

ActionLine

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

Condominiums and the Interstate Land Sales Full Disclosure Act – Part II

Principal & Income Act Updated

Estate Planning and Administration Issues in the Digital Domain

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The Importance of Being a Nice Lawyer and Advocate



Chair's Column

By W. Fletcher Belcher

Section Chair, 2012- 2013

I greatly appreciate this opportunity to share some brief and rambling thoughts concerning what many attorneys and judges feel to be a growing problem that is inflicting great harm on our legal profession and the proper functioning of our judicial system.

With much pride, we proclaim ourselves to be a nation of enlightened laws with a judicial system that can correctly apply those laws to resolve disputes in a fair and evenhanded manner. The fundamental elements of that process are the accurate determination of the applicable rule(s) of law and the true facts, and the proper application of that law to those facts. This is the way you get the perfect result – the way you get justice – this is the way it's supposed to work.

We all pretty much understand and appreciate that our adversary system is the mechanism best equipped to find the applicable law, to find the true facts, and to reach the correct outcome by properly applying the former to the latter. Significantly, the engine that drives the adversary system is advocacy. The type of advocacy that best serves the adversary system, the legal profession, and the society from which the participating parties are drawn, is advocacy that is well prepared, truthful, candid, direct, straightforward, civil, courteous, and respectful of everyone involved in the process. That is the way that our justice system delivers its finest product - the proper outcome.

The Problem

It seems clear that it has become all too common for members of the Bar to utilize a rude and abrasive demeanor as a device for achieving their goals. Discourteous and unprofessional communications are directed to other attorneys, judges, court staff, and court reporters and are displayed in hearings, depositions, conferences, letters, telephone conversations, and yes, in e-mails!

Uncivil behavior within the legal community makes life unnecessarily unpleasant and stressful for all those who have contact with the offender. It also further diminishes the level of respect that attorneys have for each other and that society has for attorneys. More importantly, whenever an attorney chooses to employ a rude and abrasive demeanor in his dealings with opposing counsel or the court, he keeps the system from functioning as it was intended. Because attorneys and judges are human beings, even the strongest of them are adversely affected when they are the target of rude and abrasive behavior. Such misguided advocacy significantly inhibits the exchange of constructive communication and serves to disrupt, to distract, and to obscure the law, the facts, and the solution. Simply stated, this type of behavior always makes it more difficult to properly determine the merits of a controversy. Advocacy should be the path, not an obstruction, for finding the proper resolution to the controversy. It would also be my observation that rudeness and abruptness by judges creates the same problems and causes the same type of damage to the process.

The Cause

It is likely that many of the people who are engaging in rude and abrasive behavior in the practice of law simply believe that they obtain a tactical and financial advantage from doing so and that they can get away with it. Unfortunately, they may be correct.

Why unprofessional conduct appears to be increasing is a very complex question that may best be answered by sociologists, psychologists, anthropologists, and others who operate well above my pay grade. Could it be related to modern advertising trends in the legal profession? Is it perhaps attributable to societal changes in greed levels, tolerance of anti-social behavior, or depersonalization? In a recent article entitled "Trial Practice and Civility: In Pursuit of Good Manners," the Honorable Mark W. Klingensmith, Circuit Judge in the 19th Judical Circuit, observed that: "Some attribute the rise of incivility to lack of mentoring for young lawyers. Others assert that the increased emphasis on paperless practice makes it easier to say something nasty to opposing counsel by e-mail than in person. Perhaps the increased focus on the billable hour and the emphasis on profitability, or the increased competition for clients in an ever-growing legal community are to blame for the rise in incivility. Maybe lawyers are simply mimicking the aggressive, take-no-prisoners approach to the practice as seen on television and the movies." See the November/December 2012 issue of Friendly Passages published by The Friends of the Rupert J. Smith Law Library of St. Lucie County, Florida.

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ARTICLES: Forward any proposed article or news of note to Scott Pence at spence@carltonfields.com. Deadlines for all submissions are as follows:

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A Solution?

Let me be the first to say that I don't begin to know what the solution to this problem is and that I am not at all certain that there is a viable solution. However, it is encouraging that the problem has not gone unnoticed and that many well-meaning people who care about our future are searching for answers.

Judge Klingensmith's article also noted that many attorneys fail to recognize that the standards of professionalism are considerably higher than the standards for ethical conduct and reported that: "To change that way of thinking, local bar associations and legal groups have been concerned with compelling behavior that the disciplinary codes do not necessarily mandate, including civility, good manners, professionalism, and common courtesy. This has included the adoption of various local rules of etiquette and standards of professional conduct and courtroom decorum to be enforced by the courts themselves." You may recall that the following pledge was recently added to the Oath of Admission to The Florida Bar: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."

Perhaps the most significant reaction to this problem has been the recent initiative of the Florida Supreme Court Commission on Professionalism to develop and implement an effective mechanism to *enforce* professionalism. The Commission, currently chaired by Justice Fred Lewis, was created in 1996 to function indefinitely at the pleasure of the Supreme Court by administrative Order of then Chief Justice Gerald Kogan. The Commission (composed of approximately 20 judges, law school deans, Bar leaders, and a public member) is charged to work closely with The Florida Bar to develop and implement an ongoing plan and policy to ensure that the fundamental ideals and values of the justice system and the legal profession are inculcated in all of those persons serving or seeking to serve in the system.

The Commission has drafted proposed rules that would prohibit "unprofessional conduct" and establish a procedure to punish it and otherwise resolve professionalism complaints. The proposed rules define "unprofessional conduct" as the "substantial or repeated" violation of the Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, the Rules Regulating The Florida Bar, or the decisions of the Florida Supreme Court.

It is probably safe to say that most everyone involved with our justice system is troubled by rude, abrasive, mean-spirited or bullying lawyer conduct, and would agree that appropriate measures to discourage such behavior should be developed and implemented. However, as is the case when attempting to find good solutions to any complex problem, the devil is in the details. There are very real and practical concerns that the Commission's proposed definition of "unprofessional conduct" may be overbroad and that the adoption of such rules may be counterproductive due to the risk that they may be used as an offensive weapon for the harassment of innocent adversaries by the very professionalism offenders whose conduct the rules seek to curtail.

From an even broader perspective, the proposed rules drafted by the Commission fairly raise the threshold question of whether it is realistic to believe that you can teach or force a highly-educated professional adult to be nice. At the Section's recent out-of-state Executive Council meeting in Asheville, North Carolina, one of our delightful and distinguished guests was Diana Cecil Pickering, the great granddaughter of George W. Vanderbilt and Vice Chair of the Biltmore Company, which owns and operates the Biltmore Estate in Asheville. In her comments to the Executive Council, Ms. Pickering attributed the Biltmore's commendable relative lack of employment issues to the careful and selective hiring of good people and wisely observed that "you can't teach nice" to adults.

The only clear solution is for parents, families, friends and schools (including law schools) to place a greater and earlier emphasis on teaching our children and students to be nice and the importance of being that way under all circumstances.

In closing, I am delighted to report that the problems with which this column deals are not prevalent in the RPPTL Section circles in which we are blessed to travel.

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Condominiums and the Interstate Land Sales Full Disclosure Act - Part II:

"Scattered Pictures of the Smiles We Left Behind - What's Too Painful to Remember, We Simply Choose to Forget"

By Jerry E. Aron, Esq., Jerry E. Aron, P.A., West Palm Beach, Florida

In Part One[1] of this article entitled "The Way We Were" and "Can It Be That It Was All So Simple Then," we examined the law at and prior to the tsunami of 2008. The tsunami brought litigation, the extent of which was unparalleled in the field of real estate. Everyone was desperate. Buyers not only wanted out of their contracts, but wanted their deposit money back. Developers facing financial ruin needed closings and desperately wanted to enforce their contracts. Lenders saw their security evaporate, whether the value of the real estate or the value of binding contracts. Title companies, sureties, lawyers, and escrow agents became targets of plaintiff's lawyers zealously representing their clients. What seemed so clear for years as to ILSA[2] matters became murky, and left many with "Scattered Pictures of the Smiles We Left Behind" and in many cases "What's Too Painful to Remember, We Simply Choose to Forget."

