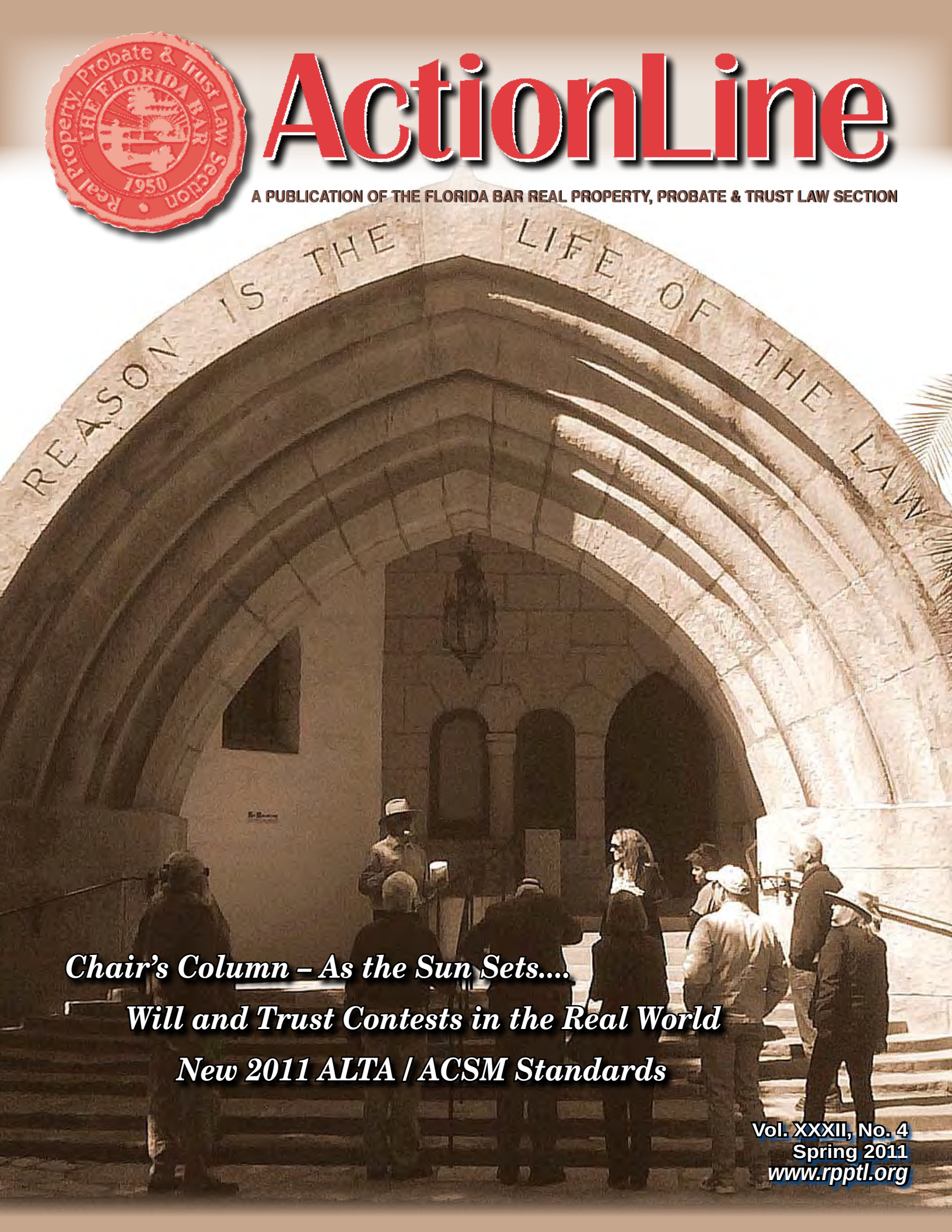
ActionLine

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



Chair's Column – As the Sun Sets....

Will and Trust Contests in the Real World

New 2011 ALTA / ACSM Standards

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Spring 2011
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Chair's Column

By
Brian J. Felcoski

Section Chair, 2010 - 2011

As The Sun Sets . . .

The Section's 2010-2011 fiscal year is rapidly drawing to a close. Our grand finale, the Section Convention, takes place at the wonderful Eden Roc Resort on Miami Beach. Each of you is invited to attend and participate in our functions which run from May 26, 2011 through May 29, 2011. The phone number for reservations is (305) 531-0000.

Much happens at our Convention, where you will see up close how the Section operates. On Thursday, most of our committees will hold their meetings. Please check the Section website for specific information on the committee schedules as well as agendas for those meetings. You will typically find our committees engaged in intense discussion over current legal issues or important subjects that impact the Section as a whole.

On Thursday evening, we will hold our welcome reception. This event provides Section members and guests with a unique opportunity to enjoy food and fellowship in a very relaxed environment. This event provides a great networking opportunity. Make sure you sign up.

On Friday, as a Section service, we plan to hold a free CLE seminar for our members. The seminar will target some very timely issues that impact real property, probate and trust lawyers equally including issues associated with our duties of professional responsibility, homestead, and durable powers of attorney. Look for a separate sign up sheet for this event.

On Friday, we will also hold our annual business meeting and luncheon, where we will elect Section officers for the upcoming fiscal year. We will also have a special luncheon speaker, who will regale us about one of the books he has written and the connection of the book's character with South Florida.

Friday evening is reserved for our special dinner and awards ceremony, where we recognize a few of the many special Section members who have devoted so much time and energy to the Section. Again, registration for this event is required.

On Saturday, we start with our real property and probate roundtable breakfasts. During each breakfast, you can expect to hear the most recent developments from the 2011 legislative session. Also, committee chairs will report on their committee meetings and discuss upcoming action items for the executive council meeting. This is a great way to find out what happened in any committee meetings you were unable to attend.

After our roundtable breakfasts, we hold our executive council meeting. This is our main business meeting, where the council as a whole gathers to discuss important issues and take action on legislative proposals and other initiatives.

On Saturday evening, we plan on holding a casual reception and dinner at Jungle Island. You are invited to bring the whole family. You and your children will get to enjoy the Jungle and some of the many animals that reside at this attraction. Sign up is required.

So we hope you will join us for our grand finale. All information about registering for the Section Convention will be posted on the Section's website in April. That website is *www.rpptl.org*. If you cannot find the information you are looking for, please contact our Section administrator, Liz Gerstman at (850) 561-5619. We look forward to seeing you in Miami Beach.

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:

In this photo, visiting RPPTLs are about to enter the historic Santa Barbara Courthouse.

Photo by Michael Gelfand.

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

DEADLINES for all submissions are as follows:

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

Will and Trust Contests in the Real World

By Glenn M. Mednick, Esq., Law Offices of Glenn M. Mednick, P.L., Fort Lauderdale, FL

People are often shocked to learn that the wills and trusts they have spent so much time developing with the assistance of their estate planning professionals can be challenged following their death. Individuals who are the intended beneficiaries of the estate plan created by their parents or other relatives may also be distressed to learn that a document under which they would be a recipient is being challenged and may be set aside by a court if the challenge is successful. However, if the right action is taken during or prior to the creation of a will or trust, the possibility of a challenge or the likelihood of a contest being successful can be greatly reduced.

I. Grounds for a Will Contest

The right to devise property is a property right protected by Article I, Section 2 of the Florida Constitution. The requirements for execution and qualification of a will are governed solely by statute. Florida Statute §732.501 provides that the person making a will, known as the testator, must be at least 18 years of age and of sound mind. An amendment to the statute effective January 1, 2002, provides that an emancipated minor may also make a will. The requirements for execution of a will are statutorily mandated and must be strictly followed. In Florida, every will must be in writing and be executed by the testator at the end or have the testator's name subscribed at the end by some other person in the testator's presence and by the testator's direction. The testator must sign the will or acknowledge that he or she previously signed or that another person subscribed his or her name to it in the presence of at least two attesting witnesses. The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.

Aside from the need for meeting the statutory requirements for proper execution and that the testator be of sound mind, statutorily recognized grounds for challenging a will in Florida are fraud, duress, mistake, or undue influence.

As previously mentioned, a testator must be of sound mind, which is referred to as testamentary capacity and means the ability to understand generally the nature and extent of one's property, the relationship of those who would be the natural objects of the testator's bounty, and the practical effect of a will. Testamentary capacity refers to competency at the time the will is executed, and a testator who is weak of mind may execute a will during a lucid interval. Together with failure to comply with the statutory formalities for execution or lack of testamentary capacity, undue influence is the ground most likely to be used to attack the validity of a will. Undue influence means that the testator's mind was so controlled by persuasion, pressure, or other outside influences that he or she did not act voluntarily but was subject to the will of another when execution took place.

In addition to the substantive grounds for challenging a will, the procedure applicable in will contests is also governed by statute. In all proceedings contesting the validity of a will, the burden is initially on the proponent of the will (normally the person seeking to have the will admitted to probate and a personal representative appointed) to establish prima facie its formal execution and attestation. Thereafter, the burden of proof shifts to the contestant to establish the grounds on which the probate of the will is opposed or the revocation is sought. The aforementioned distinction drawn in Florida Statute §733.107 refers to the time period in which the contest is initiated. In most cases, a will would be admitted to probate and a personal representative appointed to administer the estate before any relatives are aware of the existence of the will or the petition to admit the subject will to probate. Revocation of probate refers to a proceeding to challenge the validity of a will after the will is admitted to probate and the personal representative is appointed.

According to Florida law, the personal representative must promptly serve a copy of a document referred to as a notice of administration to the decedent's surviving spouse, beneficiaries, the trustee of any revocable living trust, and each beneficiary of that trust, if each trustee is also a personal representative of the estate. Following service, any interested person is limited to a period of three months after the date of service to object to or challenge the validity of the will or the qualifications of the personal representative, venue, or jurisdiction of the court. When a proceeding to revoke the probate of a will begins, the personal representative is directed by Florida law to proceed with the administration of the estate as if there were no revocation proceeding, except that no distribution may be made to beneficiaries that would violate the rights of those who would receive the property if the will were not being challenged. If possible, a caveat should promptly be filed after death by an heir who has knowledge of an instrument he or she may later seek to challenge to preclude the personal representative from being appointed and utilizing the assets of the estate to defend the will contest.

It is important to remember that, in most cases, there is no right to a jury trial in a will contest. A will contest is tried before either a probate judge in a circuit that has separately designated probate divisions or a general circuit court judge in counties that have not created a separate probate division.

II . Trust Contest

The use of pour-over wills and revocable trusts to accomplish testamentary disposition has increased dramatically. While there are many similarities between a will contest and trust litigation, there can be substantial differences. All

continued, next page

Florida trusts executed after September 30, 1995, must be executed by the settlor with the formalities required for the execution of a will in this state. Chapter 736, Florida Statutes, establishes a new Florida Trust Code effective as of July 1, 2007, unless otherwise provided therein. One of the changes implemented thereby is Florida Statute §736.0402, which requires a settlor to have capacity to create a trust. Moreover, the capacity required to create, amend or revoke is the same as that required to make a will. Florida Statute §736.0601. The same elements that apply to a will contest are applicable to a trust contest. Under Florida Statute §736.0406 fraud, duress, mistake, or undue influence may be asserted as grounds to contest the validity of the trust, in whole or in part. Any part of the trust procured by such means is void, "but the remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons." The considerations pertaining to proof of fraud, duress, and undue influence in a will contest are applicable in trust contests.

Will contests or trust contests based on mistakes are predicated on the testator's or settlor's execution of one instrument under the belief that he or she was executing another. In the law of wills, it is virtually impossible to reform a defectively drafted will or scrivener's error. Conversely a landmark Florida appellate case held that a trust with testamentary aspects may be reformed after the death of the settlor for a unilateral drafting mistake as long as the reformation is not contrary to the interest of the settlor. Judicial modifications of trusts are now authorized by statute, as are nonjudicial modifications under circumstances designated in the Florida Trust Code.

