fellowship Program. The Fellowship Program was created in 2007, modeled after the successful Fellowship Program of the American Bar Association. In its inaugural year, the Program received over 80 applicants for 4 positions. The Fellows selected have had the opportunity to participate in the section committees, work with section leaders and represent the Real Property, Probate and Trust Law Section as future leaders. Young lawyers who wish to avail themselves of this terrific leadership training opportunity should join the section and apply for one of the four slots presently available. **The deadline to apply is April 1, 2010.**

The mission of the Fellowship Program is to attract and retain young lawyers to the Real Property Probate and Trust Law Section of The Florida Bar (RPPTL). One method of achieving this goal is by providing subsidized Fellowships to qualified individuals interested in becoming active in the substantive work of the Section. The Fellowship Program allows these individuals to be substantially involved in the Section work, receive leadership training and work closely with leading attorneys in their field. It is our desire that through this Program the Section will cultivate and develop future leaders to continue the strong presence of the RPPTL Section as a leader in The Florida Bar. Our Fellowship Program is also designed to supplement and support the efforts of the membership diversity committee and the membership development committee of the Section.

The Fellowship Program is open to all lawyers who are members of the RPPTL Section and (a) have been admitted to the bar for fewer than 12 years or (b) are younger than 38 years of age. This Program will award a maximum of 4 Fellowships per year. Applicants should be able to demonstrate that a substantial portion of their practice is focused in the area of real property, probate or trtst law.

Fellowships are provided for a two-year term. The RPPTL Section has over 50 active committees and an Executive Council with more than 225 active members. The Executive Council (and the Section committees) meet on a quarterly basis, beginning in June each year, at locations throughout the state of Florida. The quarterly meetings usually run from Thursday through Saturday and include substantive work and social events for networking. Each Fellow will receive a subsidy of up to $2,500 annually (not to exceed actual out-of-pocket expenses) to help defray the expense of attending RPPTL Section meetings. Each Fellow will also be assigned a social mentor, who is a member of the Executive Council, to assist the Fellow in maximizing his or her experience as a Fellow and attending RPPTL social events. In addition, each Fellow will be assigned a committee mentor to assist the Fellow's active involvement in the committee that most closely fits the Fellow's practice area with the goal of maximizing his or her professional development through the Program. In return for the RPPTL Section commitments, a Fellow is required to attend a minimum of three Executive Council meetings per year, serve as an active member of either the membership development committee or the membership diversity committee and be an active member of at least one substantive committee. As an active committee member, the Fellow will be required to complete one substantive work project on behalf of the committee on an annual basis. This project may include writing an article in his or her area of expertise for *ActionLine* (the Section's publication), chairing a subcommittee, or drafting proposed legislation on behalf of the committee. To assure these requirements are fulfilled, each Fellow must submit a work plan to the Fellowship committee by October of each year, which outlines the substantive work project they have chosen, and a report at the end of each year.

At the end of the Fellowship term, we are confident all Fellows will find the Program helped them to enhance their development personally and professionally. We also sincerely hope that all Fellows will continue to be actively involved in the RPPTL Section committees and work towards becoming a member of the Executive Council.

The application is also available through the RPPTL section website at *www.RPPTL.org*. All applications should be submitted to RPPTLfellowship@gmail.org or by mail to RPPTL Fellowship Program, ATTN: Elizabeth Smith, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300. The co-chair of the committee is Tae Bronner. She is available for additional information. You can reach her at tae@estatelaw.com. Her phone number is 813-907-6643.

Application for Fellowship Program

Real Property, Probate and Trust Law Section of The Florida Bar

Name: First _____ Middle Initial _____ Last _____

Address: _____

Firm Name _____ Position _____

Street Address _____

City _____ State _____ Zip code _____

Telephone No.: _____ Email: _____

Law School & date of grad: _____ LLM: _____

Years admitted to Fla. Bar: _____ Years of Practice: _____

Race or Ethnic Heritage or Disability _____
(Information requested is optional.)

Please describe the area(s) of the law in which you focus your practice: _____
_____
_____

Please list your employment history for the past 5 years: _____
_____
_____

How long have you been a member of the RPPTL Section of the Florida Bar? _____

Have you ever been the subject of any disciplinary action by any Bar association? If yes, please describe in detail the nature of the disciplinary action and the outcome. Attach additional sheets if necessary. _____
_____
_____

Please state why you are interested in being appointed as a Fellow for the RPPTL Section. Attach additional sheets if necessary. _____
_____
_____

Please describe your involvement in any local, state, voluntary and national level bar association, including any leadership positions you currently hold or have held in the past. Attach additional sheets if necessary. _____
_____
_____
_____

Please describe any funding or support (including allowing time to fulfill your obligations as described in the Fellows Memo) that you may receive from your firm or employer, or other organization(s) that would support your activities as a Fellow. Attach additional sheets if necessary. _____
_____
_____

Please identify at least two substantive committees that you would be interested in joining as a Fellow: _____
_____
_____

Please list the name, email address and phone number for two members of the Florida Bar (other than members of your own firm) who can provide information regarding your professional qualifications and experience:

Name _____ Email _____ Phone _____

Name _____ Email _____ Phone _____

PLEASE NOTE the Fellows will be required to attend a minimum of three RPPTL executive council meetings during the Fellowship year.

MAIL TO: RPPTL Fellowship Program, ATTN: Elizabeth Smith, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

Guardian, Power of Attorney, Guardian Advocate, Ad Litem, Curator, Custodian, Conservator, Executor De Son Tort

By Judith B. Paul, Esq. and Richard M. Knellinger, P.A., Gainesville, Florida

Florida Statutes are rife with titles of persons who can apply to care for the person and property of other individuals while they are alive. There are also titles for persons who propose to care for the property of a decedent. But deciding whom to appoint from the multiple choices– a guardian, an administrator, a custodian or a curator– can be confusing to new attorneys.

Durable Power of Attorney

A durable power of attorney is a written power of attorney by which a principal designates another as the principal's attorney in fact pursuant to F.S. §709.08. The agent is the person appointed and acts on behalf of the principal in whatever designated scope the parties have agreed to: a limited capacity for some singular purpose or time; or a general purpose. If a petition for determination of incapacity is filed on the principal, the authority of the agent is suspended until the petition is dismissed or withdrawn, or the court determines that certain authority granted by the durable power of attorney is to remain exercisable by the attorney-in-fact.[1] The principal can be very susceptible to fraud, duress, undue influence, deceit, and whims of fancy and may revoke or change his power of attorney based on the influence or attentions of another person or for no reason at all. An individual may execute a limited power of attorney if he is unable to perform some legal duty and requires someone to act on his behalf in a particular legal matter.

A power of attorney may be exercisable immediately or may be conditioned upon the principal's lack of capacity to manage property and specific requirements must be met. The person to whom this power is granted owes the principal a fiduciary duty and may not use the principal's money and resources for his own benefit.[2] Sometimes the power and control that come with the power of attorney create too much temptation in that an attorney-in-fact is usually not under court oversight unless an objection or claim is filed.

