

ActionLine

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

Non-Traditional Remedies for Regaining Possession of Residential Property

Florida's Modern Portfolio Trust Investment Statute – A Call for Legislative Review

Social Media and Lawyer Ethics: Missing "Link?"

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RPPTL's Executive Council: The Section's Engine

I am often asked how the Real Property, Probate and Trust Law Section – a volunteer group – manages to be so productive. The answer lies in the structure of our *Executive Council*, the governing body of the Section. This column provides an overview of the Section's organization. The Executive Council consists of approximately 250 members of the Section who serve as the chairperson or vice chairperson of the various committees of the Section, or who represent the various Judicial Circuits in Florida as "At-Large" Members, or who are liaisons with various organizations with whom the Section shares an interest. All former chairpersons of the Section are also members of the Executive Council. The Executive Council is rounded out by representatives of our out-of-state members.



CHAIR'S COLUMN

By Margaret "Peggy" Rolando

Section Chair, 2013- 2014

The Executive Council is led by the *Executive Committee* which is composed of the officers and directors of the Section elected for one-year terms at the Section's annual convention. The Executive Committee is responsible for coordinating, scheduling and conducting the overall affairs and meetings of the Section. The Section meets 5 times per year (4 in-state meetings and 1 out-of-state meeting). Each meeting generally lasts for 3 days. The officers and directors and the incumbent serving in each respective position are as follows:

- Chair – Margaret "Peggy" Rolando
- Chair-Elect – Michael A. Dribin
- Director of the Probate and Trust Law Division – Deborah P. Goodall
- Director of the Real Property Law Division – Michael J. Gelfand
- Director of At-Large Members – Debra L. Boje
- Secretary – Andrew M. O'Malley
- Treasurer – S. Katherine Frazier
- Legislative Committee Co-Chairs – Robert S. Swaine (Real Property) and William T. Hennessey (Probate and Trust)
- CLE Seminar Coordination Committee Co-Chairs – Robert S. Freedman (Real Property) and Tae Kelley Bronner (Probate and Trust)
- Immediate Past Chair – William F. Belcher

The Director of the Probate and Trust Law Division and the Director of the Real Property Law Division are responsible for coordinating and scheduling the meetings of the various committees under their Division of the Section. They monitor and encourage the activities and projects of their Division's committees. The Chair-Elect performs the same roles for the General Standing Committees. The Director of the At-Large Members is responsible for coordinating and conducting meetings of the At-Large Members and organizing their events, communications and projects.

The chairs and vice chairs of each committee are selected annually by the Executive Committee. The chairs and vice chairs are responsible for setting agendas for the regular meetings of their committees, arranging for minutes of their meetings, collecting and distributing materials for committee meetings, planning CLE presentations, developing proposed legislation when appropriate to address legal issues, reviewing and evaluating proposed legislation affecting the substantive law in the subject matter of the committee, and reporting to the Executive Council on the committee's activities. They also maintain and update committee pages on the Section's website, *www.RPPTL.org*.

The **General Standing Committees** collectively comprise one of three divisions of RPPTL committees. They manage and administer the business of the Section. The various General Standing Committees coordinate the Section's legislative activities, draft amicus briefs, prepare the Section's flagship publication *ActionLine*, solicit and edit articles for *The Florida Bar Journal*, maintain the Section's website, recruit and maintain a diverse membership, and keep Section members informed about ethics and professionalism issues. Some of these committees also analyze areas of the law affecting both real estate and probate and trust practitioners, such as alternative dispute resolution and homestead topics.

The substantive committees in the **Probate and Trust Law Division** address issues that impact Florida probate and trust law practitioners. The committees in this division cover such substantive areas of interest to probate and trust attorneys as estate and trust tax planning; guardianship and advance directives; IRAs; insurance and employee benefits; principal and income issues; probate and trust litigation; probate law and procedure; trust law; asset protection; estate planning conflict of interest issues; digital assets and information; elective share review; personal representative issues; and guardianship law revision.

The **Real Property Law Division's** substantive committees focus on topics and issues of critical interest to Florida

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ABOUT THE COVER:

View of Eduardo VII statue and Tagus River in Lisbon, Portugal.

Photo by Silvia Rojas.

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Get Included in *ActionLine!*

Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments.

ARTICLES: Forward any proposed article or news of note to Silvia Rojas at srojas@thefund.com . Deadlines for all submissions are as follows:

ISSUE	DEADLINE
Spring	January 31
Summer	April 30
Fall	July 31
Winter	October 31

ADVERTISING: For information on advertising, please contact Shari Ben Moussa at sbm@katzbarron.com

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Kelly Nicole Catoe at kcatoe@hnh-law.com

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Jamie Spradlin at The Florida Bar at 800-342-8060 extension 5626, or at jspradlin@flabar.org. Jamie can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

real property practitioners. The committees in this division concentrate their efforts in the following areas: commercial real estate; condominiums and planned development; construction law; development and green buildings; landlord and tenant issues; property and liability insurance; real estate structures and taxation; real property financing; real property litigation; real property problems study; residential real estate; title insurance; and title issues and standards.

The Section's **At-Large Members** are responsible for actively participating in committee meetings, providing input on various issues on behalf of their circuit, and reporting to Section members in their circuit on proceedings at the Executive Council meetings and various Section events and initiatives.

The Executive Council benefits from committed, smart and hard working volunteers interested in the advancement of the Section and profession. The Section is seeking applications from those interested in becoming an At-Large Member of the Section for the Bar year July 1, 2014 – June 30, 2015. If you are an active member of one of the Section's committees and are willing to commit the time, talent and financial resources to attend the Executive Council meetings, please consider applying. To be nominated as an At-Large Member, you must have demonstrated the willingness and ability to assist the Section through active participation in one or more Section committees or other evidence of significant involvement in the Section.

If you are elected as an At-Large Member, you become a member of the Executive Council and have the following duties and responsibilities:

1. Attending two or more in-state meetings of the At-Large Members' meetings and two or more Executive Council meetings per Bar year (Note: there are generally 4 meetings in Florida and 1 out-of-state meeting per Bar year. Each meeting is generally 3 days);
2. Actively participating in at least one Section committee;
3. Engaging in activities of local bar associations;
4. Communicating with local Section members about legal developments in the areas of real property, probate, trust, estate and construction law and Section activities and events;
5. Reaching out to new and prospective members of the Section locally; and
6. Participating in At-Large Member projects.

If you are interested in an At-Large Member position, please complete the application posted on the Section's website at www.RPPTL.org and follow the instructions for submitting the application. Return the completed forms to alms@gunster.com. The deadline is January 4, 2014. If you have questions, please contact the Director of ALMS, Debra Boje, dboje@gunster.com, or the deputy director, Arlene Udick, arlene@udicklaw.com.

The Executive Council members readily acknowledge that their work for the Section is time consuming but rewarding. They particularly appreciate the opportunities to engage in serious discussions with their peers at a high level, to stay on the cutting edge of the law and to contribute to the development of the law. The Executive Council's blend of hard work, careful analysis, serious debate, camaraderie and professionalism offers a unique experience.

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The RPPTL Section is grateful to all of its sponsors who faithfully support the good work of the Section. In addition to recognizing them in each issue of *ActionLine* as we do, we want to offer information to you in the event you wish to speak with a sponsor about the services it provides. Below are the names of the sponsors and contact information. Again, thank you, sponsors, for supporting RPPTL!

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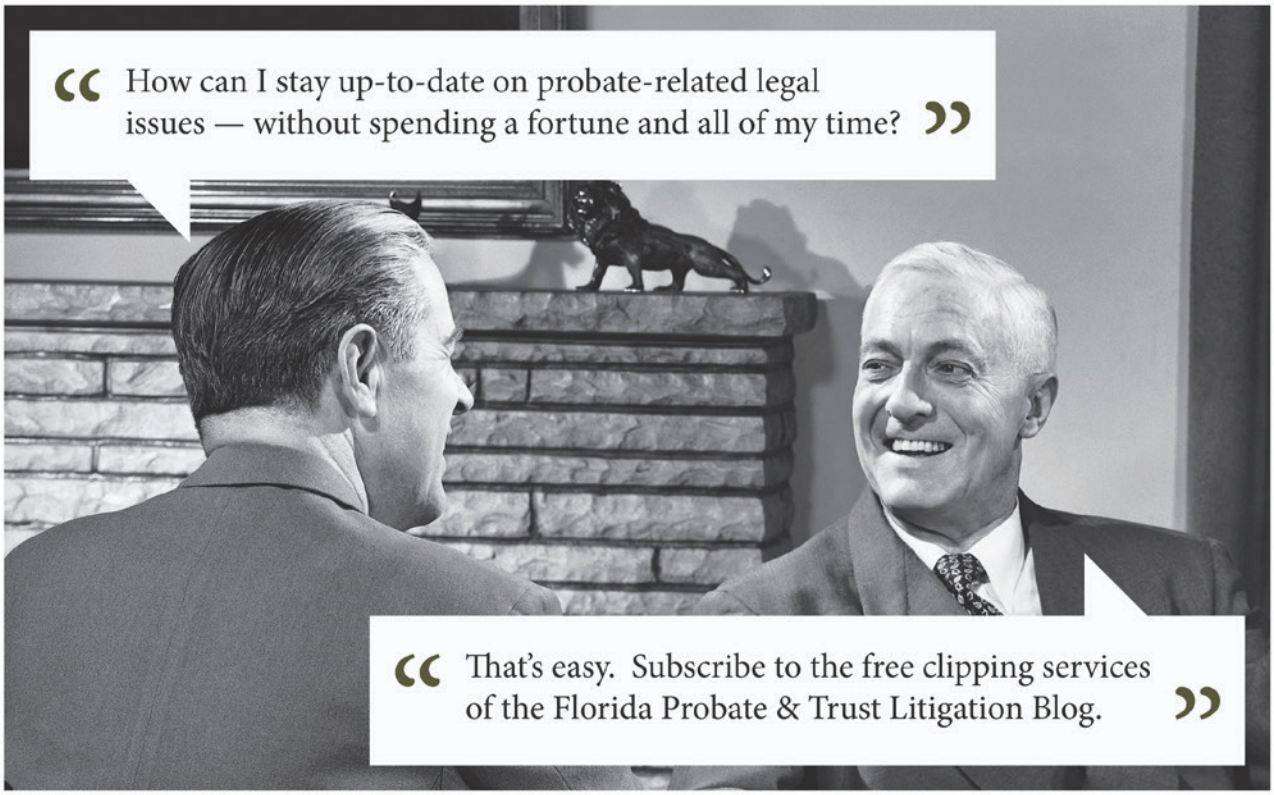

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By
Juan C. Antúnez
ATTORNEY AT LAW

Juan C. Antúnez is a partner with Stokes McMillan Antúnez P.A., a boutique trusts and estates law firm located in Miami, Florida. Trusts and estates litigation, probate administration and estate planning is all he does as a lawyer. He is a 1996 graduate of the New York University School of Law (J.D.), and a 2003 graduate of the University of Miami School of Law (LL.M. in Estate Planning). Prior to law school Mr. Antúnez volunteered for service with the United States Marine Corps Reserve from 1987 to 1993 (4th ANGLICO, West Palm Beach, Florida), including combat duty during the first Gulf War.

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Non-Traditional Remedies for Regaining Possession of Residential Property

By Anthony J. Horky, Esq., Anthony J. Horky, P.A., Boca Raton, Florida


A. HORKY

Not every dispute over the right to possession of residential property involves parties in a landlord-tenant relationship or can be settled through an action for eviction. There are situations where a person in possession of residential property is not a "tenant" and no "residential tenancy" exists. In these instances, an action to regain possession pursuant to Florida's Residential Landlord and Tenant Act, Ch. 83, Part II, F.S., ("FRLTA"), will fail. In order to regain possession, a party must resort to the non-traditional statutory remedies of Unlawful Entry and Unlawful Detention pursuant to Chapter 82, Florida Statutes, or Ejectment pursuant to Chapter 66, Florida Statutes. Because actions for unlawful entry and detention, and ejectment, are less common than your garden variety residential eviction, many attorneys and judges are unfamiliar with these statutory remedies and the procedures to prosecute or defend against them. This article will examine the differences between a residential landlord-tenant relationship governed by FRLTA and describe situations for which FRLTA is not applicable, and will explain when and how actions for unlawful entry and detainer, or ejectment, are used as the appropriate remedies for removing persons from residential real property.

The "Residential Tenancy" and Examples of When Landlord-Tenant Law Will Not Apply

To understand when and how an action for unlawful entry and detainer or ejectment is the appropriate remedy for removing a person from residential property, it is necessary to explain how a residential tenancy is created and review situations for which FRLTA will not apply. In Florida, an action to terminate a residential tenancy and recover possession of a dwelling unit requires compliance with FRLTA and the provisions of the applicable rental agreement. FRLTA applies to the "rental of a dwelling unit" and is distinct from the law governing non-residential tenancies[1] and situations in which a person has come onto and remains in possession of land or tenements without the consent of the owner.[2] FRLTA does not define a "residential tenancy" but Sec. 83.43, F.S., defines the elements that collectively create this type of tenancy.

Sec. 83.43(7), F.S., defines a "rental agreement" as a written or oral agreement for a term of less than 1 year, providing for use and occupancy of the premises. Moreover, Sec. 83.43(2) and (5), F.S., define a "dwelling unit," as a structure or part of a structure that is rented for use as a home or residence by one or more persons who maintain a common household, including a mobile home, and a "premises" as a dwelling unit. Sec. 83.43(3) and (4), F.S., define the owner or lessor of a dwelling unit as a "landlord" and a "tenant" as any person entitled to occupy a dwelling unit under a rental agreement. Finally, Sec. 83.43(6), F.S., defines "rent" as the periodic payments due the landlord from the tenant for occupancy under a rental agreement and any other payments due the landlord from the tenant as may be designated as rent in a written rental agreement. Thus, a residential tenancy requires an oral or written rental agreement for the use and occupancy of a dwelling unit owned by a landlord and occupied as a home or residence by a tenant who periodically pays the landlord rent.[3] When these elements are not present, a residential tenancy does not exist. If no residential tenancy exists between the parties disputing the right to possession, then some other remedy must be used to remove unwanted persons from residential property.

Situations arise where a person occupies or otherwise holds possession of residential property such as an apartment, single family home, or condominium, yet the elements of a residential tenancy do not exist. The following examples, while not exclusive, describe some possible scenarios where FRLTA will not apply:

- **The Friend.** This occurs when a person enters upon real property without the owner's consent but in a peaceable, easy and open manner, and thereafter refuses to vacate the property. This happens when a person rents an apartment from a landlord pursuant to a rental agreement, and during the tenancy the tenant permits a "friend" to move in to the apartment without the landlord's knowledge or consent. At the expiration of the lease term, the tenant vacates and when the landlord discovers the friend in possession, that person refuses to vacate. Later, while the friend is running errands, the landlord enters the apartment without consent and changes the locks.
- **The Family Member.** This occurs when a person enters into possession of real property with the owner's consent and, at the expiration of the person's right to remain, refuses to leave. This can occur when a family member is allowed to "use" a single-family home owned by another family member and does not pay rent. When the home is later sold or a decision is made that the family member can no longer reside on the property, the family member refuses to vacate the home. To make matters worse, the family member has allowed others to live in the home without the consent of the owner.

continued, next page

- **The Option Contract.** This occurs when a person lawfully enters upon land and refuses to leave under a *bona fide* claim of title to the property, or as the rightful title holder. Leases that contain an option to purchase may give rise to a dispute over title when the tenant claims to have exercised the option to purchase after paying rent for 12 months. Upon expiration of the lease term, the tenant refuses to vacate and claims that he or she properly exercised the option to purchase the property.[4]

All three scenarios involve a dispute over the right to possession of residential property but do not meet the definition of a residential tenancy or are expressly excluded under FRLTA. When a dispute arises over the immediate or ultimate right to possession of residential property in any of the above examples, a lawyer cannot resort to FRLTA but must use another statutory remedy to regain possession of the property for his or her client.

Non-Traditional Remedies to Regain Possession of Residential Property

Actions for unlawful entry and detention of lands and tenements, and actions for ejectment, are two statutory remedies used to settle disputes over the right to possession of real property in which a residential tenancy does not exist. The former remedy involves establishing which party has the "immediate right" to possession of the real property regardless of who has title to the property. The latter remedy involves establishing a party's "ultimate right" to possession based on the strength of a party's title to the real property or prior possession.

Unlawful Entry and Unlawful Detention: The Immediate Right to Possession

Unlawful entry and unlawful detainer actions are governed by Ch. 82, F.S.. This chapter has two parts: unlawful entry and forcible entry; and unlawful entry and unlawful detainer. This article will examine actions for unlawful entry and unlawful detention ("unlawful detainer"). Sec. 82.02, F.S., defines "Unlawful entry and unlawful detention" as entry upon land or tenements without consent, in a peaceable, easy and open manner and holding them afterwards against the consent of the party entitled to possession. The statutory remedy does not apply to residential tenancies.[5] Unlawful detention consists of a person's unlawful detention of lands or tenements against the consent of the person entitled to possession, or after the expiration of the person's right of entry, with such holding continuing against the consent of the party entitled to possession.[6] Regardless of how entry was obtained—lawful or not—the gist of any unlawful detainer action is that the possession of property is being unlawfully withheld.

Unlawful detainer actions concern the right of possession and damages and not the legal title to the real property.[7] The reason that title is not an issue is because it is immaterial whether the plaintiff has the *legal right of possession* or not at the time he or she was dispossessed or deprived of possession. The purpose of the remedy is to promote the use of the legal process and eliminate self-help tactics by a property owner. Courts in Florida have construed "right to possession" to mean an *immediate* right and not the *ultimate* right.[8] Thus, in response to a complaint for unlawful detainer, an answer that asserts title to the real property is insufficient. Examples 1 and 2 above consist of facts giving rise to an unlawful detainer action.

In Example 1, the owner of the apartment does not have a landlord-tenant relationship with the tenant's friend who entered into possession without the owner's consent and refused to vacate at the end of the tenant's lease term. The landlord cannot institute an eviction action because none of the indicia of a residential tenancy exist. Under the circumstances, the owner is required to bring an action for unlawful detainer to have the person removed from the apartment through legal process. But the situation was complicated when the landlord used self-help by entering the apartment without permission and changing the locks. By dispossessing the friend without due process of law, the owner exposed himself to an action for unlawful entry and forcible entry pursuant to Sections 82.01 and 82.03, F.S.. The wrongfulness of the friend's continued possession of the apartment following termination of the lease is not a defense to the landlord's unlawful entry and detainer.[9] Either way, the focus is on who had the immediate right to possession, not the ultimate right to possession or legal title.

The party claiming the immediate right to possession of the property must file and serve a complaint that contains the matters required by statute and shall state a cause of action. The county court has exclusive jurisdiction over actions for unlawful entry and detainer except that the circuit court has jurisdiction if the amount in controversy exceeds $15,000.00.[10] The plaintiff in an unlawful detainer action is entitled to the summary procedure under Sec. 51.011, F. S., and the action must be filed within three years after possession has been withheld from the party against his or her consent. If the defendant cannot be found at the usual place of residence, the summons and a copy of the complaint may be served by posting in a conspicuous place on the property described in the complaint. The right of possession is to be determined under the issues made by the pleadings described by statute and not the ultimate right of possession as might be determined by a suit in ejectment. The ultimate right to possession, as in the situation described in Example 3 above, is determinable in a separate action for ejectment, and a judgment in an unlawful detainer action is not prejudicial to the subsequent action.[11]

In order to prevail in an unlawful detainer action, it is necessary to prove by the preponderance of the evidence that the property is being held against the consent of the

party entitled to immediate possession, that defendant was in possession of the property at the time the suit was commenced, and that there is not a residential tenancy.[12] In addition to possession, a plaintiff is entitled to recover damages and costs. Pursuant to Sec. 82.071, F.S., at trial, damages are established by evidence of the monthly rental value of the premises and if the plaintiff recovers, the damages shall be fixed at double the rental value of the property. However, damages shall not be fixed at more than the rental value of the property unless the court or jury is satisfied that the detainer was willful or knowingly wrongful.