One major distinction between the procedural considerations in will contests and trust contests is the method for commencement. A will contest will be brought in conjunction with the administration of the estate. A proceeding concerning a trust must be commenced by filing a civil complaint and is governed by the Florida Rules of Civil Procedure. An action to contest the validity of all or a part of a trust may not be commenced until the trust becomes irrevocable. In most cases, this refers to the death of the settlor, but a trust may in some circumstances be deemed by a court to be irrevocable prior to death. For example, if an individual has previously been adjudicated to be incapacitated in conjunction with a guardianship proceeding, then an action can be brought by the guardian of the property of an incapacitated settlor upon court approval. *See*, Florida Statutes §§736.0207 and 744.441(11). Because a statutory procedure is available to file a suggestion of capacity after being adjudged incapacitated, it would be necessary to exclude any possibility of capacity being restored if a trust contest is commenced prior to the death of the settlor.

As is the case in will contests, a provision in a trust instrument purporting to penalize any interested person for contesting the trust instrument is unenforceable, and the trustee is required to proceed with the administration of the trust as if no proceeding had been commenced except no action may be taken and no distribution may be made to a beneficiary in contravention of the rights of people who may be affected by the outcome of the proceeding. Florida Statutes §§736.08165 and 736.1108.

III. Practical Considerations To Avoid a Will or Trust Contest

It is often said that we live in a litigious society. Evidence of that can easily be seen in the frequent will and trust contests commenced in Florida. While at first blush it would appear that the financial motivation for a will or trust contest is no different in Florida than in any other state, the reason that these actions appear to be more prevalent in Florida may be closely linked to the large percentage of retirees in our population. Some probate or trust litigation may result from an elderly individual's reliance on other people to act as caregivers in the absence of family members located in close geographic proximity. As the elderly person becomes more reliant on and trusting in these unrelated individuals, the caregiver may be the unintended recipient of alleged gifts, such as a joint bank account established as a survivorship account for convenience purposes only.

Some of the contests observed in Florida result from caregivers who condition their continued care of the decedent on being made a beneficiary of their will or trust, and more egregious cases result from the caregiver initiating the process to either amend or change the decedent's testamentary plan. Prudence would dictate that family members with elderly parents living in Florida should closely monitor the individuals who are assisting their parents with their physical needs or financial affairs to ensure that they are not being exploited.

In sharp contrast to cases of exploitation of the elderly, will and trust contests may result from a failure to communicate the decedent's estate plan to the natural objects of his or her bounty. It is not uncommon for a child who is due to receive a disproportionately small percentage of the estate in contrast to other similarly situated family members,

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often including siblings, to believe that this disparity was the result of the testator's or settlor's unsound mind, the exercise of undue influence, or any of the other statutorily recognized grounds for a will or trust contest. While many parents prefer not to discuss the financial details of their estate plan with their children, their so-called "children" are in many cases middle-aged individuals with grown children of their own, and their reactions to being disinherited in part or in full are to be anticipated. Communicating to one's heirs the reasoning behind his or her estate plan may in some circumstances reduce instances of trust or will contests that would otherwise result.

As an alternative to—or an addition to—lifetime disclosure of a testator's or settlor's testamentary scheme prior to death, actions can be taken to document the reasons why an heir shall receive a lesser share or no share of the assets under the will or trust. If circumstances permit, discussions with the decedent prior to the execution ceremony wherein the testator or settlor explains why he or she intends to make certain testamentary or inter vivos dispositions that later could be called into question may be videotaped and otherwise recorded, and/or a legal videographer may be hired to record the execution ceremony. While videotaping pre-execution discussions or the execution ceremony may be advantageous, it can also act as a double-edged sword in the event that anything should be revealed on the audio or video tape that could later be utilized in support of a will or trust contest.

In addition to recording discussions with the decedent and/or the execution ceremony, the decedent should document the reasons for his or her intended testamentary or inter vivos dispositions with his or her attorney so as to create a record through the drafter's file. In cases where it is anticipated that a challenge may result and testamentary capacity could become an issue, the testator's or settlor's physician can be asked to attend the execution ceremony and provide an affidavit as to capacity, or an independent mental health examination can be conducted before the execution ceremony. Finally, the attorney should attend the execution ceremony and, if possible, bring office staff to act as witnesses to ensure compliance with all the statutory requirements for execution.

While lawsuits may always be prevalent in our society, giving greater thought to the reactions of your heirs to your testamentary plan—along with taking appropriate actions—may help reduce the likelihood of probate or trust litigation after you are gone.

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New 2011 ALTA/ACSM Survey Standard Detail Requirements

By E. Duffy Myrtetus, Kaufman & Canoles, P.C., Richmond, VA

The new *2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys* (the "2011 Standards"), which have been approved by the National Society of Professional Surveyors, the American Land Title Association (ALTA) and the American Congress on Surveying and Mapping (ACSM), took effect on February 23, 2011. The new 2011 Standards replace the currently effective 2005 standards. As of February 23, 2011, all previous versions of the Standard Detail Requirements for ALTA/ACSM Land Title Surveys are superseded by the 2011 Standards. A complete copy of the revised 2011 Standards is now available free of charge on-line at the ACSM website at the following link: *http://www.acsm.net/index.cfm?fuseaction=Page.viewPage&pageId=513&parentID=506&nodeID=1.*[1]

Additionally, two other documents, which are also available free of charge at the ACSM website, are excellent resources and quick references to facilitate a review of operative changes in the 2011 Standards. The first is the: "Summary of Significant Changes from the 2005 Standards to the 2011 Standards." This document lists a detailed summary of specific revisions, inclusive of changes to standard Table A.

The second is an incredibly useful tool in the form of a redlined mark-up of the 2011 Standards. "New Standards with red highlights showing which clauses within those Standards are substantially new or are otherwise significantly modified from the 2005 version" reflects detailed redline addition of revised terms, inclusive of changes to standard Table A.

The new emphasis placed upon minimum fieldwork requirements for compliant plats under Section 5, and the requirements for preparation of a plat or map to specifically reflect the results of fieldwork data and its relationship to Record Documents per Section 6, are particularly noteworthy. Presumably, the results of the newer and more stringent precision in field data, the stated bias against creation of new legal descriptions, and the express reference to the "prudent surveyor" standard of care will all combine to produce more uniform, accurate and detailed surveys.

Heightened requirements on empirical data and related surveyor certifications should produce new processes and protocols in the title insurance industry. Removal of a standard "survey exception" will presumably require a review of surveys, plats and maps satisfying the minimum requirements of the 2011 Standards. In the context of title insurance coverages, Covered Risk 2(c) in the 2006 ALTA Policy forms would presumably require a "survey reading" of a 2011 Standards compliant plat by the underwriter in order to obtain a deletion of the otherwise applicable standard survey exception. Moreover, endorsement coverages for the ALTA 9 series, ALTA 17-06, ALTA 17.1-06, ALTA 19-06 and ALTA 19.1-06, among other special endorsements, would all also presumably require additional new underwriting of a 2011 Standards compliant survey. The standard policy terms and conditions do not expressly adopt the ALTA/ACSM standards; however, they have been the practical benchmark for underwriting purposes for decades.

As the new 2011 Standards are implemented, the ripple effect will additionally beget a broad range of timely practical issues worthy of consideration:

> With regards to loan defaults, asset recovery, and related matters in the current economic environment, new survey standards must be considered. In the context of foreclosures and deed-in-lieu transactions, lenders/loan servicers/trustees, etc. will need to consider how the newer standards may impact a prospective disposition of distressed property. Updated survey data would presumably require compliance with the new standards and existing mortgagee coverage with exceptions under the older standards may not be adequate for survey related matters;
>
> In the commercial real estate transaction context, it remains to be seen how the new procedures and commensurate expense of satisfying underwriting conditions will affect the timing and costs of CRE transactions. Presumably commercial lenders, mortgage bankers, conduit lenders, etc. will adopt objective underwriting criteria that mirror the new minimum standards and detail in the 2011 Standards; and
>
> It remains to be seen how the new 2011 Standards and detail will affect local planning, zoning, subdivision and related requirements and procedures. An argument can be made that the 2011 Standards mandate a level of detail and certification that is harmonious with many current local ordinance requirements for planning, subdivision, rezoning, Plan or Development and/or Site Plan review, etc.

Under Section 7 of the 2011 Standards, the new requirements provide significant limitations upon a surveyor's ability to deviate from the mandatory form certification, confirming compliance with the 2011 Standards. A deviation is permitted only if required under applicable federal, state and/or local laws, rules, regulations, etc. Pursuant to Section 3(B), the surveyor must complete the survey in compliance with the requirements of the 2011 Standards, and the applicable requirements of federal, state and local statutes, administrative rules, regulations and/or ordinances that set

continued, next page

out standards regulating the practice of surveying within a subject jurisdiction. In Florida, reference should also be made to the provisions of Chapters 177 and 472 of the Florida Statutes, inclusive of Fla. Stat. §§ 177.021, et seq. (Title XII, Chapter 177); § 253.39, et seq.; § 373.012; § 497.274; and, § 725.08, all as applicable, together with the applicable provisions of the Florida Administrative Code (Fla. Admin. Code R. 5J-17.050; 5j-17.052; et seq.). Effective as of October 1, 2009, professional mappers and land surveyors are regulated in Florida by the Department of Agriculture and Consumer Services. The Department's website can be found at: *http://www.800helpfla.com/psm/psm.html.* The locality's planning, zoning, and subdivision ordinances for minimum plat requirements and detail must also be reviewed.

The new 2011 Standards hold great promise for better, more complete, more precise, and more accurate surveys. It is essential that lenders, title insurers, attorneys and others, who order, use and rely upon surveys become familiar with the new 2011 Standards.

Endnote:

1 Multiple electronic versions are available in a .PDF format. Note that the website includes a "Statement of Copyright" as to the new 2011 Standards.



The Fourth Annual Construction Law Institute Thanks Its Sponsors For Another Successful Institute

On March 31 - April 2, 2011, over 350 attorneys and construction industry professionals attended the Fourth Annual Construction Law Institute and Florida Bar Construction Law Certification Review Course at the Omni Orlando Resort in ChampionsGate, Florida. In addition to advanced level seminars, the event included evening receptions and addresses by Chief Justice Charles T. Canady of The Florida Supreme Court and Kenneth D. Simonson, Chief Economist of The Associated General Contractors of America. Also, the Construction Bar congratulates Bruce Alexander, a Shareholder with Casey Ciklin Lubitz Martens & O'Connell, who received the Institute's Construction Lawyer Lifetime Achievement Award. The Institute thanks the sponsors for making the Institute another successful event!

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Real Estate Case Summaries

Prepared by Navin R. Pasem, Section Fellow
Law Office of Navin R. Pasem, P.L., Tampa, FL

Although an addendum to contract provided that Seller could require Closing to occur within 120 days after a date certain by giving a notice to close, the addendum was ambiguous as to whether the notice to close could be provided before that date certain.

Gregory K. Talbott v. First Bank of Florida, The Atlantic Land Company, John E. Carter, and Robert J. Roschman, 2011 WL 1135343, 36 Fla. L. Weekly D652 (Fla. 4th DCA 2011)

Talbott, the would-be buyer in a contract for sale of real property, appealed a judgment entered in favor of the would-be seller, The Atlantic Land Company ("Atlantic"), arising out of a specific performance action brought by Atlantic. Talbott entered into a contract for property on June 1, 2007 and an addendum to the contract on June 13, 2007. The addendum called for monthly deposit installment payments until a final deposit installment payment on November 15, 2007. The addendum also contained a clause regarding the Closing Date which read:

The Closing Date shall be set by Buyer giving Seller 30 days written notice of Closing. Notwithstanding the foregoing, Seller may require the Closing to occur at any time on or after October 31, 2007 by giving 120 days written notice to Buyer. Buyer and Seller shall provide closing instructions, if any, within 15 days of the Closing Date.

