

ActionLine

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

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Satisfaction of IRS Tax Liens with Excess Tax Sale Funds

Trustee's Refusal to Cover PR's Notice of Insufficiency

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Chair's Column

By George J. Meyer

Section Chair, 2011- 2012

Annual Section Convention and Awards

The Section's Annual Convention was held this year at the Don Cesar Resort in St. Pete Beach, from Thursday, May 31 through Saturday, June 2. In addition to the Executive Council and Division Roundtable meetings, there were the usual abundance of well-attended substantive law committee meetings (which is one of the best indications of the Section's continuing vitality and effectiveness). There also was a CLE seminar that was free to all Section members and provided 3.5 hours of ethics credits. At the Section's Friday business luncheon, in addition to the election of next year's Section Officers and At-Large Members, there was a very moving and inspirational talk given by Mark Curriden based upon his award-winning book, "Contempt of Court: A Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism." A fantastic dinner, dance and casino night was held on Friday evening, followed by a very special Saturday night reception and dinner at the new Salvador Dali Museum.

Perhaps one of the most significant functions held at the Annual Convention was the presentation of the Section's four service awards, which are: the Rising Star Award; the Annual Service Award; the Robert C. Scott Memorial Award; and the William F. Belcher Lifetime Professionalism Award. Selecting the recipients of the service awards is truly one of the most fulfilling responsibilities I was tasked with as Chair of the Section.

The Rising Star Award was first presented in 2009. It recognizes two Section members (one from the Real Property Law Division and one from the Probate and Trust Law Division) who have demonstrated the potential for future Section leadership through their active participation in various Section committees and projects. This year, the Real Property Law Division Rising Star Award was presented to Salome J. Zikakis, and the Probate and Trust Law Division Rising Star Award was presented to Shane Kelly. Both individuals have demonstrated a long involvement with and commitment to the Section and its activities, most recently evidenced by their respective chair positions of major substantive committees within their respective Divisions.

The Annual Service Award was first established in 1985 and is presented to a Section member who has given outstanding and dedicated service to the Section during the past year. Both the character and magnitude of the service furnished by the nominee is taken into consideration. This year's Annual Service Award was presented to Patricia P. Hendricks Jones, in recognition of her leadership in initiating and overseeing the completion of the monumental task of revising and updating the Section's Uniform Title Standards. This was a multi-year project that is of great service and value to the Section, and it required great persistence and a significant time commitment from Ms. Jones.

The Annual Service Award was given even greater importance this year as it was renamed, via Section Proclamation, the "John Arthur Jones Annual Service Award." I can think of no better recognition and tribute that could be given to Mr. Jones for all of his many years of service to the Section; after all, the name "John Arthur Jones" is effectively synonymous with the term "Section Service."

The Robert C. Scott Memorial Award was established in 1985 to recognize Mr. Scott's many years of untiring, devoted and valuable service to the Section. This Award is not necessarily granted on an annual basis; rather, it is to be given, when appropriate, to those Section members who best exemplify the kind of devotion and continued service to the Section and its membership displayed by Mr. Scott. This year, the Award was presented to Julius "Jay" Zschau, in recognition of his many years of loyal and dedicated service to the Section and its members, not only through his continuing participation and leadership in Section and committee activities (including his year as Section Chair), but also for his tireless efforts in recruiting, assisting, mentoring and promoting

continued, page 5

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ABOUT THE COVER:

Wading bird
by Michael Gelfand.

IN THIS ISSUE:

Chair's Column: Annual Section Convention and Awards 3

Is Florida More Protective of the IRS Than Uncle Sam? 7

Just Say No; What Happens When the Trustee Refuses to Cover the Personal Representative's Notice of Insufficiency? 9

Why Should You Care About Numeric Nutrient Criteria? 13

Real Estate Case Summaries 17

Section Executive Council Meeting, Ponte Vedra 21

Section Executive Committee Meeting, Tampa 25

Probate Case Summaries 29

Governor Scott Signs Extension of Florida's Distressed Condominium Relief Act 31

CLE: Legislative and Case Law Update Seminar 34

CLE: Drafting Powers of Attorney–What Works? 38

What's Happening Within the Section... 43

ActionLine Bulletin Board 44

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younger lawyers within the Section.

The William F. Belcher Lifetime Professional Award was established in 2003 and is to be presented, at the discretion of the Section, to an Executive Council member, in recognition of lifetime contributions to not only the Section's Executive Council, but also to all Florida attorneys and the general public, in promoting and exhibiting the highest standards of ethics and professionalism, as demonstrated by the exemplary career of William F. "Bill" Belcher. The person to whom this Award was presented this year clearly has demonstrated on a continuing basis all of those high principals and characteristics throughout her entire career. For her many years of excellent service to the Section and the Executive Council (including her year as Section Chair), for always seeking to protect the rights and interests of the general public (especially in regards to Florida real estate law), for at all times promoting and facilitating the highest standards of ethics and professionalism with a graciousness and civility that encouraged all those around her to strive for the same high standards, and for her willingness and ability to voluntarily share her extensive knowledge, expertise, ethics and professionalism with all of those around her, this year's William F. Belcher Lifetime Professionalism Award was presented to Ruth Barnes Kinsolving.

This year's service award recipients have made extensive contributions to the Section – far too many to reflect upon in this article. As Section members, each one of us owes them a great deal of gratitude for their exemplary service and commitment to the Section.

In closing, I wish to acknowledge this year's Annual Convention Co-Chairs, S. Catherine Frazier and Phillip A. Baumann. The success of the Annual Convention was due, in no small part, to their hard work and tireless efforts. Thank you both for doing such a fantastic job. 4L.



Chair George Meyer Receives Lifetime Achievement Award at CLI

Current RPPTL Section chair, George J. Meyer, was awarded the Lifetime Achievement Award at the 5th Annual Construction Law Institute for his many years of service and numerous contributions in construction law in Florida. Seen here, Luis Prats presents the award to Mr. Meyer on behalf of the Construction Law Institute Committee during the Institute's March 23rd lunch at the Reunion Resort & Club in Reunion, Florida.



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Is Florida More Protective of the IRS Than Uncle Sam?

By Joseph B. McFarland, Esq.,
Joseph B. McFarland, PA, Auburndale, Florida

Section 197.582(2), Florida Statutes, provides for distribution of proceeds after a tax sale of Florida real property. This statute states in part that "[t]he clerk shall distribute the excess to the governmental units for the payment of any lien of record held by a governmental unit against the property, including any tax certificates not incorporated in the tax deed application and omitted taxes, if any."

The law has appeal for tax collectors, as a tax deed sale may provide an excellent opportunity to clear away at least a portion of past debts held by the "government." "Governmental unit" is not defined in Chapter 197 of the Florida Statutes, but the term may be interpreted as applying to federal as well as state, county and local governmental "units."

The clerk of the court of at least one Florida county has taken the position that the excess funds remaining after a tax sale must be used to pay the U.S. Treasury pursuant to IRS tax liens recorded several years after the property had been deeded to the taxpayer and a purchase money mortgage had been duly recorded. Section 197.582(2), Florida Statutes, in fact seems to support such a position.

Section 6321 of the Internal Revenue Code (IRC) provides for the imposition of tax liens. IRC Section 6323 provides that tax liens are not valid until notice of the lien is properly filed.

IRC Section 6323 establishes four classes of creditors,

(1) Creditors who are purchasers, holders of security interests, mechanic's lienors or judgment lien creditors receive priority status only if their interests are perfected before filing of the Notice of Federal Tax Lien (NFTL). IRC § 6323(a).

(2) Creditors with "semi-super" priority status pursuant to IRC Section 6323(c). A limited priority over a perfected federal tax lien exists if the interest was created pursuant to a written agreement entered into before the NFTL is filed. Further, the interest must be protected under local law against subsequent judgment lien creditors.

(3) Creditors with "super priority" status. See IRC § 6323(b). These creditors' interests prevail over the federal tax lien whether or not the NFTL has been filed before their interests are perfected. Interests with "super priority" status can often prevail even if there is actual knowledge of a preexisting IRS lien.

(4) Creditors not in one of the above creditor classes have their lien priority determined under the choateness standard that existed prior to 1966. Choateness requires the establishment of (1) the identity of the lienor; (2) the property subject to the lien; and (3) the amount of the lien.[1]

The list of exceptions of the "super priority" category includes certain securities. Other enumerated "super priority" groups are motor vehicles, personal property purchased at retail or in a casual sale, personal property subject to a possessory lien, real property tax and special assessment liens, residential property subject to a mechanic's lien for certain repairs and improvements, attorneys' liens, certain insurance contracts, and deposit-secured loans.

IRC Section 6323(h)(1) defines in part as a security interest "any interest in property which is acquired by contract for the purpose of securing payment or performance of an obligation or for indemnifying against loss or liability." Many security interests receive semi-super priority status in relation to a federal tax lien even after filing of the NFTL. If semi-super priority status does not apply, the security interest must be perfected before the NFTL is filed to attain priority over the federal tax lien.[2]

Purchase money mortgages are not among the enumerated super priority groups in IRC Section 6323. However, Revenue Ruling 68-57 (1968-1 C.B. 553) states that purchase money mortgages are protected even though not mentioned specifically in the Federal Tax Lien Act of 1966.[3] Rev. Rul. 68-57 cites the legislative history to assert the protected status of purchase money mortgages on the grounds "that the taxpayer has acquired property or a right to property only to the extent that the value of the whole property or right exceeds the amount of the purchase money mortgage."[4] The revenue ruling succinctly concludes by stating that the IRS will consider a valid purchase money mortgage to be protected even if it arises after a notice of federal tax lien has been filed. The federal government does generally consider a purchase money mortgage to have super priority status. The U.S. Supreme Court has also weighed in on the subject, indicating that a purchase money security interest is to receive super priority status.[5]

Section 197.582, Florida Statutes, is significantly more expansive than federal tax enforcement law, and the IRS might not object to Florida clerks of court acting as a self-designated, specialized collection agent, at least as long as there were no other governmental units claiming a pro rata share.

It is worth noting that if a statutory lien (like Section 197.582, Florida Statutes) takes priority over a senior security interest (e.g., a purchase money mortgage recorded upon acquisition of the property), circular priority rules apply if the statutory lien does not take priority over the IRS tax lien.[6] The formula used with circular priority, however, would not apply since IRC Sections 6323(b)(6)(A) and (B) (real property tax and special assessment liens) show a Congressional decision to give priority to such liens.

The constitutionality of Section 197.582, Florida Statutes, has not gone unquestioned. Attorney General Opinion (AGO) 77-99, pointed out that Florida made all ad valorem taxes first liens, and superior to all other liens.[7] The opinion addressed a situation where ad valorem taxes and special assessment

continued, next page

liens were first satisfied after a tax deed sale, and the excess was to be distributed pro rata among government units. This AGO noted that the super priority afforded real property tax and special assessment liens are only two of a variety of liens that "governmental units" can impose. The AGO concluded that a state statute that impaired federal rights in the surplus proceeds of a tax deed sale "would appear" to violate the Supremacy Clause of the United States Constitution. Thus, a pro rata division among the IRS and other governmental units not granted "super priority" or other privileged status might run afoul of IRS tax lien guidelines.

A purchase money mortgage, though, is not a governmental lien. Section 197.122, Florida Statutes, gives lien priority of a governmental unit over a purchase money mortgagee. AGO 77-99 states that a "lien is a species of property protected by the due process clauses of the United States and Florida Constitutions." Further, this AGO contends that since a lien is based on contract, any impairment was contrary to the contract clauses in Article I, Section 10 of the United States Constitution and Florida Constitution.

The Florida Attorney General's office has visited the subject of tax liens since 1977. In AGO 91-64, the Attorney General acknowledged constitutional due process and contract clause problems with Section 197.582, Florida Statutes. The Attorney General's position was that any challenge to the statute would have to be taken up in the courts. This opinion is similar to the conclusions reached by the Attorney General in AGOs 82-14 and 78-64.