Two Year Completion Exemption

Much of the early post-tsunami litigation dealt with the two year completion aspect of the improved Lot Exemption[3] which provided that a seller was exempt from ILSA if the contract obligated the developer to complete within two years from the date the buyer executed the contract. The infamous *Samara*[4] decision became the cornerstone of countless complaints. In very loose language the Florida Supreme Court concluded that as to completion, "the obligation must be unrestricted." Yet, the HUD Guidelines on which all relied indicated as follows: "Contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected. For example, provisions to allow time extensions for events or occurrences such as acts of God, casualty losses or material shortages are generally permissible. Although the factual circumstances upon which nonperformance or a delay in performance is based may vary from transaction to transaction, as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and or events which are beyond the seller's reasonable control."[5]

The courts were divided on their interpretation of the requirements of the exemption[6] and strained mightily in their interpretation of specific clauses. The cases tended to recognize that the Florida Supreme Court did not mean exactly what it said.[7] In *Mona Lisa* the court properly and kindly wrote: "…*Samara* is contrary to the recent binding decisions of the Eleventh Circuit… [and] Florida appellate courts have repeatedly limited *Samara*'s reach."[8] The differences in the various court holdings added to the litigation frenzy as there was something favorable for most for awhile. The situation seems to have settled in light of a couple of well-reasoned recent decisions on this point, both by federal courts.[9]

Although little is safe to rely upon completely, it appears that the HUD Guidelines have been substantially vindicated in this respect. Moreover, after some confusion by the courts, the most recent holdings recognize force majeure, impossibility and frustration, all as valid Florida defenses to performance in real estate contracts, and all acceptable to extend performance and still comply with the two year completion requirements. Ultimately, the hard learned lesson for practitioners in this area is to be very careful in their drafting of the contract language. Many contracts caused ILSA violations because they contained force majeure type provisions which were beyond the common law of Florida in the area of excuses for contract performances. It is important to note that these common law defenses are available without an express provision.[10] Many drafters created their own list of events that would constitute a defense. The drafter who decides to provide a list of defenses must be very careful to include only matters which clearly are beyond the control of the developer and which are within the scope of Florida law. The cases seem clear that close calls will go against the drafter.

"Many contracts caused ILSA violations because they contained force majeure type provisions which were beyond the common law of Florida…"

Remedies

Continuing on the two year completion exemption, *Samara* held the "contract must not limit the purchaser's right to seek specific performance or damages."[11] Further, the decision states: "We believe that without the availability of at least both specific performance and damages the obligation to complete the construction within two years is illusory."[12] Some plaintiff's misinterpreted this wording, by attacking contract remedy clauses which expressly provided for specific performance "or" damages. This interpretation failed

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to recognize that the *Samara* decision indicates that both be "available." Utilizing the "or" in the clause does not limit their availability. It means that a plaintiff must ultimately make a decision.[13]

Many practitioners questioned whether the exemption was lost if damages were limited to actual damages. Often consequential and special damages are excluded in contracts for the sale of real estate. A clause that limited damages to "actual and direct damages" was found to be acceptable.[14]

Other Contract Delays/Issues

If the obligation to complete within two years must be unrestricted and the Guidelines provide that "any condition which qualifies the obligation to complete a building within two years nullifies the applicability of the exemption,"[15] are typical clauses such as title defects or casualty (risk of loss), where under certain circumstances, the seller is not obligated to close, problematic? Plaintiff's lawyers seized on these standard contract clauses, arguing that if a Seller could get out of a contract for a title defect or casualty, how can the obligation to complete be "unrestricted" and doesn't such a clause "qualify the obligation to complete"? Although the exact language must be examined, such clauses do not render the obligation to complete "illusory."[16]

Evasion

Probably one of the most difficult areas addressed by the courts has been the little pre-tsunami recognized provision of ILSA that an exemption will not apply if the mechanism for qualifying for the exemption was "adopted for purpose of evasion." The courts understandingly have had difficulty with this concept. If a developer complies with the exemption requirements and therefore "evades" the disclosure requirements of the statute, does the developer have a "purpose of evasion"? Certainly, the logical answer is no, but the language is there, and it means something. The courts are obligated to give it meaning. The courts are not in agreement as to what the evasion standard is. In the Eighth Circuit, there must be a "fraudulent intent to evade."[17] In others, like the Eleventh Circuit, which covers Florida, a developer "must produce factual evidence demonstrating that the method of disposition has a real world objective that manifests a legitimate business purpose. The 'legitimate business purpose' standard asks the party invoking the exemption to articulate some legitimate business reason for its method of disposition other than the avoidance of the ILSFDA's consumer protections."[18] A developer has the burden of demonstrating that evading ILSA is not the sole reason for seeking an exemption. The following have been found to be legitimate business purposes: to reduce project costs,[19] to allow for greater flexibility in developing the project and saving the company time and money,[20] and meeting the requirements of the construction lender.[21] In light of the cases in this area, the developer must spend time in advance of the sales process considering and documenting the purposes for meeting an exemption. It likely is advisable to add a contractual provision outlining these purposes. However, a provision without the backup and careful consideration of the case law should not be relied upon.

Savings Clauses

Because of the uncertainty caused by the lack of cases pre-tsunami, many practitioners utilized ILSA savings clauses. These clauses basically provided that the draftsperson attempted to comply with ILSA on a specific exemption, and if they failed, the contract should be reformed in a way to comply with the ILSA requirements. Sometimes this meant adding language and sometimes it meant deleting language. The clauses differed and so did the decisions. Interesting arguments were made when a savings clause was utilized. Plaintiffs argued its mere existence constituted an "intent to evade."[22]

Once again, there was something for both sides in the decisions. In one case, the court quoted and adopted parallel reasoning of the Florida Supreme Court in a usury case where the court rejected the notion that "the use of a savings clause [is] an absolute bar to a usury claim."[23] The *Harvey* court was particularly negative about the savings clause and counseled "[t]he savings clause in this case is no more than the Resort developer's attempt to provide itself with an 'escape hatch' in order to take advantage of the ILSFDA exemption down the road, despite its failure to draft a Purchase Agreement that actually complied with the ILSFDA in the first instance."[24] Most courts seem to look carefully at the actual language of the savings clause and whether it was specific or broad, well drafted or not, and whether the contract otherwise has a severability clause. More often than not, well drafted savings clauses have been upheld. However, there is plenty of language in some cases to cause concern.[25] Well drafted clauses are encouraged, but should not be considered a savior under all facts and circumstances.

Property Description

One of ILSA's subsections seemingly referring to situations ONLY where a property report is required,[26] provides that a contract which is "not exempt under Section 1702 of this title and which does not provide a description of the lot which makes such lot clearly identifiable and which is in a form acceptable for recording by the appropriate public official responsible for maintaining land records in the jurisdiction in which the lot is located,"[27] …may be revoked at the option of the purchaser…" The standard practice in Florida pre tsunami was to include in the contract a proper legal description of the unit being purchased with reference to the declaration of condominium "to be recorded" or with blanks for the recording information for the declaration. The

condominium unit had not been legally created because Florida law requires a proper surveyor's certificate prior to the creation of the unit although the declaration may be recorded in advance.[28] Since sales from developers typically occurred pre-construction, the declaration inclusive of the required certificate would not be available at the time of contract. Under this particular provision ILSA requires the unit be "clearly identifiable." In Florida, the contract rescission period does not begin until both the contract and additional documents, such as prospectus, are delivered to the prospective purchaser. Within the prospectus, various drawings are required, typically prepared by an architect. Those drawings show the building, the floor, the unit, the elevations and other required information. From the drawings, the unit is clearly identifiable, but since these are pre-construction drawings and not as-builts, and nothing is identifiable on the ground, is the unit "clearly identifiable" for ILSA purposes? Moreover, if the legal description in the contract states: Unit 100 as set forth in the declaration of condominium for ABC condominium recorded in Official Records Book ____, Page ____, of the public records of Palm Beach County, is the description of the unit in a form "acceptable for recording"? Can you record, and, if so, what is the effect of a legal description with blanks? Of course, the blanks were not historically filled in until after the unit was substantially complete and the declaration recorded, which was, universally on new construction, well after the contract was executed. Further, the Florida statute provides "FOLLOWING [Emphasis added] the recording of the declaration, a description of a condominium parcel by the number or other designation by which the unit is identified in the declaration, together with the recording data identifying the declaration, shall be a sufficient legal description for all purposes."[29] The Florida courts,[30] contrary to results in non-Florida federal courts,[31] have found that the commonly used mechanism in Florida for describing units in pre-sale contracts is acceptable. Their reasoning has been more practical than technical: "While the contract did fail to reference the declaration's "recording data," [the seller] actually gave more: the proposed declaration itself along with a contractual obligation to file it prior to closing. To penalize a developer for giving the entire document rather than a mere identifying reference (required so that the same document could be found) would be absurd. In any event, ILSFDA is not aimed at ensuring technical compliance with state recording statutes. Rather, its focus is preventing fraud through the disclosure of pertinent information."[32] However, until a federal court having Florida jurisdiction decides the issue, some practitioners remain concerned about the language in 15 U.S.C. §1703(d)(1).