In *Borneman v. John Hancock Mutual Life Ins. Co.,* 710 So. 2d 671 (Fla. 5th DCA 1998) the agent of a durable family power of attorney attempted to designate herself to be the beneficiary of the life insurance policy of the principal but the court found that she lacked the authority to change the beneficiary after a petition for determination of incapacity had been filed. If the principal is concerned about the agent having access to his finances, it may be prudent to consider appointing a corporate agent such as a financial institution. If the principal later undergoes an adjudication of incapacity certain authority granted by the durable power of attorney may remain exercisable by the attorney in fact after adjudication of incapacity to create a less restrictive guardianship for the ward and be in the ward's best interests.[3]

Guardianship

The Florida Legislature has recognized that adjudicating a person totally incapacitated and in need of a guardian deprives that person of all her civil and legal rights and may not be completely necessary.[4] Since the ward is the intended beneficiary of the guardianship, the attorney who represents the guardian of a person who is adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as the guardian pursuant to the Attorney General's Advisory Legal Opinion 96-94 on this matter filed on November 20, 1996 which stated that,

> "[i]t is clear that the ward is the intended beneficiary of the (guardianship) proceedings. . .. Accordingly I am of the opinion that as the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian."

This does not mean that the attorney who represents the guardian can also fairly represent the interests of the ward, only that because the ward is the intended third-party beneficiary of the proceedings, the attorney owes a fiduciary duty to the ward while representing the guardian despite a lack of privity. It is not only important but it is essential that the potential ward, also referred to as the alleged incapacitated person or AIP, be represented by their own attorney to protect their interests.[5] A guardianship should be consistent with the welfare and safety of the AIP but must be the least restrictive appropriate alternative means of caring for another person.[6] The court prefers limited guardianships where the AIP is allowed to retain control of his or her person or property and therefore will consider an executed a durable power of attorney or health care surrogate or trust, or other pre-arrangements such as in *Smith v. Lynch,* 821 So. 2d 1197 (Fla. 4th DCA 2002) where although the subject of the guardianship proceedings was declared to be incompetent, no guardianship was required because the Ward had previously executed a durable power of attorney to manage and deal with the property.

Guardian Advocate

A guardian advocate is a person who has been appointed by the court to represent a person with develop-

mental disabilities.[7] In Florida, F.S. 393.063(9) enumerates five developmental disabilities: (1) Prader-Willi syndrome, (2) autism, (3) cerebral palsy, (4) retardation, and (5) spina bifida; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. A circuit court may appoint a guardian advocate without an adjudication of incapacity for a person with developmental disabilities, if the person lacks the decision-making ability to do some, but not all, of the decision-making tasks necessary to care for his or her person or property, or if the person has voluntarily petitioned for the appointment of a guardian advocate.[8] Occasionally there is some confusion by practitioners and guardian advocates who have incorrectly assumed that reports are not required under Chapter 393, Florida Statutes. However it is stated in F.S. §393.12(10) that a guardian advocate has the same powers, duties and responsibilities are found under F.S. §744.351 and therefore must comply with the rules and file the required reports with the court annually.

Administrator ad litem and Guardian ad litem

When it is necessary that the estate of a decedent or a living ward be represented in any probate or guardianship proceeding and there is no personal representative of the estate or guardian of the ward, or the personal representative or guardian may be interested adversely to the estate of the ward, or is enforcing the personal representative's or guardian's own debt or claim against the estate or ward, or the necessity arises otherwise, the court may appoint an administrator ad litem or guardian ad litem, as the case may be, without bond or notice of that particular proceeding.[9] A guardian ad litem is appointed to represent the ward, if the current guardian is unable to do so or if no guardian has been appointed, for example, to represent the minor's interest before approving the settlement of the minor's portion in any case in which a minor has a claim for personal injury, property damage, wrongful death, or other cause of action in which the gross settlement of the claim exceeds that amount allowed by statute (currently $15,000.00)[10]. In an estate proceeding, a personal representative may be unable to represent the estate in a particular matter and the court can therefore appoint an administrator ad litem to represent the estate.

In *re Estate of Verdier v. Verdier*, 281 So. 2d 543 (Fla. 2d DCA 1973) the appellate court required the appointment of an administrator ad litem to represent the interests of the estate when it found that the interests of the brother of the decedent who had been appointed the executor were distinctly and obviously adverse to the interests of the estate and the will of the decedent and the assets had been either transferred to other family members or were the subject of extraordinary claims by the other family members. These appointments are for a particular legal

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Life Settlements can provide policyowners with a cash settlement many times their policy's cash surrender value. Consider having your client's life insurance policy appraised before surrendering it, letting it lapse or completing a 1035 exchange. Many fiduciaries feel it is their responsibility to explore all available alternatives for their clients.

We provide advisors with a non-binding valuation of their clients' life insurance policies in the secondary market, going above and beyond, to provide the highest settlement possible.

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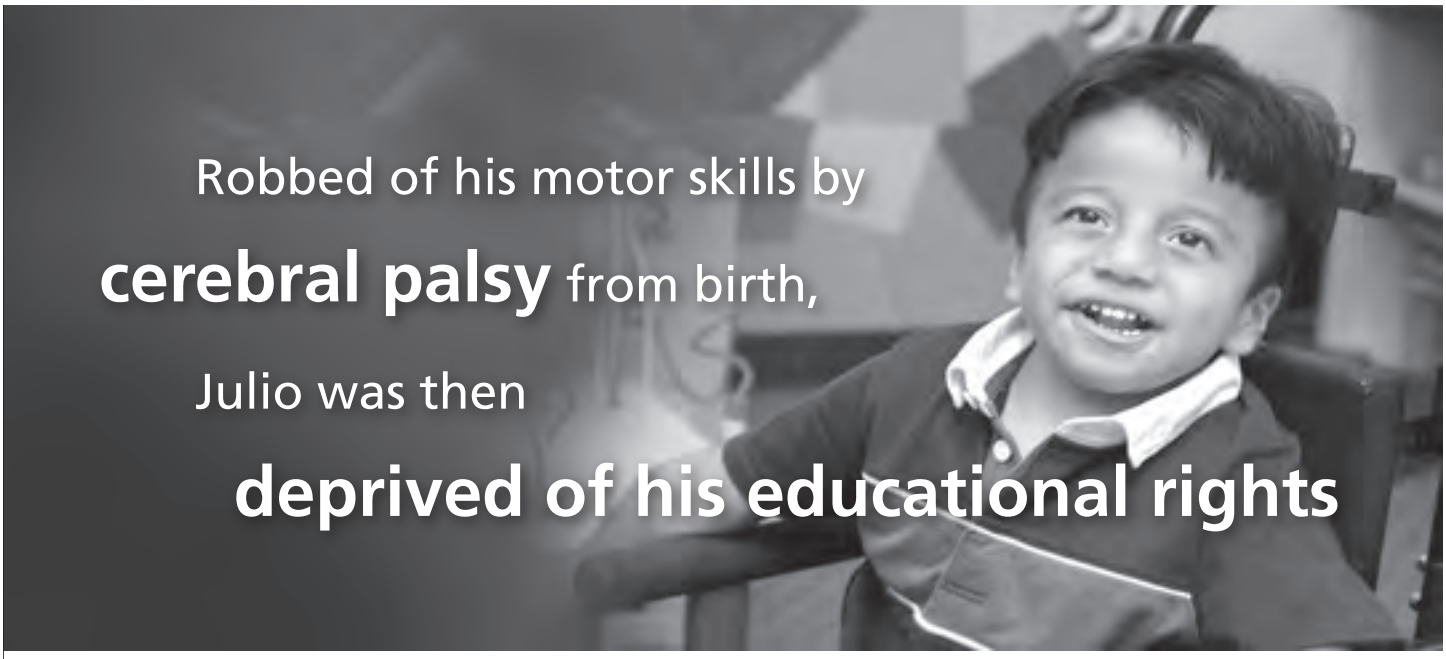

when his school told him it couldn't provide the

accommodations he needed

to function in the classroom.