All defenses in law or fact shall be contained in the defendant's answer and filed within five days after service of process. The most obvious defense is that an action for unlawful detainer does not apply to residential tenancies.[13] Equitable defenses may be raised in an answer to a complaint for unlawful detainer. If the verdict is for the plaintiff, the court will enter judgment that plaintiff recover possession of the property described in the complaint, and damages and costs.[14] The court will award a writ of possession to be executed "without delay" and for execution of plaintiff's damages and costs. If the verdict is for the defendant, judgment will be entered dismissing the complaint and awarding defendant his or her costs.[15] A judgment entered for either plaintiff or defendant will not bar an action for trespass or injury to property or ejectment between the same parties respecting the same residential property.[16]

Under FRLTA, following entry of final judgment for possession, the clerk issues a writ of possession commanding the sheriff to post the writ of possession upon the dwelling unit giving the tenant not less than 24 hours' notice to vacate the premises. However, just as with non-residential landlord-tenant law under Ch. 83, Part I, F.S., the unlawful detainer statute has no such statutory 24-hour notice requirement. Not all sheriff departments understand or appreciate this distinction and unless the prevailing party has no objection to waiting an additional 24 hours, the practitioner must ensure that the sheriff is aware that the person(s) are to be removed at the time the writ is posted.

Ejectment: The Ultimate Right to Possession of Real Property.

Unlike an action for unlawful detainer, which focuses on a person's immediate right of possession regardless of title, ejectment focuses on the ultimate right to recover possession of property and for damages that may have accrued because of it being withheld. The plaintiff is the party out of possession, and the defendant is the party who is in possession of the property. A party seeking relief by ejectment must generally have legal title to the property, the possession of which is sought to be recovered. Ejectment is an action at law brought pursuant to Ch. 66, F.S., and the parties have the right to a jury trial in such an action. The circuit court has exclusive original jurisdiction.[17] The summary procedure statute is not available in actions for ejectment.

To recover in an ejectment action, the plaintiff must have a present right of possession to the property that is the subject of the lawsuit and must show that he or she was ousted or deprived of possession by the defendant.[18] A present right to possession may be established in two ways: by demonstrating an enforceable right of title; or showing prior possession, actual or constructive, on the land.[19] To sustain an ejectment action, it must appear that the defendant was in possession of the real property when the action was commenced.[20] Although actions for ejectment are possessory, it is frequently used to try title to land. If the plaintiff is relying upon legal title, and not prior possession, he or she must prove the right through a chain of title.

The rule in ejectment is that a plaintiff must recover on the strength of his or her own title rather than on the weakness of the defendant's title.[21] This means that a plaintiff cannot recover against one who does not have title unless the plaintiff can show his or her own title or prior possession.[22] The plaintiff must show legal title to the property at the time of beginning the action and must deraign title from the original source or from one having possession and the right to convey title.[23] Sec. 66.021(4), F.S., requires that

continued, next page



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a statement of the chain of title shall be attached to each party's pleadings. The statement should set forth chronologically the chain of title that the plaintiff and defendant intend to rely upon at trial. When any part of the chain of title is recorded, the pleading shall set forth the names of the grantors and grantees and the book and page of the official record. If either party is relying upon an unrecorded instrument, it must be attached to the pleading. Under Sec. 66.21(1), F.S., if the defendant in possession is a tenant, the ejectment action cannot proceed until the landlord is also made a defendant unless otherwise ordered by the court.

The rule that the plaintiff must recover on the strength of his or her own title is subject to qualification that the plaintiff's title need not be good against the whole world if it is good as against the defendant by estoppel. This exception is known as title by estoppel. [24] A plaintiff can maintain an action for ejectment on the basis of title by estoppel where the character of the defendant's title is one deemed such as to preclude all investigation into that of the plaintiff. For example, the plaintiff may recover if it can show that the defendant entered into possession under an executory contract of purchase, breached and abandoned the contract, and that defendant lost its right in the contract.[25]

Title to real property may be acquired by conveyance of a deed, heredity, adverse possession, or judicial sale. Adverse possession of land vests the possessor with title to it against that claimed by former owners or strangers as completely as if there had been a conveyance by deed to the one in adverse possession.[26] A party claiming title by adverse possession that is ousted from possession by a third party or the former owner may maintain an action for ejectment to recover the real property but must plead and prove its right to possession.[27]

Title acquired by a purchaser at a valid judicial sale can support an action for ejectment against the former owner or person in wrongful possession of the property. The general rule is that the purchaser at a foreclosure sale acquires whatever estate or interest as was owned by the defendant at the time of the sale, including the right of possession. Thus, the purchaser at such sale is entitled to recover in ejectment against the debtor on showing a judgment, execution and sheriff's deed, and establishing that the defendant was in possession of the real property at the time of the sale.[28] Still, the right of the purchaser to recover depends not only on the strength of its title but also on his right of entry based on the prior possession of the mortgagor.

In some instances, title to the property may come from a common source. When the plaintiff and defendant both claim title from the same person in an action for ejectment, neither party may deny the validity of the title of such person.[29] When the plaintiff relies upon record title, he or she has the burden of tracing the title back to the original source. But when both parties claim through a common source, it is only necessary for the plaintiff to show a better right from that point forward. The party having the better title obtained from the common source will prevail.[30] Title from a common source does not always involve a conveyance by deed from the common source. The effect of the rule applies as well where one or both parties claim by descent or devise from a common ancestor.

A defendant may assert legal and equitable defenses to an action for ejectment. By statute, the defendant may limit his or her defense to a part of the property mentioned in the complaint, describing such part with reasonable certainty. Essentially, any facts that show that plaintiff is not entitled to immediate possession of the property can be a defense, including that legal title was not in plaintiff at the time the action was commenced, title is in defendant, the statute of limitations has run, adverse possession, laches or estoppel. Equitable estoppel may be asserted as a defense to a plaintiff setting up title when, through acts, words, or silence, the plaintiff led another to take a position in which the assertion of legal title would be contrary to equity and good conscience. [31] For example, one who, without making known his claim permits another person to purchase and make improvements to real property under an erroneous opinion of title, will not afterward be permitted to exercise his legal right to possession against such person in ejectment. However, a mere lapse in time before the true owner asserts his or her legal right does not, in itself, work an estoppel. A defendant who has made improvements to the property under a mistaken belief that he or she had title to the property, may seek to have the improvements removed and when such facts are interposed as an affirmative defense, the court may treat this as a counterclaim.[32]

The court may direct a verdict for the defendant where it is apparent that no evidence has been introduced on which a jury can lawfully find for the plaintiff. Conversely, a plaintiff is entitled to a directed verdict where he or she has made out a prima facie case and there is no evidence on which a verdict can be found for the defendant. A verdict for the plaintiff must find the right of possession in the plaintiff, not only that the plaintiff has fee simple title. Sec. 66.021(3), F.S., permits the prevailing plaintiff to have issued one writ for possession, damages sand costs, or separate writs for possession and for damages. Chapter 66 does not provide for recovery of attorneys' fees in actions for ejectment.

Ch. 66, F.S., also contains a betterment remedy for a defendant who, after judgment for ejectment is entered in favor of plaintiff, seeks to recover money for permanent improvements made to the property during the defendant's possession. Sections 66.041 through 66.101, F.S., prescribe the procedures by which a defendant can seek a judgment, including a jury trial, for the permanent improvements made by the defendant during the time that he or she held the property under apparently good legal or equitable title.

Conclusion

The choice of remedies available to a party when faced with the challenge of regaining possession of real property is not limited to eviction actions under FRLTA. Florida provides other statutory remedies that, while not as traditional, are applicable to situations in which a residential tenancy does not exist between the plaintiff and defendant. Where the dispute concerns a party's immediate right to possession, an action for unlawful entry and detainer will lie and can be prosecuted under the summary procedure statute. When the ultimate right to possession is at stake, a party should seek ejectment on the strength of his or her own title to recover possession.

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Endnotes:

1 § 83.41, Fla. Stat.

2 Pursuant to § 82.02, Fla. Stat., unlawful entry and unlawful detention actions do not apply to residential tenancies.

3 *See Toledo v. Escamilla,* 962 So. 2d 1028 (Fla. 3d DCA 2007) for a similar analysis of what constitutes a residential landlord-tenant relationship.

4 *See* § 83.42, Fla. Stat.

5 §§ 82.02 and 82.04(2), Fla. Stat. Note that the legislature has not abrogated the remedy of forcible entry pursuant to §§ 82.01 and 82.03, Fla. Stat., from residential tenancies.

6 §82.04 (1), Fla. Stat.

7 § 82.05, Fla. Stat. "No question of title, but only the right of possession and damages is involved" in an unlawful detainer action; § 82.071, Fla. Stat.

8 *Floro v. Parker,* 205 So. 2d 363, 366 (Fla. 2d DCA 1967) citing *Fla. Athletic* & *Health Club* v *Royce,* 33 So. 2d 222 (Fla. 1948) (en banc).

9 *See*, e.g., *R. Bodden Coin-Op Laundry, Inc. v. Brandychase Condominium Ass'n, Inc.,* 557 So. 2d 663 (Fla. 2d DCA 1990).

10 § 34.011(2), Fla. Stat.

11 § 82.101, Fla. Stat.

12 *Continental Coffee Co. of Fla., Inc. v. Sklar,* 479 So. 2d 255, 256 (Fla. 2d DCA 1985) (party lost right to claim that property being held without consent where trustee agreed to validity of stipulation allowing tenant to remain in possession after expiration of the lease); 20 Fla. Jur. 2d, Ejectment and Related Remedies, § 70; § 82.04; Fla. Stat.

13 *See* §§82.02 and 82.04(2), Fla. Stat.

14 § 82.091, Fla. Stat.

15 *Id.*

16 § 82.10, Fla. Stat.

17 § 26.012, Fla. Stat. (Circuit court shall have exclusive original jurisdiction over actions involving title to real property). *See Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC,* 986 So. 2d 1244 (Fla. 2008).

18 *Williams v. Guthrie, et. al.,* 137 So. 682 (Fla. 1931); *Kahn v. Delaware Securities Corp.*, 153 So. 308 (Fla. 1934).

19 *Davis v. Hinson,* 67 So. 3d 1107 (Fla. 1st DCA 2011).

20 *Jones v. Lofton,* 16 Fla. 189 (Fla. 1877).

21 *Mobley v. Hunt,* 722 So. 2d 248 (Fla. 2d DCA 1998) citing *Fla. Fin. Co. v. Sheffield*, 48 So. 42 (Fla. 1908).

22 *Alford, et. al. v. Sinclair, et. al.,* 55 So. 2d 727 (Fla. 1951);*see Davis,* 67 So. 3d at 1107.

23 *Burns v. McDaniel, et. al.,* 104 So. 2d 526 (Fla. 1932).

24 *See Cape Sable Corp. v. McClurg,* 74 So. 2d 883 (Fla. 1954).

25 *Tilman v. Niemira,* 127 So. 855 (Fla. 1930).

26 2 Fla. Jur. 2d, Adverse Possession, § 5.

27 *See Drawdy Inv. Co. v. Leonard,* 29 So. 2d 198 (Fla. 1947).

28 *McClellan v. Solomon,* 2 So. 825 (Fla. 1887);*see Cape Sable Corp., supra.*

29 *Tilman, supra.*

30 *Foreman, et. al. v. Abbott,* 116 So. 1 (Fla. 1928).

31 *Hagan, et. al. v. Ellis,* 22 So. 727 (Fla. 1897).

32 *See Brown v. Johns,* 312 So. 2d 526 (Fla. 1st DCA 1975).

RPPTL Executive Council Adds Kids' Committee

With the largest and most active Executive Council section of the Florida Bar, the RPPTL Section is constantly evolving, and now the Executive Council kids are getting in on the act. A newly formed, voluntary committee of the RPPTL Executive Council, the Kids' Committee, will serve to identify and implement kid-friendly activities for upcoming Executive Council meetings. The Kids' Committee has already met and elected officers to represent the different age groups which will be attending future meetings. Great ideas abound for interactive activities that will include lots of family fun while the rest of the Executive Council is hard at work. Executive Council parents should expect a survey or two to help the Kids' Committee select price-friendly activities, and should look for more children's options at future meetings. Anyone with questions can direct them to the Kids' Committee Chair, Steven Goodall, sgoodall@live.com, or Parent Advisor, Laura Sundberg, lsundberg@zkslawfirm.com.

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Law Students Assist Real Property Problems Study Committee

By W. Theodore Conner, Orlando, Florida
Chair, Real Property Problems Study Committee

The Real Property Problems Study Committee considers a wide range of issues. The topics are often outside the areas of focus of other standing committees and the expertise of the Committee members. On two recent occasions, law students participating in the Section's initiative to introduce law students to the RPPTL have come to the rescue.



L-R: Ted Conner, Paige Baker, Jim Russick, Deborah Boyd

Paige Baker, a third year student at Stetson Law School, provided a well-researched memorandum on the question of the constitutional right to a jury in an unlawful detainer action. The issue arose upon concerns that "squatters" would delay ejectment actions by demanding a jury trial. The Problems Study Committee was considering changes to Chap. 82, Fla. Stat. to delete references to jury trials. Ms. Baker provided authoritative information addressing the constitutional issues. She presented her research and responded to questions at the Committee's July, 2013, meeting. Ms. Baker's excellent presentation proved very helpful to the committee. Her memorandum may be found on the Problems Study Committee's website.

Sam R. Craparo, III, a recent graduate of the University of Florida College of Law and Liana Madison, a third year student at the University of Florida College of Law, recently provided a great service to the Problems Study Committee. The Committee is considering the public policy issues in continuing or deleting the witness requirements for deeds found in Sec. 689.01, Fla. Stat. Mr. Craparo and Ms. Madison researched and reported on the numerous Florida Statutes that would be affected by deleting or amending the witness requirements. A copy of their exhaustive report is available on the Problems Study Committee website.

The RPPTL Membership and Inclusion Committee encourages law students to attend and participate in Section committees. The Problems Study Committee's experience has been that committee members benefit from working with these bright and motivated future Section members. Law students interested in working on projects with Section committees, or committee chairs with an appropriate project to utilize the skills of law students, may contact coordinator Stacy Kalmanson at Stacy.Kalmanson@fnf.com.

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Florida's Modern Portfolio Trust Investment Statute – *A Call for Legislative Review*

By Trent S. Kiziah, Esq., Palm Beach, Florida,
J. Clay Singleton, Ph. D., CFA, Winter Park, Florida, and
S. A. Marshall, Esq., Winter Park, Florida

I. Introduction

In 1993, a year before the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Prudent Investor Act (the "UPIA"), Florida adopted two statutes - Fla. Stat. §§ 518.11 and 518.112 – that adopted a modern portfolio investment approach to govern the investment of trust, estate and guardianship assets.[1] While many of the phrases found in Florida's modern portfolio trust investment statutes are similar to those in the UPIA, Florida's statutes contain numerous differences, some of which were the result of Florida's statutes having been based, in part, upon an earlier draft of the UPIA. This article examines the similarities and differences and calls for a legislative review of these two statutes.

II. Five Fundamental Investment Principles

A. Portfolio Investing

The UPIA shifted the investment focus from examining each investment in isolation to a portfolio analysis that examines how assets react with each other to changing market conditions.[2] UPIA § 2(b) "emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other non-trust assets."[3] While worded slightly differently, Fla. Stat. § 518.11(1)(a) establishes a similar consolidated portfolio investment standard.

B. Tradeoff Between Risk and Return

According to the UPIA, a fiduciary's central consideration when investing is weighing the tradeoff between risk and return.[4] As noted in the comments to UPIA § 2, "[s]ubsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve…. Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries." Likewise, Fla. Stat. § 518.11(1)(a) emphasizes the "risk and return" investment focus.

C. Categorical Investment Restrictions Abrogated

For decades, legal lists in many states used categorical exclusions, such as prohibitions on junior mortgages and new ventures.[5] Under the prudent man (person) rule, a single "speculative" investment exposed the trustee to liability.[6] UPIA § 2(e) avoids the word "speculative." It provides that "a trustee may invest in any kind of property or type of investment consistent with the standards of this Act." Fla. Stat. § 518.11(1)(b) also avoids also the word "speculative" and specifically permits the fiduciary to "invest in every kind of property and type of investment." This language is strikingly similar to UPIA § 2(e).

D. Diversification

UPIA §3 provides that "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." Diversification is a fundamental tenet of prudent investing under the UPIA.[7] Under the prudent man (person) rule that applied in most states (which, prior to the adoption of the UPIA, included Florida), some courts had concluded that there was no mandatory duty to diversify trust investments.[8] Fla. Stat. § 518.11(1)(c) imposes upon a trustee the duty to diversify unless circumstances warrant a concentration retention.[9]

E. Delegation

The UPIA's fifth fundamental alteration to prudent investing permits a trustee to delegate investment functions.[10] UPIA § 9(a) permits a trustee to "delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances." Fla. Stat. § 518.112 permits a trustee to delegate investment functions to an investment agent.[11] It has been said by some authorities Florida "got it wrong" by permitting total delegation as only "slivers" of the overall portfolio are permitted under the UPIA (e.g., an orange grove, oil and gas leases, etc.). However, when drafting the applicable Florida statute, discussions were held on this very point and it was decided to permit, under proper circumstances, such "wholesale" delegation if done correctly and with proper monitoring.

F. Summary

All five fundamental principles of the UPIA have been adopted by Florida. However, Florida's modern portfolio trust investment statute contains several provisions that are significantly different from the UPIA.

III. Modifications by Florida

A. Express Requirement

The UPIA is a default rule.[12] UPIA § 1(b) provides "the prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust." Florida adopted this default concept, but

modified the language in UPIA § 1(b) to require an express provision to override the statutory rule.[13] In Florida, a settlor can create a trust by mere words alone;[14] however, for a settlor to override the prudent investor rule, the settlor must do so expressly in the trust instrument.[15] Such specificity, however, need not specifically refer to the statute.[16] By requiring an express provision in the trust instrument, Florida prohibits oral and implied modifications to the UPIA.

B. Reasonable Business Judgment

Fla. Stat. § 518.11(1)(b) provides that "[t]he fiduciary's investment decisions and actions are to be judged in terms of the trustee's reasonable business judgment regarding the anticipated effect on the investment portfolio as a whole under the facts and circumstances prevailing at the time of the decision or action." "Business judgment," as commonly understood, appears to be inappropriate in a trust context.[17] Though an earlier draft of the UPIA may have used these terms, the final version of the UPIA does not.[18] UPIA § 10, however, enunciates a "trust standard" that comes close: "… the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs …" This section equates with the 1992 Prudent Investor Rule. Hence, the language in UPIA § 10 and the use of "business judgment" in Fla. Stat. § 518.11(1)(b) are so similar it is doubtful that, when used in that context, a "trust standard" would render a different result. Also, two authors herein, Singleton and Marshall (along with the late Dean Edward A. Moses), addressed the use of "business judgment" in a previous article to show, when applied correctly, it can lead to more intuitive diversification results.[19]

C. Permissive v. Mandatory Investment Criteria

UPIA § 2(c) enumerates eight factors "that a trustee shall consider in investing and managing trust assets." If a factor is relevant, the trustee must consider the factor when investing. If a factor is not relevant, then the trustee need not consider the factor. Fla. Stat. § 518.11(1)(f) enumerates six factors to be considered by the fiduciary but provides that the trustee "may consider" the factors rather than requiring the fiduciary to consider relevant factors (*see* expanded discussion at Part III, F, 2, *infra*). Florida has relaxed the investment standard by shifting a mandatory "shall" to a permissive "may."

Query whether the duty to invest and manage as a prudent investor required by UPIA § 2(a) and Fla. Stat. § 518.11(1)(a) mandates the trustee to consider these factors. If so, the permissive standard set forth in Florida may mislead trustees. Careful consideration should be given to revising Fla. Stat. § 518.11(1)(f) to require mandatory consideration for all eight of these factors if, and to the extent, they are relevant.

"…the permissive standard set forth in Florida may mislead trustees."

