

ActionLine

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Florida Homestead – The Legal Chameleon
ILIT Trustee Protection
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Catch the Section Fever!



By
Brian J. Felcoski
Section Chair
2010 - 2011

Chair's Column

As a young trusts and estates attorney, I was fortunate to be surrounded by seasoned T&E attorneys who guided my professional development. One of the first things they encouraged me to do was to get involved in the RPPTL Section. Like many other attorneys, I joined a Section committee—the trust law committee. Over time, I observed great lawyers debate trust law issues, discuss the merits of trust legislation and otherwise educate the committee members about current issues. That committee experience provided me with the opportunity to meet trust lawyers from around the State, and receive some of the best "CLE" one could imagine as those lawyers discussed cutting-edge legal issues. Little did I know that the trust law committee was just the "tip of the iceberg" for Section committees and activities. I soon learned there were many other substantive law committees and discovered the Executive Council of the Section and the five meetings of the Council held each year to address Section business. My passion for the Section grew with my involvement. The opportunity to participate in the development of the law, to assist with continuing legal education programs, to meet lawyers and other legal professionals interested in the real property, probate and trust law issues, and to otherwise serve the profession and the public were just some of the reasons why I caught the Section fever.

Today, the Section remains a strong and vibrant organization that offers even more opportunities to lawyers than when I first joined the trust law committee many years ago. Currently, the Section has 17 probate and 18 real property division committees. Those committees address the many substantive law issues that arise in our practices on a daily basis. If you have never attended a committee meeting, I encourage you to do so. You will be pleasantly surprised at the professional level of discussion that occurs during meetings and how relevant the committee work is to your practice. We recently held our 30th Annual RPPTL Legislative and Case Law Update Seminar at The Breakers in Palm Beach, Florida. That seminar highlighted much of the outstanding work of those probate and real property division committees. The accomplishments of those committees are quite impressive, but it all starts with each volunteer lawyer who devotes hours to the improvement of our laws and the profession.

The Section also has 22 general standing committees that address issues common to our members and that help manage the Section's business. Those committees coordinate our legislative activities, draft amicus briefs, prepare our section publications, maintain our website, work to grow a diverse membership, and keep us informed about ethics and professionalism issues. As for our membership, our committee efforts have expanded in recent years to bring in young lawyers to the Section through our fellowship program. Our fellowship committee most recently selected and our Section approved four new Section fellows: Benjamin Bush, Elisa Lucchi, Theodore Kypreos, and Navin R. Pasem. Each of these young attorneys is hard at work on a substantive law committee and Section projects, and we are proud to have them as a part of the Section. With our law school liaison committee, we are also reaching out to law students throughout Florida to inform them about the Section and develop their interest in real property, probate and trust law.

There is much you can contribute as a Section member and our committees are a great place to start. So join a committee. Visit one of our executive council meetings. See for yourself what your Section is doing. Yes, you might catch the Section fever too. I firmly believe you will be happy you did.

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:

John Neukamm once again presents a colorful cover, which won first place in the Section photography contest. Accompanying the cover photo is John's article about the "legal chameleon" on page 13 of this issue.

IN THIS ISSUE:

Chair's Column: Catch the Section Fever! 3

§736.0902 – The ILIT Trustee Protection Statute 5

Mediating the Construction Dispute– Are You Ready to Mediate? 9

4th Annual Construction Law Institute Set for March 2011 12

The Continually Evolving Chameleon: Florida's Homestead Laws... 13

Section Executive Council Meetings 23

The Offices of Criminal Conflict and Civil Regional Counsel – Cost Effective Representation for the Indigent 26

Holding The Trustee Accountable: The Importance of the Fiduciary Trust Accounting 29

Probate Case Summaries 33

Real Estate Case Summaries 38

What's Happening Within the Section... 47

ActionLine Bulletin Board 48

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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.

§736.0902 – The ILIT Trustee Protection Statute

By Patrick J. Lannon, Of Counsel with Goldman Felcoski & Stone P.A., and Marian L. Hasty, a Managing Partner of Gautier & Hasty, P.L., Coral Gables, FL

There has recently been a heightened awareness of the potential liability of irrevocable life insurance trust ("ILIT") trustees.[1] The March 2, 2009, case of *In re Stuart Cochran Irrevocable Trust* is an example of claims that can be made against an ILIT trustee under the Uniform Prudent Investor Act.[2] The trustee in that case was determined not to have violated the prudent investor act or breached any duties, but the next ILIT trustee to be sued on similar grounds might not be so lucky. In addition, recent cases have highlighted the ILIT's need for an insurable interest in the life insurance it owns.[3] This article discusses statutory reduction of ILIT trustee liability with respect to investing and insurable interest under new Florida Statute § 736.0902, effective July 1, 2010.

The Irrevocable Life Insurance Trust.

Though not without its complexities, the ILIT is perhaps the most effective estate tax avoidance planning tool available.[4] Life insurance on the life of the settlor held in a properly formed and administered ILIT passes free of estate and income tax to the named beneficiaries. The policy proceeds are often used to purchase illiquid assets from the estate to provide needed cash for payment of estate taxes. Traditionally the ILIT trustee had all the fiduciary duties of any other trustee, including Prudent Investor Act responsibilities.

Duties of the Trustee.

To minimize the risk that the ILIT will not reach its tax avoidance goals, during the settlor's life a trustee must maintain at least minimal formalities. Generally, these formalities consist of keeping track of beneficiaries and sending Crummey withdrawal notices that correspond to trust contributions/insurance premium payments. In addition to these tax driven duties and absent the application of new Florida Statute § 736.0902, the ILIT trustee also has to perform standard trustee duties under the Florida Trust Code. The standard duties include not only making the premium payments on time but also sending out annual accountings, suitability reviews of life insurance, and investment of trust assets in accordance with the Prudent Investor Act under § 518. Many trustees are also concerned that they will be liable if it is determined that the trust lacks an insurable interest in the life insurance owned by the trust.

Statutory Reduction of ILIT Trustee Liability

Several states have acted to relieve the trustee of liability for handling life insurance as a trust investment, either in general or in the case of ILITs. States with protective statutes include Delaware, West Virginia, North Dakota, Wyoming, South Carolina, and Pennsylvania. Alabama also has a limited statute. As is the case with many protective statutes, Delaware was an early adopter of this legislation.

Florida's New Protective Statute

Effective July 1, 2010, Florida has joined the liability reduction club with new § 736.0902. This statute is best understood as limiting trustee duties and liability in two distinct areas: insurable interest and the prudent investor rule. The statute may be summarized as follows:

Duties Relating to Insurable Interest

If:

- The trust owns insurance on the life of a "qualified person";
- The trust agreement does not opt out of the application of the statute;
- The insurance was not purchased from an affiliate of the trustee and neither the trustee nor an affiliate of the trustee received any commission unless duties have been delegated to another person under § 518.112;
- The trustee did not have knowledge that the beneficiaries lacked an insurable interest when the policy was issued; and
- The trustee did not have knowledge of a stranger owned life insurance ("STOLI") type arrangement,

Then:

The trustee has no duty to determine whether there is or was a sufficient insurable interest in the policy.

Duties Relating to Prudent Investor Rule

If:

- The trust owns insurance on the life of a "qualified person";
- The trust agreement does not opt out of the application of the statute;
- The insurance was not purchased from an affiliate of the trustee and neither the trustee nor an affiliate of the trustee received any commission unless duties have been delegated to another person under § 518.112; and

Either:

- The trust agreement opts in to the application of the statute; or

continued, next page

ILIT TRUSTEE PROTECTION STATUTE

from previous page

- The trustee gives notice to qualified beneficiaries **and** there is no objection within 30 days of receipt or the objection is withdrawn,

Then, the trustee has no duty to:

- Determine whether the life insurance is or remains a proper investment;
- Investigate the financial strength of the life insurance company;
- Determine whether to exercise any policy option available;
- Diversify with respect to the life insurance;
- Inquire about or investigate the health or financial condition of the insured,

And:

The trustee is not liable to the beneficiaries or any other person for any loss sustained with respect to the life insurance

And:

A trustee who performs fiduciary or advisory services relating to the insurance will not be compensated for performing the services listed above or the determination of insurable interest.

To narrow the focus of the statute as to a subset of trusts owning insurance, the statute creates a new concept, "qualified person," as follows:

> "a person who is insured or a proposed insured, or the spouse of that person, *who has provided the trustee with the funds* used to acquire or pay premiums with respect to a policy of insurance on the life of that person or the spouse of that person, or on the lives of that person and the spouse of that person." (Emphasis added).

Query what it means to provide a trustee with funds within the meaning of the statute. How would a split dollar contract be treated, where some funds are provided by a third party such as an employer or a family owned entity? How about indirect transfers, such as by making the ILIT a remainder beneficiary of a GRAT? In any event, it appears that the vast majority of ILITs will have insurance on the life of a qualified person.

A Brief Analysis of Florida's Law

Florida's new law operates in a similar manner to other states such as Delaware, relieving the trustee from any duty to manage the life insurance as an investment. Its protections are perhaps even more powerful than other

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states, since it relieves the trustee from liability for any loss sustained with respect to the life insurance without specific reference to the duties removed. In addition, it goes beyond Delaware by removing any duty to determine whether there is a sufficient insurable interest in the policy as long as the trustee did not have knowledge of a lack of insurable interest or a STOLI type arrangement. Since there is no duty to investigate the insurable interest or STOLI questions, an ILIT trustee should be safe as long as it is ignorant.

However, Florida limits the application of its statute in several ways that Delaware and other states do not. Through the "qualified person" concept, the applicability of the protection depends on the source of funds for payment of the premiums. In addition, a trust agreement can opt out of the application of the statute, and unless the trust agreement opts in, beneficiaries can avoid the application of the statute by objecting upon receipt of notice from the trustee.

In an attempt to reduce abuse of the statute, the statute also prohibits compensation to trustees for performing services as to which the duty has been removed. In addition, the statute does not apply to a trust if the trustee or an affiliate sold the insurance. Delaware and other states have no similar provisions.

It is worth emphasizing that a Florida ILIT trustee is not without protective options if § 736.0902 does not apply. Florida law continues to provide generous liability reduction to ILIT trustees who delegate investment functions in accordance with § 518.112(2), and many other provisions of the trust code provide at least partial protection.[5]

Conclusion

The new Florida statute, § 736.0902, deals with thorny questions of trustee liability the old fashioned way – it eliminates them. Freed from investment responsibilities with respect to an asset that few trustees profess to fully understand, the trustee may focus on paying premiums on time and sending out "Crummey" withdrawal notifications. Those who advise grantors creating ILITs, trustees administering ILITs, or ILIT beneficiaries should review this new statute carefully in order to determine how to draft documents, seek liability reduction, or respond to a request for liability reduction as circumstances require.

A version of this article was published in Steve Leimberg's Estate Planning Email Newsletter – Archive Message # 1681, July 29, 2010.

Endnotes:

1 See, e.g., Patrick J. Lannon and Barry Flagg, Case Law Guidance for Life Insurance Trust Trustees, ActionLine Fall 2009; Patrick J. Lannon, The ILIT "Accommodation" – Florida Law Options, ActionLine Fall 2008.

2 *In re Stuart Cochran Irrevocable Trust*, 901 N.E.2d 1128 (Indiana Court of Appeals, March 2, 2009).

3 See, e.g., Steve Leimberg, Principal Life v. Mosberg: STOLI on the Rocks,

Steve Leimberg's Estate Planning Email Newsletter – Archive Message # 1666, June 28, 2010.

4 For a general discussion of ILITs, see Patrick J. Lannon, Planning Opportunities With Irrevocable Life Insurance Trusts, *Estate Planning* Volume 34, Number 5 (May 2007).

5 See, e.g. Patrick J. Lannon, The ILIT "Accommodation" – Florida Law Options, ActionLine Fall 2008.

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Mediating the Construction Dispute– Are You Ready to Mediate?

By Gregory S. Martin, Esq. Gregory S. Martin & Associates, P.A., Maitland, Fl

Why Mediation?

Mediation is opportunity. An opportunity to resolve the dispute without the risk associated with a trial and often on terms more favorable to the client when all factors are considered. Yet, despite this opportunity, many trial attorneys approach mediation as nothing more than a casual get-together to talk about the case and see if it will settle. However, if trials are not casual get-togethers, why should mediations be treated differently? Unfamiliarity or uncertainty about the mediation process might be an answer. A lack of a sense of urgency because there is always a trial if the case does not settle might be another. But, are the best interests of the client served? If the risk of loss is limited, if a more favorable outcome is available to the client, and if the cost of litigation is curtailed, then a client's interests would seem to be best served by embracing mediation and participating as seriously as though the matter were being tried.

However, there is more to going to mediation than being accepting of the process and willing to talk. As with a trial, parties must prepare for mediation. What are our strong points? What are our weak points? How do our weak points compare to the other side's view of our case? What happens if we lose? These questions and more need to be considered prior to attending the mediation and will likely need to be re-evaluated during the mediation.

Know the Issues

Every case is made up of two basic components – the law and the facts – which seemingly define the breadth of the issues to be considered in any case. Thus, the most basic question to be answered in any case is "how do the relevant facts relate to the applicable law?" However, in a technical industry such as construction this seemingly simple question can quickly become significantly more complex. First, construction law (as it is typically understood from statutes and case law) is often not well developed in any given jurisdiction. Second, "the law" is more than just statutes and case law; the law includes the contract including the technical specifications, the plans and change orders. Third, the relevant facts must be determined through an iterative process between client and counsel to truly define the essence of the dispute. Fourth, blind reliance on experts can be the downfall of a trial attorney; therefore, attorneys must become experts themselves to understand the opinions being expressed and the basis for same.

Why is "knowing the issues" important to the mediation process? While the mediator does not decide the case, the mediator is the guide along the path of self-determination. If one party or the other (or in some situations, both) does not "know the issues", the mediator will likely spend significant time simply trying to get the parties to communicate about the same issues allegedly in dispute. Frustration quickly develops, jeopardizing a mediator's ability to bring the parties together. Worse, without the parties traveling paths that ultimately intersect, resolution of the dispute will be removed from their control. Resolution is then left to a disinterested third-party who will not be as well versed on the issues as the parties.

