

ActionLine

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

Tiara: A Sea of Change or Barely a Ripple?

ITIN Problems Still Plague FIRPTA Closings

Redefining Land Trusts in Florida – The New and Improved Land Trust Act

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Mutually Beneficial: Committee Participation



Chair's Column

By Margaret "Peggy" Rolando
Section Chair, 2013- 2014

What makes the Real Property, Probate and Trust Law Section so effective? The Section has established a reputation for providing objective, accurate advice to the legislative, executive and judicial branches when called upon. The key to the Section's effectiveness is our thriving committee system. The Section's over 11,000 members have the opportunity to participate in more than 55 active committees led by knowledgeable, engaged chairs and vice chairs. The committees cover a wide range of practice areas which allow their members to develop and strengthen their expertise. The committees are grouped in one of three categories: Probate and Trust Law Division committees, Real Property Law Division committees and General Standing committees.

The typical activities of a substantive law committee include:

- Discussing recent cases in its area of law and identifying legal trends.
- Exchanging ideas and debating cases and legislation at committee meetings and through its Listserve.
- Planning and presenting continuing legal education programs. Some CLEs are presented during committee meetings, which allow the members to earn credits. Other CLEs are offered through live sessions, eCLEs or replays.
- Drafting proposed legislation and the white paper explaining the need for the legislation.
- Providing technical advice to legislators and legislative committees.
- Analyzing and commenting on proposed legislation and administrative rules.
- Coordinating with other Sections on proposed legislation or other matters of common interest.
- Advising the Amicus Committee on substantive issues within the committee's expertise when the Section is asked to submit an amicus brief or requests permission to file one with federal or state appellate courts.
- Writing articles for *ActionLine* and the *Florida Bar Journal.*
- Presenting guest speakers on subjects within the purview of the committee.

The Section's general standing committees manage and administer our business. They coordinate our legislative activities, draft amicus briefs, prepare our Section's publications, maintain our website, recruit and maintain a diverse membership, and keep us informed about ethics and professionalism issues. They also analyze areas of the law affecting both real estate and probate and trust practitioners, such as alternative dispute resolution and homestead topics.

I experienced the benefits of committee participation first hand. Throughout my career, I have been privileged to work with outstanding, sophisticated attorneys. As a young real estate lawyer, I was assigned to prepare documents creating condominiums and planned developments. While my research was instructive, my senior colleagues did not have the expertise in this area and encouraged me to seek out others who were more experienced. I began to attend meetings of what is now called the Condominium and Planned Development Committee. I observed great lawyers debate condominium law questions, discuss the merits of condominium and homeowner association legislation and otherwise educate the committee members about current issues. The Condo Committee also offered a forum for practitioners to ask for advice about the thorny practical and legal issues they encountered. My experience gave me the chance to interact with condominium lawyers from around the state and receive some of the best informal CLE imaginable.

I learned that the Condominium and Planned Development Committee was just one of the Section's many substantive and standing committees, and I discovered the Executive Council of the Section. I have remained engaged with the Section because of the myriad opportunities to participate in the development of the law, to assist with continuing legal education programs, to meet lawyers in real property, probate, trust and construction law, and to improve our profession.

If you have never attended a committee meeting, I encourage you to do so. You will be impressed by the sophisticated level of discussion during meetings and the relevance of committee activities to your practice. I urge young lawyers interested in the Section's practice areas to join the Section and participate in a committee of interest to you. It's a worthwhile investment of your time. Why? Active committee participation is a great tool for professional development because it delivers these benefits:

- Receive alerts about new cases of interest and thoughtful analysis and discussion of current legal developments through the committee ListServes and meetings.

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This newsletter is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a SERVICE to the membership.

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ABOUT THE COVER:

The historic St. Petersburg Pier, which is scheduled for demolition in September.

Photo by Michael Gelfand.

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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 Yvonne Sherron at The Florida Bar at 800-342-8060 extension 5626, or at ysherron@flabar.org. Yvonne can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

- You will know about upcoming changes in the law (or have the ability to affect such changes) through the Section's legislative review process.
- Interact with the "best and the brightest" lawyers in your practice area. The ability to post a query on a committee ListServe or to call one of the recognized experts in a particular substantive area is an invaluable resource.
- Contribute to the development of the law through drafting legislation.
- Experience excellent continuing legal education. Many committee meetings include formal presentations on new cases or emerging trends. The committees present CLE programs on a regular basis, and the speakers are recruited from the ranks of the committee membership. These CLE presentations allow you to develop and refine your public speaking skills.
- Enhance your knowledge and professional reputation by researching and writing articles for *ActionLine* or the *Florida Bar Journal.*
- Meet other lawyers from around the state and raise your professional profile.

Permit me to illustrate what our committees do by sharing with you the activities of just a few of them. While the **Commercial Real Estate Committee** is a relatively new committee, its membership has mushroomed. This Committee provides a forum for its members to address issues relating to commercial real estate with an emphasis on commercial real estate acquisition and disposition transactions. It provides expertise and input regarding proposed legislation and regulations affecting commercial real estate. The Commercial Real Estate Committee holds meeting six times a year. Each of its meetings has included a one hour CLE component focusing on different facets of commercial real estate transactions. The presentations have covered Default clauses in purchase and sale agreements; the Inspection provisions in purchase and sale agreements; Due Diligence; Arbitration provisions; and Hotel purchase and sale agreements. On September 11, the Committee will present (jointly with the Landlord/Tenant Committee) a one hour eCLE titled "The Perils of Boilerplate and Other Common Contract Provisions". The Committee is currently planning a seminar to be held in April, 2014.

The **Estate and Trust Tax Planning Committee** explores the effect of federal transfer taxes (estate, gift and generation-skipping) and income taxes on trusts, estates, grantors, beneficiaries, institutions and attorneys in Florida. The Committee develops seminars to assist trust and estate attorneys to improve their knowledge of these taxes and stay current on changes. It advises the Section on proposed federal legislation and regulations and their effect on Florida laws. Recently, the Committee drafted proposed legislation that authorizes families to form and operate family trust companies (entities which provides trust services similar to those that can be provided by an individual or financial institution, including serving as a trustee of trusts held for the benefit of the family members, as well as providing other fiduciary, investment advisory, wealth management, and administrative services to the family). The Committee has also prepared and submitted comments to the IRS regarding IRS Notice 2011-82 (portability) and IRS Notice 2011-101 (decanting). A subcommittee is currently drafting an amendment to the Florida Uniform Transfers to Minors Act which would provide individuals with the option in certain circumstances of using custodianships which do not terminate until the minor reaches age 25, rather than the current age of 21.

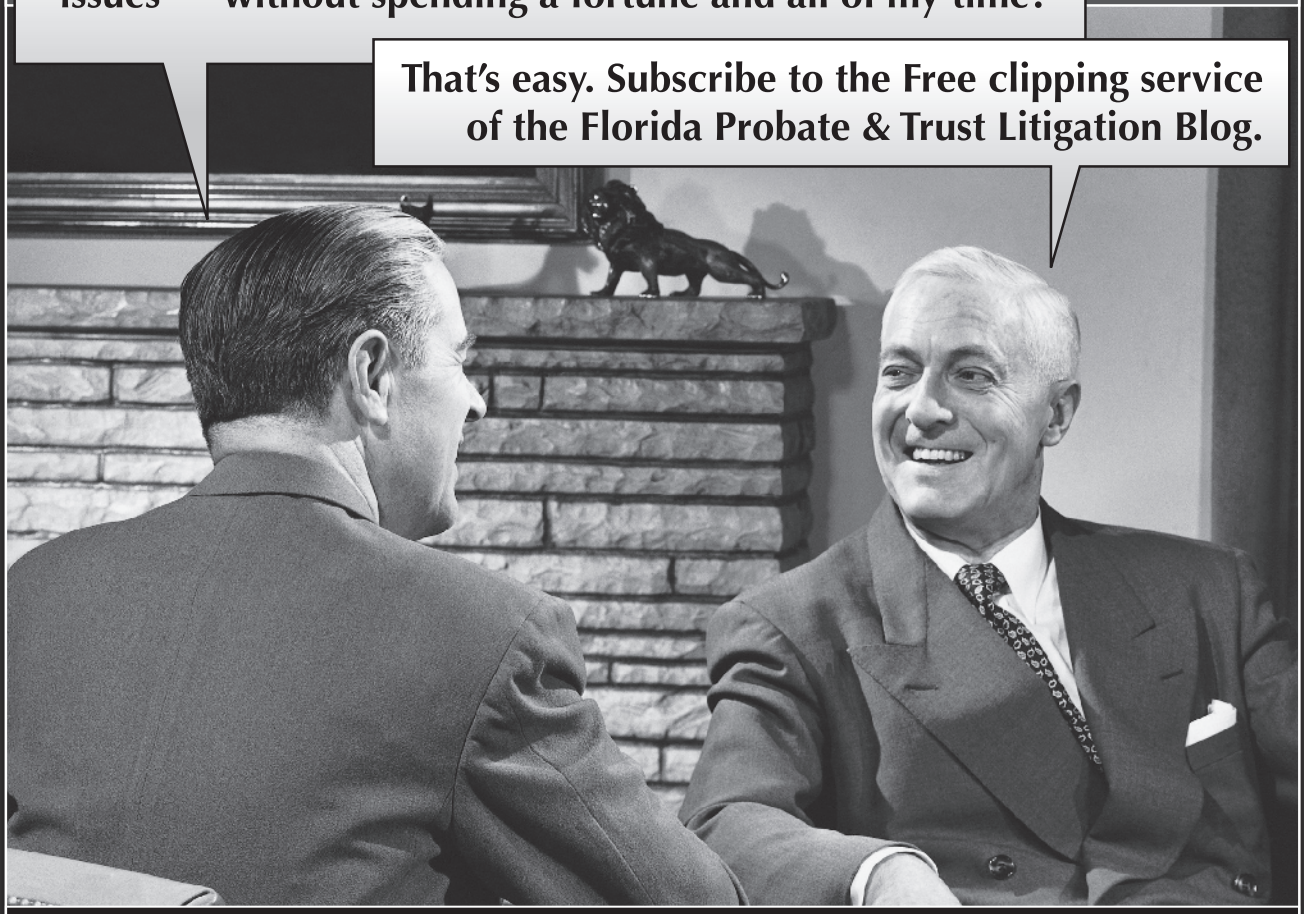
The **Membership, Inclusion and Law School Liaison Committee** is charged with recruiting and retaining RPPTL Section members. Committee members have been instrumental in making this Section the largest one in The Florida Bar. This Committee works with the substantive committees, the at-large members, and the executive council, to ensure that you receive excellent value for your dues. The Committee will soon be launching its "career coaching" program to assist law students and new admittees. In addition, the Committee continues to support a myriad of events such as The Caribbean Bar Association's 17th Annual Scholarship Banquet. Finally, recognizing that one size does not fit all, committee members believe in the "high-touch" business of building relationships with as many new members as possible, one member at a time. Whether you are a new member or a long term member, they welcome hearing from you! The Committee's activities also include recruiting young lawyers to the Section to apply for our fellowship program and encouraging students in Florida law schools with an interest in one of our practice areas to join the Section. Our Law School Liaisons plan to host at least one event at every law school in Florida to introduce law students to the Section and the practice areas we cover. In addition, they will host two "Meet and Greet" events on behalf of the Section this Bar year – one in Tampa and one in Orlando.

The **Probate Law and Procedure Committee** focuses on developing probate legislation and improving the implementation and application of laws, rules, and regulations affecting probate practice in the State of Florida. The Committee addresses problems arising under the Florida Probate Code and drafts proposed legislation aimed at improving the probate process. Over the past year, the Committee drafted amendments to the Probate Code eliminating the superfluous requirement that a caveator in a probate proceeding serve formal notice upon himself when that same caveator is the petitioner seeking to open the estate. In response to the new electronic filing rules,

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

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the Committee worked on legislation making it clear that, notwithstanding the move to electronic filing, clerks of the court must retain original wills for 20 years. The Committee is currently studying issues faced by practitioners involving summary administration, heirs born by artificial reproductive technology, and creditor claims filed in probate proceedings. It is also busy planning its annual Probate Law Seminar to be held in Tampa later this year.

The **Real Property Litigation Committee** concentrates on current legal issues and developments in law affecting, or of significance to, real property litigation practitioners and their clients. It is drafting proposed statutory amendments to clarify the law regarding appointment of ad litems for unknown parties and the requirements for adverse possession and to increase use of the internet to comply with foreclosure sale publication requirements. The Committee also has a full day, intermediate level CLE seminar scheduled for presentation on October 4, 2013, entitled "Hot Topics in Real Property Litigation: 2013 Edition".

The Section's effectiveness is the direct result of the high quality products produced by our substantive and standing committees. Hundreds of Section members willingly volunteer and contribute hours of valuable time working on the various projects, programs, meetings and other activities of our committees.

For the young lawyer, committee involvement offers you multiple opportunities for professional growth. For the experienced practitioner, the committees present the chance to engage with your peers at a high level, stay on the cutting edge and contribute to the development of the law. No matter your level of experience, if you participate in a committee meeting, you will leave with new ideas that immediately benefit you, your colleagues and clients. If you do so consistently, you will be a much better lawyer.

It's easy to join a committee if you are a Section member. Go to the Section's website at www.rpptl.org and sign in. If you don't have a password, you can request one and receive it by return email. At the bottom of the home page, find "Section Committees" and click on "more." Scroll through the list of various committees and decide which ones most interest you. Click on the link to the Committee's Directory to find the contact information for the Committee's chairperson. Email the Committee's chair and ask to join the committee, how you can participate, when the next committee meeting is scheduled and whether you can attend the meeting in person, by phone or by either means. If you are not a Section member, join now to reap the rewards the committees have to offer!

— Peggy Rolando

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Legislator Supporters of the Real Property, Probate and Trust Law Section During the 2013 Legislature

By Ashley E. DiNunzio, Esq.
Pennington, P.A., Tallahassee, Florida

The 2013 Legislative Session saw many of the Section's initiatives and items of interest pass favorably in the halls of the Senate and the House of Representatives. The Section members extend sincere gratitude and appreciation to these fifteen legislators for their important contributions to the Section's success with 2013 Session initiatives.


PASSODOMO

Representative Kathleen Passidomo was the House sponsor and author of House Bill 87 relating to mortgage foreclosures. House Bill 87 was a Section-supported initiative reforming the judicial foreclosure process. Representative Passidomo was also the sponsor of House Bill 833, relating to general assignments, which provides new and amended forms and procedures for handling the assignment of assets of insolvent businesses and the unexpired leases of non-residential property by insolvent businesses.

Representative Passidomo is the Vice Chair of the Judiciary Committee and the Justice Appropriations Subcommittee. She also serves on the Civil Justice Subcommittee; the Choice & Innovation Subcommittee; and the Select Committee on Patient Protection and Affordable Care Act (PPACA).

Representative Passidomo is a partner in the law firm of Kelly, Passidomo & Alba, LLP in Naples. Her practice centers on real estate, corporate and business law and she is a member of the Section. Representative Passidomo is a Florida Bar Board Certified Real Estate Lawyer. She has been a member of the Florida House of Representatives since 2010. Representative Passidomo currently serves as Vice Chair of the Collier County Foreclosure Task Force, formed to provide pro bono advice and assistance to Collier County residents facing foreclosure.


LATVALA

Senator Jack Latvala was involved in a number of successful Section initiatives and bills of interest during the 2013 Session. Senator Latvala sponsored the companion bill to House Bill 87 relative to mortgage foreclosures. The legislation reforms the judicial foreclosure process and includes provisions that provide finality to the foreclosure process for purposes of insurable title. Senator Latvala also sponsored Senate Bill 120 that conforms the Florida Condominium Act to ILSA requirements. The legislation allows for the early recording of declarations of condominium to create legal descriptions during the pre-sale process of a new project in compliance with ILSA.

Senator Latvala sponsored SB 2 relating to ethics, which is the comprehensive ethics reform package, authorizing qualified "blind trusts" for public officials. It also authorizes an attorney to file financial disclosure statements on behalf of public officials and provides that fines levied by the Ethics Commission may be deemed to be a judgment for purposes of garnishing wages upon recording with the Clerk of Court.

Senator Latvala is the Chair of the Ethics and Elections Committee. He also serves on the Appropriations Committee; the Appropriations Subcommittee on General Government; the Appropriations Subcommittee on Transportation, Tourism, and Economic Development; the Community Affairs Committee; the Environmental Preservation and Conservation Committee; the Gaming Committee; the Judiciary Committee; and the Rules Committee.

Senator Latvala is the CEO of GCI Printing Services, Inc. in Largo. He is the recipient of many awards for his legislative service and leadership role, including awards from the American Cancer Society, Big Brothers Big Sisters Association of Florida, Associated Industries of Florida, and Disabled American Veterans. His devotion to important public policy issues earned him the high distinction of being designated for leadership roles, such as Senate Majority Leader, and a reputation as a tough and unwavering warrior on behalf of his Tampa Bay area constituents. Senator Latvala was also cited as a rising star by the *Wall Street Journal.*


SIMMONS

Senator David Simmons was the Senate sponsor of Senate Bill 229 relating to land trusts. The bill was a Section initiative to revise the land trust statute. Senator Simmons was also the sponsor of Senate Bill 1300, which revised the Florida Limited Liability Company Act and updated its provisions consistent with the model act.

Senator Simmons is the Chair of the Banking and Insurance Committee. He also serves on the Appropriations Subcommittee on Education; the Appropriations Subcommittee on Finance and Tax; the Criminal Justice Committee, the Education Committee; the Governmental Oversight and Account-

continued, next page

ability Committee; the Rules Committee; and the Select Committee on PPACA.

Senator Simmons is the Financial Managing Partner of deBeaubien, Knight, Simmons, Mantzaris & Neal, LLP. He graduated first in his class with a degree in mathematics from Tennessee Technology University and earned his Juris Doctorate from Vanderbilt Law School. He has been a member of the Florida Senate since 2010 and previously served in the Florida House of Representatives from 2000-2008.


SPANO

Representative Ross Spano sponsored the companion bill to Senate Bill 492 relating to Estates, which contained several Section initiatives.

Representative Spano serves on the Choice & Innovation Subcommittee; the Civil Justice Subcommittee; the Health Quality Subcommittee; the Higher Education & Workforce Subcommittee; and the Judiciary Committee.

Representative Spano is an attorney from Dover where he is growing a small business and raising his family of six. He received his history degree from the University of South Florida and his Juris Doctorate from Florida State University College of Law, with honors.


MORIAITIS

Representative George Moraitis was involved in a number of successful Section initiatives and bills of interest during the 2013 Session. Representative Moraitis sponsored House Bill 73 relating to residential properties managed by community associations.

Representative Moraitis is the Vice Chair of the Finance & Tax Subcommittee and the Vice Chair of the Choice & Innovation Subcommittee. He also serves on the Insurance & Banking Subcommittee; Joint Administrative Procedures Committee; and Local & Federal Affairs Committee.

Representative Moraitis graduated from the United States Naval Academy with a bachelor's degree in political science. He served in the United States Navy for seven years. He was awarded the Navy Commendation Medal, Navy Achievement Medal, Navy Expeditionary Medal, and the Arctic Service Ribbon. Representative Moraitis is a practicing real estate attorney from Fort Lauderdale, at Moraitis, Cofar, Karney & Moraitis. He is a member of the Section. He has been a member of the Florida House of Representatives since 2010.

Senator Arthenia Joyner sponsored the Section's initiative to amend Chapter 709 as the Senate companion to House Bill 841 relating to powers of attorney. The bill makes a series of technical improvements to Chapter 709 and clarifies the circumstances concerning how and when stock powers can be used.


JOYNER

Senator Joyner is the Vice Chair of the Appropriations Subcommittee on Criminal and Civil Justice. She is also serves on the Appropriations Committee; the Appropriations Subcommittee on General Government; the Ethics and Elections Committee; the Health Policy Committee; the Judiciary Committee; the Transportation Committee; and the Selection Committee on Indian River Lagoon and Lake Okeechobee Basin. Senator Joyner is the Alternative Chair of the Joint Committee on Public Counsel Oversight.

Senator Joyner is a practicing probate attorney from Tampa with Stiles & Grace, P.A. She has represented the Tampa Bay area in the Florida Senate since 2006 and previously served in the Florida House of Representatives from 2000-2006.


WOOD

Representative John Wood sponsored House Bill 267 relating to hidden liens and repeal of the statutory requirement for providing a space on deeds to add a social security numbers.

Representative Wood is the Chair of the Health Innovation Subcommittee. He also serves on the Energy & Utilities Subcommittee; the Health & Human Services Committee; the Health Care Appropriations Subcommittee; and the Select Committee on PPACA.

Representative Wood is a real estate attorney in Winter Haven and a Section member. He is the CEO of John Wood Enterprises, a Housing and Agriculture Company, and he has been a member of the Florida House of Representatives since 2008.


HUKILL

Senator Dorothy Hukill has been a longtime sponsor of Section initiatives and is an enthusiastic supporter of the Section. During the 2013 Session, Senator Hukill sponsored Senate Bill 492 relating to estates which contained several Section initiatives.

Senator Hukill is Chair of the Appropriations Subcommittee on Finance and Tax. She also serves on the Appropriations Committee; the Appropriations Subcommittee on Education; the Commerce and Tourism Committee; the Communications, Energy, and Public Utilities Committee; the Community Affairs Committee; the Governmental Oversight and Accountability Committee; and the Joint

Committee on Public Counsel Oversight.

Senator Hukill served as Mayor of the City of Port Orange from 2000-2004. She is a practicing attorney in Daytona Beach and a Section member. She practices business, real estate and probate law.


ALTMAN

Senator Thad Altman sponsored the companion bill to House Bill 73, which contained two of the Section's initiatives relating to residential properties managed by community associations.

Senator Altman is the Chair of the Military and Veterans Affairs, Space, and Domestic Security Committee. He also serves on the Appropriations Subcommittee on Criminal and Civil Justice; the Appropriations Subcommittee on Finance and Tax; the Children, Families, and Elder Affairs Committee; the Criminal Justice Committee; the Environmental Preservation and Conservation Committee; and the Joint Committee on Public Counsel Oversight.

Senator Altman has been a member of the Senate since 2008 and previously served in the House of Representative from 2003-2008. He is the President of the Astronauts Memorial Foundation and the President of the American Lung Association for Brevard and Volusia Counties.


FITZENHAGEN

Representative Heather Fitzenhagen sponsored the companion bill to Senate Bill 120 that conforms the Florida Condominium Act to ILSA requirements. The legislation allows for the early recording of declarations of condominium to create legal descriptions during the pre-sale process of a new project in compliance with ILSA.

Representative Fitzenhagen serves on the Education Appropriations Subcommittee; the Healthy Families Subcommittee; the Higher Education & Workforce Subcommittee; the Judiciary Committee and the Transportation & Highway Safety Subcommittee.

Representative Fitzenhagen is an attorney in Fort Myers. She is a board member of the Betty Allen Ovarian Cancer Foundation, the Fort Myers Women's Community Club and the Lee County Association for Women Lawyers.


STARGEL

Senator Kelli Stargel sponsored the companion bill to House Bill 267 relating to hidden liens and repeal of the statutory requirement for providing a space on deeds to add a social security numbers.

Senator Stargel is the Chair of the Regulated Industries Committee. She also serves on the Appropriations Subcommittee on General Government; the Appropriations Subcommittee on Transportation, Tourism, & Economic Development; the Commerce and Tourism Committee; the Community Affairs Committee; the Education Committee; and the Joint Committee on Public Counsel Oversight.

Senator Stargel became a member of the Senate in 2012 and previously served in the House of Representatives from 2008-2012. She is an Investment Property Manager and the Commissioner of the Education Commission of the States.


POWELL

Representative Bobby Powell sponsored House Bill 841 a Joint Section/ Florida Bankers initiative, providing for technical improvements to Chapter 709, F.S, dealing with powers of attorney.

Representative Powell serves on the Healthy Families Subcommittee; the Higher Education & Workforce Subcommittee; the Local & Federal Affairs Committee; and the Transportation & Highway Safety Subcommittee.

Representative Powell is an urban planner from Riviera Beach. He is affiliated with the American Institute of Certified Planners, the American Planning Association, and the Leadership Board of Palm Beach County.

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To: Florida Estate Attorneys
Needing Independent Personal Representatives

For more involved estates, family members may be unavailable or unwilling to perform duties of the Personal Representative ● *Personal Representatives duties are numerous and cumbersome* ● *An Independent Personal Representative may be advantageous to the estate's attorney and the family*

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RODRIGUEZ

Representative José Javier Rodríguez sponsored House Bill 229 relating to land trusts. This bill was the Section's initiative to revise the land trust statute.

Representative Rodríguez serves on the Civil Justice Subcommittee; the Finance & Tax Subcommittee; the Health Quality Subcommittee; the Local & Federal Affairs Committee; the Rules & Calendar Committee; and the Select Committee on PPACA.

Representative Rodríguez is an attorney from Miami, and graduated from Harvard Law School in 2006. He was elected to the House of Representatives in 2012. Representative Rodriguez received the New Leaders Counsel 40 under 40 Political Leadership Award in 2013.


RICHTER

Senator Garrett Richter sponsored Senate Bill 736 relating to recorded instruments, which was the Section's initiative to provide for a curative remedy when there are defects in the execution of recorded instruments affecting real property. Senator Richter also sponsored Senate Bill 166, relating to annuities.

Senator Richter is the President Pro Tempore and Chair of the Gaming Committee. He also serves on the Appropriations Committee; the Appropriations Subcommittee on Education; the Appropriations Subcommittee on Health and Human Services; the Banking and Insurance Committee; the Commerce and Tourism Committee; the Judiciary Committee; the Rules Committee; the Transportation Committee; and the Joint Legislative Budget Commission.

Senator Richter previously served in the House of Representatives from 2006-2008. He is the President of First National Bank of the Gulf Coast. He served in the U.S. Army and the U.S. Air Force Reserves, and received the Vietnam Bronze Star and Combat Infantry Badge.


BROXSON

Representative Doug Broxson sponsored the companion bill to Senate Bill 736 relating to recorded instruments.

Representative Broxson is the Vice Chair of the Agriculture & Natural Resources Appropriations Subcommittee. He also serves on the Economic Affairs Committee; the Insurance & Banking Subcommittee; the Joint Administrative Procedures Committee; and the Veteran & Military Affairs Subcommittee.