D. Diversification

UPIA § 3 provides: "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." Fla. Stat. § 518.11(1)(c) provides that "[t]he fiduciary has a duty to diversify the investments unless, under the circumstances, the fiduciary believes it is in the interests of the beneficiaries and furthers the purposes of the trust, guardianship, or estate not to diversify." Florida's statute is similar to the American Law Institute's Restatement (Third) of Trusts: Prudent Investor Rule (hereinafter the "1992 Prudent Investor Rule") which reads: "[i]n making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so." Comment (g) to the 1992 Prudent Investor Rule notes:

> "The objective of prudent risk management imposes on the trustee a duty to diversify trust investments unless, under the circumstances, the objectives of both prudent risk management and impartiality can be satisfied without doing so, or unless special considerations make it prudent not to diversify in the particular trust situation."

This comment references "special considerations" which would justify retention of asset concentration. The language is nearly identical to the "special circumstances" referenced in UPIA § 3 and Fla. Stat. § 518.11(1)(d). The 1992 Prudent Investor Rule emphasizes that the trustee is to diversify unless it is "prudent not to do so." UPIA § 3 requires the trustee to diversify unless the trustee "reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." The 1992 Prudent Investor Rule references prudency while the UPIA references the "purposes of the trust." There is no indication the different references were intended to lead to different investment practices. In fact, § 227(a) of the 1992 Prudent Investor Rule provides the trustee is to invest bearing in mind the "terms, distribution requirements, and other circumstances of the trust." Arguably, the provision of both the 1992 Prudent Investor Rule and the UPIA are identical. If so, then because the standards are identical, Florida could adopt UPIA § 3 without changing the investment standard.

E. Delegation

Similar to UPIA § 9, Florida "permits" a trustee to delegate investment functions to an investment agent.[20] The

continued, next page

language of Florida's delegation statute, though, differs substantially from UPIA § 9.

1. Delegation of Duties With Respect to Life Insurance

The most significant modification concerns certain life insurance policies held by the fiduciary. Under certain conditions, the fiduciary may delegate to an investment agent certain investment functions with respect to life insurance without any continuing obligation to review the agent's actions.[21] Florida also has enacted a companion delegation statute which relieves the trustee of investment duties with respect to life insurance.[22]

2. Notice Requirement

UPIA § 9 does not require a trustee to notify the beneficiaries when investment functions are delegated. Florida Stat. § 518.112(3) requires a trustee to give notice of its intentions to delegate investment functions and sets out in detail what the notice is to state.

3. Specific Delegation Terms

Fla. Stat. § 518.112(1) requires a trustee to establish the "specific" delegation terms.[23] Arguably, a delegation of all investment duties may not be specific enough.

4. Review of Agent's Performance

UPIA § 9(a)(3) requires a trustee to review periodically "the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation." Florida has modified the statute by requiring the trustee to monitor the agent's "overall" performance.[24] Further, Florida requires a trustee to monitor "overall" performance and compliance with the scope and "specific" terms of the delegation.[25] Query whether these modifications are substantive or merely editorial.

F. Other Changes with Possible Investment Significance

1. "Investment assets" rather than "trust assets" and "investment portfolio" rather than "trust portfolio"

The UPIA concerns solely the investment of trust assets. Fla. Stat. § 518.11 is broader in that it also addresses the investment of guardianship and estate assets. The term "trust assets" (which appears repeatedly in the UPIA) was replaced in Fla. Stat. §§ 518.11(1) and 518.11(1)(a) with the term "investment assets." Similarly, the term "trust portfolio" was replaced in Fla. Stat. §§ 518.11(1)(a) and 518.11(1)(d) with the term "investment portfolio." In retrospect, as an unintended consequence, might it be argued the statute addresses only the investment assets held by the fiduciary? Could it also be argued that investment assets are to be distinguished from non-investment assets such as personal property, personal residences and similar use property? According to one of the authors (who was primarily responsible for drafting Florida's version of the UPIA), the reason for using the term "investment assets" was to create a generic term that might equate to "trust assets" and be applicable to estate or guardianship assets. Unfortunately, there is no legislative history to support what appears to be this clear reason for the different terminology. Thus, some clarification might be advisable especially because the language "which may include financial assets, interests in closely held enterprises, tangible personal and intangible property, and real property" is found in the UPIA §2(c)(4) but is not found in Fla. Stat. § 518.11(1)(f).

2. Differences in UPIA 2(c)

UPIA § 2(c) provides:

Among circumstances a trustee shall consider when investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

1. general economic conditions;
2. the possible effect of inflation or deflation;
3. the expected tax consequences of investment decisions or strategies;
4. the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible personal and intangible property, and real property;
5. the expected total return from income and the appreciation of capital;
6. other resources of the beneficiaries;
7. needs for liquidity, regularity of income, and preservation or appreciation of capital; and
8. an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

Fla. Stat. § 518.11(1)(f) contains the first six of these subsections. Florida deleted the word "deflation" found in UPIA § 2(c)(2). Florida also deleted the illustrations set forth in UPIA § 2(c)(4). Because the additional language provides only illustrations, the deletion does not alter the intent of the statute. The question then becomes whether the language is redundant and could it cause courts to misconstrue the language as limiting the scope of the statute?

Fla. Stat. § 518.11(1)(f) further provides that the fiduciary may consider "both income yield and appreciation of capital" in making investment decisions. UPIA § 2(c)(5) does not contain the term "yield." While apparently innocuous, the insertion of "yield" modifies the statute.

UPIA § 2(c)(6) requires a trustee to consider the "other resources of the beneficiaries." Fla. Stat. § 518.11(1)(f) elaborates on UPIA § 2(c)(6) by providing that the fiduciary "may, but need not, consider related trusts, estates, and guardianship, and the income available from other sources to, and the assets of, beneficiaries when making investment

decisions." Nine states have modified the subsection by adding at the end thereof:

1. "known to the trustee;"[26]
2. "known to the trustee as determined from information provided by the beneficiaries;"[27]
3. "fiduciary shall have no duty to inquire;"[28] or
4. "reasonably known."[29]

States have also expanded § 2(c)(6) by elaborating on the nature of the resources and expanding the reference to include:

1. "related trusts;"[30]
2. "and other income;"[31]
3. "other investments and resources, whether held in trust or otherwise;[32]
4. "and the assets of the beneficiaries;"[33]
5. "status of related assets of beneficiaries;"[34] or
6. "including earning capacity."[35]

Florida's statute does not contain the provisions of UPIA § 2(c)(7) which require the trustee to consider the beneficiaries need for liquidity, regularity of income, and preservation or appreciation of capital.

Florida's statute also does not contain UPIA § 2(c)(8) which, as stated above, provides that among circumstances to be considered is "an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries." In the list of factors referenced in Fla. Stat. § 518.11(1)(f) there is no reference to an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries (i.e., the provisions of UPIA § 2(c)(8)) but, instead, Fla. Stat. § 518.11(1)(d) provides that "[t]he fiduciary's decision to retain or dispose of an asset may be influenced properly by the asset's special relationship or value to the purposes of the trust, estate, or guardianship, or to some or all of the beneficiaries…."

3. Duties at Inception of Trusteeship

Under the law prior to enactment of the UPIA, most states had statutes which softened the application of the prudent person rule for assets received upon the commencement of the fiduciary relationship."[36] UPIA § 4 eliminates any special treatment for inception assets.[37] UPIA § 4 provides:

> "Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this [Act]."

Under the UPIA, the duty to diversify applies to all assets, including those contributed by the grantor and those purchased by a prior trustee.[38]

Fla. Stat. § 518.11(d) provides:

> "(d) The fiduciary has a duty within a reasonable time after acceptance of the trust, estate, or guardianship, to review the investment portfolio and to make and implement decisions concerning the retention and disposition of original preexisting investments in order to conform to the provisions of this section…."

This statute imposes upon a trustee the duty upon acceptance of the trust to review all of the trust assets, including grantor contributed assets, and determine if they are suitable for the trust. As the statute reads, each trustee - the original trustee and each succeeding trustee - must undertake this review. Notably, the statute is missing the phrase in UPIA § 4 that states "receiving trust assets." Thus, the statute would not appear to impose upon a trustee the duty to examine additions to the trust that are received after the trustee's appointment. The question thus arises whether Florida's common law applies to these additions or whether the statute is meant to be read more broadly to include these additions.

4. Absence of Reference to "Prudent Man Rule"

UPIA § 10 lists terms or comparable language located in provisions of a trust that are to be interpreted as invoking the UPIA provisions. The four common phrases are: "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule." If a trust contains these terms, the trust is deemed to have invoked the prudent investor rule even though executed before the effective date of the statute, unless the trust provides otherwise. Fla. Stat. § 518.11(4) is similar to UPIA § 10 but deletes the reference to "prudent man rule."[39] Does the removal of this phrase cause non-application of the UPIA to those trusts that use the term "prudent man rule"?

IV. Recommendations

The Benefits of Uniformity

Uniform Acts are adopted by the National Conference of Commissioners on Uniform State Laws to promote uniformity in the law among the states on subjects where uniformity is desirable and practicable.[40] Section 12 of the UPIA provides: "[t]his [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among the States enacting it."

A court's decision in one jurisdiction may serve to guide a court in another jurisdiction if the law is similar or identical in both states. While the decision of a court in one jurisdiction will not bind the court of another jurisdiction, it effectuates the application of UPIA § 12 if the courts strive to apply the law uniformly. To the extent that the state's UPIA deviates

continued, next page

from the UPIA, a court decision interpreting the state's modified UPIA will limit its application in another jurisdiction.

Florida has expressed a desire for uniformity in adopting several uniform acts, including the Uniform Trust Code[41] and the Uniform Principal and Income Act.[42] Since Florida's Legislature adopted its modern portfolio trust investment statutes just prior to the UPIA's adoption, and they are similar, Florida's Legislature should revisit its statutes and determine where it is wise to adopt provisions from the UPIA.

Existing Modifications

1. Express Requirement

As set forth in Part III (A), *supra*, Florida requires an express provision to modify the default rule governing the manner in which assets are invested. Retention of the express requirement deviates from the UPIA § 1(b). Because this provision effectuates a specific state objective, its retention may be warranted.

2. Reasonable Business Judgment

As discussed in Part III (B), *supra*, Florida should re-examine the "reasonable business judgment" standard set forth in Fla. Stat. § 518.11(1)(b) to determine if the standard and language in UPIA § 8 should be adopted.[43] If the standard is the same, then it would be wise to use the same terminology used in the UPIA.

3. Permissive v. Mandatory Criteria

As set forth in Part III (C), *supra*, Fla. Stat. §518.11(1)(f) contains six "permissive" standards while the UPIA § 2(c) "requires" a trustee to consider eight enumerated factors to the extent they are present and relevant. Florida should adopt the eight factors and, likewise, make them mandatory requirements.

4. Diversification

As discussed in Part III (D), *supra*, Fla. Stat. §518.11(1)(c) mandates diversification but contains the language from the 1992 Prudent Investor Rule rather than the language in the UPIA §3. Florida should consider adopting the UPIA §3 because Fla. Stat. §518.11(1)(c) contains an identical duty to diversify.

5. Delegation

As set forth in Part III (E), *supra*, Florida's delegation statute contains numerous provisions different from those found in UPIA § 9. Notably, Fla. Stat. § 518.112(2) carves out a special provision with respect to life insurance. Because this provision effectuates a specific state objective, its retention may be warranted.[44] Fla. Stat. § 518.112(3) contains a notice requirement that is not found in the UPIA. Again, a state objective is stated clearly. These provisions should be retained unless, in retrospect, the Legislature deems the notice requirement too burdensome. Florida also should re-examine use of the phrase "specific terms" and "overall performance" contained in Fla. Stat. § 518.112(1) to see if they should be retained.

6. "Investment Assets" and "Investment Portfolio"

As discussed in Part III (F)(1), *supra*, Florida should consider defining the terms "investment assets" and "investment portfolio" to prevent misinterpretation.

7. "Known to the Trustee"

As discussed in Part III(F)(2), *supra*, Florida permits, but does not require, a trustee to consider the beneficiaries' related trusts, estates, guardianships, as well as other income and assets when making investment decisions. Florida should revisit this provision, examine the changes made in the other states, and determine whether it is wiser to adopt the language in the uniform act, retain the current language in Fla. Stat. § 518.11(1)(f), or mold a revision. Adopting the UPIA language would be most consistent with the Act's intention and the goal of having trustees make decisions that incorporate all relevant information.

8. Duties at Inception of Trusteeship

To be consistent with the UPIA and remove a source of possible confusion, Florida should consider requiring trustees to examine additions to the trust received after the trustee's appointment.

9. Absence of Reference to "Prudent Man Rule"

Although Florida Stat. § 518.11(4) is similar to UPIA § 10, room remains for alternative interpretations. Florida should adopt the list of comparable terms in UPIA § 10.

VI. Conclusion

Twenty years have passed since the Florida legislature enacted a modern portfolio trust investment statute. Since its enactment, the Commissioners on Uniform State Laws have promulgated the UPIA. The Florida legislature should revisit its modern portfolio trust investment statute. When comparing its law to the UPIA, Florida should retain those modifications that effectuate clearly long-standing state objectives. Florida should not sacrifice important state objectives for the sake of uniformity. On the other hand, uniformity should not be lost merely for the sake of retaining language modeled on the 1992 Prudent Investor Rule rather than on the UPIA. Hopefully, this article will facilitate the appropriate Florida Bar and Florida Bankers' Association Sections in assessing and the Legislature in determining whether Florida should adopt variant provisions of the Uniform Prudent Investor Act for the sake of uniformity, and what, if any modifications should be made to it.


S.A. MARSHALL

S. A. Marshall, Esq. *is semi-retired, having practiced most of his career with Akerman Senterfitt in their Orlando office. While there, he was responsible for drafting Florida's Prudent Investor Act on behalf of the Florida Bankers Association and worked closely with the Section to help secure its passage. Mr. Marshall resides in Winter Park, Florida where he limits his practice to occasional consultation and expert witness work.*


C. SINGLETON

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Endnotes:

1 Laws 1993, c. 93-257, §2. Co-author Stewart A. Marshall served as the principal author for this law.

2 Prefatory Notes to the UPIA.

3 UPIA Section 2(b), cmt.

4 Prefatory Note to the UPIA.

5 Frank C. McKinney, TRUST INVESTMENT, 2nd ed., (1927) at xii-xix and at 33-44. *See* also Leslie Joyner Bobo, *Non-traditional Investments of Fiduciaries: Re-examining the Prudent Investor Rule*, 33 EMORY L. J. 1067, 1073-1074 (Fall, 1984).

6 Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U.L. REV. 52, 61 (1987).

7 John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 646 (1996).

8 P.G. Guthrie, Annotation, *Duty of Trustee to Diversify Investments, and Liability for Failure to Do So*, 24 A.L.R.3d 730 (1969) & 1992 Supp. at 78-79.

9 *Infra* Part III(D) for further examination of Fla. Stat. §518.11(1)(c).

10 UPIA §9.

11 *Infra* Part III(E) for further examination of Fla. Stat. §518.112.

12 UPIA Section 1(b).

13 Fla. Stat. §518.11(2).

14 Fla. Stat. §§736.0401(2) and 736.0407.

15 Fla. Stat. §518.11(2).

16 Fla. Stat. §518.11(2).

17 Jeffrey N. Gordon argues "[s]ince the Business Judgment Rule takes no account of risk taking (except in the limited sense that the risk must be rational in light of the expected return), it is not an appropriate trust law standard." Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U.L. REV. 52, 96 (1987).

18 *See Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003, at 1013 (D.C. DC 1974).

19 Moses, Singleton, and Marshall; *Measuring the Effectiveness of a Trust Portfolio's Diversification,* 35 ACTEC Journal 303, at 308-309 (2009).

20 Fla. Stat. §518.112

21 Fla. Stat. §518.112(2)(a). *See* also Fla. Stat. §736.0902 as enacted by 2010 Laws, c. 2010-172, §1, effective July 1, 2010.

22 Fla. Stat. §518.112(2).

23 The origin of the word "specific" is likely comment j to the 1992 Prudent Investor Rule which provides: "[t]he trustee must exercise care, skill, and caution in establishing the scope and specific terms of any delegation, and must keep reasonably informed in order to monitor the execution of investment decisions or plans."

24 Florida Stat. §518.112(1).

25 Id.

26 Maine Rev. Stat. Ann. Tit. 18-B §902(3)(F), Minnesota Stat. §501B.151(2)(c)(6), Missouri Rev. Stat. §469.902.3(6) and North Carolina Gen. Stat. §36C-9-902(c)(6).

27 Cal. Probate Code §16047(c)(6) and Montana Code Ann. §72-34-603(3)(f).

28 Delaware Stat. §3302(c).

29 New York McKinney's EPTL 11-2.3(b)(3)(4)(B) and 20 Pennsylvania Cons. Stat. §7203(c)(8).

30 Connecticut Gen. Stat. §45a-541b(c)(6); Illinois S.H.A. 760 ILCS 5/5(a)(6); New York McKinney's EPTL 11-2.3(b)(3)(4)(B); 20 Pennsylvania Cons. Stat. §7203(c)(8) and South Dakota Codified Laws Ann. §55-5-11.

31 Connecticut Gen. Stat. §45a-541b(c)(6), Fla. Stat. §518.11(1)(f), New York's McKinney's EPTL §2.3(b)(3)(4)(B); 20 Pennsylvania Cons. Stat. §7203(c)(8).

32 Delaware Stat. §3302(c).

33 Illinois S.H.A. 760 ILCS 5/5(a)(6).

34 Maryland Code Ann., Est. & Trusts §15-114(c)(5)(vii).

35 Minnesota Stat. §501B.151(2)(c)(6) and Washington Rev. Code §11.100.020(2)(h).

36 PRACTICAL DRAFTING, 162 (April 1983) and Appendix A thereto setting forth the law in each state.

37 *Id.*, 7035 (Oct. 2002).

38 PRACTICAL DRAFTING, 7035 (Oct. 2002).

39 Fla. Stat. §518.11(4).

40 Article 1.2 of the Constitution of the National Conference of Commissioners on Uniform State Laws.

41 Fla. Ch. 736.

42 Fla. Ch. 738.

43 Moses, Singleton, and Marshall, *supra* note 19, at 306-308.

44 Trent S. Kiziah, *Statutory Exculpation of Trustees Holding Life Insurance Policies*, 47 REAL PROP., TR. & EST. LAW J. 327 (2012).

Seventh Annual Construction Law Institute Set for March 20-22, 2014

On March 20-22, 2014, the Seventh Annual Construction Law Institute will be held at the Rosen Shingle Creek, Orlando, Florida. In addition to advanced level seminars, the event will include a golf tournament on Thursday, March 20th, and evening receptions on March 20th and March 21st. Over 350 Construction Lawyers and Industry Professionals attended the 2013 Institute and we expect more in 2014. The Friday luncheon speaker will be Chris Hodgkins with MAT Concessionaire, LLC. Mr. Hodgkins will give a presentation on the Miami Tunnel Project. The Miami Tunnel Project is one of the largest, most visible and most pioneering P3 (Public Private Partnership) projects in Florida's history. This is sure to be an interesting presentation you will not want to miss!

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The RPPTL Section Discovers and Explores Portugal

By M. Travis Hayes, Cummings & Lockwood LLC, Naples, Florida

The annual out-of-state meeting of the Real Property, Probate and Trust Law ("RPPTL") Section of The Florida Bar was held from September 18 through September 22, 2013. The Chair of the RPPTL Section, Peggy Rolando, selected Lisbon, Portugal as the destination for this year's out-of-state meeting. As many will recall from high school world history classes, Portugal was a driving force behind the "Age of Discovery" starting in the 15th century and continuing through the 17th century. The over 100 RPPTL members and guests who traveled to Lisbon (the "RPPTLs") had a great opportunity to do their own discovering and exploring during the Portugal trip.

The "home base" for the RPPTLs during their exploration of Portugal was the Four Seasons Hotel Ritz Lisbon. Situated atop one of Lisbon's seven hills, the hotel provided views from its room balconies over Eduardo VII Park, St. George's Moorish Castle, and the Tagus River. Long considered Lisbon's premier hotel and located in the heart of the city, the Four Seasons Hotel Ritz Lisbon provided a great bird's-eye view of Lisbon's historic sites and made the perfect starting point for exploring the city's unique architecture and historical sites.