The issue is ripe for testing in the courts. With both a large purchase money mortgage and a hefty IRS tax lien that could benefit from the distribution of the excess of a tax deed sale, a court battle may ensue to prevent the clerk of a Florida court from freely disbursing funds to the IRS.

My thanks to Lynwood Arnold and Ken Myers for their review of this article.

Endnotes:

1 *See* Tax Management Portfolios, Bloomberg BNA, *Portfolio 637-1st: Federal Tax Collection Procedure-Liens, Levies, Suits and Third Party Liability* (Priorities, F.I).

2 See BNA Portfolio 637-1st: Federal Tax Collection Procedure - Liens, Levies, Suits and Third Party Liability (Priorities, F.2.c).

3 P.L. 89-719, C.B. 1966-2, 623.

4 General Explanation of the Act, House of Representatives Report No. 1884, C.B. 1966-2, at page 817.

5 *Slodov* v. *U.S.,* 436 U.S. 238,257-258 (1978).

6 *See U.S.* v. *City of New Britain,* 347 U.S. 81 (1954) and *BNA Portfolio 637-1st at* F.8).

7 §197.122, Fla. Stat.

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Just Say No; What Happens When the Trustee Refuses to Cover the Personal Representative's Notice of Insufficiency?

By John C. (Jack) Bovay, Esq.
Dean, Mead & Bovay, Gainesville, Florida

Introduction

The use of a revocable trust to avoid probate is a standard estate planning technique. What happens when the decedent dies with no probate estate, but had assets held in a revocable trust and debts owed to creditors? Section 733.607(2) of the Florida Statutes provides that the Personal Representative can seek contribution of assets from the revocable trust to cover the claims of creditors in certain circumstances. But, what is the process if the Trustee refuses to cover the insufficiency? Should the creditor be permitted to proceed directly against the Trustee in this instance?

As discussed in this article, Florida case law implies such a direct cause of action, but the Florida Statutes do not expressly provide so. In the interest of clarity, and more importantly, judicial economy, the author proposes that the Legislature amend Section 733.607 to make it clear that, once the Personal Representative establishes that the estate has a claim against the Trustee that the Trustee refuses to cover, the claim can be assigned to the creditor, the estate can be closed and the creditor can proceed directly against the Trustee.

Discussion

Section 736.1014(1) of the Florida Statutes makes it clear that a creditor can not proceed directly against a revocable trust when the claim is based on the "individual liability" of the decedent.[1] For example, the Court in *Ziino v. Baker,* 2007 WL 2433902 (M.D. Fla) aff'd 613 F.3d 1326 (2010), applied Section 736.1014(1) to dismiss the Trustees of the decedent's revocable trust from liability for damages based upon plaintiff's allegation that the decedent instigated his daughter to file bankruptcy in an attempt to discharge debt allegedly owed to plaintiff under two promissory notes, which were made in contemplation of daughter's anticipated inheritance from the decedent.

By way of contrast, Section 736.1014(2), appropriately allows a cause of action against the Trustee of the decedent's revocable trust that is *not* dependent on the individual liability of the decedent. For example, assume a foreclosure action involving real property owned by the trust was pending at the time of decedent's death; that action may continue as the individual liability of the decedent is not at issue.

Because of the possible damage the prohibition of Section 736.1014(1) could cause to a decedent's creditors, the Florida Legislature has provided that creditors are to bring claims in the probate court. If a claim is successful in the probate court, and if the assets of the probate estate are insufficient to cover the claim, then the estate can recover from the decedent's revocable trust.[2]

What happens if the Trustee of the decedent's revocable trust refuses or declines to satisfy the deficiency or claims it is not able to cover the insufficiency? For example, assume the Personal Representative has not objected to a timely filed creditor's claim and has provided the notice of insufficiency to the Trustee. Further assume that the only asset in the trust is a limited partnership interest that is restricted by a partnership agreement requiring the consent of all partners before the interest can be transferred. The Trustee could say, "I understand but I am unable to obtain the requisite consent from the partners, and I simply do not have the authority to transfer the limited partnership units to the Personal Representative."

In the example given above, it would seem that the Personal Representative could sue the Trustee to force the payment. What if, as is so often the case, the Personal Representative and Trustee are the same person? The Personal Representative has an obvious conflict of interest, but as an "insider" also knows the ultimate outcome of any litigation will be that the partnership agreement is valid under Florida law and the "exclusive remedy" available to the creditor will be a charging order.[3] Armed with this knowledge and no assets with which to fund the litigation, the Personal Representative will be inclined to petition the probate court to close the estate and distribute the claim against the trust, as an asset of the estate, to the creditor.

The creditor might, however, ask the probate court to appoint an Administrator Ad Litem to pursue the Trustee. Since the estate has no assets, how will such an administrator be compensated? If the creditor has promised the Administrator Ad Litem that it will pay the administrator's fees, does not that create a conflict of interest? Does the Legislature want our probate judges wrestling with these types of questions?

Short of instituting litigation, the administrator will not have any authority to "investigate" the nature of the trust assets, e.g., whether the hypothesized partnership validly exists and has minded formalities. If the administrator chooses to pursue litigation, how will the litigation be funded? Wouldn't a better solution be for the creditor to sue the Trustee directly? If the Personal Representative has not objected to the claim, isn't that enough to support the creditor's cause of action against the trustee? And, at that

continued, next page

point, isn't the cause of action simply a collection action, and no longer subject to Section 736.1014(1) because it is not dependent on establishing the individual liability of the decedent?

The Florida Statutes do not address this issue. There are, however, four Florida District Court of Appeal cases somewhat on point. The remainder of this article explores existing law and proposes a legislative solution.

In *Tobin v. Damian,* 723 So. 2d 396 (Fla. 4th DCA 1999), appellant brought complaints against the decedent's revocable trust for assault and battery and intentional infliction of emotional distress allegedly committed by the decedent. The *Tobin* court affirmed the trial court's conclusion that the then existing version of Section 733.707(3), Florida Statutes (1997), did not in and of itself create a cause of action against the decedent's revocable trust.[4] That version of the statute used the term "enforceable claim," whereas the current version of the statute uses the term "obligation."[5] The *Tobin* Court held that an "enforceable claim" is "a timely filed claim against the estate where no objection has been made by the personal representative or a timely filed claim against the estate where a timely objection has been made and a subsequent judgment has been entered in favor of the claimant or stipulation for payment has been reached."[6] Under this definition, the Court further held that the appellant did "not yet have an enforceable claim against the Trust."[7] The Court, however, went on the state that its affirmance of the lower court's dismissal of appellant's claim was without prejudice to appellant to maintain her claim for an accounting and distribution under the trust in a separate action "for such 'enforceable claims' as she may now have or acquire."[8] Thus, implicit in the Court's holding is that the appellant could proceed directly against the Trustee if she had an "enforceable claim." What form does such an enforceable claim or obligation take? What did the Tobin court mean by "judgment" or "stipulation for payment"? The author's position is that if a Personal Representative has not timely objected to a claim, then the claim should be enforceable by the creditor directly against the decedent's revocable trust, and the Florida Statutes should be amended to make this clear.

Citing to *Tobin*, the Court in *Estate of Read v. A.D.K. Properties,* 766 So. 2d 393 (Fla. 2d DCA 2000) likewise held that a creditor lacking an "enforceable claim does not have a cause of action against a decedent's revocable trust under Section 733.707(3) of the Florida Statutes (1997).[9]

The creditor in *Read*, an independent living facility, attempted to proceed directly against the decedent's revocable trust on the grounds that no probate estate had been opened.[10] The court noted that the facility could have opened an estate on the decedent's behalf if no other



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interested party did so.[11]

In two cases decided in Fall 2003, the Second District Court of Appeal reinforced the concept that a creditor must first establish an "enforceable claim" before proceeding against a decedent's revocable trust. In *Shuck v. Bank of America, N.A.,* 862 So. 2d 20 (Fla. 2d DCA 2003), the Court stated that a widow's claim based on the prenuptial agreement between her and the decedent, if established in the probate court, would be enforceable against the decedent's revocable trust to the extent the estate proved insufficient to pay claims and expenses of administration pursuant to Section 733.707(3).[12] In a similar vein, the Court in *Becklund v. Fleming,* 869 So. 2d 1 (Fla. 2d DCA 2003) held that the creditor's complaint should not have been dismissed with prejudice, because, based on ambiguities in the statute relating to filing creditor's claims at that time, the creditor may have been able to establish an "enforceable claim" despite the expiration of the two-year period under Section 733.710, Florida Statutes (1993).

Footnotes in *Shuck* and *Becklund* reveal the Second District's doubt as to whether a creditor with an enforceable claim could proceed directly against the Trustee because of the then applicable Section 737.3061 prohibition (now Section 736.1014) against litigation based on the "individual liability" of the settlor. The court did not express an opinion on this issue as it was not before the court in either case. The author thinks the footnotes miss the point. If the Personal Representative has not filed a timely objection to a claim, the creditor by definition should have an enforceable claim giving rise to a cause of action that no longer depends on the "individual liability" of the decedent; rather, it is now simply a collection matter and the creditor should be allowed to proceed directly against the Trustee under Section 736.1014(2).

Conclusion

The author suggests the following legislative solution: Section 733.707(3) of the Florida Statutes should be amended to make it clear that (i) a claim that is not timely objected to becomes an "obligation" as that term is used in that section and (ii) either the Personal Representative (insolvent and thus, unlikely) or the creditor (who has the economic motivation) then has a collection cause of action against the Trustee under the "obligation," as opposed to an action based on the individual liability of the decedent. This would eliminate confusion and even litigation (as the author has experienced) over who is the correct party to sue the trustee and would also eliminate the need for the probate courts to make difficult decisions about appointing Administrators Ad Litem for insolvent estates.

The author gratefully acknowledges the editorial assistance of his law partners, Matt Ahearn and David Akins, and the research assistance of his law clerk, Freddy Munoz.

Endnotes:

1 Section 736.1014(1), Florida Statutes (2011), provides "After the death of a settlor, no creditor of the settlor may bring, maintain, or continue any direct action against a trust described in s. 733.707(3), the trustee of the trust, or any beneficiary of the trust that is dependent on the individual liability of the settlor. Such claims and causes of action against the settlor shall be presented and enforced against the settlor's estate as provided in part VII of chapter 733, and the personal representative of the settlor's estate may obtain payment from the trustee of a trust described in s. 733.707(3) as provided in ss. 733.607(2), 733.707(3), and 736.05053."

2 Section 733.607(2), Florida Statutes (2011), provides "If, after providing for statutory entitlements and all devises other than residuary devises, the assets of the decedent's estate are insufficient to pay the expenses of the administration and obligations of the decedent's estate, the personal representative is entitled to payment from the trustee of a trust described in s. 733.707(3), in the amount the personal representative certifies in writing to be required to satisfy the insufficiency, subject to the exclusions and preferences under s. 736.05053. The provisions of s. 733.805 shall apply in determining the amount of any payment required by this section."

Section 733.707(3), Florida Statutes (2011), provides "Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in ss. 733.607(2) and 736.05053."

3 Florida Statutes 620.1703 (2011). Or, in the case of a creditor of a member of a Florida LLC, the "sole and exclusive remedy." Florida Statutes 608.433.

4 *Id.*

5 *Id.* This change "increases the trust's obligation to the personal representative [and] is clearly a substantive establishment of an additional claim." *AMP Services Limited v. Walanpatrias Foundation,* 73 So. 3d 346 (Fla. 4th DCA 2011) (holding however, that the statute does not go so far as to create a cause of action against the trustees themselves for actions taken while the decedent was alive). As a "substantive" rather than "remedial" change in the statute, it does not apply retroactively. Id. Appellants' brief cited the legislative history to the effect that the prior terminology was considered "troublesome," as it was not clear that post death events, as opposed to the actions of the decedent, could also implicate the requirement of a contribution from the Trustee. Fla. H.R Comm. on Judicial Oversight Analysis of HB 0137, 2001 Fla. H. 43 n.69 (Feb. 5, 2001); Fla. S. Staff Analysis & Economic Impact Statement of SB 402, 2001 Fla. S. 45 n. 59 (Mar. 14, 2001). The House bill explained the effect of the proposed changes was make it clear that funeral expenses, debts, taxes and family allowance are within the scope of the term "obligation."