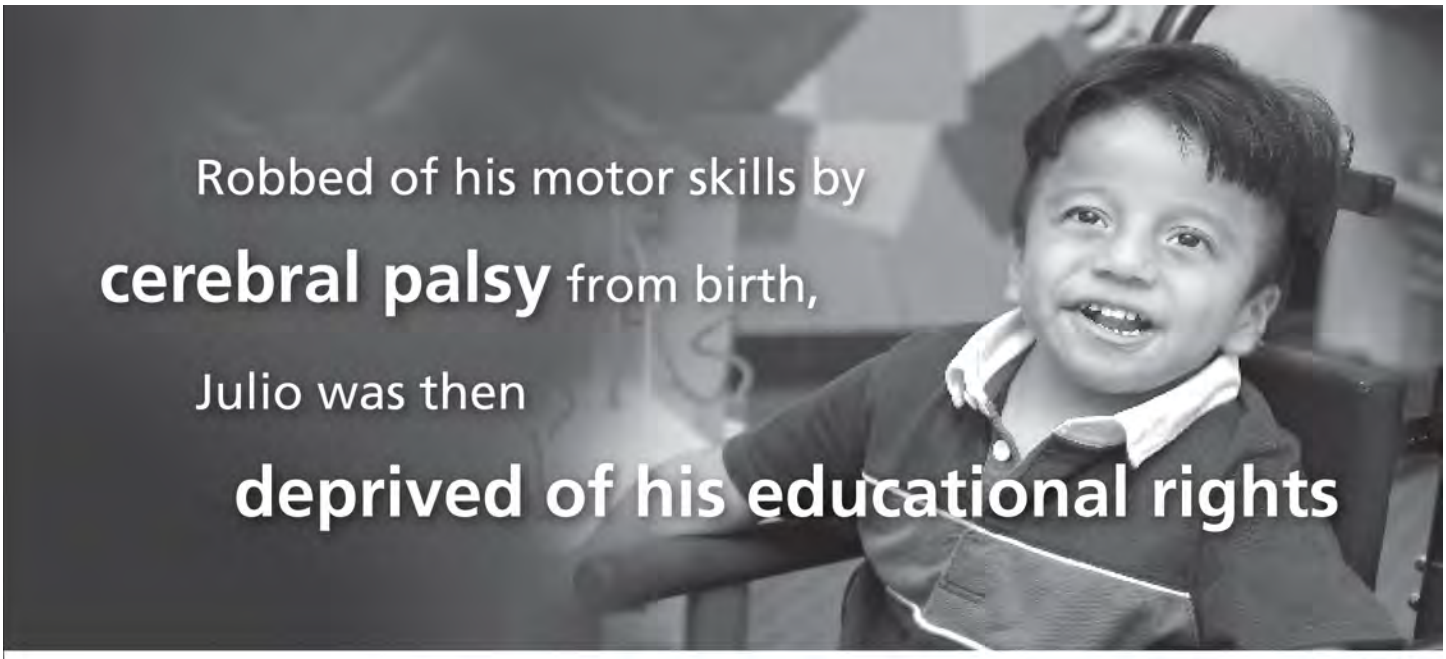
Know the Risks

There are three basic risks of loss that routinely appear in litigation: 1) Damages; 2) Cost of Litigation; and 3) Defendant's ability to pay. Other additional risks may be relevant for consideration: a client's loss of respect or standing; future exposure for a project or an issue; and, loss of future work. How these risks are evaluated is particular to the action being litigated and each client. However, the question of when to evaluate risks is worthy of discussion.

Risks of loss are not constants; they are ever changing given the fluid nature of litigation. An evaluation of damages at the beginning of a case may be radically different than just before or even during trial. Thus, an early case evaluation of the risks of loss does not end the inquiry. New documents come to light which your client only now remembers. Witnesses confident in pre-deposition preparation become shadows of their former selves once being interrogated under oath. Expert witnesses make underlying and undisclosed assumptions in performing their analyses which once brought to light change the complexion of their opinion. Clients, having felt the pain of litigation (going from "I don't care what it costs, sue!" to whimpering "When are the bills going to stop?"), have a change of heart. The court issues a substantive decision affecting the case. And, while reviewable on appeal, how likely is it to be overturned when it is ultimately reached? These factors, among others, can change an evaluation of the risks of loss.

Too often, though, parties to mediation have not fully assessed or evaluated the risks of loss in advance of mediation. Instead, mediations are often viewed as a subset of trial where parties are determined "not to show weakness" even in the face of peril. While there is a risk in mediation to "setting a floor or ceiling" relative to the damages by offers or demands exchanged, failing to candidly explore the boundaries of the risks of loss often assures a trial on the merits. To take full advantage of the opportunity for resolution offered at mediation, parties should first come prepared. The lack of preparation either increases the cost and expense of mediation or dooms it to failure.

continued, page 11



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from page 9

Anticipate/Appreciate/Understand the Other Side

The study of law is more about the process of getting to a result than necessarily the result itself. The critical, impassionate analysis of the law and the facts leads to the natural result whatever that may be. The practice of law (particularly litigation) is all about the result. The facts are presented in the light most favorable to the client; the law is argued to square with the facts. However, to fully prepare for resolution, whether through trial or mediation, effective trial attorneys anticipate the other side's argument, appreciate the positions taken and understand from the other side's perspective both sides of the case. Notably, appreciation and understanding do not necessarily equate to agreement. Rather, they represent an ability to critically evaluate the strengths and weaknesses of a position so that the interests of the client are better served.

Because mediation is a path of self-determination, the boundaries of risks may be explored without the certain finality of a trial. A client and its counsel can discuss openly the strengths and weaknesses of their position. The attorney can test arguments and theories and gauge reactions without concern that the ultimate decision maker (judge or jury) looks askance at the position being taken and reaches conclusions before the close of the entire case. The mediator can aid in expanding the client's own appreciation and understanding of the whole of the case, often acting as a foil to the trial attorney's advocate role or aiding the trial attorney in the counselor role that must be taken. However, the opportunity to explore the risks is significantly diminished if the attorney does not engage in the exercise of anticipating, appreciating and understanding the whole of the case prior to engaging in mediation.

The Demand

There are two primary factors which should be considered when formulating the demand. The first is obvious – what level of recovery does the client desire? The other is not as readily apparent (or is at least overlooked). Credibility is crucial to the collaborative process of dispute resolution that mediation represents. What does it say of the plaintiff's credibility when the demand bears little relationship to the damages sustained? Similarly, a credible, cogent demand demonstrates strength of position and communicates confidence. Wildly unsupportable demands often suggest that the plaintiff is trying to overcome deficiencies in its case by making the perceived risk of loss on the defendant greater. More times than not, however, such fantastical demands have the opposite effect and simply drive the defendant to the conclusion that negotiation is simply a waste of time and resources. Thus, the message communicated with the demand is as important as the need to make a demand in advance of mediation.

Similar comments apply with equal force to the defendant's offer. Obviously, the offer reflects a desire to pay as little as possible towards the plaintiff's claim. However, unrealistic offers which do not critically consider the risks and the defendant's exposure to damages harden a plaintiff's position. "Why should I come off my number until they make a credible offer," is often the response when the defendant's offer is communicated through the mediator. Plaintiffs left with no alternative but to try the case, take up the thrown gauntlet and a trial ensues. Thus, both plaintiff and defendant should give serious and significant consideration to demands and offers made to foster a climate that encourages rather than discourages a collaborative process to resolution.

Preparation is Critical

Whether for a client meeting, a hearing before the court, or a trial, preparation is an inviolable rule; attorneys participating otherwise do so at their peril. An attorney's approach to mediation should be no different. While a failed mediation may not result in the immediate consequences of attending court unprepared, a failed mediation represents a loss of opportunity for the client to resolve its dispute without the attendant risks associated with trying a case. Thus, failing to resolve a dispute in mediation due to a lack of preparation is no less a disservice to the client than attending court unprepared.

Importantly, preparation for mediation does not represent a separate path from preparation for trial. Whether for mediation or for trial, attorneys must know the issues and anticipate, appreciate, and understand the other side's position. How else are trial plans and strategies properly developed? Moreover, evaluating the risks is not simply saved for negotiations. Credibility is critical in a trial; unfounded and untenable positions severely damage a party's credibility. Without evaluating the risks, trial preparation is incomplete. Lastly, for the same reason the demand is important in a negotiation setting, the underlying message sent to the trier-of-fact through the demand should weigh heavily on trial counsel.

Conclusion

Mediation is opportunity. But, to be able to make the most of that opportunity, parties must be prepared before the day of mediation. Just as trial counsel should not engage in a deposition, hearing or trial without preparation and an understanding of the merits of their position, trial counsel should not blithely attend mediation thinking that if it fails a trial remains. The opportunity of mediation is to serve your client's interests by seeking a resolution which controls or limits their risk of loss. To serve that aim, preparation is critical. Know the issues; know the dispute; anticipate, appreciate and understand the other party's position; and credibly develop the first demand or offer – these are fundamental to a successful mediation. Just as failing to settle due to a lack of preparation is a disservice to your client, so is settling a case just to bring it to conclusion.

4th Annual Construction Law Institute Set for March 2011

On March 31 - April 2, 2011, the **Fourth Annual Construction Law Institute** will be held at the **Omni Orlando Resort, ChampionsGate, Florida.** In addition to advanced level seminars, the event will include a golf tournament on Thursday, March 31st, and evening receptions on March 31st and April 1st. Over 360 Construction Lawyers and Industry Professionals attended the 2010 Institute and we expect more in 2011. The Honorable Chief Justice Charles T. Canady will address the attendees during the Friday lunch session. The Saturday morning breakfast speaker will be Kenneth D. Simonson, Chief Economist The Associated General Contractors of America. We thank the sponsors listed below for their commitment to the Fourth Annual Construction Law Institute.

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The Continually Evolving Chameleon: Florida's Homestead Laws

By John B. Neukamm, Mechanik Nuccio, P.A., Tampa, FL

Florida's homestead exemption laws have been likened by the commentators to a chameleon "which changes color to accord with the background against which it is viewed." It has been noted, however, that "there exist today definite contours that remain distinguishable amid the camouflage of varying factual situations."[1] In this article, I hope to provide some background which will allow you to more easily discern and distinguish Florida's legal chameleon, as well as to describe its evolution.

In fact, like the three-horned chameleon featured on the cover of this publication, there are actually three distinct aspects of Florida homestead law (each of which derive from different constitutional and statutory bases), as follows:

Exemption from creditors' claims;

Restrictions on alienation; and

Tax exemptions and benefits.

The constitutional bases for the exemption of a Florida homestead from creditors' claims (both during the homestead owner's life and after their death) are set forth in Subsections 4(a) and (b) of Article X of the Florida Constitution. In addition, Chapter 222, Florida Statutes sets forth the statutory scheme to implement Florida's constitutional protections against the forced sale of homesteads. Article X, Section 4(c) of the Florida Constitution establishes restrictions on the alienation of a homestead. Restrictions with respect to the devise and descent of homestead property are clarified in Sections 732.401 and 732.4015, Florida Statutes. Finally, Article VII, Sections 4(d) and 6 of the Florida Constitution set forth the framework for Florida's homestead tax exemption laws (which are codified in Chapter 196 and in Section 193.155, Florida Statutes).

Creditors' Claims Exemptions

The concept of a homestead exemption is unique to American law and did not exist at common law (although English canons of decency provided an exemption for a debtor's necessary clothing).[2] Florida was the fourth state to provide some form of homestead protection for debtors when, in 1843, certain items of personal property were exempted from creditors' claims. In 1868, Florida's first constitution provided exemptions from creditors' claims for up to 160 rural acres and up to a half acre within a city owned by a debtor.

In an early decision, the Florida Supreme Court described the purposes of laws providing for the exemption of property from forced sale as follows:

> The object of exemption laws is to protect people of limited means and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want, and against the consequences of ill advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasion of others.[3]

Initially, therefore, the two major purposes of Florida homestead exemption laws were to prevent poverty (and the consequential need for public assistance) and to protect debtors from their own poor decisions. As subsequently provided in Article X, Section 4(b) of Florida's Constitution, the creditors' exemption was extended to the surviving spouse and heirs of a deceased owner of homestead property.

With the foregoing background, let us now examine the creditors' exemption with respect to homesteads in greater depth, both in the context of the rights inuring to the benefit of the homestead owner during their lifetime, as well as the rights of the surviving spouse and heirs after the homestead owner's death.

What is Homestead?

As set forth in Section 4(a) of Article X of the Florida Constitution, a "homestead" owned by a "natural person" is exempt from forced sale.

"Homestead" Property: While the extent of homestead property is described in the Florida Constitution, the term "homestead" is not explicitly defined. However, the case law provides some guidance.

In 1928, the Florida Supreme Court held that "the homestead intended by our Constitution to be exempt is the place of actual residence of the party and his family, and …a temporary absence of the head of a family in search of health, pleasure, or for business reasons will not deprive the homestead of its character and status as such unless there was a design of permanent abandonment."[4] The court continued by stating "[i]t is equally as well settled, however, by the cases just cited, that a permanent abandonment of the homestead as a bona fide home and place of permanent abode strips it of its homestead character. A homestead is abandoned by taking up a permanent abode at a distant place. Whether there has been an abandonment of a homestead so as to deprive it of its status as such under the Constitution should be determined by a consideration of all the pertinent facts and circumstances of each case."[5] Thus, the court concluded that "[t]he character of property as a homestead depends upon an actual intention to reside thereon as a permanent place of residence, coupled