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Guardian, Power of Attorney, ...

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matter only and the guardian ad litem or administrator ad litem is then discharged when his duty is complete.[11]

Custodian

Black's Law Dictionary, Second Pocket Edition, 2001 defines a custodian as a person or institution that has charge or custody of something such as property, papers or other valuables. A custodian is designated by the court to care for custodial property of a minor when a minor receives property via a will, trust, benefit plan, intestacy, a liquidated debt, an irrevocable gift, or a security. A custodianship remains subject to the act despite a change in residence of the custodian or the minor or relocation of the property, unlike property placed in a guardianship that normally transfers with the ward to the new state of residence.[12] A custodian collects, holds, manages, invests and reinvests the property for the minor until the minor reaches the age of majority, keeping that property separate from his own and other property in a manner sufficient to identify it as custodial property of the minor.[13]

Curator

If a person dies while owning property and no personal representative has been appointed and there are assets that must be taken care of during this time, the court has the authority to appoint a curator to take control of the property to prevent waste, destruction or loss through removal.[14] Typically a curator is appointed if there is a delay in the appointment of a personal representative which could be due to a will contest, failure of anyone to petition the court, removal of a personal representative, failure to nominate and appoint a successor, or the inability of someone nominated as a personal representative to act in that capacity. *In the Estate of Katz*, 501 So. 2d 68 (Fla. 3d DCA 1987) the court upheld the appointment of a curator to marshal the decedent's assets in a will contest involving multiple beneficiaries, one of whom was making distributions of assets in certain joint account property. The court in re the *Estate of Miller, Smith v. Miller,* 568 So.2d 487 (Fla. 1st DCA 1990) considered the appointment of a curator an extraordinary measure when a personal representative has been nominated by the will. The Florida Supreme Court In The Estate of Sale, 227 So. 2d 199 cited F.S. 732.21 (3) stating that, "a Curator is ordinarily appointed only as a temporary expedient to take possession of and preserve the assets of the estate until a personal representative is appointed; or conceivably, after an estate is ready for distribution and an heir is missing, to take possession of and preserve the share of the estate to which such heir is entitled, pending a search for him and his heirs." A curatorship ends when the personal representative is appointed and letters of administration are issued. The curator has the same fiduciary duty as a personal representative.

Conservator

The Florida Statutes at section 747.01 define a conservator as someone who is appointed by the court to hold the assets of an absentee until the absentee either returns or is declared deceased and includes: members of the Armed Forces, Red Cross or Merchant Marines who are serving during a period of time when a state of hostilities exists between the United States and any other power and for 1 year thereafter if that person has been reported as missing in action, interned in a neutral country, beleaguered, besieged or captured by the enemy; or for a resident of this state or any person owning property in this state disappears under circumstances indicating that he or she may have died either naturally, accidentally, or at the hand of another, or may have disappeared as the result of mental derangement, amnesia, or other mental cause. If the individual had not executed a power of attorney or other document that would appoint someone to care for his property in his absence, the court must consider whether the necessity exists of appointing a conservator or leaving the property in limbo. The court, in its discretion, may appoint a guardian ad litem to represent the alleged absentee at the hearing similar to appointing a guardian ad litem to represent a ward in a guardianship action.[15] Until the court has made a determination based on the evidence that a person is deceased, the estate of that person is treated similarly to a guardianship.

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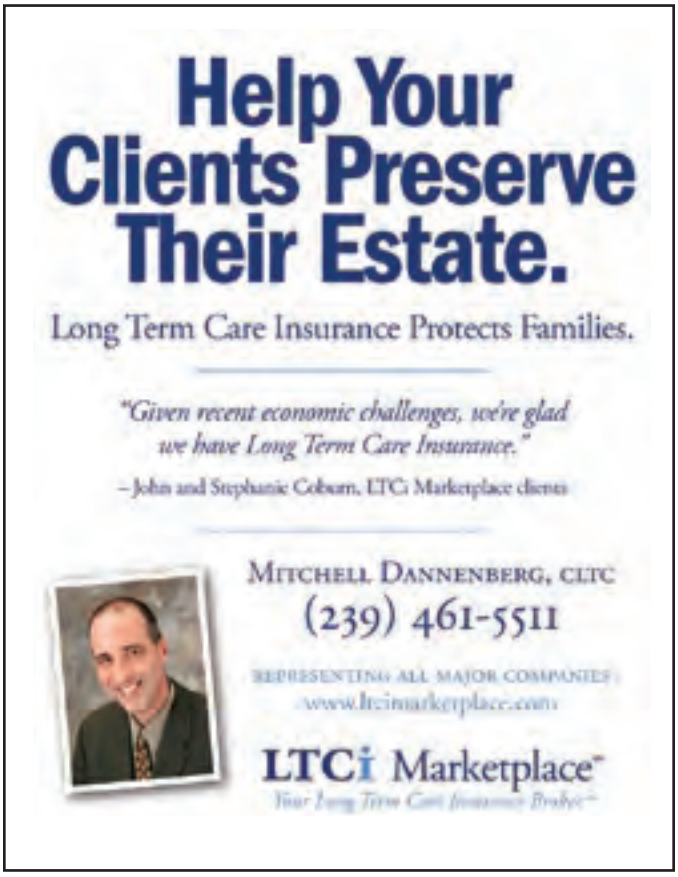

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Executor de son tort - not a legally appointed representative

An executor de son tort is one who, without authority, performs acts properly belonging to the administrator and is thus liable for assets with which he has meddled.[16] He is a person who has not been appointed by the court to represent the estate but acts as though he has that right and holds himself out to be the executor of the estate causing others to rely on his actions.[17] Although a person may be motivated by a desire to intercede on behalf of "family property" or other good intentions, if he has no authority or permission to do so, he has intermeddled in the affairs of the estate and he is liable to the personal representative if the property is taken or converted for his own use or if the estate is otherwise deprived of its right to the property.[18] This person will not be allowed credits for debts discharged which were not legal claims against the estate and will not be entitled to any set-off from application of assets to his own claim against the decedent. The executor de son tort is subject to all the liabilities of ordinary executors or administrators or personal representatives but has none of the privileges and can not obtain a personal advantage from intermeddling.[19] However, the executor de son tort may later be appointed as the personal representative in the estate and after receipt of his letters of administration, may ratify his previous actions for the benefit of the estate and beneficiaries.[20]

There are multiple persons who can be appointed by the court to intercede on behalf of a principal to care for property, the estate, a potential ward or AIP, a ward, a child, a decedent, or a person who is missing. Once the practitioner has a grasp of what particular duties are required by the appointed person then determining what to recommend in each situation is simplified.