On August 30, 2007, Atlantic delivered to Talbott a written "Notice to Close," setting a closing date for January 2, 2008—124 days from August 30, 2007. Talbott rejected the notice under the position that the contract precluded Atlantic from sending a notice to close until after October 31, 2007. However, the trial court ruled in favor of Atlantic and provided that under the plain and unambiguous language of the contract, Atlantic could send a notice to close at any time so long as the designated closing was both 120 days from the notice and after October 31, 2007. Further, when the language of a contract is clear and unambiguous, courts must give effect to the contract as written and cannot engage in interpretation or construction as the plain language is the best evidence of the parties' intent.

The appellate court overturned the trial court and stated that the contract should be read as a whole. The appellate court had issue with the addendum's language providing that the seller "may require the Closing to occur at any time on or after October 31, 2007 by giving 120 days written notice" versus the fact that the final deposit installment payment on the contract was not due until November 15, 2007. While the appellate court found that Atlantic's interpretation of the contract was certainly plausible, they did not find that it was the unambiguous intention of the addendum's language. Accordingly, in finding that each party had a plausible interpretation of the contract, the appellate court ruled that the contract was ambiguous and reversed and remanded the trial court's ruling to consider extrinsic evidence concerning the parties' intent.

Lessee should not have been allowed to deposit entire rental payments into trial court's registry when not all rents were at issue and trial court erred in ordering disbursement of all monies in registry without resolving lessee's dispute as to an ambiguity in the lease provisions.

First States Investors 3300, LLC v. Betsy Pheil, Walter Walker Pheil, 52 So.3d 845, 36 Fla. L. Weekly D319 (Fla. 2nd DCA 2011)

First States, lessee of a commercial lease, appealed a nonfinal order which vacated a deposit it made into the court registry and which ordered the disbursement of the monies to the lessor appellees. First States filed a complaint due to ambiguities in the lease regarding rent escalation and price adjustments as it was in doubt as to the proper amount of rent it was obligated to pay lessor. After filing its complaint, First States filed an emergency motion to deposit rents into the court registry. Subsequently, appellees filed a motion to vacate, arguing that the order was the equivalent of injunctive relief and that First States had not established its right to such relief. After a hearing, the trial court granted appellee's motion to vacate and ordered that the monies in the court registry be disbursed to appellees. The appellate court concluded that the trial court erred by first allowing the entire rental payments to be deposited into the court registry and then by ordering the disbursement of the monies, *in toto*, to appellees.

The first problem was that only parts of the monies deposited into the court registry were the subject of litigation as First States was only disputing the escalation provisions in the lease. However, the trial court failed to notice this and allowed First States to deposit its full rental payments into the court registry. Further, the hearing conducted by the trial court and its subsequent order failed to resolve the material issue asserted by First States of the proper amount due to appellees per the escalation provisions in the lease. Therefore, the appellate court remanded with instructions for the trial court to determine what portions of the rental

continued, next page

payments are based on the rent escalation provisions and to order the appellees to repay those portions into the court registry pending the outcome of the case.

First States sought prevailing party attorney's fees pursuant to the appellate court's ruling. First States asserted for mutuality of attorney's fees based on Fla. Stat. 57.105(7) because the lease, executed in 1973, limited the right to attorney's fees to the lessor appellee. However, the court denied First States motion because section 57.105(7) only applies to any contract entered into on or after October 1, 1988.

Homestead protection does not require that the claimant be head of a household; it requires that the claimant be a natural person who intends to make the property their homestead and maintains the property as their principal residence. In order to show abandonment of homestead protection, it must be shown that both the owner and the owner's family abandoned the property.

Evaristo Beltran and Grisel Beltran v. Stuart R. Kalb, Assignee of Tops All Roofing and Building Products, Inc., and Sunset Home Partners, Inc., 2011 WL 904244, 36 Fla. L. Weekly D551 (Fla. 3rd DCA 2011)

Appellants, father and daughter, appeal the trial court's order denying their motion to set aside / vacate the sale of property to appellee. Appellants claim that the property was exempt from forced sale for the payment of creditor's claims pursuant to Florida's homestead law. The appellate court agreed and reversed and remanded with directions to vacate the sale.

Evaristo and his ex-wife, Carmen, purchased the property as their homestead while married. After their divorce in 1990, appellees obtained a final judgment which they recorded in 1990 and re-recorded in January, 2007. In March, 2007, appellees purchased Evaristo's interest in the property at a sheriff's sale. Appellants asserted homestead protection to set aside / vacate the sale. In ruling in favor of the appellants with regards to Carmen's claim for homestead protection, the appellate court outlined the expansion of Florida's homestead protection in 1984 where the Florida constitution was amended and the phrase "head of the family" was changed to "a natural person." The appellate court found that the trial court erred in determining whether the owner of the property was the head of a household because what is determinative is whether a natural person intended to make the property his or her principal residence. The fact that property is homestead for ad valorem tax exemption is also evidence as to the issue of a claimaint's intent that the property is also homestead. In addition, appellees contention that the owner lost homestead protection because she had a tenant on the property is also erroneous.

As to Evaristo's claim for homestead protection, the appellate court found that Evaristo never quit-claimed his interest to Carmen subsequent to the parties' dissolution of marriage, therefore, the parties continued to own the home as tenants in common. Further, Article X, Section 4(a)(1) of the Florida Constitution provides the homestead exemption is "limited to the residence of the owner or the owner's family." Accordingly, the Florida Constitution does not require that the owner claiming homestead exemption reside on the property; it is sufficient that the owner's family reside on the property. The court opined that although exclusive use and possession of the marital residence was awarded to the wife in a dissolution action, it did not extinguish the husband's homestead. Homestead status continues until the homestead is abandoned or alienated in the manner provided by law. In order to show abandonment, it must be shown that both the owner and the owner's family abandoned the property. In applying these points of law to the facts, the court found that Evaristo's daughter continued to live on the property and Evaristo continued to support his daughter financially. Accordingly, there was no showing that Evaristo and his family abandoned the property, therefore, Evaristo also never relinquished homestead protection to the property.

Mechaia Investments, LLC v. Denise Romano, 2011 WL 802698, 36 Fla. L. Weekly D511 (Fla. 3rd DCA 2011)

The issue of whether a purchaser exercises due diligence and makes a good faith effort to secure requisite financing is ordinarily a question of fact for the trier of fact; summary judgment is not appropriate.

Romana appealed the trial court's order granting summary judgment to Mechaia stemming from the entitlement to an earnest money deposit after a contract failed to close. Romana and Mechaia entered into a contract for

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a residence whereby Romana paid an initial deposit of $200,000.00 and was to pay an additional $250,000.00 at Closing. The balance of the $1,800,000.00 was to be financed by Romana. The contract required that Romana apply for the financing within ten days of the effective date and that she provide Mechaia with a written Financing Commitment or Approval Letter within thirty days of the effective date. The contract further provided that "if Romana, using diligence and good faith, could not provide the commitment within the commitment period, the contract would be terminated and buyer's deposit refunded."

During the first ten day loan application period, Romana received a two page fax from the bank providing for "mortgage loan approval" on the first page. Romana sent this page to Mechaia, but failed to notice the second page of the fax which only approved her mortgage for $1,500,000.00. This fact came to light after the thirty day window in which Romana was required to provide Mechaia with a Financing Commitment or Approval Letter. Thereafter, the escrow holder filed an interpleader action to which both Mechaia and Romana sought claim to the deposit. The trial court awarded summary judgment to Mechaia, which was subsequently overturned by the appellate court. The appellate court agreed with Romana in that her failure to obtain the financing commitment or approval letter during the established commitment period terminated the contract. However, the court ruled that summary judgment was not the proper vehicle to determine the disbursement of the deposit because the issue of whether a purchaser exercises due diligence and makes a good faith effort to secure requisite financing is ordinarily a question of fact for the trier of fact.

Section 720.3085 unconstitutionally impaired the mortgagee's reliance on the homeowner's association's Declaration with regards to past due homeowner's association dues incurred by its mortgagor.

Ecoventure WGV, Ltd. v. Saint Johns Northwest Residential Ass'n., Inc., 36 Fla. L. Weekly D530 (Fla. 5th DCA 2011)

Ecoventure, as mortgagee, challenged whether 720.3085, Florida Statutes (2007), can be applied to impose joint and several liability on it for the unpaid homeowner's association assessments incurred by its mortgagor. The appellate court overturned the trial court which ruled in favor of the homeowner's association, Saint Johns.

Ecoventure foreclosed on its mortgagor and attained title to the property at foreclosure sale in March, 2008. Subsequently, Saint Johns demanded that Ecoventure pay more than two years' worth of assessments incurred by Ecoventure's mortgagor. The trial court ruled in favor of St. Johns pursuant to 720.3085, Florida Statutes (2007). The trial court found that section 720.3085 operated "outside of the Declarations" and imposed "an additional requirement on a certain class of property owners over and above what Declarations may require."

The appellate court overturned the trial court based on two promises made to mortgagees in the association's Declaration. First, the Declaration promised that any lien for unpaid assessments was subordinate to any mortgage that was "perfected by recording" before its claim of lien was recorded. Second, it promised that any mortgagee who subsequently obtained title to the property "by deed in lieu of foreclosure, pursuant to a decree of foreclosure..." would not be entirely responsible for the unpaid assessments of its mortgagor. When Ecoventure extended a mortgage to its mortgagor in 2001, its rights under the Declaration vested. The court provided that imposing section 720.3085, which was enacted after the mortgage was extended, completely alters Ecoventure's vested rights. The court quoted *Coral Lakes Community Association, Inc. v. Busey Bank, N.A.,* 30 So. 3d 579, 584 (Fla. 2d DCA 2010) which concluded that the enactment of "section 720.3085 cannot disturb that prior, established contractual relatsionhip." Likewise, this court agreed that imposing section 720.3085 on Ecoventure "would operate to severely, permanently, and immediately change the parties' economic relationship...a circumstance not supportable under the law."

Trial court properly granted defendant's motion for involuntary dismissal where plaintiff failed to provide evidence on the correct measure of damages.

Edward J. Allard v. Al-Nayem International, Inc., 2011 WL 904575, 36 Fla. L. Weekly D539 (Fla. 2nd DCA 2011)

Al-Nayem purchased commercial property from Allard containing a restaurant with a paved parking lot on its west side and thirty-foot-wide drainage ditch crossing an unimproved portion on the east side. Al-Nayem later discovered that the Florida Department of Transportation actually owned the ditch and proceeded to sue Allard and the title company who insured title. The trial court entered an order in favor of Al-Nayem and then held a nonjury trial on damages. Burton v. Price, 141 So. 728 (Fla. 1932) is the only Florida Supreme Court case addressing the measure of damages for breach of the covenant of seisin. Burton held that: "the vendee may recover, if there be a failure of seisin as to a part of the premises described in the deed, and in such case the measure of damages is such fractional part of the whole consideration paid as the value at the time of the purchase of the part to which the title failed bears to the whole block purchased..." However, Burton did not explain how to apply its measure of damages, nor did it indicate how improvements on property might impact value. Nonetheless, Al-Nayem reasoned that Burton required a simple arithmetic approach of dividing the square footage of the DOT-owned ditch by the total square footage of the property and then multiplying that number by the total purchase price. Allard disagreed in that

Al-Nayem's methodology was flawed for failing to account for improvements on the property. In particular, Allard argued that damages should be calculated by first deducting the value of the improvements from the initial purchase price and then calculating the damage attributable to the shortage of acreage. However, Al-Nayem disagreed and submitted expert testimony consistent with his methodology of damages for the court's consideration. At the close of Al-Nayem's case, the trial court granted Allard's motion for an involuntary dismissal because Al-Nayem failed to present competent, substantial evidence of damages.