6 *Id.* at 397.

7 *Id.*

8 *Id.*

9 *Estate of Read v. A.D.K. Properties,* 766 So. 2d at 394.

10 *Id.*

11 *Id.*

12 *Shuck v. Bank of America, N.A.* 862 So. 2d at 22-23.

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Why Should You Care About Numeric Nutrient Criteria?

By Vinette D. Godelia & Mohammad O. Jazil
Hopping Green & Sams, P.A., Tallahassee Florida
On behalf of the Governmental Regulation Committee

Recently, the U.S. District Court for the Northern District of Florida ruled on challenges to the imposition of federal numeric nutrient criteria for Florida's lakes, springs, and streams;[1] the Florida Legislature passed a bill directing the Florida Department of Environmental Protection ("FDEP") to submit Florida's version of the criteria to the U.S. Environmental Protection Agency ("EPA") for approval under the Clean Water Act;[2] a panel of the National Research Council issued a report criticizing EPA's implementation costs for the federal criteria;[3] and a state administrative law judge heard arguments in a case where several environmental advocacy groups challenged FDEP's criteria.[4] This is only halftime in the contentious battle over stricter water quality standards for Florida's waters – specifically numeric criteria that set limits on the level of nitrogen and phosphorus in a waterbody. This article briefly explains each of the significant steps taken so far. It also guesses at what might be over the horizon. More importantly, the article begins by explaining why you should care about numeric nutrient criteria.

I. Your pain: curbs on development

Much depends on the proper development of numeric nutrient criteria. Overly restrictive criteria would force discharges that provide essential infrastructure services – like electricity, sewage, and municipal stormwater control – to make costly retrofits. Little money would remain for the expansion of infrastructure necessary to accommodate long-term population growth in Florida, and particularly its urban centers. Also, many waters would unnecessarily be deemed "impaired." Under the Clean Water Act and Florida law, Florida would then develop total maximum daily loads or "TMDLs" for these waters.[5] New sources of discharge – which is incidental to urban development – would be precluded from locating near TMDL waters unless they could first offset existing discharges.[6] Taken together, ill-conceived numeric nutrient criteria would make it difficult to sustain the growth Florida has experienced and come to depend on over the years. Thus, it is imperative that we work together to get this issue right.

II. Federal litigation: inception of the dispute

The dispute over numeric nutrient criteria first rose to prominence in 2008 when several environmental organizations sued EPA for failing to promulgate numeric nutrient criteria in Florida.[7] Relying on guidance documents published in 1998, the environmental organizations alleged that EPA had determined that such criteria were necessary for Florida to comply with the Clean Water Act.[8] As such, the environmental groups concluded that EPA had a mandatory duty under the Act to promulgate criteria in lieu of the State. EPA disagreed.[9]

In January 2009, however, EPA changed its mind.[10] EPA made a formal determination under the Clean Water Act that numeric nutrient criteria were indeed necessary for Florida waters.[11] EPA and the environmental organizations thereafter entered into a consent decree setting a schedule for EPA – unless the State acted first – to promulgate numeric nutrient criteria for all of Florida's surface waters.[12] Per the schedule, EPA finalized criteria for Florida's lakes, springs, and streams in December 2010.[13] Lawsuits followed.[14] Specifically, the State of Florida, agricultural interests, local governments, and regulated entities like electric and wastewater utilities, sued EPA arguing that the January 2009 determination and the criteria were legally, scientifically, and factually indefensible.[15] Environmental organizations sued arguing that the criteria were too lax.[16]

In its February 18, 2012 ruling, the U.S. District Court for the Northern District of Florida upheld EPA's January 2009 determination.[17] The Court also upheld EPA's lakes and springs criteria, and EPA's decision to adopt downstream protective values (i.e., values designed to protect downstream lakes from nutrients introduced by upstream waters).[18] But the Court dealt EPA a severe blow by invalidating EPA's stream criteria – the most contentious and expensive of all the criteria – and some downstream protective values.[19] The Court gave EPA until May 21, 2012 to correct the deficiencies.[20]

III. Bipartisan state action: regaining state primacy

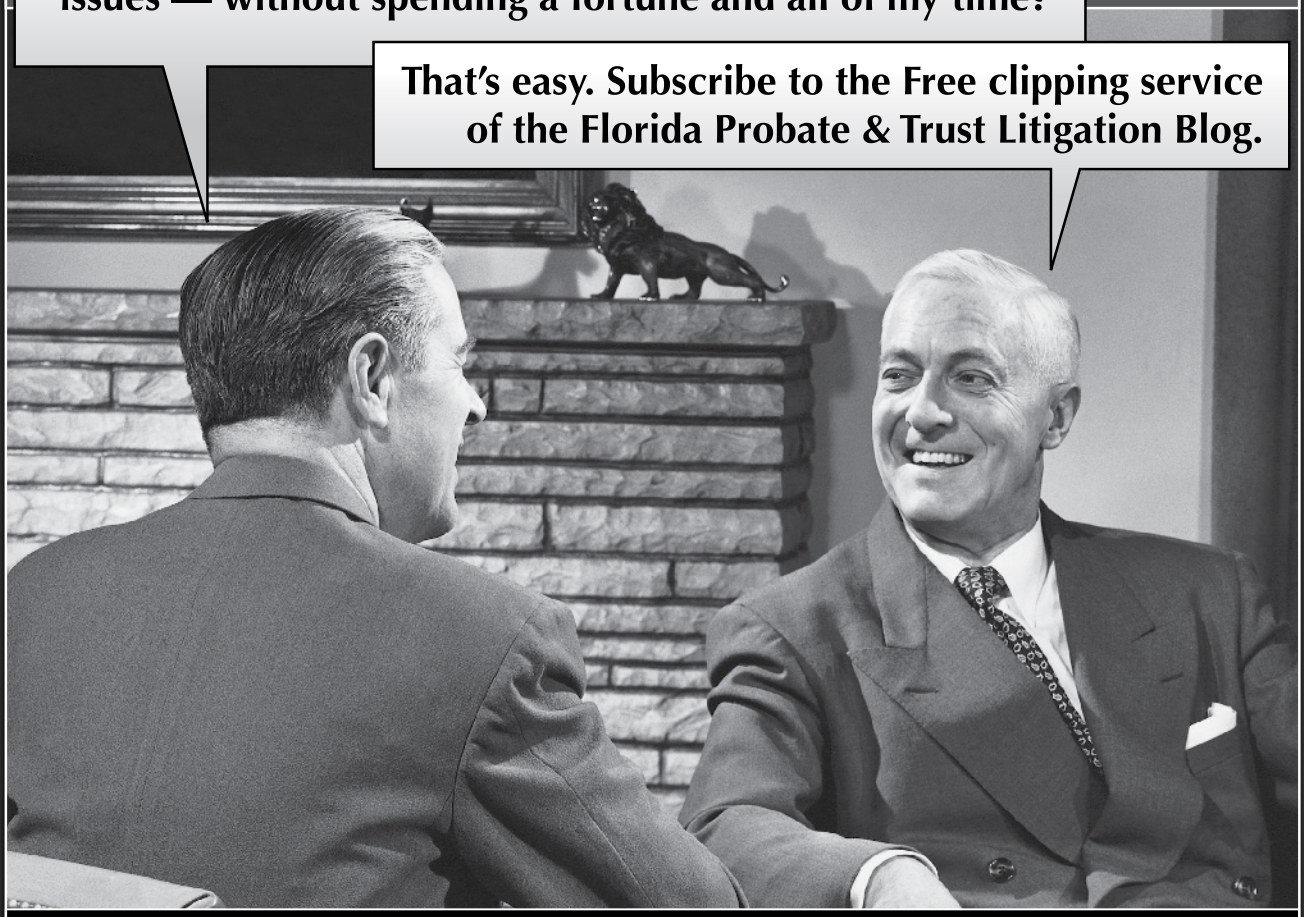
While the federal litigation was ongoing, the State of Florida sought to reassert its primacy over the issue as contemplated by the Clean Water Act. In April 2011, by benchmarking Florida's efforts to curb nutrients against a recent EPA guidance memorandum, FDEP petitioned EPA to revoke its January 2009 determination and criteria.[21] EPA neither granted nor denied FDEP's petition.[22] Instead, EPA encouraged FDEP to pursue the development of its own criteria for EPA review.[23] FDEP did just this.

The 2012 Florida Legislature weighed in as well.[24] Indeed, numeric nutrient criteria legislation was the first piece of legislation passed during the session.[25] It received unanimous support in both the Florida House and Senate.[26]

continued, page 15

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The legislation contains three parts.[27] First, it provides legislative approval of FDEP's numeric nutrient criteria rules.[28] Second, it directs FDEP to submit its criteria to EPA for review under the Clean Water Act.[29] Third, to ensure the integrity of FDEP's rules, it provides that a majority of FDEP's rule provisions "shall be effective only if EPA approves these rules in their entirety, concluded rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines . . . that these rules sufficiently address EPA's January . . . 2009 determination."[30] Governor Scott signed the legislation into law on February 16, 2012.[31] FDEP submitted its numeric nutrient criteria rule to EPA for review.

A state administrative challenge to FDEP's rule, however, continues to delay formal EPA review.[32] At the administrative hearing that concluded on March 5, 2012, several environmental organizations asserted that FDEP's rule was "reactive" and "irrational."[33] The environmental organizations focused their criticism primarily on the provisions in FDEP's rule that differ from EPA's rule.[34] The administrative law judge is expected to rule on validity of FDEP's numeric nutrient criteria by May 1, 2012.

IV. Federal litigation: culmination of the dispute

Assuming the administrative law judge approves FDEP's numeric nutrient criteria rule, EPA would begin its formal review under the Clean Water Act.[35] Given the Court's May 21, 2012 deadline to correct errors in EPA's own rule, and the National Research Council's criticisms of EPA's cost estimates for complying with the federal numeric nutrient criteria, one would hope for swift EPA approval of FDEP's criteria.

Regardless of whether EPA approves or disapproves FDEP's numeric nutrient criteria rule, more federal litigation is sure to follow. Under the Clean Water Act, EPA's decision would be reviewable in federal court.[36] The environmental organizations have made clear their desire to challenge any approval of FDEP's criteria. And it is reasonable to expect the State, local governments, and the regulated community to challenge EPA's disapproval of FDEP's numeric nutrient criteria rule.

Endnotes:

1 Florida Wildlife Fed'n, Inc. v. Jackson, ___ F. Supp. 2d ___, 2012 WL 537529 (Feb. 18, 2012).

2 *See* HB 7051 (2012).

3 National Research Council, Review of the EPA's Economic Analysis of Final Water Quality Standards for Lakes & Flowing Waters in Florida (National Academies Press March 6, 2012).

4 *See* Florida Wildlife Fed'n, Inc. v. Dep't of Environmental Protection, DOAH Case No. 11-6137.

5 *See, e.g.,* § 403.067, Fla. Stat. (2011) (citing to relevant provisions of the Clean Water Act).

6 *Id.*

7 *See* Florida Wildlife Fed'n Inc. v. Jackson, 2009 WL 5217062 (Dec. 30, 2009).

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *See* 75 Fed. Reg. 75,762 (Dec. 6, 2010).

14 *See* Florida Wildlife Fed'n, Inc. v. Jackson, ___ F. Supp. 2d ___, 2012 WL 537529 (Feb. 18, 2012).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *See* Letter and Petition submitted by Hershel Vinyard (FDEP) to Administrator Lisa Jackson (EPA) (Apr. 22, 2011).