Endnotes:

1. F.S. 709.08(3)(b)-(c)
2. F.S. 736.0901, 518.10
3. F.S. 709.08(3)
4. F.S. 744.1012
5. F.S. 744.331
6. *Smith v. Lynch,* 821 So. 2d 1197 (Fla. 4th DCA 2002)
7. F.S. 393.063
8. F.S. 393.12(2)(a)
9. FPR 5.120
10. F.S. 744.3025
11. F.S.744. 102(10)
12. F.S. 710.103(1), 744. 524, FPR 5.670
13. F.S. 710.114(1)
14. F.S. 733.501
15 F.S. 747.031 (3)
16. F.S. 733.309
17. *Albritton v. Albritton,* 731 So. 2d 154 (Fla. 1st DCA 1999)
18. *Black v. Hart,* 301 So. 2d 787, (Fla. 3d DCA 1974)
19. *Johnston v. Thomas,* 93 Fla. 67, 111 So. 541 (1927
20. *Albritton, supra.*

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Section Executive Council Meeting

Naples, September 24 - 27, 2009

B: Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, Florida

The September 2009 meeting of the RPPTL Section Executive Council was held at the Ritz Carlton Beach Resort in Naples, right on the Gulf. The Ritz Carlton Beach Resort is rated as one of the top resorts in the nation for good reason. The resort accommodations are fabulous, and the service from the staff is outstanding.

The committee meetings started shortly after lunch on Thursday, the 24th, with a busy schedule through 5:00 that afternoon. An evening welcome reception gave all attendees the opportunity to say hello and try some very tasty hors d' oeuvres.

Friday morning the 25th started off bright and early with lots of committee meetings from 8:00 am until 6:30 pm. An evening reception started at 7:00 p.m. by the pool, but threatening weather moved everyone inside. Dinner was an extensive buffet with entertainment by everybody's favorite band "Roadkill." If rock music by "Roadkill" wasn't enough, a special appearance by the "Hoochie Mommas" was definitely the highlight of the evening (one can only hope that pictures were taken and shared).

The roundtable breakfast, both the Probate and Real Property sides, started at 7:30 a.m. since each group was facing a large agenda. The well-attended Executive Council Meeting then came to order at 9:30 am. There was some very lively discussion and interesting debate primarily focused on probate issues. If you haven't read the minutes of the Executive Council Meeting sent by your Circuit Representative, you should take a minute to do so. If for some reason you didn't get the minutes, they are posted on the Section website.

Saturday evening capped off with a dinner cruise on a very comfortable boat called the "Naples Princess." The cruise left around 5:45 p.m. and everyone on board was treated to a West Coast sunset over the Gulf of Mexico.

If you missed the Executive Council meeting at the Ritz Carlton Beach Resort, you missed out on some fascinating discussion and some fun events. There are some great meetings at great locations coming up in 2010 (St. Augustine and Hawaii to name two), so make your plans soon.

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Executive Council Meting photo collages courtesy of Kelly Catoe



Section Executive Council Meeting

Naples, FL, Sept. 24 - 27, 2009

Executive Council Meting photo collages courtesy of Kelly Catoe



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Viable Options for Deferring Capital Gains Taxes When Selling Property

By Allan Roth CEA, Tax Efficient Advisor Institute

Deferral of capital gains has received much attention over the last few years as property values have grown rapidly. Many tax experts will often advise their clients to just pay the taxes because the capital gains rates are the lowest they've been in years and are likely to go up in 2011. Advice such as this can be misplaced and may not be in the best interest of the property owner.

Take a hypothetical case in which someone purchased a property 20 years ago for $250,000. Assume that the property has appreciated to $2,000,000. This appreciation represents a capital gain of $1,750,000. If the property is located in California, then that property is subject to federal capital gains taxes of 15% and state capital gains taxes of 9.3% for a total tax of 24.3%. This total tax of 24.3% is $425,250 leaving the client a net of $1,324,750. Additionally, if the property owner took depreciation over the 20 years, then that depreciation will be subject to as much as 34% recapture tax. For this example, we have assumed no depreciation.

So, when tax and investment professionals advise clients to pay taxes now, they fail to realize that the taxes paid may very well represent a very large and significant portion of that client's net worth. Many times the cash proceeds from a property sale represent a client's net savings for retirement and cutting that number by 20%+ can make a very significant difference in the quality of the property owner's retirement.

What are Capital Gains?

Capital gains taxes are federal and state taxes applied to any gain or appreciation, on an asset, above that asset's basis or purchase price. Current federal capital gains rates are at 15% and state rates vary from 4% to 9% bringing total taxes, in general, to roughly 20%-25%. Capital gains taxes are applied at the time the sale takes place which is when the gain is realized. The taxes must be paid in the year of sale.

The federal tax rate on long-term gains was reduced in 2003 to 15%, or to 5% for individuals in the lowest two income tax brackets. In 2011, these reduced federal tax rates will "sunset," or revert to the rates in effect before 2003, which were generally 20%.

Why Deferral of Capital Gains Taxes is Important

Most property owners understand the concept of time value of money and the importance of getting and keeping as much cash as possible in today's dollars so that they can invest those monies and allow for compounding or returns on that money over time.

This same basic concept of compounding can be applied to paying capital gains taxes and taxes on depreciation recapture. The key is to defer the payment of capital gains taxes and depreciation recapture for as long as possible in order to yield the maximum return on those tax dollars.

In our example above, if the property owner were able to take the $425,250 in taxes and defer that over 25 years, then the property owner would have actually ended up with more money than when they started. If we assume that this money could grow at a 6% rate of return per year for a period of 25 years, then that $425,250 would have grown to over $1.8M.

Techniques for Deferral of Capital Gains Taxes

There are a number of techniques and strategies available to property owners to defer capital gains taxes.

a. Installment Sale

With this technique the property owner sells the property and holds a note for some amount of the sales price at a stated rate of interest for a stated number of years and a stated payment frequency and amount.

Pros

This is a simple, low cost and easy method for deferring taxes.

Cons

Risk of buyer default; foreclosure costs can be significant; property values can decline at the time of foreclosure; the property has been "run down" or degraded in some manner due to buyer negligence.

There is no protection against creditors

b. Structured Sale

This method requires that the buyer agree to an installment note with you as the seller. The buyer secures full financing for the property. The buyer agrees to assign their obligation to pay to an independent, third party assignment company. The assignment company agrees to make payments on behalf of the buyer. The assignment company invests the monies into an annuity. The annuity provides enough interest income to support the installment note.

Pros

Simple to implement; low cost

Cons

Difficult to get the buyer to agree to the concept of giving their monies to a third party; if buyer used debt financing,

continued, next page

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then buyer is dually obligated to the lender and the seller; interest rates on the note will tend to be low which means a low payout for the seller

c. Self Directed Installment Sale ™

This technique allows the property owner to transfer the property to a LLC. The property owner secures a buyer for the property. The property owner then sells the membership units of the LLC to an independent Trust on an installment basis. The Trust then has the property sold from the LLC and the buyer gives cash to the LLC. The Trust then starts payments to the original property owner.