Representative Broxson has built a career in real estate, property insurance sales and investments in Santa Rosa County. He is the youngest of eleven children and a lifelong resident of Northwest Florida. Representative Broxson is the County Champion of the Florida Association of Counties.

New RPPTL Website Launch Forthcoming Winter 2013



The RPPTL Section website is being completely redesigned for a Winter 2013 launch. The new website will deliver content effectively and efficiently in an aesthetically pleasing design. RPPTL members will be able to customize their website view with committees of interest. In addition, RPPTL resources such as *ActionLine* will be optimized for online viewing and searching.

The website will work on mobile devices and tablets. In addition, you will be able to download a link to access the website from your Smartphone or tablet home screen. The new website has a helper – ASK RPPTL – who will help you quickly and efficiently find information on the new website as you get oriented. The new website will require a new log-in and password for each member. You will receive an email with new log-in information once the new website launches. We look forward to giving you an overview of the new website in the Winter edition of *ActionLine.*

Changes from the 2013 Legislative Session

By Peter M. Dunbar, Esq.
Pennington, P.A., Tallahassee, FL


P. DUNBAR

The 2013 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The presiding officers in both the House and the Senate were very helpful in assisting with the Section's program this year, and a special acknowledgement goes out to Senate President Don Gaetz and House Speaker Will Weatherford for the special assistance from their respective offices.

The Section is also appreciative of the members of the House and Senate that sponsor initiatives this year, and these members are acknowledged below with the legislation that passed during this past Session.

All of the bills from this year's Regular Session appear in chronological order by bill number with a brief summary along with the applicable Chapter Law citation for each initiative. The final status and full text of each enrolled bill, including the legislative staff reports and Chapter Law citation, are available on the legislative web sites

www.leg.state.fl.us
www.flsenate.gov
www.myfloridahouse.com.

Legislation Containing Section Positions and Initiatives

Community Associations: CS/CS/CS/HB 73 by Representative Moraitis and Senator Altman contain 2 of the Section's initiatives—(1) revisions to the phasing provisions to allow a 3-year extension to complete the project; and (2) the implementing language for "condo-in-a-condo" developments. **(*Chapter 2013-188, Laws of Florida*.)**

Florida Fair Foreclosure Act: CS/CS/HB 87 by Representative Passidomo and Senator Latvala is a Section-supported initiative reforming the judicial foreclosure process. The legislation also includes provisions that provide finality to the foreclosure process for purposes of insurable title. ***(Chapter 2013-137, Laws of Florida.)***

Condominium Act—ILSA: CS/SB 120 by Senator Latvala and Representative Fitzenhagen amends the Condominium Act to allow for the early recording of declarations of condominium to create legal descriptions during the pre-sale process of a new project in compliance with ILSA. ***(Chapter 2013-122, Laws of Florida.)***

Land Trusts: CS/HB 229 by Representative Rodriquez and Senator Simmons is the Section's initiative to revise the land trust statute, and it distinguishes traditional land trust from a trust created under the Florida Trust Code. **(*Chapter 2013-240, Laws of Florida*.)**

Hidden Liens: CS/HB 267 by Representative Wood and Senator Stargel contains two of the Section's initiatives. The first provides a uniform process for creating and recording liens that are authorized by municipal or county ordinances. It also includes the Section's initiative to repeal the statutory requirement that deeds include a space for inclusion of social security numbers. **(*Chapter 2013-241, Laws of Florida*.)**

Design Professionals: CS/SB 286 by Senator Negron would permit limitations of liability for design professionals by terms of the contract for services and other conditions. The Section opposed this initiative. **(*Chapter 2013-28, Laws of Florida*.)**

Estates: CS/CS/SB 492 by Senator Hukill and Representative Spano contains several of the Section's initiatives, among them: (1) caveat; (2) the designation of beneficiaries glitch fix; (3) deposit of will; (4) unclaimed property disposition; (5) long-arm statute dealing with trusts; (6) a distributee trust definition; (7) provisions for trust accountings; (8) prohibition of gifts to lawyers; (9) and a repeal of the estate tax form filing requirement. ***(Chapter 2013-172, Laws of Florida.)***

Recorded Instruments: CS/SB 736 by Senator Richter and Representative Broxson is the Section's initiative providing for a curative remedy when there are defects in the execution of recorded instruments affecting real property. ***(Chapter 2013-234, Laws of Florida.)***

Power of Attorney: CS/HB 841 by Representative Powell and Senator Joyner is the joint Section/Florida Bankers initiative that makes a series of technical improvements to Ch. 709, F.S., and clarifies the circumstances concerning how and when stock powers can be used. **(*Chapter 2013-90, Laws of Florida*.)**

Timeshares—Non-Judicial Foreclosure: CS/HB 7025 by Business Regulation Committee modifies the non-judicial foreclosure procedures for timeshare estates. The legislation also outlaws resale strategies that involve dumping devalued timeshare estates. A Section liaison worked to resolve technical concerns with the legislation. ***(Chapter 2013-159, Laws of Florida.)***

Legislative Initiatives of Interest

Ethics Fines—Liens of Property: CS/SB 2 by Senator Latvala is the comprehensive ethics reform package. The legislation creates new Sec. 112.31425, F.S., authorizing qualified "blind trusts" for public officials. It also authorizes an attorney to file financial disclosure statements on behalf

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of public officials, and further provides that fines levied by the Ethics Commission may be deemed to be a judgment for purposes of garnishing wages upon recording with the Clerk of Court. **(*Chapter 2013-36, Laws of Florida*.)**

Texting Ban: CS/CS/CS/SB 52 by Senator Detert bans texting will operating a motor vehicle, and it makes it a noncriminal traffic infraction to engage in such activity. The legislation provides exceptions for reporting emergency activities; criminal or suspicious activities; and receiving navigational information or safety-related information. **(*Chapter 2013-58, Laws of Florida*.)**

Landlord—Tenant: CS/CS/HB 77 by Representative Porter revises the provisions of Ch. 83, F.S., relating to residential tenancies, and the legislation amends Sec. 83.64, F.S., to prevent a landlord from retaliating against a tenant when rents are paid to a community association to pay the landlord's assessments. The legislation also provides that the right to attorney's fees may not be waived in a lease agreement; revises landlord disclosure requirements and maintenance obligations; provides restrictions on advance rent and security deposits; and revises provisions relating to termination of lease agreements by a landlord. It redefines a bona fide contract for sale; provides for reciprocal attorney's fees; and requires new notice procedures concerning advance rents and security deposits. ***(Chapter 2013-136, Laws of Florida.)***

Charitable Contributions: CS/HB 95 by Representative Holder exempts qualified charitable organizations from the "claw-back" provisions of the Uniform Fraudulent Transfer Act. **(*Chapter 2013-189, Laws of Florida*.)**

Property—Fraudulent Claims: CS/CS/CS/SB 112 by Senator Dean makes it a third degree felony to intentionally file a false claim to ownership or a claim of lien against real or personal property. **(*Chapter 2013-228, Laws of Florida*.)**

Annuities: CS/SB 166 by Senator Richter extends the annuity disclosure requirements made by an insurer from senior consumers to all consumers of annuities. ***(Chapter 2012-163, Laws of Florida.)***

Eminent Domain: CS/HB 179 by Representative Young requires interest earned on deposited funds to be paid to the party entitled to the deposit. **(*Chapter 2012-23, Laws of Florida*.)**

Jurisdiction of State Courts: CS/SB 186 by Senator Diaz de la Portilla provides jurisdiction for Florida courts when a contract specifies that state law governs the contract or when parties agree to submit to arbitration in this state. It also extends foreign judgments covered by Sec. 55.502, F.S., to those judgments entered in a United States territory or commonwealth of the United States. ***(Chapter 2012-164, Laws of Florida.)***

Flag Etiquette—Community Associations: SB 230 by Senator Ring requires the Governor to adopt protocols for proper display of the state flag on certain occasions, and extends such protocols to displays in condominiums and other residential settings. ***(Chapter 2013-165, Laws of Florida.)***

Property Tax Incentives: CS/CS/HB 277 by Representative Rehwinkle-Vasilinda implements the constitutional amendment providing property tax incentives for the installation of renewable energy devises on residential and non-homestead real property. ***(Chapter 2013-77, Laws of Florida.)***

Homestead Exemption: CS/SB 342 by Senator Thrasher permits leases of residential homestead property for up to 30 days without the owner losing the homestead exemption status on the property. ***(Chapter 2013-64, Laws of Florida.)***

Onsite Sewage Treatment Systems: CS/CS/CS/HB 375 by Representative Roberson revises the requirements for permitting and reporting for onsite sewage treatment systems. It revises the reporting system for inspections; permits reports to be filed electronically; and permits owners of owner-occupied residential property to service their own systems when properly certified. ***(Chapter 2013-79, Laws of Florida.)***

Unclaimed Property: CS/SB 464 by Senator Flores authorizes the Department of Financial Services to promulgate rules to permit claims for unclaimed property to be submitted electronically. **(*Chapter 2013-34, Laws of Florida*.)**

Arbitration: CS/SB 530 by Senator Thrasher revises the Florida Arbitration Code and is an initiative of the Business Law Section. Among its provisions, the legislation provides that statutory requirements may be waived by written agreement and requires disclosures by an arbitrator. ***(Chapter 2013-232, Laws of Florida.)***

Growth Management: CS/HB 537 by Representative Moraitis clarifies the referendum process with regard to development orders, local comprehensive plan amendments and land use map amendments. The same provision also passed in Section 3 of CS/HB 7019. ***(Chapter 2013-115, Laws of Florida.)***

Mobile Homes: CS/CS/CS/SB 573 by Representative Hooper requires coverage by Citizens of mobile homes and related screened enclosures, patio roofs and carports at a minimum value of at least $3,000. The legislation also provides for quarterly distribution to the Florida Relocation Trust Fund and requires supporting documentation to be provided to support the funding for the mobile home relocation program. ***(Chapter 2013-158, Laws of Florida.)***

Insolvent Business Estates: CS/CS/HB 833 by Representative Passidomo provides new and amended forms

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and procedures for handling the assignment of assets of insolvent businesses and the unexpired leases of non-residential property by insolvent businesses. **(*Chapter 2013-244, Laws of Florida*.)**

Tax Deeds: CS/HB 837 by Representative Mayfield provides that the tax collector may charge a $75 application fee for a tax deed and reimbursement of costs for online services. In lieu of the paying the combined charges, an applicant will have the option to use the electronic application process. ***(Chapter 2013-148, Laws of Florida.)***

Adverse Possession: CS/HB 903 by Representative Davis revises the doctrine of adverse possession and the circumstances under which a person may claim the right of adverse possession. The initiative is designed to address the problem of "urban squatters." **(*Chapter 2013-246, Laws of Florida*.)**

Recreational Vehicle Parks: CS/HB 969 by Representative Raburn revises the definition of "occupancy" in an RV park to mean when a vehicle is occupied by a guest and not when the vehicle is located in the park and not occupied. The bill also establishes the effective date for setback requirements for recreational vehicles in the park. **(*Chapter 2013-91, Laws of Florida*.)**

Permitting Regulations: CS/CS/CS/HB 999 by Representative Patronis is a comprehensive bill that revises permitting procedures and the state and local level. The bill provides for (1) rules to incentivize the electronic filing in the permitting process; (2) limits requests for additional information by a local government on development permits to 3; (3) new procedures for water well permits; and (4) eliminates lease fees for docks adjacent to single-family and multi-family residential properties meeting a ratio of 10 times the length of the riparian shoreline. ***(Chapter 2013-92, Laws of Florida.)***

Board of Adjustment—Agricultural Lands: CS/HB 1193 by Representative Beshears eliminates the authority of a county or a board of adjustment to reclassify agricultural lands on its own initiative. The legislation also deletes a statutory presumption that eliminates a designation of bona fide agricultural use based upon the purchase price of real property. ***(Chapter 2013-95, Laws of Florida.)***

Limited Liability Companies: CS/CS/SB 1300 by Senator Simmons is the Business Law Section's initiative to revise the Florida Limited Liability Company Act and update its provisions consistent with the model act. ***(Chapter 2013-180, Laws of Florida.)***

Property Insurance: CS/SB 1770 by the Appropriations Committee is the comprehensive property insurance bill from the 2013 Session. Section 7 of the bill amends Sec. 627.351, F.S., and limits the amount of available coverage for personal lines residential structures available from Citizens. The new limits are effective on January 1, 2015, and condominium units or residential dwellings with a replacement cost of $900,000 or more will not be eligible for coverage; effective January 1, 2016, the coverage limit drops to $800,000; and on January 1, 2017, the coverage limits drops to $700,000. ***(Chapter 2013-60, Laws of Florida.)***

Property Taxation: SB 1830 by the Appropriations Committee provides for electronic transmission of property tax notices, tax exemption renewals, and decisions of value adjustment boards. It also eliminates annual filings for certain reductions in property taxes previously approved. ***(Chapter 2013-72, Laws of Florida.)***

National Mortgage Settlement: SB 1852 by the Appropriations Committee provides for the disposition of more than $200 million of settlement funds received from Bank of America in the consent judgment obtained by the Florida Attorney General. It allocates the use of monies for rehabilitating owner-occupied houses; assisting purchasers to acquire existing housing; and providing housing counseling and assistance with lease-purchase of existing housing. It also allocates funds to a variety of state affordable housing programs. ***(Chapter 2013-106, Laws of Florida.)***

Expert Testimony: CS/HB 7015 by Representative Metz revises the standard for expert testimony in Florida to the *Daubert* standard established by the United States Supreme Court. **(*Chapter 2013-107, Laws of Florida*.)**

Development Permitting: CS/HB 7019 by Representative Trujillo revises various permitting procedures at both the state and local level. Section 3 of the bill prohibits referendums on any development order, amendment to a local government comprehensive plan, or land use map amendment. ***(Chapter 2013-213, Laws of Florida.)***

Timeshare—Telephone Sales: CS/CS/HB 7023 by Representative Cummings is a comprehensive bill dealing with the Department of Agriculture. Section 47 of SB 1040 and Section 46 of HB 7023 require telephone sellers and sales representatives to be regulated by Part IV of Chapter 501. ***(Chapter 2013-251, Laws of Florida.)***

Mandatory Homeowners Associations: CS/HB 7119 by Representative La Rosa makes revisions to Ch. 720, F.S., that permits records to be copied by photograph or other electronic means; sets limits on costs that an association may charge for copying records; mandates new reporting responsibilities by community managers and homeowners associations; requires the certification of newly elected board members; and imposes new disclosure and bonding requirements on board members in certain circumstances. **(*Chapter 2013-218, Laws of Florida*.)**.

Tiara: A Sea of Change or Barely a Ripple?

By Manuel Farach, Richman Greer, P.A., West Palm Beach, FL, and Sanjay Kurian, Becker & Poliakoff, P.A., Ft. Myers, FL

The Florida Supreme Court's recent decision in *Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013), held that Florida's Economic Loss Rule ("Rule") applied only in products liability cases and receded from all inconsistent prior holdings. This follows the Court's recent trend in trying to limit the scope of the Rule.[1] The decision will affect the way in which real estate lawyers view their practices.

History of the Rule in Florida

The Rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. Typically, such economic losses include the costs of repair and replacement of the defective product or consequential loss of profits in the absence of any claim of personal injury or damage to other property. Originally, the Rule appeared in both state and federal courts in products liability type cases in response to attempts to apply tort remedies to traditional contract law damages.[2] Despite being grounded in the products liability context, the Rule was also applied to circumstances where the parties were in contractual privity and one party sought to recover tort damages for contractual matters.[3] The Rule has been described as "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others."

The first Florida Supreme Court ("Supreme Court") case to apply the Rule was *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla.1987). The Rule in products liability contexts developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law.[4] In *Florida Power*, the Supreme Court adopted the products liability Economic Loss Rule, precluding recovery of economic damages in tort where there is no property damage or personal injury.

In that case, Florida Power & Light ("FPL") entered into contracts with Westinghouse in which Westinghouse agreed to design, manufacture, and furnish two nuclear steam supply systems, which included six steam generators. FPL discovered leaks in all six generators. FPL brought suit, alleging that Westinghouse was liable for breach of express warranties in arising out of the contracts and for negligence, and sought damages for the cost of repair, revision, and inspection of the steam generators. The Court concluded that warranty law was more appropriate than tort law for resolving economic losses in this context, and held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself."[5] The Court concluded that warranty law was more appropriate than tort law for resolving economic losses where nuclear generators were faulty but damaged only themselves.

A few months after deciding *Florida Power*, the Supreme Court applied the Rule in the contractual context in *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So. 2d 180 (Fla. 1987). In *AFM*, AFM entered into an agreement with Southern Bell to advertise in the yellow pages. A series of errors resulted in AFM's telephone number being disconnected or improperly directed to other Southern Bell customers. The Court extended the Rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional service context.

Subsequent to *AFM* the Supreme Court decided *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996). In *HTP*, the Supreme Court reviewed the *AFM* decision and stated that the "Economic Loss Rule has not eliminated causes of action based upon torts independent of the contractual breach even though there exists a breach of contract action. Where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from acts that breached the contract."[6]

After the *AFM* and *HTP* decisions, the Supreme Court then began to attempt to limit the application of the Rule, beginning with *Moransais v. Heathman*.[7] The *Moransais* case was the first case where the Supreme Court looked at the landscape created by the Rule and began to move away from a broad application of the Rule. The Supreme Court permitted a claim of negligence against an engineering professional and stated that the Rule was "primarily intended to limit actions in the product liability context and its application should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis."

The Supreme Court in *Indemnity Insurance v. American Aviation, Inc.*[8] limited the Rule to situations where: (1) the parties were in contractual privity; or (2) the manufacture of a defective product that damages only itself, with the application of several established exceptions, such as claims for professional negligence, fraudulent inducement or negligent representation. The Supreme Court explained in great detail the two categories when the Rule would apply. However, the Supreme Court also stated that the exceptions which it had created to the Rule remained untouched. These exceptions included the "other property" exception in the products liability context and professional malpractice, fraudulent inducement, negligent misrepresentation, or free-standing statutory causes of action in the contractual privity context.[9]

The *Tiara* Decision

In *Tiara*, the condominium association (the "Association") retained Marsh & McLennan as its insurance broker to se-

cure condominium insurance coverage. The broker secured windstorm coverage through Citizens Property Insurance, which issued a policy that contained a loss limit of approximately $50 million. In September 2004, the condominium sustained significant damage from hurricanes Frances and Jeanne. The Association was assured by the broker that the loss limits coverage was "per occurrence" (meaning almost $100 million in coverage as opposed to half of that amount if it was in the aggregate). The Association proceeded with the remediation. However, Citizens claimed that the loss limit was $50 million in the aggregate, not per occurrence. Eventually, the Association and Citizens settled for approximately $89 million, which was less than the more than $100 million spent by the Association. In October 2007, the Association filed suit against Marsh, alleging (1) breach of contract, (2) negligent misrepresentation, (3) breach of the implied covenant of good faith and fair dealing, (4) negligence, and (5) breach of fiduciary duty. The trial court granted summary judgment in favor of Marsh on all claims and *Tiara* appealed to the Eleventh Circuit.

The appeals court concluded that summary judgment was proper as to all counts except the negligence and breach of fiduciary duty claims. As to these two claims, the Eleventh Circuit Court of Appeal certified a question to the Supreme Court:

> DOES AN INSURANCE BROKER PROVIDE A "PROFESSIONAL SERVICE" SUCH THAT THE INSURANCE BROKER IS UNABLE TO SUCCESSFULLY ASSERT THE ECONOMIC LOSS RULE AS A BAR TO TORT CLAIMS SEEKING ECONOMIC DAMAGES THAT ARISE FROM THE CONTRACTUAL RELATIONSHIP BETWEEN THE INSURANCE BROKER AND THE INSURED?

The Supreme Court, stating that the certified question was premised on the continuing applicability of the Rule in cases involving contractual privity, rephrased the certified question as follows:

> DOES THE ECONOMIC LOSS RULE BAR AN INSURED'S SUIT AGAINST AN INSURANCE BROKER WHERE THE PARTIES ARE IN CONTRACTUAL PRIVITY WITH ONE ANOTHER AND THE DAMAGES SOUGHT ARE SOLELY FOR ECONOMIC LOSSES?

In answering the rephrased certified question, the Supreme Court noted its experience with the Rule over time and the need to create exceptions to the Rule demonstrated that expansion of the Rule beyond its origins "was unwise and unworkable in practice, [and] . . . today we return the Economic Loss Rule to its origin in products liability."[10]

Negligence in Economic Situations After *Tiara*

A. What is Negligence?

Negligence applies a general community standard to conduct, while contract law applies a privately agreed upon standard to conduct. The Florida Supreme Court Standard Jury Instruction for each is telling:

> 401.4 NEGLIGENCE
>
> Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

continued, next page

Kozyak Minority Mentoring Picnic – Save the Date



The Tenth Annual Minority Mentoring Picnic will be held on November 9, 2013 at Amelia Earhart Park located at 401 E. 65th St., Hialeah, FL 33014. Come and meet distinguished members of the community, bar leaders and most importantly, young attorneys and law students who need mentors. As usual the RPPTL Section will be sponsoring the event with another tent this year.

There is always a feast every year with delicious free food and drinks. Bring your family, including the four-legged kind because the park is pet friendly. For more information on the picnic, visit *www.kmmfoundation.org*.

RPPTL Section members who would like to help at the Section tent can do so by contacting Hung V. Nguyen at 305-441-8900 or via email at *hnguyen@welbaum.com*. See you there!

> Now compare the negligence jury instruction with the instruction for breach of contract:
>
> 416.3 CONTRACT FORMATION — ESSENTIAL FACTUAL ELEMENTS
>
> (Claimant) claims that the parties entered into a contract. To prove that a contract was created, (claimant) must prove all of the following:
>
> 1. The essential contract terms were clear enough that the parties could understand what each was required to do;
>
> 2. The parties agreed to give each other something of value. [A promise to do something or not to do something may have value]; and
>
> 3. The parties agreed to the essential terms of the contract. When you examine whether the parties agreed to the essential terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. The making of a contract depends only on what the parties said or did. You may not consider the parties' thoughts or unspoken intentions.

In other words, negligence analysis takes the decision-making power out of hands of the contracting parties and has a jury determine the proper standard of care for a particular act.[11] By contrast, parties to a contract are held to the standard of care set forth in the contract. Under a contractual approach, generalized principles such as "good faith" do not apply to non-contractual terms and cannot be used to override contractual terms.[12]

B. Justice Pariente's Concurrence

Justice Labarga's opinion in *Tiara* is clear: the Rule does not apply outside of the products liability context.[13] Justice Pariente's concurrence, in which Justice Labarga joined, is more nuanced. For example, Justice Pariente states the *Tiara* decision does not upset traditional contract principles: "Our decision is neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles. To the contrary, the majority merely clarifies that the Economic Loss Rule was always intended to apply only to products liability cases."[14] Justice Pariente further states:

> The majority's conclusion that the Economic Loss Rule is limited to the products liability context does not undermine Florida's contract law or provide for an expansion in viable tort claims. Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and, contrary to the assertions raised in dissent, our clarification of the Economic Loss Rule's applicability does nothing to alter these common law concepts. For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim. . . (citations omitted)."

The gist of reading the majority and concurring opinions together is that the Rule no longer applies in contract (i.e., non-products liability) cases, but traditional contract principles, including the principle that a party cannot use tort to contract damages, still apply. We know that *Moransais v. Heathman* holds that professionals such as lawyers may be liable for both contract and negligence liability, but what effect does the *Tiara* decision have on those types of situations that confront a typical real estate lawyer?

Selected Real Estate Actions After *Tiara*

A. Closings

The first question that comes to mind is what effect will the *Tiara* decision have on real estate closings, which is a large portion of the practice of many lawyers. The concern is, of course, whether a "community standard" will now apply to vary the obligations of the real estate contract, and especially, the closing requirements of the contract. Although it is too early to tell, it appears that *Tiara* will have little effect.

Recall that real estate transactions are subject to the Statute of Frauds, and Statute of Frauds contracts can only be varied by a writing signed by the party to be charged.[15] What about oral agreements; can they modify closing requirements based on community standards? The Supreme Court recently answered the question in the negative in *DK Arena, Inc. v. EB Acquisitions I, LLC*.[16] Presumably, *Tiara* cannot be read to overrule a decision that the same court issued just a few months earlier, and as a result, practitioners are probably secure in relying on written contracts for closings.

B. Leases

Leases can also be subject to the Statute of Frauds, as illustrated by Sec. 725.01, F.S.:

> Promise to pay another's debt, etc.—No action shall be brought whereby to charge any . . . for any lease thereof for a period longer than 1 year . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

Case law is clear that modification of leases is also governed by the Statute of Frauds, so practitioners are also safe relying on written leases.[17]

C. Quiet Title

Based on case law, there does not appear to be a community standard that is applied in quiet title actions. Specifically:

> A complaint to quiet title must allege plaintiff's title to

the property in controversy, must show how plaintiff obtained title and the chain of title, must show the alleged cloud or defect on title and the basis upon which defendant claims an interest in or claims the title, and why defendant's claim is not well founded.[18]

This cause of action is based on record title, and thus, it does not appear that a community standard would apply to a quiet title action.

D. Ejectment

The Supreme Court has promulgated an approved form of complaint for ejectment, which form is found at Florida Rules of Civil Procedure Form 1.940. This form reads:

Plaintiff, A. B., sues defendant, C. D., and alleges:

1. This is an action to recover possession of real property in County, Florida.

2. Defendant is in possession of the following real property in the county:

(describe property)

to which plaintiff claims title as shown by the attached statement of plaintiff's chain of title.

3. Defendant refuses to deliver possession of the property to plaintiff or pay plaintiff the profits from it.

WHEREFORE plaintiff demands judgment for possession of the property and damages against defendant.

Again, it is difficult to see how a community standard would apply to the factual question of whether a party, who has no legal ownership, is claiming possession. Presumably, no community standard would apply in this situation.

E. Slander of Title

Slander or disparagement of title generally follows the same legal principles as defamation.[19] As demonstrated by the standard jury instruction on defamation, a community standard has always applied to defamation:

Florida Standard Civil Jury Instruction 405.2

The claims [and defenses] in this case are as follows. (Claimant) claims that (Defendant) [made] [published] [broadcast] a false statement about [him] [her] [it] which caused [him] [her] [it] harm. (Claimant) claims the statement was (identify the alleged defamatory statement and its alleged defamatory meaning).