Bem Vindo a Lisboa (Welcome to Lisbon)

A majority of the RPPTLs arrived in Lisbon on Wednesday, September 18, 2013. For those members arriving early who wanted to get a head start on exploring the city, Peggy arranged for guided tours of Lisbon on the city's historic electric trams. This was a great way to get oriented and start to have a feel for the city and its various districts. The majority of the tram tour was in Lisbon's "old quarters", known as the Estrala quarters, which are famous for their cobblestone sidewalks and colorful buildings covered with glazed tiles. The trams stopped at one of the highest points in Lisbon, atop one if its seven hills, which provided a picturesque view of the entire city and one of its most famous monuments, the Castle of São Jorge (St. George's Castle) (which was a recent checkpoint on *The Amazing Race* reality show). With its electric trams, hilly streets, suspension bridges, and orientation around the water, Lisbon reminded many of the RPPTLs of a historic version of San Francisco.



Riding the tram

A welcome reception was held in the Fernando Pessoa Room at the Four Seasons Hotel Ritz Lisbon on Wednesday night. This dining room opened up to an expansive courtyard overlooking Eduardo VII Park, which is one of the largest parks located in Lisbon. The welcome reception provided a great opportunity to catch up with old friends and make new acquaintances.

A Turnê Dos Monumentos (A Tour of the Monuments)

Thursday started with a guided tour focusing on Lisbon's most famous monuments, many of which are dedicated to Portugal's history of discovery and exploration. The first stop on the tour was Belem Tower, which was part of a defense system at the mouth of the Tagus River and a ceremonial gateway to Lisbon. The Belem Tower is a UNESCO World Heritage Site because of the significant role it played in the Portuguese maritime explorations during the Age of Discovery. Next to the Belem Tower is

continued, next page



Belem Tower

the Padrão dos Descobrimentos (the Monument to the Discoveries). The Monument to the Discoveries was built in 1939 prior to the Portuguese World Fair, and it celebrates the Age of Discovery during the 15th and 16th centuries. Thirty-three statues line the sides of the monument representing monarchs, explorers, cartographers, artists, scientists, and missionaries who played significant roles in the Age of Discovery, including Henry the Navigator, Vasco da Gama, and Ferdinand Magellan. Another famous feature of the Monument to the Discoveries is the compass rose and mappa mundi (a medieval European map of the world), which are set out in colored marble on the ground in front of the monument.

The next stop on the Thursday morning tour was the Jerónimos Monastery, which is another UNESCO World Heritage Site. The monastery was built by Henry the Navigator around 1459 and is one of the most prominent examples of the Manueline-style (also known as Portuguese late-Gothic) architecture in Lisbon, featuring an airy interior, palm-tree-like columns, and motifs from the sea, including shells, artichokes (eaten for vitamin C to fight scurvy), and monsters representing the mystery of undiscovered lands. Explorers such as Vasco da Gama, who is buried in an ornate tomb at the monastery, prayed there before embarking on their sea voyages. After touring the monastery, the RPPTLs took a coffee break at one of the oldest and most famous pastry shops in Lisbon to sample the local Belem pastry, a delicious warm egg custard inside a thin, crackly pastry cup. The pastry shop's recipe is a well-kept secret, and, after having one (or five), everyone could taste why!



The Maritime Museum was the last stop on the Thursday morning tour. It is one of the most visited Portuguese museums and contains over 17,000 items. The RPPTLs were able to view most of the exhibits, which included historical paintings, archaeological items, and scale models of ships used in Portugal since the 15th century. The oldest exhibit is a wooden figure representing the Archangel Raphael, which accompanied Vasco da Gama on his voyage to India.

A group lunch followed the Thursday morning tour at Restaurante Olivier Avenida. The RPPTLs were able to discuss the amazing sites that were visited that morning over a great meal prepared by the owner, Chef Olivier. The restaurant was located in a trendy, cosmopolitan neighborhood in downtown Lisbon. The neighborhood provided an interesting contrast to the historic Belem district, which was visited earlier that morning.

Tours Individuais Para os RPPTLs (Individual Tours for the RPPTLs)

After such a well-prepared and filling lunch, many of the RPPTLs surely wanted to take a siesta. However, Peggy had even more great events planned for Thursday afternoon. Because there are so many things to do and see while in Lisbon, Peggy decided not to try to pack everything into group tours, instead allowing each RPPTL to customize his or her Thursday afternoon and Friday afternoon sightseeing.

Tours of the Gulbenkian Museum were available on Thursday or Friday afternoon. Located in the financial district of Lisbon, known as the "New Avenues", this museum houses over 1000 pieces of Egyptian art, Greco-Roman art, decorative art, sculptures, and paintings. The exhibits are displayed in modern-designed buildings, which are surrounded by the Gulbenkian Gardens.

Many RPPTLs elected to visit the royal palace located in Quelez, which is a short distance outside of Lisbon. The Quelez National Palace is the official residence of all foreign Kings and Presidents who are on a state visit to Portugal. It is referred to by many visitors as a "miniature Versailles". The RPPTLs on this tour were able to see and appreciate the splendid halls and gardens of the Palace, including the 18th century furniture, decorations, glazed-tile wall panels, and Brazilian wood parquet floors.

A wine and port tasting was available for those who wanted a break from the sightseeing. The wine tasters were able to take the Gloria Lift, a funicular which has been proclaimed as a Portuguese national monument, from the downtown area to the Barrio Alto district, which is an old quarter of the city and is one of the most picturesque districts. From the Garden of San Pedro de Alcantara, the group enjoyed



View of Lisbon

spectacular panoramic views of the city. While at the wine bar, the RPPTLs were able to taste various Portuguese wines and ports and pair them with local delicacies.

The history buffs in the group were able to take a tour which focused on the history of Jews in Portugal. The tour focused on the Jewish influence in the city, featuring the Marques de Pombal square, Liberdade Avenue, Rossio Square, and the Estaos Palace, which was the headquarters of the Inquisition Court in Lisbon. The excursion continued with a walk through the three main Jewish quarters in the city, concluding with a tour of the Synagogue in Lisbon Shaare Tiekwa.

Sidecar rides were available for the RPPTLs seeking an exciting and scenic tour of Lisbon. The thrill-seekers were taken throughout the city on a motorcycle with a sidecar replica from the 1940s. The tours went through the main streets and alleys of old Lisbon, the Alfama, Barrio Alto, Graca, and the Moorish quarter.

Os RPPTLs Fez Algum Trabalho (The RPPTLs Did Get Some Work Done)

On Friday morning, an Executive Council meeting was held at the Four Seasons Hotel Ritz Lisbon during breakfast. A CLE program, entitled "Lisbon: Real Law, Real Life - Exploring the Effects of the Economy on our Practice, Our Ethics and Our Corporate Responsibility," was put on as part of the Executive Council meeting.

The CLE consisted of a panel discussion moderated by Julie Williamson, a former Chair of the Section. The panel, which was comprised of several Portuguese attorneys and business professionals, discussed the economy in Portugal and Spain and its effects on business practices, ethics, and the lives of attorneys and their clients. Particular attention was given to how the depressed economies have put pressure on clients and changed their business practices, and how this has affected attorneys' ethical considerations and their approach to taking on *pro bono* projects. The presentation was very informative, and all of the attendees were impressed by our Portuguese colleagues who participated on the panel.

Vendo Mais da Cidade (Seeing More of the City)

On Friday morning, a walking tour was offered for those who wanted to do some additional exploration of the city. The Chicado, Baixa, and Rossio quarters were visited during this tour, and the RPPTLs were able to see the famous Praça do Comércio (Commerce Square), which is the most famous square in Lisbon and was once the main maritime entrance to the city. As part of the tour, some of the RPPTLs were able to ride up the Santa Justa Lift, which is the only vertical lift in Lisbon and has been classified as a National Monument.

Later on Friday afternoon, Peggy arranged for an Architecture Tour of Lisbon. The first stop was the Marques de Pombal square and the downtown area. Downtown Lisbon


Baixa

was completely rebuilt after an earthquake destroyed the city in 1755. This area is regarded as a great example of neoclassical design and urban planning and is considered one of the finest European architectural achievements of that time period. Leaving the downtown area, the RPPTLs were able to view the 25th April Bridge over the Tagus River, which is one of the longest suspension bridges in Europe and is often compared to the Golden Gate Bridge because of its similar appearance.

The next stop on the Architecture Tour was the "Aguas Livres" aqueduct. The aqueduct is made up of 109 stone arches, which were the tallest stone arches in the world when they were built. Walking across the tall structure, the RPPTLs were treated to picturesque views of Lisbon.

The final stop on the tour at the eastern side of Lisbon was in stark contrast to the historical architecture viewed earlier in the afternoon. The eastern side of Lisbon is where Expo '98 was held, which was the last World Exhibition of the 20th century. The RPPTLs were able to enjoy a panoramic view of this district by cable car. This offered a great perspective of the contemporary architectural structures in this area of Lisbon, including the Vasco da Gama Bridge, the Portugal Pavilion (designed by Siza Vieira), the Oceanarium (designed by Peter Chermayeff), and the Gare de Oriente train station (designed by Santiano Calatrava).

Jantar, Bebidas e Fado (Dinner, Drinks and Fado)

A special event was held for the RPPTLs on Friday evening. The night started with a cocktail reception on the terrace of the Palace do Rocha Conde d'Obidos (also known


Fado Concert

continued, next page

as the Red Cross Palace), which overlooked the Tagus River and the Lisbon port and docks. The reception was followed by a fado show featuring some of Portugal's most highly respected "fadistas". Fado originated in the 1820s and is often described as Portguese blues. Peggy has long been a fan of fado and, as a result of the concert, many of the RPPTLs now have a great appreciation for this distinctive type of Portuguese music. After the conclusion of the fado concert, the RPPTLs enjoyed a great dinner in one of the main halls of the Palace, which was decorated with exquisite 18th century tiles. The dinner, reception, and fado concert provided a unique and memorable experience for all of the RPPTLs who attended.

O Ultimo Dia de Exploração (The Final Day of Exploration)

On Saturday, the RPPTLs traveled to the town of Sintra which is located about thirty minutes outside of Lisbon and was the summer resort area of the Portuguese Court. The first stop was Monserrate Palace, a stunning Moor-inspired palatial villa. Monserrate Palace is surrounded by a variety of gardens featuring over 3,000 different exotic plants and flowers throughout its hills and valleys.


Monserrate

Leaving the Monserrate Palace, the RPPTLs traveled to the historical quarter of Sintra. Some of the group took the opportunity to explore the narrow streets of the town, which were full of small shops selling tiles and ceramics. The rest of the group toured the National Palace of Sintra. This palace was the residence of many Portuguese kings during the 14th century. While touring the town of Sintra and the palaces, the RPPTLs were able to see why the famous poet, Lord Byron, referred to the town as "Glorious Eden". The exploration of Sintra ended with a catered lunch at an old palace located on Sintra Mountain, named Casa dos Penedos (the "House of Rocks"). The RPPTLs were treated to views of the town of Sintra and the neighboring coast line from the palace's expansive terrace.

Leaving the town of Sintra, the RPPTLs travelled to the western-most point of continental Europe, Cape Roca. Stopping at Cape Roca, the RPPTLs were able to soak in the scenery and sun. The cliffs, white-capped waves, surfers, and numerous beach-goers provided a great photo opportunity. The tour continued through the coastal town of Cascais, a former fishing village turned seaside resort. Due to Portugal's neutrality in World War II and the town's elegance and royal past, Cascais became home to many of the exiled royal families of Europe, including those of Spain, Italy, Hungary, and Bulgaria. It is a beautiful town and the RPPTLs could see why it is a favorite vacation spot for European travelers. The tour concluded by traveling down the Estoril Coast, with its panoramic views over the Atlantic Ocean, back to Lisbon.


Cascais

The Saturday night farewell dinner was held at the Via Graca restaurant. The restaurant, with its floor-to-ceiling windows, offers one of the best views of Lisbon. It was great to be able to see many of the sites that the RPPTLs had visited or previously seen during the trip lit up at night, such as St. Georges Castle and the 25th April Bridge over the Tagus River. Peggy and the owner of the restaurant planned the four-course meal, as well as the wine and port pairings, and they were excellent. The farewell dinner was a fantastic way to end a spectacular trip.

Adeus Lisboa (Goodbye Lisbon)

The RPPTLs' discovery of Lisbon came to an end on Sunday. Whether flying back to the States or continuing to explore parts unknown (such as Mike Gelfand who was going on a scouting mission for the 2015 out-of-state trip), all of the RPPTLs were grateful to have had such a great experience on the Lisbon trip. Peggy did an amazing job of planning the Lisbon trip and the multitude of events for the attendees. The RPPTLs are already looking forward to Mike Dribin's out-of-state trip to Chicago next year!

Estate of Kester – Undue Influence Challenge to Inter-Vivos Transfers

By Patrick J. Lannon, Esq.,
Bilzin Sumberg Baena Price & Axelrod LLP, Miami, Florida

Recently decided *Estate of Barbara Kester/Glenna Kester v. Pamela Rocco and Cynthia Collins*[1] is a good reminder of the dangers of "do it yourself" estate planning using beneficiary designations and joint forms of ownership in addition to, or instead of, more formal estate planning documents such as wills and revocable trusts. The very informality of such planning that makes it attractive to individuals may also raise the suspicions of disappointed would-be inheritors. In extreme cases, this will result in a challenge based on inter-vivos undue influence (undue influence with respect to lifetime gifts or gifts passing by beneficiary designation or joint ownership at death). A challenge is particularly likely when such planning is inconsistent with an estate plan created with the assistance of an attorney (as was the case in *Estate of Kester*).

Given the ubiquity of such informal planning, estate planning attorneys naturally look to published cases for guidance on (i) planning to avoid inter-vivos undue influence challenges and (ii) challenging transfers that appear to have been made due to inter-vivos undue influence. Unfortunately, *Estate of Kester* (like the many other reported Florida cases dealing with inter-vivos undue influence) is very focused on the facts and circumstances before the court. Absent from the case is any sort of descriptive framework for the reader to apply to different facts and circumstances. However, the court's analysis can be generalized by reference to the inter-vivos undue influence factors proposed by this author below.

Factors Described by the Court

In *Estate of Kester*, the court considered an inter-vivos undue influence challenge to certain transfers passing from the decedent to her daughter, Glenna, as a beneficiary, pay-on-death beneficiary, or joint account holder with right of survivorship. The court explained that:

> "[u]ndue influence must amount to 'over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator.' *Raimi v. Furlong*, 702 So. 2d 1273, 1287 (Fla. 3d DCA 1997); see also *Peacock v. Du Bois*, 105 So. 321, 322 (Fla. 1925) (undue influence present where person 'is not left to act intelligently, understandingly, and voluntarily' and the influence operates 'to dethrone the free agency of the person . . . rendering his act the product of the will of another instead of his own')."

In its analysis, the court noted that undue influence is presumed when "(i) a person with a confidential relationship with the testator, (ii) was active in procuring or securing the preparation or execution of the devise and (iii) is a substantial beneficiary thereof." The court listed the following factors to be considered in determining the active procurement element:

> "presence of the beneficiary at the execution or the occasions where the testator expressed desire to devise; recommendation of an attorney; the beneficiary's knowledge of the contents prior to its execution; giving instructions to the drafting attorney; securing witnesses and safekeeping of documents after execution . . . [and] (in)equality of mental capacity and strength between testator and beneficiary."

However, these factors give little guidance as to the court's ultimate reasoning based on the facts of the case. The quoted factors were developed by courts in the context of undue influence in the procurement of a will or revocable trust (both of which generally involve the active participation of an attorney and significant planning) and have limited applicability in the context of undue influence challenges to inter-vivos transfers, which seldom involve an attorney and are frequently handled informally. However, as long as the courts continue to repeat these factors in inter-vivos undue influence cases, practitioners are left to an exhaustive review of cases to determine what indicia of active procurement will actually be useful in an analysis of potential inter-vivos undue influence.

Inter-Vivos Undue Influence Factors

In *Challenging Inter Vivos Transfers Procured by Undue Influence: Factors to Consider*,[2] this author proposed that in reported Florida cases dealing with inter-vivos undue influence, courts have been swayed not by the traditional indicia of undue influence, which rely heavily on the involvement of an attorney and the execution of formal documents, but by one or more of a somewhat expanded and related set of factors, namely:

1. Donee's level of involvement in the donor's affairs;
2. Donee's level of involvement in the actual gift in question;
3. Relationship of the donee to the donor as compared to the natural objects of the donor's bounty;
4. Secrecy or openness of the transaction;
5. Effect of the transfer on the donor's pre-existing estate plan; and
6. Physical health and mental acuity of the donor at the time of the gift.

continued, next page

Interestingly, in overturning the probate court and determining that no undue influence occurred, the court in *Estate of Kester* ignored most of the factors it quoted, but directly or indirectly hit on every one of the factors listed above. Among other things, the court found that:

- While Glenna had a close relationship with her mother, other heirs (siblings) also had close relationships and assisted her with various tasks (factor 1, factor 3).
- Glenna did not actively participate in the process of changing the relevant account designations (factor 2).
- For one of the accounts in question, a sibling (not Glenna) accompanied the decedent to the bank to make the beneficiary change (factor 4).
- The decedent had made various pre-death outright gifts to her children, and there was no evidence that her intended equal treatment of heirs was to be accomplished by the probate proceedings alone without reference to other gifts effective at death (factor 5). An unsigned, undated, unwitnessed "to do list" referencing contrary intentions was deemed insufficient to take precedence over the actual actions taken by the decedent.
- The decedent acted without confusion or anxiety, retained her mental faculties, and was fully aware of her actions when the accounts were changed, even shortly before death (factor 6).

While no one set of factors will ever perfectly capture the tangled web of facts present in any real-life situation involving potential inter-vivos undue influence, the guidance offered by the courts in this area is distinctly lacking. The proposed alternate factors above, however imperfect, may serve as a guide for those assisting clients where undue influence is alleged.

This article was originally published in a slightly different format. Reproduced courtesy: Leimberg Information Services, Inc. (LISI) at http://www.LeimbergServices.com

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Endnotes:

1 117 So.3d 1196 (Fla. 1st DCA, June 24, 2013)
2 The Florida Bar Journal Volume 82, No. 3

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RPPTL Section Executive Council Meeting

The Breakers
July 24th through July 27th, 2013

By Jane L. Cornett, Esq., Becker & Poliakoff, P.A., Stuart, Florida

As has been the custom of the Real Property, Probate, and Trust Law Section of The Florida Bar, the July Executive Council Meeting was held at The Breakers in Palm Beach. The Breakers is a historic hotel and spa located immediately adjacent to the Atlantic Ocean on the Island of Palm Beach. Over recent years, the hotel has been thoroughly and extensively renovated, and its appearance and amenities are spectacular.

The various committee meetings got off to a rousing start with twenty-seven (27) different meetings all held on Thursday from 9:00 a.m. until 6:00 p.m. Thursday evening featured a very well-attended welcome reception held in a beautiful oceanfront room at The Breakers. The highlight of the room is an impressive mural painted on the dome ceiling. The mural has been restored in recent years and is very striking.

Friday was taken up with the legislative and case law update. There were twenty (20) different presentations covering a vast variety of statutory and case law changes from the past year. In addition to presentations by preeminent attorneys from all over Florida, the seminar also included a presentation by Representative Kathleen Passidomo of Naples. Representative Passidomo was involved in crafting the statutory amendments to Chapters 95 and 702, Florida Statutes, which revamp Florida's mortgage foreclosure laws.

Friday evening included a reception and dinner at The Breakers. Executive Council activity resumed bright and early at 8:00 a.m. on Saturday morning with the Real Property and Probate Roundtables. The minutes for both roundtables are published in ActionLine as well as being posted on the Section's website.

The Executive Council meeting convened promptly at 10:00 a.m. under the direction of Peggy Rolando, the Section Chair.

Saturday evening's activities included a reception and dinner at the Norton Museum of Art. The Norton is located in West Palm Beach, a short bus ride from The Breakers. The attendees were treated to a stroll through the different exhibits on display at the Norton. Interestingly, the Norton includes a Chihuly room with glass sculptures covering the ceiling, reminding us all of the Chihuly museum in Tampa which we visited back in May.