The appellate court affirmed the lower court stating that Burton refers to "value," which requires more than the simple calculation advanced by Al-Nayem. Involuntary dismissal is proper where there is inadequate proof at trial on the correct measure of damages. Al-Nayem moved for a rehearing, arguing that because Florida case law is unsettled as to the measure of damages, it should have an opportunity to present evidence of damages based on the method approved by the trial court. While the trial court agreed to avoid the injustice of a potential windfall to Allard, the appellate court reversed under the proposition that a party's failure to prove damages is not a proper ground for rehearing. Rehearing is not intended as a device to present additional evidence that was available, although not presented, at the original trial.

It is noteworthy to mention that a dissenting opinion in this case viewed the trial court's granting of the motion for involuntary dismissal as erroneous. The dissenting opinion would certify a question of great public importance to the Florida Supreme Court because the majority opinion passes on a question of statewide importance.ty issue.

Browncorp Construction Contracting, Inc. v. Stoneybrook South Community 47 So.3d 965 (Fla. 5th DCA 2010).

Browncorp Construction Contracting, Inc. ("Browncorp") sought certiorari review of an order entered by the trial court denying Browncorp's motion to consolidate two foreclosure cases. The two foreclosure cases had at least twelve parties in common, involved the same property, and had common issues, including lien priority. The Fifth District Court of Appeal noted that consolidating the two cases would eliminate duplicative efforts and trials, thus accelerating the trial process. The Fifth District Court of Appeal also noted that consolidation would eliminate the risk of inconsistent results on issues that are common to the two cases, a harm for which the involved parties would not have adequate remedy on plenary appeal. The Fifth District Court of Appeal found certiorari relief warranted, quashed the trial court's order denying consolidation, and remanded the matter to the trial court for an entry of an order for consolidation.

Where material supplier did not serve notice to owner, contractor was not required to identify unpaid material supplier in contractor's final payment affidavit as condition precedent to action against owner---Even if contractor negligently omitted material supplier from final payment affidavit, lien would still be valid.

Fetta v. All-Rite Paving Contractors, Inc. 36 Fla. L. Weekly D40 (Fla. 4th DCA 2010)

All-Rite Paving Contractors, Inc. ("Contractor") filed an action to foreclose its construction lien against Loreto G. Fetta ("Fetta"). Contractor gave a contractor's final payment affidavit to Fetta, but Contractor negligently failed to include a material supplier who had not served a notice to owner. The trial court entered a final judgment in favor of Contractor on the lien foreclosure.

Fetta appealed and argued that Contractor did not satisfy a statutory condition precedent of identifying an unpaid material supplier in the contractor's final payment affidavit pursuant to Section 713.06(3)(d)1., Florida Statutes. Section 713.06(3)(d)1. provides, in pertinent part: "The contractor shall give to the owner a final payment affidavit stating, if that be the fact, that all lienors under his or her direct contract *who have timely served a notice to owner on the owner and the contractor* have been paid in full or, if the fact be otherwise, showing the name of *each such lienor* who has not been paid in full and the amount due or to become due each for labor, services, or materials furnished… . The contractor shall have no lien or right of action against the owner for labor, services, or material furnished under the direct contract while in default for not giving the owner an affidavit… ." (emphasis supplied). The trial court ruled that Fetta was in privity with the material supplier and, therefore, Fetta was on notice of its obligation to pay the material supplier.

The Fourth District Court of Appeal disagreed with the trial court's reasoning but agreed with the trial court's result and affirmed the trial court's decision. The Fourth District Court of Appeal stated that no competent substantial evidence existed that Fetta was in privity with the material supplier; however, the Fourth District Court of Appeal also held that competent substantial evidence existed that the material supplier never served a notice to owner on the owner. The Fourth District Court of Appeal read Section 713.06(3)(d)1. to require that the contractor identify only lienors "who have timely served a notice to owner on the owner." Therefore, the Contractor's final payment affidavit was not defective since the material supplier had never served a notice to owner on Fetta. Further, the Fourth District Court of Appeal found competent, substantial evidence in the record to support the conclusion that Contractor's omission of the material supplier from the final payment affidavit did not prejudice Fetta, therefore, the Contractor's lien was valid.

Florida statute on recordation is a "notice" statute, and was not converted to a "race-notice" statute by 1967 amendment to section 695.11, Florida Statutes---Subsequently executed mortgage in favor of mortgagee who did

not have actual or constructive notice of prior mortgage takes priority over the prior mortgage even though prior mortgage was recorded first.

Argent Mortgage Company, LLC v. Wachovia Bank, N.A. 36 Fla. L Weekly D69 (Fla. 5th DCA 2010)

On August 31, 2004, Gene M. Burkes and Ann Burkes (the "Burkes") executed and delivered a mortgage to Olympus Mortgage Company securing a loan in the amount of $90,000.00 (the "Olympus Mortgage"). The Olympus Mortgage was recorded on January 5, 2005. The Olympus Mortgage was later assigned to Wachovia Bank, N.A., as trustee under a pooling agreement ("Wachovia"). On December 10, 2004, the Burkes executed and delivered a mortgage to Argent Mortgage Company, LLC ("Argent") securing a loan in the amount of $65,000.00 (the "Argent Mortgage"). The Argent Mortgage encumbered the same real property as the Olympus Mortgage. The Argent Mortgage was recorded on January 31, 2005. The Argent Mortgage was later assigned to Wells Fargo Bank.

As a result of a default in the Olympus Mortgage, Wachovia filed a complaint to foreclose the Olympus Mortgage and named Argent as a defendant, alleging that Argent might claim some interest in or lien upon the real property being foreclosed under the Olympus Mortgage. As a result of default, an action to foreclose the Argent Mortgage was initiated. The trial court consolidated the two foreclosure actions. Argent filed a motion for summary judgment claiming that the Argent Mortgage had priority over the Olympus Mortgage. Likewise, Wachovia also filed for summary judgment claiming that the Olympus Mortgage had priority over the Argent Mortgage. The trial court held a hearing on the competing motions and determined that, when read together, Sections 695.01 and 695.11, Florida Statutes, "to be of the race-notice variety". The trial court ruled that the Olympus Mortgage had priority over the Argent Mortgage.

The Fifth District Court of Appeals noted that Wachovia prevails under a race-notice recording statute because, although Argent is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage, the Olympus Mortgage was recorded before the Argent Mortgage. The Fifth District Court of Appeal also noted that Argent prevails under a notice recording statute because it is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage. The Fifth District Court of Appeal reversed and remanded holding that Section 695.01, Florida Statutes, is a "notice" recording statute and that notice controls the issue of priority. The Fifth District Court of Appeal noted that commentators uniformly categorize Section 695.01 as a "notice" type of recording statute. Also, the Fifth District Court of Appeal rejected Wachovia's argument that the 1967 amendments to Section 695.11, Florida statutes, effectively converted Florida from a "notice" state to a "race-notice" state.

Language of easement providing for "free and unencumbered access" did not clearly prohibit servient owner from erecting gate across easement where gate did not interfere unreasonably with easement.

Gilliand v. Heiderich 46 So.3d 1186 (Fla. 5th DCA 2010)

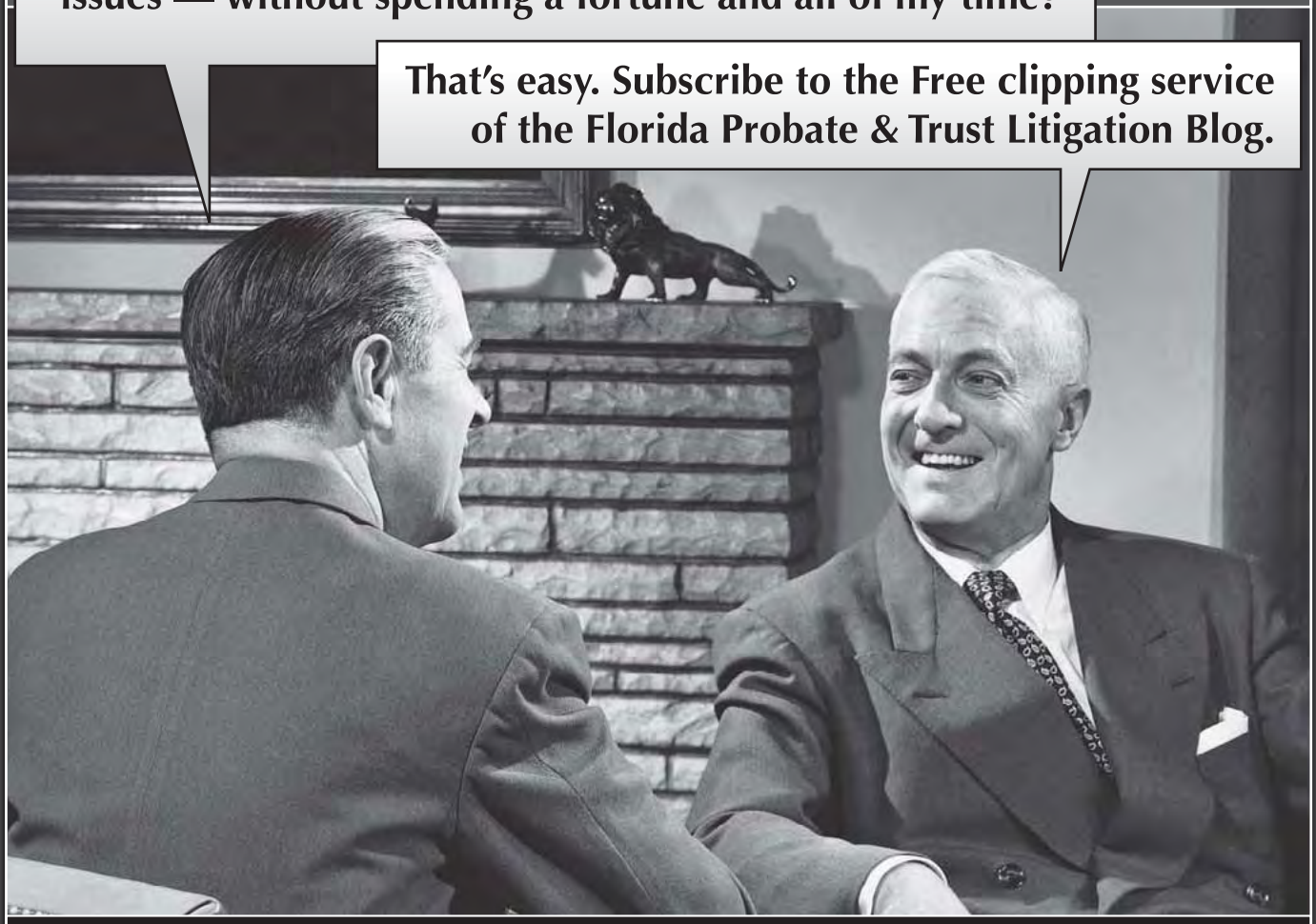
John Gilliand and Wendy McAllister ("Appellants") purchased a five acre parcel in 2003. The property, the dominant estate, was landlocked and required an easement over property owned by the Davidsons, the servient estate. A fifty-foot-wide easement for "free and unencumbered access," was conveyed with the purchase of the five acre parcel. In 2007, Heather Heiderich ("Appellee") purchased the servient estate from the Davidsons subject to the easement. Appellee informed Appellants of her plan to install an electronic gate at the point where the easement met S.R. 19 so that her horses would not wander onto the roadway. The gate would be activated by remote, keypad or manual override. Appellants objected to the installation of the gate and Appellee filed suit seeking declaratory and injunctive relief. Appellants answered, demanding the easement remain ungated, an asserting their right to the unobstructed use of the driveway.