Accordingly, *Tiara* does not affect this cause of action and a community standard will still apply.

F. Partition

Partition is a former common-law action that has been codified into Chapter 64 of the Florida Statutes. A review of the statute demonstrates that a community standard would probably not apply:

64.041 Complaint.—The complaint shall allege a description of the lands of which partition is demanded, the names and places of residence of the owners, joint tenants, tenants in common, coparceners, or other persons interested in the lands according to the best knowledge and belief of plaintiff, the quantity held by each, and such other matters, if any, as are necessary to enable the court to adjudicate the rights and interests of the party. If the names, residence or quantity of interest of any owner or claimant is unknown to plaintiff, this shall be stated. If the name is unknown, the action may proceed as though such unknown persons were named in the complaint.

G. Foreclosure

Like closings of purchase and sale contracts, it appears that foreclosures would be ripe for the application of a community standard to the action. Also like closings, certain principles call into question how much effect *Tiara* will have on foreclosures. Keeping in mind that foreclosures are merely enforcement of existing contracts, and that Justice Pariente's concurrence states that traditional contract principles have not changed, it does not appear this area of law will be greatly affected. Specifically, courts enforce the contract terms as written in the note and mortgage unless a fraud or misrepresentation can be proven. An example of this is found in the 4th DCA opinion of *Vidal v. Liquidation Props., Inc.,* 104 So.3d 1274 (Fla. 4th DCA 2013), in which both the borrower and the lender alleged fraud in the negotiations.[20] Responding to the allegations, the court stated that, "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him" and, "A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract."[21] Based on this reasoning, it seems unlikely that a *Tiara*-type "community standard" would be applicable.

continued, next page

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H. Breach of Contract

Breach of contract situations not governed by the Statute of Frauds present the most uncertain area of post-*Tiara* application of the Rule. Granted, Justice Pariente re-affirms existing contract principles but the cause of action itself and the manner in which the cause of action is proven leads to a murky forecast of future effects. The applicable contract jury instruction reads:

> Florida Standard Jury Instruction Contracts 416.4
>
> BREACH OF CONTRACT – ESSENTIAL FACTUAL ELEMENTS
>
> To recover damages from (defendant) for breach of contract, (claimant) must prove all of the following:
>
> 1. (Claimant) and (defendant) entered into a contract;
> 2. (Claimant) did all, or substantially all, of the essential things which the contract required [him] [her] [it] to do [or that [he] [she] [it] was excused from doing those things];
> 3. [All conditions required by the contract for (defendant's) performance had occurred;]
> 4. [(Defendant) failed to do something essential which the contract required [him] [her] [it] to do] [(Defendant) did something which the contract prohibited [him] [her] [it] from doing and that prohibition was essential to the contract]; and
> 5. (Claimant) was harmed by that failure.

Specifically, what is "essential" to a contract is a question to which community standards may apply notwithstanding Justice Pariente's statement that the Independent Tort Doctrine removes negligence from most contractual disputes.[22] Thus, community standards may become a standard by which non statute of frauds contracts are interpreted.

Responses to *Tiara*

So how does a real estate practitioner react to *Tiara*? Here are three courses of action to consider.

A. Waiver of Jury Trial

The unease practitioners suffer arises not so much from the decision, but from a belief that juries will not understand and will not apply contract principles. The easiest way to allay such a concern is to include a jury waiver in contracts. Jury waivers are enforceable if they are conspicuous and voluntary.[23] A typical waiver may read as follows:

> Waiver of Jury Trial. THE UNDERSIGNED WAIVES THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING ARISING OUT OR RELATED TO ANY ASPECT OF THE TRANSACTION IN CONNECTION WITH WHICH THIS DOCUMENT IS BEING GIVEN OR ANY DOCUMENT EXECUTED OR DELIVERED IN CONNECTION WITH SUCH TRANSACTION. THIS WAIVER IS KNOWINGLY, INTENTIONALLY AND VOLUNTARILY MADE BY THE UNDERSIGNED AND THE UNDERSIGNED ACKNOWLEDGES THAT NO ONE HAS MADE ANY REPRESENTATIONS OF FACT TO INDUCE THIS WAIVER OF TRIAL BY JURY OR IN ANY WAY TO MODIFY OR NULLIFY ITS EFFECT. THE UNDERSIGNED FURTHER ACKNOWLEDGES HAVING BEEN REPRESENTED IN CONNECTION WITH THE TRANSACTION WITH RESPECT TO WHICH THIS DOCUMENT IS BEING GIVEN AND IN THE MAKING OF THIS WAIVER BY INDEPENDENT LEGAL COUNSEL, SELECTED BY THE UNDERSIGNEDS' OWN FREE WILL, AND THAT THE UNDERSIGNED HAS HAD THE OPPORTUNITY TO DISCUSS THIS WAIVER WITH SUCH COUNSEL. THE UNDERSIGNED FURTHER ACKNOWLEDGES HAVING READ AND UNDERSTOOD THE MEANING AND RAMIFICATIONS OF THIS WAIVER PROVISION.

B. Limitation of Remedies

At the outset, practitioners should note the misconception of many that contracts require "mutuality of remedy" in order to be enforceable. Contracts require mutuality of obligation, i.e., consideration, but not mutuality of remedy:

> The Buyers correctly note that the contracts' remedial limitations favor the Developer. However, the Buyers led the circuit court into error by approaching the difference in the remedies available to the contracting parties as an issue relating to mutuality of obligation instead of mutuality of remedy. As this court has previously observed, "[m]utuality of obligation is sometimes confused with mutuality of remedy. Obligation pertains to the consideration while remedy pertains to the means of enforcement. Mutual obligation is essential, but the means of enforcement may differ without necessarily affecting the reciprocal obligations of the parties."[24]

Thus, contracts can be drafted to provide for different remedies of the parties, and presumably can be drafted to waive any tort or non-contractual remedies.

C. Contractually Compensate for Increased Risk

The final approach a practitioner may want to employ is a discussion with their client that the area of contract law has changed and has become less clear. Armed with that information, clients can make a decision as to how to allocate risk in their contracts and whether they wish to adjust contract pricing in order to take into account the possibility of "contractual negligence" lawsuits.

Conclusion

It is too early to tell whether every breach of contract claim will now give rise to a negligence claim as well. Although the majority opinion in *Tiara* does not specifically address this issue, the concurrence by Justice Pariente and the

dissents by Chief Justice Polston and Justice Canady reflect the Supreme Court has differing views on the topic.

Do we now, as stated by Justice Canady, "face the prospect of every breach of contract claim being accompanied by a tort claim" or the possibility that contract law will "drown … in a sea of tort",[25] or does Justice Pariente's opinion that "[b]asic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies"[26] mean that contract law will survive *Tiara* without much change? Only time will tell.


M. FARACH

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Endnotes:

1 See Moransais v. Heathman, 744 So.2d 973 (Fla. 1999); Indemnity Insurance v. American Aviation, Inc., 891 So.2d 532 (Fla. 2004).

2 *Tiara,* 110 So.3d at 401.

3 Id.

4 *See Id.* (Fla.1987) (relying on *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965)).

5 Seely

6 *Id.* at 1239.

7 744 So.2d 973 (Fla. 1999).

8 891 So.2d 532 (Fla. 2004).

9 *Am. Aviation*, 891 So.2d at 543.

10 *Tiara,* 110 So.3d at 407.

11 *Adamo v. Manatee Condominium, Inc.,* 548 So.2d 287 (Fla. 3d DCA 1989) ("The Florida Appellate (sic) decisions generally pertain to the use of OSHA regulations as the 'community standard,' when the plaintiff is an injured worker who brings a negligence suit sounding in tort for recovery against a property owner, or third party not protected by worker's tort immunity.").

12 *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 896 So.2d 787, 792 (Fla. 2d DCA 2005); *City of Riviera Beach v. John's Towing*, 691 So.2d 519, 521 (Fla. 4th DCA 1997).

13 *Tiara*, 110 So.3d at 399.

14 *Tiara*, 110 So.3d at 408.

15 *Wharfside at Boca Pointe, Inc. v. Superior Bank*, 741 So.2d 542, 545 (Fla. 4th DCA 1999) ("[An] agreement that is required by the statute of frauds to be in writing cannot be orally modified.").

16 112 So.3d 85 (Fla. 2013).

17 *Berdick v. Costilla*, 97 So.3d 316, 318 (Fla. 2d DCA 2012) ("Pursuant to section 689.01, Florida Statutes [(2010)], an assignment or sublease for a lease with a term of more than one year must be in writing and signed by the party to be bound with two subscribing witnesses.")

18 Manuel Farach, 19 Florida Real Estate 483.

19 *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So.2d 204 (Fla. 4th DCA 2002).

20 Boiled to its essence, the first fraud claim says that the lender falsely inflated the Vidals' income in the loan application that they signed to get the loan; had the lender taken steps to verify their income then the exaggerated income would have been revealed. Of course, the Vidals want damages caused by the lender's treachery. The Vidals were obviously in a position to know their own income. Signing off on their own fraudulent loan application precludes them from raising this fraud as an affirmative defense. "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him."

The second claim of "fraud" is that the lender orally misrepresented the loan to be a fixed rate loan. However, the note and other documents the Vidals signed at the closing plainly indicate that the note had an adjustable rate. "A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract."

21 *Vidal* at 1278.

22 *Tiara*, 110 So.3d at 408 ("For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim.")

23 *Vista Centre Venture v. Unlike Anything, Inc.,* 603 So.2d 576, 578 (Fla. 5th DCA 1992).

24 *Redington Grand, LLP v. Level 10 Properties, LLC*, 22 So.3d 604, 608 (Fla. 2d DCA 2009).

25 *Tiara,* 110 So.3d at 414 (Canady, J., dissenting).

26 *Tiara,* 110 So.3d at 408 (Pariente, J., concurring),

Summary of 2013 Florida Laws Impacting Condominiums, Homeowners' Associations and Cooperatives

By Steven H. Mezer, Bush Ross, P.A., Tampa, Florida, and Christopher N. Davies, Cohen & Grigsby, P.C., Naples, Florida on behalf of the Condominium & Planned Development Committee

The 2013 Florida legislature passed two bills impacting the development and operation of condominiums, homeowners' associations, and cooperatives. The bulk of the changes are set forth in CS/CS/HB 73, now known as Chapter 2013-188, Laws of Florida, while CS/HB 7119, now known as Chapter 2013-218, Laws of Florida, is shorter and focuses primarily upon homeowners' associations. The effective date of both was July 1, 2013.

In addition, the RPPTL Section's Condominium and Planned Development Committee suggested a series of changes that would dovetail with the recording of a declaration of condominium prior to entering into a purchase contract. There were also changes addressing the application of the Federal Interstate Land Sales Disclosure Act to the sale of Florida condominiums. The changes were incorporated into CS/CS/SB 120, now known as Chapter 2013-122, Laws of Florida, and signed into law by Governor Scott on June 6, 2013, effective as of such date.

The following is a summary of relevant changes; it is not intended to be either a comprehensive overview or to include every revision.

Elections and Recalls

Condominium Associations, Homeowners' Associations, and Cooperatives

- **Election challenges.** Any challenge to the election process must be commenced within 60 days after the election results are announced.

Homeowners' Associations

- **Nominations.** A homeowners' association is not required to allow for nominations from the floor if the election process in the governing documents provides for nominations prior to the meeting. An election is not required unless the number of candidates exceeds the number of vacancies.
- **Members' representation.** In a homeowners' association, members other than the developer are entitled to elect at least one director, if 50 percent of the parcels in all phases of the community which will ultimately be operated by the association have been conveyed to members.

Condominium Associations

- **Director terms.** Two year terms for condominium association directors may be authorized by an association's Articles of Incorporation, in addition to the By-Laws.
- **Delinquent unit owners.** A person who is delinquent in paying any monetary obligation due to the association is not eligible to run for the Board and may not be on an election ballot.

Recall of Board Members

This legislation clarifies the procedures for condominium associations, homeowners' associations, and cooperative ownership communities regarding the recall of Board members:

- **Unit owner may submit Department of Business and Professional Regulation ("DBPR") petition.** If the Board fails to duly notice and hold a Board meeting within 5 full business days after service of the written agreement by a majority of all voting interests, or after the adjournment of the unit owner recall meeting, the recall is deemed effective and the owners' designated representative may file a petition challenging the Board's failure to act. It must be filed within 60 days after the Board's 5-day window to act has expired. Any DBPR review will be limited to proper service on the Board and the facial validity of the written notice or ballots filed.
- **Challenge by recalled Board member.** Any Board member who has been recalled may file a petition to challenge the validity of the recall with the DBPR. The challenge must be filed within 60 days after the recall is deemed certified.
- **DBPR timelines.** The DBPR may not accept a recall: (1) 60 days prior to a scheduled election of that Board member or (2) fewer than 60 days have elapsed since the election of that Board member.

Bylaws and Meetings

Homeowners' Associations

- **Owners have the right to speak at meetings.** An owner has the right to speak for at least 3 minutes on any item at a meeting. Submitting a written request to speak prior to the meeting is no longer required.
- **Transfer of control.** The time frames for transfer of control of a homeowners' association have been modified to be similar to the requirements for condominium associations. In addition to the existing 90 percent threshold or when the developer decides to transfer control earlier, turnover is now triggered when (1) the developer abandons its responsibility to complete amenities or infrastructure (with there being a rebuttable presump-

tion that 2 years of non-payment of assessments by the developer constitutes abandonment), (2) the developer files a Chapter 7 bankruptcy petition, (3) the developer loses the property through foreclosure or deed in lieu of foreclosure, unless the successor owner has accepted an assignment of developer rights and responsibilities first arising after the date of assignment, or (4) a receiver is appointed for the developer and such receiver is not discharged within 30 days, unless the court determines within 30 days after the appointment that receiver control would be detrimental to the association or its members.

- **Directors' conflict.** Contracts with a director or an entity in which an association officer or director has an interest must comply with the requirements of Sec. 617.0832, F.S., which addresses disclosure and approval requirements. Approval requires 2/3 of the directors present to be documented in the minutes, and at the next meeting of the members, the transaction must be disclosed and may be cancelled by a majority vote of the members present.
- **Directors' solicitation.** Officers, directors and managers may not solicit or accept any good or service of value from current or potential vendors, except for limited consumption of food, service or goods at trade fairs, or education programs.
- **Directors' suspension.** If charged with embezzlement or felony theft of association funds or association property, an officer or director is suspended from office.
- **Board certification.** Within 90 days of being elected, a new Board member must either (1) submit a written certification that attests to specifically enumerated items or (2) submit a certificate of having completed the educational curriculum as provided for by the DBPR. If a Board member fails to submit the certification, the Board member is suspended from the Board until the Board member complies, and the Board may temporarily fill the vacancy.
- **A Board member's certification must be held for the duration of the Board member's term (if the term exceeds 5 years).** The Board secretary shall retain a Board member's written certification or education certificate for inspection for the longer of: (1) 5 years after that Board member's election or (2) for the duration of the Board member's uninterrupted tenure, whichever is longer. However, failure to retain the certification does not affect the validity of any Board action.

Condominium Associations

- **Broadcast notice of Board meetings.** Broadcast notice may be used in lieu of notice posted physically on the condominium property.
- **A Board member's certification must be held for the duration of the Board member's term (if the term**

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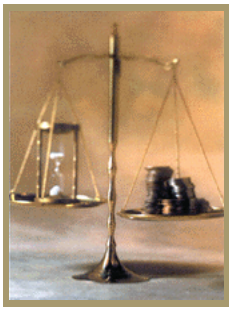
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Cooperatives

- **Board certification.** Within 90 days of being elected, a new Board member must either (1) submit a written certification that attests to specifically enumerated items or (2) submit a certificate of having completed the educational curriculum as provided for by the DBPR. If a Board member fails to submit the certification, the Board member is suspended from the Board until the Board member complies, and the Board may temporarily fill the vacancy. This addition is substantially similar to and brings cooperatives in line with the existing condominium and new homeowners' association Board certification requirements.
- **A Board member's certification must be held for the duration of the Board member's term (if the term exceeds 5 years).** The Board secretary shall retain a Board member's written certification or education certificate for inspection for the longer of: (1) 5 years after that Board member's election or (2) for the duration of the Board member's uninterrupted tenure, whichever is longer. However, failure to retain the certification does not affect the validity of any Board action.
- **Board or committee meetings for the purpose of discussing personnel matters.** Board and committee meetings may be closed to unit owners when the purpose of the meeting is discussing personnel matters.

Financial Reporting

Condominium Associations and Homeowners' Associations

In both condominium and homeowners' associations, the Legislature has raised the thresholds for what type of financial statements must be prepared:

- An association with total annual revenues of $150,000 or more, but less than $300,000, shall prepare compiled financial statements.
- An association with total annual revenues of $300,000 or more, but less than $500,000, shall prepare reviewed financial statements.
- An association with total annual revenues of $500,000 or more shall prepare audited financial statements.
- An association with total annual revenues less than $150,000 shall prepare a report of cash receipts and expenditures.

Condominium Associations

- **50 unit condominiums submit financial statements.** The threshold was lowered from 75 units to 50 units. Associations that operate fewer than 50 units must prepare a report of cash receipts and expenditures in lieu of financial statements. Condominiums with 50 or more units must now submit financial statements as required by Sec. 718.111(13)(a), F.S.

Bonding/Reserves

Homeowners' Associations

- **Bonding.** Homeowners' associations are required to maintain insurance or fidelity bonding on all persons who control or disburse association funds, unless waived by a vote of the membership.
- **Reserve accounts.** Any reserve account established by the developer must be designated in the budget.

Homeowners' Association Assessment Liability

A homeowners' association which owns a parcel is excluded from the definition of "previous owner" and, therefore, is not jointly and severally liable with the new owner for delinquent assessments.

Hurricane Protection

Condominium Associations

- **Hurricane protection expanded.** Sec. 718.113(5)(a)-(d), F.S., expands the authorized hurricane protection improvements that are permitted in a condominium by adding code-compliant windows and doors, impact glass, and other types of code-compliant hurricane protection improvements.
- **Costs for hurricane protection shall be a common expense.** Sec. 718.115(1)(e), F.S., conforms the common expense definition to include expenses for code-compliant windows and doors, impact glass, and other types of code-compliant hurricane protection improvements in a condominium.
- **Credits for previously installed shutters, windows, and doors.** The qualifications for receiving a credit for previously installed hurricane shutters have been amended. Specifically, laminated glass designed to function as hurricane protection is no longer the standard for receiving a credit for previously installed hurricane shutters. Under the amended language, owners receive a credit for hurricane shutters that comply with the current applicable building code provisions when the shutters are installed. Sec. 718.115(1)(e), F.S., also provides owners with additional credits for code-compliant windows and doors previously installed by the owners.

Official Records

Condominium Associations, Homeowners' Associations, and Cooperatives

- **Smartphones, tablets, and other portable devices.** Condominium associations, homeowners' associations, and cooperatives must allow the use of portable devices (i.e. smartphone, tablet, portable scanner, camera) to make electronic copies of official records in lieu of the association's production of said documents. Furthermore, the amended language forbids the association from charging the member or its representative for the use of portable devices.
- **Permitted information contained in association directories.** An association may distribute directories to owners containing the name, parcel address, and telephone number of each owner. Owners wishing to exclude their telephone number from the directory may do so by making a written request to the association. Note that there is a conflict in the language between CS/CS/HB 73 and CS/HB 7119. CS/HB 7119 continues to provide that addresses and telephone numbers (among other identifying information) are not subject to inspection or copying and does not contain the exception for a directory or the opt out provision for owners to prevent the publication of their telephone numbers. Homeowners' associations should obtain consent from each member before publishing a directory containing addresses and telephone numbers. This conflict will have to be addressed by the Division of Statutory Revision.

Cooperatives

- **Information not accessible to owners.** Sec. 719.104(2)(b), F.S., is amended to conform the Cooperative Act to identify information relating to an owner's identity as previously included in the 2011 Condominium Act.

Suspension of Use Rights

Condominium Associations, Homeowners' Associations, and Cooperatives

In condominium associations and cooperatives, the Legislature has clarified that an owner, tenant, guest, or invitee, suspended by the association for failure to comply with any provision of the declaration, bylaws, or reasonable rules may still be entitled to access: (1) limited common elements intended to be used only by that lot or unit, (2) common elements necessary to access that lot or unit, (3) utility services provided to that lot or unit, and (4) parking spaces and elevators, if applicable.

- For homeowners' associations, the Legislature has clarified that an association may not suspend an owner's or tenant's right to that portion of common areas used to provide access or utility services to the parcel or to impair vehicular or pedestrian ingress or egress from the parcel, including the right to park.

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Amendments of Cooperative and Homeowners' Association Documents

- **Mortgagee consent not required.** Regarding mortgages recorded after July 1, 2013, if the cooperative's or homeowners' association's documents require consent or joinder of some or all mortgagees to amend the cooperative or homeowners' association documents, it is enforceable only as to amendments that adversely affect priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien, or interests of the mortgagees. With regard to mortgages recorded before July 1, 2013, existing provisions in the cooperative's and homeowners' association's documents that require mortgagee consent are enforceable. Any amendment adopted without required consent of a mortgagee is voidable by the mortgagee who was entitled to notice and an opportunity to consent, subject to a 5-year statute of limitations. The remaining sections specify how notice should be given to mortgagees and the finding that a mortgagee's failure to respond is deemed to be consent.
- **Copies of amendments.** The homeowners' association is required to provide members with a copy of each recorded amendment to the governing documents within 30 days of the amendment.
- **Developer amendments.** Prior to transfer of control of a homeowners' association, unilateral amendments by the developer are subject to a test of reasonableness, which test prohibits unilateral amendments by the developer which are (1) arbitrary, capricious, or in bad faith; (2) destroy the general plan of development; (3) prejudice the rights of existing non-developer members to use and enjoy the benefits of common property; or (4) materially shift economic burdens from the developer to the existing non-developer members.

DBPR

Homeowners' Associations

- **Homeowners' associations reporting.** By November 22, 2013, each community association manager or management firm (or the homeowners' association, if no manager has been employed) must file a report that contains the association's legal name, physical and mailing addresses, FEIN, total number of governed parcels, and total amount of revenues and expenses from the association's annual budget, in the manner prescribed by the DBPR. If the association is still under developer control, the report must also identify the name and address of the developer and the total number of parcels then owned by the developer. DBPR is required to establish an Internet registration website for the submittal of the required information. The DBPR is required to provide a summary report to the Legislature of the registrations by December 1, 2013. The statute is slated to sunset on July 1, 2016.

Licensed Community Association Managers

- **Community association managers' compliance.** Disciplinary action may be taken against a licensed community association manager for violating any provision of Chapter 718, 719, or 720 F.S. during the course of performing community association management services pursuant to a contract with a community association.

Condominium Insurance

The condominium association may now undertake reconstruction, repair, or replacement work that is the result of damage from an insurable event, for which (1) the unit owner was required to carry property insurance, (2) the unit owner caused the damage through intentional conduct, negligence, or failure to comply with the declaration or association rules, and (3)(a) if the damage was known or should have been known to the unit owner and (b) was not reported to the association until after the insurance claim was settled or resolved with finality, or denied because it was untimely filed. Moreover, the association may collect such funds from the unit owner in the same manner provided for the collection of assessments.

Elevators and Escalators

Implementation of Phase II Firefighters' Service is not required unless or until the elevator or escalator is replaced or requires modification as opposed to requiring such implementation by July 1, 2015, which was the date prior to the change in the law.

Interstate Land Sales Full Disclosure Act

The changes incorporated into CS/CS/SB 120, now known as Chapter 2013-122, Laws of Florida, are as follows:

- **Financial reporting requirements.** Financial reporting requirements for condominium associations may be waived by a majority vote of all unit owners, including the developer, from the date of incorporation through the end of the second fiscal year after the year of recording of the surveyor's certificate of substantial completion or the recording of a deed to a unit that is not accompanied by a recorded assignment of developer's rights, whichever occurs first. Formerly, these financial reporting requirements were tied to the date of recording of the declaration of condominium, thereby requiring unnecessary filings and expense for developers of having to record the declaration of condominium prior to taking contracts.
- **Waiver of reserves.** The developer's votes may be included in any vote for the waiver of collection of reserves prior to developer transfer of control through the end of the second fiscal year after the year of recording of the surveyor's certificate of substantial completion or the recording of a deed to a unit that is not accompanied by

a recorded assignment of developer's rights, whichever occurs first. Formerly, the ability of the developer to cast its votes in this regard was tied to the date of recording of the declaration of condominium, meaning that, with the third year, the developer would not be entitled to vote to waive the collection of reserves (even if the developer owned all of the units in the condominium), thereby requiring the developer to fully fund reserves for improvements that were not even complete.

- **Transfer of control.** The final trigger for transfer of control has been modified to be 7 years after the date of recording of the surveyor's certificate of substantial completion or the recording of a deed to a unit that is not accompanied by a recorded assignment of developer's rights, whichever occurs first. Formerly, the 7-year time clock was tied to the date of recording of the declaration of condominium. Under the prior statutory provision, if a developer recorded a declaration of condominium to meet the ILSFDA requirement but construction took 3 years to lead to the first closing, the developer would only have a 4-year period to control the condominium association, thereby prejudicing the developer's ability to ensure proper operation during the period of sales after completion of construction.
- **Turnover records.** Turnover records to be provided by a developer upon transfer now include a copy of the surveyor's certificate of substantial completion or the recorded instrument that transfers title to a unit that is not accompanied by a recorded assignment of developer's rights, whichever occurs first.
- **Omission or error in amendment of declaration.** An action to determine compliance with the requirements for proper formation of a condominium must now be brought within 3 years of the recording of the surveyor's certificate of substantial completion or the recording of a deed to a unit that is not accompanied by a recorded assignment of developer's rights, whichever occurs first. Formerly, the requirement to bring an action was tied to the date of recording of the declaration of condominium.
- **Acquisition of leasehold, membership, or possessory interests.** An association agreement to acquire leasehold, membership, or possessory interests which is not entered into within 12 months of the date of recording of the surveyor's certificate of substantial completion or the recording of a deed to a unit that is not accompanied by a recorded assignment of developer's rights, whichever occurs first (formerly, the date of recording of the declaration of condominium), constitutes a material alteration or substantial addition requiring a membership vote.
- **Annual budget regarding limited common elements.** If the association maintains limited common elements, with cost to be shared only by those entitled to use the limited common elements, a schedule to the budget must show the amount budgeted for the limited common elements.