22 *See* Letter from Assistant Administrator Nancy Stoner (EPA) to Secretary Herschel Vinyard (FDEP) (Jun. 13, 2011).

23 *Id.*

24 *See* HB 7051 (2012).

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *See* Florida Wildlife Fed'n, Inc. v. Dep't of Environmental Protection, DOAH Case No. 11-6137.

33 *Id.*

34 *Id.*

35 *See* 33 U.S.C. § 1313(c).

36 *Id.*

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Real Estate Case Summaries

Prepared by Benjamin B. Bush, Esq.,
Gardner, Bist, Wiener, Wadsworth, Bowden, Bush, Dee, LaVia & Wright, P.A., Tallahassee, FL

Deficiency judgment reversed where it was not supported by competent, substantial evidence. Formula for a deficiency judgment is the total debt, as secured by the final judgment of foreclosure, minus the fair market value of the property at the time of the foreclosure sale.

Empire Developers Group, LLC, et. al. v. Liberty Bank, 37 Fla. L. Weekly D881 (Fla. 2d DCA 2012)

In July 2009, Liberty Bank brought a foreclosure action against Empire for 9 condominium units. A final judgment was entered in December 2009 for $6,768,895.09. The foreclosure sale was held on January 6, 2010 where the Bank was the successful bidder with a bid of $800,100. Thereafter, the Bank filed a motion for deficiency judgment and the Court granted a judgment against Empire for $2,657,219.72. Prior to the deficiency hearing, the Bank sold seven of the nine units to mitigate its damages.

Empire challenged the deficiency judgment amount based on the methodology used by the trial court. First, to assess the value of two units not sold by the Bank, the trial court relied on the Bank's appraisals of the units from June 2010. Second, to assess the value of the seven units sold by the Bank, the trial court used the value of the net sales proceeds from each sale. The appellate court ruled that the trial court erred by relying upon the values submitted by the Bank to determine fair market value of the nine units because no evidence was presented to link the value of the units as of the June 2010 appraisal date or the sales dates with the value of the units at the date of foreclosure sale on January 6, 2010. In its defense, the Bank argued that in six months there could not have been much change in the rate. However, the court found this to be a conclusory statement not supported by competent, substantial evidence. Accordingly, the court reversed the deficiency judgment and remanded to the trial court for further proceedings.

Bank's pursuit of foreclosure action against mortgagor and simultaneous guaranty action against guarantors was permissible where guaranties were unambiguously absolute and unconditional. Guarantors are allowed to seek set-off based on foreclosure sale proceeds where a money judgment is entered against them prior to the foreclosure sale.

Fort Plantation Investments, LLC v. Ironstone Bank, 37 Fla. L. Weekly D874 (Fla. 5th DCA 2012)

Fort Plantation borrowed $1,035,000 from Ironstone Bank in exchange for a promissory note secured by a mortgage on a two-parcel piece of property and two commercial guaranties executed by each of the guarantors. Fort Plantation defaulted and the Bank filed a single complaint against Fort Plantation and the guarantors. Count I and II sought to recover from Fort Plantation on the note and foreclose on the property. Counts III – VI sought money judgments against the guarantors for the full amount of the note. At the summary judgment hearing, the trial court awarded the Bank a final judgment wherein the court directed the guarantors to pay the bank $1,165,240.33, plus statutory interest, and ordered the clerk to sell the property at a public sale. On a motion for rehearing, the court entered an order abating the Bank's collection efforts against the guarantors until completion of the foreclosure sale.

On appeal, the guarantors claimed that the Bank was not entitled to monetary damages under the guaranties until after completion of the foreclosure sale and finding of a deficiency judgment. The appellate court disagreed.

In Florida, the drawer or maker of a negotiable instrument and any party who guaranteed payment thereof may be sued in the same action. Section 46.041(1), Florida Statutes (2010). "A suit on a guaranty and a foreclosure action are not inconsistent remedies, and therefore pursuit of either of those remedies without satisfaction is not a bar to the pursuit of the other." *Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C.,* 438 So. 2d 408, 409 (Fla. 2d DCA 1983).

The court drew a distinction between an absolute guaranty and a conditional guaranty. As to an absolute guaranty, the guarantor becomes liable upon default in payment by another, whereas under a conditional guaranty, the guarantor does not become liable until the occurrence of certain conditions. Here, the guaranties signed and executed by the guarantors were unambiguously absolute and unconditional ("For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full…"). Accordingly, the court ruled that after Fort Plantation defaulted, the bank was entitled to pursue a guaranty action against the guarantors, irrespective of filing a foreclosure action against the mortgagor.

However, the court did state that the guarantors were entitled to seek set-off or a credit of the foreclosure sale proceeds.

continued, page 19

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Trial court did not abuse its discretion in refusing to issue a certificate of sale and certificate of title to the highest bidder because the clerk could not certify that the notice of sale was published prior to the foreclosure sale.

Castelo Development, LLC v. Aurora Loan Services, LLC, 37 Fla. L. Weekly D739 (Fla. 4th DCA 2012)

On October 26, 2010, a final judgment of foreclosure was entered in favor of Aurora Loan Services LLC with a foreclosure sale date of January 5, 2011. The foreclosure judgment required the clerk of the court to sell the property by electronic sale to the highest bidder for cash in accordance with Section 45.031, Florida Statutes. Castelo was the successful bidder at the foreclosure sale, however, the clerk of court would not issue the certificate of sale or the certificate of title because the notice of sale was not published in advance of the foreclosure sale as required by Section 45.031. Castelo filed a motion objecting to the clerk's reasoning while Aurora filed a motion to reschedule the foreclosure sale claiming that "through inadvertence and by mistake, the Clerk of Court allowed the online foreclosure sale to proceed."

On appeal, Castelo argued that it was a good faith purchaser at the foreclosure sale and the trial court grossly abused its discretion by effectively vacating the foreclosure sale. Castelo further argued that Section 45.031 is silent as to what happens if the notice of sale is not published. However, the appellate court disagreed. Section 45.031 requires that notice of sale be published once a week for two consecutive weeks in a newspaper of general circulation. Section 45.031(4) requires that as part of the certificate of sale, the clerk must certify that the "notice of public sale of the property described in the order or final judgment was published in… a newspaper circulated in the county where the property is located." Therefore, because the clerk cannot certify that the notice of sale was published, the clerk should not issue the certificate of sale and subsequent certificate of title.

Where parties stipulated to stay lien foreclosure action so that they could arbitrate issues raised in complaint, and property owner prevailed in arbitration, contractor could not voluntarily dismiss its claim of lien action in order to divest trial court of jurisdiction to confirm arbitration award and award prevailing party attorney's fees to property owner.

Soares Da Costa Construction Services, LLC v. Alta Mar Development, LLC, et. al., 37 Fla. L. Weekly D879 (Fla. 2d DCA 2012)

In August 2003, Soares, a contractor, entered into a contract with Tarragon, a property owner, to construct a multifamily high-rise condominium in Fort Myers, Florida. Following numerous disputes between the parties, Soares filed a claim of lien against the property in June 2006 and served a demand for arbitration against Tarragon per the contract. Tarragon responded with its own counterdemand in the arbitration asserting breach of contract against Soares and breach of the performance bond against Soares' surety. Eventually, Tarragon prevailed in the arbitration proceedings and was awarded $1.925M against Soares. The arbitration award specifically pronounced Tarragon to be the prevailing party on claims between Soares and Tarragon. Two months later, Soares served its notice of voluntary dismissal of the claim of lien action. Despite Soares' voluntary dismissal, the trial court entered judgment in favor of Tarragon on its motions to confirm the arbitration award, discharge Soares' lien and award itself prevailing party attorney's fees.

Soares appealed the final judgment. On appeal, the court found the issue to be whether Soares could voluntarily

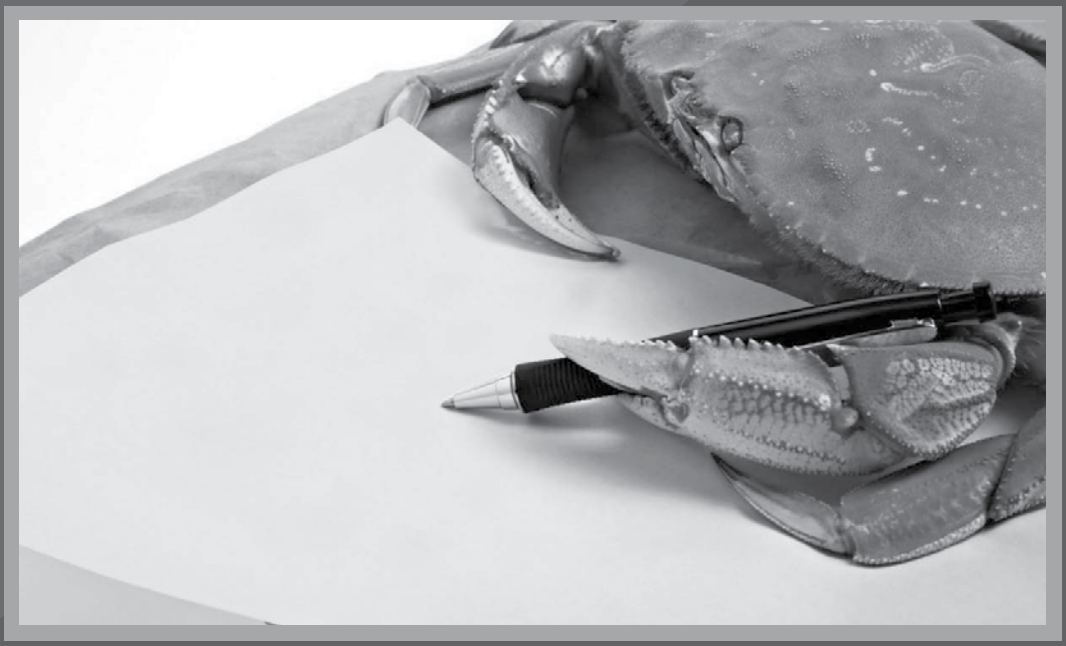
continued, page 24

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Section Executive Council Meeting

Sawgrass Marriott, Ponte Vedra
March 1 – 4, 2012

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

The Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar convened its first meeting of 2012 at the Sawgrass Marriott in Ponte Vedra, Florida. Since meetings started early on Thursday, the hospitality suite was open Wednesday evening providing light snacks and appropriate adult beverages.

Thursday was packed with ten (10) different meetings and a Welcome Reception on the outside veranda Thursday evening. The weather cooperated although it was a tiny bit cool and breezy. One of the nice features on Thursday which was repeated on Friday, was a "Grab n' Go" lunch that was provided complimentary to those who attended the committee meetings.

Just like Wednesday evening, the hospitality suite was open Thursday and Friday nights with drinks and light snacks. Thursday evening there was an assortment of desserts served and Friday night there were some delicious pretzels.

Friday had more meetings in the morning and both Probate and Real Property Roundtables were held between 1:30 p.m. and 3:00 p.m. Holding the Roundtables on Friday instead of Saturday morning is a modification that has been instituted by our Chair, the result being an earlier finish time on Saturday and an opportunity for golf. If you are a golfer, you will know that the Sawgrass stadium course at Ponte Vedra is world renown. Friday evening saw a reception and "sit down" dinner at the hotel.

The Executive Council met Saturday morning, combining the meeting and a breakfast buffet. There were a number of important issues presented at the Executive Council for action including a request from Condominium & Planned Development Committee (Steve Mezer, Chair) to approve a letter inquiry to the Supreme Court concerning unlicensed practice of law by community association managers and a request from the Legal Opinions Committee (David Brittain, Chair) for the publication of the recently approved report on third party legal opinion practice in Florida. By now you have received a notice about how to obtain a copy of this outstanding publication which will also be available to section members through the RPPTL website.