If you haven't had a chance to attend a July meeting at The Breakers, this meeting is always well-attended and the reservations are snapped up quickly so make your plans soon.



Executive Council Meeting... The Breakers, Palm Beach, July 24 – 27, 2013



Title Insurance meeting



Thanks to Senator Jack Latvala and Representative Kathleen Passidomo for promoting the foreclosure bill



Dixie Teel, Marlies Bronner and Allie Lile handing out manuals at Legislative Update



Mike Gelfand, Willie Kightlinger and Burt Bruton



Jason and Ginger Ellison with daughter, Ayla, at Thursday reception



Great turnout at the Legislative Update



Members of Kids' Committee with Chair Steven Goodall (Laura Sundberg, Adult Consultant - not pictured)



Two of the speakers: Stacy Kalmanson and Robert Swaine



The Executive Council meeting in the Grand Ballroom



Kathy Neukamm, David Prather and Peggy Rolando at the Lego Museum

... Four Seasons, Lisbon, Portugal, September 18 – 22, 2013

To see more photos, log in to www.rpptl.org.



Lisbon area seminar speakers and guests sitting for a group photo with the Section members (seminar group photo courtesy of Bob Williamson)



Mary Arpe, Peggy Rolando, Ann Sang and Salome Zikakis at the beach with most western point of continent behind them



Ana Maria and Joaquin Alemany; and Lyan Zamora with Enrique and Lian Zamora awaiting the Fado concert at the Red Cross Palace



Sheri and Rob Freedman ready to explore the city



One of the tour groups at the Maritime Museum's map of voyages of discovery



Awaiting dinner at the Red Cross Palace Michael Stafford, Pat and George Meyer and George Lange



We enjoyed fine wines with delicious meats and cheeses on this tour



Julie Williamson (standing) welcoming Section members and Lisbon guests

Photos by Michael Gelfand, John Neukamm, Andrew O'Malley and Silvia Rojas

Roundtables

Saturday, July 27, 2013
The Breakers
Palm Beach, Florida

Prepared by Brian M. Malec, Esq., Orlando, Florida, and Jane L. Cornett, Esq., Stuart, Florida

The following briefly identifies for future reference some notable presentations at the Division Roundtables.

Highlights from Minutes of the Meeting of the RPPTL Section PROBATE AND TRUST DIVISION Roundtable

Thank you to the Roundtable Sponsors: Stout Risius Ross, Inc. and BMO Harris Bank

The meeting was called to order by the new Division Chair, Debbie Goodall.

Announcements

Brandon Bellew, John Cole, Jonathan Galler, Rob Lancaster, Brian Malec, Marina Nice, Margaret Palmer, Tara Rao, Mike Simon, Matt Triggs, Chris Wintter and Diana Zeydel were recognized as new Executive Council members.

Action Items

Ad Hoc Committee on Treatment of Life Insurance Payable to Revocable Trust – Richard Gans, Chair: Rick Gans presented proposed legislation clarifying that a waiver of the statutory protection under Sec. 733.808(4), Fla. Stat., from creditors' claims afforded to certain death benefits payable to trusts must be clear and specific. A general statement to "pay all claims from the assets of my revocable trust" will be insufficient to waive the statutory protections. This proposed legislation, which was prepared in response to *Morey v. Everbank*, 93 So.3d 482 (Fla. 1st DCA 2012), was passed at the Executive Council meeting immediately following the Roundtable.

Estate and Trust Tax Planning – Elaine Bucher, Chair: Rick Gans presented proposed legislation to permit Floridians to extend custodianships in certain circumstances until the minor reaches age 25 rather than the current age of 21. Concerns were raised about preserving the Federal gift tax annual exclusion for gifts to a custodianship that does not terminate until age 25. As a result, the proposal was tabled as an action item until the next RPPTL meeting.

Randy Randolph presented proposed legislation authorizing the formation and operation of Family Trust Compa-

See "Probate & Trust Division," next page

Highlights of the Minutes of the Meeting of the RPPTL Section REAL PROPERTY DIVISION Roundtable

Thank you to the Roundtable Sponsor, Fidelity National Title Group

The Roundtable meeting for the Real Property Division of the RPPTL Section was called to order shortly after 8:00 a.m. on Saturday, July 27th at The Breakers Hotel. **Michael J. Gelfand**, **Division Chair**, started the meeting by acknowledging and thanking all who had spoken at the Legislative Update seminar which was held the day before. Michael requested all new Roundtable members to introduce themselves which they did.

The Agenda included 3 Action Items. The first 2 items were proposed by the Condominium & Planned Development Committee, but both items were pulled by that Committee. Committee Chair, Steve Mezer, explained that both items, one concerning the Marketable Record Title Act and the other concerning the Sunset provisions in the bulk buyer section of the Condominium Act, are anticipated to return for consideration at a later date.

Action Item

Randy Randolph from the **Estate and Trust Tax Planning Committee** of the Probate and Trust Division reported on the family trust company proposal. Randy explained that this will be an important action item at the Executive Council Meeting. A family trust company promotes the consolidation of investments and responsible transfer of wealth to a next generation, which is a useful tool when an individual trustee or corporate trustee is not appropriate. It assists large family groups with substantial wealth to avoid SEC registration, but instead is subject to Florida regulation. Randy elaborated on details, stating that some already exist, are registered in other states, but have their primary activity in Florida. The Section draft has been coordinated with state regulatory agencies, and presented to bankers to avoid opposition.

See "Real Property Division," next page

PROBATE & TRUST DIVISION

nies (FTC) in Florida. This legislation would create a new Ch. 659, Fla. Stat., governing the requirements, powers and limitations of a FTC. At least 14 other states currently have similar legislation. Concerns were raised about the ability of a FTC to serve as personal representative because Florida has long-standing restrictions limiting the ability of nonresidents to serve. The committee revised the proposed legislation to remove authority for a FTC to serve as (1) personal representative or (2) as agent under a power of attorney. The proposed legislation was passed at the Executive Council meeting immediately following the Roundtable.

Guardianship, Durable Power of Attorney and Advance Directives – Sean Kelley, Chair: Sean Kelley presented proposed legislation to transfer authority for a medical power of attorney from Ch. 709, Fla. Stat., to Ch. 765, Fla. Sta., because Ch. 765, Fla. Stat., governs medical directives and contains medical standards of care to safeguard a principal from inappropriate actions. All revisions to Ch. 709, Fla. Stat., in the proposed legislation were removed. The proposed legislation also allows "springing" health care directives and the ability for a parent to grant authority to make health care decision for a minor to a surrogate. The proposed legislation was passed at the Executive Council meeting immediately following the Roundtable.

Trust Law – Shane Kelley, Chair: Shane Kelley presented a proposed amendment to Sec. 736.1106, Fla. Stat., to make the Florida Trust Code anti-lapse statute consistent with the Florida Probate Code anti-lapse statute regarding the treatment of specific devises to individuals who do not survive the settlor of a revocable trust or testator of a testamentary trust. The proposed legislation was passed at the Executive Council meeting immediately following the Roundtable.

Committee Reports

Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets – Angela Adams, Chair: The proposed legislation (1) for the creation of a process for the payment of enforceable creditor claims from a decedent's non-exempt, non-probate assets and (2) clarifying a fiduciary's right to bring an action under Florida's fraudulent transfer and fraudulent conversion statutes to recover assets for the benefit of estate creditors, is expected to be an action item at the next RPPTL meeting.

Ad Hoc Study Committee on Estate Planning Conflict of Interest – William Hennessey, III, Chair: As part of its study of ethical issues pertaining to an attorney naming

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REAL PROPERTY DIVISION

Upcoming Issues

Insurance and Surety Committee – **Member Sanjay Kurian** explained the economic loss rule following the Supreme Court of Florida decision in *Tiara*. The Insurance and Surety Committee has also produced a newsletter with a detailed article written by Sanjay which is posted on the Section website, www.rpptl.org. It was also commented that since title insurance policies cannot be changed without approval by the Office of Insurance Regulations (OIR), the title industry is working on changes to the policies to be presented to the executive council in the fall, with a goal of dealing with the *Tiara* decision.

Real Property Litigation Committee – **Co-Vice Chair Manny Farach** for the committee and the working group on ad litems under Ch. 49, Fla. Stat., stated that some judges decline to appoint guardian ad litems, the judges asserting that they lack statutory authority. The inability to obtain a guardian ad litem can result in a failure to obtain clear title in a foreclosure action. Manny reports efforts to coordinate communications between the Real Property Division and the Probate and Trust Division so that this issue can be presented either in the next meeting in Lisbon or later in Sarasota with a goal of legislation in 2014.

CLE Seminar Coordination Committee (General Standing) – Rob Freedman, Chair: Rob thanked everyone who attended the 2-hour training session on Wednesday and reported that recent 1-hour webinars have been exceptionally well received. Rob asked members to look for "needs" for seminar topics. Rob also indicated that the committee now has the ability to respond very quickly to recent developments, that webinars can sometimes be presented within thirty (30) days or even less from the date of a major decision. Rob also emphasized the need to meet deadlines in submitting and preparing for a CLE.

Member Communications & Information Technology Committee (General Standing) – Nicole Kibert, Chair: Nicole reported that in conjunction with her, Michael encouraged everyone to update the webpages of their committees. Nicole reminded everyone that the content on the webpage is the responsibility of individual committees. Nicole and her committee have been working vigorously to get the new Section website up and running and it is anticipated there will be a seminar at the Sarasota meeting about the new Section website.

Michael thanked Roundtable sponsor, **Fidelity National Title Group, recognizing** the Fidelity representative present, Homer Duval.

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PROBATE & TRUST DIVISION

himself or herself as a fiduciary for a client, the committee is considering (1) requiring written disclosure to a client of fees and options regarding such appointment and (2) whether attorney's fees should be reduced if such disclosure is not made.

Ad Hoc Committee on Personal Representative Issues – Jack Falk, Chair: The committee expects to present at the next RPPTL meeting a proposal for changes to Sec. 733.212, Fla. Stat., to handle non-qualified personal representatives as a result of issues raised in *Hill v. Davis*, 70 So.3d 572 (Fla. 2011).

Asset Protection – Brian Sparks, Chair: The committee will be co-hosting a CLE in Tampa on October 18th. Brian Sparks recommended that all members drafting discretionary trusts read Barry Nelson's Florida Bar Journal article entitled, *Bacardi on the Rocks*, 86 Fl. Bar. J. 3 (March 2012) and all members doing domestic asset protection trust planning read *In re Huber*, Case No. 11-41013 (Bankr. W.D. WA May 17, 2013), which found that assets held in an Alaska Domestic Asset Protection Trust created by a Washington debtor were available to the bankruptcy creditors of the debtor under Washington law.

Attorney/Trust Officer Liaison Conference – Jack Falk, Chair: There was an increase in attendance at the recent ATO conference. The 33rd Annual ATO Conference will be held June 11-15 at the Ritz Carlton in Naples.

Digital Assets and Information Study Committee Report – Eric Virgil, Chair: The committee is reviewing the current draft of the Uniform Fiduciary Access to Digital Assets Act and will begin drafting legislation for Florida.

Elective Share Review Committee – Lauren Detzel, Chair: The committee will circulate among other committees a survey regarding elective share issues prior to the next RPPTL meeting.

Estate and Trust Tax Planning – Elaine Bucher, Chair: A subcommittee, chaired by Jerry Wolf, was created to review the recently enacted Uniform Powers of Appointment Act.

IRA, Insurance and Employee Benefits – Linda Griffin and L. Howard Payne, Co-Chairs: The committee discussed the recent U.S. Supreme Court decision of *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), which found that federal law requiring the payment of insurance proceeds to the designated beneficiary preempted a Virginia law allowing the family of a deceased employee to sue the designated beneficiary for insurance proceeds where the beneficiary was the employee's former spouse.

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REAL PROPERTY DIVISION

Ad Hoc Trust Accounting Committee – John Neukamm, Co-Chair: John reported that Committee members have attended three committee meetings of the Florida Bar Professional Ethics Committee. The Ad Hoc Trust Accounting Committee's preliminary report was presented. *[See the committee webpage to view the report]*. This is an issue of major importance to all real estate attorneys who maintain trust accounts.

The bottom line on the report is that consistent with the Section and the Bar seeking to protect client funds, the Section asserts that title insurers need to be permitted to audit special trust accounts maintained exclusively for real estate transactions. Section members are encouraged to contact their local member of The Florida Bar Board of Governors and advocate that position.

Committee Reports

Committee reports were presented quickly as time was running out and the following highlights the reports.

Condominium & Planned Development Committee – Steve Mezer, Chair: He explained why the two agenda items had been pulled and how they are being addressed. Steve also reported that an amicus brief had been filed that day with the Supreme Court of Florida on the Unlicensed Practice of Law issue.

Construction Law Certification Review Committee – Lee Weintraub, Chair: Lee reported that the next certification review course will be March 20th through the 22nd. It has been expanded to 2½ days which the Committee feels will serve the attendees better.

Construction Law Institute – Reese Henderson, Chair: The Institute will be held in conjunction with the Construction Law Certification Review. Reese reported that the Institute's seminar is shorter than the Construction Law Certification Review class and it is designed for transactional attorneys as well as litigators.

Development and Green Building Committee - Anne Pollack, Chair: Anne reported that there was a very well received CLE seminar on ethics of communication with governmental lawyers presented by the Committee. A new seminar will be held July 31 on the *Kuntz* case.

Legal Opinions Committee – Kip Thornton, Chair: The Committee is working with the Business Law Committee and looking at the LLC law.

Insurance and Surety Committee – W. Cary Wright, Chair: The Committee holds monthly phone meetings with a CLE component. This Committee has proposed legislation at its last meeting and the Florida Office of Insurance

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PROBATE & TRUST DIVISION

Liaisons with Elder Law Section – Charles Robinson, Chair: Charlie Robinson received the Lifetime Achievement Award from the Elder Law Section. The Elder Law Section is currently looking at the effect of the Affordable Care Act on special needs trusts.

Probate and Trust Litigation – Thomas Karr, Chair: The committee continues to draft proposed legislation (1) articulating a standard for assessing attorneys' fees and costs in will and trust contests, (2) clarifying aspects of Sec. 736.0802(1), Fla. Stat., for the payment of attorneys' fees and costs from trust assets in trust proceedings and (3) addressing issues arising from *Smith v. DeParry*, 86 So.3d 1228 (Fla. 2d DCA 2012) concerning the probate of a lost will.

Probate Law and Procedure – John Moran, Chair: The committee discussed concerns regarding the issuance of orders in summary administrations while creditor claims are outstanding. The committee continues to review issues related to artificial reproductive technology.

Trust Law – Shane Kelley, Chair: The committee continues to work on issues relating to directed trustees and e-accountings. Don Tescher was appointed as chair of a new subcommittee to review Florida's decanting statute.

REAL PROPERTY DIVISION

Regulation has asked for hard evidence that insurance companies do not comply with Chapter 627, Fla. Stat., when a policy is requested.

Real Estate Certification Review Course Committee – The review will be February 21st through the 22nd at the Orlando Hyatt. All Section members are encouraged to attend even if not taking the test as it's an excellent overview of real property law.

Real Estate Structures and Taxation – Wilhelmina Kightlinger, Chair: She reports that her committee will be examining the status of real estate transactions, especially relating to federal and state taxation issues and a CLE will be presented October 30th in Tampa about the new Land Trust Act.

Real Property Finance and Lending Committee – Jim Robbins, Chair: He reported the committee is studying a proposed statute to allow receivers to sell property.

Residential Real Estate & Industry Liaison (RREIL) Committee – Frederick W. Jones, Chair: There was a very well attended meeting on Thursday. The speaker was Florida House Representative Kathleen Passidomo who gave a comprehensive presentation on the new foreclosure law. On August 21st the Committee is presenting a CLE seminar on TRIM taxes and on appeals to the value adjustment board. The 2013 FR/BAR "as is" contract will be on the committee website and available for use by September.

Title Insurance & Title Insurance Liaison Committee – Kristopher Fernandez, Chair: The Committee is examining the recent *Tiara* decision on the economic loss rule and its impact on title insurance. Committee members are also concerned about attorney trust accounts and ALTA Best Practices. *[More information on these topics can be found on the committee website.]*

Title Issues & Standards Committee – Christopher Smart, Chair: A new version of the Florida Uniform Title Standards will be available on the website *[check the committee website]* and a CLE is planned for November on the Florida Uniform Title Standards. The Committee is also looking into the possibility of creating an app for smart phones to access the title standards.

The meeting was adjourned just before 10:00 a.m. and everyone proceeded to the Executive Council Meeting.

New Section Mascot Named

The contest period to name the new RPPTL Section website mascot has expired. A name has been chosen. Congratulations to our winners: **Nancy Yakow, Sula McAuley and William Sax**, who all contributed to the name "***DD Lex – The Lizard Wizard***." ***DD Lex*** will guide you through the website and answer your search questions. Look for the icon on our new RPPTL Section website, launching shortly.



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Social Media and Lawyer Ethics: Missing "Link"?

By Lawrence J. Miller, Esq., Boca Raton, Florida



L. MILLER

With its Staff Ethics Opinion of September 11, 2013 ("Florida Opinion"), the Florida Bar ("Bar") tackles a once adolescent medium that has now come of age. Set on its course, in part, by *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)[1], lawyer advertising, marketing and public access to lawyer information have finally arrived, in part before they have been fully vetted, at the social media "station." In some respects, the social media "child" has now outgrown its more basic advertising "parent." Though instructive beyond its express content, the Florida Opinion, a response to an attorney request for a Bar advertising opinion, directly reviews one use of the "LinkedIn" profile page. The Florida Opinion was subsequently appealed ("Appeal"). The Bar's Standing Committee on Advertising ("Committee") issued its ruling on the Appeal on October 29, 2013. This Article reviews the Florida Bar's Opinion and its relevant background as well as the Appeal.

The Florida Bar's Opinion and Relevant Background

Specifically, the Florida Opinion responds to whether the inquiring attorney may list relevant areas of practice in the "Skills and Expertise" section of the attorney's LinkedIn profile "page" when the attorney is not Florida Bar Board Certified in the listed practice area. Citing New York State Bar Association Opinion 972 ("New York Opinion") as reaching a similar conclusion, Bar staff concludes that a lawyer can only state or imply that the lawyer is "certified," a "specialist," or an "expert" if "the lawyer is certified by the Florida Bar, by a certification program accredited by the American Bar Association, or by a state bar with certification standards comparable to those of the Florida Bar." Fla. Bar Rule 4-7.14(a)(4).[2] Since the inquiring attorney was not certified in the listed practice area, the LinkedIn profile page section on "Skills and Expertise" could not contain a statement of, or imply the attorney's expert status in, the listed area. The Florida Opinion (which does not directly quote the offending language) further states that certification is available for individuals only, and not for law firms, thereby precluding the argument that a law firm specialization could somehow circumvent the restriction otherwise imposed on an "uncertified" individual's listed practice area. The Bar states that in this LinkedIn profile page matter, the provisions of Florida Bar Rule 4-7-14(b), allowing explanation and clarification of otherwise potentially misleading information (such as expertise or certification), are not available to remedy the matter. In other words, the listing of attorney practice areas under the profile page section delineated as "Skills and Expertise" is potentially too misleading to be "fixed" by any sort of explanatory language. Yet, the New York Opinion, on which the Florida Opinion is based and which reached a similar conclusion, indicates that such designated areas of practice could possibly be listed under "Products and Services" rather than "Skills and Expertise."

The New York Opinion deserves a bit more focus in that it draws more of a distinction on its face than the Florida Opinion which cites it. The New York Opinion states that "[a] lawyer or law firm listed on a social media site may, under Rule 7.4(a), identify one or more areas of law practice. But, to list those areas under a heading of 'Specialties' would constitute a claim that the lawyer or law firm 'is a specialist or specializes in a particular field of law.'"[3] Similarly, the New York Opinion demonstrates the reach of its conclusion by also casting its net over specialty designations in law school alumni directories (as a cited example of offending conduct). In essence, it is the listing of such areas of practice in a field entitled "specialties" or "expertise," which seems to provide the basis for the ethics offense of providing "misleading information." While somewhat instructive, the applicable New York rule calls attention to its possible exceptions. Is the listing of practice areas anywhere else in the LinkedIn profile any less a public indication of expertise? If it is misleading at all, is it any less so because the relevant information is set forth under a different heading (*e.g.,* one regarding "experience" rather than "skills and expertise")? Do we risk making distinctions without differences?