Phase Condominiums

The RPPTL Section's Condominium and Planned Development Committee suggested a change to Sec. 718.403, F.S., which change was incorporated into both CS/CS/SB 120 (§ 8, Chapter 2013-122, Laws of Florida) and CS/CS/HB 73 (§ 7, Chapter 2013-188, Laws of Florida). The new provision provides that a proposed phase can be submitted to condominium ownership beyond the initial 7-year period if an amendment to the declaration of condominium (as required under Sec. 718.110, F.S.) enabling the addition of time is approved by the unit owners. The extension of the 7-year period can only be approved during the last 3 years of the 7-year period and can only permit a total of 10 years from the date of recordation to add all phases.


S. MEZER

Steven H. Mezer *is a shareholder at the law firm of Bush Ross, P.A., where he is the Practice Group Leader for Community Association law. Mr. Mezer received his B.A. from the University of Miami and his J.D. from Stetson University College of Law in. He is Board Certified in Real Estate Law and is a member of the Executive Council of the Real Property, Probate and Trust Law Section. He chairs the Condominium and Planned Unit Development Committee of the Florida Bar's RPPTL Section and is vice-chair of the Common Interest Ownership Development Committee of the ABA. Mr. Mezer served on the steering committee for Florida Condominium and Community Association Law, The Florida Bar.*


C. DAVIES

Christopher Davies *focuses his legal practice on providing advice to condominium, cooperative and homeowner associations in the Southwest Florida region with a focus in Collier and Lee Counties. Christopher is a Director at Cohen & Grigsby, P.C. and leads the condominium and homeowner association law team. He is Co-Vice Chair of the Florida Bar Condominium and Planned Development Committee and a member of the Real Property Section of The Florida Bar. Christopher is a graduate of the Tulane University School of Law, where he earned both his Juris Doctorate (J.D.) and Master of Law (LL.M.) degrees.*

Tribute To William Fletcher Belcher

By Michael A. Dribin, Esq., Miami, Florida

On July 1, 2013, William Fletcher Belcher ("Fletch") completed his year as Chair of the Real Property, Probate and Trust Law Section of The Florida Bar and assumed the coveted title of "Immediate Past Chair." Although his year as Chair was filled with great accomplishments, there was a time in Fletch's life when becoming a lawyer was anything but certain, and becoming a trusts and estates lawyer and starting down the path towards the RPPTL Chair was even more remote. Fletch's career as an attorney is a model of the important role that mentors can play in helping young attorneys develop. Fletch credits the roles of his esteemed first cousin, himself a past RPPTL Section Chair, and two other past RPPTL Section Chairs for setting in motion the events which led to his becoming Section Chair. More on that later.



Fletch's ancestors were founding pioneers of the Clearwater-Largo area of what was then "Western" Hillsborough County. His great, great grandfather, who was one of the seven McMullen brothers, arrived in the area before the Civil War and served in the Confederacy by guarding prisoners. After homesteading a 100 acre parcel on what is now known as Belcher Road, Fletch's great grandfather, State Representative William Alexander Belcher, introduced a bill in the Florida Legislature to create Pinellas County, although that initiative was not accomplished until 1911. Fletch's family has continuously lived in what is now Pinellas County since the mid-1800's. His great uncle, John S. Taylor, was a State Senator from Pinellas County.

The fact that Fletch become an attorney is in no small part the result of the influence of his first cousin, the late William S. Belcher ("Bill"). Bill was a pioneer in the trust and estate world and served as RPPTL Chair from 1976-77. His devotion to the work of the Section is recognized by the naming of the Section's Annual Professionalism Award in his memory. Fletch was encouraged to attend law school by his parents due to their tremendous admiration and respect for his cousin Bill. Fletch entered Stetson University's College of Law in 1965, clerked for Bill as a law student, and joined Bill and another pioneer Florida trusts and estates attorney, Joe Fleece ("Joe"), in 1968. That association was soon interrupted by the military draft. After a four-year stint as an Army JAG Officer and law instructor for Cadets at the U.S. Military Academy at West Point, Fletch returned to practice with Bill and Joe in 1973. In 1973, however, Fletch was a long way away from becoming the distinguished trusts and estates practitioner he ultimately became. For the first ten years, Fletch's practice focused on business and real estate litigation, including mortgage foreclosures, defense of a securities brokerage firm, and a fair amount of title insurance defense work for the late John Thornton, a highly-regarded in-house counsel and former Executive Council member.

Then, in one of those ways that can change the direction of one's career, Bill asked Fletch to handle a small will contest and to assist in the defense of an appeal concerning preference in appointment as personal representative in an intestate estate where some of the beneficiaries were half-blood siblings of the decedent. That appeal was brought by Sam Smith, another pioneer of Florida trusts and estates law who later become President of The Florida Bar. As a result of those experiences, Fletch got hooked on trust and estate litigation and has practiced exclusively in that area since the early 1980s. He opened his own practice in 1981 and had the good fortune to be joined by Angela Adams in 1988. Fletch and all those who are involved in his practice and Section activities recognize the magnitude and quality of the unselfish support and contributions that Angela has consistently provided in all of those areas. With Bill's encouragement, Fletch became active in speaking at CLE programs and in writing chapters of CLE manuals. He clearly recalls participating in his first CLE program with Bill, John Arthur Jones, Wilson Smith and Jim Weber, and speaking on the burden of proof in will contests. Three chapters of The Florida Bar publication "Litigation Under the Florida Probate Code" have been authored by Fletch: "Jointly Held Assets," "Jury Trials in Probate," and "Tortious Interference in Estate Planning." Fletch continued to work together with Bill on several cases until he passed away in 1992.

Fletch's RPPTL career was launched through his involvement with the Probate and Trust Litigation Committee, beginning in the early 1990s when Bruce Marger, then

Director of the Probate and Trust Law Division, appointed him as its Vice-Chair. At that time, the committee was small, did not meet regularly or function as a substantive committee, and its only organized activity was to produce an annual CLE program. In the late 1990s, Fletch accepted then-Director Steve Hearn's offer to appoint him as Chair of the Committee if he would agree to turn it into a working substantive committee. The first legislative project for the new Committee was to consider statutory changes to Florida law concerning the nature of the presumption of undue influence in will and trust contests. Those changes are now found in Section 733.107, Fla. Stat. From that point on, the Probate and Trust Litigation Committee was on its way to becoming one of the largest and most active committees of the RPPTL Section. As Fletch became more and more involved in the Section, he rose through the ranks of Section leadership, serving as Secretary, Treasurer, Probate and Trust Law Division Director, Chair-Elect, and Chair.

When asked to describe the most significant accomplishments during his involvement in the leadership of the Section, Fletch broke his answer into two categories: those which improved probate and trust law in Florida, and those which impacted the operation and structure of the RPPTL Section as a whole.

Over the last several years, Fletch was deeply involved in successful legislative proposals to shift the burden of proof when the presumption of undue influence has been established, to give guardians of the property the standing to challenge revocable trusts under certain limited circumstances, to overrule erroneous case law misinterpreting statutes providing for the award of attorneys' fees in surcharge actions, to codify the statute of limitations for breach of trust by trustees where there has been no disclosure, and to enhance protections for principals and fiduciary duties of agents under powers of attorney.

Fletch was also instrumental in the creation of two focused ad hoc committees, each of which proposed legislation enacted by the 2013 Florida Legislature. The first, the Section's Ad Hoc Study Committee on Jurisdiction and Service of Process, chaired by Barry Spivey, developed a new "long-arm" jurisdictional statute which will greatly clarify the law regarding the jurisdiction of Florida courts over non-Florida resident trustees and trust beneficiaries. The second ad hoc committee, the Ad Hoc Study Committee on Estate Planning Conflict of Interest, chaired by Bill Hennessey, developed legislation that would generally render void gifts to estate planning attorneys from clients for whom the attorney drafts estate planning documents, with a number of exceptions. This committee was formed in response to concerns expressed by The Florida Bar and others that current ethics prohibitions on such gifts alone do not provide sufficient economic disincentives to such conduct.

One of the most significant governance developments for the RPPTL Section in recent years was the complete rewrite of its bylaws. Fletch chaired the hard-working Bylaws Committee, consisting of Laird Lile, John Neukamm, and Marjorie Wolasky, which worked diligently on this project for several years before the new Section bylaws were completed and adopted. From Fletch's perspective, the most significant change in the new bylaws is the addition of provisions designed to protect the integrity of the Section by requiring full disclosure of potential conflicts. Those concepts have now moved forward and are being further developed with the creation of the Integrity Awareness and Coordination Committee. That important Committee is composed of five dedicated and highly-respected Section leaders: Jerry Aron, Sandy Diamond, Andy Sasso, Mike Swaine, and Gwynne Young.

In addition to the revised bylaws, Fletch also points with great satisfaction to more subtle improvements in the tools which facilitate the Section's efficient operation, including upgrades to the Executive Council agendas and revamping of the Section Directory to make them more professional, informative, and user-friendly.

Fletch's experience is a good example of how attorneys' careers and interests can be shaped and directed as the result of the caring input of mentors. His experience is also illustrative of how the impact of an RPPTL Section Chair is not only assessed by what transpires during his or her year as Chair, but also by the accumulated effect of years of experience in a variety of capacities and projects. In the same vein, Fletch has attempted to recognize, develop, and promote younger Section members who have displayed the potential to lead the Section in the right direction in the decades ahead.

At its Convention in St. Petersburg, the Section thanked Fletch for his service as Chair, but, in reality, thanks are due for his body of work over the years, and those contributions are far from over. Fletch looks forward to his newfound freedom from leadership responsibilities to be able to once again immerse himself in committee activities.

LRS

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Meet the RPPTL Section's Executive Committee for 2013-2014

By Silvia B. Rojas, Esq., Miami, Florida



Seated – L-R: Michael Gelfand, Margaret (Peggy) Rolando, Michael Dribin
Back– L-R: Debbie Goodall, Bob Swaine, Tae Kelley Bronner, Drew O'Malley, Fletch Belcher, Debra Boje, Rob Freedman, Yvonne Sherron, Bill Hennessey, and Katherine Frazier

The Executive Committee (EC) of the Executive Council of the RPPTL Section oversees the activities of the Section committees charged with enhancing the practice of real estate, probate, estates, trust and construction attorneys and the laws under which they practice for the benefit of Florida residents, visitors and investors. In addition to Section officers, such as the Secretary, Treasurer, and Director of the Section's At-Large Members (ALMs), the EC officers include the Section's CLE Seminar Coordination Committee Co-Chairs and the Legislation Committee Co-Chairs. The EC is comprised of volunteer attorneys selected by the Section's Long-Range Planning Committee, whose members are the Section's past Chairs. The Long-Range Planning Committee nominates members to the EC based on their activities as committee chairs, their leadership skills and Section involvement. The nominations of the Long-Range Planning Committee are then published to the entire RPPTL Section and voted on at the Section's Annual Convention in May. The chairs, vice-chairs and ALMs, who constitute the 200± members of the Executive Council first volunteered as members of committees, then decided to be more involved with Section activities and demonstrated their leadership abilities within their committees. In addition to the impressive professional credentials and tireless work on behalf of the Section, the EC officers also keep a balance with their social and family life. The narratives below provide a glimpse why Section work is so fulfilling to them and, on a personal note, the other interests and activities they enjoy aside from their professional endeavors.

Margaret "Peggy" Rolando, Chair

Shutts & Bowen, LLP, Miami, Florida
www.shutts.com

Peggy first got involved in the Section in 1980 when she joined the Condominium and Planned Development Committee seeking more information about the creation of condominiums and planned communities. This committee has

played a critical role in her professional development, offering her opportunities to speak at CLE seminars sponsored by the Committee and to draft significant revisions to the Condominium Act. As a member of the Executive Council since 1993, she appreciates the legal discussions, camaraderie, and dedication to the law and profession so prevalent at meetings of the committees, divisions and Executive Council.

Peggy's interests include classical music, historic preservation, Iyengar yoga, American art, antiques and her 2 black and tan miniature dachshunds, Lulu and Zoe. Peggy is also an enthusiastic alum and supporter of Florida State University College of Law and has served on its Board of Visitors since 1994.

Wm. Fletcher Belcher, Immediate Past Chair

Law Offices of W. Fletcher Belcher. St. Petersburg, FL

His practice is limited to trust and estate litigation. Led by a desire to be a better lawyer in his specialized area of practice and as a result of the influence of his cousin and mentor, Bill Belcher (Section Chair 1976-77), Fletcher became an active member of the Section in the late 1980's. Service on the Executive Council has given him the opportunity to acquire a better knowledge of the law, be proactive in improving laws in his practice area, and to form friendships with several very capable professionals of high character. While most of his time is spent at work, work, work . . . , he also enjoys building and construction projects; attending Tampa Bay Rays and Tampa Bay Buccaneers games; following politics; and trying, without success, to convince his wife that he does not spend all his time on Section matters.

Michael A. Dribin, Chair-Elect

Harper Meyer Perez Hagen O'Connor Albert and Dribin, LLP, Miami, Florida
www.harpermeyer.com

Michael Dribin became an active member of the Section around 1985 after having been appointed to the Probate Law Committee. He does what he does for the Section because he really enjoys the intellectual interchange with colleagues who clearly are the experts in Florida. While not realizing it at the time, he has come to appreciate by a close second the many friendships he has established with lawyers and their spouses. This also summarizes what Michael enjoys most about being on the Executive Council. He is a sports fan—that's what he does—Heat games and Marlin games in particular. Michael is a past president of his synagogue and continues to enjoy being an active member of that Board.

Michael J. Gelfand, Real Property Division Director

Gelfand & Arpe, P.A., West Palm Beach, Florida
www.gelfandarpe.com

As a Board Certified Real Estate Lawyer, Michael's practice emphasizes the representation of community associations and owners within communities while serving as the co-owner of Palm Beach County's largest mediation and arbitration firms. Volunteering on the Condominium Committee, reviewing proposed legislation, introduced him to the Section. Observing Section leaders vigorously defending property rights of citizens during the so-called "S&L Crisis", intellectually challenging everyone while having fun, prompted him to volunteer for Section projects. Outside of the Section, pursuits include reading (no fiction about lawyers please), bicycling, cooking, scuba diving, and returning some of the benefits bestowed on us by volunteering for public school and other community organizations.

Debbie Packer Goodall, Probate and Trust Law Division Director

Goldman Felcoski & Stone, Boca Raton, Florida
www.gfsestatelaw.com

Debbie focuses on estate planning, post-mortem tax planning, and probate and trust administration. A native Rhode Islander, she moved to Florida to attend Rollins College. She graduated from University of Miami Law School and worked in New York City before returning to Florida. She has been on the Executive Council for about 15 years – first as co-vice chair of the Legislative Update Committee. Inspired by the dedication and hard work of so many of the people that she met, Debbie stayed active and went on to become Professionalism and Ethics Committee co-chair, CLE Seminar Coordination Committee Chair, and Secretary. The Section is like a second family to Debbie and her first family, husband, Gadget, and children Steven (13) and Ellie (10). Debbie is a member of the St. John Catholic Church Finance Committee and enjoys cooking and spending time with family and friends.

Andrew (Drew) O'Malley, Section Secretary

Carey, O'Malley, Whitaker & Mueller, P.A., Tampa, Florida
www.cowmpa.com

Jay Zschau took Drew under his wing in the mid-90's, encouraged him to devote time to Section activities. Jay has been his mentor ever since. Best thing about the Section…meeting 5 times a year with friends in wonderful locations to share knowledge and fellowship. When Drew is not at the office, he enjoys being outwitted by snook, redfish, etc. from his dock on Little Gasparilla Island and following the exploits of his wife Dianne (a Guardian ad Litem) and three sons (Andy, a combat engineer in the Marine Corp; Thomas, 2013 FSU Grad and Police Academy admittee; and Ian, a fascinating 15 year-old).

S. Katherine Frazier, Section Treasurer & Budget Committee Chair

Hill Ward Henderson, Tampa, Florida
www.hwhlaw.com

Katherine is a real estate practitioner. In 2004, Katherine

continued, next page

became involved in the RPPTL Section as Vice Chair of the Land Trusts and REITs Committees. She has learned from many lawyers throughout Florida as she has become more involved in the Section. As Chair of the Problems Study Committee, she enjoyed the efforts to solve issues, improve existing laws, and to create new legislation. Her experiences have provided current knowledge on cutting-edge issues that benefit her practice, clients and firm.

As a fourth generation Tampa attorney, she is passionate about involvement in the community, as she holds leadership roles in local civic, charitable and social organizations.

Robert (Bob) S. Swaine, Co-Chair of the Legislation Committee

Swaine & Harris, P.A., Sebring, Florida
www.heartlandlaw.com

His practice includes real property, probate, trust law and local government law. Bob became an active member of the RPPTL Section in 2003 in the Probate and Trust Law Division. He was in a litigation firm and wanted to get involved in more probate litigation. He was prompted to devote his time to Section activities by past Chair of the Section, Laird Lile. Bob enjoys attending Executive Council meetings for the intellectual discourse on a wide range of legal subjects that he might not otherwise have exposure to. He also enjoys the collegial atmosphere and the development of professional relationships with great people who are experts in a wide variety of areas of law. When not participating in professional activities, Bob enjoys cycling (road, triathlon, mountain and cyclocross), swimming, surfing, paddleboarding, fishing and cooking up a great meal.

William (Bill) T. Hennessey, Co-Chair of the Legislation Committee

Gunster, Yoakley & Stewart, P.A., West Palm Beach, Florida
www.gunster.com

Bill Hennessey practices primarily in the areas of probate, trust, and guardianship litigation and is chair of Gunster's Private Wealth Services Group. He has been actively involved in the Section since the mid-1990s. He credits the Section with providing him innumerable opportunities for growth both as a attorney and a leader and is grateful for the many friendships he has found in the Section ranks. Bill and his wife, Cathy, have four children who keep them incredibly busy. Bill's family enjoys seeking out adventure-ziplining, whitewater rafting, and canyon rappelling – all topped the list just this summer.

Robert (Rob) S. Freedman, Co-Chair of the CLE Seminar Coordination Committee

Carlton Fields, P.A.. Tampa, Florida
www.carltonfields.com

Rob became an active RPPTL member in 1992 when he joined the Condo Committee, and has been an Executive Council member since 2001. He views being on the EC as giving back to the profession, and it is very fulfilling. Rob also has enjoyed the many friendships he has made in his years of involvement with RPPTL. In his spare time (wait, does he have spare time?), he enjoys (not necessarily in this order) spending time with his wife Sheri and the kids, Duke basketball (go Blue Devils!), reading mysteries, DMB and Jimmy Buffett, laughing at Duck Dynasty with his son, and traveling with Sheri.

Tae Kelley Bronner, Co-Chair of CLE Seminar Coordination Committee

Tae Kelley Bronner, P.L., Tampa, Florida

Tae focuses on probate and trust administration and litigation. She was born and raised in Florida and is a 4th generation attorney. She has literally grown up in the Section with her father serving as former Chair, but first became actively involved as a young lawyer in the Probate Law Committee. The dedication and the expertise of the Section members inspired Tae to assist the Section in creating a Fellowship and active Diversity program to reach out to and gain new membership. When she is not practicing law, Tae enjoys spending time with her husband, Eric, and her daughters, Marlies (15) and Meghan (12).

Debra L. Boje, Director of At-Large Members

Gunster, Stewart & Yoakley, P.A.,), Tampa, Florida
www.gunster.com

Debbie became an active member in the Section in the mid 90's. Shortly after becoming involved in the Section, Rohan Kelley began the grueling task of comparing the Florida Probate Code to the Uniform Probate Code. Rohan took Debbie under his wing and asked her to serve on a subcommittee. As the saying goes "the rest is history." The thing Debbie enjoys the most about the Executive Council is being able to interact with fellow attorneys throughout the state on both a personal and professional level. When not working she enjoys spending her free time with her nieces and nephews.

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RPPTL Section Executive Council Meeting

The Vinoy, St. Petersburg
May 23rd through May 26th, 2013

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

The Real Property, Probate and Trust Law Section of The Florida Bar held its annual meeting May 23rd through May 26th in St. Petersburg, Florida, at the historic Vinoy Resort and Golf Club.

The Vinoy was the creation of Aymer Vinoy Laughner. In 1923, Mr. Laughner purchased the land on which the Vinoy stands for $170,000—a handsome sum in 1923. In January of 1925, Mr. Laughner hired architect Henry A. Taylor and contracted with George A. Miller to build a hotel. Miller guaranteed a completion date of December 31, 1925 and it happened. On December 31, 1925, the Vinoy Park Hotel opened to the public. The nightly rate on the opening day for one of the most expensive rooms in the state was $20.00.

While the depression hit shortly after the grand opening, the Vinoy remained a key part of the local economy throughout the 1930s. On July 3, 1942, the Vinoy ceased operation as a resort hotel and was leased to the U.S. Department of War. In April of 1944, the U.S. Government cancelled its lease.

In September, 1945, Chicago businessman Charles Alberding purchased the hotel for $700,000 and the Vinoy was back to business as usual, its elegance restored. By 1968, the hotel was forced to close due to changing times. In 1978, despite the fact that it was closed, the Vinoy was named to the National Registry of Historic Places and in 1980, the long plight to restore the Vinoy began. By 1980, the Vinoy had lost its luster and was mostly home to the homeless and local SWAT teams who used it for training.

In 1987, a group of businessmen formed the Vinoy Development Corporation and reached an agreement with Mr. Alberding for a lease. In 1989, in order to make the project more viable, the citizens of St. Petersburg approved a charter amendment to lease the submerged land in the Vinoy basin for 74 boat slips, and by December of that same year, a $33.6 million dollar contract was awarded to renovate and expand the Vinoy. While the final restoration cost over $93 million dollars, the Vinoy finally reopened in July of 1992. In the 90s and early 2000s the hotel changed hands several times, but its resurrection continues with additional restoration and beautiful renovations, including the Chihuly chandeliers in the ballroom and lobby.

Today the Vinoy Resort and Golf Club, in the heart of the downtown area just steps away from a number of cultural centers, can again claim a place of grandeur, beauty and elegance. Poised on the city's waterfront, the Vinoy is a tribute to devotion, persistence and pride of the community and the resort owners.

As usual, Thursday, May 23rd was busy with committee meetings all day and an evening reception at the Chihuly Collection Glass Museum and Gallery. A significant number of law students from the University of Florida (Levin), Stetson University, and Florida State University Colleges of Law as well as from Barry University School of Law, attended the committee meetings.

The Chihuly Collection is housed in its own building just a short walk from the Vinoy across a municipal park. The Chihuly Collection is a permanent collection of works by the world-renowned glass artist, Dale Chihuly, showcased in a 10,000 square foot setting designed by award winning architect Albert Alfonzo. A twenty foot sculpture created specifically for this site – the ruby red icicle chandelier-welcomes visitors to the collection. A pioneer of the studio glass movement, Chihuly is credited with transforming the methods of creating glass art as well as the development of complex multipart glass sculptures and environmental art. Everyone greatly enjoyed viewing the varied and striking pieces of glass art throughout the museum and, as always, the food was excellent and the company stellar.

Friday included the presentation of a seminar on Homestead from 9:00 a.m. through 12:00 p.m. and the annual meeting and election luncheon at 12:15 p.m. The luncheon speaker was our own Pete Dunbar talking about his pilgrimage for development of his book, "A Son Discovers his Father's War." Pete's presentation was made with great reverence and tenderness toward his dad and the men who were his comrades as pilots in the Second World War. At times, there was hardly a dry eye in the room. Everyone really enjoyed Pete's talk.

Friday evening was a dinner reception at the Vinoy at which time annual awards were presented to outstanding Reptiles. The Chair's Column in the 2013 summer *ActionLine* issue has further details on the awards and its recipients.

Saturday started bright and early with the Real Property Roundtable and the Probate & Trust Roundtable at 8:00 a.m. including a sumptuous buffet breakfast, followed by the Executive Council meeting at 10:00 a.m. The afternoon was free time. At 3:30 p.m. the buses left for a very unique, sold out event – the New York Yankees vs. the hometown Tampa Bay Rays baseball game at Tropicana Field. The trip to the game included food (lots of hot dogs of course!) and beverages and everyone had a great time. Saturday evening a reception and dinner at the Vinoy capped off an excellent weekend.

The weekend at the Vinoy was truly educational, professional, cultural and just plain fun. Hope you will plan to attend a RPPTL meeting soon.

Executive Council Meeting — The Vinoy, St. Petersburg, May 23– 26, 2013



RREIL Committee meeting



Title Insurance Committee meeting



Sanjay Kurian and his lovely daughter, Kareena



Willie Kightlinger, Bill Partlow, Susan Seaford and Amber Williams sharing a lively evening at the Chihuly Collection



Tom and Marsha Rydberg next to a crystalline Chihuly sea



Previewing the Section videos at the Friday evening awards dinner



One of the homestead seminars at RPPTL Convention, May 24, 2013



Brenda and Terrell Ezell winding down after a very busy day



Nicole Kibert and Jane Cornett by one of the Chihuly exhibits

To see more photos, log in to www.rpptl.org, "Section Information" tab



Executive Council Meeting on Saturday



Carla Jones, Denise Lattau and Jessica Lillesand on their way to the Friday evening reception



Pete Dunbar giving a heart warming talk regarding his father's WWII diaries



Roger and Melinda Larson looking forward to the evening's entertainment



David and Leigh Brennan, ready for the evening festivities



Steve Mezer's daughter, Amanda, and spouse, Karen, and Chris Davie's spouse, Ruth, at the Friday evening reception — all smiles



Steven Goodall earned his golden name tag — here with Fletch Belcher and Yvonne Sherron



A most gracious couple: William Muir and spouse, Judge Celeste Muir



Section members enjoyed watching every move at the ball park



Fletch Belcher finally relaxing and having a great time at The Tampa Bay Rays game

Photos by Michael Gelfand, Michael Dribin and Silvia Rojas

Roundtables

Saturday, May 25, 2013
Renaissance Vinoy Resort & Golf Club
St. Petersburg, 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 Division Director, Mike Dribin.