Saturday evening the bus left at 6:45 p.m. to transport everyone to an off-site location called "JJ's Bistro." JJ himself, with a charming French accent, took us on a virtual tour of the French vineyards. The three-course dinner was paired with wines from the different French regions. I'm not sure the evening could exactly be called educational but I did learn a lot about French wines. I inquired of a number of the golfers how the golf tournament had gone that afternoon and all I could get anyone to say was "fun" so that means the course must have been pretty challenging.

The meeting at the Sawgrass Marriott was located close to St. Augustine and Jacksonville and it was great to see a lot of our Section members from that area who are folks we don't often see at other locations.

The schedule of upcoming meetings is always posted on the Section website but in addition to the next meeting in St. Petersburg, the two (2) meetings following after that are July 25-28 at The Breakers in Palm Beach and September 12-15 at the Ritz Carlton in Key Biscayne. So if you're not someone who has been able to regularly attend in the past, watch for a meeting in your neck of the woods and hope to see you then.

The next meeting will be the annual meeting at the Don CeSar Beach Resort in St. Petersburg. The meeting will include a free seminar on Friday, presenting an opportunity for three (3) hours of ethics credit. The Don CeSar is a very special historic location so if you haven't made reservations, you probably should do so soon as the block reserved for the Bar is likely to fill up quickly.

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dismiss its claim of lien action in order to divest the trial court of jurisdiction to confirm Tarragon's arbitration award. The court found two flaws in Soares' attempt to appeal. First, while the Florida rules of civil procedure (1.420(a)) allow a plaintiff to voluntarily dismiss its civil court action, that right is not without limitations. The appellate court found similarities between Tarragon's arbitration counter-demand and the example of how a counterclaim filed prior to a voluntary dismissal is unaffected by such dismissal. Because Tarragon prevailed on its counterclaim in the arbitration proceedings, its motion to confirm the award with the trial court must be treated in exactly the same manner as a counterclaim in a civil case. Tarragon's motion to confirm the award on its arbitration counterclaim acted as a counterclaim in the claim of lien action once the motion to confirm was filed and served.

Second, the court adopted the common law exception to the rule that a voluntary dismissal deprives a court of jurisdiction where a defendant demonstrates serious prejudice if the dismissal is upheld. *See Ormond Beach Assoc. Ltd. v. Citation Mortg., Ltd.,* 835 So. 2d 292, 295 (Fla. 5th DCA 2002). Here, when Tarragon prevailed on its counterclaim in the arbitration proceedings, it acquired substantial rights in the civil cause of action and a voluntary dismissal of the action would be inequitable. By virtue of stipulation between the parties that the issues underlying the complaint in the claim of lien action were also the issues involved in the arbitration, the parties each attached some level of importance to the determination of the issues by the arbitration panel.

Trial court's grant of summary judgment was improper where Defendant in foreclosure case had outstanding discovery requests, and the information contained in the outstanding discovery could create genuine issues of material fact.

Dilcia Osorto v. Deutsche Bank National Trust Company, 37 Fla. L. Weekly D747 (Fla. 4th DCA 2012)

Deutsche filed a foreclosure suit against Osorto to which Osorto responded with a motion to dismiss with various allegations. The case proceeded to a summary judgment hearing where the court granted summary judgment in favor or Deutsche.

On appeal, Osorto argued that the parties were in the middle of discovery at the time the order granting summary judgment was entered. Specifically, Osorto contended that there were outstanding discovery requests and that the court ordered Deutsche to provide better responses to Osorto's request for production of documents and, specifically, to provide the pooling and servicing agreement pinpoint cite.

The appellate court discussed two pertinent cases in reaching its decision: An order granting summary judgment while there is an outstanding request for production of documents is premature and the appellate court should reverse and remand for discovery to be completed. *Henderson v. Reyes,* 702 So. 2d 616, 616 (Fla. 3d DCA 1997). However, if the incomplete discovery will not raise future disputed issues of material fact, summary judgment may be properly granted. *Estate of Herrera v. Berlo Indus., Inc.,* 840 So. 2d 272, 272 (Fla. 3d DCA 2003).

Here, the trial court granted a motion to compel which required Deutsche to provide answers to various requests of production by Osorto. The appellate court ruled that the information that may be included in the answers to these requests for production could potentially be material. Accordingly, where the information contained in outstanding discovery could create genuine issues of material fact, summary judgment would not be proper.

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Section Executive Committee Meeting

March 16, 2012
Tampa, FL

**By Jane L. Cornett, Esq., Cornett, Googe & Associates, P.A., Stuart, Florida
with assistance from
Margaret "Peggy" Rolando, Esq., Shutts & Bowen, LLP., Miami, Florida,
Michael Dribin, Esq., Harper, Meyer, Perez, Hagen, O'Connor, Albert & Dribin LLP,
Miami, Florida, and
Michael Gelfand, Esq., Gelfand & Arpe, P.A., West Palm Beach, Florida.**

Those of us who attend the Real Estate and Probate Roundtables and the subsequent Executive Council meetings held by the Section throughout the year probably never think about substantive planning that goes into making those meetings productive and successful. We here at *ActionLine* thought you might want to know something about all the hours of hard work that goes into organizing our extensive Committee structure and those Executive Council meetings.

The planning and organizational processes of the Real Property, Probate and Trust Law Section are conducted by our Executive Committee. The Executive Committee of the Section is made up of the Section Chair, the Chair Elect, the Probate and Trust Law and Real Estate Division Directors, the Secretary, the Treasurer, the Chairperson for CLE, the Chairperson for the Legislative Committee, the Director of At Large Members and the immediate past Chair. These folks meet in person on a regular basis before each Executive Council meeting. They also have phone conferences to deal with issues that arise between meetings and to deal with a special issue such as recommending an amicus brief, dealing with unanticipated legislation or making recommendations for appointments to Florida Bar and other committees. Of course that doesn't include the daily email exchange of comments and questions.

The Executive Committee met on March 16th in Tampa for the annual planning meeting of the officers. At the annual planning meeting, any new officers who will take office in July 1st are also invited to attend. This is an exceptionally important meeting because this is when the officers select Committee Chairs, Vice Chairs and Liaisons for the new Bar year beginning July 1st. The Executive Council directory shows the total number of Committees is 65. That calls for a lot of appointments! No wonder the March meeting took eight (8) hours.

As we know, there are three (3) sets of Committee groups. We have the Real Property Division Committees, the Probate and Trust Law Division Committees and the General Standing Committees and Liaisons. Prior to the Executive Committee's annual planning meeting, each Committee Chair is asked to submit a confidential report concerning the activity of the Committee over the past year and recommendations for Vice Chairs and promotions from the committee's members. These reports are circulated to the Executive Committee members prior to its actual meeting and then, in a very open process, all of the officers offer their input and comments and the Committee Chairs and Vice Chairs are selected. There are all kinds of factors that are taken into account, including leadership ability, judgment, responsiveness, attendance at Executive Council meetings and much more. The Executive Committee is looking for folks who are willing to be engaged with their Committees and understand and appreciate the extensive time that is involved in managing an effective Committee. The Executive Committee members spend a great deal of time and thought in selecting the folks who will be leaders through their Committee involvement.

Michael Dribin advises that for the Probate and Trust Law Division, discussions on who should fill leadership roles started earlier in the year and the folks on the Real Estate side also had numerous discussions before they got to the March 16th meeting where decisions were to be made. To help in the selection process, the members of the Executive Committee try to get to know as many people in the Executive Council as possible and to attend as many committee meetings as possible. That gives the Executive Committee members the opportunity to observe the contributions being made by both the committee chairs and committee members. As **Peggy Rolando** said, the Executive Committee is always trying to spot "up and comers" talent to be for committee leadership.

The March 16th meeting also saw the creation of some new or reorganized committees. Michael Dribin advises that, on the Probate side, an ad hoc committee is being created which will be titled the "Guardianship Law Review Committee" and charged with a complete review of Florida Statute Chapter 744. These kinds of ad hoc committees, pursuant to the section bylaws, are utilized for the purpose of pulling talent from a number of different substantive committees to coordinate on a topic which will impact more than one existing committee.

continued, page 27

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Michael further advises that a new substantive committee of the Probate and Trust Law Division will be the "Digital Asset and Information Study Committee" which will be charged with reviewing existing laws to determine if they are adequate to deal with digital assets and information and if not, to recommend proposed legislation. An ad hoc committee, under the General Standing Committees, is being created to deal with the new trust account rules and how they impact practitioners in our Section. On the Real Property side, the Mortgage Law Committee will become "The Real Property and Finance Lending Committee" to better reflect the more diverse options available for real property financing beyond just mortgages. There will also be a new Real Property Committee added to address commercial real estate issues and practice. All of the activities of the Executive Committee will be reported in greater detail at the council meeting starting May 31st at the Don CeSar in St. Petersburg.

After interviewing the three (3) officers of the Executive Committee who helped with this article, I have a much-enhanced appreciation for the time, dedication and sincerity with which our Executive Committee addresses its responsibilities, especially as relates to our committee structure and organization.

Peggy reports that our Section is often cited by the "Big Bar" as being highly successful and effective due to our highly productive committee structure. It is great to know that our leadership is working hard to keep that success on track for the future.

Next time you see one of our Executive Committee members, give him or her a big hug and say thanks for all their many, many hours of service.

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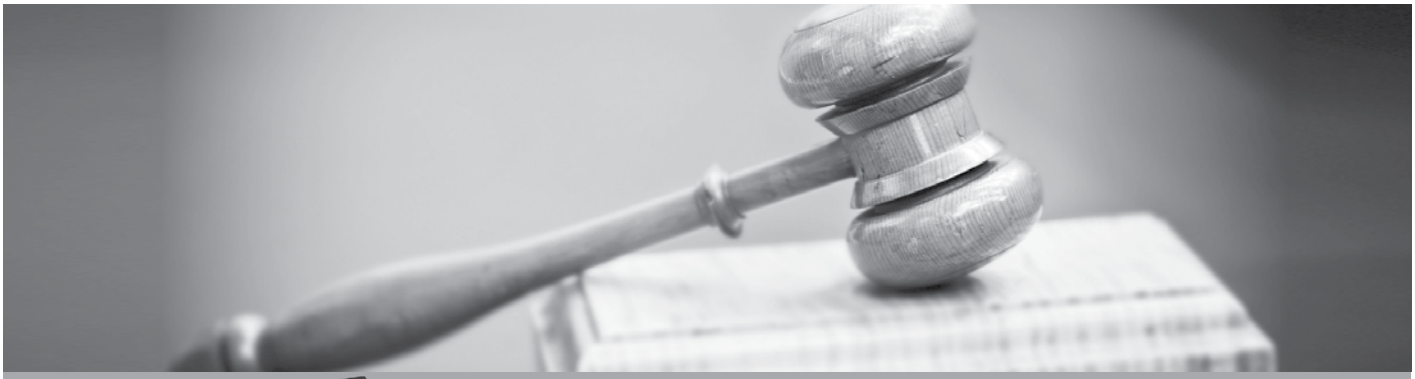
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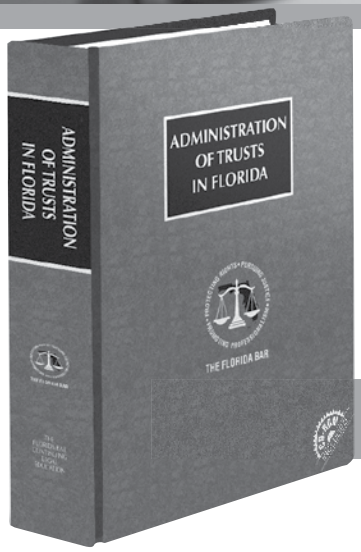
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Probate Case Summaries

Prepared by Theodore S. Kypreos
Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, FL

Affirming probate court's determination that personal representative of Florida ancillary estate breached his fiduciary duties by using ancillary estate assets for, among other things, funding litigation in Panama concerning decedent's domiciliary estate.