During the litigation, Appellee installed the electronic gate. Appellee testified that the plate beneath the keypad for the electronic gate displayed the entry code for visitors and delivery personnel. The electronic gate was solar-powered with a battery backup and had a manual override. Prior to trial, Appellants moved and leased the dominant estate. At trial the tenant that occupied the dominant estate testified that both he and his guests had no problems using the electronic gate. Appellants argued that the value of the dominant estate was impaired by the existence of the electronic gate and refused to use the electronic gate to avoid any argument that they consented to its existence. The trial court entered a final judgment declaring that the language of the easement did not prevent Appellee from erecting a gate across the easement and that the electronic gate was not an unreasonable interference with Appellants' access to the dominant estate.

The Fifth District Court of Appeals affirmed the trial court's decision. The Fifth District Court of Appeals reasoned that parties that want to keep an easement free from gates and other obstacles can specifically express that intention in the document. However, failure to do so does not preclude the right to erect a gate so long as it does not interfere unreasonably with the right of way. The Fifth District Court of Appeals also stated that "free and unencumbered access" did not clearly express a prohibition on gates. The Fifth District Court of Appeals also stated that there was competent, substantial evidence to support the trial court's finding that the electronic gate did not unreasonably interfere with Appellants' easement.

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Section Executive Council Meeting

The Four Seasons – Santa Barbara

February 24th through February 27th, 2011

By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, FL
(with assistance from Margaret "Peggy" Rolando, Esq., Shutts & Bowen, LLP)

The February meeting of the RPPTL Section of the Florida Bar took place at The Four Seasons Resort in Montecito. Montecito is an area of Santa Barbara, California, and is located about ninety-five (95) miles north of the Los Angeles International Airport. The Four Seasons is an old, beautifully restored Biltmore Hotel. Not only was the facility fabulous, it was right across the street from the Pacific Ocean. The rooms were absolutely lovely and some even included fireplaces.

Many of the folks attending arrived on Wednesday and were able to take advantage of the events which started on Thursday morning.

Thursday morning's event was a walking tour through Santa Barbara. The tour covered twelve blocks and explored some of the oldest and most famous landmarks of the area including the Old Mission, the Santa Barbara County Courthouse, the Historical Museum, and El Presidio State Historic Park. The culmination of the tour was lunch at a restaurant with a view of the sunken gardens which grace the Historic Courthouse.

A buffet lunch was also available back at The Four Seasons Resort for those who did not participate in the walking tour. The afternoon event at The Four Seasons was a lesson on the Art of Wine Blending. For a meeting that was located in the heart of wine country, what could be more fun than learning how to make your own!

Thursday evening was the Welcome Reception at The Four Seasons and from all reports the food and drink were excellent.

Friday morning offered additional opportunities to take the walking tour for those who may not have been able to take advantage of the tour on Thursday.

At the same time as the repeated walking tour, there was an almost full day event which was a tour of vineyards. There were four separate groups and each group experienced two separate wineries. At each of the wineries, a tasting of the locally produced wine was offered and a tour of the facilities took place at one of the wineries. Afterwards, the four groups met back together at Roblar Winery for a lunch (with more wine). Peggy reports this event was very well attended and everyone very much enjoyed the relaxing atmosphere and the convivial conversation. Perhaps the wine put everyone in a mellow mood.

As if the vineyard tours didn't offer enough wine and food, there was an outstanding dinner at The Four Seasons Friday evening. The food was excellent and of course a variety of nice wines were served. The only negative thing Friday was that it poured rain but since the dinner was at the resort, it didn't matter too much.

Saturday morning, bright and early, saw the convening of the Executive Council Meeting. At the end of the meeting a trip was offered to "Flag is Up Farms." Flag is Up Farms is the home of Monty Roberts, a very famous horse trainer (the horse whisperer!). This is the kind of tour and demonstration that is unavailable to the general public. The horse trainers there showed a demonstration of the special technique they use called "the join up." This technique is employed to train a young horse to accept the blanket, saddle and rider in a very short time. Peggy Rolando reported that it was astonishing how these trainers were able to work with these untrained horses. The trainers were very gentle and used their sense of touch to connect with the horses. Experiencing the evolution of the horse within one short hour was simply amazing. Following the demonstration, the owners of the farm took folks on a tour of their very interesting home at the top of a hill with really incredible views of the valley below. The wife is an accomplished sculptress and her sculptures are scattered throughout the home. The participants enjoyed a leisurely lunch in the saloon attached to the home.

Peggy reports that the trip was truly a "one-of-a-kind" experience. She further commented that it was obviously clear that Brian and his lovely wife Sally spent a great deal of thought and energy on preparation for this trip and should be warmly thanked for their gracious and welcoming attitude.

Without a doubt, lots of important decisions were made at the Executive Council Meeting as well as the participants at Santa Barbara enjoying excellent food, delicious wine and great company.

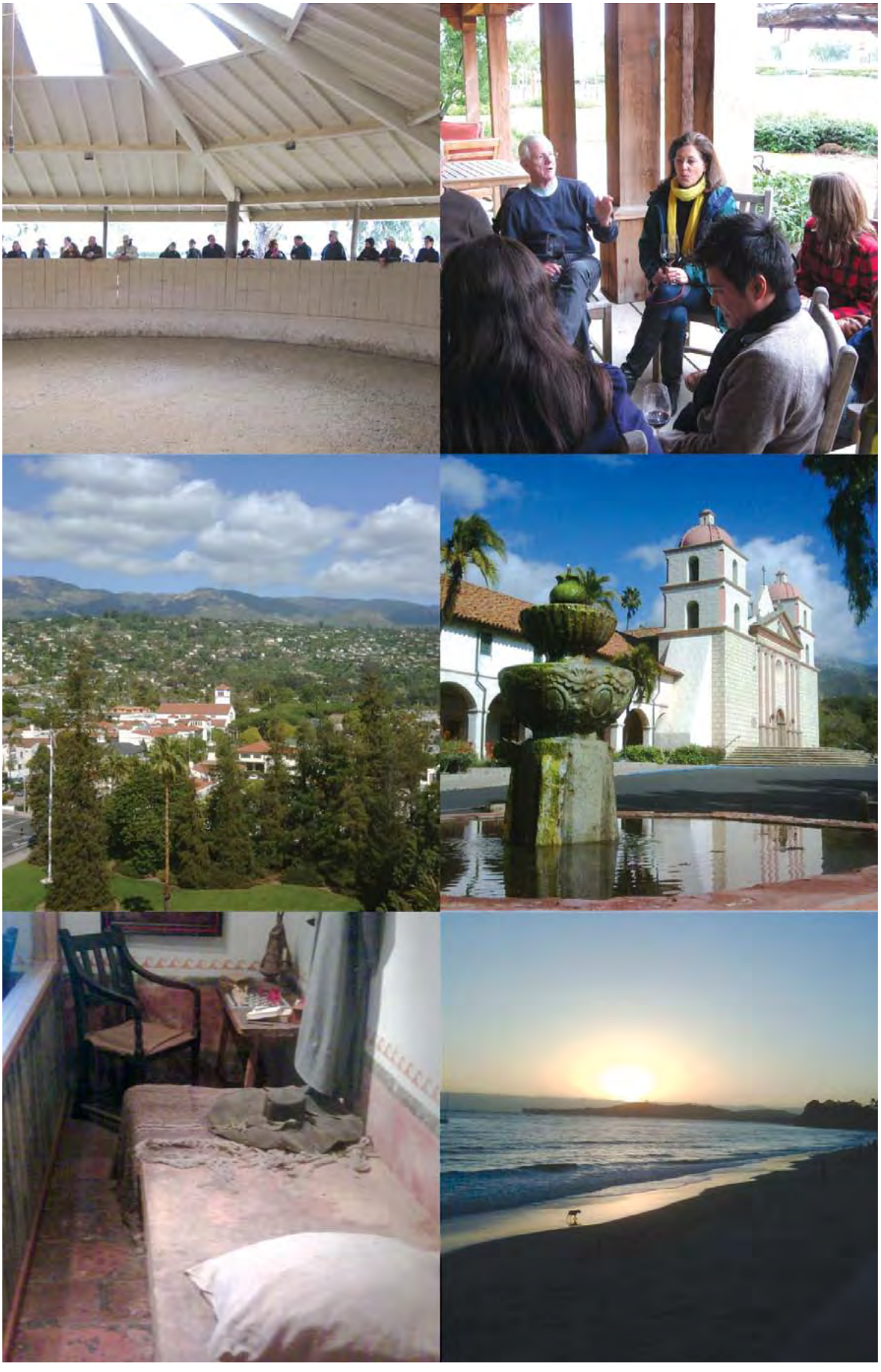
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RPPTL Section Executive Council Meets at The Four Seasons in Beautiful Santa Barbara, Calif.



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Probate Case Summaries

Prepared by Elisa F. Lucchi, Section Fellow
Goldman, Felcoski & Stone, P.A., Coral Gables, FL

TRUSTS:

Trial court erred in determining that condominium was not protected as homestead property from forced sale where property was held by decedent's revocable trust with widow as life beneficiary.

Aronson v. Aronson, 35 Fla. L. Weekly D2404 (2010)

Prior to his death, the decedent executed a revocable trust naming himself as the sole trustee. The decedent later transferred a condominium to the trust, which was the trust's sole asset and which later became the marital residence of the decedent and his widow. At the decedent's death, his sons became the trustees of the trust.

The widow is the life beneficiary of the trust and the trustees are the remainder beneficiaries. The trust states: (1) non-income producing property may be converted into income producing property; (2) income shall be paid to the widow; (3) principal may be paid to widow for her support, maintenance, medical care and enjoyment; and (4) principal may be paid to widow at her request so long as it does not exceed Five Thousand Dollars ($5,000.00) or five percent (5%) of the market value of the principal of the trust on the last day of the calendar year in which the withdrawal is requested.

Because the decedent executed a quit claim deed of the condominium in favor of the widow, she believed she owned the condominium. As such, the widow continued to reside in the condominium after the decedent's death and paid all fees, taxes and expenses of the property and satisfied a mortgage. The trial court declared the deed void and declared that the trust owned the condominium.

Soon after, the widow brought suit stating: (1) the property was exempt from forced sale as her homestead; (2) specific performance of the annual principal disbursal required by the trust; (3) reimbursement for the money she paid to maintain the property on the grounds of unjust enrichment. The trial court determined that the condominium was not protected homestead, but ruled in the widow's favor on the other counts and directed that the widow be paid by a transfer of equivalent interest in the condominium.

On appeal, the trustees contend that the trial court erred in ordering that the trust transfer an interest in the condominium to the widow instead of selling it on the basis that such transfers would eliminate their remaindermen benefits. The appellate court sided with the widow stating (1) the trial court erred in denying declaratory judgment on the homestead protection; (2) the trust as a whole demonstrates the decedent's intent to provide for his widow; (3) the widow is equitably entitled to be reimbursed for the unjust enrichment to the condominium during the time she believed she was the owner; and (4) the trial court erred in not awarding prejudgment interest on the awards to the widow.

The appellate court reversed the involuntary dismissal of the widow's claim for declaratory judgment, remanded for an entry of a judgment declaring the condominium as the widow's homestead and to aware prejudgment interest on the awards to the widow, and affirmed the awards to the widow granted by the trial court.

Error to enter summary judgment in favor of plaintiff on counts alleging breach of trust from defendant's conduct as co-trustee and an order compelling defendant to cooperate with distribution of plaintiffs share or removal of defendant as trustee where there were significant factual disputes concerning defendant's breaches of trust and damages from same.

Share v. Medina, 50 So. 3d 705 (Fla. 4th DCA 2010)

At the trial court level, the Appellee filed a four-count complaint against the Appellant, her step-brother, involving a trust formed by their parents. Three of the counts involved the trust and appellee sued the appellant for: (1) breach of trust from conduct as a co-trustee; (2) for an order compelling appellant to distribute appellee's share; (3) in the alternative, to remove appellant as a trustee; and (4) for recovery on a defaulted note. Appellant denied the allegations, asserted affirmative defenses and counterclaimed. Appellee moved for summary judgment which was granted on all counts.