Announcements

There are notable changes for the 2013-2014 year. A new Ad Hoc Elective Share Review Committee has been formed to study whether revisions are necessary to Florida's Elective Share statutes. Lauren Detzel, Charlie Nash and Lee McElroy will lead this committee. Bruce Stone, Diana Zeydel and Mike Simon will serve as the Division liaisons to ACTEC. Lester Law has been appointed as the new Co-Chair of the IRA, Insurance & Employee Benefits Committee with Howard Payne. John Moran has been appointed as the new Chair of the Probate Law & Procedure Committee. Sarah Butters, Travis Hayes and Marsha Madorsky will be the new vice-chairs. Finally, Bill Hennessey has been appointed to serve as Co-Chair of the Legislation Committee.

Action Items

Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets – Angela Adams, Chair: The proposed legislation for (1) 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, was deferred as an action item until the next RPPTL meeting because of concerns raised by Division members, including the ability to recover assets on a non-pro-rata basis and the possibility of liability on the personal representative for not pursuing non-exempt, non-probate assets.

See "Probate & Trust Division," next page

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

Thank you to the Roundtable Sponsor: Fidelity National Title Group

The meeting was called to order by the Division Director, Michael Gelfand. Michael started by recognizing Steve Mezer, who had been given the Rising Star Award the previous night. Michael also thanked everyone for the hard work over the past year on legislation and CLE.

Action Items

Condominium & Planned Development Committee – Steve Mezer, Chair: Steve brought everyone up to date on the application by the Committee for a Condominium & Planned Development Law Certification. The proposed certification standards passed the Board of Legal Specialization with some minor changes. There are three changes of concern to Section Members: (1) this certification had previously been proposed as a subspecialty under real estate but would now be free standing; (2) mandatory years of practice before review of an application is reduced from ten to five; and (3) the percentage of practice devoted to this area of the law is reduced from 50% to 40%. The changes were unanimously approved and are to be presented at the Executive Council meeting.

Residential Real Estate and Industry Liaison (RREIL) Committee - Fred Jones, Chair: Fred discussed the FR/BAR contract changes which have been worked on in close coordination with the Realtor-Attorney Joint Committee. The current comprehensive contract had been revised in 2010 and is now updated with 2013 revisions for the standard contract, the as-is contract and the various riders. After corrections, the forms were approved without opposition.

See "Real Property Division," next page

PROBATE & TRUST DIVISION

Probate & Trust Litigation Committee – Thomas Karr, Chair: The committee offered proposed legislation to (1) clarify that a contestant in an action to contest the validity or revocation of any part or all of a trust has the burden of proof to establish grounds for invalidity and (2) confirm that § 733.107(2), F.S., applies in all circumstances in which the presumption of undue influence is established, including trust contests and challenges to inter vivos gifts. This proposed legislation was passed at the Executive Council meeting immediately following the Roundtable.

Legislative Report

The Estates Bill (SB 492) and Power of Attorney "Glitch" Bill (HB 841) were passed by the Florida Senate and House, and awaiting the Governor's signature. The Estates Bill is a compilation of revisions to Florida law relating to unclaimed property held in trusts, caveat notice requirements, gifts to lawyers, the retention of original wills and codicils by a clerk of court, trust accountings and jurisdiction over trustees and trust beneficiaries. Two guardianship related bills did not pass, however. These guardianship bills dealt with the payment of members of the examining committee's fees from court funds when the alleged ward is found to have capacity and the creation of a public records exception for guardianships.

Information Item

E-filing – Division members identified issues and inconsistencies among the counties with e-filing. Karen Rushing, the Clerk of Courts for Sarasota County, reported that there is ongoing debate around the state concerning the standardization of the e-filing systems. Laird Lile and Rohan Kelley are on the Florida Bar E-Filing/Technology Committee and reported the committee is working hard to resolve several e-filing issues.

Committee Reports

Digital Assets and Information Study Committee Report – Eric Virgil, Chair: The committee is studying the laws of other states concerning digital assets and is awaiting the completion of the Uniform Law Commission's Fiduciary Access to Digital Assets Act. The committee intends to use the Uniform Act as a framework for drafting Florida legislation to include in the 2015 legislation package.

Ad Hoc Committee on Personal Representative Issues – Jack Falk, Chair: The committee is analyzing how to handle non-qualified personal representatives and whether revisions are necessary to the time period for objections in a probate proceeding based upon issues raised in *Hill v. Davis*, 70 So.3d 572 (Fla. 2011).

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REAL PROPERTY DIVISION

Information items:

Ad Hoc Trust Account Committee – Roland "Chip" Waller, Chair: Jerry Aron reported on the client confidentiality concerns arising out of a statute calling for an audit of trust accounts by title companies. He reported that the Florida Bar Ethics Committee took a very strict position on confidentiality rules. The Florida Bar Ethics Committee created a subcommittee to look at this issue and a possible compromise has now arisen whereby title insurance auditors would enter into confidentiality agreements. This has not received final approval but the Ethics Committee will meet again in June. Representatives of our Section will remain fully engaged in the discussion.

Jerry also reported on the foreclosure bill which passed the House and Senate and has now been sent to the Governor for consideration. Jerry reported about opposition and encouraged everyone to ask the Governor to support the House Bill.

Committee Reports:

Insurance and Surety Committee – Andrea Northrop, Co-Chair: Andrea Northrop reported that the committee is working on proposed changes to §627.4137, Fla. Stat. to put "teeth" into the request for insurance information.

CLE Seminar Coordination Committee – Rob Freedman, Chair: Rob reported on two upcoming programs and many more in the works. Rob reminded everyone that CLE programs provided by the Bar are less expensive than other commercially available options.

Division Chair Request on Future Legislation: Michael reminded everyone that the meeting at The Breakers is really the last opportunity to have legislation approved for 2014 session.

Division Chair Reminder Regarding the Listserv: Michael reminded everyone that in order to be on a listserv, an attorney must be a Section Member but that the rules for committee operation are up to the committee leadership.

Legal Opinions Committee – Kip Thornton, Chair: Kip reported that the committee is considering a rewrite of the LLC statute and reminded everyone that a hard copy of the report produced by the committee is available from the website.

Commercial Real Estate Committee – Art Menor, Chair: Art reminded everyone that a CLE component is provided for each meeting and will be presenting a seminar in 2014 and plans ECLE (electronic CLE, also called a webinar) in 2013.

Construction Law Committee – Arnold D. Tritt, Chair: Arnold reported that the committee now has 585 members

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PROBATE & TRUST DIVISION

Ad Hoc Committee on Treatment of Life Insurance Payable to Revocable Trust – Richard Gans, Chair: The committee is working on proposed legislation to address the waiver of statutory protection from creditor claims for life insurance proceeds payable to a revocable trust as a result of *Morey v. Everbank*, 93 So.3d 482 (Fla. 1st DCA 2012). Lauren Detzel reported that proposed legislation will be intended to make it more difficult to waive the statutory protection to prevent inadvertent waivers. The committee expects to have proposed legislation as an action item at the next RPPTL meeting.

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair: Mike Foreman reported that the committee is analyzing the existing Guardianship Code and considering the need for a complete rewrite.

Ad Hoc Study Committee on Estate Planning Conflict of Interest – William Hennessey, III, Chair: The committee is studying issues pertaining to an attorney naming himself or herself as a fiduciary for a client. The committee is drafting proposed legislation that would require a signed acknowledgement from a client that certain disclosures were made by the attorney regarding his or her appointment as a fiduciary. The committee hopes to have proposed legislation completed this year.

Ad Hoc Committee on Jurisdiction and Service of Process – Barry Spivey, Chair: The committee's legislation passed the Florida legislature. The committee discussed the recent *Peirels* decisions in Delaware, which addressed jurisdictional issues including transferring situs of a trust to Delaware to make modifications under Delaware law and seeking confirmation that Delaware law governs the administration of a trust after a Delaware trustee is appointed.

Asset Protection Committee – Brian Sparks, Chair: The committee voted to oppose the legislation proposed by the Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets. Recent cases of interest were discussed, including *In re Clark*, 714 F.3d 559 (7th Cir. 2013) which found that the proceeds of an inherited IRA were available to bankruptcy creditors, and *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. Linda Griffin noted that the *Clark* decision creates a conflict between the Fifth and Seventh Circuits and, therefore, *Clark* may make it to the U.S. Supreme Court. The committee also discussed whether Florida needs legislation authorizing tenancy-by-the-entireties trusts.

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REAL PROPERTY DIVISION

with 60-80 members attending monthly meetings for CLE credit. The next institute will be March 20, 2014.

Development and Green Building Committee – Anne Pollack, Chair: Anne reported that the committee will have its bi-annual joint meeting with the Environmental Land Use Section in January, 2014.

Landlord & Tenant Committee – Neil Shoter, Chair: Neil reported membership of approximately 100 members and expects to present at least one seminar in the coming year. The committee has two *ActionLine* articles by its members coming this year, with more planned.

Real Estate Certification Review Course Committee – Ted Conner, Chair: Ted reported that the tentative date for the course in 2014 is February 21st and 22nd.

Real Estate Entities and Land Trusts Committee – Wilhelmina Kightlinger, Chair: Wilhelmina reported that the committee's bill passed the House as the very last item of the year for the Legislature. Once signed by the Governor, the Committee will be preparing a seminar on the new Legislation.

Real Property, Finance and Lending Committee – Dave R. Brittain, Chair: Dave reported the committee's meeting on Friday was well attended and included a CLE on ILSA. The committee reports it now has about 75 members with 30-35 attending its meetings.

Real Property Forms Committee – Homer Duvall, III, Chair: Homer reported that revised forms will soon be sent to the Landlord Tenant committee for review and the committee is also working with the Real Property Finance and Lending Committee on forms, as well as a set of signature blocks for business entities.

Real Property Litigation Committee – Marty Awerbach, Chair: Marty reported that the committee is working with its counterparts in the Probate Division on a proposal to address the issue of guardian ad litem authority because some judges refuse to appoint the same. The committee has a seminar planned for October 4, 2013.

Real Property Problem Study Committee – S. Katherine Frazier, Chair: Katherine reported that the committee's bill on hidden liens made it through the Legislature and is now waiting consideration by the Governor. Ted Conner will take over as the Chair of the committee.

Residential Real Estate and Industry Liaison (RREIL) Committee – Frederick W. Jones, Chair: Fred reminded everyone that in July the FR/BAR contract will be 40 years old. On August 21, 2013, there will be an ECLE on real estate tax issues.

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PROBATE & TRUST DIVISION

Attorney/Trust Officer Liaison Conference Committee – Jack Falk, Chair: The 33rd Annual ATO Conference will be held June 11-15 at the Ritz Carlton in Naples. Mike Dribin stated that this is the best bargain of the year for CLE credit hours and networking opportunities.

Estate & Trust Tax Planning Committee – Elaine Bucher, Chair: The committee plans to have as action items at the next RPPTL meeting proposed legislation authorizing

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REAL PROPERTY DIVISION

Title Insurance & Title Insurance Liaison Committee – Kristopher Fernandez, Chair: Kris reported that the Committee meeting included a lively discussion on the economic loss rule and recent cases and plans to have an update at The Breakers meeting.

Title Issues & Standards Committee – Christopher W. Smart, Chair: Chris reported that the committee is working on turning the title standards into an electronic searchable version. The Committee plans to have this available by July.

THE FLORIDA BAR CLE

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

Trick or Treat: The Revised Land Trust Act – All Treats, No Tricks

• Live
• Live Webcast
• Audio CD
• Video DVD

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live and Webcast Presentations: Wednesday, October 30, 2013

Tampa Airport Marriott • 4200 George J. Bean Parkway
Tampa, FL 33607 • (813) 879-5151

Course No. 1610R

SEMINAR TOPICS:

10:00 a.m. – 10:05 a.m. **Welcome and Introductions**

Ancient Mystic Rituals: History and Background of Land Trusts

Skeletons in the Closet: The Revised Land Trust Act - Where Are We at Now and Why?

Lunch Presentation: Eat, Drink, and Be Scary

Illinois Land Trusts and the Changes in Florida

Double, Double Toil and Trouble – A Witches' Brew of Hot Topics

A. Things that Go Bump in the Night: Taxation Issues Involving Land Trusts

B. Witch-ful Thinking: Financing Land Trusts

C. A Wrinkle in Time: Timeshares and Land Trusts

2:50 p.m. – 3:50 p.m. **Never Summon Anything You Cannot Banish: Ethical and Practical Issues for the Practitioner**

CLER PROGRAM
(Max. Credit: 6.5 hours)
General: 6.5 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 6.5 hours)
Elder Law: 5.0 hours
Real Estate: 6.5 hours
Tax Law: 0.5 hours
Wills, Trusts & Estates: 5.0 hours

LOCATIONS / DATES:

Tampa — Wednesday, October 30, 2013 (049) Tampa Airport Marriott

Live Webcast / Virtual Seminar* – Wednesday, October 30, 2013 (317) Online

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

REGISTRATION FEES: **WEBCAST:**

- Member of the Real Property, Probate & Trust Law Section: $215 $275
- Non-section member: $275 $335
- Full-time law college faculty or full-time law student: $158
- Persons attending under the policy of fee waivers: $40

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

To REGISTER, order audio CD / DVD or course material, go to FLORIDABAR.ORG/ CLE and search by course number 1610R.

PROBATE & TRUST DIVISION

the formation and operation of Family Trust Companies in Florida and revising the Florida Uniform Transfers to Minors Act to permit the extension of new UTMA accounts until age 25. The committee will be hosting a joint seminar with Asset Protection and the IRA, Insurance and Employee Benefits Committees. A subcommittee will also be established to review Florida's decanting statute.

Guardianship, Power of Attorney and Advance Directives Committee – Sean Kelley, Chair: The committee is studying whether new legislation is necessary to address issues raised by *Shen v. Parkes,* 100 So.3d 1189 (Fla. 4th DCA 2012), which found that written reports of the examining committee in a guardianship proceeding were inadmissible hearsay. Theo Kypreos also updated the committee on the status of the proposed guardianship accounting form.

IRA, Insurance & Employee Benefits Committee – Linda Griffin and L. Howard Payne, Co-Chairs: Lester Law gave a presentation on portability and its effect on IRAs. The committee discussed (1) *In re Clark,* 714 F.3d 559 (7th Cir. 2013) which found that the proceeds of an inherited IRA were available to bankruptcy creditors, and (2) malpractice issues that may arise when dealing with IRAs and the potential exposure on estate planning attorneys.

Liaisons to Elder Law Section Committee – Charles Robinson, Chair: Legislation proposed by the Department of Children and Family Services concerning who may act as a caregiver did not pass the Florida Legislature.

Probate & Trust Litigation Committee – Thomas Karr, Chair: The committee hopes to have proposed legislation articulating a standard for assessing attorneys' fees and costs in will and trust contests ready for the next RPPTL meeting. The committee has also progressed on two other projects. The first deals with clarifying aspects of § 736.0802(1), F.S., for the payment of attorneys' fees and costs from trust assets in trust proceedings. The second deals with issues arising from *Smith v. DeParry*, 86 So.3d 1228 (Fla. 2d DCA 2012) concerning the probate of a lost will.

Probate Law & Procedure Committee – Tae Kelley Bronner, Chair: The committee discussed updates to proposed legislation concerning the disposition of decedent's remains. Tae has been working closely with lobbyists representing funeral homes on this issue. This was Tae's last meeting as Chair of this committee.

Trust Law Committee – Shane Kelley, Chair: The committee plans to have as an action item at the next RPPTL meeting proposed legislation to make the Florida Trust Code anti-lapse statute similar to the Florida Probate Code anti-lapse statute. The committee approved the concept of allowing trust accountings to be served via email with beneficiary consent. Details will be ironed out in subsequent meetings. The committee also approved the concept of allowing a settlor to prohibit non-judicial modification of a trust during the first 90 years of a trust that has a 360 year RAP period. A subcommittee was also created to review Florida's directed trustee statute.

The 7th Annual
Florida Bar Real Property, Probate and Trust Law Section
Construction Law Institute
and Certification Review Course

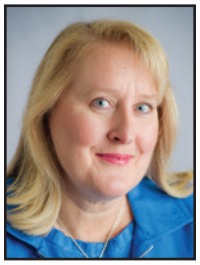


March 20-22, 2014
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Orlando, Florida

Spotlight on the Trust Law Committee

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


KELLY


ADAMS


CONETTA

The Trust Law Committee is one of the most active committees in our Section. It is chaired by Shane Kelley and the Co-Vice Chairs are Angela Adams and Tammy Conetta. The committee has about eighty members with approximately sixty attending each meeting. Chairman Shane Kelley opines that "in person" meetings are exceptionally productive. The committee meets in conjunction with the Real Property Probate and Trust Section Executive Council meetings. Members of the RPPTL Section are invited to attend all section committee meetings. The committee currently has five separate sub-committees each working on complex issues.

The first sub-committee is tasked with reviewing § 736.0703(9), F.S. dealing with directed trustees; specifically, the extent of the directed trustee's liability in following directions of the directing trustee. The present statute absolves the directed trustee from liability except where the directed trustee has actual knowledge of "willful misconduct" of the directing trustee. It is noted that there is no definition of "willful misconduct" and that term might extend so far as directing an imprudent investment. Also, some committee members pointed out that several states, Delaware being one example, have very broad trustee exculpation statutes that absolve trustee liability for following the directions of the directing trustee, even in the instance where the directed trustee has actual knowledge of willful misconduct of the directing trustee. These members express concern that settlors who wish broader ability to absolve their trustees of liability will create their directed trusts in other jurisdictions. The sub-committee is studying whether Florida should retain its current statute or whether it would be advantageous to modify our current statute to provide greater clarity and greater trustee exculpation. The committee is considering the often-competing interests of settlors, trustees and beneficiaries in determining what will be in the best interests of the residents of the State of Florida. The goal is to create more clarity and some flexibility in the existing statute, but at the same time to provide an appropriate level of protection for beneficiaries. The sub-committee is expected to report its conclusions to the Trust Law Committee at its next meeting.

Another issue under consideration by a sub-committee is the service by trustees of accountings and other trust documents electronically. Representatives of corporate fiduciaries point out that ways of doing business have changed and in this day of electronic transmission it makes sense to utilize these new methods to provide account statements electronically. Financial institutions indicate that service by an attachment to an email is not appropriate for this purpose because of privacy concerns. Instead, most financial institutions send an e-mail containing a link which the recipient may use to sign in with a user name and secure password to obtain the relevant financial records. Although trustees may now use this method of service if they choose, it is uncertain whether the shortened statute of limitations per § 736.1008(2), F.S. (six months from receipt of a trust disclosure document), would apply to that type of service. Because the statute of limitations on claims against trustees for breach of trust can be as short as six months from receipt of a trust disclosure document, the committee must balance the interests of the beneficiaries in obtaining adequate notice of relevant trust information prior to being barred from objecting to a trustee's actions with the need to address the electronic service of documents.

A third sub-committee is looking at whether the trust modification statutes, specifically § 736.0412, F.S., dealing with nonjudicial modification, should be revised. The sub-committee has presented a proposal to the committee that would limit nonjudicial modification during the first 90 years of trust administration unless the trust document specifically allows it during that period.

A fourth sub-committee has recently been formed to study the issue of trust decanting, which involves the shifting of assets from an existing trust into another trust created for the same or similar purposes. This sub-committee will review the current statutory scheme in Florida and determine whether there needs to be additional guidance or revisions to the current statutory provisions.

Finally, a sub-committee has been formed to review the current structure in Florida regarding fees for trustees. § 736.0708,F.S., which is the current Florida statute addressing trustee's fees, only provides that the trustee should receive reasonable compensation for serving as trustee without any other guidance. There are unresolved questions as to what the appropriate fees should be if there are multiple trustees serving at the same time. Florida Statutes

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concerning the probate of wills make it clear that if there are two personal representatives then two separate fees are appropriate, but the existing trust statutes do not address the issue. The sub-committee will be looking at the uniform trust code and statutes in other states to determine whether it is necessary to make any revisions to our current statutes.

This is a committee with a strong history of active response to current problems. In the 2013 legislature, the committee was responsible for recommending and passage of a clarification to the trust accounting statute, fixing the definition of a "qualified beneficiary" under the Florida Trust Code, and revising the statutes on unclaimed property as they relate to express trusts. In the past, a trustee was required to retain unclaimed property for a period of five years which made it very unmanageable for the trustee of a trust that directed distribution of all of the trust property. The statute has now been amended to allow for retention of the unclaimed property for a period of only two years which reduces the trustee's holding time (and resulting duties and liability) by three years.

As Shane pointed out, trust law is a rapidly evolving area of the law due to the relative youth of the Trust Law statutes. This committee is and will be very involved in this evolution. If you are interested in knowing more about the Trust Law Committee please contact Shane at *shane@estatelaw.com*.

Request for Information: Violations of Sec. 627.4137, F.S.

The Insurance and Surety Committee is looking for information on situations where insurance carriers are not complying with Sec. 627.4137, F.S.

As many are aware, the Insurance and Surety Committee proposed changes to Sec. 627.4137, F.S., to provide more teeth to the statute. During that process, representatives of the Florida Office of Insurance Regulation asked the Committee to provide information relating to violations of the above statute by insurance carriers. If you have ever encountered this scenario, please contact Sanjay Kurian at *skurian@becker-poliakoff.com*. We will need you to provide the name of the claimant, the name of the carrier and the relevant demands. This information will be provided to the Office of Insurance Regulation for appropriate follow up.

Currently Sec. 627.4137, F. S., requires a liability insurance carrier, whose policy may pay for all or a portion of a claim, to provide a statement under oath, within 30 days of demand by the claimant, with the following information:

(a) The name of the insurer.

(b) The name of each insured.

(c) The limits of the liability coverage.

(d) A statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement.

(e) A copy of the policy.

A party that believes it has a claim against another is allowed to make a demand for insurance information under Sec. 627.4137, F. S. Typically, the demand is made by the attorney for the claimant on the insured, the insurance agent for the insured (if known) or the carrier directly (if known). Once the demand is made, there is an obligation on the part of the insured or his insurance agent to provide that demand to the carrier. The carrier has 30 days from receipt to provide the information required by the statute.

Florida High Court Adopts Standards and Procedures for Addressing Unprofessional Conduct

By Lawrence J. Miller, Esq., Gutter Chaves Josepher, et al., Boca Raton, FL


MILLER

In its June 6, 2013, revised opinion ("Opinion"), the Florida Supreme Court adopted the "Code for Responding to Professionalism Complaints" (CRPC). The CRPC is the culmination of approximately 17 years of studying and measuring unprofessional lawyer conduct in Florida. In its Opinion, the Court observed that its efforts and that of the Bar in addressing the "steep decline" of lawyer professionalism since 1996 have been laudable, though focused on aspirational and educational measures. The Opinion adds CRPC as a "more active" alternative for addressing lawyer professionalism issues in Florida. In adopting the CRPC, the Court approves recent recommendations of the commission that it empaneled in 1996 (the Supreme Court Commission on Unprofessional Conduct, called the "Commission" in this article).

Background and History: The Path to CRPC

Starting with the Florida Bar Professionalism Task Force's 1996 report to the Florida Supreme Court ("Report"), and the empaneling of the Commission two years later, both the Court and the Bar have in essence pursued a two pronged approach to addressing lawyer professionalism concerns. The first approach involved the creation of what the Opinion calls more "aspirational" approaches including educational programs, speeches, contests and meetings. Coupled with these aspirational methods, as a second approach, was the Court's direction that each Circuit Court Chief Judge establish a Circuit Committee on Professionalism to adopt goals and identify professionalism objectives for Bar members in each Florida Circuit. When used by the Circuits, the professionalism committees could intervene in certain individual instances and provide recommendations in dealing with unprofessional conduct. But, unless such conduct amounted to independent and specific violations of the Florida Code of Professional Responsibility, grievance procedures or sanctions flowing therefrom were usually not available to address unprofessional lawyer actions. With the Commission's application for and the Court's adoption of the CRPC, the Court appears to change the landscape and provides: a) concrete express standards for expected lawyer "professionalism"; b) procedures to address alleged breaches of the standards and; c) a mechanism for the imposition of sanctions through the grievance process if the standards are breached.

The "New" Code?: CRPC's Professionalism Standards

In the Opinion, the Court adopts the Commission's recommendation that "we should not attempt to create an entirely new code of "professional" or "unprofessional" conduct nor should we, at this time, attempt to codify an entirely new 'Code of Professionalism.' We agree with this approach." *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280, 281 (Fla. 2013). Instead, as stated in the introductory paragraph of the CRPC, as well as in the explanatory portion of the Opinion, the Court establishes Florida's lawyer professional conduct standards by combining the existing provisions of: (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; and (5) the decisions of the Florida Supreme Court into and as part of the CRCP's Standards of Professionalism ("Standards"). This approach provides an integrated fabric of standards comprised of previously adopted and existing guidelines and avoids the delay associated with the "invention" of a new professionalism code. While there is significant aspirational language in the Standards, there are also sufficiently concrete provisions to which attorney conduct can be conformed. With the establishment of the Standards, the Court provides the tools by which to measure lawyer professional conduct and brings previous methods from the somewhat esoteric and aspirational, to the more concrete and measurable.

CRPC's Complaint, Investigation and Screening Process for Breach of the "Standards"

Under the CRPC, allegations of a lawyer's breach of the Standards ("Professionalism Complaint") may be filed or presented either through the Bar's already existing Attorney Consumer Assistance Program ("ACAP") or through a circuit court panel which, pursuant to the Opinion, is now to be known as a "Local Professionalism Panel." Ultimately, serious and repeated breaches of the Standards, for which discipline is sought, will find their way to the local Grievance Committee for final determination.

The ACAP Path. Once filed, the ACAP (if the Professionalism Complaint is filed there) undertakes an investigation of the allegations to determine if there is "probable cause" to believe a breach of the Standards has occurred. The ACAP procedure for Professionalism Complaints appears to be the same as any other ethics proceeding filed through the ACAP against a Florida attorney. Once investigated, the ACAP can dismiss the Professionalism Complaint or it can be referred to local or Branch Bar Counsel ("Branch Counsel"). Branch Counsel can then dismiss the matter,

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refer it to various "intervention programs" or send the matter to a Grievance Committee in a Circuit. Once referred to the Grievance Committee, the Professionalism Complaint proceeds in the same way as other grievances.