Lehman v. Lucom, 78 So. 3d 592 (Fla. 4th DCA 2011)

Decedent Wilson Charles Lucom died in 2006 in the Republic of Panama, where he left an estate valued in excess of $25 million. Decedent also left a Florida ancillary estate comprised of real property and a bank account with a balance of approximately $665,000. Decedent's will named Appellant Richard Lehman, Appellee Hilda Lucom, and another individual as co-executors. On July 5, 2006, an order was entered opening the Panama estate and appointing Appellant as sole executor. Thereafter, Hilda Lucom appealed this order. In Florida, Appellant petitioned to be and was appointed ancillary personal representative of Decedent's Florida estate. As ancillary personal representative, Appellant spent approximately $600,000 of ancillary estate assets to pay expenses, including $400,000 which he reimbursed to himself for expenses he paid on the estate's behalf. Upon Appellant's resignation and final accounting as ancillary personal representative, the trial court found that Appellant had no authority when the ancillary estate was opened in Florida because Appellant's appointment in Panama was *void ab initio* due to Hilda Lucom's challenge to the July 5, 2006 order in Panama. The trial court further found that Appellant acted recklessly and in bad faith as ancillary personal representative through his use of ancillary estate assets.

On appeal, Appellant argued that his appointment an ancillary personal representative was voidable rather than *void ad initio*. However, the Fourth District focused instead on Appellant's conduct as a fiduciary rather than the validity of his appointment. Specifically, the Court found there was substantial evidence to support the trial court's ruling that Appellant misappropriated estate funds and breached his fiduciary duty. The Court found that Appellant's use of ancillary assets, including his use of assets to fund his litigation in Panama, improperly prevented the payment of Class 1, 3 and 8 payment obligations of the ancillary estate. Thus, the Court concluded Appellant had acted in bad faith by failing to reserve any funds with which to pay creditors' expenses. The trial court's final judgment surcharging Appellant was therefore affirmed.

Reversing probate court's appointment of decedent's mother as personal representative where decedent's husband was entitled to preference in appointment under § 733.301, Fla. Stat. and decedent's mother offered no witnesses or other evidence showing husband was unfit to serve as personal representative.

Bowdoin v. Rinnier, 81 So. 3d 582 (Fla. 2d DCA 2012)

Decedent died intestate, leaving her husband, the Appellant, and a minor child as her sole heirs. Decedent's mother, Appellee, filed a petition for administration seeking her appointment as personal representative. Appellant filed a counter-petition for administration seeking his appointment as personal representative. After hearing, the trial court granted Appellee's petition notwithstanding Appellant's preference in appointment under § 733.301, Fla. Stat., as the trial court determined it was in the best interest of all parties to appoint Appellee as personal representative. On appeal, the Second District found the trial court's decision was an abuse of discretion. The Second District reinforced the proposition that statutorily preferred individuals should be appointed unless the record shows the preferred person is unfit to serve. In the instant case, Appellee produced no witnesses or evidence at the hearing to show Appellant was unqualified to serve. The Court therefore reversed the trial court's appointment of Appellee and remanded the matter back to the trial court to conduct an evidentiary hearing to determine whether Appellant was fit to serve as personal representative.

Reversing probate court's dismissal of will contest and finding that bequests under prior will to drafting lawyer and his wife in violation of Rule 4-1.8(c) of the Rules Regulating The Florida Bar were not *per se* void, and that lawyer and his wife had standing to contest decedent's later executed will and trust.

Agee v. Brown, 73 So. 3d 882 (Fla. 4th DCA 2011)

Decedent Herbert G. Birck died on October 25, 2009. On November 17, 2009, Appellee Roger Brown filed and the probate court granted his petition for administration seeking to have Decedent's February 11, 2009 will admitted to probate and to have himself appointed as personal representative per the provisions of the 2009 will. In April 2010, Appellants Jon and Susan Agee filed their verified petition to revoke probate of the 2009 will. Appellants alleged they were beneficiaries under the Decedent's 2007 will and that Decedent's 2009 will and living trust referenced in the 2009 will had been procured through undue influence upon the Decedent or, alternatively, had been executed at a time when Decedent lacked testamentary capacity. Ap-

continued, next page

pellee moved to dismiss Appellants contests on grounds they lacked standing. Appellee argued Appellants lacked standing because the 2007 will, which included bequests to Appellants, was drafted by Appellant Jon Agee, who was Decedent's attorney, and was therefore in contravention of the Rules Regulating The Florida Bar, namely Rule 4-1.8(c). Appellee argued the 2007 will was void as being contrary to public policy and, thus, Appellants had no interest in the Decedent's estate. The probate court agreed and entered a final order granting Appellee's motion to dismiss with prejudice, finding the 2007 will was void and Appellants were therefore without standing to contest the 2009 will and living trust.

On appeal, the Fourth District reversed the probate court's decision that Appellants lacked standing. The Court noted that the probate court was without authority to incorporate the provisions of Rule 4-1.8(c) into the statutory framework of the probate code. Thus, the Court found that Appellants were interested persons under § 731.201(23), Fla. Stat., and the fact that their bequests under the 2007 will might ultimately be determined to have been procured by undue influence does not alter their status as interested persons with standing to challenge the 2009 will. The Court also noted that, even if the bequests to Appellants under the 2007 will were void, Appellant Jon Agee's status as alternative personal representative under the 2007 will nevertheless gave him standing to bring the instant lawsuit.

Finding trial court was in error by not conducting an evidentiary hearing that would have allowed interested parties the opportunity to present evidence to demonstrate the *cy pres* doctrine should apply to fulfill decedent's original intent of trust bequest.

SPCA Wildlife Care Center v. Abraham, 75 So. 3d 1271 (Fla. 4th DCA 2011*)*

Decedent Mary Ericson died in 1991. Under her "death bed" will, she created a testamentary trust for the lifetime benefit of a close friend, after which the trust's remaining assets were to be distributed to the "International Wildlife Society." After Decedent's death, it became known that no such organization existed. In 2007, the trustees of the trust filed a Joint Petition to Determine Beneficiaries, wherein they stated their belief that the proper entity to take the trust's assets upon the life tenant's death was the Human Society of Broward County or a similar organization with a no-kill policy. Several organizations, including Appellant, were notified of and given an opportunity to respond to the trustee's joint petition. Appellant filed a response asserting the trust's residual assets should be distributed to it under

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the *cy pres* doctrine. The probate court, without conducting an evidentiary hearing, issued an order on the trustee's joint petition wherein it found the distribution provision concerning the residuary of the testamentary trust failed and, upon the life tenant's death, the trust residue would pass under Florida's intestacy laws.

Appellant appealed the probate court's order, asserting its due process rights were violated and, further, that the court erred by not making any findings regarding the applicability of the *cy pres* doctrine. The Fourth District reversed the probate court's order, finding the court violated the parties' due process by determining that the subject will provision was invalid notwithstanding the issue was not presented in the pleadings or noticed by the parties. Additionally, the Court found the probate court erred by not conducting an evidentiary hearing concerning the applicability of the *cy pres* doctrine. The Fourth District noted the record evidence reflected the decedent had a general charitable intent for her trust residue to benefit animals, and the interested parties were therefore entitled to present evidence in support of an alternative distribution that could better achieve Decedent's original intent than the intestacy laws.

Affirming probate court's summary judgment that found trust settlor lacked requisite testamentary capacity to execute second trust amendment, which was signed after settlor was adjudicated incapacitated, as settlor failed to restore her capacity as required under the trust.

Jervis v. Tucker, 37 Fla. L. Weekly D349 (Fla. 4th DCA 2012)

Bernice J. Meikle executed a revocable trust agreement in 1991, which she subsequently amended by executing a first amendment. Her trust, as amended by the first amendment, provided that Meikle's power to revoke or amend the trust would be suspended upon her being "adjudicated incapacitated by a court of appropriate jurisdiction." The trust further provided that Meikle's powers could be restored by an order of an appropriate court having jurisdiction over Meikle, or upon the issuance and receipt by the Trustee of a written opinion from two licensed physicians after their examination of Meikle.

Meikle was adjudicated incapacitated in 2000. On December 27, 2001, Meikle executed a second amendment to her trust without obtaining a court order authorizing the amendment or restoring her capacity to amend the trust, and without written opinions from two licensed physicians. The second amendment attempted to reallocate the distribution of her assets. Meikle died in 2007 and the second amendment to her trust was subsequently challenged by beneficiaries under her first trust amendment. In granting Appellees' motion for summary judgment, the trial court ruled that the second amendment was "void and of no legal effect." On appeal, Appellant argued that the record evidence showed that Meikle did not lack testament capacity when she executed the second amendment in 2001. The Fourth District found that the plain meaning of the trust agreement, as amended by the first amendment, required Meikle to either have her capacity restored by the court or through the written opinion of two licensed physicians. Although the trial court had judicially restored certain of Meikle's rights before her death, it had not restored her rights concerning her property. Moreover, at the trial level, Appellant only offered the opinions of one licensed physician in support of his argument that Meikle had testamentary capacity. Although Appellant also offered the opinion of a licensed nursing home health care administrator, the Fourth District noted this witness, even though possessed of expert experience, was without a physician's license. Therefore, because the unambiguous provisions of the trust had not been met, the Fourth District affirmed the trial court's ruling that Meikle lacked the requisite testamentary capacity to execute the second amendment to her trust.

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Governor Scott Signs Extension of Florida's Distressed Condominium Relief Act

By Robert S. Freedman, Nicole C. Kibert, Richard C. Linquanti & Jin Liu, Carlton Fields, P.A., Tampa, FL

On Friday, April 6, Governor Scott signed into law CS/HB 517, which, among other statutory changes, extends Florida's Distressed Condominium Relief Act ("Act"). Originally, the Act was scheduled to sunset on July 1st of this year. Now, the Act's sunset is extended to July 1, 2015. The Act encourages the bulk purchase of condominium units in distressed condominium projects by protecting bulk purchasers from inheriting liabilities, both known and unknown, from the original developer. The Act also enables certain bulk purchasers to acquire and utilize certain rights of the original developer pertaining to sales and marketing of units and operations involving the condominium association. This extension is welcome news for potential bulk purchasers of distressed assets and will help the Florida condominium market's continued recovery.

Reversing trial court's summary judgment and finding beneficiaries of ward's estate could proceed with legal malpractice lawsuit against guardian's attorneys for their alleged failure to implement estate planning for ward prior to ward's death.

Hodge v. Cichon, 78 So. 3d 719 (Fla. 5th DCA 2012)

On March 25, 2004, Decedent C.H. Cowart was judicially determined to be partially incompetent and guardians were appointed for Decedent. In February 2007, Decedent died at the "age of ninety-nine and possessed of considerable wealth." Prior to Decedent's guardianship proceedings, Decedent revisited his estate planning needs with two attorneys and Frank Yong, who was a tax and estate planning specialist. Mr. Yong thereafter prepared partnership and corporate documents to implement a limited partnership, including a family limited partnership (the "FLP"), for Decedent's estate planning purposes. Thereafter, during the administration of Decedent's guardianship proceeding, and at the request of Decedent's court-appointed guardians, the probate court entered an order directing the implementation of Mr. Yong's estate plan in order to, among other things, reduce Decedent's estate tax liability. Decedent died two and half years later, during which time Mr. Yong's plan was never fully implemented for Decedent.