Pros

Buyer completes transaction in a normal manner; seller has note secured/collateralized with a cash investment inside the LLC versus using the real estate; seller does not have to worry about foreclosing; seller does not have to worry about declining property values as a result of market conditions or buyer misuse;

Protection against creditors

Cons

Requires setup fees and expenses

d. 1031 Exchange

This involves the exchange of a current property with a new property. This is most typically accomplished through the use of an independent party known as a qualified intermediary (QI). The QI takes possession of your property, sells it to a buyer, and then the QI holds onto the cash proceeds until you find a replacement property. Upon finding a replacement property, the QI is instructed to bring the cash to closing. Upon closing, the QI turns over the replacement property to you. This entire process has to take place within 180 days of selling the current property.

Pros

Provides indefinite deferral of taxes; low cost

Cons

Difficult to find replacement properties; if replacement property is cheaper, then taxes are due on the difference; difficult to complete transaction in 180 days; 20%-30% of 1031 exchanges will fail which requires paying all taxes in that tax year; does not provide an exit strategy from real estate; does not provide as good of an income stream as a series of payments.

No protection against creditors

e. 1031 Rescue ™

This technique is a combination of a 1031 exchange along with a Self Directed Installment Sale™. Under this method the qualified intermediary agrees to handle your 1031 exchange with two conditions: 1) They will provide you with a replacement property if one is found, or 2) They will give you an installment note at the end of 180 days if no replacement property is found. The end result of this is that you can have a 1031 exchange without worrying about a failed exchange. If the exchange fails, you will still receive tax deferral via the installment note issued by the QI.

Pros

Guarantees deferral of taxes

Cons

Setup fees; still have the issues with a 1031 exchange related to 180 days and ability to locate a replacement property.

Protection against creditors

Anyone who has been delaying the sale of their property because of taxes should re-think strategy by considering one of the tax deferral techniques outlined above. Many of these strategies are very powerful and will leave you in better financial shape. You should also note that by being able to sell property tax deferred you are able to discount your property's sales price and recoup that discount through the deferral and compounding of the taxes.

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Probate Case Summaries

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Welbaum Guernsey, Coral Gables, Florida

No time requirement for service of will contest by formal notice within three months of service of the notice of administration.

Aguilar v. Aguilar, 15 So. 3d 803 (Fla. 2d DCA 2009)

The wife of a decedent filed a "motion" to contest the decedent's purported last will and to remove the personal representative, who was a daughter of the decedent. The wife's motion alleged undue influence.

The wife's motion was filed within three months after service of the notice of administration. During the litigation, the wife moved for summary judgment. In response, counsel for the personal representative filed a motion to dismiss arguing that the motion to contest the will had not been served by formal notice within three months of the date of service of the notice of administration. The trial court denied the wife's motion for summary judgment and ordered mediation.

The wife then served her motion to contest the will with formal notice and filed proof of service. This was done about six months after service of the notice of administration.

The personal representative filed an amended motion to dismiss the wife's motion to contest the will. The trial court granted the personal representative's amended motion to dismiss with prejudice. The trial court reasoned that any objection to the validity of a will must be served with formal notice within three months after service of the notice of administration.

The appellate court reversed, holding that nothing in Section 733.212(3) or Fla. Prob. R. 5.025, 5.040, or 5.041 requires serving formal notice with the motion to contest the will within three months after service of the notice of administration. The appellate court noted that Section 733.212(3) only requires filing of the motion to contest the will within three months after service of the notice of administration.

Estate was entitled to damages for medical and funeral expenses against tortfeasors despite tortfeasors' action in directly settling claim with hospital, which was creditor of the estate and had filed claim against estate for medical expenses provided to the decedent prior to his death.

Copeland v. Buswell, 20 So. 3d 867 (Fla. 2d DCA 2009)

The decedent was involved in an automobile accident where he suffered injuries which ultimately resulted in his death. Prior to his death, he received medical treatment from a hospital for injuries sustained in the accident.

The personal representative filed a wrongful death action against the driver who caused the accident and his employer ("tortfeasors") seeking to recover medical and funeral expenses. The hospital which provided medical care to the decedent for the accident filed a claim against the estate for the medical expenses. The hospital also moved to intervene in the wrongful death action, which was allowed.

Without notice to the estate or approval from the probate court, the hospital settled with the tortfeasors and their insurance company for an amount less than the actual medical expenses. In exchange, the tortfeasors received a general release from the hospital which also released the claim against the personal representative.

The wrongful death action went to trial where the trial court found that the tortfeasors were solely at fault for causing the accident and that the medical and funeral expenses sought by the estate were necessary.

However, the trial court ruled that it could not award damages for a satisfied debt because of the agreement between the hospital and the tortfeasors. The trial court only awarded funeral expenses which were not covered by the agreement.

On appeal, the appellate court reversed the trial court's decision and ordered the trial court to award the estate all damages it sought for medical expenses in addition to the funeral expenses. The appellate court reasoned that the agreement between the hospital and the tortfeasors circumvented the priority of payments pursuant to Section 733.707 and therefore depleted potential assets of the estate to pay claims that took precedence over medical expenses. The appellate court held that the estate had exclusive jurisdiction to resolve the wrongful death action after the hospital filed its claim against the estate.

Surviving spouse was required to pay part of the estate taxes apportioned to her elective share pursuant to Section 733.817(5)(f) where will did not have express language pursuant to Section 733.817(5)(h)4 directing that property passing under the will is to bear the burden of taxation for property not passing under the will.

Boulis v. Blackburn, 16 So. 3d 186 (Fla. 4th DCA 2009)

The surviving spouse of the decedent appealed three orders from the trial court determining the apportionment of estate taxes against her elective share, homestead

property, and life insurance proceeds.

When the decedent died, he left nothing in his will for the surviving spouse, from whom he was estranged, and devised the residuary of his estate, after payment of funeral expenses, taxes and creditors, to a trust for the benefit of his children and nieces and nephews.

After the surviving spouse filed her request to take her elective share, the trial court approved the request. She then moved for summary judgment to establish the amount of her elective share. In response, the personal representative filed a cross motion for summary judgment requesting the trial court to determine the allocation of any federal estate tax to the elective share, the homestead property, and the decedent's life insurance. The surviving spouse was not a U.S. citizen so she was not entitled to the marital deduction which would apply to the elective share. The trial court agreed with the personal representative that estate taxes should be apportioned to the elective share, homestead property, and life insurance. The surviving spouse appealed.

The surviving spouse argued that certain provisions of the probate code applied to relieve her elective share of any liability for estate taxes. The appellate court disagreed and held that under Section 733.817(5)(f), the net tax attributable to the surviving spouse's elective share is apportionable. It also rejected her argument that Section 732.215 applies so that she owes only the amount of additional taxes her election caused the estate to have to pay.