The Circuit "Panel" Approach. Complaints concerning alleged unprofessional lawyer conduct under the CRPC can also proceed by the filing of a Professionalism Complaint with a local circuit court's professionalism panel. Each Chief Judge is now directed to establish a "Local Professionalism Panel" ("Panel"). Within the discretion of each respective Chief Judge, the Panel may be a newly empaneled group or a previously empaneled Local Professionalism Committee. The Panel in each circuit would be "activated to receive, screen and act upon any and all complaints of unprofessional conduct and to resolve such complaints informally, if possible, or to refer those complaints to The Florida Bar, if necessary." *Id.* The Opinion does NOT identify or set out the qualifications for those serving on a Panel, nor does it specifically set out the procedures for referral of a Professionalism Complaint by a Panel to The Florida Bar. It does appear that once referred by a Panel to The Florida Bar, the matter should proceed through the ACAP process outlined briefly above and in detail in Section 3 of the CRPC. Furthermore, under CRPC, a Panel's referral to the Bar may be made at any time.

Remedial Measures, Interventions and Sanctions under the CRPC

The ACAP, a Panel, Branch Counsel or the applicable Grievance Committee may in certain instances refer and direct that a Professionalism Complaint Respondent enroll or take part in educational and other programs set forth in Section 1.6 of the Code. *Id.* at 283. These steps, as with other ethics investigations and grievance procedures, are alternative "intervention" programs which are generally pursued for less drastic and more remediable conduct in the ethics context. If, however, a Grievance Committee finds probable cause that a violation of the Standards has occurred and requires disciplinary action, such may be undertaken as authorized under Section 3.5 of the CRPC.

Next Steps

The Professionalism and Ethics Committee of the RPPTL Section will be posting on its website comparisons with procedures in other states and will be providing additional information including updates on the use of and procedures under CRPC as it "rolls out."

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 Law Committees.*

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Report of Florida Bar Leadership Academy Fellow

(from an inaugural RPPTL Fellow's viewpoint)

By Brenda B. Ezell, Esq., Jacksonville, Florida

I began the journey as an inaugural Fellow in the Florida Bar's William E. Reece Leadership Academy in June. Honored to have been chosen and grateful for the support of the RPPTL Section's Executive Council, I approach this year-long adventure with high expectations. The first meeting of the Leadership Academy in Boca Raton made it clear I will not be disappointed. The meeting not only marked a historic occasion because it was held on the same day that Eugene Pettis was sworn in as the first African American President of The Florida Bar; it also represented the fulfillment of Mr. Pettis's vision for a Leadership Academy and the hard work of many dedicated Florida Bar leaders. The initial Academy meeting (themed "Lawyers as Leaders") began with a welcome from President Pettis. His passion for the Leadership Academy was evident as he discussed how it evolved and the assistance received from other bar leaders and volunteers to make his vision a reality. The inaugural Leadership Academy consists of 59 Fellows – 30 in the "South Region" and 29 in the "North Region." The Leadership Academy Committee is the standing committee of the Florida Bar that screens the Academy's applications and assists in program planning. Navin Pasem, RPPTL Executive Council member and past RPPTL Fellow, serves on the Leadership Academy Committee, which is comprised of 22 attorneys throughout the State.

The programs held during Academy meetings are filled with speakers providing motivation and encouragement. The initial meeting included presentations from motivational speakers and several former Florida Bar leaders, who discussed engagement within the Florida Bar. The distinguished Florida Bar speakers at the Boca Raton meeting included Stephen N. Zack (ABA President, 2012; Florida Bar President, 1989; and Florida Bar YLD President, 1980), Mayanne Downs (Florida Bar President, 2010) and outgoing Florida Bar President and RPPTL Section Executive Council member Gwynne Young.

The Academy aims to educate the Fellows on various divisions and sections of the Florida Bar and how they interact with one another and the Bar as a whole. In this regard, the Fellows attended the Council of Sections breakfast meeting where they were introduced to each section of the Florida Bar. Next, the Fellows attended a session entitled "FL Bar 101" which involved presentations from leaders of various sections and divisions of the Florida Bar. This particular session will take place at each of the Academy meetings so that each Florida Bar section can be introduced in detail, including the RPPTL section.

The Academy is also meant to enhance leadership skills through an exploration of each Fellow's behavioral style. The Academy's July meeting included topics such as "Balancing Personal, Volunteer and Work Life," "Resolving Conflict When Dealing with Difficult People," and a panel discussion entitled "The Legacy of a Leader: Footprints on our Legal Community," which was led by President Eugene Pettis, Bill Loucks, who is the President of Florida Lawyers Mutual Insurance Company, and Jane Curren of the Florida Bar Foundation.

The Academy Fellows will also plan and participate in the "President's Project," which requires the Fellows to identify and build consensus around a project to be adopted by the Florida Bar or a voluntary bar association that will change some aspect of legal services in Florida. Several ideas were generated in the initial brainstorming session, and I look forward to seeing what our Academy class eventually presents for implementation. After the first few sessions with my co-fellows, I'm convinced that whatever is ultimately decided upon will be impactful.

The Leadership Academy meets twice in the fall and twice in the spring prior to graduation at the 2014 Florida Bar Annual Meeting. As someone who participated in a variety of other leadership programs, I am extremely impressed with the content and pace of the Leadership Academy's activities, and the outstanding qualifications and personal qualities of the Fellows. President Pettis, the Leadership Academy Committee and everyone involved should be commended for their hard work in creating this innovative experience.

County and Municipal Code Enforcement: Questions and Answers

By James C. Russick, Esq., Tampa, Florida and Roger W. Cruce, Esq., Orange Park, Florida

"Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."[1] This is the foundation of the "home rule powers" exercised by Florida municipalities as augmented by Chapter 166, Florida Statutes.

Municipal Liens: The Historical Landscape

The home rule powers allowed for a carve-out in the County or Municipal Code Enforcement statute.[2] The statute sets forth both structural and procedural outlines for counties or municipalities to establish local code enforcement boards, including the ability to assess fines for noncompliance. Recognizing home rule, the statute also allowed municipalities to "adopt an alternate code enforcement system that gives code enforcement boards … the authority to hold hearings and assess fines against violators of the respective county or municipal codes and ordinances."[3] Enforcement authority for assessed fines allowed that "a certified copy of an order imposing a fine … may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator."[4] The language in the enforcement clause suggested an assessed fine could not be enforced unless recorded and attached to the property as a lien. However, the lack of recording did not necessarily negate the ability to enforce the fine.[5]

The autonomy provision allowing municipal and quasi-municipal units to establish individual systems of assessment and enforcement created an area of uncertainty for consumers, real estate professionals and title insurers. The question always present was whether a search of the public records would disclose the liens assessed against the property being searched. The issue was compounded by the fact that the lien attached to" land on which the violation exists and any other … property owned by the violator."[6]

The Problem Study Committee of the Real Property, Probate and Trust Law Section conducted a survey of municipalities in an attempt to determine whether consistency, or lack of consistency, existed between municipal programs. The results of the survey showed that only one-half of the municipalities responding followed the procedures set forth in Ch. 162, Fla.Stat. – one-half chose to follow the carve-out exception and create their own programs for assessment and enforcement. The disparity in the "home rule" programs was emphasized when the responses showed one in three did not record a lien in the public records. Many municipalities maintained a separate set of records of which only a local resident would be aware. Records tracking ran from following the owner's name, to address, to tax identification number, or to "other." The disparities were underscored in the area of priority. One panhandle county assesses a fine but not a lien because "it isn't neighborly." Conversely, many city ordinances granted their liens super-priority status on level with ad valorem taxes.

These issues have been the recent subject of both judicial and legislative refinement.

Court Addresses Issue of Super-priority

The Florida Supreme Court addressed the relationship between municipal code enforcement board lien priority and the "home rule powers" in *City of Palm Bay vs. Wells Fargo Bank, N.A.*[7] The case began in 2007 when Wells Fargo filed an action to foreclose a mortgage recorded in 2004 against property located in the City of Palm Bay. The city was made a defendant because of two code enforcement board liens it had recorded in the public records after the recording of the Wells Fargo mortgage against the same real property. The City asserted priority over the Wells Fargo mortgage, stating that their liens had a superior priority, a priority per its ordinance which they alleged was "coequal with the liens of all state, county, district and municipal taxes, superior in dignity to all other liens, titles and claims until paid . . ."[8] Both the trial court and the 5th District Court of Appeal held otherwise.

On appeal the Florida Supreme Court undertook to examine a municipality's authority pursuant to the provisions of Article VIII, Section 2(b) of the Florida Constitution "to enact an ordinance stating that its code enforcement liens, created pursuant to a code enforcement board order and recorded in the public records of the applicable county, shall be superior in dignity to prior recorded mortgages?" Justice Canady stated the issue more succinctly as "whether a municipal ordinance may validly establish super-priority status for municipal code enforcement liens." [9]

The Court first focused on the state preemption of the home rule powers, the "exception as otherwise provided by law" portion of Article VIII, Section 2(b) of the Florida Constitution. This concept was restated by the legislature in § 166.021(3), Fla. Stat. that reads in pertinent part, "The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except: . . .(c) Any subject expressly preempted to state or county government by the constitution or by general law…" The emphasis then was whether or not the state had preempted the ability for

municipalities to alter or amend the way in which liens are perfected and prioritized on Florida real property.

The Court examined the statutory regimen set forth in the Florida statues for the creation of interests and liens in real property. The analysis began with an examination of § 28.222, Fla. Stat. (2004) which requires the clerk of the circuit court to record various instruments and maintain the "Official Records" and to record those instruments listed in the statute while maintaining a "register in which he or she shall enter at the time of filing the filing number of each instrument filed of record, the date and hour of filing, the kind of instrument, and the names of the parties to the instrument." [10]

The Court went on to note that "the sequence of such official numbers shall determine the priority of recordation. An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series."

The Court then cited the introductory provision of § 695.01(1), Fla. Stat. (2004) which states, "No conveyance, transfer, or mortgage of real property, or of any interest therein . . . shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law." In fact, the court noted that the city liens in question were recorded in the public records.

The city claimed that its home rule powers granted it the authority to enact exceptions to the statutory scheme of lien priorities. The Court rejected that argument out of hand, stating that "The power to create exceptions to a legislative scheme is the power to alter that legislative scheme." In doing so, the Court said, "…it is undisputed that the Palm Bay ordinance provision establishes a priority that is inconsistent with the priority established by the pertinent provisions of Ch. 695, Fla.Stat. In those statutory provisions, the Legislature has created a general scheme for priority of rights with respect to interests in real property. Giving effect to the ordinance super-priority provisions would allow a municipality to displace the policy judgment reflected in the Legislature's enactment of the statutory provisions. And it would allow the municipality to destroy rights that the Legislature established by state law. A more direct conflict with a statute is hard to imagine."

"Hidden Lien" Legislation

At the same time that the Florida Supreme Court was considering the *City of Palm Bay* case, the Florida legislature was grappling with the hidden municipal lien problem. As previously noted, numerous municipalities historically have not recorded municipal liens in the Official Records pursuant to § 28.222, Fla. Stat., and § 162.09(3), Fla. Stat. Rather than record in the official records, separate proprietary files were maintained by many municipalities. This required a separate municipal lien search for what many referred to as "hidden liens."

CS/HB 267 signed by the Governor on June 28, 2013, creating Chapter No. 2013-241, amended § 695.01, Fla. Stat., to add a new subparagraph (3). It was the combined work of the Problem Study Committee of the Section and Section member Representative John Wood, (R), Lakeland. It reads, "(3) A lien by a governmental entity or quasi-governmental entity that attaches to real property for an improvement, service, fine, or penalty, other than a lien for taxes, non-ad valorem or special assessments, or utilities, is valid and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration only if the lien is recorded in the official records of the county in which the property is located. The recorded notice of lien must contain the name of the owner of record, a description or address of the property, and the tax or parcel identification number applicable to the property as of the date of recording."

This new provision will take effect October 1, 2013.

On the effective date of Sec. 695.01(3), F. S., most municipal liens to be perfected against real property will have to be recorded in the public records.

The Interplay

The interplay between the *City of Palm Bay* case and this new statutory provision is interesting. On the effective date of § 695.01(3), Fla. Stat., most municipal liens to be perfected against real property will have to be recorded in the public records. There is a carve-out for "taxes, non-ad valorem or special assessments, or utilities."

The *City of Palm Bay* case focused on lien priority more than lien creation as the facts presented indicated the City's liens were recorded consistent with § 162.09(3), Fla. Stat. But a fair reading of the case could lead one to conclude that the amendment to § 695.01, Fla. Stat., was unnecessary as there was already a legislatively imposed manner to perfect liens on real property that precluded any alternative attempt by municipalities given the state pre-emption analysis by the court.

It is axiomatic that a lien cannot be created on real property without simultaneously establishing the priority of that lien. The legislature passed § 695.11, Fla. Stat., and § 28.222, Fla. Stat., to establish the means to both notice and prioritize liens on real property. In *City of Palm Bay* the court noted the pertinent provisions of Ch. 695, Fla. Stat., (note § 28.222, Fla. Stat., is imbedded into § 695.11, Fla. Stat., by specific reference) and said, "In those statutory

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provisions, the legislature has created a general scheme for priority of rights with respect to interest in real property." Given that this case clearly stands for the proposition that a municipality cannot alter this legislative scheme of lien prioritizations, it follows that no municipal ordinance can create a mechanism or repository for perfecting liens on real property separate from the official records.

The logical conclusion then is no "municipal lien" is in fact a lien on real property unless recorded in the public records. This conclusion is consistent with the permissive recording in the public records provisions found in § 162.09(3), Fla. Stat.

Put another way, the argument will be that municipal liens not recorded in the public records prior to October 1, 2013, were *never* liens on any real property because such efforts by a municipality conflicted with the legislative scheme for perfecting and prioritizing liens on real property. The prioritization of any lien is key to the analysis because the establishment of a lien with no integration of said lien into the real property lien regimen created by the legislature cannot be accomplished. The argument will be a legitimate means to address an ex post facto attack on the validity of § 695.01(3), Fla. Stat.

Practical Implementation

Consider the impact of the carve-out in § 695.01(3), Fla. Stat. Assuming the pre-emption rationale in *City of Palm Bay* is and always has been applicable to municipal liens, then "taxes, non-ad valorem or special assessments, or utilities" cannot be legitimate unrecorded liens after October 1, 2013, unless their priority has been otherwise legislatively established.

Municipalities would be prudent to record their liens for practical reasons. Recording of their liens in the public records rather than some proprietary, poorly accessible file will only promote their easy identification and payment by title professionals.

The inability of municipalities to claim any superior priority to their liens should facilitate mortgage foreclosures going forward. Prior to the *City of Palm Bay* case, it was commonplace for title insurance underwriters to not rely upon a final judgment of foreclosure to extinguish a municipal lien unless there was an express finding by the court that the lien of the mortgage was superior to that certain municipal lien identified by its recording information. The traditional concern was the threat of an alleged super priority of the municipal lien, an issue that is now moot. But we caution that we are aware of some municipalities that do not want to accept the impact of the *City of Palm Bay* case and advise practitioners to consult with their underwriting counsel prior to insuring title.

This article has only addressed municipal liens to this point, but there is the related question as to the applicability of *City of Palm Bay* to county liens. There are both charter and non-charter counties, with a separate legal authority for each to enact ordinances.

The authority of non-charter counties to enact ordinances is set out in Art. VIII, § 1(f) of the Florida Constitution. It authorizes ordinances "not inconsistent with general or special law." For charter counties, there is a similar provision in Art. VIII, § 1(g) of the Florida Constitution. It enables charter counties to enact ordinances "not inconsistent with general law." Notwithstanding the obvious parallels to the state pre-emption provisions restricting the municipal home rule provisions that substantiate the argument consistent with *City of Palm Bay* (to the effect that, like a municipality, a county cannot enact an ordinance creating a superior lien priority), it is recommended that title insurance underwriting counsel be consulted before binding a title insurer.

Given the fundamental importance of clarity in all real property transactions of whatever nature, this latest evolution giving clarity to the law relating to municipal code enforcement board liens will be a distinct benefit to Florida's real property centric economy.


J. RUSSICK

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Roger Cruce *is a graduate of Florida Coastal School of Law, having attended after an extensive career as an abstractor and title examiner in the title insurance industry. As a member of the Problem Study Committee of the Real Property, Probate and Trust Law Section, it was his background and experience that identified and championed the "Hidden Liens" legislation discussed in this article. He is currently in private practice in Orange Park, FL.*

Endnotes:

1 Article VIII, Section 2(b), Florida Constitution
2 Chapter 162, Florida Statutes (2004)
3 § 162.03(2), Fla. Stat. (2004)
4 § 162.09(3), Fla .Stat. (2004)
5 *See Dade County vs. Certain Lands*, 247 So.2d 787,789-90 (Fla. 3d DCA 1971)
6 § 162.09(3), Fla.Stat. (2004)
7 114 So. 3d 924 (Fla. 2013)
8 57 So. 3d 226, 227
9 114 So. 3d 923 (Fla. 2013)
10 *See* § 28.222(2), Fla. Stat.

ITIN Problems Still Plague FIRPTA Closings

By Jonathan H. (Jason) Warner, Esq., Miami, FL


J. WARNER

Over a year after the Internal Revenue Service (the "IRS") announced changes in its procedure for issuing Individual Taxpayer Identification Numbers ("ITIN") to foreign individuals, reports from attorneys and accountants involved in real estate closings for foreign sellers[1] indicate substantial problems remain for filings under the Foreign Investment in Real Property Tax Act, as amended ("FIRPTA"),[2] when an ITIN is needed for the foreign seller.[3]

Background

The ITIN system originated in 1996 to allow foreign individuals, ineligible for a Social Security number, to obtain a taxpayer identification number.[4] Prior to 2003, taxpayer identification numbers were not required at closings that required FIRPTA filings, although a foreign seller would have needed one in time to file the required federal income tax return reporting the sale. In August 2003, the IRS issued regulations requiring a taxpayer identification number for all FIRPTA filings, but immediately thereafter modified the requirement to avoid disrupting closings by authorizing holding remittances in a suspense account and assigning temporary identification numbers so that closings could proceed.[5]

The IRS workarounds quickly were rendered obsolete by substantial changes in the ITIN system announced in December 2003, which primarily required, subject to certain exceptions, an applicant to attach a valid tax return to the ITIN application (Form W-7). The new procedures initially did not contain an exception for FIRPTA withholding filings (which do not involve a tax return), but the IRS's "FIRPTA Unit" quickly negotiated modifications with the IRS's "ITIN Unit," reflected by publication on the IRS website of "ITIN Guidance for Foreign Property Buyer/Sellers" in February, 2004.[6]

The 2004 system remained in effect until June, 2012, when, in reaction to the pending release of a report by the Treasury Inspector General for Tax Administration ("TIGTA," and such report is referred to as the "TIGTA Report") criticizing IRS procedures and controls as inadequate to detect fraudulent ITIN applications, the IRS announced drastic changes.[7] The TIGTA Report noted that out of total ITIN refunds of $6.8 billion,[8] claims for the Additional Child Tax Credit (which can result in a refund in excess of tax withheld) by ITIN users totaled $4.2 billion in 2011.[9] The June 2012 changes were modified in November 2012,[10] effective January 1, 2013.

Documentation Requirements Toughened

To obtain an ITIN, the applicant must file Form W-7 with supporting documentation to prove both the applicant's identity and foreign person status. A valid passport suffices for both purposes, but, in lieu thereof, other forms of identification listed in the Form W-7 Instructions are accepted, provided that one of the two forms of identification contains a photograph of the applicant. Under the system in effect prior to the 2012 changes, an applicant for an ITIN could either:

- use a Certifying Acceptance Agent ("CAA," typically a certified public accountant), who would review the applicant's documentation, complete a certificate as to the authenticity, accuracy and completeness of the required identification documentation that the CAA reviewed, and forward the Form W-7 application and certificate of accuracy (without enclosing copies of the reviewed documents) to the IRS for processing.[11]

or

- send the original document(s) or certified or notarized copies directly to the ITIN Unit with Form W-7. Copies could be notarized by a U.S. notary (after inspecting the original document) or, if the applicant's home was in one of the many countries signatory to the applicable Hague Convention, by a foreign notary under the apostile process. The prior Form W-7 Instructions actually discouraged the use of original documentation.

Currently, notarized copies are no longer acceptable, and only original documents or copies certified by the issuing agency (hereinafter, "agency-certified") are accepted. This has caused substantial hardship for foreign individual sellers.[12] A foreign individual seller seeking to comply with FIRPTA withholding has several choices, not all of them practical:

1. To avoid sending original documents to the IRS, the new procedures offer applicants the option of obtaining a certified copy of a document from the issuing agency. Unfortunately, the IRS apparently did not check with foreign countries before announcing this alternative, as it is not easy (or even possible) in some foreign countries to obtain a proper certified copy of a passport.[13] For example, the United Kingdom, Commonwealth countries, and Switzerland will not issue certified copies satisfactory to the IRS.[14] For some countries, it may be possible to travel to a consulate in the United States, if conveniently located, but not all countries allow their consulates to certify passports. There may be only one office in a particular country that will certify a passport or other applicable document, and it may not be conveniently located.
2. Send their original passport or other original documents to the ITIN Unit. This option prevents the risk of the applicant sacrificing the possession of such documents

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for an estimated 60 days or even permanently.[15] If the applicant is located convenient to a U.S. Tax Attaché office (currently located only in London, Paris, Frankfurt or Beijing), the IRS suggests that the applicant travel to such office to have the original document certified by the Attaché office so that the applicant either retains possession of his/her original documents or is not required to obtain an agency-certified copy. However, it appears that, at least at the London office, unless the applicant provides a pending tax return (which is not feasible for a FIRPTA closing) the Attaché will insist on sending the original or agency-certified documents to the ITIN Unit. In addition, it is reported that office is open only limited hours, cannot be reached by telephone, and requires long waits for service.

3. If the Seller is in the United States, he/she should visit a participating Taxpayer Assistance Center ("TAC"), which is supposed to certify the applicant's original passport or national identification card. There are seven participating TACs in Florida, including Miami, Plantation, West Palm Beach, Fort Myers, Tampa, St. Petersburg and Sarasota (but not Orlando, for example). For a complete list, see: *http://www.irs.gov/uac/TAC-Locations-Where-In-Person-Document-Verification-is-Provided.*
4. Find a CAA in the United States (or in certain other countries) who can certify the applicant's original documents, help the applicant properly complete the Form W-7 and forward it to the ITIN Unit with photocopies of the documents and the CAA's certificate of authenticity. CAAs are permitted to use videoconferencing[16] instead of requiring the applicant to meet in person, offering the possibility of sending the original documents to the CAA by courier and avoiding the necessity of traveling. CAAs generally charge for their services.
   A list of CAAs can be found at *http://www.irs.gov/Individuals/Acceptance-Agent-Program*, but care should be exercised to ensure that the CAA has completed the forensic training required by the IRS and is willing to actually authenticate documents. Some CAAs may be of the opinion that the training they received was inadequate and may insist on forwarding the original documents to the ITIN Unit, thus negating the benefit of this option. In addition, the IRS lists non-certifying Acceptance Agents together with CAAs, differentiating them only by an asterisk next to the name of the non-certifying Acceptance Agents. The list is updated quarterly.
   Interestingly, the TIGTA Report recommended discontinuing the CAA program due to evidence of fraud,[17] but the IRS declined. However, CAAs are now required to undergo forensic training and to submit copies of authenticated documents.
5. For foreign students only, the special "Student Exchange Visitors Program" remains in effect at educational institutions.

No More Notarization or Apostiles

The TIGTA Report strongly criticized the IRS for accepting notarized copies of documents, claiming that notaries only certify the identity of the signers instead of authenticating originals, and that neither the IRS nor a CAA can authenticate a document without seeing the original. As support for its position, the TIGTA Report cites a conversation with representatives of the Social Security Administration, which does not accept notarized documents based on their view that a notary does not authenticate the legitimacy of documents or prove the identity of individuals.

The TIGTA Report ignores the document authentication function of a civil law notary. Civil law notaries are permitted in Florida, Alabama and Louisiana, and civil law notaries outside the United States historically have performed a far more significant and sophisticated function than that dismissed by the TIGTA Report. And in the more than 100 countries party to the Hague Apostile Convention,[18] a foreign notary's certification is confirmed through the apostile procedure previously accepted by the IRS.[19]

Further, the TIGTA Report fails to discern the obvious difference in hardship between providing an original birth certificate to the Social Security Administration or surrendering one's passport for 60 days or more and risking its loss, or the difference in difficulty between obtaining an agency-certified birth certificate and an agency-certified passport outside the United States. One can travel on business (or emergencies) without a birth certificate, but surrendering possession of one's passport effectively prevents the holder from traveling while waiting for its return or using the passport, as often required, for identification or proof of legal status in the United States.

Rejected ITINs – Still No Explanation

The IRS failed to take the opportunity to cure a glaring problem with the ITIN program. CAAs frequently complain about serious inconsistencies in the ITIN process, with complete documentation being rejected by one examiner and poor documentation being accepted by another. Currently, the ITIN Unit gives no reason for the rejection and it generally is not possible to obtain an explanation by telephone or otherwise. It would substantially improve the process from the point of view of both the IRS and the applicant if the ITIN Unit were required to specify in writing why it has rejected an application or a particular document.

5-Year Limit on ITINs

ITINs now will expire in five years. This is not particularly relevant to the typical FIRPTA closing, but there may be foreign sellers with more than one U.S. real estate investment who may have to apply again when the initial number expires. A foreign buyer also may be affected by the new limit if the acquired property is held longer than five years,

thus requiring re-application when the property is sold.

FIRPTA Problems That May Arise from the New ITIN Procedures

Apparently, improper documentation has caused the rejection of a large number of ITIN Applications. The best way to avoid this for FIRPTA closings is to have the foreign seller use a CAA to prepare the W-7 and certify the applicant's original documentation. A participating TAC is the next best alternative.[20]

Apparently a large number of ITIN Applications are being rejected because of improper documentation.