Appellants, who were beneficiaries of Decedent's estate, thereafter filed a legal malpractice action against the guardians' attorneys, alleging they were negligent in failing to implement Mr. Yong's plan and, as a result, causing higher estate taxes and significantly reducing the corpus of Decedent's estate. Appellees filed a motion for summary judgment on grounds that no attorney-client relationship existed with Appellants and, thus, Appellants lacked standing to sue. Appellees also argued that Mr. Yong's plan could not be implemented because it was created solely to reduce estate taxes and therefore would be disallowed by the IRS. The trial court granted Appellees' motion for summary judgment, finding there were no genuine issues of material fact. The trial court accepted Appellees' argument that Appellants lacked standing and, further, that the FLP was not a viable estate planning tool under the circumstances. Appellants appealed and the Fifth District reversed, finding there were issues of fact as to both Appellants' standing and the viability of the FLP. As to the issue of standing, the Court found that the "intended beneficiary" exception to the rule of privity in legal malpractice actions was not limited to will drafting cases. In finding that the issue of standing was a fact question for the jury, the Court noted that the record demonstrated that Decedent's overall intent for retaining counsel to create and establish the FLP was to preserve and maintain estate assets, and to prevent dissipation through estate taxes. Thus, the Court found the purpose of this plan was to benefit all named and intended beneficiaries of Decedent's estate. As to the viability of the FLP, the Fifth District found there was conflicting evidence as to whether the FLP would be accepted by the IRS. Accordingly, the Court reversed the trial court's summary judgment.

Reversing trial court's ruling that objection to guardianship plan was untimely filed where filing occurred 30 days after initial filing of guardianship plan, notwithstanding trial court had already approved the plan prior to objection being filed.

Rothman-Browning v. Marshall, 36 Fla. L. Weekly D2780 (Fla. 4th DCA 2011)

On April 4, 2011, Appellee, the ward's guardian of the person, filed her guardianship plan. Appellant, who was a co-trustee of a trust benefitting the ward, filed an objection to the guardianship plan on May 4, 2011. Prior to Appellant filing her objection, the trial court entered its Final Order approving the guardianship plan on April 29, 2011. At a subsequent hearing, the trial court denied the objection as being untimely.

On appeal, Appellant argued that her objection was timely under § 744.367 (4), Fla. Stat. because Appellant filed the objection within 30 days of Appellee's filing of the guardianship plan. Appellee argued that the trial court was only required to review the guardianship plan within 30 days under § 744.369(1), Fla. Stat. and could approve the plan within that time rather than waiting until after the 30-day objection period contained in § 744.367 (4), Fla. Stat. expired. The Fourth District disagreed with the Appellee's argument and found that, when reading all of the relevant statutes together, their plain meaning permitted Appellant to file an objection within 30 days and, given her compliance with that deadline, she was therefore entitled to a hearing on the merits of her objection. The trial court's ruling was therefore reversed.

Finding son's quitclaim transfer of interest in townhome to father and father's ex-wife during father's life did not constitute a waiver of son's expectancy to inherit father's tenant in common interest in townhome upon father's death.

Layne v. Layne, 74 So. 3d 161 (Fla. 1st DCA 2011)

In 1985, Appellant acquired a townhouse via warranty deed with his father and his father's then wife, Appellee. The deed conveyed an undivided one-half interest to Appellant, and the remaining undivided one-half interest to Appellant's father and Appellee as husband and wife, with all of them being joint tenants with right of survivorship. Five years later, Appellant executed a quitclaim deed conveying his interest in the townhouse to his father and Appellee, who were at that time divorced from one another. Because of the divorce, Appellee and Appellant's father became tenants in common with respect to the townhouse. Nine years later, Appellant's father died intestate survived by Appellant and Appellant's sister as his only heirs. By virtue of Appellant's

earlier quitclaim transfer, the father's estate possessed a one-half (50%) interest in the townhouse. Appellant and Appellee litigated whether Appellant was entitled to a one-half interest in the estate's share of the townhouse. Appellee contended that, by virtue of the earlier quitclaim deed, Appellant had transferred any and all interest he had in the property, including the right to take under Florida's intestacy laws, to Appellee. The trial court agreed with Appellee and issued an Order of Subsequent Summary Administration and distributed the estate's interest in the townhouse to Appellant's sister and Appellee equally.

On appeal, the First District reversed the trial court's order. The Court found that the after-acquired title doctrine was inapplicable in the instant case because no fraud or inequity occurred when the quitclaim deed was executed, as Appellant was possessed of a property interest in the townhouse at the time of conveyance. The Court further found that the quitclaim deed did not convey Appellant's interest in the property as a beneficiary of his father's estate because such interest did not exist at the time of the quitclaim conveyance. The Court noted that Appellant's possibility of inheritance from his father's estate amounted to an expectancy, not a property interest, and the quitclaim deed only conveyed Appellant's property interests held at the time of conveyance.

Reversing trial court and determining homestead residence owned in decedent's revocable trust at the time of decedent's death passed pursuant to Art. X, § 4(c), Fla. Const. and § 732.401(1), Fla. Stat. to surviving spouse for life with remainder to decedent's children *per stirpes*, and spouse had no right to request principal transfers of residence under terms of trust.

Aronson v. Aronson, 81 So. 3d 515 (Fla. 3d DCA 2012)

On July 2, 1996, Decedent Hillard J. Aronson created a revocable trust naming himself as trustee. At the time, Decedent and his wife, Appellee Doreen Aronson, were residents of Massachusetts. Decedent conveyed his Key Biscayne condominium, which was titled in his name alone, into his revocable trust. Decedent died on November 10, 2001. The year before his death, Decedent and Appellee sold their Massachusetts home, which was titled in Appellee's sole name, and moved into the Key Biscayne condominium. Appellee used approximately $130,000 of the sale proceeds from the Massachusetts home sale to satisfy the existing mortgage on the Key Biscayne condominium. Upon Decedent's death, his two adult sons from a prior marriage became successor trustees of the Decedent's revocable trust. The trust's terms gave a life estate to Appellee, with a remainder interest to the sons. The trust further provided Appellee with a right to withdraw principal on an annual basis. At the time of Decedent's death, the only remaining asset of the trust was the Key Biscayne condominium.

In a prior lawsuit, Appellee unsuccessfully attempted to claim the entire Key Biscayne condominium for herself based on a quitclaim deed signed by Decedent to Appellee in his individual capacity. Subsequently, Appellee began requesting principal transfers from the trustees pursuant to the trust's terms, and further requested reimbursement for the prior mortgage payoff and for all taxes, special assessments and other expenses of the condominium from the sons as trustees. The sons responded with a plan to sell the condominium, and the parties thereafter found themselves in litigation again. After a non-jury trial, the trial court entered a final judgment determining the Key Biscayne condominium was Appellee's homestead, and ordered the trust to reimburse her for the prior mortgage payoff and for approximately $136,000 of condominium repair and expenses. The trial court also found she had the power to withdraw principal from the trust on an annual basis per the terms of the trust.

On appeal, the Third District reversed the trial court's final judgment. The Court found the Key Biscayne condominium was clearly the Decedent's homestead residence, and thus the Florida Constitution's restrictions against devise were applicable notwithstanding the condominium was held by Decedent's revocable trust. Because Decedent was survived by his spouse (Appellee), the Key Biscayne condominium was not subject to the trust's testamentary provisions. Upon Decedent's death, the Key Biscayne condominium passed outside of probate "in a twinkle of an eye" to Appellee for life, with a remainder to his sons per stirpes. Thus, the Third District found that the sons, as trustees, had no power or authority with respect to the condominium, and Appellee became responsible for the expenses of the condominium so long as she remained a life tenant. The Court also reversed the trial court's ruling that Appellee was entitled to reimbursement for the mortgage payoff prior to Decedent's death, regardless of whether the payoff was made under a mistaken belief she was the titleholder to the property.

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9:35 a.m. – 9:50 a.m.
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9:50 a.m. – 10:10 a.m. **Break**

10:10 a.m. – 10:35 a.m.
Forward (and Back) to the Future of Principal and Income Accounting
Edward F. Koren, Tampa
F. Gordon Spoor, St. Petersburg

10:35 a.m. – 10:45 a.m.
There's a New Appellate Rule in Town – Rule 9.170 Appeal Proceeding in Probate and Guardianship
Thomas M. Karr, Miami

10:45 a.m. – 11:05 a.m.
Practical Pointers for Powers of Attorney
Deborah Russell, Naples

11:05 a.m. – 11:25 a.m.
Homestead for Heroes
Shane Kelley, Fort Lauderdale

11:25 a.m. – 11:40 a.m.
Recent Developments in Property Taxation
Arthur J. Menor, West Palm Beach

11:40 a.m. – 12:00 p.m.
Managing Growth and Protecting the Environment – What is Working and What is Not
Ronald L. Weaver, Tampa

12:00 p.m. – 1:15 p.m.
Lunch (included in registration fee)

1:15 p.m. – 1:30 p.m.
Follow the Money: Data Calls, Trust Accounts & Payoffs
Ted Conner, Orlando

1:30 p.m. – 1:55 p.m.
Tainted Gifts – Ethical Rules for Drafting Attorneys
William T. Hennessey, West Palm Beach

1:55 p.m. – 2:05 p.m.
Uniform Commercial Code – Recent Revisions to Article 9
R. James Robbins, Jr., Tampa

2:05 p.m. – 2:30 p.m.
Ethics and Professionalism in a Challenging Business World
Paul R. Lipton, Miami

2:30 p.m. – 2:50 p.m.
Till Divorce Do Us Part
Linda S. Griffin, Clearwater

2:50 p.m. – 3:10 p.m. **Break**

3:10 p.m. – 3:50 p.m.
Real Property Case Law Update: Practical Implications of Significant Decisions
Michael J. Gelfand, West Palm Beach

3:50 p.m. – 3:55 p.m.
The Vote's in Your Court – Judicial Merit Retention
Sandra Fascell Diamond, Seminole

3:55 p.m. – 4:35 p.m.
Til Death Do Us Part – Florida Cases and News from Planet Zarcon
David C. Brennan, Orlando

CLE CREDITS
COURSE NUMBER 1425R

CLER PROGRAM
(Maximum Credit: 8.0 hours)

General: 8.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Maximum Credit: 8.0 hours)

Construction Law: 8.0 hours
Elder Law: 6.0 hours
Real Estate: 8.0 hours
Wills, Trusts and Estates: 6.0 hours

Robert S. Swaine, Sebring – Program Chair
Stuart Altman, Miami – Co-Vice Chair
Charles I. Nash, Melbourne – Co-Vice Chair
James R. Robbins, Jr., Tampa – Co-Vice Chair
Sharaine A. Sibblies, Miami – Co-Vice Chair

W. Fletcher Belcher, St. Pete – RPPTL Section Chair
Margaret A. Rolando, Miami – RPPTL Section Chair-Elect
Laird A. Lile, Naples – RPPTL-PAC Chair
Sandra F. Diamond, Seminole – RPPTL-PAC Treasurer
Ronald D. "Chip" Waller, New Port Richey – Real Property, Probate and Trust Law-PAC Chair

USE THIS FORM FOR LIVE IN-PERSON REGISTRATION

The Florida Bar Real Property, Probate & Trust Law Section, the Real Property, Probate and Trust Law PAC and the RPPTL-PAC present

32nd Annual RPPTL Legislative and Case Law Update

PRE-REGISTRATION DEADLINE: July 20, 2012

REGISTRATION FORM — Course No. 1425R

(105) The Breakers, July 27, 2012

Name_____ Florida Bar Number _____

Nick Name_____ Firm Name _____

Mailing Address_____

City/State/Zip_____

Email _____ Telephone _____

PAYMENT BY CHECK ONLY. **YDS: Course Number 1425R**

- ❑ Real Property, Probate and Trust Law Section Member $185.00
- ❑ RPPTL-PAC Member $185.00
- ❑ Full-time law college faculty or full-time law student ..... $ 92.50
- ❑ Persons attending under The Florida Bar's policy of fee waivers (including judges) ..... $ 50.00
- ❑ All Others..... $235.00

Lunch is provided at no additional charge to registered attendees

Send form and check payable to RPPTL-PAC* to:
RPPTL-PAC, P.O. Box 568157, Orlando, FL 32856-8157

Any questions regarding seminar registration please call (407) 515-1501

We are unable to accommodate registrations by telephone or facsimile. **Checks only. No cash or credit cards.**

Registrations will be processed on a first-received, first-registered basis, until the facility's capacity has been reached.