The Florida and New York Opinions are at one end of the electronic media conundrum and represent the latest in a continuing effort by bar regulators to get a handle on the proliferation of electronic marketing and lawyer directory designations regarding expertise, while providing a road map for proper conduct. At another end of this spectrum is the issue of electronic/social and print media endorsements of lawyers. As an example, by its "endorsements" feature, LinkedIn provides another illustration of the legal ethics debate over social media and its "proper use." In the endorsement context, more directly in its "skill endorsement" section, LinkedIn provides its subscribers with a way to "recommend" other subscribers who possess certain skills and expertise. For instance, a client is able to endorse an attorney within the "skill endorsement" protocol for LinkedIn. The below mentioned committee ruling aside, it appears that few attorney subscribers appreciate the potentially rule offending conduct if such endorsements are accepted by counsel who is not properly certified in the endorsed

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practice area, as is evident from reviewing both the Florida and New York Opinions.

For Florida lawyers, the Florida Opinion is connected to the approaches set out in the new rules regulating lawyer advertising adopted by the Florida Supreme Court and effective on May 1, 2013.[4] In reviewing the Florida Opinion and in mapping a proper course of conduct, the Florida practitioner must keep in mind that though the Florida Opinion restricts the placement of specific practice area designations in specific places pursuant to Florida Bar Rule 4-7.14(a) and (b), immediately preceding Rule 4-7.13 implies that a lawyer's characterizations of skills, experience, reputation or record that are objectively verifiable, are not deceptive or misleading. The implication arising from the comparison of these successive Florida rules seems to track the New York Opinion's approach. Specifically, those designations of experience and skill placed by a "non-certified" Florida lawyer under a marketing or advertising heading other than "skills and expertise" may not run afoul of the purpose and meaning of the applicable rule or the Florida Opinion.

The Committee's Review of the Florida Opinion:

An Appeal to the Bar's Standing Committee on Advertising and Some Additional Guidance

After receipt of the Florida Opinion, requesting counsel pursued an appeal to the Bar's Standing Committee on Advertising. The Committee met on October 29, 2013, to consider the appeal. Following its review of the matter, the Committee affirmed one portion of the Florida Opinion and reversed two.

In the first instance, the Committee voted 3 to 1 to affirm the Florida Opinion as to the subject law firm's (or lawyer's) LinkedIn specialty designation by stating that even though LinkedIn chooses to use the term "Specialties" and not the subject law firm (or lawyer), the subject law firm did choose to list its firm's area of specialty in LinkedIn's "Specialties" listing. Since a law firm cannot be "certified" and because the law firm's practice or that of its lawyers under the "Specialties" designation on LinkedIn is not an area of appropriately sanctioned certification, the law firm ran afoul of the new Bar advertising parameters. The bright line appears to have been that the law firm made the choice to list under the "Specialties" area. It appears that such information could be deemed misleading under the Rules, whether qualifying language is included or not.

In the first and more relevant of its two reversals, the Committee voted 4 to 0 to reverse the Florida Opinion regarding LinkedIn's own designation of law firm expertise. The Committee found that the listing of the same law firm's practice areas, for which no certification exists, in LinkedIn's "Top Skills and Expertise" (as opposed to its "Specialties" subheading) was not violative of the applicable Rules in that first, the subject skills and expertise were listed by LinkedIn without law firm control or input; second, the areas listed are those for which no certification exists in Florida; and third, the law firm placed qualifying language in this LinkedIn area stating that the subject skills and expertise statements were made by LinkedIn and NOT the law firm. The reversal of this aspect of the Florida Opinion again appears in some part to be based upon the voluntary actions of the law firm. In other words, when a lawyer or law firm chooses to list an area in the "Specialties" portion and the area listed is one for which a certification exists and the lawyer (or law firm, in that a law firm cannot be certified) is NOT certified, a violation appears to exist. There would appear to be no violation in this context when it is LinkedIn which makes the determination and places the practice designation in an area other than its subheading for "Specialties."

The Committee also voted to contact LinkedIn directly and inform the company of the problem created when it uses the terms "specialties" and "expertise" in its "Skills and Expertise" section without permitting any qualification or modification by its lawyer/law firm user---and to request that the Bar's Board of Governors direct the committee to issue a formal advisory opinion on the LinkedIn matter.

Conclusion

Social media has recently provided fascinating examples of other forms of seemingly natural and human (though ethically improper) responses to external stimuli. Examples such as use of social media by the judiciary, attorney advocates carrying on public discourse on pending cases, and the use of pictures on various media sites have begun to present themselves in ethically confounding ways. These will be the subject of future ActionLine articles. As to the reach of the Florida Opinion, however, perhaps the best place to check where we may be is on Google Maps. While waiting for that place to be more definitively located, it would be best to be wary of where you place your designations of expertise, experience, and the like. Refusing endorsements, when actually possible, may be part of that cautious approach. Until the "missing links" are supplied, tread carefully as this teenager grows up.

***Lawrence J. Miller** is a shareholder in the Boca Raton firm of Gutter Chaves Josepher Rubin Forman Fleisher Miller, P.A. His practice focuses on Estate, Trust and Guardianship litigation and administration, including multi-state and multi-jurisdictional disputes and contests. Mr. Miller received his B.A. with highest honors from Lehigh University (1974) and his J.D. from Emory University (1977). He is currently Chair of the Professionalism and Ethics Committee of the Real Property, Probate and Trust Law Section of The Florida Bar and remains active in its Probate and Trust Litigation, Probate Law and Procedure, Trust Law and Guardianship Committees.*

Endnotes:

1 The Supreme Court held that an attorney's truthful newspaper advertisement containing the availability and terms of routine legal services was part of the "free flow of information" guaranteed by the First Amendment. *See, generally, Bates*, 433 U.S. at 350.

2 This is the Florida Bar Rule regarding potentially misleading advertisements.

3 *See* New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 972, 6/26/13.

4 *See*, In re: Amendments to the Rules Regulating The Florida Bar-Subchapter 4-7, Lawyer Advertising Rules, 108 So. 3d 609 (Mem) (Fla. 2013).

Recent RPPTL Events with Law Students



L-R: Judge Celeste Muier, FAMU law student Domini Gibbs, Probate Clerk David Shanks, Silvia Rojas, Debbie Goodall, Florida Bar President Eugene Pettis, Steven Goodall, Hung Nguyen, Probate Clerk Jesse Friedman. *Photo courtesy of Scott Silverman*

Kozyak Minority Mentoring Picnic

The Kozyak Minority Mentoring Picnic took place on November 9, 2013 at Amelia Earhart Park in Hialeah, Florida. The RPPTL Section sponsored the event and had a tent at the picnic. RPPTL Section members, including Section chair, Peggy Rolando, chair-elect, Michael Dribin, probate director, Debbie Goodall, and Judges Celeste Muir and Maria Korvick, and others were in attendance at the Section table. As usual, the event was a huge success. In addition to enjoying the festivities, Section members were able to educate law students, lawyers, and judges about the Section's mission and activities. A handful of attorneys and law students signed up to join the Section as well. The Section extends a big thank you to everyone who came out to support us!

South Asian Bar Association (SABA) Forum

On the day before the Minority Mentoring Picnic, Peggy Rolando and Hung Nguyen also participated as panelists for the South Asian Bar Association's annual Diversity Leadership Forum held at Florida International University School of Law. Peggy and Hung spoke about the importance of diversity in the practice of law in front of law students and practicing attorneys. Peggy and Hung provided invaluable input from a private practice perspective as the panel also included a South Asian judge, law professor and government attorney.



L-R- Peggy Rolando, Hung Nguyen, Asst. Federal Public Defender Sowmya Bharati, and FIU Law Professor Cyra Akila Choudhury.

The Death of the Pet Restricted Community

By Dane E. Leitner, Esq., Ward Damon Posner Pheterson & Bleau PL, West Palm Beach, Florida on behalf of the Condominium & Planned Development Committee


D. LEITNER

For many years condominium associations and homeowner associations (collectively, "Associations") have been able to implement and enforce no pet restrictions in their communities. The rationale behind creating a no pet restriction is that a majority of the residents agree that their community would be benefited by not having pets. Typically, the reasons are because residents do not want to hear their neighbor's dog barking in the early hours of the morning, or to walk in the common area lawn and step in a warm surprise. The concept of community living was best stated in *Hidden Harbor Estates, Inc. v. Norman*, when Florida's Fourth District Court of Appeal stated that:

> "It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization."[1]

The little democratic sub society ideology is under increased attack because of new laws and policies that affect no pet restrictions. The Americans with Disabilities Act of 1990 (ADA), the Fair Housing Act (FHA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and all amendments thereto, require exceptions to be made to no pet restrictions should certain criteria be met. Moreover, the U.S. Department of Housing and Urban Development (HUD) is tasked by Congress with the duty to make rules and enforce the FHA. Amendments to these Acts, judicial interpretation, and new HUD polices have seemingly caused the death of pet restricted communities.

FHA and the Request for Accommodation

The FHA is the authority that individuals predominately use to obtain an exception to a pet restricted community so their dog Fido can live in their home notwithstanding the restriction. The FHA makes it illegal to discriminate against handicapped individuals in providing housing.[2] Under the FHA, discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[3] The decision of whether an Association is required to make a reasonable accommodation is highly fact-specific, and requires a case-by-case determination.[4] To prevail on a claim alleging a violation of the FHA, the plaintiff must establish:

- That he/she is handicapped within the meaning of the FHA, and that the defendants knew or should have known of the fact;
- That the defendants knew that an accommodation was necessary to afford him/her equal opportunity to use and enjoy the dwelling;
- That such an accommodation is reasonable; and
- That the defendant refused to make the requested accommodation.[5]

An Association may not deny a reasonable accommodation request because it is uncertain whether or not the person seeking the accommodation has a handicap related need for an assistance animal.[6] The Association may ask the applicant, whose handicap is not readily apparent or known to the Association, to submit reliable documentation of a handicap and his or her handicap related need for an assistance animal.[7] For example, the Association may ask the person seeking the reasonable accommodation for an assistance animal that provides emotional support to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing handicap.[8]

To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's handicap.[9] Caution must be used though when requesting documentation from applicants. Associations may not ask an applicant to provide access to medical records or medical providers, or request extensive information or documentation of a person's physical or mental impairments.[10] If an Association determines a reasonable request for accommodation should be granted, the Association must modify or provide an exception to its no pet restriction.[11] The individual with a handicap would be permitted to live with and use an assistance animal in all areas of the premises where persons are normally allowed.[12]

Emotional Support Animals

A majority of the requests before Associations today involve non-apparent issues such as anxiety, depression, panic disorder or other mental impairments. Associations ask, "what is it about Fluffy that alleviates one or more of the identified symptoms or effects of an existing handicap?" The ADA requires that a "service animal" be trained, and

continued, next page

was amended to specify that emotional support animals are not considered "service animals."[13] However, unlike the ADA, the FHA does not specifically state that the animal must be trained. In fact, there are cases and HUD notices that state an emotional support animal does not need to be trained.[14] One court even stated it is "the innate qualities of a dog, in particular a dog's friendliness and ability to interact with humans, that ma[k]e it therapeutic."[15]

Type of Animal

The ADA was amended to define "service animal" narrowly as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.[16] It is worth noting though that while trained dogs are the only species of animal that may qualify as "service animals" under the ADA, there is a separate provision provided for in the ADA regarding trained miniature horses.[17] The FHA is broader and does not limit assistance animals to only dogs.[18] Also, under the FHA, breed, size, and weight limitations may not be applied to an assistance animal.[19] Therefore, if an Association has limitations on the types of animals that are allowed and restricted, or weight requirements for dogs, the Association may not apply those restrictions to an individual with an assistance animal. Moreover, Associations may not condition an approval of a reasonable accommodation on the applicant paying a deposit for the assistance animal.[20]

Conclusion

Pet restricted communities are facing an increased number of individuals seeking reasonable accommodations to the Association's no pet restrictions. The ADA and FHA were implemented to help disabled and handicap individuals that truly need assistance. However, due to the broadness of the Acts, and especially HUD's policies regarding the FHA, many individuals are using the Acts for the purpose of circumnavigating no pet restrictions in communities when no such disability truly exists. While Associations may be skeptical of an applicant's request for a reasonable accommodation, it is imperative that they analyze the request in accordance with the law, or face a claim for discrimination. This is why it is important to educate Associations on this issue and implement policies and procedures for reviewing requests for reasonable accommodation, even though applicants may not be bound by them[21].

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Endnotes:

1 *Hidden Harbor Estates, Inc. v. Norman,* 309 So.2d 180, 181-182 (Fla. 4th DCA 1975).

2 42 U.S.C. § 3604(f)(1) & (f)(2)(1988); *see Overlook Mut. Homes, Inc. v. Spencer,* 666 F. Supp. 2d 850 (S.D. Ohio 2009).

3 *Id.* at § 3604(f)(B).

4 *Hawn v. Shoreline Towers Phase I Condo. Ass'n.,* 347 Fed. App'x 464, 467 (11th Cir. 2009).

5 *Id.*

6 U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 3 (April 25, 2013).

7 *Id.*

8 *Id.* at 4.

9 U.S. Dep't of House. & Urban Dev., Reasonable Accommodations Under The Fair Housing Act, 6 (2004).

10 U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 4 (April 25, 2013); *see also, Bhogaita v. Altamonte Heights Condominium Ass'n., Inc.*, 2012 WL 10511 (M.D. Fla. 2012) (finding that three detailed requests regarding the homeowner's mental and physical conditions far exceeded that permitted under the FHA).

11 U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 3 (April 25, 2013).

12 *Id.*

13 *Id.* at 4.

14 *Falin v. Condominium Ass'n. of La Mer Estates, Inc.,* 2012 WL 1910021, 3 (S.D. Fla, May 28, 2012); Auburn Woods I *Homeowners Ass'n v. Fair Emp't & Hous. Comm'n,* 18 Cal. Rptr 3d 669, 682 (Cal. App. 3d Dist. 2004); U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 4 (April 25, 2013).

15 *Auburn Woods I Homeowners Ass'n v. Fair Emp't & Hous. Comm'n,* 18 Cal. Rptr 3d 669, 682 (Cal. App. 3d Dist. 2004).

16 U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing an HUD-Funded Programs, FHEO-2013-01, 4 (April 25, 2013).

17 *Id.*

18 *Id.* at 1.

19 *Id.* at 3.

20 U.S. Dep't of Hous. & Urban Dev., Reasonable Accommodations Under The Fair Housing Act, 9 (2004).

21 *Id.* at 10 (stating "However, housing providers must give appropriate consideration to reasonable accommodation requests even if the requester makes the request orally or does not use the provider's preferred forms or procedures for making such requests").

A Horse is a Horse, of Course of Course

By Ralph A. DeMeo, Esq., Hopping Green & Sams, Tallahassee, Florida
on behalf of The Florida Bar Animal Law Committee

"In the context of animal owners and homeowners' associations, it truly can be said that 'one man's dog is another man's horse'"


R, DEMEO

Animal owners and home owners are often not birds of a feather and they frequently do not flock together. In an infamous Tallahassee, Florida case, this principle was very apparent. In fact, it would be even more appropriate to say that this case represents a horse of a different color! The dispute which is the subject of this article relates to the keeping of horses within an unwilling Florida homeowners' association.

First, some general legal background is in order. In Florida, a distinction is often made between "domestic" animals and "livestock." By statute, animal cruelty laws preclude the "torture, torment, or cruelty of any animal defined to include every living dumb creature."[1]



With respect to horses, there also are laws prohibiting the "killing or aggravated abuse" of horses.[2] However, there are exceptions for "recognized livestock husbandry practices or techniques."[3] Local governments also promulgate ordinances that both protect and in some cases create exceptions for domestic animals and livestock.

Under Tallahassee's Code of Ordinances, "livestock" means "all animals of the equine, bovine, ratite, or swine class."[4] This includes "goats, sheep, mules, horses, hogs, cattle, ostriches, and other grazing animals."[5] While the Ordinances protect all animals from cruelty, it is unlawful for any person to keep any livestock or fowl within the city limits, subject to certain exceptions. With respect to horses, the exception is for "any horse or fowl kept on tracts of land within the city limits that consist of five or more contiguous acres or any other livestock kept on 15 or more contiguous acres."[6]

Additionally, the common law concept of "nuisance" provides that no person may utilize her property in a manner that unreasonably interferes with another's reasonable enjoyment of his property. Common law nuisance claims have been asserted for centuries in the context of animal disputes.[7] Typically, when any litigation ensues, whether under state or local laws or homeowners' association covenants, nuisance claims are included.

Also, homeowners' associations are specifically authorized and regulated by statute in Florida.[8] Florida law allows written instruments "which subject the land comprising the community to the jurisdiction and control of an association or associations in which the owners of the parcels, or their association representatives, must be members."[9] Florida law also authorizes actions at law or in equity against the homeowners' association, any member, and others for violation of these statutes or the homeowners' association declarations.[10] Not surprisingly, tensions frequently arise between homeowners and their associations. This is particularly true in the context of animal owners and homeowners' associations.

In the context of animal owners and homeowners' associations, it truly can be said that "one man's dog is another man's horse." Animal lovers by definition love their animals. However, as simple as that concept may seem, not every animal lover loves his neighbor's animal (or his neighbor for that matter). This is particularly true in battles relating to neighbors' pets.

An infamous case arose in Tallahassee involving an individual in a prominent Tallahassee neighborhood who owned approximately 7 acres of land that was considered to be subject to the covenants of a homeowners' association.[11] This homeowner loved her miniature horses and considered them to be her "pets." Her neighbors, however, considered the horses to be "livestock" and thereby argued against their ownership within the limits of the homeowners' association. This led to threats and ultimately litigation which was resolved on somewhat surprising grounds as discussed later in this article.

Typical homeowners' association covenants provide as follows:

> No animals other than cats, dogs, or other household pets shall be kept temporarily or permanently on any Lot. No livestock or poultry of any kind shall be kept or raised on any Lot. No household pets shall be kept, bred, or raised on any Lot for commercial purposes. Any animal which, in the sole opinion of Declarant or its successor, is or becomes dangerous or an annoyance or nuisance in the neighborhood or nearby property, or destructive of wildlife, immediately upon notice to the Owner of such animal, may not thereafter be kept on the Lot. Owners shall be responsible for removal of any pet litter on easements, public and private streets, beaches, and other residents' property. When off the Owner's property, all household pets shall be kept on leash or otherwise under the physical control of a responsible party.

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Some homeowners' association's covenants do not distinguish between "livestock" or "pets" and specifically preclude horses. Nevertheless, under the definitions identified above, a horse would be considered livestock, and therefore generally may not be kept temporarily or permanently within the limits of the association, unless specifically excluded from the prohibitions.

The horse owner in the Tallahassee case considered her miniature horses to be pets, no different than a cat or dog or other household pet, and refused to give them up. It should be noted that while she maintained 30 miniature horses on approximately seven acres she maintained her property very well, and there was no obvious extreme odor or sanitary problem. Nevertheless, residents complained loudly and bitterly that her horses were disturbing their peace and enjoyment of their property, in violation of the homeowners' association's covenants and other laws.

Following numerous "over the fence negotiations" and irate presentations and counter presentations at homeowners' association gatherings, the inevitable litigation ensued, with both parties lawyering up and staking their claims. Unsurprisingly, the homeowners' association claimed violation of the covenants and nuisance law. Interestingly, violations of local and state animal cruelty laws were argued because of the alleged high horse to acreage ratio. The horse owner argued that the homeowners' association arbitrarily and capriciously excluded horses which were her pets, and otherwise denied that she was creating a nuisance or engaging in any way in animal cruelty. Of course, the mere allegations by the homeowners' association of nuisance and particularly, animal cruelty, only served to inflame the discussions with the horse owner and drive the parties further apart.