At the appellate level, the court reversed on the first three trust related counts described above on the grounds that although appellant breached his duties to appellee, the extent of the breaches and the damaged incurred were disputed issues of material fact. The appellate court noted that although both parties presented affidavits and exhibits at the trial court level, the evidence created significant factual disputes regarding the breaches of trust and damages from same. Citing *Craven v. TRG-Boynton Beach, Ltd.*, 925 So. 2d 476, 489 (Fla. 4th DCA 2006), the appellate court noted "the facts are [not] so crystallized that nothing remains but questions of law."

The appellate court affirmed the portion of the summary judgment related to the defaulted note as a matter of law on the grounds that the Appellant rendered no performance which would have discharged his obligation to repay the note. Citing *Jacksonville Elec. Auth. V. Draper's Egg Poultry Co.*, 557 So. 2d 1357, 1358 (Fla. 1990), the appellate court noted "discharge of a claim by accord and satisfaction means a discharge by the rendering of some performance

different [in content] from that which was claimed as due and the acceptance of such performance by the claimant as full satisfaction of his claim."

Bank which made unsecured loan to party allegedly for the purpose or purchasing a condominium was not entitled to a constructive trust on the proceeds of the sale of the condominium at a sheriff's sale to satisfy a foreign state judgment against the borrower's estate after the borrower's death.

Bank of America v. Bank of Salem, 48 So. 3d 155 (Fla. 1st DCA 2010)

Appellee obtained two separate unsecured loans from separate banks totaling $800,000. Shortly thereafter, appellee purchased a condominium and then died. Both banks sought to recover their loans by having the trial court impose a constructive trust upon the condominium that the appellee allegedly used the funds to purchase. The trial court entered an order imposing a constructive trust in favor of the first of the two banks which loaned funds.

The appellate court reversed the order on the grounds that neither bank was entitled to a constructive trust on the property or on the res derived from the sale. Although both banks maintained that their loan to the decedent was contingent on the purchase of a property and later securing the loans with a mortgage on the condominium, neither bank was able to show how their loan to the decedent was used. The appellate court noted that mere allegations that the decedent promised to secure the property with a mortgage are insufficient evidence of fraud to warrant a constructive trust.

The appellate court reversed the order on the grounds that neither bank was entitled to a constructive trust on the property or on the res derived from the sale. Citing *Gersh v. Cofman*, 769 So. 2d 407, 409 (Fla. 4th DCA 2000), the appellate court noted that under Florida law, courts may impose a constructive trust where there is "clear and convincing proof of (1) a promise, express or implied, (2) transfer of the property and reliance thereon, (3) a confidential relationship, and (4) unjust enrichment." The court also noted that constructive trusts may be imposed only where the trust res is specific and identifiable or can be clearly traced in the assets of the defendant, that the mere promise of future conduct will not serve as a predicate for a claim of fraud to support a constructive trust

It was error to determine that beneficiaries of revocable trust did not have standing to challenge certain pre-death distributions and expenditures from the trust by the trustee and the settlor's attorney-in-fact.

Siegel v. JP Morgan Chase Bank, 36 Fla. L. Weekly D371 (2011)

Settlor created a trust to benefit her for her life with the remainder to her children. The trust permitted the trustee to pay from income and principal so much as the trustee deemed necessary for the settlor's health, maintenance, support, comfort or general welfare. The settlor reserved the power of amendment, revocation and modification and specifically excluded an attorney-in-fact from exercising those powers. However, the settlor also executed a power of attorney to her daughter granting her the ability to gift to individuals and charitable organizations consistent with the settlor's pattern of giving and not in excess of the annual exclusion.

The settlor later appointed the appellee as her trustee and amended her trust to state that New York law would govern and provided that the trustee could relocate the trust corpus. The trustee later relocated the trust corpus to Florida. The attorney-in-fact made considerable gifts and at the settlor's death, the trustee sought discharge from liability for its actions as trustee. The beneficiaries in turn alleged that some trustee distributions were not permitted by the trust. The trustee argued that the beneficiaries had no standing to challenge pre-death distributions because they had no present interest in the trust assets during the settlor's life.

In the prior appearance of this case in the appellate court, the judge detailed the application of New York Law. The appellate court applied New York law and determined that the beneficiaries had standing to challenge gifts made from the principal of the trust because they had a direct interest in the trust corpus after their mother's death. At issue was whether the trustee and attorney-in-fact breached their fiduciary duties. The trial court determined that the trustee and the attorney-in fact acted within the terms of the trust. However, the appellate court held that an evidentiary hearing was required to determine whether the expenditures and distributions were a breach of fiduciary duty.

Personal representative of estate that was a 50% owner of a foreign limited liability company (LLC) filed petition for temporary injunction to prevent the other 50% owner from disposing the assets; however, there was no personal jurisdiction over the corporation.

Henderson v. Elias, 36 Fla. L. Weekly D452 (2011)

Appellants (an individual and a Delaware LLC) seek review of an interlocutory order denying their motions to dismiss a petition for a temporary injunction filed by the decedent's personal representative. The individual appellant moved to dismiss for inconvenient forum and the Delaware LLC appellant moved to dismiss for lack of personal jurisdiction. The trial court denied both motions and entered the temporary injunction. The appellate court reversed the order denying the motion to dismiss for lack of personal jurisdiction.

The appellate court noted that since the Delaware LLC was a foreign corporation, that the estate was required to plead jurisdictional allegations in its amended petition

which were sufficient to establish personal jurisdiction over the Delaware LLC and that they petition was insufficient to show that the Delaware LLC fell within the scope of Florida's long arm statute (Fla. Stat. §48.193(1) (2009)) or to show that the Delaware LLC had sufficient minimum contacts with Florida to satisfy constitutional due process requirements.

At issue was whether the estate's amended petition contains sufficient allegations to establish personal jurisdictions. The appellate court held that the allegations in the amended petition were insufficient to state a basis for personal jurisdiction over the Delaware LLC on the grounds that personal jurisdiction over a foreign corporation cannot be granted solely because the two shareholders of the foreign corporation are subject to personal jurisdiction in Florida in their individual capacities. The appellate court held that the trial court should have dismissed the amended petition as to the Delaware LLC without prejudice.

ESTATES:

Error to enter order requiring production of will without hearing or proof that petition had been received by custodian of will.

Rossen v. Bilchik, 46 So. 3d 1223 (Fla. 4th DCA 2010)

Two sisters engaged in a dispute upon their father's death. Appellee filed a petition against appellant under Fla. Stat. §732.901 (2008) which provides that upon petition and notice, the custodian of any will may be compelled to produce and deposit the will with the clerk of court having venue of the decedent's estate within ten (10) days after receiving information that the testator is dead. Pursuant to the aforementioned statute, "all costs, damages, and a reasonable attorney's fee shall be adjudged to petitioner against the delinquent custodian if the court finds that the custodian had no just or reasonable cause for failing to deposit the will."

Appellee filed the petition with the clerk on January 11, 2008. On January 15, 2008, a circuit judge entered an order without a hearing and without proof that the Appellant had received the petition which was tantamount to a final judgment granting full relief by requiring Appellant to produce the will and awarding attorney's fees against her. The entry of this order without due process generated a plethora of motions, hearings and contempt orders.

Appellant timely objected to the order of January 15, 2008 and was entitled to have the order set aside under Fla. R. Civ. P. 1.540(b). The appellate court reversed the January 15, 2008 order, afforded the appellant relief under Fla. R. Civ. P. 1.540(b), the order granting attorneys fees and remanded the case to the circuit court.

No error in denying objection to inventory or in approving amended inventory; competent substantial evidence supported finding that decedent intended to make inter vivos gift of brokerage accounts; error to authorize personal representative to liquidate estate assets to protect homestead property where issue was not properly before trial court for consideration.

Gordon v. Gordon, 36 Fla. L. Weekly D386 (2011)

The decedent's son appeals the order entered by the trial court denying his objection to inventory, approving the amended inventory filed by the decedent's personal representative and authorizing the personal representative to protect the decedent's homestead property.

The appellate court held that the trial court's order denying the appellant's objection to inventory and approving the inventory filed by the personal representative is affirmed because there was competent, substantial evidence in the record supporting the trial court's finding that the decedent intended to make an inter vivos gift of brokerage accounts to the decedent's brother.

The appellee conceded error on the issue of whether the personal representative was entitled to liquidate assets of the estate to protect the decedent's homestead property and acknowledged that the issue was not properly before the trial court for consideration. On this basis, the appellate court reversed the portion of the trial court's order which authorized the personal representative to liquidate assets.

Where decedent left two minor children as the sole heirs of her intestate estate, it was error to appoint as personal representative a person other than the person tendered by the children through the guardian of their property.

Stalley v. Williford, 50 So. 3d 680 (Fla. 2d DCA 2010)

The trial court appointed the decedent's father, the Appellee, as personal representative of the decedent's intestate estate in preference to the Appellant who was person tendered by the decedent's minor children through the guardian of their property. The appellate court noted that absent evidence suggesting that the Appellant was unfit to serve as personal representative, the trial court abused its discretion by appointing the decedent's father rather than the representative chosen by the heirs. The appellate court held the appointment of the Appellee was contrary to Fla. Stat. §733.301 (2008) which prescribes the order of preference in appointment of a personal representative.

It was error to allow witness to testify from foreign country via telephone without a notary public or a person authorized to administer an oath where one party objected to the testimony.

Golden & Cowan v. Estate of Kosofsky, 45 So. 3d 986 (Fla. 3d DCA 2010)

A professional association and others filed a petition to determine homestead. The trial court granted the petition in favor of the estate finding that the property was the decedent's homestead. The appellants argue that the

trial court abused its discretion by allowing the telephonic testimony of an individual in a foreign country without a notary public or a person authorized to administer an oath over the appellant's objection to same.

The appellate court noted that under Florida Rule of Judicial Administration 2.530(d)(1), a judge may allow the use of telephonic testimony if all parties consent and as such the trial court's introduction of telephonic testimony over the objection of the appellant's was improper. However, the appellate court held that there was no miscarriage of justice as the telephonic testimony constituted harmless error due to the existence of other independent evidence which would have led the trial court to reach the same conclusion.

Trial court properly found that a warranty deed executed by husband and wife conveying their marital homestead to the wife relinquished all spousal homestead rights the husband had in the property and accomplished a complete waiver of husband's homestead rights under article X, section 4(c) of the Florida Constitution.

Habeeb v. Linder, 36 Fla. L. Weekly D300 (2011)

Husband and wife took title to a condominium in 1973 as tenants by the entireties. The condominium was their residence and Florida homestead. In 1979, husband and wife executed a warranty deed granting to wife a fee simple interest in the homestead property. The deed did not contain the terms "waiver" and "homestead rights", but did contain traditional sweeping terms of a warranty deed including the term "heriditaments".

In 2006, wife executed a will devising both her residuary estate and a life estate in the condominium to husband with remainder to sister. Wife died in 2008 survived by husband and sister. Husband died in 2009 survived by his children, one of which is the appellant and husband's personal representative. Sister died in 2010 survived by her child, who is the appellee and sister's personal representative.

The appellant brought action against the appellee challenging the devise of the homestead property under wife's will. At the trial court level, the appellant moved for a summary judgment striking the devise and determining that wife's fee simple interest in the condominium passed to her husband as her surviving spouse. The trial court denied the motion and concluded that husband had relinquished his entire interest in the 1979 warranty deed including any spousal rights in the homestead.

The question presented to the appellate court as one of first impression in Florida is whether the 1979 warranty deed accomplished a complete transfer of husband's homestead rights under article X, section 4(c) of the Florida Constitution. The appellant argued that no such transfer or waiver of husband's homestead rights was effectual in 1979 because the warranty deed failed to satisfy the requirements of Fla. Stat. §732.702 (1979), because the spouses made no fair disclosure of their estates to the other prior to the 1979 deed, and because the 1979 deed did not constitute a knowing intelligent waiver of homestead rights.