The appellate court also rejected the surviving spouse's other argument that pursuant to Section 733.817(5)(h)1, the language of the will, that directs the decedent's Personal Representative to "pay out of the property which would otherwise become a part of the Residuary Estate, all estate, inheritance, transfer and succession taxes, including interest and penalties thereon, which may be lawfully assessed by reason of [his] death," would require the taxes on her elective share to be paid out of the residuary estate. The appellate court relied on Section 733.817(5)(h)4 because under that section, the decedent did not effectively direct the payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument. The appellate court cited *In re Estate of McClaran*, 811 So. 2d 799 (Fla. 2d DCA 2002) which addressed the issue of whether the direction in the decedent's will was effective under Section 733.817(5) to override the statutory method of apportionment of estate taxes.

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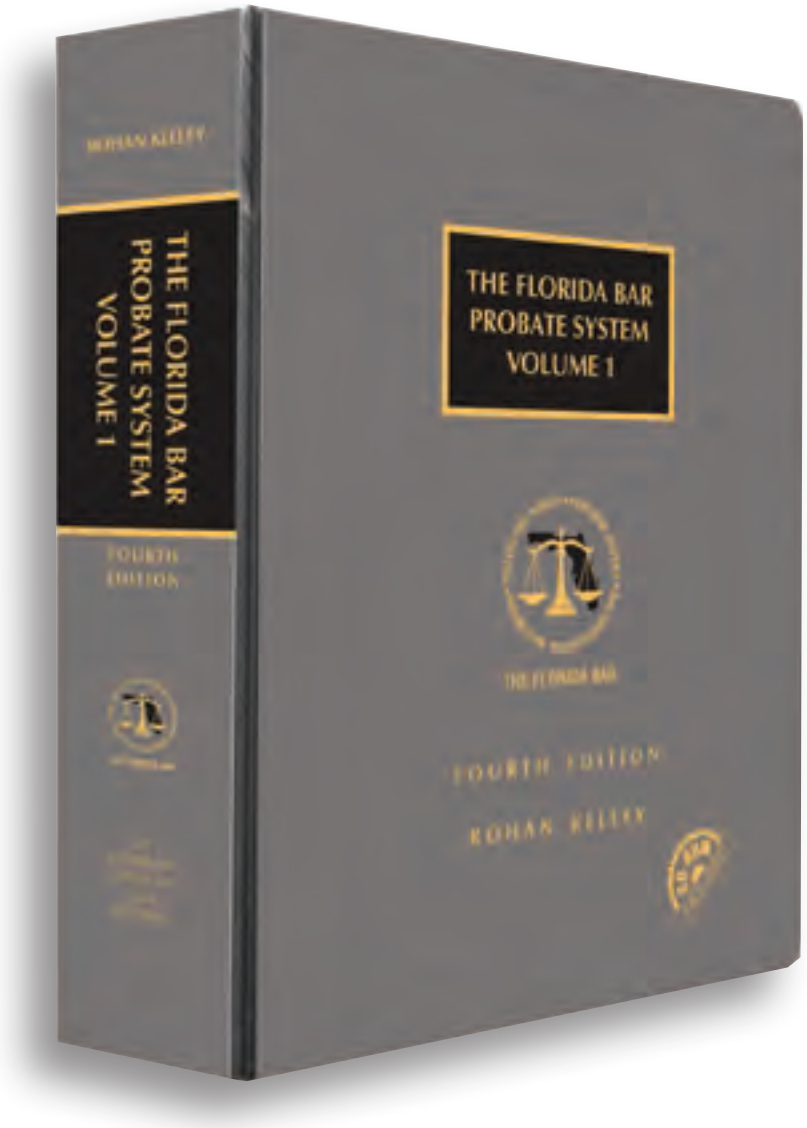

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The appellate court agreed with *McClaran* and affirmed all three trial court orders because the will does not expressly refer to Section 733.817(5)(h)4 nor does it have language expressly indicating that the property passing under the will is to bear the burden of taxation for property not passing under the will.

Court will look at testator's intent in construing ambiguous provisions in will, including the situation of the parties, such as ties and affection between the testator and his or her legatees.

Chin v. Chin, 15 So. 3d 894 (Fla. 3d DCA 2009)

Prior to his death, the decedent drafted a will. When the decedent died, he co-owned property in Miami-Dade County as tenants in common with his sister. Both the decedent and his sister lived on the property.

After the decedent's death, the decedent's son obtained an order of summary administration that transferred to him an immediate half interest in the property. The decedent's son subsequently filed suit against decedent's sister to partition the property and force its sale.

The trial court ordered the partition action stayed to provide the sister with an opportunity to re-open the estate and have her rights to the property recognized. The trial court found that the son, as personal representative, failed to comply with Section 733.212(1)(b) by not giving the sister notice of the original order of summary administration or notice that she was a beneficiary under the decedent's will.

The decedent's will had the following language:

> I direct that property held by me in co-ownership with my brother the said Earl Anthony Chin and with my sister, Mary Victoria Chin, shall not be sold as long as my said brother or sister desires to occupy same.

After hearing all the facts and considering the applicable law, the trial court concluded that pursuant to the quoted language above, the sister was given a life estate to the property. The trial court entered an Amended Order of Summary Administration.

The son appealed and argued that the language from the will only applies to property which was co-owned by the decedent, his brother, and his sister concurrently. The sister argues that the decedent devised a life estate to each sibling with whom he co-owned property.

Because the will's language was ambiguous, the appellate court looked at the family situation. It noted that the decedent co-owned a property with each sibling, which makes it more likely that he wanted each of them to have a life estate. In affirming, the appellate court noted that the decedent did not co-own any property with both his siblings, and in interpreting the will, the appellate court refused to adopt the notion that the decedent inserted a restriction into the will with full knowledge that it had no meaning.

A child is a blood issue where the child was born in wedlock and the father acknowledged paternity in a marital settlement agreement, despite later DNA tests which conclusively exclude the father as the biological father, and thus the child was entitled to inherit despite language in a trust which limited inheritance to "descendants by blood."

Doe v. Doe, 20 So. 3d 892 (Fla. 2d DCA 2009)

[The names of the parties are fictitious to protect the privacy of the individuals involved.]

In 1998, Chester, Jr. and his wife, Eleanor ("settlors"), executed mutual revocable trust agreements that made certain class gifts to the grandchildren of the settlors. The current trustees of the trusts are two of the settlors' sons, Chester III and Roger Doe, and a bank. The trust agreements contained the following language:

> For all purposes, hereunder, in determining whether any person is a child or descendant, only children and descendants by blood shall be included. The term "grandchild" as used herein includes all grandchildren of the Settlor and is not limited to grandchildren by the one son whose death causes a trust to terminate.

The trusts made gifts to various family members upon the settlors' death, including Catherine, the appellant, who was the purported child of Chester III. Catherine was born in 1966 during the marriage of Chester III and Catherine's mother, who were later divorced. Chester III was listed on the birth certificate as Catherine's father.

In 1999, Chester III obtained a DNA test that conclusively excluded him as Catherine's biological father.

After both Chester, Jr. and Eleanor passed away, the trustees filed an action against Catherine and the settlors' three other grandchildren under Section 737.201 seeking an order determining whether Catherine was a beneficiary of the trusts. The trustees relied on the 1999 DNA test to argue that she was not a beneficiary of the trusts as she was not a descendant by blood of the settlors.