continued, page 15

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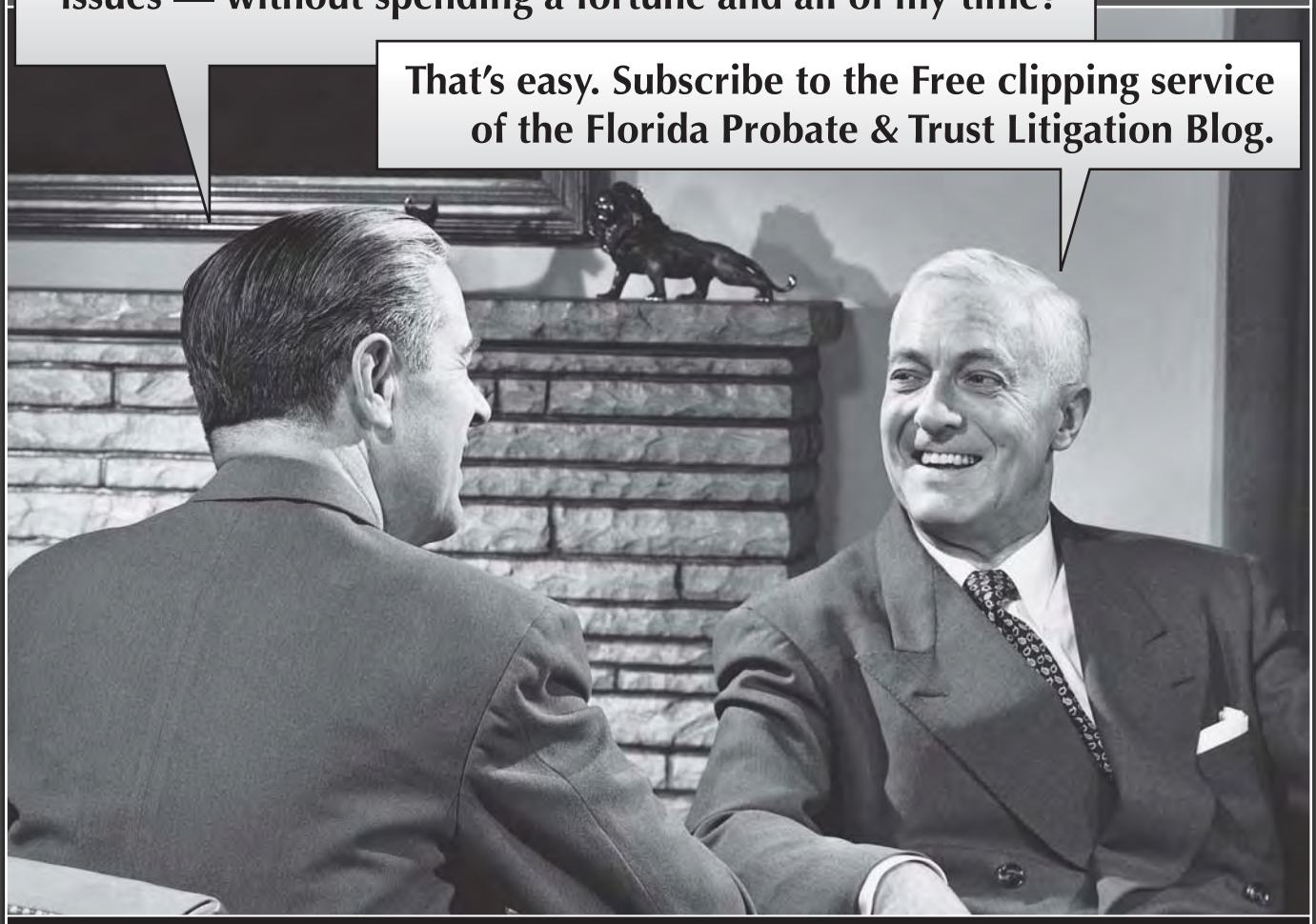

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with the fact of residence."[6] As the Florida Supreme Court subsequently noted, once created, a homestead interest can only be waived by abandonment or by alienation in the manner provided by law.[7]

Owned by a "Natural Person": Since January 8, 1985, it has no longer been necessary to be a "head of family" in order to avail oneself of the homestead exemption from creditors' claims; it has only been necessary to be a "natural person." A "natural person" is defined in the Florida Statutes, in the context of stock and mutual insurers, as "an individual."[8] However, there is no explicit definition of a "natural person" in the homestead context under the Florida Constitution or the Florida Statutes. Nevertheless, Florida cases have generally confirmed the approach described in the foregoing statute. For example, a bankruptcy court held that a residence held in a revocable trust by a trustee who resided on the property and was also the settlor was held by a "natural person" and was, therefore, exempt from creditors' claims.[9] However, it should be of no surprise that partnership property has been held not to constitute the homestead of one of the partners.[10]

Extent of Homestead

Article X, Subsection 4(a)(1) of Florida's Constitution provides that a homestead located outside a municipality consists of up to one hundred sixty acres of contiguous land and improvements thereon or of up to one-half acre of contiguous land within a municipality (upon which the exemption shall be limited to the residence of the owner or the owner's family).

Outside a Municipality: Property used as a mobile home park which was contiguous to residential property located outside a municipality has been held to qualify for the homestead exemption from creditors' claims in a case in which the total acreage was less than 160 acres.[11]

Within a Municipality: A bankruptcy court held that, when two separate structures were located upon a single lot which could not be subdivided and only one of the structures was used for residential purposes (with the other being used for rental purposes), only the structure utilized for residential purposes qualified for the homestead exemption from creditors' claims.[12] In another bankruptcy case, the bankruptcy trustee was authorized to sell an entire indivisible 2.3 acre tract located within a municipality upon which the debtor's residence was located, with an apportionment of the sales proceeds between the homestead and non-homestead portion of the property.[13]

Contiguous Land: A husband and wife who purchased their residence located upon one lot, along with four other contiguous lots (which were used for their driveway and front lawn) were found to be entitled to homestead protection with respect to all five lots regardless of the fact that they had only claimed a homestead exemption for ad valorem tax purposes with respect to the lot upon which their residence was located.[14] The same result was reached in a case involving two contiguous lots which were acquired in separate transactions.[15]

Types Property Interests Qualifying as Homesteads

The Florida Constitution does not distinguish between different types of ownership interests or property that qualify for the homestead exemption.[16]

Life Estates: A life estate interest "that gives the owner the right to use and possess a co-op as his or her residence may be sufficient" to establish a homestead interest which is exempt from creditors' claim since homestead is broadly defined as "property owned by a natural person ... upon which the exemption shall be limited to the residence of the owner or the owner's family."[17] In that case, the court recognized that the Florida Constitution does not define "owned," and stated:

> "[I]t does not designate how title to the property is to be held and it does not limit the estate that must be owned, i.e., fee simple, life estate, or some lesser interest.... [T]he Florida courts have consistently held that the exemption should be liberally construed in favor of protecting the family home and those whom it was designed to protect"[18]

In analyzing the ownership interest necessary to claim the homestead exemption, consideration must be given to a person's intention to make the property their homestead and the actual use of the property as the principal residence.[19] At least one other court has also held that a life estate is a protected homestead interest.[20]

Leasehold Interests: Florida courts have also upheld homestead exemption claims in cases in which the debtor merely leased the underlying real property.[21] In a Florida bankruptcy case, the debtor claimed that his residence located on a long-term leasehold was exempt under Florida law, and the court, citing the "long and well established history of liberally construing and applying" the homestead exemption, concluded that "ownership" for purposes of the homestead exemption is not limited to fee simple ownership. Rather, the court found that a lessee's interest in a leasehold estate is, for all purposes, the equivalent of absolute ownership and is protected by Florida's homestead exemption.[22]

Trusts: Both Florida appellate and bankruptcy courts have held that legal title does not need to be in an individual's name in order to qualify for Florida's homestead exemption. As noted above, a residence held in a revocable trust by a trustee who resided on the property and was also the settlor was held to be owned by a "natural person" and was, therefore, exempt from creditors' claims.[23] In another case, legal title to a home was held not in the debtor's name, but in the name of another person, as trustee. The court found

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that, even if the debtor only owned a beneficial interest in the property, she was entitled to homestead exemption.[24] Another recent case held that a residence held in a revocable trust was owned by a "natural person" for purposes of Florida's homestead exemption.[25]

Partial Interests: A half interest, the right of possession or any beneficial interest in property may be entitled to homestead protection from creditors' claims.[26]

Types of Property Qualifying as Homesteads

Just as Florida courts liberally construe ownership interests qualifying for homestead status, the courts have broadly construed the types of property qualifying for homestead treatment for the purposes of the creditors' claims exemption. Thus, Florida courts have held that condominiums,[27] mobile homes,[28] co-operatives[29] and boats[30] all qualify as homesteads for the purposes of the creditors' claim exemption. However, a remainder interest in real property does not qualify as an exempt homestead interest since such an interest does not constitute a present possessory interest.[31] A very recent case recognized that insurance proceeds paid after a homestead suffers casualty damages are constitutionally exempt from creditors' claims; in that case, the court confirmed that such proceeds were not subject to a charging lien securing the debtor's attorneys' attorneys' fees.[32]

Application of Homestead Exemption from Creditors' Claims

As set forth in Article X, Section 4(a) of the Florida Constitution, a homestead owned by a natural person is exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed thereon.

Designation of Homestead Before Levy:

Pursuant to Section 222.01, Florida Statutes, a person wishing to avail themselves of Florida's homestead exemption from creditors' claims and who wishes to sell or encumber their homestead property may record a Notice of Homestead in the public records of the county in which the homestead property is located if a certified copy of a judgment is recorded in the public records. That statement should be in substantially the form set forth in the statutes.

After recordation, the Clerk is required to furnish a copy of the Notice of Homestead upon the judgment creditor reflected in the Notice, and, if the creditor fails to file an action seeking declaratory relief or foreclosure of their judgment lien within 45 days (and record a lis pendens), the sale or encumbrance described in the Notice of Sale shall be free and clear of the judgment lien. Subsection (5) of the foregoing statute provides that, in accordance with the Florida Constitution, the statute shall not apply to:

(a) Liens and judgments for the payment of taxes and

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assessments on real property,

(b) Liens and judgments for obligations contracted for the purchase of real property,

(c) Liens and judgments for labor, services, or materials furnished to repair or improve real property, or

(d) Liens and judgments for other obligations contracted for house, field, or other labor performed on real property.

Designation of Homestead After Levy: Pursuant to Section 222.02, Florida Statutes, whenever a levy is made upon property, a portion of which constitutes homestead property, the owner may, at any time before the sale date, notify the officer making the levy, by written notice under oath, of which portion of the property they regard as their homestead, and only the remainder shall be subject to sale under such levy.

Effect of Bankruptcy Laws: Federal bankruptcy law reduces the homestead exemption by the amount attributable to the debtor's disposition of non-exempt property with the intent to hinder, delay or defraud creditors within 10 years prior to the bankruptcy filing.[33] This provision is intended to prevent debtors from transferring the bulk of their assets into homestead property shortly before filing bankruptcy in order to eliminate debts while claiming their home as exempt property. In addition, bankruptcy law disallows homestead exemptions in excess of $125,000 (which may be stacked with a joint debtor's exemption limitation) to the extent that additional value was added within 1,215 days of the bankruptcy filing, unless the additional value derived from another homestead within the same state or the homestead is the principal residence of a family farmer.[34]

Federal Tax Liens: The federal government may levy upon homestead property because federal law preempts the Florida Constitution. In fact, the federal government may even levy upon homestead property held as tenants by the entireties to satisfy a federal tax lien against only one of the spouses.[35]

Protection of Surviving Spouse and Heirs

As noted above, the homestead exemption from creditors' claims derives from Article X, Subsection 4(b) of the Florida Constitution. The most "user friendly" and thorough analysis of Florida's homestead laws with respect to the exemption of a decedent's homestead from creditors' claims (as well as issues related to the devise or descent of homestead) is set forth in Rohan Kelley's "Homestead Paradigm," which, with his generous permission, is reproduced below.

Protected Homestead: For the purposes of Florida's Probate Code, "protected homestead" means the property described in Article X, Section 4(a)(1) of the Florida Constitution on which the exemption inures to the owner's surviving spouse or heirs under Article X, Section 4(b) of the Florida Constitution,[36] and real property owned as tenants by the entirety is not "protected homestead." Protected homestead is not considered to be an asset in the hands of the personal representative under the Florida Probate Code;[37] thus, it is not subject to probate[38] or administrative expenses.[39]

Creditors' Claims Exemption: Only the decedent's surviving spouse and heirs are entitled to the homestead exemption from creditors' claims. If a decedent is not survived by a spouse or heirs, as defined in the Florida Probate Code,[40] then the decedent's homestead is not "protected homestead" and will be subject to creditors' claims. "Heirs" are defined to include those persons (including the surviving spouse), who are entitled under the statutes of intestate succession to a decedent's property. If a testate decedent was not survived by a surviving spouse or minor children but was survived by heirs, the homestead may be devised to any person described as an "heir" under the intestacy statute in order to qualify for the creditors' claims exemption.[41] However, if the homestead is devised to a person not qualifying as an "heir," it will not be considered to be a "protected homestead," and it will be subject to probate administration, administrative expenses and creditors' claims. Furthermore, if a decedent bequeaths proceeds from the sale of their homestead to their heirs, the homestead loses its protected status.[42]

Personal Representative's Lien: Notwithstanding the foregoing, the personal representative is entitled to a lien for funds advanced to preserve homestead property.[43]

(See "Kelly's Homestead Paradigm" Illustration, next page)

Restrictions on Alienation: The foregoing Homestead Paradigm provides an excellent segue between the issue of homestead exemptions from creditors' claims and issues arising from efforts to sell, encumber or otherwise transfer homestead realty. As noted above, in addition to the provisions set forth in Article X, Subsection 4(c) of the Florida Constitution, specific restrictions with respect to the devise and descent of homestead property are set forth in the Florida Probate Code.[44]

Devise and Descent of Homesteads: Florida law provides that, except with respect to entireties property or property devised as permitted by applicable law[45] and the Florida Constitution, the homestead shall descend in the same manner as other intestate property. However, if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.[46] The Florida Probate Code restates the constitutional mandate that the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child, except that the homestead may be devised to the owner's spouse if there is no minor child.[47] Notwithstanding the foregoing, homestead rights (as well as other spousal rights) may be waived in a properly executed marital agreement; provided, however, fair disclosure must be provided if the agreement is executed after marriage.[48]

continued, next page

FLORIDA'S HOMESTEAD LAWS

from previous page

Spousal Joinder Required for Inter Vivos Alienation of Homestead: As set forth in Article X, Subsection 4(c) of the Florida Constitution, the owner of homestead realty may, if joined by their spouse if married, alienate the homestead by mortgage, sale or gift, and, if married, may transfer title to an estate by the entirety with their spouse. Obviously, if the owner is unmarried, no spousal joinder is required (but a recitation confirming the unmarried status is advisable). Married individuals must be joined by their spouse, and it is recommended that the joinder be in the same instrument.[49]

Exceptions:

(1) Powers of Attorney: Joinder may be accomplished through the use of a power of attorney (provided that the power of attorney was executed in the same manner as required for a deed).[50]

(2) Creation of Tenancies by the Entireties: It is not necessary for the other spouse to join in the execution of a deed which creates a tenancy by the entireties in homestead property that was previously owned by only one of the spouses.