The problem is most acute when a foreign seller lacking an ITIN wishes to file an Application for Withholding Certificate (Form 8288-B; hereinafter, "Application") to reduce or eliminate the required 10% withholding. The original Application and supporting documentation must be sent to the ITIN Unit along with Form W-7 and its required documentation. Assuming that the seller has given the required notice to the buyer that the seller has filed an Application prior to closing,[21] the 10% withholding will have been escrowed on behalf of the buyer pending receipt of the FIRPTA Unit's ruling on the Application.

Normally, the ITIN Unit is in communication with the FIRPTA Unit regarding Applications received with Form W-7, and informs the FIRPTA Unit of acceptance or rejection of the ITIN application. If the ITIN is issued, the assigned number(s) and the Application for Withholding Certificate are forwarded to the FIRPTA Unit, which processes the Application and notifies the seller and buyer of the amount of withholding (if any) to be remitted to the IRS. If the Form W-7 is rejected, in addition to the ITIN Unit's notification to the applicant the FIRPTA Unit sends Letter 3793 SC/CG, informing the seller (or buyer, if applicable) that they should correct the problem with the Form W-7 and reapply for the Withholding Certificate.[22]

Occasionally, things go wrong. Mail may get lost or other communications glitches may occur. Several months may pass with no contact from the ITIN Unit or the FIRPTA Unit and the withholding amount remains in escrow.[23] What are the parties to do in that circumstance?

One option is to contact the FIRPTA Unit to verify whether the Application has been received.[24] If not, the seller could submit a new Application directly to the FIRPTA Unit for the purpose of receiving a formal rejection so that the time frame for remitting the withholding is clearly stated in the rejection letter.[25]

Alternatively, depending on the terms of the escrow agreement, the escrow agent could terminate the escrow and send the withheld amount to the FIRPTA Unit with Forms 8288/8288-A, along with a letter explaining that the delay in remittance was due to the pending Application for Withholding Certificate. It would be helpful if the escrow agent possessed a copy of the Application and proof of mailing to enclose with the letter.[26] In that regard, it is suggested that closing attorneys review their escrow agreements to require the seller to notify the escrow agent of any communication received from the ITIN Unit, including a rejection or suspension of an ITIN application, and to impose a reasonable time limit after which the escrow agent may terminate the escrow and remit the withholding, even without the seller's ITIN.

The consequence in either case is that the seller will not receive the stamped copy of Form 8288-A required to obtain a refund of excess withholding or to credit the withheld amount against the tax due. The seller will be required to correct the Form W-7 deficiency, and then work with the FIRPTA Unit to obtain the stamped copy of Form 8288-A in time to file the tax return reporting the sale.

A preemptive alternative is for the buyer (i.e., a U.S. person, or a foreign person with an ITIN) simply to refuse to cooperate with the Application for Withholding Certificate (which is the buyer's right absent a contrary provision in the sales agreement), and remit the withholding and Form 8288/8288-A within 20 days of closing without the seller's ITIN. The seller can file an Application for Withholding Certificate with Form W-7 and documentation immediately after closing, which should not result in a significantly longer response time than for one (as is typical) filed the day of closing, but there may be a somewhat longer time in obtaining a refund once the seller's ITIN is issued.

This article is intended to educate closing attorneys about potential problems attendant to FIRPTA closings, problems that are yet another reason for the attorney to determine whether the seller is foreign and to discuss FIRPTA compliance and availability of tax identification numbers at the earliest possible opportunity. This article is not intended to encourage closing attorneys to assist the parties with Form W-7 and the required documentation. That task is better left to CAAs or to a participating TAC.

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Endnotes:

1 The issues discussed herein are relevant only to a foreign person owning or acquiring property directly, and not to indirect ownership through a corporation. The ITIN revisions do not affect employer identification numbers for entities.

2 Omnibus Reconciliation Act of 1980, P.L. 96-499, §1122(a) (1980), codified in §§ 897 and 6039C of the Internal Revenue Code of 1986, as amended (the "Code"). FIRPTA withholding under Code § 1445 was added by the Deficit Reduction Act of 1984, P.L. 98-369, div. A., title I, §129(a)(1).

3 This also applies to a foreign buyer, but the focus of this article is on foreign sellers.

4 Code § 6109; Treas. Reg. § 301.6109(d)(3).

5 The IRS also established a special procedure to allow foreign corporations to obtain an employer identification number even if it had no U.S. officer.

6 See http://www.irs.gov/Individuals/ITIN-Guidance-for-Foreign-Property-Buyers-Sellers for the latest version.

7 July 16, 2012, Ref. # 2012-42-081.

8 TIGTA Report, Highlights.

9 TIGTA Report, page 6.

10 IR 2012—98, Nov. 29, 2012. See also FS 2012-11.

11 An applicant also may use the assistance of an Acceptance Agent, but an Acceptance Agent cannot certify documents.

12 Problems arise as well as for foreign buyers when the seller is foreign. If the seller is a U.S. person, a foreign buyer is not affected by these changes until the property is sold or rented.

13 Applicants prefer to use their passports for ITIN applications, since a passport can serve as the sole document required. More than one document is required if a passport is not submitted. See the Form W-7 Instructions for a chart of acceptable documentation.

14 They might do so under the apostile procedure, but the IRS no longer accepts such documents.

15 Oddly, if the documents are submitted by mail to the ITIN Unit, there is no in-person verification that the party submitting the documents is in fact the person named in them, leaving open the question as to exactly how does the new procedure prevent fraud.

16 FS 2012-11.

17 TIGTA Report, page 26. The TIGTA Report cites one scheme where four CAAs were prosecuted for obtaining refunds exceeding $20 million by filing over 10,000 tax returns based on fraudulent ITIN applications.

18 More properly, the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents.

19 The IRS claims that it is not unilaterally abrogating the Convention because it is declining all notarization, not just those under apostile.

20 However, it would not be surprising for a foreign seller or buyer to be reluctant to go to an IRS office.

21 See Treas. Regs. § 1.1445-1(c)(2)(i)(B). The notice should set forth the name, address, and taxpayer identification number (or "applied for"), a brief description of the subject property, and the date the application was submitted to the IRS.

22 A copy of the Letter must be included with the re-application

23 Although this scenario can happen with a proper ITIN Application, even one done by a CAA, it seems more often associated with filing by a professional not familiar with the new ITIN changes, particularly the "original document" requirement.

24 The telephone number for that purpose is 801-620-4442.

25 The FIRPTA Unit informally allows filing the original Form 8288-B directly, with a copy to the ITIN Unit. A copy of the W-7 should be sent to the FIRPTA Unit along with the original Form 8288-B, and a copy of the Form 8288-B should be included with the original W-7 filed with the ITIN Unit.

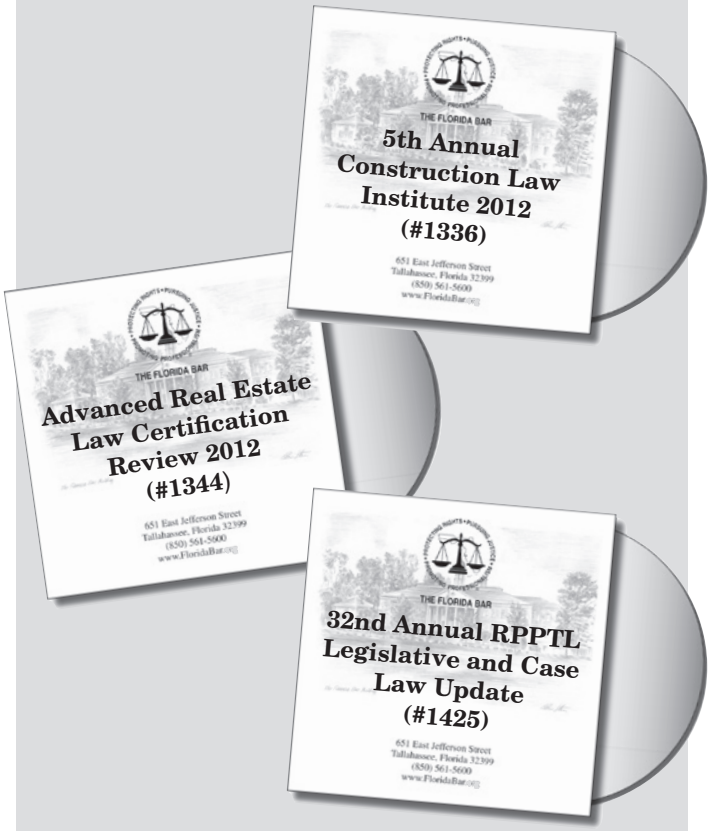
26 The IRS may still assert a penalty and interest for late filing and remittance, but the penalties and interest can be removed by sending documentation showing timely filing of the Application.

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Technical Corrections and Improvements to the Florida Power of Attorney Act

By Tami Foley Conetta, Esq., Northern Trust, Miami, Florida


CONETTA

Ch. 709, F.S., the Florida Power of Attorney Act (the "Act"), was signed into law on June 21, 2011 (effective October 1, 2011), and substantially rewrote Ch. 709, F.S., to conform to the Uniform Power of Attorney Act.

The two years since enactment have been an opportunity to better understand the implications of the Act. Practitioners were thoughtful in providing feedback for further improvements and many of their suggestions were incorporated into House Bill 841 sponsored by Representative Powell and Senate Bill 832 sponsored by Senator Joyner in the 2013 Session. The committee substitute for House Bill 841 was signed into law by the Governor on May 30, 2013, (Session Law no. 2013-90) and was effective immediately. The following changes to the Act were adopted.

Definitions

The original Act referenced financial institutions but it became clear that broker-dealers should be treated similar to financial institutions in the application of the Act. The Act now includes a definition of "broker-dealer" and conforming amendments were made to Sections 709.2120, 709.2121, 709.2207 and 709.2208, F.S.

The definition of "sign" was modified to clarify that the principal may use either a signature or a simple mark as evidence of execution.

A definition of "state," as it relates to acceptance of powers of attorney executed in compliance with the laws of another state of the United States, was added to acknowledge that holdings of the United States are included as "states" for this purpose.

Exclusions from the Act

Sec. 709.2103, F.S., provides that the Act does not apply to powers of attorney frequently encountered in common agency relationships and commercial contexts. The Act specifically excluded:

- A power created by an entity, such as a corporation;
- A proxy or other delegation to exercise voting or management rights;
- A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose; or
- Powers coupled with an interest (such as powers given to a creditor to perfect or protect title in or to sell, pledged collateral).

The 2013 changes confirmed that the following documents that create an agency relationship are not governed by the Act:

Stock powers. The Depository Trust Company and other transfer agents rely on stock transfer powers to facilitate transfers of shares. A stock transfer power is a common law agency and should not be subject to the additional requirements and restrictions of the Act, such as the requirement to have two witnesses and a notary acknowledgment. One should note that Sec. 709.2201(2)(a), F.S., authorizes the agent under the power of attorney to execute stock powers and delegate authority to a transfer agent. This is one of the few exceptions to the general prohibition on delegation by the agent.

Agent for trades and transfers. Most investment management agreements authorize the broker-dealer or financial institution to execute trades and transfers on the client's behalf by appointing the broker-dealer or financial institution (or their employee) as an agent of the client. This appointment is necessary to facilitate the sale and purchase of investments and transfers in a timely manner in response to market changes. As with stock powers, the agreements rarely meet the witness and notary execution requirements of the Act. The bill clarifies this type of agency appointment is not covered by the Act.

Agent for a trustee to whom authority has been delegated. A trustee is authorized in The Florida Trust Code to appoint agents to assist the trustee in fulfilling its responsibilities. The 2013 changes clarify that the Act is not applicable to this type of agency appointment since the fulfillment of a trustee's responsibilities and those of his agent are governed by Ch. 736, F.S. Under Sec. 736.0807, F.S., a trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee must exercise reasonable care, skill, and caution in:

- Selecting an agent.
- Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.
- Reviewing the agent's actions periodically, in order to monitor the agent's performance and compliance with the terms of the delegation. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

Execution by disabled principal

The Act requires the principal to sign the power of attorney with either a signature or a mark. A reasonable accommodation is needed to facilitate the signing of a power

continued, next page

of attorney by a principal who is physically unable to sign, but otherwise has the capacity to enter into a power of attorney. The procedure in Ch. 117, F.S., authorizes a notary to sign the name of the disabled principal. This procedure is now specifically acknowledged in Sec. 709.2105, F.S., as an approved method of execution. In addition, the principal may also direct the notary to acknowledge the separate powers that require additional signatures or initials under Sec. 709.2202, F.S. The separate powers in this provision authorize the disposition of the principal's assets by trust, gift or beneficiary designation. Due to the nature of this authority, the Act requires a separate acknowledgment by the principal that such authority has been granted to the agent. The amendment of Sec. 709.2202, F.S., adds a new subsection (2) to include the requirements for a notary to provide the acknowledgment on behalf of the principal. These include:

- The principal must direct the notary to sign or initial the specifically enumerated authority;
- The notary must do so in the presence of the principal and two disinterested witnesses, and
- The notary must include a reference to Sec. 117.05(14), F.S., in each instance where the acknowledgment is made by the notary.

Validity of power of attorney

One of the key provisions of the Act recognizes the validity of a power of attorney executed in another state. The Act allows third parties to request an opinion of counsel that the power of attorney was properly executed under the laws of such other state since third parties cannot be expected to know the requirements of all states. Sec. 709.2106(3), F.S. was changed to clarify that if a third person requests the opinion of counsel and it is not provided, the third person may refuse to accept the power of attorney. The prior language was unclear regarding the third person's right to refuse to accept the power of attorney.

Another key provision of the Act allows third parties to accept a copy of a power of attorney rather than requiring the agent to produce an original each time. Title insurance agents expressed concern that an original must be recorded in the public records for purposes of real estate title transfers using a power of attorney. Sec. 709.2106(5), F.S. was changed to clarify that the agent must provide the original power of attorney when it must be recorded in the public records as part of a transaction. Additionally, a new Sec. 709.2106(6), F.S. authorizes the recording of an original power of attorney in the public records upon payment of the prescribed fee. This may be a useful mechanism for the agent to obtain certified copies to present to third parties.

Delegation by agent

There are limited circumstances in which an agent may delegate his or her authority to another person. The Act previously limited such delegation to Sec. 518.112, F.S., (to enable an agent to obtain qualified investment management on the principal's behalf) and to a stock transfer agent as previously discussed. The changes allow the agent to now delegate his or her authority using a prescribed governmental form, such as a power of attorney to a car dealer to facilitate the transfer of title for the sale of a vehicle, or the appointment of an agent for communication with the Internal Revenue Service using IRS form 2848.

Attorney's fees

The Act allows a court to award attorney's fees and costs in any proceeding involving a power of attorney in Sec. 709.2116, F.S., but no standard was provided for the court to apply in making the award. The Act now allows the court to award fees "as in chancery actions" providing discretion to the court in whether or not to make an award and against whom.

Modifications to statutory form affidavit

A third party may request that the agent provide an affidavit as to the current validity of the power of attorney. The contents of the affidavit and the suggested form were modified to include statements regarding the marital status of the principal and agent, if appropriate.

English translation

A third person may require a translation if a power of attorney is presented in a language other than English. The Act required the translation be "verified" and this was changed to "certified." Verification of a translation requires the certification by the translator that it is an accurate translation as well as a certification by a court that the translator has been approved to provide translation services. This additional requirement placed too great of a burden on the agent. A certification by the translator is sufficient to ensure accuracy of the translation.

Rejection of power of attorney

Sec. 709.2120 of the Act identifies situations where it is appropriate for a third party to reject a power of attorney. It includes a requirement that the third party notify the agent in writing of the reason for the rejection. If the notice is not provided in a timely manner then the third person will be deemed to have accepted the agent's authority. This provision was revised for clarification and to confirm that a written notice of rejection is not required when the third person is not otherwise required to engage in the same transaction with the principal. Conversely, notice is required in all other situations. An example where the third person would not have to give notice of rejection is when the agent wants to establish a new account with a bank. The bank may turn away any potential customer without giving a reason for doing so. The same concept would

apply to the agent. However, if the agent is requesting access to an existing account in the name of the principal, and the bank elects to reject the agent's authority, the bank would need to provide notice of rejection under the statute.

Authority to make gifts

The agent's ability to make a gift of the principal's property is limited under Sec. 709.2202 of the Act to a default limit equal to the annual exclusion amount for federal gift tax purposes. This amount is $14,000 per donee in 2013. The principal may expand this authority to a greater amount in the power of attorney. The change clarifies that this limit is measured on a calendar year basis, which is the same as it is measured for Federal gift tax purposes, so that the agent may make gifts of $14,000 per donee each calendar year.

Tami Conetta *is the East Region Trust Practice Executive for The Northern Trust Company. Ms. Conetta is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and an active member of the Real Property, Probate and Trust Law (RPPTL) Section of The Florida Bar, where she serves on the Executive Council and as Vice Chair of the Trust Law Committee. Ms. Conetta is a graduate of Furman University and the University of Florida College of Law.*

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Redefining Land Trusts in Florida – The New and Improved Land Trust Act

By Wilhelmina F. Kightlinger, Esq.,
Old Republic National Title Insurance Company, Tampa, Florida


W. KIGHTLINGER

The Florida legislature revised the Florida Land Trust Act, Sec. 689.071, F.S., (the "Land Trust Act") during the last legislative session to harmonize the Land Trust Act with provisions of the Florida Trust Code, Ch. 736, F.S., and to codify existing land trust practices. The revised Land Trust Act includes improvements based on the experience of Florida land trust practitioners to facilitate and encourage the use of land trusts in Florida. The revised Land Trust Act is the result of 3 years of hard work and the combined efforts of the Real Estate Structures and Taxation Committee (formerly the Land Trusts and Real Estate Entities Committee), the Trust Law Committee, and the Title Insurance Committee. This legislation is an example of how both Divisions of the Section work together. The work on the revised Land Trust Act started after issues regarding the use of the "title estoppel" powers in deeds to trustees of trusts under Ch. 736, F.S., ("Chapter 736 trusts") caused those trusts to be characterized and treated as Land Trusts by Florida courts. The Section's efforts were sponsored in the House by Representative Jose Javier Rodriguez from Miami and in the Senate by Senator David Simmons from Altamonte Springs.

Defining a "Land Trust"

The Land Trust Act was first enacted in 1963 to validate the use of Illinois land trusts in the State of Florida and to confirm the marketability of real property titles derived through the trustee of a land trust. From its initial enactment, the Land Trust Act protected third parties who relied on the statutory authority of the trustee based on the powers granted to the trustee in the vesting deed or instrument without requiring them to inquire into the identity of the beneficiaries or the terms of the unrecorded trust agreement. As a result, it became a common practice in Florida to include those powers in conveyances to trustees even if the trust was not intended to be a land trust, in order to obtain the "title estoppel" benefits of the statute.

Before the latest revisions to the Land Trust Act, there was a concern that if a deed granted that power and authority to a trustee of a Chapter 736 trust, that deed created a land trust governed by the Land Trust Act even if the underlying trust agreement was for a Chapter 736 trust because the definition of a "land trust" under old Sec. 689.071, F.S., relied upon the grant of the powers in the deed. This was a problem for both trustees and beneficiaries of Chapter 736 trusts who wanted the provisions of Chapter 736 to apply to their trusts. To address this concern, the definition of a "land trust" is clarified in new Sec. 689.071(2). F.S., so that whether or not a trust is a land trust is not dependent solely on the grant of powers in the deed. The definition now focuses on the distinctions between the functions of a trustee of a land trust and a Chapter 736 trust. The trustee of a land trust acts as an agent of the beneficiaries of the trust or the party holding the power of the direction under the land trust agreement (without the Land Trust Act, the trust could be considered a passive trust). The trustee of a Chapter 736 trust is more than just an agent of the beneficiaries and can act without the direction of the beneficiaries. Thus, Ch. 736, F.S., provides for fiduciary duties and responsibilities for a trustee of a Chapter 736 trust which are not found in the Land Trust Act (which is why many did not want their Chapter 736 trust to be treated as a land trust). The clarified definition of a land trust focuses on the distinction between those duties.

For trusts created on or after July 1, 2013, the revised definition of a "land trust" will limit the duties of a trustee of a "land trust" to the following: (i) the duty to exercise the trustee's deed powers as directed by the beneficiary or by the holder of the power of direction; (ii) the duty to dispose of the trust property at the termination of the trust (i.e., the classic "active" duty that historically saved Illinois land trusts from the statute of uses); (iii) the duty to perform ministerial and administrative functions delegated to the trustee; and (iv) the duties required of certain timeshare trustees by Ch. 721, F.S. If the trustee's duties exceed the foregoing limited duties and the trust is created after July 1, 2013, then the trust will not be treated as a land trust and will be subject to Ch. 736, F.S. Because the "title estoppel" provisions of Sec. 689.073, F.S., (discussed further herein) apply to any conveyance containing deed powers, the classification of the trust as a "land trust" (or not) will not affect the title to any real property held by the trustee.

Switchbox Provision

The revised definition of a "land trust" contains a cross-reference to a transition rule that appears in new subsection 689.071(12), sometimes referred to as the "switchbox" provision. This transition rule exempts land trusts created prior to July 1, 2013, from the new duties-based test in subsection 689.071(2)(c); an existing trust is a land trust (or not) based on the intentions expressed in (or discernible from) the existing trust agreement. As a practical matter, the overwhelming majority of existing land trusts sharply curtail the discretionary duties of the land trustee so that those existing trusts would meet the new duties-based "land trust" definition even if it were applied to them retroactively. But because there are some land trust agreements that

vest the land trustee with greater discretion, the switchbox provision does not apply the duties-based test to any existing land trust agreement that says the trust is a "land trust" or clearly was intended to be a land trust. In this way, existing obvious -land trusts are "grandfathered" into the revised land trust statute.

There are two necessary exceptions to the switchbox provision in subsection 689.071(12): (1) if it is not obvious from reading the existing trust agreement that the parties intended to create a land trust, then the duties-based test applies; and (2) if an existing land trust agreement is amended to add or expand duties of the trustee, then the duties-based test is applied only to the added or expanded duties that were not found in the trust agreement before the effective date of the amended act. In either case, if the trustee has or acquires too many duties beyond those in the land trust definition, the result is that the trustee becomes subject to the tougher trustee standards of Ch. 736, F.S., but there is no effect on the title to the trust property.

Extension of Title Estoppel Provisions

One of the most significant revisions was the creation of Sec. 689.073, F.S., which relocates the subsections of the Land Trust Act that allow a third party to rely upon the power and authority granted to a trustee in a deed or other recorded instrument. The new Sec. 689.073, F.S., extends this third party protection to trustees of both land trusts under the Land Trust Act and trustees under Chapter 736 trusts. If the vesting deed to the trustee of a trust or other recorded instrument grants to the trustee the full power and authority to sell, convey, encumber the property, or other powers as may be granted to the trustee, third parties may rely upon those powers in the deed or other recorded instrument. This protection applies to deeds and other instruments recorded before and after the effective date of the revised Land Trust Act. For deeds or other instruments recorded after July 1, 2013, the deed or instrument should not refer to Sec. 689.071, F.S., but instead refer to Sec. 689.073, F.S.

Beneficial Interests – Characterization, Perfection of Security Interests, and Timeshare Issues

A common misconception is that the beneficial interest in a land trust is automatically a personal property interest and not a real property interest. Under both the prior Land Trust Act and the revised Land Trust Act, the default is that the beneficial interest is a real property interest. The revised Land Trust Act provides that the beneficial interest can be designated as a personal property interest in either the recorded instrument or the trust agreement. The designation of the beneficial interest as a real or personal property interest does not affect title to the real property since the trustee of a land trust holds both legal and equitable title to the real property. However, even if the beneficial interest is designated as a personal property interest, the assignment of a beneficial interest in a land trust is subject to the documentary stamp tax as provided in Rule 12B-4.013(25) of the Florida Administrative Code.

Chapter 721 of the Florida Statutes (the Florida Vacation Plan and Timeshare Act) authorizes the creation and marketing of timeshare estates through trusts complying with Sec. 721.08(2)(c)4, F.S. Because timeshare estates are defined as real property in Sec. 721.05(34), F.S., the purchasers of Florida timeshare estates typically finance their purchase with a mortgage recorded against the timeshare estate. But if the timeshare estate is created as a beneficial interest in a timeshare trust under Chapter 721, F.S., that is a land trust, then UCC Article 9 and the Land Trust Act prescribe two different methods of perfection. This leads to the question: should the timeshare lender use a mortgage or UCC security interest?

Sec. 689.071(8)(c), F.S., resolves this apparent contradiction by clarifying that the UCC governs perfection if the beneficial interest in a land trust is declared to be personal property but that a mortgage instrument recorded in the real estate records is the proper method of perfection if the beneficial interest in a land trust is declared to be real property. In the latter case, the proper county for recording the mortgage may be specified in the recorded instrument or in a declaration of trust or memorandum that is recorded in the same county as the recorded instrument; otherwise, the location of the trust property determines the proper county for recording the mortgage. A transition rule appears in subsection 689.071(13) to provide for the continuation of perfection for any UCC financing statement that may have been filed, before the effective date of this clarification, against a land trust beneficial interest that is real property. It is an abbreviated version of the transition rules that were included in Revised UCC Article 9 in 2001.

The last sentence of Sec. 689.071(8)(c), F.S., was revised to clarify that a lien or security interest perfected against a beneficial interest in a land trust does not affect, in any way, the legal or equitable title of the land trustee to the trust property. New paragraph 689.071(8)(d) makes explicit a concept that is inherent in a beneficiary's ability to encumber a beneficial interest as described in paragraph 689.071(8)(c): the trustee's legal and equitable title to the trust property is separate and distinct from the beneficiary's beneficial interest in the land trust and the trust property. A lien, judgment, mortgage, security interest or other encumbrance against one interest does not automatically attach to the other interest. Paragraph 689.071(8)(e) was also revised to clarify this same point: documents recorded by a beneficiary to transfer or encumber a beneficial interest do not affect the legal and equitable title of the trustee or the deed powers granted to the trustee in the recorded instrument.

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Some Additional Revisions

Sections 689.071(4) and (5), of the revised Land Trust Act codify that the Statute of Uses and Doctrine of Merger do not apply to land trusts. Also included in the revised Land Trust Act are provisions that a guardian ad litem is not required to be appointed to represent the beneficiaries of a land trust in litigation involving land trust property and that a notice to a land trustee regarding the trust property must identify the trust property or the trust by information shown in the recorded instrument.