Piggybacking

As mentioned in Part I, a popular mechanism for avoiding registration in pre-tsunami times for middle to larger projects of over 99 units was to "piggyback" exemptions. ILSA provides that lots which are wholly exempt from ILSA are not included in the unit count of the one hundred lot exemption. So, it was common practice for a project of, say, 150 units, to rely on the two year completion exemption for 51 units and the 100 lot exemption for 99 units. The standard practice was to utilize the 100 lot exemption for the first 99 units, because under this exemption, the contract did not have to contain a provision to complete within two years. That was important because with larger projects that two year requirement was hard to meet, keeping in mind that construction lenders would not provide financing until a pre-sales condition was met. So, suppose the project was 20 stories containing 200 units. Further, suppose that such a building took 20 months to construct. Suppose in the heyday the developer could sell 100 units in 3 months, assuming the pre sale requirement was fifty percent, which would have been the minimum at the time. Further suppose it took 1 month to close the construction loan. So, first, the developer must enter into 100 contracts (3 months), then close the loan (1 month), then construct (20 months). The total is 24 months or two years. If all the contracts required completion in 2 years there was a real danger of a problem in the first contracts that were signed. There was absolutely no room for any delays. There were always delays. Seldom could the sales process, building permit and certificate of occupancy process, or the construction process (where the demand for materials and laborers were unprecedented) be without multiple hitches. The answer was simple: piggy-back. That way, the first 99 contracts need not contain a two year completion provision. This practice would require compliance with the two year completion exemption and the anti-fraud provisions[33] of the statute. HUD issued advisory opinions endorsing this practice. The Guidelines indicated "developers of subdivisions containing more than 99 lots who wish to operate under the [100-lot exemption] must assure themselves that all lots in excess of 99 have been and WILL BE [Emphasis Added] sold in transactions" [utilizing another exemption][34]. This practice, however, became highly scrutinized in the litigation era. The language of the 100 lot exemption was the unraveling of the "piggybacking" concept. The text of the 100 lot exemption provides that the 100 lot exemption applied to subdivisions "containing fewer than one hundred lots which ARE [Emphases Added] not exempt under subsection (a)…"[35] Subsection (a) contains the two year completion exemption. The courts have interpreted this "unambiguous" text along with the legislative history to conclude that ILSA's 100-lot exemption is determined as of the time of the sale…of the lot."[36] So, at the time of the first sale utilizing the 100 lot exemption, any contracts utilizing the 2 year completion exemption have to be in place. This result arises because the 100 lot exemption states that the remaining lots "ARE" [Emphasis Added] (rather than

"will be") not exempt [under a full exemption]. As a result, the two year completion contracts had to be in existence before the 99 one-hundred-lot-contracts. In the fact pattern presented, that simply does not work. Two years is just not enough time in the larger projects. This interpretation by the courts makes piggybacking a smile left behind for most mid to larger projects.

Conclusion

After hundreds and hundreds of cases, there is a better understanding of how the courts will interpret ILSA. It is clear that ILSA will be narrowly construed. It is also clear that many who relied on lower court cases to litigate or settle disputes found those lower court cases reversed on appeal. As Yogi Berra once said: "it ain't over till it's over." Not even the irrepressible Yogi could have known his adage would apply to ILSA. Now, the question remains: When will it be over? Part III, entitled "Has Time Rewritten Every Line", will address the future.

Endnotes:

1 *ActionLine,* Vol. XXXIV, No.1, p. 10 (Fall 2012). As mentioned in Part One, the three articles deal with limited issues. Space requires a summary handling of the topics raised and that certain topics not be addressed, such as statute of limitations, remedies for ILSA violations, deference to HUD, reliance on advisory opinions, additional exemptions, definition of completion, definition of lot, other exemptions, filing issues and more. Also, footnotes are not intended to include all cases on a particular topic.

2 15 U.S.C. §1701-1720 (2011).

3 15 U.S.C. §1702(a)(2) (2011).

4 *See Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097 (Fla. 1990).

5 Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 61 Fed. Reg. 13596, 13603 (March 27th, 1996). Also see http://www.gpo.gov/fdsys/pkg/FR-1996-03-27/pdf/96-7280.pdf.

6 *See Id.* at 13603 (providing "[t]he question is whether [the contractual provision] allows nonperformance by the seller at the seller's sole discretion"); See also *Harvey v. Lake Buena Vista* , 568 F. Supp. 2d 1354 (M.D. Fla. 2008); *Santidrian v. Landmark Custom Ranches, Inc*., 655 F. Supp. 2d 1260 (S.D. Fla. 2009); *Plaza Court, L.P., v. Shane Baker-Chaput*, 17 So.3d 720 (Fla. 5th DCA 2009); *Winterrowd v. Taylor Morrison Services, Inc*., 2009 WL 2149239, 2009 U.S. Dist. Lexis 60875 (M.D. Fla. 2009); *Adams-Lipa v. TDS Town Homes (Phase 1) LLC*, 2009 WL 1850267, 2009 U.S. Dist. Lexis 53855 (M.D. Fla. 2009); *Stefan v. Singer Island Condominiums Ltd*., 2009 WL 426291, 2009 U.S. Dist. Lexis 44553 (S.D. Fla. 2009); *Jeffrey L. Tedder M.D. v. Harbour Phase I Owners, LLC, 2009* WL 1043911, 2009 U.S. Dist. Lexis 36251 (M.D. Fla. 2009); *Pilato v. Edge Investors, L.P.,* 609 F. Supp. 2d 1301 (2009); *Pohlman v. Aqua Condominium Developers, Ltd*., 44 So.3d 645 (2010); *Mailloux v. Briella Townhomes, LLC*, 3 So.3d 394 (Fla. 4th DCA. 2009); *Stein v. Paradigm Mirasol, LLC,* 586 F. 3d 849 (11th Cir. 2009); *Rondini v. Evernia Properties, LLLP,* 2008 WL 793512, 2008 U.S. Dist. Lexis 49026 (S.D. Fla. 2008); *Kamel v. Kenco/The Oaks at Boca Raton LP*, 321 Fed. Appx. 807 (11th Cir. 2008); *Van Hook v. The Residences at Coconut Point, LLC,* 364 Fed. Appx. 549 (11th Cir. 2010); A*ikin v. WCI Communities, Inc*., 26 So.3d 691 (Fla. 2d DCA 2010), Jankus v. Edge Investors, L.P., 650 F. Supp. 2d 1248 (S.D. Fla. 2009); *Ryan v. WCI Communities Inc*., 2008 WL 2557541, 2008 U.S. Dist. Lexis 106818 (N.D. Fla. 2008); *Gentry v. Harborage Cottages-Stuart, LLLP,* 602 F. Supp. 2d 1239 (S.D. Fla. 2009*); and Snavely Siesta Assocs., LLC v. Senker*, 34 So.3d 813 (Fla. 2010).

7 *See,* e.g. *Hardwick Properties, Inc. v. Newbern*, 711 So.2d 35, 39-40 (Fla. 1st DCA 1998).

8 *See In re Mona Lisa at Celebration, LLC,* 472 B.R. 582, 605 (Bkrtcy. M.D. Fla. 2012).

9 *See Id.; Stein v. Paradigm Mirasol, LLC*, 586 F. 3d 849 (11th Cir. 2009).

10 *See Kamel v. Kenco/The Oaks at Boca Raton, LP*, 321 Fed. Appx. 807, 811 (S.D. Fla. 2008).

11 *See Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1100 (Fla. 1990).

12 *See Id.*, at 1101.

13 *See In re Mona Lisa at Celebration, LLC*, 472 B.R. 582, 606-607 (Bkrtcy. M.D. Fla. 2012).

14 *See Stein v. Paradigm Mirasol, LLC*, 586 F. 3d 849 (11th Cir. 2009).

15 Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 61 Fed. Reg. 13596, 13599 (March 27th, 1996). 16 *Adams-Lipa*, 2009 WL 1850267, 2009 U.S. Dist. Lexis 53855; *Stefan v. Singer Island Condominiums Ltd*., 2009 WL 426291, 2009 U.S. Dist. Lexis 44553 (S.D. Fla. 2009); Also see *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 857-858 (11th Cir. 2009) (providing examples of delay provisions which do not violate the two year completion exemption).

17 See *Atteberry v. Maumelle Co*., 60 F. 3d 415, 421 (8th Cir. 1995).

18 *See Gentry v. Harborage Cottages-Stuart, LLP*, 654 F. 3d 1247, 1254 (11th Cir. 2011).