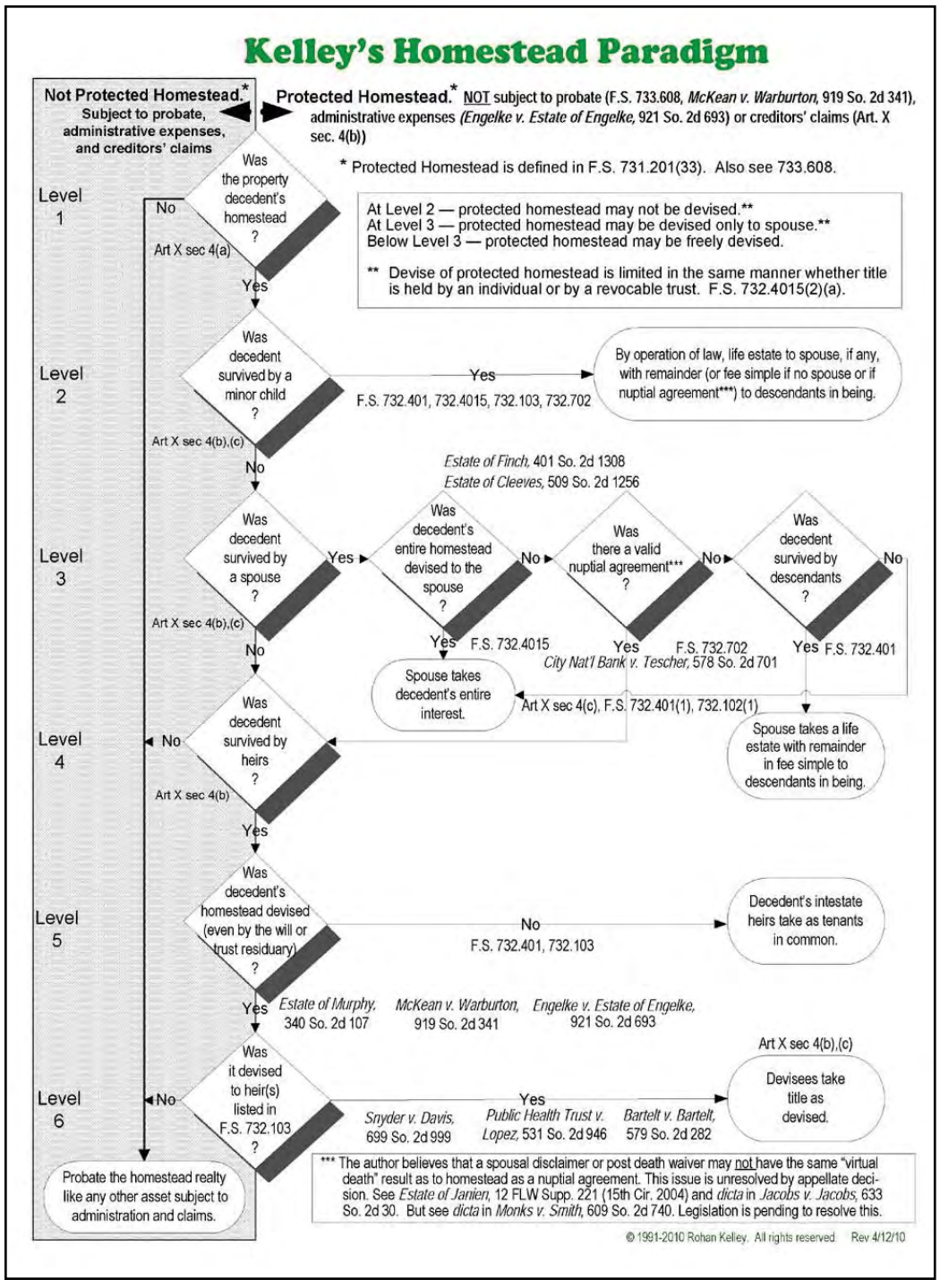
(3) Guardianships: If a spouse is incompetent, the guardian may, with court approval, join in the execution of the deed on behalf of the incompetent spouse.[51]

Effect of a Spouse's Failure to Join:

(1) Conveyances: If homestead property is purportedly conveyed via deed without spousal joinder, the deed is a nullity and is void *ab initio*.[52]

(2) Mortgages: If homestead property is encumbered without spousal joinder, the mortgage is voidable.[53] However, a spouse who joins in the execution of a mortgage which includes a promise to pay may be liable for amounts due under the promissory note, even if the spouse did not execute the note, unless clear disclaimer language is included in the mortgage.[54]

Tax Exemptions and Benefits: One of the most confusing aspects of homestead law is the distinction between the availability of homestead exemptions from creditors' claims and various property tax benefits available with respect to homestead property. As noted above, the constitutional bases for homestead exemptions and benefits for tax purposes are set forth in Article VII of the Florida Constitution (and are further addressed in Chapter 196, Florida Statutes and in



Section 193.155, Florida Statutes), while the constitutional bases for homestead exemptions from creditors' claims and alienability restrictions are set forth in Article X of the Florida Constitution.

The most obvious distinction between the tax exemptions and other benefits described in Article VII and the creditors' rights exemptions and alienability restrictions arising under Article X is that the homestead status arising under Article X either exists or does not exist depending on the nature and ownership of the property; no action on the part of the owner or third parties is necessary. On the other hand, in order to avail oneself of the tax benefits set forth in Article VII, a taxpayer must affirmatively apply for those tax benefits within specific time frames. Thus, in a bankruptcy case referenced above, the court held that the creditors' rights exemption existed with respect to all five contiguous lots owned by the debtors despite the fact that the debtors had only claimed a homestead exemption for ad valorem tax purposes with respect to the single lot upon which their residence was located.[55]

Homestead Tax Exemption

Florida's Constitution allows up to $50,000 to be deducted from the assessed value of a primary residence (provided, however, only $25,000 may be deducted for the purpose of calculating the assessed value for school taxes). The first $25,000 and the third $25,000 of the property's value (that portion of the property's value between $50,000 and $75,000) may be deducted from the assessed value. In order to avail oneself of the homestead tax exemption, a taxpayer must fulfill the following requirements:

The taxpayer must have legal or beneficial title to the property recorded in the appropriate public records prior to January 1st of the year of application.

A homestead application (Florida Department of Revenue Form DR-501) must be submitted to the appropriate Property Appraiser's office on or before March 1st of the year for which the exemption is sought (unless that date falls on a weekend or legal holiday, in which event the deadline is extended to the next business day).

The taxpayer must establish the appropriate Florida County as their legal domicile, reside on the subject property and be a U.S. citizen or permanent resident.

Once homestead exemption is established it is automatically renewed each year, until there is a change of ownership. Florida law requires the property owner to inform the appropriate Property Appraiser's office of any change in residency, use of the property or marital status that would affect the qualification of the homestead exemption.

If the taxpayer only uses a portion of their property for residential purposes, the Property Appraiser may allocate the homestead exemption and benefits between the homestead property and the non-homestead property. Thus, in a recent case, the court approved the apportionment of the homestead exemption between a single apartment building unit within which the taxpayer resided and the remaining four units which were rented to third parties.[56] In that case, the court specifically noted, in a footnote, that:

> The term "homestead" is used in two other contexts in the Florida Constitution. First, it is used to define property that is protected from forced sale by creditors under article X, section 4(a)-(b) of the Florida Constitution. Second, it is used in the context of devise and descent in article X, section 4(c). The definition of "homestead" in those two contexts is distinct from that term's definition in the context of property taxation… It is well appreciated in the case law concerning homestead that the definition of homestead property for Article VII, section 6 purposes is not the same as Article X, section 4 of the Florida Constitution.[57] We recognize that the homestead provisions found in Article VII and Article X of our constitution are separate and distinct, and principles relating to one do not necessarily govern the other.[58]

For taxation and finance purposes, the court explained that the Florida Legislature had defined "real estate used and owned as a homestead" as real property to the extent provided in Article VII, Section 6(a) of the Florida Constitution, but less any portion thereof used for commercial purposes.[59] That statute goes on to provide that property rented for more than 6 months is presumed to be used for commercial purposes.

A similar result was reached in a recent case in which the court confirmed that the applicable statute,[60] which provides that the rental of an entire dwelling previously claimed as homestead for tax purposes shall constitute abandonment of the homestead, could be construed to deny a homestead exemption to a taxpayer who rented their prior dwelling, other than two locked closets, since the closets constituted a *de minimis* amount of space within the building.[61]

"Save Our Homes" Amendment: The "Save Our Homes Amendment" to Florida's Constitution (also commonly known as Amendment 10) was approved by Florida voters in 1992 and became effective as of January 1, 1995. This amendment limits any annual assessment increases on Florida homestead properties to the lesser of 3% or the increase in the CPI (consumer price index). However, except for specified statutory exceptions (which include interspousal transfers),[62] when homestead property is transferred, the homestead exemption is removed, and, subject to the portability rules described below, the assessed value increases to just value during the following year. There are exceptions to that limitation, including new construction or additions which are found to have escaped assessment increases in the past.

The "Save Our Homes" Amendment has been the subject of several lawsuits alleging that the Amendment is unconstitutional, three of which have been considered by the 1st DCA. In its first decision on this particular issue, the 1st DCA affirmed the trial court's order finding that the Article VII, Section 4(c) of the Florida Constitution did not violate the plaintiffs' rights under the Equal Protection Clause, the Privileges and Immunities Clause or the Commerce Clause of the United States Constitution.[63] Essentially, the plaintiffs argued that the "Save Our Homes" Amendment has a dis-

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criminatory effect upon nonresidents. The court noted that the federal constitutional challenges had all been rejected in previous cases, including a U.S. Supreme Court case which upheld California's constitutional amendment limiting property tax increases to 2% per year in the absence of a change of ownership,[64] and a prior 1st DCA decision which upheld the $25,000 homestead exemption.[65]

Two other cases addressing the constitutionality of the "Save Our Homes" Amendment, as well as the portability provisions described below, were considered by the 1st DCA on November 17, 2009. In the *Bruner* case, Florida residents alleged that both Amendments 10 (the "Save Our Homes" Amendment) and 1 (the Amendment giving rise to portability) violated the federal constitution,[66] and, in the *DeLuccio* case, nonresidents made identical arguments.[67] In *Bruner*, the court noted that it had already considered and rejected virtually identical challenges, so the court affirmed the trial court's dismissal of the plaintiffs' complaint. In *DeLuccio*, the court reversed the trial court's determination that it did not have subject matter jurisdiction to consider the complaint and remanded the case back to the trial court. Since the trial court had erroneously concluded that it lacked jurisdiction to consider the case, the appellate court noted that it also could not consider the merits of the case. However, it specifically noted that the case raised nearly identical challenges to those that had been raised and rejected by the court in the *Bruner* case.

Other Exemptions: In addition to the general homestead exemption described above, homestead property owned by certain taxpayers or used for certain purposes may be subject to other exemptions, including an additional $50,000 homestead tax exemption for taxpayers at least 65 years old with household income of less than $25,000 (subject to inflation adjustments) provided that the taxpayer's county or municipality has approve that additional exemption, and a discount for certain partially or totally disabled veterans who are at least 65 years old in proportion to their combat related disability.

Portability: Finally, on January 28, 2008, Florida voters approved Amendment 1, which allows Florida residents who owned property qualifying as homestead property for tax purposes in 2007 or later to transfer the benefit of their "Save our Homes cap" (or a portion thereof) to subsequently acquired Florida homestead property. In order to qualify for portability benefits, the taxpayer must timely file an application on Florida Department of Revenue Form DR-501T, as provided in F.S. §193.155. Essentially, the portability benefit allows the taxpayer to transfer their entire assessment savings (not to exceed $500,000) to their new residence if "upsizing" and a pro-rated portion of their assessment savings (again, not exceeding $500,000) to a "downsized" new residence. The Hillsborough County Property Appraiser has provided the following explanation which more clearly illustrates the application of the portability concept to "real world" factual scenarios:

(See illustration below.)

Conclusion

While Florida's homestead laws are quite complicated and have evolved significantly over the years, through careful consideration of the foregoing analyses and continued study of future evolving developments with respect to our legal chameleon, it is possible to apply the appropriate laws in each applicable situation to arrive at the correct conclusion.

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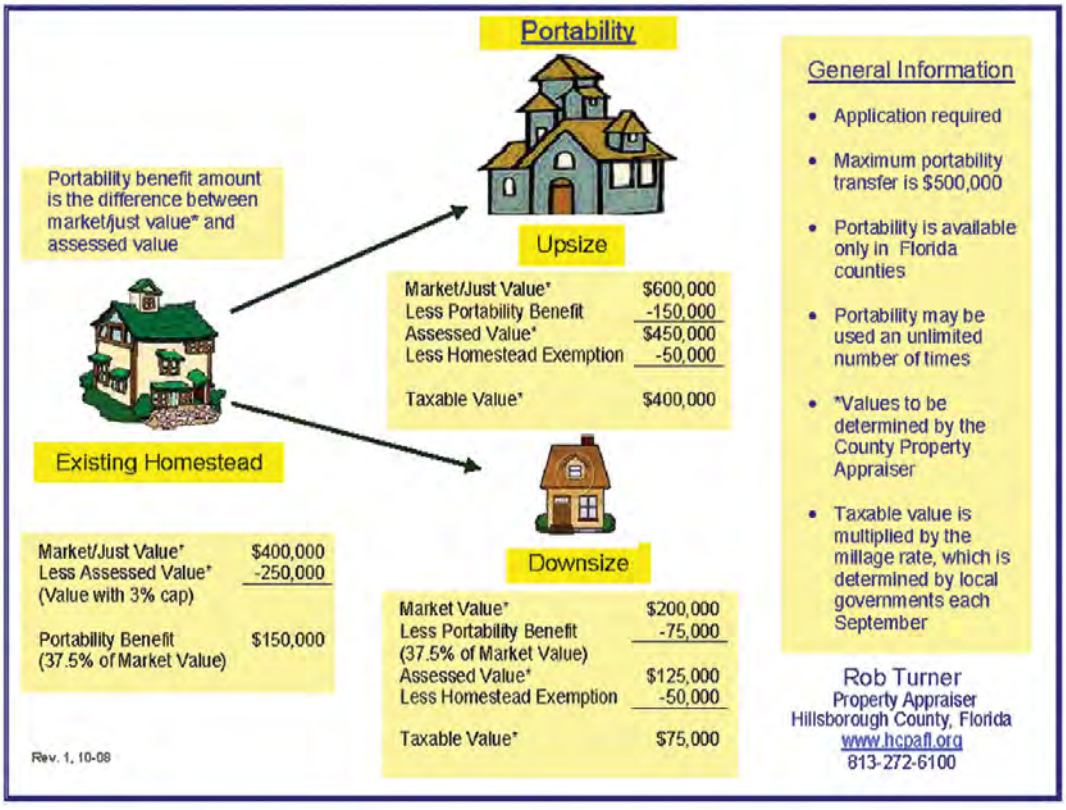

FLORIDA'S HOMESTEAD LAWS

from previous page

Endnotes:

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2 Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. Fla. L. Rev. 227, 228 (1978).

3 *Carters Administrators v. Carter,* 20 Fla. 558, 569 (1875).