The appellate court noted that the 1979 deed was signed by spouses who had been married for a number of years at a time when they both occupied the condominium. The deed was prepared by a Florida attorney and signed before two subscribing witnesses and a notary public. The spouses also prepared testamentary documents based on the assumption that the 1979 deed relinquished husband's property rights, including homestead interests. Based on this and other supportive evidence, the appellate court upheld the trial court's conclusion that the spouses made fair disclosure to the other.

The appellate court then analyzed the legal sufficiency of the waiver and noted that article x, section 4(c) of the Florida Constitution expressly authorizes spouses to alienate their homestead property by mortgage, sale or gift. The appellate court found that husband and wife clearly expressed their right to convey and that husband waived his right to "heriditaments" which includes anything capable of being inherited.

Abatement by trial court was improper where plaintiff in action challenging the validity of a trust is the defending party in the probate action seeking to establish the validity of the concomitant will and abatement is appropriate only where plaintiffs and defendants in the two actions are the same.

Relinger v. Fox, 36 Fla. L. Weekly D294 (2011)

The petitioner as the personal representative of the decedent's will was administering a 1984 will executed by the decedent. The respondent and decedent's siblings filed a petition to administer a 2007 trust and pour-over will they produced. The petitioner challenged the validity of the 2007 will claiming improper execution, undue influence and filed a separate civil action attacking the validity of the trust based on improper execution, undue influence and lack of capacity. The trial court granted the respondent's motion to abate the trust action due to the probate proceedings.

The petitioner filed a petition to review the abatement, but the respondents moved to dismiss the petition on the grounds that the petitioner cannot demonstrate the irreparable harm hat is a jurisdictional prerequisite for certiorari review. However, the appellate court noted that it has been held that an abatement order is properly reviewable by certiorari because an appeal from an eventual final judgment would not be an adequate remedy for the delay caused by the abatement.

The appellate court also noted that the abatement was a departure from the essential requirements of the law which require a strict identity of parties between the two suits and can be ordered only when the plaintiffs and defendants in the actions are the same. The appellate court furthered

that when a party is a defendant in one suit and a plaintiff in a subsequent suit, the first suit cannot be pleaded in abatement of the second. The appellate court quashed the order of abatement and granted the petitioner's petition.

House owned by decedent and his mother as joint tenants with right of survivorship was not homestead property for purposes of the administration of the decedent's estate.

Marger v. De Rosa, 36 Fla. L. Weekly D214 (2011)

The decedent and his mother purchased a home and had a warranty deed which states the house was owned "as joint tenants with full right of survivorship and not as tenants in common." At the time of the conveyance, the decedent had two minor children. The decedent later died intestate, with no surviving spouse, and with two minor children. Mother claimed title to the property at decedent's death.

The appellant argues that the home should have homestead status for the benefit of the two minor children because the two minor children were in existence at the time the home was purchased and as such was a future devise of homestead. The appellate court disagreed and noted that the decedent was free to take title as a joint tenant with right of survivorship and that in doing so the property did not become homestead property when the decedent and his mother purchased it. The appellate court affirmed the trial court's holding that the decedent's interest in the property terminated at his death and then became the sole property of his mother as the surviving joint tenant.

Trial court properly held that decedent's condominium was not homestead property where the decedent purchased a life estate from a condominium association and entered into a repurchase agreement with the association to give the association fee simple title to the condominium at the decedent's death and the ability to sell the condominium for the benefit of the decedent's heirs.

Boren v. Suntrust Bank, 46 So. 3d 1156 (Fla. 2d DCA 2010)

Appellant appeals an order by the trial court which found that the decedent's contractual interest in a condominium was not homestead property protected from claims of creditors. The inclusion of the value of the condominium in the decedent's estate increased the fees to which the appellee was entitled as personal representative.

The decedent purchased a life estate in the condominium in 2000 and at the same time entered into a repurchase agreement with the condominium association which provided that the life estate would terminate at the decedent's death and that fee simple title would automatically vest with the condominium association. The trial court determined that the condominium was not protected homestead property on the grounds that the decedent exchanged and negotiated away the homestead character of the condominium by signing and negotiating a buy back agreement with a life estate provision for financial and personal benefit which negated the homestead character of the property.

The appellate court affirmed the trial court on the grounds that the decedent never had more than a life estate interest in the condominium.

GUARDIANSHIPS:

Appeal of order on guardian ad litem's petition for permanent guardianship was untimely where appeal was filed nearly a year after entry of order.

Crawford v. Guardianship of Crawford, 50 So. 3d 1240 (Fla. 4th DCA 2011)

Appellant appeals an order on the guardian ad litem's petition for permanent guardianship and an order denying a motion to disqualify the circuit judge. The appeal of the order on permanent guardianship was untimely was filed nearly a year after entry of the order. Citing Fla. R. App. P. 9.110(b), the appellate court dismissed the appeal from that order. However, the appellate court affirmed the order denying disqualification of the circuit judge. The appellate court also noted that although the appeal was timely as to the order denying disqualification, the appellant did not raise any challenge to it in the appellant's brief.

The ward's death does not prevent court from enforcing orders previously entered in guardianship cases.

Sowden v. Brea, 47 So. 3d 341 (Fla. 5th DCA 2010)

The parties entered into a mediation settlement agreement wherein the trustee agreed to pay attorney's fees and costs for certain tasks. The trial court later approved the settlement agreement and ordered the parties to comply with its terms. Two years later the ward died and the guardians consented to payment, but the trustee objected to payment and argued the trial court lacked authority over the trustee and the trust assets.

The trial court held that upon the ward's death, the only proceedings authorized under Fla. Stat. §744.527(1) (2008) were the consideration of the guardian's petition for discharge and any objections thereto. The appellate court also held that personal jurisdiction can be conferred by consent and that by entering into the settlement agreement, the trustee submitted to the jurisdiction of the court.



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Thursday, June 16

11:30 a.m. – 5:30 p.m. **21st Annual Scramble Golf Tournament and Lunch**
Hosted by Wells Fargo Private Bank

6:15 p.m. – 7:30 p.m. **Reception (Spouses Welcome)**
Hosted by U.S. Trust, Bank of America Private Wealth Management

Friday, June 17

7:30 a.m. – 8:15 a.m. **Breakfast**
Hosted by SunTrust Bank

7:45 a.m. – 8:15 p.m. **Check In & Late Registration**

8:15 a.m. – 8:30 a.m. **Welcome and Announcements**
Liaison with Corporate Fiduciaries Committee:
Robin J. King, Buchanan Ingersoll & Rooney PC, Aventura, Chair
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Mark T. Middlebrook, Wells Fargo Private Bank, Jacksonville, Fiduciary Chair

8:30 a.m. – 9:05 a.m. **The Florida Power of Attorney Act – More Durable Than Ever**
Tami Conetta, Northern Trust, Sarasota

9:05 a.m. – 9:55 a.m. **IRAs....Love Them or Leave Them, Trust Them or Convert Them....and Are They Protected?**
Lester Law, US Trust, Bank of America Private Wealth Management, Naples
Kristen Lynch, Ruden McClosky, P.A., Fort Lauderdale
Richard S. Franklin, McArthur Franklin PLLC, Washington, D.C.

9:55 a.m. – 10:30 a.m. **Will Reformation Legislation**
Brian Felcoski, Goldman Felcoski & Stone P.A., Coral Gables

10:30 a.m. – 10:40 a.m. **Break**
Sponsored by Fiduciary Trust Company International

10:40 a.m. – 11:30 a.m. **Estate Planning Current Developments Including Estate Planning Under the New Paradigm of the Tax Relief Act of 2010**
Steve Akers, Bessemer Trust, Dallax, TX
Sponsored by Neuberger Berman Trust Company N.A.

11:30 a.m. – 12:20 p.m. **So You Wanna Be a Philanthropist?**
Christopher R. Hoyt, University of Missouri, Kansas City, Missouri
Sponsored by The Community Foundation of Broward, The Miami Foundation, and The Community Foundation for Palm Beach and Martin Counties

12:20 p.m. – 1:30 p.m. **Lunch/Discussion**
Hosted by Regions Morgan Keegan Trust

1:30 p m. – 2:05 p.m. **Commodity Investment Options**
Richard C. Ewan, Beach Horizon, Inc., Chicago, Illinois

2:05 p.m. – 2:40 p.m. **Decanting....Even Better With Age**
Laird Lile, Law Offices of Laird Lile, Naples

2:40 p.m. – 3:30 p.m. **Asset Protection in a Post Recession World**
Brian Sparks, Hill Ward Henderson, Tampa
Tom Wells, Thomas O. Wells, P.A., Coral Gables
Howard D. Rosen, Donlevy-Rosen & Rosen P.A., Coral Gables

3:30 p.m. – 3:40 p.m. **Break**
Sponsored by Fiduciary Trust Company International

3:40 p.m. – 4:30 p.m. **Litigation Updates and Conflicts of Interest & Other Potential Liability Areas for Lawyers and Other Individuals Acting as Trustee**
Gail Cohen, Fiduciary Trust Company International, New York, NY

4:30 p.m. – 5:10 p.m. **2011 Florida Trust and Probate Legislative Update**
Tae Bronner, Tae Kelley Bronner P.L., Tampa
Sponsored by Guardian Trust

5:30 p.m. – 7:00 p.m. **Reception (Spouses Welcome)**
Hosted by BNY Mellon Wealth Management

Saturday, June 18

7:30 a.m. – 8:30 a.m. **Breakfast**
Hosted by The Florida Bar Foundation

8:30 a.m. – 9:05 a.m. **Tangible Assets–What Every Estate Planning Professional Should Know**
Leslie Hindman, Leslie Hindman Auctioneers, Chicago / Naples / Palm Beach

9:05 a.m. – 10:00 a.m. **Celebrity Estate Planning Disasters–Part II–Stuff Happens**
Richard E. Warner, Law Offices of Richard E. Warner, P.A., Marathon

10:00 a.m. – 10:50 a.m. **Your Estate Plan in the Review Mirror: What Your Executor Wishes You Had Done**
Aen Webster, Buchanan Ingersoll & Rooney, Washington, D.C.

10:50 a.m. – 11:00 a.m. **Break**
Sponsored by Northern Trust

11:00 a.m. – 11:40 a.m. **Case Law Update**
Steven L. Hearn, Steven L. Hearn, P.A., Tampa

11:40 a.m. – 12:20 p.m. **Recent Trends in Using Trusts in Business Owner Transactions**
Kent Burrow, Key Bank, Cleveland, OH

12:20 p.m. – 1:00 p.m. **Elder Exploitation**
Gerald Hemness, Emma Hemness P.A., Brandon

6:30 p.m. – 8:30 p.m. **Reception (Spouses Welcome)**
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Sunday, June 19

9:00 a.m. – 10:30 a.m. **Breakfast: Post Conference Discussion**
Hosted by U.S. Trust, Bank of America Private Wealth Management

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Robert Bulloch, Quarles & Brady LLP, Naples
Mary Jane Olsavsky, BNY Mellon Wealth Management, Fort Lauderdale
Mary Biggs Knauer, First Guaranty Bank
Sharon DaBrusco, Wells Fargo Private Bank
Brandan J. Pratt, Miller & O'Neill, P.L., Boca Raton

Speaker Coordinators: Lydia Sprankle, Coconut Grove Bank, Miami
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Break-Out Session Coordinator: Daniel T. Fleischer, Craig Donoff, P.A., Aventura

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A flash drive with the course materials will also be provided on-site at no additional charge. **Sponsored by Christiana Trust

❑ Registrant (LIVE WEBCAST): $480 **1210R317**

WEBCAST CONNECTION: Registrants will receive webcast connection instructions two days prior to the scheduled course date via e-mail. If The Florida Bar does not have your e-mail address, contact the Order Entry Department at 850-561-5831, two days prior to the event for the instructions.