19 *See Double AA Int'l Investment Group, Inc. v. Swire Pacific Holdings, Inc.,* 674 F. Supp. 2d 1344, 1355-1356 (S.D. Fla. 2009).

20 *See Id.*

21 *In re Mona Lisa at Celebration, LLC*, 472 B.R. 582, 606 (Bkrtcy. M.D. Fla. 2012).

22 *See Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1361 (M.D. Fla. 2008).

23 *See Jersey Palm-Gross, Inc. v. Paper*, 658 So. 2d 531, 535 (Fla. 1995).

24 *See Harvey v. Lake Buena Vista Resort, LLC* 568 F. Supp. 2d 1354, 1365 (M.D. Fla. 2008).

25 See Weaver v. Opera Tower, LLC, 2008 U.S. Dist. Lexis 91294, 2008 WL 4145520 (S.D. Fla. 2008); Kabula v. Southern Homes of Homestead VIII, Inc., 2008 U.S. Dist. Lexis 65809, 2008 WL 4691983 (S.D. Fla. 2008), P*ilato v. Edge Investors, L.P.*, 609 F. Supp. 2d 1301 (S.D. Fla. 2009); Van Hook v. The Residences at Coconut Point, 2008 U.S. Dist. Lexis 107216 (M.D. Fla. 2008); Rosenstein v. Edge Investors, LP, 2009 U.S. Dist. Lexis 27802, 2009 WL 903806 (S.D. Fla. 2009); Plaza Court, L.P. v. Baker-Chaput, 17 So.3d 720 (Fla. 5th DCA 2009).

26 *See* 15 U.S.C. §1703(d)(1).

27 *Tablett v. TRG Oasis (Tower Two) Ltd., L.P.*, 755 F. Supp. 2d 1197 (M.D. Fla. 2009).

28 See § 718.104(4)(e), Fla. Stat. (2012), § 718.105, Fla. Stat. (2012).

29 *See* § 718.109, Fla. Stat. (2012).

30 *Boynton Waterway Investment Associates, LLC v. Bezkorovainijs* 82 So. 3d 924 (Fla. 4th DCA 2011).

31 Berkovich v. Vue-North Carolina, LLC, 2011 U.S. Dist. Lexis 123049 (W.D. N.C. 2011), *Bacolistias v. 86th and 3rd Owner, LLC,* 2010 U.S. Dist. Lexis 99642 (S.D. N.Y. 2010).

32 *Tablett v. TRG Oasis (Tower Two) Ltd., L.P.,* 755 F. Supp. 2d 1197, 1204-05 (M.D. Fla. 2009).

33 *See* 15 U.S.C. § 1703 (a)(2).

34 *See* Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 61 Fed. Reg. 13596, 13604 (March 27th, 1996).

35 *See* 15 U.S.C. 1702(b)(1).

36 *See 200/East Partners, LLC v. Gold*, 997 So. 2d 466 (Fla. 4th DCA 2008); *Nahigan v. Juno-Loudon, 677 F.3d 579 (4th Cir. 2012); Bodansky v. Fifth on the Park Condo, LLC,* 635 F. 3d 75 (2d Cir. 2011); *Nickell v. Beau View of Biloxi, LLC,* 636 F. 3d 752 (5th Cir. 2011); See also, *Gentry v. Harboridge Cottages-Stuart, LLLP, 654 F. 3d 1247, 1257-58* (11th Cir. 2011) (putting forth the argument that piggybacking may constitute a method to evade).

Sixth Annual Construction Law Institute Set for March 7-9, 2013

On March 7-9, 2013, the Sixth Annual Construction Law Institute will be held at the Rosen Shingle Creek, Orlando, Florida. In addition to advanced level seminars, the event will include a golf tournament on Thursday, March 7th, and evening receptions on March 7th and March 8th. Over 350 Construction Lawyers and Industry Professionals attended the 2012 Institute and we expect more in 2013. The Saturday morning breakfast speaker will be Chief Justice Ricky L. Polston of the Florida Supreme Court. Justice Polston will give a presentation on the current state of the judiciary in Florida. We thank the sponsors listed below for their commitment to the Sixth Annual Construction Law Institute.

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Principal & Income Act Updated

By Edward F. Koren, Esq., Holland and Knight LLP, Tampa, Florida, and F. Gordon Spoor, CPA/PFS/CGMA, St. Petersburg, Florida

Over the years, the Florida Principal and Income Act (the "Act") has undergone significant changes. The initial adoption of the Act occurred in 1974 with the passage of the then 12 year old 1962 Uniform Principal and Income Act (the "1974 Act"). In 2002, Florida adopted its version of the National Conference of Commissioners on Uniform State Laws ("NCCUSL") 2000 Uniform Principal and Income Act, which was codified in Chapter § 738 of the Florida Statutes, effective January 1, 2003 (the "2002 Act"). Since the adoption of the 2002 Act, there have been three separate "Glitch Bills" to fix various problems with the Act.[1]

During the 2012 Legislative Session, Florida adopted its fourth "Glitch Bill" as part of Chapter 2012-49, Laws of Florida, effective January 1, 2013 (the "2012 Revisions"). This article focuses on some of the more important 2012 Revisions.

Fiduciary Duties; General Principals

While most of Florida's Principal and Income Act is intended to apply to all fiduciaries, including trustees and personal representatives,[2] certain sections of the Act that were intended to apply to all fiduciaries contained the word "trustee." Additionally, the word "fiduciary(ies)" was used in certain sections that were only intended to apply to "trustee(s)." The 2012 Revisions clarify some of these inconsistencies by using the word "trustee" rather than "fiduciary" in all sections intended to apply only to trusts. Additionally, the 2012 Revisions added a specific provision that states that, "All provisions of this chapter also apply to any estate that is administered in Florida, unless the provision is limited to a trustee rather than a fiduciary."[3]

Addition of "Carrying Value"

The 1974 Act included a definition of "Inventory Value."[4] Although a defined term, "inventory value" was only used in one statute within the 1974 Act, which was former F.S. § 738.11 entitled, "Other property subject to depletion." The 2002 Act removed this definition because the replacement statute – F.S. § 738.603 – referenced payment based on a percentage of the receipts from a liquidating asset rather than a calculation based on the inventory value. The 2002 Act made no reference to inventory value. Until the 2012 Revisions, the closest use of this phrase in the trusts and estates statutes was outside of Chapter 738 in F.S. § 736.08135(2)(b), which used the phrase "carrying value" and provided that trust accountings were required to present a "carrying value" for each asset owned by the trust. The only other related use of "carrying value" within the probate and trust context is found in Florida Probate Rule 5.346, Appendix B(IV), when referencing the inclusion of "carrying values" in the preparation of a fiduciary accounting.

The 2012 Revisions re-introduce the concept of "inventory value" by instead adopting the phrase "carrying value." In addition to harmonizing the cited provisions of F.S. § 736.08135(2)(b) with Florida Probate Rule 5.346, Appendix B(IV), several statutes within the 2002 Act were revised to reference "carrying value" within the context of income and principal allocations.[5]

"Carrying value" is defined in F.S. § 738.102(c) as "the fair market value at the time the assets are received by the fiduciary." This is different from "cost basis," which is defined in the Internal Revenue Code. For the estates of decedents, and trusts described in F.S. § 733.707(3) after the grantor's death (i.e., revocable trusts), the carrying value of assets received upon the grantor's death is the value as determined for federal estate tax purposes (or date of death if no estate tax return is required). For assets acquired during the administration of the estate or trust, the carrying value is equal to the acquisition cost of the asset. If there is a change in fiduciaries, a majority of the continuing fiduciaries may elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. If such an election is made, it must be reflected on the first accounting filed after the election.[6]

Changes to Unitrust Provisions

When the 2002 Act was adopted, it included a "unitrust provision" that was not included in the NCCUSL version of the Uniform Principal and Income Act.[7] Under Florida's unitrust provision, unitrusts can be created in one of two ways – either an existing trust can be converted to a unitrust, or a grantor may provide for an "express unitrust" when drafting the governing instrument. The ease of administration aspect of a unitrust has caused it to gain wide acceptance. Typically, the annual unitrust amount is based on the valuation of the trust as of a specific date.[8] Recent market fluctuations, however, have impacted the value of trust assets, resulting in significant variations in the annual calculation of the unitrust amounts. In an effort to minimize these fluctuations, the 2012 Revisions incorporate a "smoothing rule" to be used when computing the fair market value of the unitrust. The smoothing rule incorporates an "Average Fair Market Value" concept,[9] which requires that fair market value for purposes of the unitrust computation be computed using the average of the fair market value of the trust's assets at the beginning of the current year and each of the prior two years. Additionally, any principal additions to the unitrust during the periods used in computing the "Average Fair Market Value" are taken into account, as illustrated in the following examples.[10] (See examples #1 and #2, next page).