4 *Lanier v. Lanier*, 116 So. 867 (Fla. 1928), citing *Matthews v. Jeacle*, 55 So. 865 (Fla. 1911), and *Murphy v. Farquhar*, 22 So. 681 (Fla. 1897).

5 *Lanier* at 868 (citing *Nelson v. Hainlin*, 104 So. 589 (Fla. 1925)).

6 *Lanier* at 868.

7 *Hillsborough Investment Co., v. Wilcox*, 13 So. 2d 448 (Fla. 1943), citing *Clark v.Cox*, 85 So. 173 (Fla. 1920).

8 F.S. §628.4615(13).

9 *In re: Alexander*, 346 B.R. 546 (Bkrtcy. M.D. Fla. 2006).

10 *Buchman v. Canard,* 926 So.2d 390 (Fla. 3rd DCA 2005), *rev. den.* 929 So.2d 1051 (Fla. 2006).

11 *Davis v. Davis*, 864 So.2d 458 (Fla. 1st DCA 2004).

12 *In re: Bell*, 252 B.R. 562 (Bkrtcy. M.D. Fla. 2000).

13 *In re: Radtke*, 344 B.R. 690 (Bkrtcy. S.D. Fla. 2006).

14 *In re: Coin*, 241 B.R. 258 (Bkrtcy. S.D. Fla. 1999).

15 *In re: Mohammed*, 376 B.R. 38 (Bkrtcy. S.D. Fla. 2007).

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30th Annual Attorney Trust Officer Liaison Conference

June 16 - 18, 2011
Palm Beach, The Breakers Resort

Course No. 1210R

Section Executive Council Meetings

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

Palm Beach— August 5-8, 2010

If you like crystal clear blue waters, outstanding food, excellent fellowship, hot sun and cool jazz then you would have loved Real Property, Probate and Trust Law Section Executive Council and Committee meetings that were held at The Breakers from August 5th through August 8th.

The Committee meetings started bright and early at 8:30 am on Thursday morning and continued throughout the day, with the final meeting of the Circuit Representatives ending by 5:30 that afternoon. The Thursday evening reception was a short bus ride to a local venue called "Top of the Point" which is a private club that offers stunning views of Palm Beach County along with tasty appetizers. The evening continued in the Chair Suite back at The Breakers.

Friday was the 30th Annual Legislative update, and was extremely well-attended. The Legislative update is one of the most popular seminars presented by the Section and gave everyone an opportunity to be updated about the significant number of developments affecting our practice areas, which have been recently adopted as law.

Friday cocktails were served at The Breakers in the Mediterranean ballroom followed by dinner overlooking the Atlantic Ocean. As usual, there was a special event for the children with a pizza party and movie that evening, and again, our reptiles gathered in the Chair's Suite for comical conversation and nightcaps. We have some really fun folks, especially our sponsors, so if you are not visiting the Chair's Suite for after-hours camaraderie, you are missing out on a good time.

Saturday morning again started out early at 8:00 am with the Roundtables, one for Real Property and one for Probate, and the Executive Council meeting was called to order shortly thereafter. The minutes of the Executive Council meeting are posted on the website to be read and reviewed at any time.

Saturday evening was something quite unique. The busses took everyone to a casual evening at City Place and "BB King's House of Blues." The band was absolutely outstanding, the jazz was hot and the food was southern fun with lots of fried chicken, collard greens, macaroni and cheese and the old classic, banana pudding.

The annual meeting at The Breakers is always a very popular event. In fact, Liz tells us that the hotel is already booked up for 2011 although there are some very nice spots that are close by if you didn't make a reservation at The Breakers. Hope to see you there next summer.

Ritz Carlton — September 24-26, 2010

While it's pretty near impossible to outdo the service and amenities that were offered by The Breakers at our August meeting, the Ritz Carlton in Orlando came pretty darn close.

Situated back from the road in a very gorgeous setting, including a hill (I didn't realize we had any hills in Orlando until I went to the Ritz Carlton), the Ritz Carlton is a gorgeous location and a wonderful place to get away from it all, while still being close to all the fun stuff Orlando has to offer.

While this was a meeting where lots of important business was accomplished, it didn't seem quite as hectic as some of our other Section meetings. The location seemed to impart a pleasant emphasis on business as well as social and fun activities.

Committee meetings started at 1:30 p.m. on Thursday and continued throughout the day on Friday. The Thursday evening welcome reception was held at the Ritz, and the food served went way beyond your typical hors d'oeuvres. On Friday while the meetings were occurring, the spouses and guests went on a Winter Park Tour that everyone reported was lots of fun. Friday night dinner and reception at the Ritz Carlton was absolutely superb. And of course, Thursday and Friday evenings, as well as Saturday, the frivolity continued late into the evening in the Chair's Suite.

Saturday morning kicked off with the usual Probate and Real Estate Roundtable breakfasts. Those breakfasts are always complimentary and the turnout is typically pretty good. The Executive Council Meeting began shortly after 10:00 a.m., and even though the agenda was jam-packed, the meeting concluded shortly after noon. During the afternoon from 2:00 p.m. through 4:00 p.m., our fearless Chairman led an Eco Canoe Tour through some of the very pretty surroundings immediately adjacent to the Ritz Carlton.

Saturday night was a really fun activity for both adults and children. The busses took the participants to Sea World for dinning among the sharks. Some people might ironically characterize that as "taking coals to new castle." The food was excellent and the setting was completely unique. Everybody had a chance to fraternize with the fishes in a very up-close and personal fashion.

This unique and relaxing weekend ended with the farewell breakfast on Sunday morning. If you are not attending the Executive Council Meetings, you are really missing out on some great venues, excellent food and convivial conversation.



Palm Beach Meeting photos by John Neukamm and Michael Gelfand; arrangements by Kelly Catoe, Photo Editor.



Orlando Meeting photos by John Neukamm and Michael Gelfand; arrangements by Kelly Catoe, Photo Editor.

Agency Snapshot:

The Offices of Criminal Conflict and Civil Regional Counsel

Cost Effective Representation for the Indigent

By Joseph P. George, Jr., Esq., Offices of Criminal Conflict and Civil Regional Counsel

When the cost of private court-appointed attorneys' fees in state criminal and civil cases mushroomed from nearly $49 million to nearly $95 million dollars in just two years, the Legislature, in response, passed Florida Statute 27.511, effective July 1, 2007, titled, "Offices of criminal conflict and civil regional counsel; legislative intent; qualifications; appointment; duties." This statute created five (5) Offices of Criminal Conflict and Civil Regional Counsel to represent persons entitled to court-appointed counsel under the Federal or State Constitution. For the first time in Florida, indigent parents accused by the government of mistreating their children are now assigned a government lawyer in these civil law cases including child dependency, termination of parental rights and involuntary civil commitment cases. Moreover, Regional Counsel attorneys are now directed to be court-appointed as secondary safety net counsel in all criminal cases where the Office of the Public Defender is unauthorized to provide representation, or is unable to provide representation due to a conflict of interest, including the defense of Death Penalty cases. The Legislature stated that representation in all of these cases should be done in accord with constitutional principles of due process in a "fiscally responsible manner."

Each of these five newly created offices is located in one of the state's five appellate courthouse districts. They are headed by a Regional Counsel, appointed for a term of four years by the Governor, and confirmed by the Senate. In making these appointments, Governor Crist said, the new offices would provide important legal representation to some of Florida's most vulnerable citizens.

This unique agency was created to handle far more than criminal matters. By statute, the agency is required to provide representation to indigents in such diverse matters as: Dependent child matters under Chapter 39, Florida Statutes (Fla. Stats.); termination of parental rights under Chapter 63, Fla. Stat.; cases involving sexually transmitted diseases under Chapter 384, Fla. Stat.; Tuberculosis Control Act cases under Chapter 392, Fla. Stat.; Developmental Disabilities under Chapter 393, Fla. Stat.; Florida Mental Health Act (Baker Act) commitment cases under Chapter 394, Fla. Stat.; Jimmy Ryce Act cases under Chapter 394, Fla. Stat.; Substance Abuse Services (Marchman Act) commitment cases under Chapter 397, Fla. Stat.; Adult Protective Service Act cases under Chapter 415, Fla. Stat.; Disability of Non-Age of Minors under Chapter 743, Fla. Stat.; Guardianship Law under Chapter 744, Fla. Stat.; Children and Families in Need of Services under Chapter 984, Fla. Stat.; all criminal and civil appeals related to the above, and all Florida Rules of Criminal Procedure Rule 3.800, seeking postconviction relief cases and Rule 3.850 cases, where the court determines that appointment of counsel is necessary to protect a person's due process rights.

The task of building five new offices, all from scratch, and all simultaneously, was not always smooth for the new Regional Counsel. There were legal challenges, disputes with counties over funding and resources, budget constraints and extremely diverse geographical considerations. For example, how to serve one county consisting of 44 islands connected by 43 bridges spanning over one hundred miles.

And before the ink was dry on their appointments, the five Regional Counsel were sued by the Florida Association of Criminal Defense Lawyers ("FACDL"). The Florida Supreme Court, in a "question of great importance," reversed the trial court's order and held that the new offices were not a second-tier "appointed" Public Defender, but "an essential safety net" backup system, utilized only when the office of the Public Defender has filed a Certificate of Conflict of Interest.

Other pending litigation affecting the new agency includes: A suit for declaratory and supplemental relief, where 25 counties and the Florida Association of Counties are challenging Florida Statute 29.008(1), which requires the counties to pay for services related to communications, radio, information, construction and lease, maintenance, utilities and security for the new offices, like the other long existing Florida court system agencies of the offices of the state attorney, public defender and trial courts. The trial court and the First District Court of Appeal found that the counties need not be responsible for the above costs and the matter is currently on appeal to the Florida Supreme Court.

And finally, there are the several lawsuits brought by the Public Defender for the 11th Judicial Circuit, alleging excessive caseloads and under funding, in which the trial court ruled that the Public Defender would decline taking 3rd Degree felony cases that would result in thousands of additional cases being transferred to the new agency. The Third District Court of Appeal reversed the trial courts and these matters are currently on appeal to the Florida Supreme Court.

Yet today, the Offices of Criminal Conflict and Civil Regional Counsel, in spite of the obstacles, is fully functional, carrying out its statutory mandate, and have handled over

100,000 cases. It has been estimated that to date, the new offices have saved the state over 100 million dollars in payment of private attorney' fees. But more importantly, the agency has stabilized and raised the bar of legal representation to Florida's most vulnerable. In addition, the agency provides legal representation to Florida's indigent in many new and diverse areas. It is evident that the Regional Counsel's have proven that legal service delivery to indigents can be accomplished in a cost effective manner, without sacrificing quality representation.

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Holding The Trustee Accountable

The Importance of the Fiduciary Trust Accounting

By Joseph W. Fleece, III, Baskin Fleece, Clearwater, FL

A trustee is a person who has broad discretion with very little oversight over someone else's assets. Practically the only time a beneficiary can review what the trustee has done and have an opportunity to challenge those actions is when the trustee provides an accounting to the beneficiary. As such, one of the many duties a trustee has is the duty to inform and account. This fiduciary duty is critically important to ensure that the trustee is properly discharging his or her fiduciary duties in managing the affairs of the trust.

A Fiduciary Has a Duty io Inform and to Account

A beneficiary of a trust has standing to seek an accounting and it is from that accounting that a beneficiary can enforce the terms of the trust and hold the trustee accountable. A trustee also has the right to seek an accounting from a co-trustee. It has also been held that the settlor's estate has standing to seek an accounting from the trustee of the settlor's trust, even if the estate is not an income or residuary beneficiary, if the trust document provided for the payment of settlor's debts, estate claims and expenses.

For this very reason the law of trusts has always imposed a duty on the trustee to keep the beneficiary informed as to the administration of the trust and to account to the beneficiary for all actions taken by the trustee. Without a proper accounting disclosing how the trustee has handled the trust affairs, there is little chance of a trustee being held accountable and therefore,the trustee's duties could be breached at will without any means of redress. The burden of proof is on the fiduciary to show that he has fully performed his duties, and the means for such proof is by providing a sufficient and proper accounting.

The Florida Trust Code explicitly sets forth the trustee's duty to inform and account. A trustee is under a duty to provide an accounting to the beneficiaries on an annual basis, when there is a change of the trustee and on the termination of the trust.

Accordingly, a trustee is under a duty to keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration and provide each qualified beneficiary with an accounting. In order to obtain an accounting, it is not necessary that the beneficiary allege that the trustee is in default or that a payment is due.

The duty to account is so fundamental to the law of trusts that this duty cannot be diminished by the trust itself. The trust instrument may provide that a trustee need not account or only account informally to a beneficiary, but according to the Florida Trust Code, any such limiting provisions are ineffectual and cannot relieve the trustee of his or her duty to account fully to a qualified beneficiary. This is a codification of the common law of trusts. Additionally, a qualified beneficiary can only waive his or her right to an accounting if the waiver is in writing.

One way to look at the need for an accounting is to consider the trust accounting as the road map which should show all the financial activities of the trustee for the accounting period and is the vehicle that is used by the beneficiaries to hold the trustee accountable.

A Trustee Is Under a Duty to Keep Accurate Records

A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust.It is important for the trustee to keep clear and complete records so that the beneficiary can tell whether the trustee has acted with prudence, loyalty, and impartiality and whether the costs of administration have been reasonable and appropriate. Courts have held that when one becomes a trustee, he must maintain records of his transactions so complete and accurate that he can show by them his faithfulness to the trust. It is not enough for the trustee to know that he is honestly performing his duty. "Since generally the burden of proof rests upon him to prove his fidelity, he must be able to sustain his position by honest records."

In Florida the Florida Trust Code explicitly states that a trustee shall keep clear, distinct and accurate records of the administration of the trust.

When he or she assumes the trusteeship, a trustee should set up a bookkeeping system to keep track of all receipts, disbursements and transactions. The trustee should also set up a filing system so that vouchers, receipts, or other documents evidencing receipts, disbursements or capital transactions can be kept safe and produced when needed to substantiate the accounting.

A trustee who, after being requested to do so, refuses to provide a beneficiary with relevant information about the assets of the trust, how the trust is being administered or other material information being considered by the trustee in the discharge of his duties or who refuses to provide an accounting when required, has breached his fiduciary duty owing to the beneficiary.

Sufficiency of the Accountings

The Florida Trust Code codifies what should be included in the trust accounting. The account of the trustee should show in detail the items expended and show when, to whom, and for what purposes the payments were made, so that the beneficiary can make a reasonable test of the accuracy of the accounts. A complete statement of prin-

continued, next page

cipal and income both received and expended, present investments, proposed distributions, payment of expenses, commissions and fees should be included.