After the case was at issue, the trustees and Catherine both filed motions for summary judgment. The trial court denied both motions for summary judgment. Afterward, the trustees moved for an order directing Catherine to submit to a DNA test under Fla. R. Civ. P. 1.360(a), which was granted. Like the 1999 DNA test, the court-ordered DNA test conclusively excluded Chester III as the biological father of Catherine.

Upon receipt of the court-ordered DNA test results, the trial court entered summary judgment for the trustees, basing its ruling on the unambiguous language of the trusts that only children and descendants by blood shall be included as beneficiaries. Catherine's motion for rehearing was denied and her appeal ensued.

The appellate court reversed the trial court's decision because the case law in Florida supports the conclusion that Catherine is in fact the blood issue of Chester III. In addition, the appellate court wrote that the trustees' reliance on the "descendant by blood" language is misplaced be-

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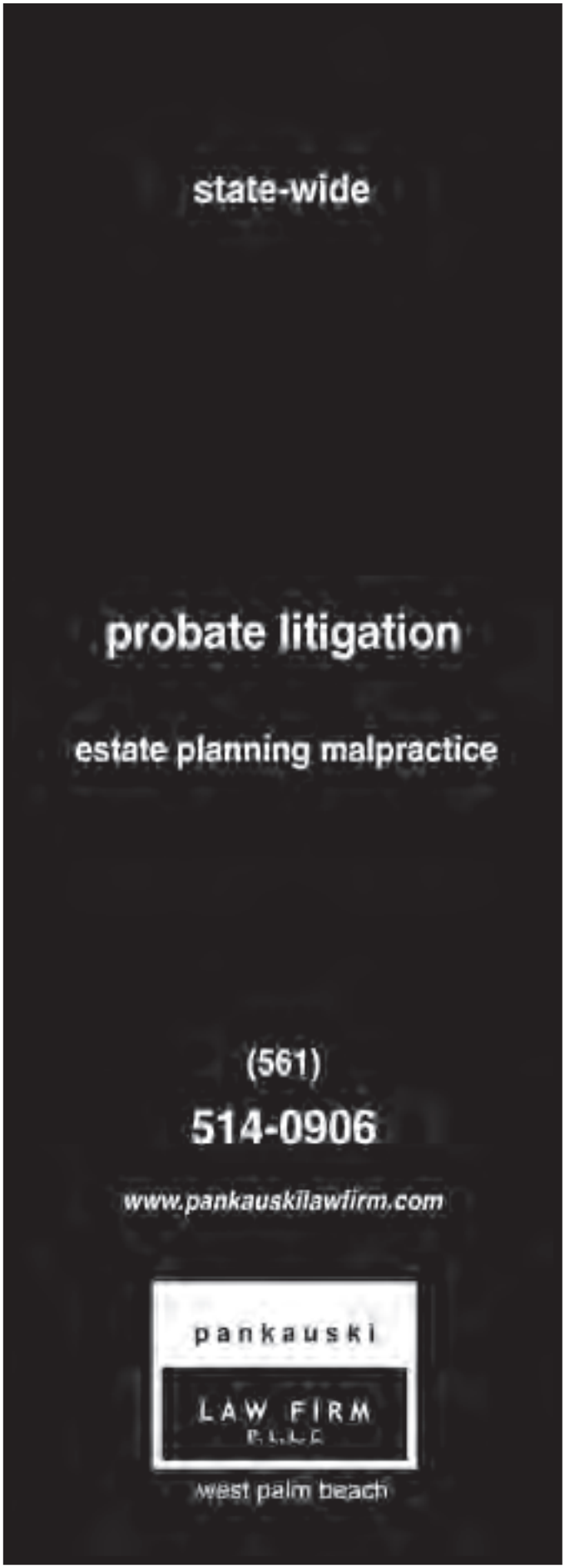

Probate Case Summaries

from preceding page

cause that language has been historically used to exclude adoptees from class gifts. The appellate court noted that based on its research, a limitation to blood descendants has never been applied based on genetic test results to exclude from a class gift a person born into wedlock who would otherwise qualify as a beneficiary of the class gift.

The appellate court held that Catherine was a legitimate child of Chester III based upon the fact that she was born into wedlock, and that when Chester III was divorced from Catherine's mother, the final judgment dissolving the marriage approved the parties' marital settlement agreement wherein Chester III acknowledged paternity of Catherine and agreed to pay support for her. Under relevant Florida case law, the appellate court held that Catherine is indisputably the legitimate child of Chester III. Relying on *Knauer v. Barnett*, 360 So. 2d 399 (Fla. 1978), the appellate court quoted language that a child cannot be a legitimate child without also being a blood issue of that parent.

The appellate court also went over the history of the limitations to "descendants by blood" language and noted that such expressions are terms of art that have been traditionally used to limit class gifts to persons related to the testator, settlor, or other designated person by a blood relationship and thus to excluded adopted persons. The appellate court also noted that the settlors referred to Catherine by name as their grandchild in their trust agreements, and the surviving settlor alive at the time of the blood test did not revise her trust agreement after such test.

Seeking to determine beneficiaries of an estate where there was a potential will contest prior to resolving the will contest is an impermissible request for an advisory opinion.

McMullen v. Bennis, 20 So. 3d 890 (Fla. 3d DCA 2009)

The trial court concluded that a party to a potential will contest was the "virtually adopted daughter" of the decedent, potentially assuring her a distribution from the estate either as a beneficiary under the will or as the sole heir of the decedent under the laws of intestacy.

The personal representative appealed the decision of the trial court.

The appellate court declined to address the merits, holding that a determination of beneficiaries is premature because the validity of the will is unresolved. The appellate court held that the parties' actions in seeking to obtain a determination of beneficiaries prior to resolving the validity of the will is an unauthorized request for an advisory opinion. The case was remanded.

Real Estate Case Summaries

Prepared by Meredith Freeman, Bush Ross, Tampa, FL

A temporary injunction requiring the landlord not only to halt construction, but also to return the property to its original condition was beyond preserving the status quo and improper permanent relief.

Sacred Family Investments, Inc. v. Doral Supermarket, Inc., 20 So. 3d 412 (Fla. 3d DCA 2009)

Doral Supermarket, Inc. (the "Tenant") was a tenant in a shopping center owned by Sacred Family Investments, Inc. (the "Landlord"). The lease prohibited the Landlord from constructing any building on the parking area without the Tenant's consent. Notwithstanding, the Landlord began construction of a two story bank building on the parking area, which would result in the loss of approximately forty parking spaces. The tenant sent two letters advising the Landlord that the construction violated the lease. The appellate court affirmed the trial court's entry of a temporary injunction halting construction. However, the appellate court reversed the trial court's order requiring the Landlord to return the construction site to useable parking spaces, reasoning that the order went beyond the purpose of a temporary injunction which is to preserve the status quo.

Catch-all language in a purchase contract that allowed delays in construction, including *any* matters beyond the developer's control, caused the developer to lose its twenty-four month build exemption under the Interstate Land Sales Full Disclosure Act.