Distributions To Residuary And Remainder Beneficiaries

The 2002 Act required that distributions of income to pecuniary devisees in trust and remainder beneficiaries be

continued, next page

Example #1

The trustee of a unitrust wants to compute the unitrust distribution for calendar year 2013. This computation will involve averaging the market values of 2011-2013. On July 1, 2012, the trustee receives an addition to principal in the amount of $1,000,000. Average Fair Market Value would be computed as shown. *(For illustration purposes, market fluctuation has not been reflected).*

	2011	2012	2013
Beginning Market Value	$1,000,000	$1,000,000	$2,000,000
Principal Addition 07/01/12	1,000,000	1,000,000	
Total FMV	$2,000,000	$2,000,000	$2,000,000

Average FMV for unitrust calculation purposes = $2,000,000
In 2014, assuming no further additions to principal:

	2012	2013	2014
Beginning Market Value	$1,000,000	$2,000,000	$2,000,000
Principal Addition 07/01/12	1,000,000		
Total FMV	$2,000,000	$2,000,000	$2,000,000

Average FMV for unitrust calculation purposes = $2,000,000

Because the principal addition occurred on July 1, 2012, its value is added to the 2012 asset balance as well as the asset balance for all prior periods used in the computation (limited to 2011 in this example). No prospective adjustment for future years is required because the addition will comprise part of the principal of the trust.

Example #2

Same facts as Example #1, except that during 2012, the beneficiary receives a $500,000 principal distribution.

	2011	2012	2013
Beginning Market Value	$1,000,000	$1,000,000	$1,500,000
Principal Distribution	(500,000)	(500,000)	
Principal Addition 07/01/12	1,000,000	$1,000,000	
Total FMV	$1,500,000	$1,500,000	$1,500,000

Average FMV for unitrust calculation purposes = $1,500,000

Computation for 2014, assuming no further principal contributions or withdrawals, and assuming principal appreciation in 2014:

	2012	2013	2014
Beginning Market Value	$1,000,000	$1,500,000	$2,000,000
Principal Distribution	(500,000)		
Principal Addition 07/01/12	1,000,000		
Total FMV	$1,500,000	$1,500,000	$2,000,000

Average FMV for unitrust calculation purposes = $1,666,667

Changes to F.S. § 738.1041 clarify that the smoothing rules apply to express unitrusts unless another method is directed in the governing instrument. To avoid the default rules for computing "Average Fair Market Value," the grantor must provide that a unitrust approach is desired, how the fair market value will be computed, what percentage (which must be between 3% and 5% for Internal Revenue Service reasons) is to be used to calculate the unitrust amount and which, if any, assets are to be excluded from the computation.[11]

computed in proportion to their respective interests in the trust principal. This was determined by using fair market values as of date of distribution. This was cumbersome because it required revaluing all assets when each income distribution was made to a pecuniary devisee. This also caused the allocation of income to be different from the taxation of distributable net income. The Internal Revenue Code requires that distributable net income be allocated to beneficiaries based upon the lesser of fair market value or carrying values.[12]

As was the case under the 1974 Act, the 2012 Revisions now require that accounting income be allocated to beneficiaries based upon carrying values, except in cases where disproportionate distributions are made. This greatly simplifies trust administration by not requiring valuation of trust assets each time a distribution is made--unless disproportionate distributions are made.[13] Examples #3 and #4 illustrate the application of this revision when disproportionate distributions are made.[1] (See Examples #3 and #4, next page).

Distributions From Entities

The 2002 Act provided that cash distributions from entities not in liquidation were allocated to income.[15] In determining if a distribution was in liquidation, absent a representation from the entity, a default rule existed that provided that any distributions made by the entity in excess of 20% of the entity's gross assets (as shown on the entity's year end financial statements immediately preceding the initial receipt) was deemed to be made in liquidation.[16] This posed a problem for service entities, which have a very small investment in infrastructure, because they regularly distribute in excess of 20% of their gross assets. A similar problem arose when Microsoft declared its very first dividend, which exceeded 20% of the company's gross assets. While it was clear that the distribution was from accumulated earnings and profits, it was nevertheless treated as a liquidating distribution under the default rule.

Additionally, the 2002 Act contained

Example #3

The total principal of a trust remaining after all debts and expenses is $12,000,000. A pecuniary devise of $7,000,000 is to be held in further trust for the benefit of Beneficiary A with the residue left outright to Beneficiary B. From the onset, the trust for Beneficiary A is entitled to 7/12 of all income earned during administration and Beneficiary B is entitled to 5/12.

Prior to the funding of Beneficiary's A's trust, Beneficiary B receives a principal distribution of $1,000,000. As of the date of this principal distribution, but prior to the actual distribution, the fair market value of the trust assets is $20,000,000. The fractional interests are recomputed as follows:

	Beneficiary A	**Beneficiary B**
Date of death values	$7,000,000	$ 5,000,000
Fair Market Value Adjusted as of Date of Disproportionate Principal Distribution	7,000,000	13,000,000
Disproportionate Principal Distribution	_____	(1,000,000)
Remaining Principal	7,000,000	12,000,000
Recomputed Fractions	7/19	12/19

Example #4

	Beneficiary A	**Beneficiary B**
Date of death values	$ 6,000,000	$ 6,000,000
Fair Market Value Adjusted as of Date of Disproportionate Principal Distribution	10,000,000	10,000,000
Disproportionate Principal Distribution	_____	(1,000,000)
Remaining Principal	10,000,000	9,000,000
Recomputed Fractions	10/19	9/19

separate rules for tax "pass through" entities by creating two classes of pass through entities.[17] "Targeted Entities" were defined as pass through entities that were not "investment entities." "Investment Entities" were defined as pass through entities that derived in excess of 50% of their annual cumulative net income from passive sources (i.e. dividends, interest, rents, royalties, etc.).

Distributions from Targeted Entities were treated as income only to the extent of cumulative undistributed income earned by the Targeted Entity while the trust held an interest in the entity. Distributions from Investment Entities were treated as income to the extent that the cumulative undistributed income earned by the entity represented traditional income items (i.e. interest, dividends, rents & royalties) and as principal to the extent that the accumulated undistributed income represented traditional principal items (i.e. long and short term capital gains). The allocation was made in the same proportion of the income and principal items included in the cumulative undistributed income of the entity.

The 2012 Revisions attempt to simplify these computations and clarify the application of the 20% rule used in determining liquidating distributions. For non- publicly traded entities, cash distributions are treated as income unless they are determined to have been received in liquidation. If the total distributions by the entity exceed 20% of the entity's gross assets as shown on the entity's year-end financial statements immediately preceding the initial receipt, the distribution will be allocated to income to the extent that total distributions received from the entity – for the number of years or portions thereof while it was subject to the trust – have not equaled a cumulative annual return of 3% of the entity's carrying value, computed at the beginning of each period included in the measuring period. Distributions in excess of this amount are treated as principal.[18]

For publicly traded entities, cash distributions are treated as income unless they are determined to have been made in liquidation. The 20% default rule is replaced by 10% of the entity's fair market value as of the beginning of the measuring period. If total distributions exceed this 10% threshold, such distributions will be income to the extent that amounts allocated to income for the number of years (or portion of years) that the trust held an interest in the entity have not equaled a cumulative return of 3% of the entity's fair market value at the beginning of each measuring period.[19]

Conclusion

This article covered some but not all of the 2012 Revisions. Changes were also made to F.S. § 738.602 – payments from deferred compensation plans, annuities, and retirement plans or accounts; F.S. § 738.603 – liquidating assets; F.S. § 738.705 – Income Taxes and; F.S. § 738.801 – application with respect to apportionment of expenses. The complete text of the revised Act can be found at myflorida.com and should be reviewed in its entirety by all practitioners handling issues covered by the Act.

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Section of the American Bar Association, and the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel (ACTEC), and is an Emeritus member of its Board of Regents. He also is a Fellow of the American College of Tax Counsel, the American Law Institute and the American Bar Foundation, and remains active in the Florida Bar, having also served as Chair of its Tax Section.


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Endnotes:

1 Chapter 2003-43, Laws of Florida, effective 05/23/03; Chapter 2005-85, Laws of Florida, effective 07/01/05 and Chapter 2006-217, Laws of Florida, effective 07/01/07.