Keep in mind that the function of a fiduciary accounting is two-fold. It is to ensure the beneficiary is fully informed as to what the trustee has done with the trust assets for the accounting period. And, it is to serve as a vehicle for relieving the trustee from further liability for his past actions as trustee. This is the traditional concept of discharge accounting. Both functions are premised on full disclosure and the price of immunity is disclosure.

Moreover, a trustee cannot fulfill his duty to account by merely turning over to the beneficiary the check register of the trust bank account, a list of checks, bank statements, copies of bills and receipts. It is the duty of the trustee to provide a proper and sufficient accounting. The accounting cannot leave discrepancies in what was received and disbursed and must match the actual bank records or other source documents. Federal income tax returns are not sufficient because federal laws as to what is taxable income and which expenses are deductible differ from a determination of income and principal under the Principal and Income Act.

Failure to Keep Accurate Records

All presumptions are taken against the fiduciary, and the burden of proof is on the fiduciary to prove that any expenses were proper disbursements.

If a trustee fails to keep clear, distinct and accurate accounts, all presumptions are against the trustee. A trustee must have records to support the disbursements made from the trust, and all doubts and obscurities will be resolved against the trustee.

When the trustee's claim for reimbursement for expenses is based on his own testimony, which is vague and not supported by vouchers, the claim will be disallowed.

Objections to the Accounting

A beneficiary who has received an accounting, together with a limitation notice, has six months to challenge and object to the accounting. The challenge to the accounting is done by filing an action in the circuit court asking the court to review and settle the accounting. If the accounting discloses a breach of fiduciary duty, another count should be added to the complaint seeking to hold the trustee liable for that breach of fiduciary duty. The objections to the accounting should be set forth with specificity. Prior to filing a complaint, the beneficiary should attempt to obtain information from the trustee as to any questions the beneficiary may have as to the accounting entries, including the inspection of source documents kept by the trustee. If the trustee fails to provide the additional information to the beneficiary, then those documents can ultimately be discovered once a lawsuit has been brought against the trustee either for failing to account, for failing to properly account, or for breaching his fiduciary duty.

When an objection is made, the burden should be on the trustee to show the propriety of an act or transaction set forth in the accounting, but if he makes a prima facie case, the burden of proving contrary evidence should return to the one making the objection.

The issues are framed by the accounting and the objections raised thereto. The court should pass only on objections specifically raised and should not decide questions not raised by the parties or collateral questions.

The court may make an order or decree, which is deemed equitable, and usually (1) rejects the account and requires a new one, or (2) corrects the accounting, or (3) approves it as originally presented or as modified.

The court also has the power to direct who is to receive what assets and may direct the trustee to reimburse the trust for breach of trust.

Remedies for Failure to Account

The failure to account is a breach of fiduciary duty. The Florida Trust Code has a specific section on remedies for breach of trust. Remedies include the removal of the trustee, reducing or denying compensation to the trustee, requiring the trustee to repay money to the trust or by restoring property to the trust by other means, or any other relief the court deems appropriate.

If the trustee cannot establish that disbursements, sale of assets or other payment of expenses from the trust were proper, the trustee could be held personally liable for those transactions. A trustee could also be held liable for the value of all property improperly conveyed.

When a trustee does not maintain any records, the courts have disallowed the expenditures of the trustee and charged those against the trustee as well as the value of property improperly conveyed by the trustee.

Defenses

Consent, Release or Ratification. A trustee will not be held liable for a breach of trust if the beneficiaries consented to the transaction, ratified the transaction or released the trustee from liability for the transaction. However, the beneficiaries must know of their rights and all material facts relating to the transaction and the consent, release or ratification cannot be induced by improper conduct of the trustee.

Waiver. A beneficiary may waive the trustee's duty to account, but any such waiver must be in writing and the beneficiary may withdraw that waiver as to future periods.

Statute of Limitations and Statute of Repose. Once the trustee renders its accounting to the beneficiaries and provided that accounting adequately discloses all matters, then the four year statute of limitations for breach of fiduciary duty begins to run. If an accounting is not provided to the beneficiaries, or that accounting does not fully disclose all material matters, then the statute of limitations never begins to run as to the non-disclosed matters.Claims may

subsequently be barred by a statute of repose contained in the Florida Trust Code.

Even though an accounting has never been provided to a beneficiary, claims of beneficiaries can be barred in Florida after the later of ten years from when the trust terminates, the trustee resigns or the fiduciary relationship ends, provided the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary during those ten years. Actions can be barred after twenty years from the date of an act or omission of the trustee, provided the beneficiary had actual knowledge of the existence of the trust, and the beneficiary's status as a beneficiary during those twenty years or forty years after the termination of the trust, the trustee resigns or the fiduciary relationship ends.

The four year statute of limitations, nevertheless, does not begin to run until there has been adequate disclosure or until repudiation. If a beneficiary has actual knowledge of the matter not adequately disclosed in the accounting, and it can be proven by clear and convincing evidence that the beneficiary had actual knowledge, or if there has been a repudiation of the trust by the trustee and the beneficiary has actual or constructive notice of the repudiation, then the four year statute of limitations will bar that claim.

The fact that a trustee has not rendered an accounting for many years is only knowledge of a breach of trust and not repudiation of the trust and thus, the statute of limitations is not triggered. However, if the beneficiary demands an accounting and the trustee refuses, that may be sufficient to put the beneficiary on notice that the trustee has repudiated the trust, thus triggering the four year statute of limitations.

Laches. The doctrine of laches is an equitable defense which will bar a cause of action if a person "sleeps on his rights." If a beneficiary has knowledge that a trustee has denied the existence of the trust or that trustee has repudiated the continued existence of the trust and a sufficient amount of time passes during which the beneficiary failed to take any action to hold the trustee accountable, the courts could deny the beneficiary's claim for having waited too long to assert it. However, if the trustee by fraud, deception or otherwise misleads a beneficiary, including by remaining silent when he ought to have spoken up so that the beneficiary is unaware of his rights, laches will not bar a subsequent claim brought by the beneficiary.

Trustee Released From Liability

Once the trustee renders its accounting to the beneficiaries and provided that accounting adequately discloses all matters, then the four year statute of limitations for breach of fiduciary duty will bar the claims of the beneficiaries.

As four years is a rather long time for a trustee to wait to find out if he is off the hook, a trustee can now shorten that time period by providing the beneficiaries with a "limitation notice" at the time of providing the accounting and in accordance with the Florida Trust Code. This limitation notice advises the beneficiaries that an action by a beneficiary against the trustee for any matter adequately disclosed in the accounting may be barred unless an action is commenced within six months after receipt of the accounting.

However, if a trustee provides a "trust disclosure document" to a beneficiary and that document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim, that too can start the running of the statute of limitations or the shorter six month limitation if accompanied with a "limitation notice".

A trust disclosure statement is defined as a trust accounting "or any other written report of the trustee." Thus, even if the trustee does not provide the beneficiaries with a fiduciary accounting but does provide a written report which discloses a potential claim, the statute of limitations begins to run.

Another way to shorten the liability period of the trustee, other than by a written waiver, ratification or release, would be for the trustee to bring an action for the court to review and settle the accounting.

A trustee who sends out an accounting with a limitation notice cannot be compelled to make distributions to beneficiaries within that six month period unless the beneficiaries sign a release.

Conclusion

With the office of trustee comes very serious duties and responsibilities. The duty to inform and account is only one of many duties owed by a trustee to a beneficiary. Without keeping meticulous records and accounting for all transactions, the trustee could be personally liable for failing to do so. To avoid liability, a trustee must be vigilant at all times in keeping track of all receipts and disbursements, must be aware of the need to properly allocate these receipts and disbursements between income and principal, and must fully disclose these transactions in a timely manner.



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Probate Case Summaries

Prepared by Elisa F. Lucchi, RPPTL Section Fellow
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GUARDIANSHIPS:

Sufficient evidence is required to rebut the statutory presumption that a designated preneed guardian is entitled to serve as guardian.

Acuna v. Dresner, 41 So. 3d 997 (Fla. 3d DCA 2010)

Prior to her incapacity, the ward executed a written declaration of preneed guardian naming the ward's three daughters together, or the survivor thereof, to serve as plenary guardian. If no daughters were able or willing to serve as guardian, the ward named her son-in-law as plenary guardian.

Three years later, son-in-law filed a petition to determine incapacity seeking a determination of: (1) the ward's total incapacity, and (2) the appointment of a plenary guardian. At the hearing, son-in-law presented evidence concerning the ward's incapacity and evidence that the three daughters were in disagreement as to the ward's living arrangements. The trial court, based on the representations made by son-in-law, found that the declaration named the three daughters to act in unison and that any disagreements amongst the daughters would cause the ward's assets to dissipate quickly. Although the actual declaration had not yet been filed with the court, the trial court appointed the ward's accountant as her plenary guardian. Two daughters appealed.

The appellate court cited *Estate of Salley v. Comprehensive Pers. Care Servs., Inc*., 742 So. 2d 268 (Fla. 3d DCA 1997) noting that where a ward's preference of guardian is capable of being known, that preference is the "polestar" to guide judges in the appointment of guardians. The court noted Fla. Stat. §744.3045 provides for a statutory rebuttable presumption in favor of the designated preneed guardian to serve as guardian, unless the guardian is unqualified to serve.

Pursuant to *Miller v. Goodell*, 958 So. 2d 952 (Fla. 4th DCA 2007), an appellate court reviews a probate court's appointment of a guardian under an abuse of discretion standard. Where the ward has designated a preneed guardian in a written declaration, the rebuttable presumption in favor of the designated preneed guardian may only be overcome by substantial, competent evidence.

The appellate court found the trial court abused its discretion in appointing the ward's accountant as her plenary guardian on the grounds that: (1) the trial court failed to properly consider the declaration (which was not then filed) and instead relied on representations made by son-in-law; (2) the declaration is clear that the ward's intent was for her three daughters to serve as her guardian without the requirement of unanimity and that none of the daughters was unqualified, unwilling or unable to serve; (3) there was no evidence that the appointment of the daughters as guardians would not be in the ward's best interest; and (4) no evidence that disagreements amongst the daughters would cause the ward's assets to dissipate quickly.

An attorney is entitled to receive a reasonable attorney's fee for professional services rendered and for reimbursement of costs incurred for the benefit of the ward; the payment of reasonable compensation is mandatory, unless the petition for attorney's fees is not timely filed.

Price v. Austin, 43 So. 3d 789 (Fla. 1st DCA 2010)

Appellant filed petitions to determine the incapacity of her mother and to appoint a guardian for same. The petitions were opposed by Appellant's sister. A notice that the proceeding for incapacity was adversary was served two weeks before the trial court entered an order determining total incapacity. Over a year later, the Appellant served a verified petition to approve payment of fees.

The trial court previously admonished the Appellant and her sister stating that their dispute over who should be guardian would be waged at their expense and not their mother's expense (there was no dispute that mother was incompetent). As such, the trial court denied the Appellant's petition for fees.

The appellate court held that the trial court was correct in denying fees, but for the wrong reason. Pursuant to Fla. Stat. §744.108(1), an attorney is entitled to receive mandatory compensation for the payment of reasonable attorney's fees for professional services rendered and reimbursement of costs incurred for the benefit of the ward. However, Fla. Prob. R. 5.025(d)(2) provides that once a proceeding has been declared to be adversarial, it "shall be conducted similar to suits of a civil nature and the Florida Rules of Civil Procedure shall govern, including entry of defaults".

Further, Fla. R. Civ. P. 1.525 requires a motion for attorney's fees to be filed no later than 30 days after filing the judgment. Citing *Hayes v. Lawrence*, 1 So. 3d 1176 (Fla. 5th DCA 2009), the appellate court noted that in a proceeding declared as adversarial, Fla. R. Civ. P. 1.525

continued, page 31

governs a motion for attorney's fees filed pursuant to Fla. Stat. §733.106(2). In *Hayes*, the court denied a claim for attorney's fees as untimely. Although *Hayes* involved a different fee statute than the present case, the appellate court held that both Fla. Stat. §733.106(2) and Fla. Stat. §744.108(1) are legislative expressions of the payment of attorney's fees under specified proceedings. As such, the appellate court affirmed the denial of fees on the grounds that they were untimely filed under Fla. R. Civ. P. 1.525.

ESTATES:

The trial court did not have authority to suspend a prior order which compelled payment of claim against an estate.

Zayas-Hood v. Jusino, 44 So. 3d 626 (Fla. 1st DCA 2010)

Appellants (estate creditors) appeal an order suspending a prior order which compelled payment of their claim against the estate of the Appellees' mother and granting the Appellees' motion for an extension of time to file an objection to a claim.

The appellate court noted that although Fla. Stat. §733.705(2) provides that a court may extend the time for filing or serving an objection to a claim against an estate, the statute does not address a situation where an order has been entered compelling payment of a claim. The appellate court noted that Fla. R. Civ. P. 1.540 could not relieve Appellees from the order compelling payment because under Fla. Prob. R. 5.010, the "Florida Rules of Civil Procedure apply only as provided herein" and that the applicable probate rules made no mention of the Florida Rules of Civil Procedure. Further, the appellate court determined that the proceeding was not an adversary proceeding under Fla. Prob. R. 5.025 which mandates when the Florida Rules of Civil Procedure shall govern.

The appellate court reversed and remanded the trial court's order which granted the Appellees' a motion for extension of time to file an objection to the claim.

A trial court erred in entering a final judgment for damages in an action for trust accounting following a default where the defaulting parties were not afforded 30 days' notice and the damages were unliquidated.

Matejka v. Dulaney, 40 So. 3d 865 (Fla. 4th DCA 2010)

In 1994, parents created a trust for which one of the Appellants, the Appellee and another were beneficiaries. In 2006, after parents died, Appellee filed a complaint against Appellants for a trust accounting. Appellants abandoned their defense of the suit and moved to France. The trial court entered a default judgment in favor of Appellee, who then filed a Motion for Final Judgment requesting a specific damage amount.

On April 17, 2009, Appellee sent the Appellants internationally by regular mail a Notice of Final Hearing to be held on June 9, 2009. On April 24, 2009, Appellee sent the Appellants by regular mail a Notice of Hearing which moved the Final Hearing up by more than a month to May 4, 2009. The second notice was mailed ten days before the re-scheduled hearing. Appellants argue they were not given sufficient notice of the final hearing on damages after the default judgment was entered.

The appellate court stated that due to the adversarial nature of the trust action, the issue of notice is governed by the Florida Rules of Civil Procedure and by Fla. Prob. R. 5.025(d)(2). Citing *Bowman v. Kingsland Development, Inc.*, 432 So. 2d 660 (Fla. 5th DCA 1983), the appellate court noted that a default "admits the plaintiff's entitlement to liquidated damages due under the pleaded cause of action, but not unliquidated damages" and that a defaulting party has "a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary" to the judicial determination of the amount of unliquidated damages.