If the facility's capacity has not been reached with advanced registrations, on site registration will be available, with an additional $25 charge. On-site registrations could not be accommodated last year.

The registration fee, less a $25 cancellation charge, will be refunded if the refund request is postmarked by July 20, 2012. There will be no refund if request is not postmarked on or before July 20, 2012 and mailed directly to RPPTL-PAC.

Please mail your refund request to RPPTL-PAC at the above address. Do not mail refund requests to The Florida Bar.

Refund requests mailed to The Florida Bar cannot be processed.

*The seminar registration fee is payable to the RPPTL-PAC. The RPPTL-PAC is a political action committee, which is not affiliated with, or controlled by The Florida Bar Real Property, Probate and Trust Law Section. This seminar is being held in conjunction with the Section's Executive Council Committee meetings on July 26th and the Executive Council meeting on July 28th, also at The Breakers, Palm Beach. All RPPTL section members are invited to participate in the programs and receptions. The registration form for the executive council meeting can be found at www.rpptl.org. Should you have additional questions, please call (850) 561-5626.

Hotel Reservation Information

THE BREAKERS, Palm Beach
561-655-6611

Suggested lodging alternatives:

The Four Seasons: 561-582-2800 **The Brazilian Court: 561-655-7740**
The Colony Palm Beach: 561-655-5430 **The Chesterfield: 561-659-5800**

LEGISLATIVE UPDATE

Date: _____

Check #_____ Check: $_____

Package # _____ Date: _____

SEE REVERSE SIDE FOR LIVE WEBCAST OR AUDIO / VIDEO ORDERS

USE THIS FORM TO: • Register for the Live Webcast • Order Audio CD • Order Video DVD • Order Course Book

32nd Annual RPPTL Legislative & Case Law Update

LIVE WEBCAST, AUDIO CD, VIDEO DVD and/or COURSE BOOK

ORDER FORM ONLY

To order the audio CD, video DVD and/or course book separately, please complete the form below and mail it, along with your check **payable to "The Florida Bar"** to the address at the bottom of the page.

~ Presented Live: Friday, July 27, 2012, The Breakers, Palm Beach ~

Name: _____ Florida Bar # _____

Address: _____

City/State/Zip: _____ Phone #_____

E-mail*_____

E-mail address required to transmit electronic course materials and is only used for this order.

FOR CREDIT CARD ORDERS COMPLETE THE FOLLOWING & FAX TO (850) 561-9413

☐ MASTER CARD ☐ VISA ☐ DISCOVER ☐ AMEX

Signature: _____

Name on Card: _____

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

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____ **LIVE WEBCAST Friday, July 27, 2012** over the internet to your home, office or laptop
Cost: $250 (LOCATION CODE 317) **1425R**

____ **AUDIO CD** (includes electronic course book) **1425C**
Cost: $235 plus your local tax

____ **VIDEO DVD** (includes electronic course book) **1425D**
Cost: $235 plus your local tax

____ **COURSE BOOK ONLY** (hard copy) **1425M**
Cost: $100 plus your local tax

Contact Information: **The Florida Bar**
ATTN: Order Entry
651 East Jefferson Street
Tallahassee, Florida 32399-2300
850-561-5831

WEBCAST CONNECTION

Live webcast attendees receive course materials and audio via the Internet. Connection instructions will be e-mailed 2 days prior to scheduled course; or contact The Florida Bar Order Entry Department at 850-561-5831 for instructions 2 days prior to the event.

Return this completed form with payment to The Florida Bar

Course # 1425R

THE FLORIDA BAR CLE

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

Drafting Powers of Attorney – What Works? It's All in the Eye of the Beholder!

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live and Webcast Presentation: Wednesday, July 25, 2012

The Breakers Resort • One South County Road
Palm Beach 33480 • 1-888-273-2537

• Live
• Live Webcast
• Audio CD
• Video DVD

Course No. 1536R

12:30 p.m. – 1:00 p.m.
Late Registration

1:00 p.m. – 1:30 p.m.
Drafting Issues from a Financial Institution's Perspective
Jennifer Robinson, The Northern Trust Company, Miami

1:30 p.m. – 2:00 p.m.
Elder Law, Disability and Capacity Issues
Charlie Robinson, Law Offices of Charles F. Robinson, P. A., Clearwater

2:00 p.m. – 2:30 p.m.
Non-springing Health Care Powers
Michael Foreman, Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota

2:30 p.m. – 3:00 p.m.
Drafting Issues from a Title Insurance Perspective
James Russick, Old Republic Title, Tampa

3:00 p.m. – 3:15 p.m.
Break

3:15 p.m. – 3:45 p.m.
Mandatory and Default Rules - You Can't Draft Without Knowing These!
Angela M. Adams, St. Petersburg

3:45 p.m. – 4:20 p.m.
What Estate Planning Powers Can Be Included
Laird A. Lile, Laird A. Lile, P.A., Naples

4:20 p.m. – 5:00 p.m.
Putting It All Together
Richard Stockton, Holland & Knight, Jacksonville

REAL PROPERTY, PROBATE AND TRUST LAW SECTION
W. Fletcher Belcher, St. Petersburg — Chair
Margaret Ann Rolando, Miami— Chair-elect
Robert S. Freedman, Tampa — CLE Chair

CLE COMMITTEE
Paul H. Chipok, Orlando — Chair
Terry L. Hill, Director, Programs Division

FACULTY & STEERING COMMITTEE
Deborah L. Russell, Naples — Program Co-Chair
Michael L. Foreman, Sarasota — Program Co-Chair

CLE CREDITS

CLER PROGRAM
(Max. Credit: 4.5 hours)

General: 4.5 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 4.5 hours)

Elder Law: 3.5 hours
Real Property: 4.5 hours
Wills, Trusts & Estates: 3.5 hours

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

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

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.

TO REGISTER | **ON-LINE:** www.floridabar.org/CLE | **MAIL:** Completed form with check | **FAX:** Completed form to 850/561-9413

Register me for the "Drafting Powers of Attorney – What Works? It's All in the Eye of the Beholder!" Seminar

ONE LOCATION: (105) THE BREAKERS RESORT, PALM BEACH (WEDNESDAY, JULY 25, 2012)

TO REGISTER OR ORDER AUDIO CD / DVD OR COURSE BOOKS 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 required to transmit electronic course materials and is only used for this order. **YDS: Course No. 1536R**

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LOCATION (CHECK ONE):

❑ **Palm Beach - Wednesday, July 25, 2012**
(105) The Breakers

❑ **Live Webcast / Virtual Seminar* Wednesday, July 25, 2012**
(317) Online

***Webcast registrants receive an email two days prior to the seminar, with log-in credentials to access course materials and the webcast link. Call The Florida Bar Order Entry Department at (800) 342-8060, ext. 5831 with any questions.**

❑ 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.

REGISTRATION (CHECK ONE)

❑ Member of the Real Property, Probate & Trust Law Section: $140

❑ Non-section member: $190

❑ Full-time law college faculty or full-time law student: $95

❑ Persons attending under the policy of fee waivers: $0

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, 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 personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

WEBCAST

❑ $175

❑ $225

METHOD OF PAYMENT (CHECK ONE)

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Advance registration only. Fax to 850/561-9413.)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

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❑ Enclosed is my separate check in the amount of $50 to join the Real Property, Probate and Trust Law Section. Membership expires June 30, 2013

COURSE BOOK — AUDIO CD — DVD — ONLINE — PUBLICATIONS

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 07/30/12. TO ORDER AUDIO CD / DVD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price. Tax exempt entities must pay the non-section member price.** Those eligible for the above mentioned fee waiver may order a complimentary audio CD in lieu of live attendance upon written request and for personal use only.

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 media 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 1536M**
Cost $60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)
TOTAL $ _____

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(includes electronic course material)
$140 plus tax (section member)
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❑ **DVD 1536D**
(includes electronic course material)
$250 plus tax (section member)
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TOTAL $ _____

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

Florida Lawyers Support Services, Inc.
Post Office Box 568157 - Orlando, Florida - 32856-8157 (407) 515-1501 Fax (407) 515-1504 www.flssi.org

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

INCLUDES SALES TAX AND SHIPPING

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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*)

Condominium Association Disclosure
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Assumption of Existing Mortgage(s)
Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA)
Appraisal Contingency
Short Sale Approval Contingency
Homeowners Insurance
Foreign Investment in Real Property Tax Act ("FIRPTA")
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence
Lead-Based Paint Disclosure
Housing for Older Persons
Rezoning Contingency
Lease Purchase Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
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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:_____

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METHOD OF PAYMENT

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OR

Please Circle One: VISA or MASTER CARD Amount to be charged $_____

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Action Line July 2010

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PROBATE & GUARDIANSHIP FORMS

The FLSSI forms are 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 2012 FLSSI forms.**

Firm: _____

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

Physical Address: _____

City/State/Zip: _____

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

2012 PROBATE FORMS

OPTION #1 **2012 FORMS AND INDEX - .PDF ON DISK . . . . . .$ 369.10**
OPTION #2 **2012 NEW & REVISED FORMS ONLY - .PDF ON DISK $135.20**
OPTION #3 **2012 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH . . . . . .$ 389.30**

2012 GUARDIANSHIP FORMS

OPTION #1 **2012 FORMS AND INDEX - .PDF ON DISK . . . . . $ 343.10**
OPTION #2 **2012 NEW & REVISED FORMS ONLY - .PDF ON DISK . . . . . .$ 164.20**
OPTION #3 **2012 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH . . . . . .$ 363.30**

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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AL 2012

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 resource 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, each Section committee has list serves that discuss issues and current hot topics, available to committee members.

SCHEDULE

EXECUTIVE COUNCIL MEETINGS

JULY 25 – JULY 28, 2012
RPPTL Executive Council Meeting and Legislative Update

The Breakers
Palm Beach, Florida

Reservations: 561/655-6611
www.the breakers.com
Room Rate $199.00
Cut-off Date: June 25, 2012

SEPTEMBER 13-16, 2012

Ritz Carlton Key Biscayne
Key Biscayne, Florida

Reservations: 800/241-3333
www.ritzcarlton.com/keybiscayne
Room Rate $169.00
Cut-off Date: August 22, 2012

Watch your mail and email for more information.

2012 CLE SCHEDULE:

Note: Detailed information can be found on the Florida Bar website: www.floridabar.org/CLE. Search by course number.

JULY 25, 2012
Power of Attorney*
(Course #1536)
The Breakers, Palm Beach

JULY 26 - 28, 2012
Legislative Update*
(Course #1425)
The Breakers, Palm Beach

SEPTEMBER 18, 2012
Alternate Dispute Resolution*
(Course #1507)
Buena Vista Palace, Orlando

October 5 & 6, 2012
THE PROBATE TEAM

Caribe Royale
Orlando, Florida

Reservations: 888/258-7501
Room Rate: $139.00
Cut-Off Date: Sept. 1, 2012

NOVEMBER 30, 2012
Joint Estate Tax/Asset Protection*
(Course #1509)
Tampa*

** Webcast & Live*
Courses scheduled later in the year will appear in future editions of ActionLine.

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).

The Florida Bar
651 East Jefferson Street
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ARTICLES

... for the next issue of ActionLine are being accepted. Contact: spence@carltonfields.com

32ND ANNUAL LEGISLATIVE AND CASE LAW UPDATE SEMINAR

Friday, July 27, 2012
The Breakers, Palm Beach

See page 34-37 for more details or visit www.floridabar.org/CLE and search by Course No. 1425.

Do You Know...

The Florida Bar's CLE is available to you **24/7**? Visit www.floridabar.org/CLE and check it out!

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.)