2 "Fiduciary" is defined as meaning a personal representative or trustee. The term includes an executor, administrator, successor personal representative, special administrator, or a person performing substantially the same function. [F.S. § 738.102(4)]

3 F.S. § 738.103(3)

4 F.S. § 738.01(2) [Applied prior to 01/01/03]

5 F.S. § 738.202, F.S. § 738.401(6), and F.S. § 738.603

6 F.S. § 738.102(3)

7 F.S. § 738.1041

8 *See generally* F.S. § 738.1041(2)(b)2.b.

9 F.S. § 738.1041(1)(a)

10 Example #1 and #2 are excerpted from the White Paper written for the 2012 changes.

11 F.S. § 738.1041(10). Also note that a trust that otherwise qualifies for the federal estate tax marital deduction under I.R.C. § 2056(b)(7) (a "QTIP Trust") may be a total return unitrust as Treas. Reg. § 1.643(b)-1 provides that the unitrust amount is a reasonable apportionment of the total return of a trust and therefore, the unitrust amount is considered to be "income." Several Internal Revenue Service Private Letter Rulings have approved a conversion of the "income only" requirement of a QTIP Trust to a unitrust, but have done so within the guidelines of the applicable state statute as to the unitrust percentage. *See, for example,* Priv. Ltr. Rul. 201148001.

12 IRC §643(e)(2)

13 F.S. § 738.202

14 Examples #3 and #4 are excerpted from the White Paper written for the 2012 changes.

15 F.S. § 738.401(2)

16 F.S. § 738.401(5)(b)

17 F.S. § 738.401(7)

18 F.S. § 738.401(5)(b)

19 F.S. § 738.401(e)

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Planners on the Ground, Assets in the Cloud: *Estate Planning and Administration Issues in the Digital Domain*

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


T. HAYES

What happens to your iTunes account if you die?

Many people may be unaware that the terms and conditions for iTunes state that when we buy music from iTunes, we are paying for the license to listen to songs via our iPhone, iPod or other Apple device, but we are not buying the music itself. So, what class of property is this digital asset and what do you own? As our online presence and activities continue to expand, fiduciaries and estate planning attorneys should take steps now to acquaint themselves with the digital domain and how to access, value, protect, and transfer this new class of property. The expansion of the online world will force attorneys to think about planning and administration issues within the digital domain.

The advent of the computer, initially, and then the Internet, has changed how we access and store information, including how we manage our financial lives. It is astonishing to think how much the digital domain has changed our lives in such a short period of time. Applications that many people use every day, such as Yahoo, Google, and Facebook, have been in existence for less than twenty years. An increasing number of people communicate by email or social networking sites, bank electronically, and have electronically accessed credit. There are numerous types of digital assets and information which each person now owns or deals with on a daily basis, ranging from computers, smartphones, and other electronics devices, to multiple e-mail accounts, online bank and financial accounts, and social networking accounts.

Digital Estate Planning

An estate planning attorney's primary goal usually entails helping a client to establish a plan that ensures that the client's family is taken care of and financial goals are met after death or during incapacity. All assets of any value should be considered when developing an estate plan, including digital assets and information. If the attorney does not account for digital property in the planning process, the client's goals and intentions may be frustrated. An important aspect of any estate plan is keeping records. Estate planning attorneys should consider speaking with each client about establishing a method to keep track of important logins, usernames, passwords, and personal identification numbers to ensure that the client's family members and fiduciaries can access important online and electronic records. In order to manage a client's expenses in the event of incapacity or death, a fiduciary will need a list of user names, passwords, and answers to secret questions to gain access to online accounts. This information should be maintained as part of the estate plan.

Many estate planning attorneys may not be comfortable receiving a client's user names and passwords due to liability issues. Keeping this information in a safe deposit box may not be advisable since fiduciaries would not likely be able to access the box until the will has been probated. The best approach may be for estate planners to encourage clients to establish a document storage area on a single device (e.g., burn files to a CD or DVD), to update the files as needed, and to let the appointed fiduciary know of the device's location and access codes. The increasing popularity of "cloud" computing may make a fiduciary's job easier in the future since the cloud consolidates digital information from multiple devices owned by the decedent or incapacitated person.

A client's digital property could be worth significant amounts which could eventually become part of the estate. Estate planning attorneys typically have a client fill out a questionnaire listing residences, brokerage accounts, retirement accounts, insurance policies, and other types of real and personal property. An attorney dealing with digital estate planning should also take inventory of a client's digital domain.

Estate planning attorneys should consider including specific language in a client's powers of attorney, trusts and wills which allow a fiduciary to deal with digital assets and information wherever situated. Provisions with specific authorization language permitting disclosure of information covered by federal and state data privacy laws to a fiduciary should be considered. Attorneys may also wish to discuss establishing "digital directives" with clients. This type of document would be similar to a tangible personal property memorandum, but would instead contain directions as to the access (or prohibition of access) and disposition of digital assets and information. The U.S. General Services Administration is now recommending that "social media wills," which would be a form of a digital directive, should be set up.

Digital assets and information should be taken into consideration when discussing the appointment of fiduciaries. Estate plans typically name a surviving spouse or adult child, especially one with financial savvy, as a personal representative, trustee or agent. That person may not be an ideal candidate to deal with digital assets, especially if he or she is not technologically savvy. It may be advisable

to appoint a "digital fiduciary," as the U.S. General Services Administration now recommends. The digital fiduciary could be granted the power to maintain the digital assets and information and disperse it appropriately. The role of a digital fiduciary typically comes with important responsibilities that are often overlooked by an estate fiduciary, such as closing e-mail accounts, social networking accounts, photo storage accounts, shopping accounts, and any other online account which has credit card information, and archiving photos, videos and other digital content to a DVD or flash drive.

Websites are now being created which will serve as a digital fiduciary (e.g., Legacy Locker, DataInherit, AssetLock and LastPass). LegacyLocker.com, for example, allows a client to store the access information to his or her accounts in a secure online account. Those listed as beneficiaries to the client's legacy locker receive access to all of the accounts upon providing proof of the client's death. While it has been described as a state-of-the-art operation, clients may wish to wait for consumer reports and expert reviews on the product. The risk in this approach is putting all of the client's "eggs in one basket." If the website was breached by a hacker, a disgruntled employee, or by the company's own mishandling of data, the client's online identity would be completely exposed (LastPass was recently hacked). Another risk is that the company could go out of business prior to the client's death. There are websites available, such as www.thedigitalbeyond.com/online-services-list/, which have comparison charts of the different available websites and list the services provided by each (digital estate planning, posthumous e-mails, online memorials, etc.).