Applying Fla. R. Civ. P. 1.080(h)(1), the appellate court noted that no service need be made on parties against whom a default has been entered except orders setting an action for trial as prescribed in Fla. R. Civ. P. 1.440(c). Looking to Fla. R. Civ. P. 1.440(c), the appellate court noted that a trial shall be set not less than thirty days from the service of notice for trial and that in actions where damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with Fla. R. Civ. P. 1.080(a).

As such, the appellate court held: (1) the damages could not be determined with exactness from the trust agreement; (2) the damages were unliquidated; and (3) the Appellants have a due process entitlement to not less than thirty days notice under the rules. The trial court decision was reversed and remanded for a new trial on damages.

An order denying motion to dismiss is not an order that finally determines a right or obligation of an interested party.

Vanlandingham v. Desak, 43 So. 3d 841 (Fla. 1st DCA 2010)

The appellate court determined they lacked jurisdiction over an appeal on the grounds that an Order Denying Motion to Dismiss is not an order that finally determines a right or obligation of an interested person in a probate matter pursuant to Florida Rule of Appellate Procedure 9110(a)(2). As such, the appellate court dismissed the appeal.

Fla. R. App. P. 9110(a)(2) applies to proceedings that seek review of orders entered in probate and guardianship matters that finally determine a right or obligation of an interested person as defined in the Florida Probate Code. Fla. Stat. §731.201(23) defines an "interested person" as any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved.

Law firm is not entitled to personal representative's lien under Fla. Stat. §733.608 where law firm was neither personal representative nor curator, nor counsel for same.

Cowan v. Locascio, 41 So. 3d 1113 (Fla. 3d DCA 2010)

The Appellants, a law firm, appealed the trial court's denial of Appellant's petition for an order adjudicating its claim of lien under Fla. Stat. §733.608. The appellate court held that absent the Appellants acting as personal representative, curator or counsel for either the personal representative or curator, there is no basis on which the Appellant's are entitled to a personal representative's lien under Fla. Stat. §733.608. The appellate court affirmed.

Proponent of a lost will who presents a correct copy of same must provide testimony of one disinterested witness to prove the execution and content of the will; otherwise, there is no competent, substantial testimony to overcome the presumption that the testator voluntarily destroyed the will with intent to revoke it.

Brennan v. Estate of Brennan, 40 So. 3d 894 (Fla. 5th DCA 2010)

In 2001, decedent executed a will leaving his estate to his children. In 2002, decedent executed another will leaving a property to decedent's acquaintance and the remainder to decedent's brother (who disclaimed his interest in the estate). After decedent's death in 2007, the petition for administration sought to admit the 2001 will (the original 2002 will could not be located).

Acquaintance appeared in 2008, filing: (1) a declaration that the proceeding was adversary; (2) an objection to probating the 2001 will; and (3) a petition to establish lost will on the grounds that the 2002 will was lost or destroyed without the decedent's knowledge, consent or intent to revoke. Acquaintance provided a copy of the lost 2002 and her own testimony. No other witnesses testified in support of the 2002 will; rather, decedent's brother and children testified in opposition. The trial court entered an order stating the 2002 will: (1) was executed in accordance with Fla. Stat. Chapter 732; (2) was the decedent's Last Will and Testament; and (3) was entitled to be admitted to probate.

Appellants filed a motion for rehearing, arguing the testimony of at least one disinterested witness was required to prove execution and content if the document submitted was a correct copy of the will; otherwise, the testimony of two disinterested witnesses was required. Acquaintance then filed the affidavits of two persons who stated the decedent executed the 2002 will in their presence.

The appellate court cited *In re Estate of Parker*, 382 So. 2d 652 (Fla. 1980) and *Lonergan v. Estate of Budahazi*, 689 So. 2d 1062 (Fla. 5th DCA 1996), noting it is well settled under Florida law that when an original will known to have existed cannot be located after decedent's death, the presumption is that the testator destroyed the will with intent to revoke it. The proponent of the lost will has the burden of introducing competent, substantial evidence to overcome the presumption. The first step to overcome the presumption is to establish and admit the lost or destroyed will pursuant to Fla. Stat. §733.207, which requires the specific content of a will to be provided by the testimony of two disinterested witnesses, or, if a correct copy is provided, by one disinterested witness.

Acquaintance argued corroborating testimony is not needed when a correct copy of the 2002 will was provided. The appellate court cited *In re Estate of Parker*, where the Supreme Court held that "a draft which is an accurate reflection of the contents of the will does not constitute a 'correct copy.' To prove the former, the statute requires the testimony of two witnesses. To prove the latter, the testimony of one witness suffices." The appellate court noted that the Third and Forth DCA similarly stated that a copy of a will must be established by the testimony of one disinterested witness.

Here, the only testimony in support of the petition to establish the lost will came from acquaintance (an interested person). Although two affidavits were filed, they did not constitute testimony. As such, the appellate court found that an evidentiary hearing should have been conducted and that the submission of affidavits was insufficient to establish the lost will under Fla. Stat. §733.207. The trial court's final order was reversed.

For claims arising before the decedent's death, a court will not grant an extension of time to file a claim against an estate absent the grounds required under Fla. Stat. §733.702(3).

Boston Investors Group, Inc. v. Spatz, 43 So. 3d 149 (Fla. 3d DCA 2010)

The appellate court found that the claim against the estate arose prior to the death of the decedent for purposes of Fla. Stat. §733.702(1). The appellate court also noted that no grounds existed for an extension of time under Fla. Stat. §733.702(3) and affirmed that the trial court properly denied the motion for extension of time. Under Fla. Stat. §733.702(3), an extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period.

Personal Representative breached the terms of a settlement agreement by failing to deliver documents and the party who filed a motion to compel compliance with the settlement agreement was entitled to attorney's fees as the prevailing party and as a special remedy for having to compel compliance with the agreement.

Carlin v. Javorek, 42 So. 3d 820 (Fla. 4th DCA 2010)

The decedent was the mother of both the Appellant (the personal representative) and the Appellee. Both Appellant and Appellee claimed entitlement to prevailing party's attorney's fees under the fee provisions of a settlement agreement reached after seven years of probate litigation.

In 2003, the trial court ordered Appellant to grant Appellee access to decedent's medical records and sua sponte vacated the order to facilitate mediation. In 2006 the trial court ordered Appellant to submit the decedent's medical records. In 2007, the parties entered into a settlement agreement and the trial court reserved jurisdiction to enforce same.

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Paragraph eleven of the settlement agreement stated that Appellant's failure to provide the decedent's medical records and HIPPA release would result in an order to comply and a duty to pay reasonable attorney fees. Appellant later provided the medical records but not the HIPPA release. In 2008, Appellee filed a motion to compel compliance with paragraph eleven alleging that Appellant failed to turn over medical records by not providing the HIPPA release. The trial court held an adversary hearing and found that because Appellant substantially complied with her duties under the settlement agreement by delivering the medical records, the breach was non-material. The trial court directed each party to bear their own attorney fees and costs.

Appellant appealed order claiming entitlement to attorney's fees as the prevailing party pursuant to paragraph two of the settlement agreement on the grounds that Appellee failed to prove a material breach (paragraph two of the settlement agreement entitled the prevailing party to recover attorney fees in enforcement actions). Appellee cross-appealed arguing entitlement to attorney fees under both paragraphs eleven and two of the settlement agreement.

The appellate court applied *Glantz & Glantz, P.A. v. Chinchilla*, 17 So. 3d 711 (Fla. 4th DCA 2009) noting that although the standard of review for an award of attorney's fees is abuse of discretion, *Stevens v. Zakrzewski*, 826 So. 2d 520 (Fla. 4th DCA 2002) allows appellate courts to undertake a de novo review when the entitlement of attorney's fees is based on the interpretation of contractual provisions.

The appellate court affirmed the trial court's failure to award attorney's fees and costs to Appellant on the grounds that the parties intended the fee provision in paragraph eleven to govern if the dispute involved Appellant's failure to deliver medical records or releases. As to the cross-appeal by the Appellee, the appellate court found the Appellant's breach in failing to timely provide the medical records and HIPPA release was material and reversed the trial court's failure to award Appellee attorney fees. The appellate court reversed and remanded in part with directions to award Appellant attorney fees as both the prevailing party and as a special remedy for having to compel compliance under paragraph eleven.

Probate court could not deny the petitions of a beneficiary to decrease personal representative and attorneys fees and to discharge the personal representative, when the beneficiary timely objected to the final accounting, without holding a hearing as to the reasonableness of the fees.

Gaines v. DeWitt, 41 So. 3d 951 (Fla. 2d DCA 2010)

The Appellant (the decedent's son and beneficiary) appeals both a final order discharging the personal representative and an order denying his petitions to decrease the fees charged by the personal representative and the two attorneys hired by same.

Appellee was appointed as the decedent's personal representative in August of 2007 and filed an initial inventory in October of 2007, listing a total value of $152,648.06. Appellee filed an amended inventory in February of 2008, listing a total value of $190,532.44 and the decedent's home as exempt. A year after the issuance of letters of administration, the petition for discharge had not yet been filed or served and Appellant filed a petition for an interim accounting and partial distribution. Appellee sought to dismiss the petition for partial distribution and requested an extension of time for filing the final accounting and petition for discharge, the deadline for which the trial court set in October of 2008.

The petitions were not filed by the October 2008 deadline; rather, Appellant filed an initial accounting listing disbursements of $22,215.97 to the Appellant and $22,215.97 to Appellant's attorney. Thereafter, a second amended inventory was filed, listing a total value of $550,000 and the decedent's home as non-exempt. Appellant objected to the initial accounting and agreed in open court to withdraw said objection. The trial court issued a new deadline to file the final accounting and petition for discharge.

Appellee met the new deadline and submitted a final accounting reflecting additional sums for extraordinary personal representative fees and legal services. Shortly thereafter, Appellant filed petitions to decrease the compensation paid to Appellee and his attorneys. The trial court entered an order discharging the personal representative, and then vacated the order after Appellant filed an objection on the ground that the pending and unresolved petitions precluded discharge of the personal representative.

The trial court denied the Appellant's petitions to decrease fees and entered an order discharging the personal representative without holding a hearing as to the reasonableness of the fees as set forth in the final accounting (on the grounds that Appellant waived his ability to challenge the reasonableness of the fees when he withdrew his objection to the initial accounting).

The appellate court noted that the Appellant repeatedly reserved the right to challenge the reasonableness of the personal representative and attorney's fees at the time of final accounting. Citing *In re Estate of Cordiner*, 947 So. 2d 920 (Fla. 2d DCA 1986), the appellate court noted "even if the initial accounting had taken the form of an interim order awarding partial fees, it would not have foreclosed a later challenge at the time of the final accounting because an interim award is not a final determination that the fees allowed were reasonable". As such, the appellate court: (1) reversed the order discharging the personal representative and the order denying the petitions to decrease the fees charged by the personal representative and attorneys; and (2) remanded for proceedings consistent with the appellate findings.

TRUSTS:

The trial court erred in denying a motion to dismiss based on lack of jurisdiction by failing to conduct a limited evidentiary hearing to determine whether the non-resident trustee had required minimum contacts to expect to be haled into a Florida court.

Covenant Trust Co. v. Guardianship of Ihrman, 45 So. 3d 499 (Fla. 4th DCA 2010)

Alleging Appellant breached its fiduciary duties, Appellee (the guardianship) filed petitions requesting the court to order: (1) Appellant to pay ward's expenses; (2) a trust accounting; and (3) the removal of Appellant as trustee. Appellee sent the petitions and notice of hearing by U.S. mail to Appellant in Illinois. Appellant objected and moved the court to dismiss on grounds that: (1) service of process was not effected; and (2) under Fla. Stat. §736.0205 the action was required to be brought in Illinois; and (3) the court had no personal jurisdiction.

The trial court entered an order giving Appellee thirty days to effectuate service of process. Appellant then: (1) filed a motion to quash process and service of process; (2) renewed its objection to the motion to dismiss; and (3) provided supporting affidavits challenging that sufficient contacts existed to invoke long-arm jurisdiction. Appellee responded with an affidavit to establish that Appellant did business within the State of Florida.

The trial court entered an order prohibiting Appellant from expending trust funds without court order and requiring Appellant to pay Appellee's attorney fees. Appellant appealed on the grounds that: (1) the court lacked in personam jurisdiction over Appellant; and (2) no evidence was offered to support the breach of trust as required by Fla. Stat. §736.0802(10). Appellant filed a second motion to quash and to dismiss on the grounds that the trial court failed to set forth the elements to long-arm jurisdiction and the necessary minimum contacts. The trial court: (1) denied the motion to dismiss; (2) ordered Appellant to file a responsive pleading; and (3) entered an order granting the motion requiring Appellant to pay an additional retainer to Appellee. An appeal ensued.

The appellate court noted: (1) the standard of review for personal jurisdiction over a foreign corporation is de novo (citing *Buckingham, Doolittle & Burroughs, LLP v. Kar Kare Auto. Grp., Inc.*, 987 So. 2d 818 (Fla. 4th DCA 2008)); (2) Florida's long arm statute must be strictly construed (citing *Greystone Tribeca Acquisition, LLC v. Ronstrom*, 863 So. 2d 473 (Fla. 2d DCA 2004)); and (3) under Fla. Stat. §736.0201(1), trust proceedings are governed by the Florida Rules of Civil Procedure and Rule §1.070(h) which states for service on nonresidents of Florida it is sufficient to plead the basis for service in the language of the statute without pleading the facts supporting service)

Regarding the Appellant's claim of lack of in personam jurisdiction, the appellate court looked to *Buckingham* and to *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989) for a two-part analysis to determine jurisdiction over a non-resident defendant: (1) whether the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute (the plaintiff may satisfy this burden by either alleging the language of the statute without pleading supporting facts or by alleging specific facts that indicating the defendant's actions fall within the long-arm statute); and (2) if so, are there sufficient "minimum contacts" to satisfy due process requirements (defendant must file an affidavit supporting its argument, then the burden shifts to plaintiff to prove by affidavit on which basis the jurisdiction may be obtained; if affidavits can be reconciled, a court may make a decision on undisputed facts, but if not a court should conduct a limited evidentiary hearing on the issue of jurisdiction). With regard to the first part of the analysis, the appellate court held that the petition alleged sufficient facts to fit within the long-arm statute. With regard to the second part, the appellate court held the trial court erred by failing to conduct a limited evidentiary hearing to determine if Appellant has the required minimum contacts to expect to be haled into court in Florida.