Home Devco/Tivoli Isles LLC v. Silver, 34 Fla. L. Weekly D1932b (Fla. 4th DCA 2009)

Donna Silver (the "Buyer") sued Home Devco/Tivoli Isles LLC (the "Developer") seeking rescission of her contract for the sale of property, alleging that she did not receive a property report as required by the Interstate Land Sales Full Disclosure Act ("ILSA"). The Developer contended that the Buyer did not have a right to rescind the contract because the developer was exempt from ILSA due to the requirement in the contract that construction be completed within two years. The trial court found in favor of the buyer holding that the contract language which included, "any other similar causes not within Seller's control" was broad enough to render the contract illusory. The appellate court agreed, reasoning that the majority view on this issue is that "catch-all language which sought an exception for any matters beyond its [the developer] control, many of which would not necessarily rise to contract defenses under Florida law" causes a developer to lose its exemption.

In denying a plat application, the Gainesville City Commission need not make findings of fact to support its decision, so long as the decision is consistent with competent substantial evidence.

Alachua Land Investors, LLC v. City of Gainesville, 15 So. 3d 782 (Fla. 1st DCA 2009)

The Gainesville City Commission (the "Commission") denied Alachua Land Investors, LLC's plat application without written factual findings. The circuit court noted com-

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petent substantial evidence and upheld the Commission's decision. The appellate court affirmed the circuit court's decision. The appellate court found that findings of fact are not required provided that the court can locate competent substantial evidence consistent with the Commission's decision, that the Commission applied the correct law and that the petitioner was not deprived of due process.

The trial court erred in entering an order requiring Guarantor's wife, a non-party, to disclose financial information when the information sought was not relevant to any pending claim or reasonably calculated to lead to the discovery of admissible evidence.

Rappaport, et al. v. Mercantile Bank, 17 So. 3d 902 (Fla. 2d DCA 2009)

Mercantile Bank (the "Bank") loaned Clearwater City Homes, LLC ("CCH") $2,438,000.00 Alexander Rappaport signed a personal guaranty for the loan; Diane Rappaport, his wife, did not execute a guarantee or otherwise promise to repay the loan. The Bank filed an action for nonpayment of the note against CCH and an action for nonpayment of the guaranty against Alexander Rappaport. Diane Rappaport was not named in the lawsuit. The Bank served Diane Rapport with a notice of deposition duces tecum, seeking Mrs. Rappaport's financial information. CCH and Mr. Rappaport filed a motion for protective order. The trial court entered an order permitting the Bank to take Mrs. Rappaport's deposition and required her to disclose certain financial information. Ms. Rappaport appealed the trial court's ruling. On appeal, the Bank argued that Mrs. Rappaport's financial information was relevant to a potential fraudulent transfer claim. The appellate court found that the Bank could not obtain the discovery because it had not made any such claim against Mrs. Rappaport in any pleading. The Bank also argued that it relied on Mrs. Rappaport's financial information in making the loan to CCH. The appellate court found that there was very little, if any, evidence to support the contention that the Bank actually relied on Mrs. Rappaport's financial information. Furthermore, the appellate court did not find it credible that the Bank would rely on the assets or income of a person who had no obligation to repay the loan. The appellate court quashed the trial court's order finding that Mrs. Rappaport's financial information was not relevant to the Bank's claims or reasonably calculated to lead to the discovery of admissible evidence.

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The Florida Bar and LegalSpan Bring Online CLE to Attorneys

Since August of 2000, The Florida Bar has been offering quality CLE programs as online, on-demand seminars through their partnership with LegalSpan. The popularity of this type of education delivery method has been growing exponentially ever since.

With increasingly hectic schedules and the rising cost of travel, attorneys are turning to the internet to satisfy their educational needs. Online CLE programs offer the flexibility of viewing programs at your own pace, anytime, anywhere.

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"I found this online seminar to be convenient, understandable, and user-friendly. I will use this method more in the future. Thank you for this informational and convenient seminar" — Gerald, West Palm Beach

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With the explosion of MP3 players and iPods in the market, LegalSpan developed the technology to enable The Florida Bar to introduce Downloadable Audio versions of their CLE programs. Since its inception in March of 2006, the downloadable versions of The Florida Bar's CLE programs have become as popular a method of obtaining education as Online CLE. "We want to foster greater collaboration among members and a more vibrant educational dialogue. Attorneys learn best at their own pace, in their own way, in a comfortable environment. Our online options give members educational content when and where they want it" said Programs Division Director Terry Hill.

The Florida Bar's catalog of online and downloadable programs is robust, offering over 200 programs, covering all practice areas. Attorneys are able to enjoy the time and money savings without sacrificing content, by participating in these types of programs. **The complete catalog of Florida Bar CLE courses can be viewed at *www.floridabar.org/cle* by accessing the LegalSpan link under Online Courses.**

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.

SCHEDULE

EXECUTIVE COUNCIL MEETING

January 14 - 17, 2010

The Casa Monica Hotel
St. Augustine, Florida

Hotel Reservations: (904) 827-1888
www.casamonica.com
Room Rate: $199.00

Cut-off Date: December 14, 2009

EXECUTIVE COUNCIL MEETING

March 16 - 21, 2010

The Ritz-Carlton, Kapalua
Lahaina, Maui Hawaii

Hotel Reservations: (800) 241-3333
Room Rate: $370.00 (Deluxe Room)
$370.00 (Garden View Suite)
$325.00 (Deluxe Ocean View)
$395.00 (Ocean View Suite)

Cut-off Date: January 30, 2010

THIRD ANNUAL CONSTRUCTION LAW INSTITUTE & CONSTRUCTION LAW CERTIFICATION REVIEW COURSE

April 8 - 10, 2010

Omni Orlando Resort at ChampionsGate
1500 Masters Boulevard
Championsgate, Florida 33896

Hotel Reservations: (407) 390-6664

FLEA: THE REAL ESTATE TEAM 2010

April 16 & 17, 2010 - Live presentation ONLY

InterContinental Tampa
Hotel Reservations: (800) 235-4670
Room Rate: $174.00

Cut-off Date: March 22, 2010

EXECUTIVE COUNCIL MEETING

May 27 - 30, 2010

Tampa Marriott – Waterside Hotel & Marina
Tampa, Florida
Hotel Reservations: (800) 228-9290
Room Rate: $159.00 (Single/Double)
$179.00 (Triple) $199.00 (Quad)

Cut-off Date: April 27, 2010

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).

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FANNIE MAE RESOURCES FOR ATTORNEYS:

Fannie Mae has an extensive website at https://www.efanniemae.com/home/index.jsp with many resources for attorneys. Under the "Industry Specialist" column there is an "Attorney" link with downloads of forms including guideline publications.

SOME BANKS OPT OUT OF FDIC IOTA INSURANCE PROGRAM:

As reported in *The Florida Bar News*, some banks have decided to opt out of the FDIC program that provides unlimited insurance on ITOA accounts. A list of banks that have opted out of the program can be found on the FDIC's Web site at www.fdic.gov/regulations/resources/TLGP/optout.html.

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

DEADLINE

for submissions for the next issue of ActionLine have been extended to

FEBRUARY 15, 2010.

This issue of ActionLine has been printed on RECYCLED PAPER with soy-based ink!