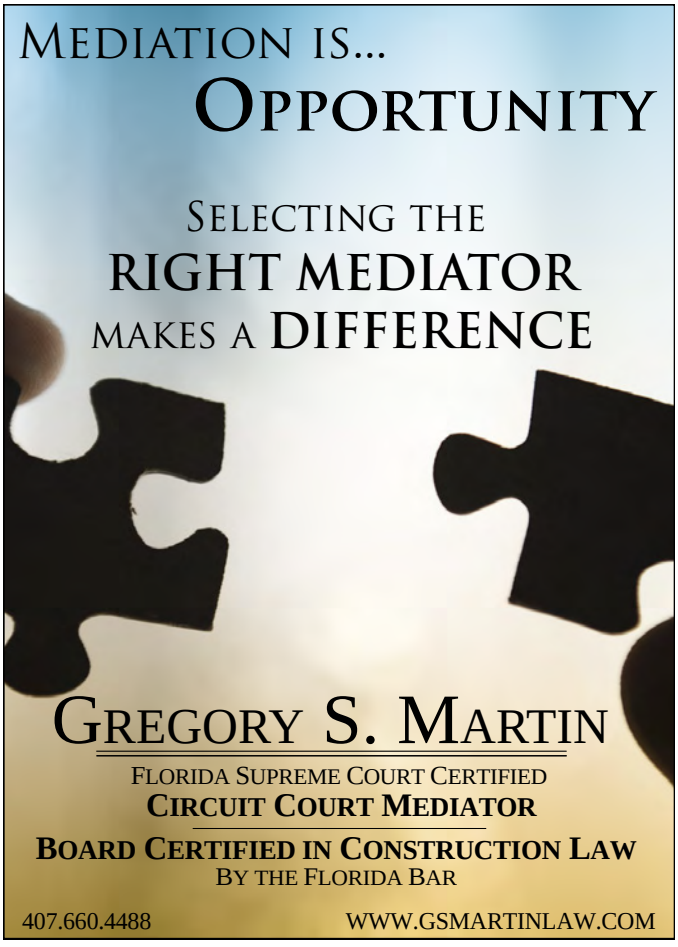
Digital Estate Administration

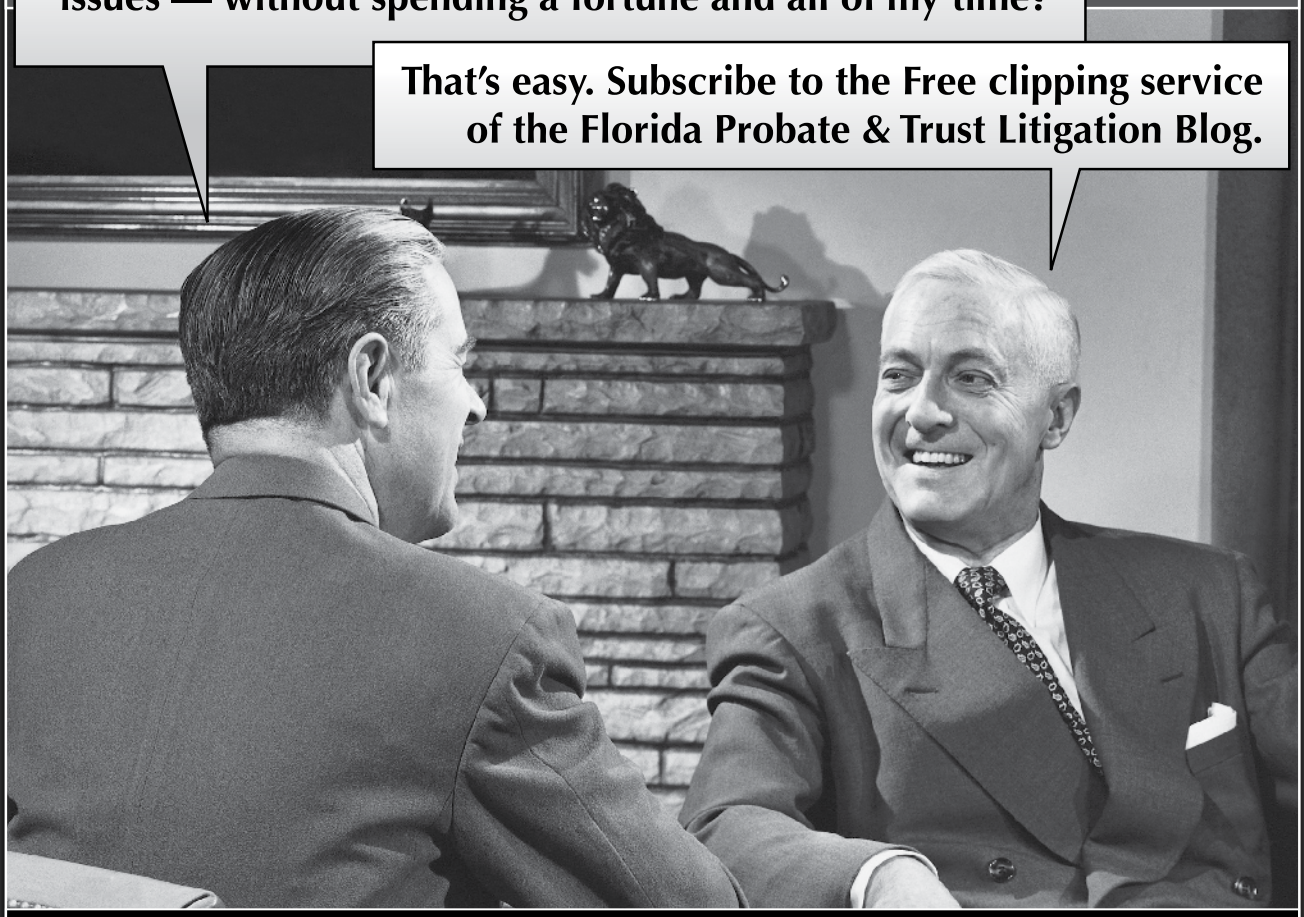
"Digital estates" have begun to raise a number of complex issues. After a client's death, the estate planning attorney has the duty to identify, take possession of, protect, and eventually distribute the decedent's digital assets and information. The same principles should apply to the administration of digital assets and information as would apply to real-world assets.

The first step in administering a digital estate is to understand the totality of the decedent's digital domain using information available to the fiduciary, including any inventories prepared as part of the estate planning process. It is important for a fiduciary to find, access, and protect voicemails, smartphones, computers and other digital assets and information as soon as possible after a decedent's death. In addition, a fiduciary should change the decedent's passwords, remove credit card information from online shopping accounts and services, such as PayPal, and notify the credit bureaus of the decedent's death in order to reduce the chances of theft and identify fraud. Electing to receive hard copies of the decedent's financial statements and bills will allow for easier record-keeping for the fiduciary.

In collecting information regarding the decedent's assets, a fiduciary will usually sort through paper copies of account statements, review hard copies of tax returns, and contact a decedent's bookkeeper, accountant and broker. In the digital domain, a fiduciary should look into accessing the decedent's smartphone, personal computers, and similar computing devices, as they may be the key to finding and accessing the decedent's financial information, online accounts, and other digital property. A fiduciary should attempt to access a decedent's e-mail accounts as soon as possible. Stored e-mails from banks, brokerage firms and credit card companies can contain PDF statements or links to statements. Time-sensitive financial information might also be delivered to the e-mail address after death. A digital fiduciary should not close a decedent's e-mail account before the estate fiduciary has retrieved important information. While the fiduciary should act quickly to identify and preserve the decedent's digital assets and information, the fiduciary should not rush to close accounts, shutdown hosting and e-mail, delete information or take other drastic measures until the fiduciary has a good sense of the decedent's digital presence and what is to be done with the digital assets and information. Keeping a website running for a year or more will not be expensive. Shutting it down

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early and losing valuable data or potential revenue could be quite expensive for the fiduciary. When a fiduciary does delete any digital information or any computers or drives are disposed of, the fiduciary should first purchase an external hard drive and make a copy of all hard drives, flash drives and other data, make copies of websites and other online accounts, and delete the information or dispose of the hardware in accordance with forensic standards so data cannot be retrieved by others.

If a fiduciary does not identify and preserve a digital asset, the fiduciary could be exposed to liability for the waste of an estate asset.

Digital items with financial value should be included on an estate tax return and in an inventory for the probate estate. The exponentially increasing prevalence of the internet and consumers' online presence has caused the value of digital property, such as the ownership of domain names and websites, to skyrocket. For example, many domain names have recently been sold for seven-figure sums, such as fund.com, which sold for $9,999,950, diamond.com, which sold for $7,500,000, and beer.com, which sold for $3,000,000. A recent survey cited by the *Wall Street Journal* showed that U.S. consumers value their digital assets and information, on average, at $55,000.

A fiduciary or estate planning attorney may not initially realize the value in a website, blog, or, other digital asset since these types of property are not dealt with as often in estate administrations. If a fiduciary does not identify and preserve a digital asset, the fiduciary could be exposed to liability for the waste of an estate asset. For example, if the ownership of a domain name is not maintained by the fiduciary and expires, the domain name is suspended for two months and then put up for auction to the general public. If the domain name is lost by the fiduciary and later sells for a substantial price, the fiduciary should expect to be liable to the estate for this amount. If a fiduciary is concerned that a decedent may have owned domain names that the fiduciary is not aware of, there are websites that will perform the search functions for the fiduciary, such as the WHOIS search on www.networksolutions.com.

Beyond financial value, a fiduciary must also take sentimental value into account. Many people now keep all of their personal photos in digital form, on social networking websites, or on photo-hosting websites. The fiduciary should search for and preserve any electronically stored personal items in a decedent's personal e-mail, social networking, and photo-hosting accounts before closing down the accounts. There could be sentimental value in an email address or social networking account, the content of a financial account, internet domain names, and online photographs. The fiduciary should also access contact lists, e-mail accounts and social media accounts to (presumably in conjunction with family members) notify friends of the decedent's death. If a fiduciary is not technologically savvy, he or she should consider finding knowledgeable technical help, such as a computer security or computer forensics expert, especially if there may be valuable digital property on the decedent's digital devices. Technicians may be able to access hard drives and copy contents to a CD or flash drive. A technician may request to see documentation such as a death certificate, letters of administration, or the decedent's proof of ownership. Some of the websites listed above, which provide digital fiduciary services, supply information about how to delete online accounts and digital information, and are useful resources for a fiduciary dealing with digital assets and information. In addition, if there is a current or potential civil suit or law enforcement investigation involving the decedent, a fiduciary should work with a technician to preserve potential electronic evidence, including data stored in smartphones, computers and other storage media in order to avoid contempt or obstruction of justice charges.