Wilhelmina F. Kightlinger *received her Bachelor of Arts degree (Summa Cum Laude) in History from the University of South Florida in 1990. She received her Juris Doctor degree (with Highest Honors) from Florida State University College of Law in 1995. She is an active member of the Title Insurance Committee, Chair of the Real Estate Structures and Taxation Committee, Co-Chair of the Sponsorship Committee, and an Executive Council member of the Florida Bar Section of Real Property, Probate and Trust Law. Ms. Kightlinger has spoken at various seminars on special title insurance issues in commercial real estate transactions, land trusts, Florida documentary stamp taxes and intangible tax issues, and commercial real estate closing and lending. Ms. Kightlinger was named one of the top women in Florida commercial real estate for 2008 by the Florida Real Estate Journal.*

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Real Estate Case Summaries

Prepared by Brian Hoffman, Esq., Pensacola, Florida

Following a foreclosure sale, the trial court has broad discretion to consider all equitable grounds in assessing a motion to set aside a foreclosure sale. Inadequate bid price is one of the equitable grounds that may be considered by the trial court, but it is not a necessary requirement to set aside a foreclosure sale.

Arsali v. Chase Home Finance, LLC, 38 Fla. L. Weekly S562a (Fla. 2013)

The trial court vacated the judicial foreclosure sale and certificate of sale issued by the clerk of court, dismissed the final judgment of foreclosure entered in favor of Chase Home Finance, LLC ("Chase"), and ordered the return of all monies paid by the third party purchaser, Nicholas Arsali ("Arsali"), at the foreclosure sale. Arsali appealed to the Fourth District Court of Appeal, which affirmed the trial court's ruling. The Fourth District Court of Appeal questioned whether the test set for in *Arlt v. Buchanan*, 190 So. 2d 575 (Fla. 1966) for vacating a foreclosure sale applies when adequacy of the bid price is not at issue, and certified that question to the Florida Supreme Court.

In September 2010, the trial court entered final judgment of foreclosure for Chase against Amy Wilson and Chris Manning (collectively the "Borrower"), and the foreclosure sale was scheduled for May 9, 2011. Nearly one month before the scheduled foreclosure sale, Chase and the Borrowers entered into a written agreement for reinstatement of the mortgage upon receipt of a lump sum payment to be made no later than May 6, 2011. On May 3, 2011, the Borrowers sent a cashiers check to Chase's counsel for payment of the entire indebtedness, which was received on May 4, 2011. Chase's counsel neglected to arrange for cancellation of the foreclosure sale. At the foreclosure sale on May 9, 2011, third party purchaser, Iron National Trust, LLC ("INT") submitted the highest bid for the property for $125,300. INT later assigned all rights to the property to Arsali. On May 13, 2011, after learning of the foreclosure sale, the Borrower filed a motion to vacate the foreclosure sale. On May 26, 2011, the Court heard the motion, and considered evidence including a copy of the reinstatement offer letter, the Borrower's cashiers check, and overnight mail receipts. Accordingly, the trial court's ruling to set aside the foreclosure sale was not based on inadequacy of the foreclosure bid. The Fourth District Court of Appeal explained that it was receding from its prior decision to the extent it requires that inadequacy of price be applied to every attempt to set aside a foreclosure sale.

The Fourth District Court of Appeal submitted to the Florida Supreme Court the following certified question: Does inadequate bid price need to be alleged and proven in order to set aside a judicial foreclosure sale? The Florida Supreme Court concluded inadequate bid price does not have to be proven. In reaching that conclusion, the Florida Supreme Court determined there was no conflict with the Court's prior rulings in *Arlt* and *Moran-Alleen Co. v. Brown*, 123 So. 561 (Fla. 1929). The Second, Fourth and Fifth District Courts of Appeal had concluded that *Brown* should be applied when grounds other than inadequacy of the bid form the basis to set aside a foreclosure sale, and *Arlt* should be applied when inadequacy of the bid is at issue. The Florida Supreme Court explained that *Brown* and *Arlt* are not in conflict and provided guidance with respect to why the trial court's broad discretion to weigh the equities in those cases should have been upheld. The Florida Supreme Court concluded the Borrower alleged and provided adequate equitable grounds, irrespective of the adequacy of the bid price, to set aside the judicial foreclosure sale and to dismiss the foreclosure action. Therefore, the Florida Supreme Court affirmed the trial court's ruling, and confirmed that an inadequate bid price is not a necessary requirement in an action to set aside foreclosure sale.

The doctrine of implied warranties of fitness, merchantability and habitability extends to essential services in common areas that support the habitability of a residence. Sec. 553.835, F.S. (2012) enacted July 1, 2012 cannot retroactively divest a cause of action based on those essential services that accrued prior to the enactment of that statute.

Maronda Homes, Inc. v. Lakeview Reserve Homeowners Assoc. Inc. et al., 38 Fla. L. Weekly S573a (Fla. 2013)

The trial court granted summary judgment in favor of the defendants, Maronda Homes, Inc. ("Maronda") and Thomson Construction Company ("Thomson"), with respect to the action filed by Lakeview Reserve Homeowners Association ("Lakeview") for breach of implied warranties of fitness and merchantability. The Fifth District Court of Appeal reversed that summary final judgment, remanded for further proceedings and certified conflict to the Florida Supreme Court regarding the scope of implied warranties of fitness and merchantability under Florida law.

Lakeview's cause of action arises from alleged defects in the development and construction of a residential subdivision that Maronda and Thomson had developed. During

construction, Maronda and Thomson retained control and managed the subdivision before transferring control to Lakeview, the homeowners association. After Lakeview assumed control of the subdivision, residents reported water drainage problems caused by the infrastructure of the subdivision that created problems including soil erosion and depressions, buckling and splitting of pavement and asphalt, faulty drainage and flooding of retention ponds that directly impacted the homes and access to the homes. Before the trial court, Maronda and Thomson moved for summary final judgment contending that common law implied warranties of fitness and merchantability do not extend to the construction and design of infrastructure, private roadways, drainage systems, retentions ponds, underground pipes, or any other common areas in a residential subdivision. The trial court agreed and granted summary final judgment to Maronda and Thomson based on the decision of the Fourth District Court of Appeal in *Port Sewall Harbor and Tennis Club Owners Ass'n, Inc. v. First Fderal Sav. And Loan Ass'n of Martin County*, 463 So. 2d 530 (Fla. 4th DCA 1985). The Fifth District Court of Appeal reversed the trial court's summary final judgment, held that the common law warranty of habitability is applicable to this case, and certified a conflict with *Port Sewall.*

The Florida Supreme Court discussed at length the foundations of implied warranty under Florida law, and the departure from the doctrine of caveat emptor, and confirmed the ruling of the Fifth District Court of Appeal that implied warranties of fitness for a particular purpose, habitability and merchantability apply to structures in common areas of a subdivision that immediately support the residence in the form of essential services. The Florida Supreme Court determined that the services in this case were essential to the habitability of the home, and Lakeview did have standing to bring those claims on behalf of the homeowners. The Florida Supreme Court also addressed the newly enacted Sec. 553.835, F.S. (2012), that took effect on July 1, 2012, and applied retroactively. The Florida Supreme Court noted that Sec. 553.835, F.S. (2012) was enacted to abrogate the decision of the Fifth District Court of Appeal, and the statute provided that the doctrine of implied warranties of fitness and merchantability do not apply to offsite improvements, which were defined to include infrastructure related improvements like those present in this case. The Florida Supreme Court determined that Sec. 553.835, F.S. (2012) was unconstitutional as applied to Lakeview's cause of action since it retroactively divested Lakeview of its cause of action. Accordingly, the Florida Supreme Court affirmed the decision of the Fifth District Court of Appeal, remanded to the trial court for further proceedings, and specifically disapproved the decision in *Port Sewall* to the extent it conflicted with this decision. Justice Canady dissented on the grounds that there were disputed facts as to whether the defects were essential services, which should have been remanded to the trial court for factual determination. Justice Canady further noted that the portions of the opinion that eluded to the unconstitutionality of Sec. 553.835, F.S. (2012) are purely dicta, and prospective application of that statute has not been decided by this decision.

Appointment of a receiver following final judgment of foreclosure but prior to foreclosure sale is permissible if the mortgage expressly provides for appointment of a receiver and if the moving party establishes a prima facie case that appointment of a receiver is necessary, such as to allow for remediation of environmental problems affecting the property.

U.S. Bank National Assoc. et. al. v. Terence B. Cramer et al., 113 So. 3d 1020 (Fla. 2nd DCA 2013)

The trial court denied U.S. Bank National Association's ("U.S. Bank") motion to appoint a receiver following entry of final judgment of foreclosure, but before the foreclosure sale had occurred, and U.S. Bank appealed to the Second District Court of Appeal.

U.S. Bank's predecessor in interest loaned Terence B. Cramer and Nancy H. Cramer (the "Cramers") the sum of $937,500.00, and the Cramers executed a mortgage securing that loan on real property that was the former site of a gas station. The mortgage contained a provision that allowed for the court to appoint a receiver as a matter of strict right to the lender and without notice to the borrower and without reference to the adequacy or inadequacy of the value of the property. After final judgment of foreclosure was entered U.S. Bank filed a motion to appoint receiver on

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the grounds that 1) the mortgage permitted appointment of a receiver upon a default, 2) the Cramers failed to pay the real property taxes for the prior five years, 3) the existing environmental problems amounted to physical waste of the property, and 4) the Cramers repeatedly violated an existing rents order.

The Second District Court of Appeal reviewed the denial of motion for appointment of receiver based on abuse of discretion. The Second District Court noted that appointment of a receiver is typically permitted to maintain the status quo of the property, and therefore such appointment should only be made cautiously. However, the Second District Court noted that after entry of final judgment of foreclosure, the cautious approach carries must less weight. The Second District Court confirmed prior case law that permitted the appointment of a receiver post-judgment. The Second District Court determined that failure to pay taxes or comply with a rents order were arguably insufficient reasons to appoint a receiver; however, the express provisions of the mortgage permitting appointment of a receiver and the environmental contamination issues were valid reasons, and were substantiated by the affidavit from the loan servicer for U.S. Bank, which explained that the loan is subject to a pooling and servicing agreement that prohibits foreclosure of environmentally contaminated property until a receiver is appointed and those issues remediated. Since the Cramers filed no affidavit in opposition, U.S. Bank had established a prima facie case for appointment of a receiver. Accordingly, the Second District Court concluded that the trial court had abused its discretion, and remanded to the trial court to enter an order appointing a receiver.

An undated allonge to a promissory note endorsed in blank does not preclude standing of the plaintiff in a foreclosure action, as long as ownership of the note and mortgage is evidenced by substantial and competent evidence, such as ownership by virtue of a purchase and assumption agreement with the FDIC

Andrea Stone et. al. v. BankUnited, 115 So. 3d 411 (Fla. 2nd DCA 2013)

The trial court granted final summary judgment of foreclosure in favor of the plaintiff, BankUnited, a national bank ("BankUnited"), and the borrower, Andrea Stone ("Stone") appealed to the Second District Court of Appeal.

On April 16, 2010, BankUnited filed a foreclosure complaint against Stone based on a promissory note in the amount of $248,569.76 secured by Stone's homestead residence in Sarasota, Florida. As exhibits to the Complaint, BankUnited attached a promissory note and mortgage naming another entity as lender, BankUnited, FSB, a federal savings bank ("BankUnited FSB"), which was placed into receivership by the FDIC on May 21, 2009.

continued, next page

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The subsequent filing of the original note and mortgage included an allonge which contained a blank endorsement from BankUnited FSB. Stone challenged on the grounds that BankUnited did not have standing at the time the case was filed, and the allonge was not dispositive of that issue since it was endorsed in blank and undated. An evidentiary hearing was held, and BankUnited presented testimony from an employee that worked for BankUnited, FSB, and remained an employee of the new BankUnited. Pursuant to the purchase assumption agreement with the FDIC, BankUnited acquired all assets of the defunct BankUnited FSB including the note and mortgage in question. The trial court granted summary final judgment of foreclosure following the evidentiary hearing, and Stone appealed.

On appeal Stone argued that standing to foreclose derives from endorsement of the note and that BankUnited must show that endorsement occurred prior to the inception of the lawsuit, which could not be done since the allonge was not dated. The Second District Court determined that competent evidence had been presented by BankUnited that it was the owner of the note and mortgage prior to commencement of the lawsuit by virtue of the purchase assumption agreement. The Second District Court concluded that the fact the note was endorsed in blank and the endorsement was not affixed to the original note carries no weight in light of the competent and substantial evidence that BankUnited was the owner of the note and mortgage at the time the lawsuit was filed. According, the trial court ruling was affirmed.

Amobile home park prospectus pursuant to the Florida Mobile Home Act, Chapter 723, F. S. (2012) is a disclosure document and part of the contract between the mobile home owner and the mobile home park, but it is not a supreme governing document that can be used to override lot increase provisions in a valid lease between the mobile home owner and mobile home park.

Tara Woods SPE, LLC v. Louella Cashin, 116 So. 3d 492 (Fla. 2nd DCA 2013)

The trial court granted final summary judgment rescinding a mobile home lease contract in favor of the plaintiff, Louella Cashin ("Cashin"), and against the defendant, Tara Woods SPE, LLC, ("Tara Woods"), the mobile home park owner. Tara Woods appealed to the Second District Court of Appeal.

In August 2007, Cashin purchased a resale mobile home in Tara Woods Mobile Home Park. Tara Woods owns

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the park which is regulated by the Florida Mobile Home Act, Chapter 723, F.S. (2012) (hereinafter the "Act"). On August 8, 2007, Cashin executed a Rental Assumption Agreement acknowledging and agreeing to assume the lease of the prior owner. Cashin also executed a Rental Agreement for the period assumed from September 1, 2007, through December 31, 2007. In addition, Cashin executed an acknowledgement confirming receipt of an approved prospectus from Tara Woods, and acknowledging that the original prospectus supplied to the prior owner was not provided. The approved prospectus (the "Approved Prospectus") provided by Tara Woods included as an attachment a Lifetime Lease, which Cashin later executed with Tara Woods, although the date of that execution is unclear. The Lifetime Lease permitted lot increases greater than those in the prior owner's lease. In June 2010, almost three years after executing the Lifetime Lease, and after two annual rent increases, Cashin filed a two count suit against Tara Woods seeking (1) declaratory relief that the Approved Prospectus be deemed the "supreme governing document" such that any provisions in the Lifetime Lease that conflicted with the Approved Prospectus were unenforceable, and (2) damages for the difference between rent Cashin paid under the Lifetime Lease as opposed to the obligation that would have been otherwise due under the prior owner's lease. Following a non-jury trial, the trial court ordered, among other things, that Cashin was entitled to rely on the prior owner's original prospectus and that lot increases must comply with that original prospectus. Cashin later elected to rescind the Lifetime Lease as provided in the Final Judgment, and thereafter a supplemental Final Judgment was entered that provided for damages pursuant to Count 2.

On appeal, Tara Woods argued that the trial court erroneously concluded that the park owner did not do enough to comply with the Act, and that Cashin waived certain rights. The Second District Court of Appeal adopted Tara Woods' argument, and addressed several of the issues in dispute that formed the basis of the trial court's ruling. First, Cashin's rights are governed by the Act and the Lifetime Lease, but not the Approved Prospectus. The Second District Court explained in detail that the Approved Prospectus is a disclosure document. Second, the Second District Court addressed Sec. 723.059, F.S. (2012) of the Act, titled "Rights of Purchaser". The Second District Court concluded that the trial court had misinterpreted this statute, not as a statute delineating Cashin's obligations, but a statute imposing duties on Tara Woods. The effect of the trial court's interpretation was to place a duty on Tara Woods to inform Cashin of her rights under the statute, that the Lifetime Lease was optional, and that if Cashin elected to execute the Lifetime Lease the rental increase provisions would not be the same. The Second District Court concluded the trial court's interpretation was in error and effectively imposes requirements and duties to the mobile home park owner that are not included in the Act. The Second District Court further concluded that a park owner: 1) has no obligation to provide a resale purchaser a copy of the prior owner's prospectus, only a current approved prospectus; and 2) has no obligation to provide a resale purchaser a copy of the optional lease Cashin had the right to enter into or to explain the difference between the lot increase terms in that optional lease and the prior owner's lease. For these reasons, the Second District Court determined Tara Woods had complied with all statutory obligations under the Act. Accordingly, the trial court ruling was reversed and remanded.

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Probate Case Summaries

Prepared by Tara Rao, Esq., Lutz, Florida

Because a surcharge would be a recovery for breach of fiduciary duty by a limited guardian, the guardian needs to show both (1) the existence of a fiduciary duty and (2) the breach of that duty such that it is the proximate cause of damages to the ward.

Reed v. Long, 111 So. 3d 237 (Fla. 4th DCA 2013).

Michelle Reed, daughter of Frances Reed and her guardian of the person and property, pursued a surcharge action against Robert Long, who claimed to be the ward's husband and also was initially appointed as limited guardian. The surcharge was to recover a loss of consortium award obtained by Long through a medical malpractice claim on behalf of the ward.

The marriage between Long and the ward was declared by the trial court to be null and void based on Reed's petition that the ward had never divorced Michelle's father before marrying Long.

The trial court granted Reed's motion to allow a supplemental petition for the removal of Long as limited guardian and to surcharge Long for wrongfully obtaining the consortium settlement. The trial court granted Reed relief for the removal of Long as limited guardian but denied the supplemental petition for surcharge. A "surcharge" is the amount that a court may charge a fiduciary that has breached its duty. (*See Merkle v. Guardianship of Jacoby,* 862 So.2d 906, 907 (Fla. 2d DCA 2003)).

The Fourth DCA reversed, indicating that it was an error to dismiss Reed's petition to amend her pleading to support the claim for surcharge and remanded to give Reed a chance to amend the petition. Surcharge of a guardian is considered to be an adversary proceeding under the Florida Probate Rules and under Florida Rules of Civil Procedure 1.190(a). The plaintiff has an absolute right to amend a complaint once as a matter of course before a responsive pleading is served and a trial court has no discretion to deny such an amendment. Even though it was assumed that Long had a fiduciary duty as a limited guardian to the ward, it must be proved that a breach of that duty occurred because Long's marriage to the ward was void.

There is a conflict of interest where an attorney who had previously represented the interest of minor children in probate proceedings seeks appointment as personal representative.

Long v. Willis, 113 So. 3d 80 (Fla. 2d DCA 2011).

In *Long v. Willis (Long I),* 100 So. 3d 4 (Fla. 2d DCA 2011), the court found that Robin Willis was qualified to serve as personal representative. However, the ruling of the probate court was reversed to allow Mr. Long's minor children the opportunity to seek appointment of a guardian of their property and for their guardian the right to vote for the personal representative.

The probate court's order denied the petition to remove Robin Willis as the personal representative of the Estate of Thomas Long by Renee Long, as guardian of the property of Emily N. Long, Evan A. Long, and Edward M. Long. She had sought to appoint attorney Hugh C. Umsted as the personal representative of the estate to replace Robin Willis. The probate court denied her petition because Renee Long did not seek her appointment as guardian of the property for the minor children within a reasonable time and also because they found attorney Umsted as not a suitable personal representative because he had a conflict of interest.

The appellate court found that the probate court erred in ruling that Renee was not entitled to vote her preference for personal representative because of the unreasonable delay in obtaining appointment of a guardian, noting that she did accomplish obtaining a guardian of the property to vote for the children within a "reasonable time." However, citing *Bowdoin ex rel. Bowdoin v. Rinnier*, 81 So. 3d 582, 583 (Fla. 2d DCA 2012), the appellate court ruled that the probate court had the discretion to appoint someone other than the preferred person if he is an unsuitable candidate to serve as personal representative. It ruled that attorney Umsted should not serve as personal representative because he had a conflict of interest that might make it difficult for him to administer the estate in the interest of all the beneficiaries. This was based on the reasoning that attorney Umsted already previously participated in the pending probate case when he made an appearance at the guardianship hearings on behalf of the interests of the minor beneficiaries and signed the Agreement for the Distribution of Wrongful Death Settlement proceeds

Because the order being reviewed fails to contain sufficient findings of fact as required by Sec. 744.331(6)(c), F.S. and the original trial judge is no longer available, the order is reversed for new adjudicatory hearing before a successor judge.

Krumholz v. Guardianship of H.K., 114 So. 3d 341 (Fla. 3d DCA 2013).

Hannah M. Krumholz appeals an order determining her to be totally incapacitated and the appointment of a plenary guardian to act on her behalf which was initiated by her niece, Rhoda Rosen. Rosen was appointed as guardian along with a professional guardian, Vicki Brail, as temporary co-guardians.

continued, next page

The appellate court entered an order for the trial court to relinquish jurisdiction for ninety days to allow the trial court judge to make requisite findings of fact pursuant to Sec. 744.331(6)(c), F.S. and requested the parties to provide a status report within sixty days. At the time the parties submitted their reports, the original presiding judge had retired. The current trial judge was prohibited from making any order containing facts as directed by the appellate court and thus, the order was reversed and remanded for a new adjudicatory hearing before the successor judge.

Counsel must be appointed for the alleged incapacitated person at the same time the emergency temporary guardian is appointed.

Martinez ex rel. Smith v. Cramer, 2013 WL 4006526 (Fla. 4th DCA 2013).

Guardianship proceedings were initiated for J. Alan Smith in 2010. Smith was declared incapacitated and his son was appointed as guardian of his property. The trial court found that Smith was not incapacitated with respect to his person. Thus, Glenda Martinez, who had a health care surrogate and power of attorney executed by Smith in her favor, continued to make decisions for Smith relating to his persons. Smith's son was succeeded by John Cramer, a professional guardian. After Martinez moved Smith from one facility to another almost eight times, Cramer filed an emergency motion with the probate court to obtain a temporary injunction to prevent Martinez from moving Smith from the current Lauderhill facility, a skilled nursing facility, to her home. He also filed a renewed petition to determine incapacity and a petition to appoint a guardian for Smith's person. The court did not appoint any counsel to represent Smith's interest.

The temporary injunction was granted but was moved to be dissolved by Martinez and another hearing was held. Again, no counsel was appointed to represent Smith, who at this time was non-communicative and bedridden. The trial court appointed an emergency temporary guardian for Smith's person after requesting and reviewing Cramer's petition and evidence presented at the hearing.

Sec. 744.3031(1), F.S., states in pertinent part, "[T]he court shall appoint counsel to represent the alleged incapacitated person during any such summary proceedings, and such appointed counsel may request that the proceeding be recorded and transcribed." The summary proceeding here was when the trial court appointed an emergency temporary guardian after hearing the evidence presented at the hearing on the conversion of the temporary injunction.

The appellate court found that the trial court erred twice. The trial court should have appointed counsel for Smith when Cramer filed the renewed petition for determination of incapacity and again when an emergency temporary guardian was appointed. The case was remanded.

A close familial relationship with the decedent is insufficient to infer any undue influence.

Kester v. Rocco, 2013 WL 3155849 (Fla. 1st DCA 2013).

Glenna Kester, personal representative of her mother's estate, appealed the trial court decision that found that she unduly influenced her mother and breached her fiduciary duties to the estate and took possession of her mother's three financial assets upon her death as constructive trustee rather than as beneficiary.

Mrs. Kester had a will and two codicils. Her codicils specifically named her five children as beneficiary of her estate and designated Glenna and her son, David Kester, as personal representatives. Mrs. Kester also gave Glenna a durable power of attorney several years prior and there was enough evidence to indicate that Mrs. Kester had all of her mental faculties and ability to understand her affairs until her death in January 2011.

After Mrs. Kester's death, Glenna took possession of two financial accounts, as either a payable on death beneficiary or joint account holder with rights of survivorship. In addition, she also took possession of a third bank account where Mrs. Kester named Glenna and the two sons as beneficiaries. The two sons received their distributions from this third account and none of these three assets were listed in the probate inventory as they were not estate assets.

Two other daughters of Mrs. Kester, Pamela and Cynthia, challenged the inventory of the estate in the probate and compelled Glenna to return the value of the three financial accounts to the estate for distribution. They argued that Mrs. Kester stated in her estate planning documents that her estate was to be equally distributed among all five children. They further argued that they received less than Glenna and their brothers due to Glenna exercising undue influence upon their mother and that she misappropriated the assets for her own benefit, in breach of her fiduciary duty to the estate and beneficiaries.

The evidence that Glenna had a close relationship with the decedent was insufficient to infer that there was any undue influence. There was evidence that the decedent had close relationships with the other heirs who helped her with many other tasks. The evidence of Glenna's active procurement of the decedent's designations of ownership and beneficiaries on the accounts was insufficient to establish undue influence. Glenna was not present when the decedent made changes to her financial accounts ownership or beneficiary designations or that she gave the decedent any instructions. The appellate court reversed the trial court order because they found that there was not enough evidence to support a finding of undue influence or a showing that Glenna breached her fiduciary duties.

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HOT TOPICS IN REAL PROPERTY LITIGATION
(#1506)
October 4 –Tampa (Live) & Webcast

CURRENT DEVELOPMENTS IN ESTATE PLANNING TECHNIQUES
(#1640)
October 18, 2013 – Tampa (Live) & Webcast

TRICK OR TREAT: THE REVISED LAND TRUST ACT – ALL TREATS, NO TRICKS
(#1610)
October 30 – Tampa (Live) & Webcast

PROBATE LAW SEMINAR
(#1672)
December 6 – Location: TBA

Courses scheduled later in the year will appear in future editions of ActionLine.
Detailed 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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RPPTL ON THE GO

ACTIONLINE BULLETIN BOARD

Proposed Advisory Opinion on UPL Re Community Association Managers,
Check docket at Fla. Sp. Court Case No. SC13-889.

Did you know? – Applications for Board Certification in Real Estate and Wills, Trusts & Estates are due Oct. 31, 2013

Do you have any information on Insurance carrier violations of s.627.4137? See page 44.

Get Involved !– Attend the RPPTL Committee Meetings in Sarasota on Nov. 20-24.

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

ARTICLES
... for the next issue of ActionLine are being accepted.
Contact: Silvia Rojas
srojas@thefund.com

Ad Hoc Trust Accounting Committee's report on Title Insurers' Audits can be viewed at committee Webpage

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.)