The claims of the homeowners' association under the covenants were facially well founded, if somewhat arbitrary. However, because as mentioned above, the horses were healthy and the property was well maintained, it was not an obvious nuisance. The case ultimately was resolved after a surprising turn of events.

The smart money in the local legal community was on the homeowners' association prevailing under the covenants. However, it was learned that much to the surprise of all the parties, not all of the horse owner's property was located within the limits of the homeowners' association. Therefore, arguably, she was not subject to the covenants or to any control whatsoever by the homeowners' association. Nevertheless, the Circuit Judge ruled for the homeowners' association, finding that the entire parcel was intended to be within the homeowners' association. On appeal, the home owner argued that her property was not within the limits of the homeowners' association because she did

Join the Florida Bar's Animal Law Committee!

What is the Animal Law Committee?

The Animal Law Committee (ALC) monitors and informs the members of the Florida Bar and the public of significant developments in the area of animal law. We meet at least three times a year to share new information regarding this practice area.

The ALC is in the midst of a membership drive to help reach section status. This is an opportunity to make a real difference in animal law and with minimal effort. The Florida Bar has made it clear membership must increase before we submit a request to become a section. Section status is a critical goal. Section status will also allow us to engage in a number of activities that we are currently prohibited or restricted from pursuing, including but not limited to increasing publications and drafting and supporting legislation. It will allow us to make a far greater impact in animal law.



How you can assist the ALC.

Join the ALC. We request that attorneys with an interest in this legal area email Gil Panzer at gil@gilpanzerlaw.com and commit to complete the committee preference form in December with a request to be on the ALC. We further request that attorneys contact as many other attorneys as possible to let them know about joining the ALC.

not agree to the unity of title document executed by the homeowners' association. The First District Court of Appeal reversed, holding that the entire acreage was not subject to the homeowners' association covenant and restrictions because there was no agreement between the homeowner and the homeowner's association to make all her acreage subject to the association's covenants and restrictions.[12]

In reaching its per curiam opinion, the First District Court specifically noted that "the purpose of a unity of title document is to in some way restrict or transfer development rights; it is an agreement entered into by the property owner and a governmental authority."[13] Because there was no agreement between the homeowner and the homeowners' association relating to the additional acreage, the Court applied this principle to rule in favor of the homeowner. The Court also specifically noted that: "it is a basic principle that covenants restraining the free use of realty are not favored in the law."[14] Furthermore, the Court pointed out that "restrictive covenants 'are private promises or agreements creating negative easements or equitable servitudes which are enforceable as rights arising out of contract.'"[15]

The above case demonstrates several points which are instructive. First, state and local laws, and homeowners' association covenants and restrictions, are not always well suited for every dispute that may arise, particularly in the context of animals. Second, homeowners' associations are ill equipped to deal with animal-related issues such as this case. Finally, it should be acknowledged that, as in this case, one man's dog is indeed another man's horse.

Ralph A. DeMeo *is a Shareholder in Tallahassee's Hopping Green & Sams, practicing environmental, land use, and animal law. His B.A. and M.A. are from Stetson University and J.D. from FSU. He is present Chair of The Florida Bar Animal Law Committee, and past Chair of The Environmental and Land Use Law Section, and Journal and News Editorial Board. He is rated by Martindale-Hubbell A/V 5.0 Preeminent, Florida Super Lawyers, Chambers USA America's Leading Business Lawyers, Best Lawyers in America, and Who's Who Legal of Florida. He is a Board member of St. Francis Wildlife Association and Pets Ad Litem.*

Endnotes:

1 § 828.02, Fla. Stat. (2013)
2 § 828.125, Fla. Stat. (2013)
3 § 828.125(5), Fla. Stat. (2013)
4 § 4-2, Tallahassee Code of Ordinances.
5 § 4-2, Tallahassee Code of Ordinances
6 § 4-5, Tallahassee Code of Ordinances.
7 *Beckman v. Marshall*, 85 So. 2d 552 (Fla. 1956); see also *Gates v. City of Sanford*, 566 So.2d 47 (Fla. 5th DCA 1990) and *Bal Harbour Village v. Welsh*, 879 So. 2d 1265 (Fla. 3d DCA 2004).
8 Ch. 720, Fla. Stat. (2013)
9 § 720.301(4), Fla. Stat. (2013)
10 § 720.305, Fla. Stat. (2013)
11 *Kilgore vs. Killearn Homes Association, Inc.*, 676 So. 2d 4 (Fla. 1st DCA 1996).
12 *Id. at 6.*
13 *Id.* at 6.
14 *Id.* at 7.
15 *Id.* at 7.

Fellowship Program Open To All Young RPPTL Attorneys

The Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) is pleased to announce that it is currently accepting applications for the new 2014-2016 Fellowship class. The Fellowship Program is designed to attract and retain young lawyers to the RPPTL Section. The Fellowship program allows young lawyers to become substantially involved in the Section work, receive leadership training and work closely with leading attorneys in their field. The RPPTL Section program is designed to cultivate and develop future leaders to continue the strong presence of the Section as a leader in The Florida Bar.

The Fellowship Program is open to all lawyers who are members of the RPPTL Section and (a) have been admitted to the bar for fewer than 12 years or (b) are younger than 38 years of age who practice in the area of real property, estate or other area of law covered by the RPPTL Section.

Fellowships are provided for a two-year term and each Fellow will receive a subsidy of up to $2,500 annually (not to exceed actual out-of-pocket expenses) to help defray the expense of attending RPPTL Section meetings. The Section will begin taking applications on January 1, 2014 and the deadline to apply is March 15, 2014. The application is available through the RPPTL section website at www.RPPTL.org or from Marsha Madorsky, mmadorsky@carltonfields.com.

Real Estate Case Summaries

Prepared by Nishad Khan, Esq., Orlando, Florida

Florida Marketable Record Title to Real Property Act relieves an insurer of any legal obligation to search the chain of title pertaining to the insured property back to the time where recordation of deed occurred more than 30 years before the effective date of root of title. Insurer did not have an obligation to list as an exception from coverage personal privileges that are exercisable in the future and do not create an interest in real property.

Village Carver Phase 1, LLC etc. vs. Fidelity National Title Insurance Co., 38 Fla. L. Weekly D2078a, 2013 WL 5429585 (Fla. 3d DCA, 2013)

Village Carver Phase 1, LLC ("Village Carver" and "Appellant") appeals an order dismissing its amended complaint in which Village Carver sought recovery under an owner's title insurance policy for losses associated with the demolition and redesign of an affordable housing project. During the initial stages of construction, Village Carver unearthed an abandoned cemetery on the project site. Village Carver first contends the title insurer, Fidelity National Title Insurance Company ("Fidelity National" and "Appellee") should provide coverage under the policy because they failed to include the statutory easement for ingress and egress provided to "relatives and descendants of any person buried in a cemetery for the purposes of visiting the cemetery" under § 704.08 of the Florida Statutes as an exception to the policy.

The subject cemetery discovered during construction was created by a deed recorded in the public records in 1908, and the title insurance policy in this case was issued on December 24, 2008. Village Carver conceded that under the Florida Marketable Record Title to Real Property Act (MRTA), Fidelity National was relieved of any legal obligation to search the chain of title pertaining to the insured property back to that time. However, Village Carver took the position that because the deed was recorded and searchable, Fidelity National had an "implied notice of the existence of a cemetery and human remains in the ground", and therefore was required to provide coverage. Village Carver also argued that the "mere possibility of the existence of an easement in favor of the relatives renders the title unmarketable." The 3rd DCA disagreed.

The Court first analyzed a title insurer's obligation under § 627.7845(1) of the Florida Statutes, which states that a title insurer is only required to perform a "reasonable title search" before issuing a title commitment. § 627.7845(1) Fla. Stat. (2011). Next, the Court examined the requirements under § 712.04 of MRTA, which states that "a marketable record title is free and clear of all estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title." § 712.04, Fla. Stat. (2011). "Root of Title", as defined by the statute means "Any title transaction to have been recorded at least 30 years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded. § 712.01(2), Fla. Stat. (2011).

In the instant case, the 1908 deed was recorded more than thirty years before the effective date of the "Root of Title." The Court noted that the "implied notice" on which Village Carver relies "depends upon" the existence of the 1908 deed. § 712.04, Fla. Stat. The delivery and recording of that deed, the Court opined, is indisputably "an act, title transaction, event, or omission that occurred before the effective date of the root of title" within the meaning of MRTA. The Court held that MRTA represents a codified limitation on a title insurer's obligation to research the public records in connection with the issuance of a title policy, and therefore Village carver's attempt to charge Fidelity National with "implied notice" of the existence of the cemetery is excluded by law.

Village Carver then argued that Fidelity National had an obligation to list § 704.08, Fla. Stat., (statutory easement for ingress and egress provided to "relatives and descendants of any person buried in a cemetery for the purposes of visiting the cemetery" as an exception to the policy, relying on *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004).

In *Blanton,* the issue before the Court was whether the MRTA applies to statutory ways of necessity. The Florida Supreme Court held in *Blanton* that statutory ways of necessity are not subject to the provisions of MRTA, because "determining whether a landlocked owner has a valid claim to a statutory way of necessity requires only findings on the *current status of the property* - that the parcel is landlocked, that the parcel is outside of a municipality, and that the parcel is being used or desired to be used or desired to be used for one of the enunciated purposes." *Blanton,* 887 So. 2d at 1232.

The Court distinguished *Blanton* from the current case, stating that in the current case, "no one sought to exercise a legal right or assert any interest pursuant to Section 704.08, and there has been no 'act, title transaction, event

or omission' giving rise to a claim under the title insurance policy, not to mention one 'that occurred before the effective date of root of title.' ". The Court concluded that § 704.08, Fla. Stat., does not create an interest in real property, but instead creates a personal privilege that is exercisable in the future, and title insurance policies, unlike casualty insurance, are indemnity contracts against actual monetary loss resulting from specified causes, defects, liens or encumbrances, and do not insure against future occurrences. The trial court decision was affirmed.

A trial court's inherent, equitable authority to appoint a receiver in cases involving a non-profit condominium association is not restricted by statutes.

Granada Lakes Villa Condominiums Association, Inc. v. Metro-Dade Investments Co., 38 Fla. L. Weekly S1777, 2013 WL 5878908 (Fla. 2013)

Granada Lakes Villas Condominium Association ("Granada") appeals a Second District Court of Appeals Decision, which held that a trial court's inherent, equitable authority to appoint a receiver in an action involving a condominium association is not restricted under §§ 617.1432, 718.117 and 718.1124 of the Florida Statutes.

Metro-Dade Investments ('Metro Dade") developed Grande Lake Villas, a subdivision of a larger condominium complex known as Santa Barbara Landings in Collier County, Florida. Owners of the condominium units must pay fees and assessments to both the master association, Santa Barbara Landings Property Owner's Association ("Santa Barbara"), and the condominium association, Granada. The parties initially agreed that Granada would collect all of the fees and assessments and then pay Metro-Dade and Santa Barbara the expenses for the common areas.

In 2009, a financial dispute arose, and Metro-Dade, joined by Santa Barbara, filed an action against Granada, alleging that Granada failed to pay Metro-Dade and Santa Barbara their shares of expenses. According to the complaint, because Granada failed to pay Santa Barbara and Metro Dade, they were unable to pay for utilities and maintenance expenses creating several health & safety issues on the property.

In 2010, Metro-Dade filed an emergency motion for the appointment of receiver over Granada to collect fees and assessments from the unit owners and perform proper accounting. The trial court initially granted the appointment of receiver, but upon rehearing, determined that it lacked the statutory authority to appoint a receiver. Although the court acknowledged that a receiver would be of great assistance in proper accounting, the court held that Ch. 718 of the Florida Statutes specifically defines the circumstances on which the court may appoint a receiver, and these circumstances were not enumerated in the present case.

On appeal, the 2nd DCA reversed and remanded for the trial court to exercise its discretion on appointing a receiver, holding "the trial court erred as matter of law because its right to appoint a receiver in this instance is inherent in a court of equity, not a statutorily created right." *Metro-Dade Investments, Co. v. Granada Lakes Villas Condominiums, Inc.*, 74 So. 3d 593 (Fla. 2d DCA 2011) Specifically, the 2nd DCA found that §§ 617.1432, 718.117, and 718.1124 of the Florida Statutes do not "restrict a trial court's broad, equitable authority to appoint a receiver; rather the statutes merely cite to specific instances when a receiver may be appointed". *Id,* at 595.

The Florida Supreme Court first examined the power to appoint receivers, noting that this power has long been recognized as one that is inherent in a court of equity, which lies in the discretion of the court to be granted or withheld depending on the circumstances of the particular case. The Florida Supreme Court then explained that equitable receiverships are a creation of common law and should be reserved for cases involving fraud, self dealing and waste. However, the Florida Supreme Court distinguished an "equitable receiver" from a "statutory receiver," noting that a statutory receiver may serve a different purpose, and that Florida Statutes authorize the appointment of a receiver in special situations such as a residential rehabilitation or home facility (§ 607.1432 Fla. Stat. (2012)), or to wind up a corporation (§ 658.79 Fla. Stat. (2012)).

In the current case, Granada argues that the court's power to appoint a receiver is limited to the specific circumstances set forth in the statutes. Specifically, Granada explained that § 718.1124(1), Fla. Stat., provides that a unit owner may petition the court for the appointment of

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a receiver to manage the affairs of the association if the association fails to fill vacancies on the board to constitute a quorum; § 718.117, Fla. Stat., provides that if there is a natural disaster and members of the association's board cannot be found, fail to act, or are unable to act, then any interested party can file a petition to appoint a receiver to conclude the affairs of the association; and § 617.1432, Fla. Stat., provides that a receiver may be appointed to liquidate and wind up the affairs of a non-profit corporation. Granada argued that because none of these circumstances existed; the court lacked the power to appoint a receiver.

The Florida Supreme Court disagreed and concluded that nothing in the statutory language of these sections expressly prohibits or even implies that these enumerated circumstances are the only instances in which a court may appoint a receiver in cases involving a non-profit condominium association. Instead of restricting a court's power to appoint a receiver, the Florida Supreme Court held that these statutory provisions authorize a court to appoint a receiver under certain circumstances that do not involve the common law ground for appointment of an equitable receiver.

The Court also identified several cases in which a receiver has been appointed over a condominium association in situations that do not fall within the enumerated circumstances of §§ 617.1432, 718.117 and 718.1124, Fla. Stat. As such, the Court held that a court's inherent equitable power to appoint a receiver over a non-profit condominium association like Granada is not limited to the enumerated categories set forth in §§ 617.1432, 718.117, 718.1124, Fla. Stat.

Sec. 720.3085(2)(b), Fla. Stat., does not provide a safeguard for unpaid assessments when title is transferred by means of a tax deed sale under Chapter 197, Fla. Stat.

Cricket Properties, LLC v. Nassau Pointe at Heritage Isles Homeowner's Association, Inc., 38 Fla. L. Weekly D2013b, 2013 WL 5288863 (Fla. 2d DCA 2013)

Cricket Properties, LLC ("Cricket") sought review of a final judgment in its action to quiet title to real property it acquired by purchasing a tax deed. The primary question before the court was whether § 720.3085(2)(b), Fla. Stat., acts as a "safeguard" for liens for unpaid assessments which would otherwise have been extinguished under §197.573(2), Fla. Stat., by the issuance of a tax deed.

In January of 2012, Cricket filed a quiet title action naming Regions Bank, SunTrust Bank, and Nassau Pointe at Heritage Isles Homeowner's Association ("Nassau Pointe") as defendants in the suit. Both SunTrust Bank and Regions Bank failed to file a response and defaults were entered against them. Nassau filed an answer and raised as a defense that Cricket was liable for all unpaid assessments

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that came due up to the time of transfer of title under § 720.3085(2)(b), Fla. Stat. (2011). In its motion to strike this defense and in summary judgment, Cricket argued that § 720.3085(2)(b), Fla. Stat., was inapplicable, and that under § 197.532(2), Fla. Stat., tax deed purchasers acquire property free and clear of liens for assessments. The trial court ruled that § 720.3085(2)(b), Fla. Stat., supersedes the provisions in § 197.573(2), Fla. Stat., and entered a final judgment quieting title in Cricket's favor as to the bank's claims, but not for any liens held by Nassau for unpaid assessments accrued prior to the tax deed sale.

On appeal, Cricket argued that the trial court erred in ruling that § 720.3085(2)(b), Fla. Stat., supersedes the provision in § 197.532(2), Fla. Stat., and therefore controls the issue of whether any lien for assessment survives the issuance of the tax deed. After a lengthy explanation of the statutory scheme enumerated in Chapter 197, Fla. Stat., the Court found that both covenants governing assessments and liens for unpaid assessments do not survive the issuance of a tax deed.

The Court then reviewed Chapter 720, Fla. Stat., which governs the procedures for the operation of homeowner's associations and on which Nassau relies. Specifically, the Court examined recently enacted § 720.3085(1), Fla. Stat., which provides that associations have a lien on property to secure payment of assessments if provided in the governing documents. The Court held that this section imposes liability for future assessment on a new parcel owner for all unpaid assessments that came due up to the time of transfer of title.

The Court acknowledged that although the primary question before the trial court was whether § 720.3085(2)(b), Fla. Stat., acts as a "safeguard" for liens for unpaid assessments which would otherwise have been extinguished under § 197.573(2), Fla. Stat., by the issuance of a tax deed, the resolution of this question turns in large part on the related question of whether acquisition of property by a tax deed is a "transfer of title".

To determine whether a purchase through a tax deed is considered a "transfer of title", the Court focused on both the legislative intent and the plain language of the statute. Particularly, the Court examined § 720.3085(2)(b), Fla. Stat., noting the intent of this statute is to impose liability for previous accrued assessments on a new parcel owner who acquires property by transfer of title. However, because this section omits any mention of the survival of liens, it does not safeguard liens for unpaid assessments from being extinguished under § 197.573(2), Fla. Stat. The Court then explained that the plain language of this section imposes liability in relation to property acquired by "transfer of title", and because it is well settled that a tax deed does not represent a transfer of title, but constitutes a commencement of a "new original and paramount" title, the liens are extinguished. *Blume v. Giles,* 197 So. 346 (Fla. 1940).

The Court supported this finding by discussing the contrasting language in subsections (2)(a) and (b) of § 720.3085, Fla. Stat., specifically the omission of the phrase "regardless of how his or her title has been acquired." The Court held that this omission calls for the application of the rule of statutory construction that by mentioning one thing the legislature intended to exclude the other. Accordingly, the Court held that the trial court erred in concluding that § 720.3085(2)(b), Fla. Stat., provides that liens for unpaid assessments survive the issuance of a tax deed, and erred in concluding that § 720.3085(2)(b), Fla. Stat., supersedes the provisions in §§ 197.552 and 197.573(2), Fla. Stat. Any lien Nassau may have had for unpaid assessments did not survive the issuance of a tax deed.

When a responsive pleading raises a genuine issue of material fact as to whether plaintiff complied with notice requirements in the mortgage, summary judgment is improper. Default is improper when a response is filed before the default was entered.

Edward A. Wadsworth v. JP Morgan Chase Bank, N.A. *38* Fla. L. Weekly D2207a, 2013 WL 5729754 (Fla. 4th DCA 2013)

The trial court granted summary judgment in favor of the plaintiff JP Morgan Chase Bank ("Chase") and entered a default against defendant Edward A. Wadsworth ("Wadsworth") for failure to file a response with respect to mortgage foreclosure filed by Chase. The Fourth District Court of Appeal reversed and remanded both orders and found the trial court improperly granted Chase's motions for default and held that summary judgment was improper in this case.

Wadsworth executed a mortgage note with Chase in March, 2007. The mortgage includes an acceleration clause requiring Chase to notify Wadsworth before accelerating the note and specifies that the notice must provide a date by which Wadsworth may cure the default. The clause further specifies this date cannot be less than thirty days (30) from the date notice is given to Wadsworth.

On December 2007, Wadsworth failed to make a payment on the note. On April 4th, 2008, Chase sent a letter to Wadsworth informing him the note had been accelerated and did not include a date for him to cure the default. Three days later, Chase filed a mortgage foreclosure complaint against Wadsworth. There were no other letters on record.