Conference Events for Registrants

(Conference Events are included in registration fee. Please check the events you plan to attend.)

Thursday, June 16

❑ Reception **1210S1051**

Friday, June 17

❑ Continental Breakfast **1210S1052**

❑ Luncheon **1210S1053**

❑ Reception **1210S1054**

Saturday, June 18

❑ Continental Breakfast **1210S1055**

❑ Reception **1210S1056**

Sunday, June 19

❑ Breakfast **1210S1057**

Conference Events for Spouses

(The following events are open to spouses. Please check the events your spouse plans to attend. An additional fee applies where indicated.)

Thursday, June 16

❑ Reception **1210S1051**

Friday, June 17

❑ Continental Breakfast $25 [$23.58 plus $1.42 tax] **1210S1052**

❑ Reception **1210S1054**

Saturday, June 18

❑ Continental Breakfast $25 [$23.58 plus $1.42 tax] **1210S1055**

❑ Reception **1210S1056**

Sunday, June 19

❑ Breakfast $25 [$23.58 plus $1.42 tax] **1210S1057**

Thursday, June 16 – Scramble Golf Tournament *(Sponsored by Wells Fargo Private Bank)*

NOTE: An additional fee applies to both registrants and spouses. (Please provide us with your Handicap or Average Score)

❑ Golf $75 **1210S1058** [$70.75 plus $4.25 tax] Handicap or Average Score _____

❑ Golf - Spouse/Guest $75 **1210S1058** [$70.75 plus $4.25 tax] Handicap or Average Score _____

Total Amount Enclosed $_____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

COURSE BOOK – AUDIO CD – DVD

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 06/18/11. TO ORDER AUDIO CD / DVD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax.**

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

❑ **COURSE BOOK ONLY (1210M)**
Cost $60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)
TOTAL $ _____

❑ **AUDIO CD (1210C)**
(includes Electronic Course material)
$360 plus tax (section member)
$410 plus tax (non-section member)
TOTAL $ _____

❑ **DVD (1210D)**
(includes Electronic Course material)
$500 plus tax (section member)
$550 plus tax (non-section member)
TOTAL $ _____

The Real Property, Probate & Trust Law Section presents

Sun, Sea and CLE...

Updates in Ethics, Homestead and the Use of Powers of Attorney

FREE TO RPPTL SECTION MEMBERS

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: Friday, May 27, 2011

Eden Roc Hotel • 4525 Collins Avenue • Miami Beach, FL 33140 • 1-305-531-0000

Course No. 1205R

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

8:55 a.m. – 9:00 a.m.
Opening Remarks

9:00 a.m. – 9:25a.m.
To Tell or Not to Tell – New Ethics Opinion 10-3 and the Duty of Confidentiality to a Deceased Client
Barry F. Spivey, Esq., Adams and Reese, LLP, Sarasota
Deborah P. Goodall, Esq., Holland & Knight, LLP, Fort Lauderdale
Wm. Fletcher Belcher, Esq., Law Offices of Wm. Fletcher Belcher, St. Petersburg

9:25 a.m. – 10:15 a.m.
It's 10 pm – Do You Know Where Your Data Is? Ethical Considerations on How Storage Media Sanitization Impacts Your Practice
Steven W. Teppler, Esq., Edelson McGuire, LLC, Sarasota
Eric A. Hibbard, Hitachi Data Systems
John E. or Serge D. Jorgensen, Sylint Group

10:15 a.m. – 10:30 a.m.
Break

10:30 a.m. – 11:00 a.m.
Important Homestead Issues for Trustees and Personal Representatives in Recessionary Times
Shane Kelley, Esq., The Kelley Law Firm PL, Fort Lauderdale
Pat Hancock, Esq., Fidelity National Title Group, Maitland

11:00 a.m. – 11:45 a.m.
Use or Abuse? Issues Arising from Powers of Attorney
Tami F. Conetta, Esq., Northern Trust, NA, Sarasota
Wilhelmina Kightlinger, Esq., Old Republic National Title Insurance Co., Tampa

REAL PROPERTY, PROBATE & TRUST LAW SECTION
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CLE CREDITS

CLER PROGRAM
(Max. Credit: 3.0 hours)
General: 3.0 hours
Ethics: 1.5 hours

CERTIFICATION PROGRAM
(Max. Credit: 1.0 hour)
Elder Law: 1.0 hour
Real Estate Law: 0.5 hours
Wills, Trusts & Estates: 1.0 hour

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

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

TO REGISTER

MAIL: Completed form with check

FAX: Completed form to 850/561-5816

REFUND POLICY: A $25 service fee applies to all requests for refunds. Requests **must be in writing and postmarked** no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid.

HOTEL RESERVATIONS: A block of rooms has been reserved at the **Eden Roc Hotel**, at the rate of **$199** single/double occupancy. To make reservations, call the **Eden Roc Hotel** directly at 1-305-531-0000. Reservations must be made by **05/03/11** to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for "Sun, Sea and CLE... Updates in Ethics, Homestead and the Use of Powers of Attorney"

ONE LOCATION: (255) EDEN ROC RENAISSANCE RESORT AND SPA, MIAMI BEACH, FL (MAY 27, 2011)

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

Name _____ Florida Bar # _____

Address _____ Phone: ( ) _____

City/State/Zip _____ E-mail* _____

E-mail address is required to receive electronic course material and will only be used for this order.

LCG: Course No. 1205R

ELECTRONIC MATERIALS: Effective July 1, 2010, every CLE course will feature an electronic course book in lieu of a printed book for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable, downloadable, printable material will be available via e-mail several days in advance of the live course presentation or thereafter for purchased products. We strongly encourage you to purchase the book separately if you prefer your material printed but do not want to print it yourself.

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Real Property, Probate & Trust Law Section: $0
- ❑ Registration and Section Membership until June 30, 2011: $50
- ❑ Full-time law college faculty or full-time law student: $25
- ❑ Persons attending under the policy of fee waivers: $0
  Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and for personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

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

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REAL PROPERTY FORMS

(Please note this disk DOES NOT include the FR/BAR Contracts or Riders, those are available at www.flssi.org.)

Interactive CD Formatted for both WordPerfect and MS Word

Fill In The Forms, Save Updated Form To Your Computer & Print

(Current update 2008)

The Real Property Forms Committee of the Real Property, Probate & Trust Law Section of The Florida Bar has completed the arduous task of preparing suggested forms with comments for the Real Property Practitioner. The forms are available through Florida Lawyers Support Services, Inc. to RPP&TL Section members.

ONLY $ 100

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Firm: _____

Attn: _____ Bar #: _____

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FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

Approved by The Florida Bar, Real Property, Probate & Trust Law Section and The Florida Realtors

_____ **Set(s) of 10 FR/BAR CONTRACTS (Revised June 2010)** **$50.00 per set**

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(*a package is ten copies of each rider listed below*)

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Homeowners Insurance
Foreign Investment in Real Property Tax Act ("FIRPTA")
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
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Pre-Closing Occupancy by Buyer
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Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
Buyer's Attorney Approval
Licensee Disclosure Of Personal Interest in Property
Binding Arbitration

Order Sub-Total	$_____
Sales Tax 6.5%	$_____
Shipping & Handling	$ 9.00
TOTAL	**$**_____

Firm:_____

Attn:_____ Attorney Bar #: _____

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

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

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OR

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Action Line July 2010

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PROBATE & GUARDIANSHIP FORMS

Developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2011 FLSSI forms.**

Firm: _____

Attorney Name: _____ **Attorney Bar #:**_____

Physical Address: _____

City/State/Zip: _____

Phone: (_____)_____ E-mail Address: _____

2011 PROBATE FORMS

OPTION #1 ALL 2011 FORMS WITH INDEX - .PDF ON DISK $379.10
OPTION #2 1 PHYSICAL COPY OF ALL 2011 FORMS WITH INDEX $399.20

2011 GUARDIANSHIP FORMS

OPTION #1 ALL 2011 FORMS WITH INDEX – .PDF ON DISK. $333.10
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If you would like to order individual forms, please visit www.flssi.org to download our "long" order form which lists each form for separate purchase.

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METHOD OF PAYMENT

Either mail this form with check to the address listed above or include credit card information and fax to 407.515.1504. Prices include shipping, handling and sales tax. **VISA or MasterCard Only.**

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LITIGATION UNDER FLORIDA PROBATE CODE

8TH EDITION

NEW EDITION

Turn to this manual when a probate matter appears headed toward litigation. Leading Florida probate practitioners guide you through the complex issues that arise in probate such as homestead, will construction proceedings, creditors' claims, and compensation disputes. This new edition discusses numerous recent statutory and rules changes and reflects the latest case law.

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- Discussion of statutory changes through the 2010 session of the Florida Legislature, including:
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- Updates to probate rules through 2010
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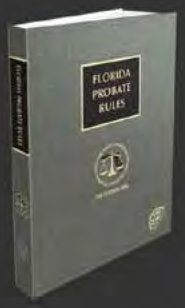
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RELATED PUBLICATION

FLORIDA PROBATE RULES

2011 EDITION



The 2011 Edition of *Florida Probate Rules* features the full text of all the probate and guardianship rules, including 3-year cycle amendments, with the committee notes, rule histories, and statutory and rule references for each rule.

In addition, this reference includes related provisions from Florida Statutes, updated through the 2010 Session:

- Florida Probate Code
- Recently enacted Florida Trust Code (and the former trust law)
- Principal and income law
- Florida Guardianship Law
- Statutes governing the right to decline life-prolonging procedures
- Constitutional provisions regarding homestead

$50

ISBN: 9781422467381
PUB NO.: 22736 • YEAR: 2011

What's Happening Within the Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, other publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses, and a whole host of relevant links to other real property, probate & trust law websites.

Additionally, the Section is working on human resources pages where searches can be done for out-of-state licensed Section members, law students available for clerkships or special project assistance, and other classifications. Further, Section committees each have list serves that discuss issues and current hot topics, available to committee members.

SCHEDULE

EXECUTIVE COUNCIL MEETING / RPPTL CONVENTION
May 25-28, 2011
Eden Roc Renaissance Miami Beach
Miami Beach, Florida
Reservations: (305) 531-0000

ATTORNEY / TRUST OFFICER LIAISON CONFERENCE
"XXX RATED (THREE DECADES OF DEDICATION)"
June 16 – 19, 2011
The Breakers
Palm Beach, Florida
Reservations: (561) 655-6611

EXECUTIVE COUNCIL MEETING & LEGISLATIVE UPDATE
August 4 – August 7, 2011
The Breakers
Palm Beach, Florida
Reservations: (561) 655-6611
Room Rate $190
Cut-off Date July 3, 2011

THE PROBATE TEAM 2011
September 30 & October 1, 2011
Caribe Royale
Orlando, Florida
Reservations: (888) 258-7501
Room Rate: $129 (Standard Queen Suite)
Cut-off Date: August 26, 2011
Seminar Registration Information: FLSSI.org

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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CONGRATULATIONS TO GWYNNE YOUNG!

RPPTL congratulates **Gwynne A. Young** on being elected President-Elect of The Florida Bar for 2011-2012. Gwynne, a shareholder in the Tampa office of Carlton Fields, P.A., will be the fifth female Bar president. She will be sworn in during the Bar's Annual Convention in June and will begin her term as Bar President in June 2012.

Gwynne has served on the Board of Governors for eight years and has actively been involved on the Executive Council of the RPPTL Section.

Stay tuned for a special report on Gwynne in the upcoming Summer 2011 issue of *ActionLine*. For more information, please visit: *http://tinyurl.com/gwynneyoung.*

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 on page 4 inside.)

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