Appellant also argued that if the trial court had in personam jurisdiction, then Fla. Stat. §736.0205 requires this action be brought in Illinois. Under Fla. Stat. §736.0205, a court "shall not entertain proceedings under Fla. Stat. §736.0201 for a trust registered, or having its principal place of administration, in another state unless all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration". The trust did not designate the principal place of administration, which, if unspecified, is the trustee's usual place of business under Fla. Stat. §736.0108(2)). The appellate court stated that if the trial court were to determine in personam jurisdiction, it would next need to determine if the parties could be bound by litigation in Illinois.

Regarding the Appellant's claim that no evidence was offered to support the breach of trust as required by Fla. Stat. §736.0802(10), the appellate court noted that the trail court failed to explicitly decide whether Appellant breached the trust. The appellate court stated: (1) Appellee had discretion to make payments from the trust assets; (2) no evidence was presented to indicate that Appellant acted arbitrarily; (3) there was no authority for the court to order Appellant to make payments. The appellate court reversed and remanded the case to the trial court with direction to hold an evidentiary hearing on the issue of jurisdiction over the Appellant which is consistent with the opinion of the appellate court.

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Real Estate Case Summaries

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Plaintiff's possession of an original note, indorsed in blank with the hand printed signature of an agent of the indorser was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms.

Riggs v. Aurora Loan Services, LazLC., 36 So. 3d 932 (Fla. 4th DCA)

This case update initially appeared in the Summer, 2010 edition of ActionLine on Pg. 36. That update referenced an opinion that was subsequently reversed pursuant to Aurora's motion for rehearing.

Aurora Loan Services, LLC ("Aurora") filed a foreclosure action against Jerry Riggs ("Riggs"). At the summary judgment hearing Aurora produced the promissory note which had an indorsement in blank with the hand printed signature of an agent of the indorser, First Mangus Financial Corporation. The circuit court granted summary judgment in favor of Aurora over Riggs's objections that Aurora's status as lawful "owner and holder" of the note was not conclusively established. On rehearing, the Appellate Court affirmed the circuit court stating that Aurora's possession of the original note, indorsed in blank, was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms. The negotiation of the note by its transfer of possession with a blank endorsement made the Plaintiff the holder of the note entitled to enforce it.

Unilateral mistake of mortgagee failing to send representative to foreclosure sale which results in grossly inadequate sale price is sufficient to invoke trial court's discretion to consider setting aside sale.

U.S. Bank N.A. v. Bjeljac, 43 So.3d 851 (Fla. 5th DCA 2010)

U.S. Bank obtained a final judgment of foreclosure and properly noticed a public foreclosure sale, but failed to send a representative to the foreclosure sale. At the sale, Hill & Beckman, Inc. and Tamco Corporation purchased the property. The next day, U.S. Bank filed an objection and a motion to return third-party funds, vacate the certificate of sale and set aside the sale. Without a hearing, the trial court denied the motion because U.S. Bank alleged only that it "requests that the foreclosure sale...be cancelled and reset." In agreeing with the trial court, the Appellate Court found that U.S. Bank's motion failed to meet Florida Rule of Civil Procedure 1.100(b) requiring that motions "state with particularity the grounds therefor." However, U.S. Bank then successfully argued that the trial court failed to set aside the foreclosure sale and vacate the certificate of title because the bid price was inadequate and it mistakenly failed to send a representative to the sale. The Appellate Court reversed and held that when the inadequacy of price is gross and results from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result. The Appellate Court reversed the order denying U.S. Bank's motion and remanded for further proceedings to determine whether U.S. Bank's failure to have a representative present at the sale was the result of a mistake.

Promissory estoppel is an equitable doctrine for the enforcement of agreements, not a device to nullify an expressly-agreed, written contractual term.

Coral Reef Drive Land Development, LLC v. Duke Realty L.P., 45 So. 3d 897 (Fla. 3d DCA 2010)

Coral Reef appealed a summary judgment and final judgment of foreclosure entered in favor of Duke Realty. Duke Realty, as Lender, provided financing for Coral Reef's medical office project in southwest Miami-Dade County. In addition to the standard Loan Documents, Duke Realty bargained for an option to purchase the Property which would require them to pay Coral Reef a $1.5M premium above the Loan Amount along with reimbursement of Coral Reef's interest costs and rezoning expenses. If Duke Realty exercised the option, the Project would proceed as a joint venture with Duke Realty's interest at 75% and Coral Reef's interest at 25%. The Loan Documents provided a standard *No Joint Venture* provision between the Borrower and Lender and an *Option Notice* provision requiring the Lender to provide written notice to Borrower if it intended to exercise the Option. Coral Reef subsequently defaulted on the Loan and Duke Realty filed for foreclosure. In their defense of the foreclosure action, Coral Reef alleged promissory estoppel and fraud based on verbal commitments from Duke Realty to exercise the option. Coral Reef argued that they relied on that commitment in not seeking to refinance the loan or otherwise sell the Property. Further, after receiving a written default notice from Duke Realty, Coral Reef alleged that representatives of Duke Realty verbally advised that the default notice was a mere formality and that Duke Realty still intended on exercising the option to purchase. The Appellate Court affirmed the lower court's ruling and rejected

Coral Reef's defenses based on a lack of justifiable reliance due to the fact that Coral Reef executed Loan Documents requiring written notice from Duke Realty to exercise the option. The court also noted, that "Promissory estoppel...is an equitable doctrine for the enforcement of agreements, not a device to nullify an expressly-agreed, written contractual term." The Appellate Court also utilized Section 687.0304, Florida Statutes (2007), known as Florida's Banking Statute of Frauds to find in favor of Duke Realty.

Mortgagor may exercise right of redemption by tendering the amount of the foreclosure judgment before the clerk files the certificate of sale.

Verneret v. Foreclosure Advisors, LLC, 45 So. 3d 889 (Fla. 3d DCA 2010)

Carole H. Verneret appealed the trial court's final judgment of foreclosure, and the order denying both a motion to dismiss the complaint and a motion for satisfaction of judgment. While married to Verneret, Verneret's ex-husband entered into a Home Equity Credit Line Revolving Loan Agreement with the Lender. This Agreement was secured by a mortgage which was allegedly signed by Verneret in favor of Lender and its assignee, Foreclosure Advisors. As the result of a divorce proceeding, Verneret was conveyed exclusive title to the Property. She subsequently defaulted on the Mortgage and Foreclosure Advisors filed foreclosure. Verneret filed a motion to dismiss alleging that her purported signature on the mortgage was fraudulent. The trial court denied Verneret's motion and granted judgment in favor of Foreclosure Advisors. Verneret then filed a motion to vacate the judgment on the grounds of unproven facts, but the trial court denied that motion also. Verneret proceeded to satisfy the judgment by sending a cashier's check for the judgment amount to Foreclosure Advisors' counsel. Based on Verneret exercising her right of redemption, the Appellate Court reversed the trial court's denial of Verneret's motion for satisfaction of judgment pursuant to Section 45.0315, Florida Statutes (2004), which provides that the mortgagor's indebtedness may be paid to prevent a foreclosure sale at any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment.

Seller of home was not exempt from provisions of Interstate Land Sales Full Disclosure Act because the provision in the contract obligating Seller to complete construction within two years was an illusory obligation.

Taylor v. Morrison Homes, 2010 WL 3061384

Tamara Taylor contracted with Morrison Homes to purchase a home. Seeking rescission of that contract, Taylor alleged that Morrison Homes had violated certain reporting and registration provisions of the Interstate Land Sales Full Disclosure Act ("ILSA"). However, the trial court agreed with Morrison's claim that it was exempt from ILSA based on a provision in its contract with Taylor obligating it to complete

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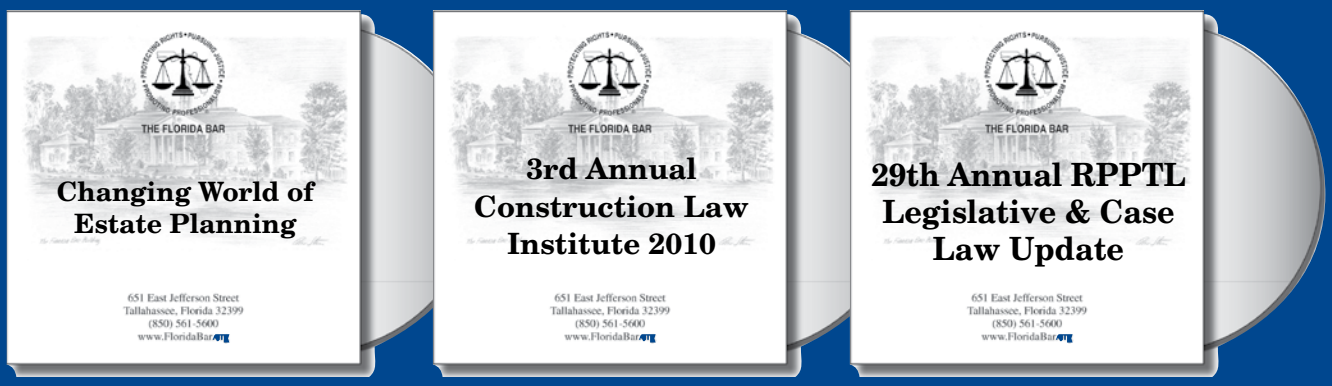

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construction within two years. The Appellate Court reversed the trial court's ruling finding that this provision requiring Morrison to complete the home within two years was illusory based on another conflicting provision in the contract. In particular, another provision provided that Morrison may elect to terminate the contract at any time prior to Closing and for any reason whatsoever or no reason by providing written notice, together with a full refund of Taylor's Deposit and liquidated damages in the sum of $500.00. In order for a builder to claim ILSA's exemption of a contractual obligation to complete the project within two years, the obligation must be unrestricted and the contract must not limit the purchaser's right to seek specific performance or damages. *Samara Dev. Corp v. Marlow, 556 So. 2d 1097, 1100 (Fla. 1990).* Without the availability of both specific performance and damages, the obligation to complete the construction within two years is illusory. Pursuant to *Samara,* the Appellate Court ruled that the contract limited Taylor's right to seek specific performance rendering Morrison' two year completion obligation illusory.

Title insurance company was not liable for title insurance agency's misappropriation of buyer's escrow deposits where title insurance agency received funds in its limited capacity as escrow agent for developer.

Winkler v. Lawyers Title Insurance Corporation, 41 So. 3d 414 (Fla. 3d DCA 2010)

Coastal Title Services, Inc. ("Coastal") was a licensed title insurance agency authorized to issue title insurance commitments, policies and endorsements as an agent for, and on behalf of, Lawyers Title Insurance Corporation ("Lawyers Title"). The Appellants were individual real estate investors who entered into separate Reservation Agreements with Lake Buena Vista Vacation Resort LC ("developer") to reserve a condominium unit. The principal of Coastal was also the manager of the developer. The Reservation Agreements required the appellants to pay a $15,000.00 deposit to Coastal, as escrow agent, to reserve a condominium unit. Subsequently, the appellants also executed Purchase Agreements for their respective condominium units whereby they made initial contract deposits payable to Coastal as escrow agent. While the completion date was set for 2009, construction never began and neither the developer nor Coastal returned the escrow deposits to appellants. Appellants then sought reimbursement for their escrow deposits from Lawyers Title pursuant to section 627.792, Florida Statutes, which imposes liability upon a title insurer for the defalcation of funds by their licensed title agents if the funds are held in trust pursuant to section 626.8473, Florida Statutes. The latter section states that a title insurance agent may engage in business as an escrow agent as to funds received from others to be subsequently disbursed by the title insurance agent in connection with real estate closing transactions involving the issuance of title insurance binders, commitments, policies of title insurance, or guarantees of title. The key issue was whether the funds were held in trust by a licensed title insurance agency. The Appellate Court affirmed the trial court in finding that Coastal was never designated as the title issuing agent for the transactions and as a result the deposits did not constitute funds held in trust by a licensed title insurance agency pursuant to section 627.792. The court could not fit Coastal into the definition of a title insurance agent as the appellants' escrow deposits were not received in connection with a transaction involving the issuance of title insurance binders, commitment, policies of title insurance or guarantees of title. The Court found that all the relevant documents identified Coastal only as "escrow agent," and not "closing agent" or "title agent." Further, the Purchase Agreement gave the buyer the option of obtaining a title insurance commitment and policy from his or her own sources, or electing to have "Seller's closing agent" issue the commitment and policy.

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Real Estate Practice in Tough Times 2011

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Course No. 1155R

8:30 a.m. – 8:55 a.m.
Late Registration

8:55 a.m. – 9:00 a.m.

Opening Remarks
Guy W. Norris, Lake City – Program Co-Chair

9:00 a.m. – 11:00 a.m.
The New Residential Mortgage Foreclosure Mediation Program – What you Need to Know
Chris Shulman, Jim Williams, Bob Maxey, Clearwater

11:00 a.m. – 11:10 a.m.
Break

11:10 a.m. – 12:00 p.m.
Play Fair and Don't Hit Anyone – Ethical Practice in the Real World
Eugene E. Shuey, Gainesville – Program Co-Chair

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

1:00 p.m. – 1:50 p.m.
Foreclosure and Bankruptcy Statutory and Case Law Updates
Manual Farach, West Palm Beach

1:50 p.m. – 2:40 p.m.
Bankruptcy – The Creditor's Approach to Preserving Value and Liens
Marsha Rydberg, Tampa

2:40 p.m. – 3:30 p.m.
Foreclosure Defense and the Documentation Crisis
April C. Charney, Jacksonville

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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

REAL ESTATE PRACTICE IN TOUGH TIMES 2011
February 10, 2011
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OUT-OF-STATE EXECUTIVE COUNCIL MEETING
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EXECUTIVE COUNCIL MEETING / RPPTL CONVENTION
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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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STATUS OF ADVISORY OPINION 10-3

Proposed Advisory Opinion 10-3 addresses a lawyer's duty of confidentiality for a deceased client. During the comment period, the Professional Ethics Committee received comments concerning PAO 10-3. The Professional Ethics Committee will consider those comments at its next meeting in early 2011. At this time, PAO 10-3 remains a proposed advisory opinion.

RIGGS V. AURORA LOAN SERVICES OPINION UPDATED

The opinion in the case of Riggs v. Aurora Services summarized in the Summer issue of ActionLine was subsequently withdrawn and a new opinion was issued. The updated case summary appears on page 38 of this issue.

ARTICLES

... for the next issue of ActionLine are being accepted. Contact: jrcactionline@gmail.com

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.)

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