Wadsworth moved to dismiss the complaint, and this motion was denied by the trial court. Chase then filed a motion for default and summary judgment for Wadsworth's failure to file a response. Because Wadsworth filed a motion to dismiss, the trial court denied the motion for default. On June 26, 2012, Chase filed a third motion for default against Wadsworth for "failure to file an Answer." On July 6th, 2012, Wadsworth filed an answer.

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On July 10th, 2012, the trial court granted both Chase's motion for default and motion for summary judgment against Wadsworth. Wadsworth immediately filed a motion to vacate the final order for reconsideration, arguing that the default was improper because he had filed an answer and that Chase had not complied with the notice requirement in the acceleration clause. This motion was denied by the trial court. Wadsworth then filed this appeal.

The 4th DCA reversed both the order granting the default and the order granting summary judgment. With respect to the default, the Court examined Florida Rule of Civil Procedure 1.500(c), which allows a party to file a pleading any time before a default is entered. The rule then states that only after a party has failed to serve any paper in an action may a default be entered. Fla. R. Civ. P.1.500(b). The 4th DCA held that because Wadsworth clearly filed an answer on July 6th, and the default was entered on July 10th, the trial court abused its discretion in entering a default, and thus reversed the order.

Next, the court examined whether the trial court properly granted summary judgment in favor of Chase. Relying on *Frost v. Regions Bank,* 15 So. 3d 906 (Fla. 4th DCA 2009), the Court found that because Chase did not give Wadsworth proper notice in accordance with the acceleration clause, a genuine issue of material fact existed, and therefore summary judgment was improper. Accordingly, the Court reversed the order and remanded the case for further proceedings.

Spotlight on the At-Large Members Committee

By Jane L. Cornett, Esq., Becker & Poliakoff, Stuart, Florida

The At-Large Members Committee (Debra Boje, Director) is made up of elected members of the RPPTL Section from each judicial circuit in Florida. For many years, this group was known as the "Circuit Representatives," but in 2010, the Section Bylaws were amended and the group was renamed "At-Large Members." The purpose of this group is to serve as a liaison for communication between the Section and its members.

At-Large Members have a variety of responsibilities. They are required to attend two or more in-state meetings of the At-Large Members' meetings and two or more Executive Council meetings per Bar year. At-Large Members must be active in at least one Section committee and local Bar activities in their respective circuits, especially local Bar activities concerning Real Property, Probate or Trust Law.

At-Large Members are also charged with communicating the business of the Section to Section members in the At-Large Members' local circuits. This includes publicizing upcoming activities, projects, seminars of interest and special events like the annual Diversity Picnic. In conjunction with certification courses, At-Large Members of the circuit where the program is presented host a reception for course attendees. These local receptions have been hosted by At-Large Members after the Real Property Certification review course in Orlando as well as the review class for Probate and Trust Law.

At-Large Members are expected to participate in At-Large Member projects, of which there have been several over the past few years. Examples of recent At-Large Member projects include compiling lists of probate judges in each county, organizing local orders on foreclosures, promoting Section membership at local law schools and collaborating with other Section committees, such as the Membership Diversity and Law School Initiative. Each year, At-Large Members in each circuit have an annual organization meeting to report back to the Director on the activities and projects that the circuit has undertaken for the past year, propose ideas for the upcoming year and assign responsibilities.

These are just some of the many responsibilities of an At-Large Member. At-Large Members significantly contribute to the promotion and operation of the Section and provide assistance and guidance to its thousands of members through its myriad of projects. If you are interested in becoming an At-Large Member, please contact Debra Boje, dboje@gunster.com, or the deputy director, Arlene Udick, arlene@udicklaw.com.

All Section members are encouraged to contact their local At-Large Member if there are questions, suggestions or ideas. Contact information can be found in the At-Large Members (ALM) Committee directory under "Committees" in the Section website.

Lots of useful information for you on the RPPTL Section website! www.rpptl.org

Probate Case Summaries

Prepared by Noelle M. Melanson, Melanson Law, P.A., Ft. Myers, Florida

Renunciation requirement before challenge to trust and estoppel based on challenger receiving benefits from a trust do not apply to self-settled trust. In addition, settlor of self-settled inter vivos trust was not estopped from challenging the validity of the trust on grounds of undue influence and lack of testamentary capacity due to the fact that he made demands for performance under the trust and executed a codicil exercising a power of appointment under the trust or that he took inconsistent positions. There was no allegation of any prejudice resulting from settlor's allegedly inconsistent positions.

Fintak v. Fintak, 120 So. 3d 177 (Fla. 2d DCA 2013)

The Second District Court of Appeal reversed and remanded the trial court's finding of summary judgment in favor of the defendant finding the doctrine of estoppel inapplicable.

Edmund and Shirley Fintak married in 1998. In 2006, Edmund executed a self-settled irrevocable trust which was initially funded with Edmund's assets. The trust named Edmund and his sons, Thomas and John, as co-trustees. The trust provided that regular income payments were to be made to provide for the health, education and support in reasonable comfort of Edmund during his lifetime as well as payments from the principal paid to Edmund upon his written request. Edmund's children were the ultimate beneficiaries of the trust with no mention of his wife, Shirley.

In 2007, Edmund received periodic income from the trust, however in February of 2007 Edmund's children initiated an incapacity proceeding against Edmund in which the court found that Edmund had sufficient capacity and the proceeding was dismissed. The co-trustees of the trust thereafter made disbursements from the trust directly to pay Edmund's bills rather than make disbursements directly to him.

Edmund Fintak filed his initial complaint against the co-trustees in 2007 seeking to compel payment based upon his written request for $30,000 and to set aside the trust based on coercion. In March 2010, Edmund exercised a power of appointment under the trust, executed a codicil directing the remainder of the trust assets be given to his wife and filed a second amended complaint against the co-trustees alleging undue influence, lack of testamentary capacity, judicial modification, breach of trust and request for declaratory judgment. While the action was still pending, Edmund passed away. Mrs. Fintak was substituted as plaintiff and also sought to probate his estate acknowledging the trust as a beneficiary and listing the trust as an asset of the estate.

The co-trustees argued that undue influence and lack of capacity required the beneficiary to renounce the benefits received under the trust to protect the co-trustees from any adverse claims; that the plaintiff was estopped from making these claims due to the receipt of disbursements from the trust; that demand for performance under the trust and the execution of a codicil exercising the power of appointment under the trust was not consistent with plaintiff's claim of undue influence and lack of testamentary capacity; and finally that Mrs. Fintak was estopped from taking inconsistent legal positions in the current litigation and the probate action. The lower court found summary judgment in favor of the co-trustees.

The 2nd DCA reversed the lower court, finding that since Edmund was the owner of the assets before they were transferred to the trust and that Edmund was the sole beneficiary of the trust during his lifetime, Edmund would have no possible claim against the co-trustees that would require Edmund's renunciation. The court also found that Edmund would have been legally entitled to any benefits from the assets whether included in the trust or not, so Edmund was not estopped from making the claims for undue influence or lack of capacity based on receipt of disbursements from the trust. It also found that while the doctrine of estoppel applies when inconsistent positions prejudice another party who has relied on the position, the co-trustees did not allege or show any prejudice. Finally, the 2nd DCA found that Shirley's legal position in the probate with regard to listing the trust as an asset and as a beneficiary of the estate were not inconsistent with her claim as plaintiff in this action because at the time of filing the probate action, no court had found the trust invalid and determining it invalid on her own would have put her in an indefensible position in the probate action. Further, the court again found no allegation by the co-trustees of any prejudice in relying on Mrs. Finkat's position.

Trustee breached his fiduciary duty by failing to accurately value golf course thus subjecting trust to capital gains tax. Trustee also breached his duties by failing to properly account, post a bond, and unilaterally paying himself a contingency fee of over a million dollars. Proper remedy for these breaches included removing trustee, his sons who were successor trustees, and ordering disgorgement of all fees received, as well as awarding damages for purchasing a property in order to avoid the capital gains tax.

McCormick v.Cox, 118 So. 3d 980 (Fla. 3d DCA 2013)

The Third District Court of Appeal affirmed the trial court's decision to remove the trustee for breach of fiduciary duties

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and because the trustee, his son and law partner, and his law firm participated in the breach of fiduciary duties, surcharged each for the expenses incurred as the result of the breach, and found that legal fees charged to the trust by the trustee were unreasonable.

Arthur F. McCormick drafted a trust agreement for Mr. Cox naming himself as trustee. When Mr. Cox passed away in 2001, the trust owned a single asset, a property containing approximately 100 acres that was then operated as a golf course in Lynnfield, Ma. McCormick, having hired his own firm as counsel for the trustee, obtained an appraisal of the property for valuation purposes in filing an estate tax return on behalf of Mr. Cox's estate. The appraisal valued the property, as a golf course, at approximately $2,500,000 at the time of Mr. Cox's death but suggested that the highest and best use of the property would be for development as a residential parcel up to the maximum allowable density. No effort was made to determine what the value of the property would be if developed to its highest and best use and McCormick filed the estate tax return on behalf of Mr. Cox wherein the property was valued at $2,500,000.

McCormick then investigated the potential higher and better uses for the property, as shown by his time entries presented by the court, and eventually listed the property for $15,400,000 in 2003. In 2005, the trust sold the property to the Town of Lynnfield for $12,000,000. No adjustments were ever made to the initial estate tax return and in an effort to avoid the immediate assessment of capital gains taxes, McCormick, with the support of the beneficiaries of the trust, structured a like-kind exchange (under Section 1031 of the Internal Revenue Code) and the trust acquired a shopping center in Collier County, Florida. The trust incurred $2,146,812 in expenses related to the like-kind exchange exclusive of the trustee's claim for fees. McCormick instructed the closing agent to disburse $1,548,000.00 to the trust before remitting the net sales proceeds to the intermediary of the 1031 exchange from which he paid himself $1,217,528 in trustee fees.

During the years after becoming trustee of the trust, McCormick did not post a bond with the court or provide trust accountings to any beneficiary, claiming he was trying to save the trust expenses; however, just prior to the sale of the property, he provided trust accountings through December 2004 which reported the value of the property at year end to be just over $2.5 million.

The beneficiaries of the trust alleged breach of fiduciary duties, sought removal of McCormick as trustee, a preemptive order precluding McCormick's sons from serving as successor trustee and disgorgement of trustee and attorney fees. The Third District Court of Appeal affirmed the trial court's decision, finding that McCormick breached his fiduciary duty as trustee by accepting the initial appraisal of the property without investigating further and causing the trust to incur over $2 million dollars in professional fees for a 1031 exchange because of the undervaluation; by unilaterally failing to post a bond as required by the trust, without approval of the beneficiaries or the court; by failing to account annually to the beneficiaries as required by Sections 737.303 and 737.3035, F.S., and then providing an inaccurate accounting; and by unilaterally paying himself in excess of $1 million dollars from trust funds without prior disclosure to the beneficiaries or court approval. The appellate court further found that the trial court did not abuse its discretion when it removed McCormick as trustee and precluded his sons from serving as successor trustee nor when it disallowed trustee's and attorney's fees paid to McCormick's law firm.

Holographic will executed in Colorado and admitted to probate there was invalid under Florida law because it was signed without attesting witnesses as required by Sec. 732.502, F. S.

Lee v. Estate of Payne, 2013 WL 5225200, 38 Fla. L. Weekly D1969 (Fla. 2d DCA 2013)

The Second District Court of Appeal affirmed a lower court's order refusing to give full faith and credit to a Colorado holographic will in an ancillary proceeding in Florida.

Randy John Payne died in Colorado where the court admitted his holographic will to probate for administration. Ms. Lee, Mr. Payne's fiancée, sought to have his will admitted for ancillary administration in Pinellas County, Florida, because Mr. Payne owned three houses in Pinellas County at the time of his death. Mr. Payne's holographic will devised to Ms. Lee one of the Florida houses and $40,000 in cash with the remaining assets being devised to Mr. Payne's father. Mr. Payne was survived by a minor child who sought to invalidate the Colorado holographic will since it was not executed in compliance with Sec. 732.502(1), F.S. Ms. Lee asserted that failure of the court to give full faith and credit to the Colorado holographic will violated Mr. Payne's constitutional right to testamentary disposition of property established under *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So 2d 64 (Fla. 1990).

The 2nd DCA, following the Florida Supreme Court's decision *In re Estate of Olson*, 181 So 2d 642 (Fla. 1966), which addressed the exact issue at hand, found that *Olson* had not been overturned by *Zrillic* and affirmed the lower court's order refusing to admit the Colorado holographic will to probate in Florida. The 2nd DCA, however, certified the following question to the Florida Supreme Court as an issue of great public importance: "Do Sections 732.502(2) and 734.104(a) violate Article 1, Section 2 of the Florida Constitution by categorically defeating the intent of the testator of a handwritten holographic will without a rational relation to the fraud it seeks to cure?"

Verified statement of an interested person alleging that certain estate planning documents were invalid due to lack of mental capacity or undue influence was sufficient to determine that a less restrictive alternative to guardianship was not available.

Searle v. Bent, 2013 WL 5225218, 38 Fla. L. Weekly D1975 (Fla. 2d DCA 2013)

The Second District Court of Appeal affirmed the lower court's opinion that a verified statement of an interested person alleging that certain estate planning documents were invalid due to lack of mental capacity or undue influence was sufficient to determine that a less restrictive alternative to guardianship was not available.

Anne S. Bent petitioned the court to determine the capacity of her mother, Dain F. Searle, whom she believed was being exploited by those responsible for her care. Along with her petition, Ms. Bent submitted a verified statement in compliance with Sec. 744.331(6)(f), F.S., alleging that a durable power of attorney and amendments to trust documents that were executed by her mother after 2006 were invalid because her mother lacked the mental capacity to execute the documents or that the documents were the result of undue influence. The court found Mrs. Searle incapacitated and appointed a guardian of her person and property. Mrs. Searle appealed the ruling contending that the durable power of attorney and trust documents provided a less restrictive alternative to guardianship and that reliance on the verified statement of Ms. Bent not only violated Mrs. Searle's right to due process but that it in effect invalidated her entire estate plan.

The Court affirmed the lower court's order which relied on the opinion in *Fla. Convalescent Ctrs. V. Somberg*, 840 So 2d 998, 1000 (Fla. 2003), stating that "(w)hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning…the statute must be given its plain and obvious meaning." The court's reliance on the verified statement of Ms. Bent was sufficient to question the validity of the documents and thereby determine that a less restrictive alternative to guardianship was not available that adequately protected the welfare and interests of Mrs. Searle.

Trial court erred when it held that a creditor claim against an estate filed outside of the 3 month publication period was untimely without first determining whether the creditor was a reasonably ascertainable creditor.

Golden v. Jones, 2013 WL 5810360, 38 Fla. L. Weekly D2259 (Fla. 4th DCA 2013)

The Fourth District Court of Appeal reversed the lower court order and found that it is necessary to determine whether a creditor is known or reasonably ascertainable before the court can determine if a claim was timely filed when a creditor has alleged that it was known or reasonably ascertainable.

Harry Jones died in February 2007 and the notice to creditors in the probate action was first published in June 2007. In 2008, a guardian was appointed for Mr. Jones' former wife, Katherine Jones, and in January 2009, the guardian filed a statement of claim in Mr. Jones' probate estate claiming money owed to Katherine Jones based on a marital settlement agreement executed in 2002 between Harry and Katherine.

Neither Katherine nor her guardian were ever served with a notice to creditors and after Katherine passed away in 2010, the curator of her estate filed a Petition for Order Declaring Statement of Claim Timely Filed and/or for Enlargement of Time to File a Statement of Claim Nunc Pro Tunc, alleging that Katherine and/or the guardianship were a known or reasonably ascertainable creditor in Harry's probate. The lower court didn't address whether Katherine or the guardianship estate were a known or reasonably ascertainable creditor but found that the claim was untimely under Sections 733.702 and 733.710, F.S.

On appeal, the 4th DCA reversed and remanded the case, relying on its opinion in *In Re Estate of Puzzo*, 637 So 2d, 26, 27 (Fla. 4th DCA 1994), in which the it held that "under Sections 733.702 and 733.710, any claim of known or reasonably ascertainable creditors, though filed after the three-month period following publication of the notice of administration, should not be stricken as untimely if filed prior to the earlier of 30 days after the service of notice of administration or two years after the decedent's death." The court directed the lower court to first establish whether or not Katherine or her guardianship were a known or reasonably ascertainable creditor and thereafter, following *Puzzo*, determine the timeliness of the guardian's claim. Acknowledging a conflict with this decision, *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2d DCA 2012) and *Morgenthau v. Estate of Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009) the court also certified the issue to the Florida Supreme Court for consideration. AL



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Appraisal Contingency
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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 (Pre-1978 Housing)
Housing for Older Persons
Rezoning Contingency
Lease Purchas/Lease Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
Sale Of Buyer's Property
Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
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Licensee Disclosure of Personal Interest in Property
Binding Arbitration

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

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Action Line August 2013

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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 2013 FLSSI forms.**

Firm: _____

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

Physical Address: _____

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

2013 PROBATE FORMS

OPTION #1 **2013 FORMS AND INDEX - .PDF ON DISK $370.10**
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OPTION #3 **2013 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $390.30**

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SHIP DATE _____/_____/2013 LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___

AL 2013

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

2014 EXECUTIVE COUNCIL MEETINGS

February 6 – 9, 2014
Executive Council Meeting
Ritz Carlton Amelia Island, Amelia Island, Florida
Reservations: 800-241-3333
http://www.ritzcalton.com/amelia
Room Rate: $199.00
Cut-off Date: January 6, 2014

May 29 – June 1, 2014
Executive Council Meeting / RPPTL Convention
South Seas Island Resort, Captiva, Florida
http://www.southseas.com
Reservations: 877-597-9696
Room Rate: $165.00
Cut-off Date: May 7, 2014

July 30 – August 2, 2014
Executive Council Meeting & Legislative Update
The Breakers, Palm Beach, Florida
Reservations: 561-655-6611
www.thebreakers.com
Room Rate: $206.00
Cut-off Date: June 30, 2014

September 17 – 21, 2014
Executive Council Meeting/Out of State
Sofitel Chicago Water Tower, Chicago, IL
Reservations:1-312-324-4000
www.sofitel.com/gb/hotel-2993-sofitel-chicago-water-tower/index.shtml
Room Rate: $255.00
Cut-off Date: September 3, 2014

November 13 – 15, 2014
Executive Council Meeting
Waldorf Astoria, Naples, Florida
Reservations: 1-239-597-3232
www.waldorfastoria3.hilton.com/en/hotels/florida/waldorf-astoria-naples-APPNGWA/index.html?WT.srch=1
Room Rate: $179.00
Cut-off Date: October 23, 2014

2014 CLE SCHEDULE:

EMERGING TRENDS ON THE DEVELOPMENT FRONT FOR ENVIRONMENTAL, LAND USE AND REAL ESTATE PRACTITIONERS
(#1655)
January 31, 2014, Tampa — Live & Webcast

REAL PROPERTY CERTIFICATION REVIEW
(#1669)
February 21-22, 2014, Orlando — Live & Webcast

CONSTRUCTION LAW INSTITUTE
(#1679)
March 20-21, 2014, Orlando — Live

CONSTRUCTION LAW CERTIFICATION REVIEW
(#1680)
March 20-22, 2014, Orlando — Live

WILLS AND TRUSTS CERTIFICATION REVIEW
(#1668)
April 4-5, 2014, Orlando

Courses scheduled later in the year will appear in future editions of ActionLine.

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

For the most up-to-date information on Section activities, visit the Section website (www.rpptl.org) or The Florida Bar's website (www.floridabar.org).

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Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

Fellowship applications now available. See page 43.

At Large Members – applications being requested, see page 48.

Important changes to the Florida Rules of Civil Procedure and Probate Rules. See Sup. Ct. Orders SC13-74, SC13-30 and SC13-2065

Check out the new RPPTL website at www.rpptl.org launching shortly

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

Get Published!

Articles for the next issue are being accepted – Contact Silvia Rojas at srojas@thefund.com

E-mail Service now available through E-Filing Portal! Review Sup. Ct. Order AOSC13-49

If you are working on an interesting case or legal issue that you'd like 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.)