Accessing Digital Assets and Information

At the death or incapacity of the owner of digital assets and information, a fiduciary will likely find his or her authority under existing law to be non-existent or ambiguous. Most current state laws are either unclear or poorly written, and don't specifically spell out the role of a fiduciary with respect to gaining access to digital property.

A duly-appointed fiduciary is statutorily charged to take possession of the assets of the estate or an incapacitated ward. A trustee may be charged to take possession of the assets of the trust. In all instances, the fiduciary must have access to the necessary information to carry out his or her tasks. Most state statutes do not clearly authorize this. The primary reason for the ambiguity is that electronic communication and storage has developed independently of the historical definitions of assets and property. This ambiguity may create unintended criminal and civil consequences for alleged cybercrime, financial elder abuse or financial exploitation when an authorized fiduciary seeks to access, control or transfer digital assets, accounts or information.

A fiduciary needs to consider who owns or who is authorized to access digital assets or information before allowing family members or other fiduciaries to attempt to access a decedent's digital property. If a fiduciary accesses a decedent's e-mail account without the e-mail provider's knowledge, that action might violate the e-mail provider's terms of service. Allowing access to a device and data may also waive legal privileges or may violate federal or state data privacy laws.

Despite the best intentions of the fiduciary, accessing certain digital information may break the law and put the

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fiduciary at risk of arrest. Could a fiduciary be committing an illegal act if he retrieves someone else's digital files? Most current state laws are either unclear or have little to say about a fiduciary's role in gaining access to a deceased individual's digital assets and information. This may not be an issue with a personal representative or guardian since the personal representative or guardian steps into the shoes of the decedent or ward and should have authority to access the digital assets and information, such as the computer or online bank accounts of the decedent or ward. However, it may raise an issue if an agent or trustee accesses the digital assets or information.

Absent a state law addressing this issue, the fiduciary should consider obtaining a court order before accessing digital assets and information, in particular online accounts. Federal and state criminal laws criminalize certain types of unauthorized access or damage to computers and data. The federal and state criminal and data privacy laws may apply even if the family members or fiduciaries have a list of the person's passwords needed to access the decedent's device and data. If a fiduciary accesses a decedent's financial or investment accounts without the proper authority, the fiduciary could be found to have committed identity fraud or violated a cybercrime law such as the Computer Fraud and Abuse Act[1] which makes it a criminal offense to intentionally access a computer without authorization to obtain information contained in a financial record of a financial institution. A bank could also view third-party access of financial accounts without permission as an attempt to defraud. In Florida, estate planning attorneys and fiduciaries need to be aware of Sections 815.01 through 815.07, Fla. Stat., which deal with computer-related crimes. In particular, Sec. 815.04(1), Fla. Stat., and Sec. 815.04(2), Fla. Stat., provide that anyone who willfully, knowingly, and without authorization modifies or destroys data, programs, or supporting documentation residing or existing internal or external to a computer, computer system, or computer network commits an offense against intellectual property. Until Florida has a statute specifically authorizing a fiduciary to access the data, programs, or supporting documentation of a decedent or incapacitated person (which is discussed below), the fiduciary should proceed with great caution when dealing with digital property.

Most e-mail servers and websites will allow access to the personal data of a deceased or incapacitated person by the next of kin, but it's likely they will require some form of proof to establish the relationship and that the owner has died or is incapacitated. However, some service providers will not reveal or reset an incapacitated or deceased person's password, even for a duly-appointed guardian, personal representative, or agent acting under a power of attorney. In most cases, ownership of the account is never simply transferred to the personal representative or next of kin. An attorney or fiduciary will need to look to the terms of service for the service provider in order to determine the policies and procedures which apply to the account.

Yahoo has one of the most stringent policies when it comes to third-party access to accounts. In a case involving the release of a deceased soldier's emails, Yahoo made the following statement: "While we deeply sympathize with any grieving family, protecting the privacy of our users remains our priority. Yahoo is committed to ensuring that the activities of every person who signs up for an account is confidential, even after their death." Yahoo further stated that a user who is worried that family members might need access to pertinent passwords to financial accounts or other important information should "plan for this as part of their estate-planning process." Yahoo's stance on this issue is a strong reminder to attorneys that digital assets and information need to be accounted for in the planning process, especially in the absence of state law addressing third-party access to accounts.

It has yet to be seen whether the terms imposed by websites and account providers, such as Yahoo, will withstand judicial scrutiny. Most websites require account holders to first approve of the Terms of Service before they are allowed to establish an account. In most states, a "contract of adhesion" is one offered by an organization on a standard form that is presented on a "take it or leave it" basis, where the party signing has unequal bargaining power to otherwise negotiate. Such contracts are generally held to be unenforceable. It could be argued that the websites' Terms of Service constitute contracts of adhesion and are thus unenforceable. In any event, as of now, the Terms of Service should be the starting place for an attorney when determining what rights family members and fiduciaries have in accessing the account of a decedent or incapacitated person.

State and Uniform Laws Concerning Digital Assets and Information

When it comes to laws pertaining to post-mortem or post-incapacity access to a person's digital assets and information, most states are far behind the times, providing little or no direction on the matter. However, legislators are beginning to take notice that it is important to give families and fiduciaries control of the digital property of their deceased or incapacitated clients or relatives. Some states have begun to address the issues involved with digital estate planning and administration by passing laws that provide fiduciaries with access to digital property and authorizing a fiduciary to take control of a deceased individual's online presence.

Connecticut, Rhode Island, Indiana, Oklahoma and Idaho were the first states to pass legislation concerning digital assets and information.[2] Other states, such as Oregon and Massachusetts, have proposed legislation concerning these issues. Oregon's proposed statute is the most comprehensive legislation to date. The Oregon statute combines many of the aspects contained in the existing

legislation of other states. The Massachusetts proposal is unique in that it states that the statute supersedes provisions in the electronic mail service provider's contractual limitations, terms and conditions, or privacy policy. To date, the service providers have not challenged any of the state statutes, and have complied with court orders compelling access to accounts. Because of the constitutional issues involved, the Massachusetts proposal, if passed, will likely be the first statute to be challenged by service providers. It has yet to be seen whether these state statutes will be successful in allowing fiduciaries and family members to access the accounts of a decedent or incapacitated person. Some commentators believe that the laws will ultimately be ineffective based on the argument that the law cannot create property rights in an account in which none were granted in the first place. However, others argue that websites claiming ownership of accounts and their content are freely taking the intellectual property rights of its account holders. It will be interesting to see how the common law develops in this new area of law.

The Uniform Law Commission[3] is also studying these issues in order to draft a uniform law on the subject. As a result of recommendations by its Fiduciary Powers and Authority to Access Digital Information Committee, a drafting committee has been authorized by the Uniform Law Commission to have a uniform law drafted and approved by the Uniform Law Commission's July, 2013, annual meeting due to the high demand from the states for this type of uniform legislation.

Digital Assets and Information Study Committee

Florida may become one of the next states with legislation pertaining to digital assets and information. The Real Property, Probate and Trust Law Section of the Florida Bar recently established the Digital Assets and Information Study Committee to look into many of the issues discussed herein. The study committee has been charged as follows: (1) to study and identify issues and problems associated with access to and the disposition of digital assets and information under the following situations: inter vivos (the rights and obligations of agents of durable powers of attorney, guardians, and trustees of inter vivos trusts, for example); and, following death (the rights and obligations of personal representatives and testamentary trustees, for example); (2) to study the extent, if any, to which existing Florida statutes are inadequate in providing solutions to those issues and problems; (3) to study the content of statutes enacted in other states which seek to address these issues and problems and whether any of those statutes might have

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applicability in Florida; (4) to consider and assess efforts to create uniform legislation on these subjects; and (5) to advise the Executive Council of the RPPTL Section whether remedial legislation in Florida should be considered as the next phase of the project.

The ultimate goal of the study committee is to draft legislation which will allow fiduciaries to perform the obligation of identifying, marshalling and protecting the digital assets and information of a decedent, incapacitated person, ward, or trust beneficiary with greater efficiency, lower costs, and no court involvement. Any proposed legislation will likely extend the authority of fiduciaries to access and possess digital assets and information, provide a working definition of digital assets and information, and not affect the underlying contractual relations between the decedent, incapacitated person, ward or trust beneficiary and the internet-based entity holding the digital assets or information.

Where Do We Go From Here?

The rapidly expanding digital domain has created a new wrinkle for estate planning attorneys. Attorneys must now be mindful of digital assets and information when creating an estate plan for a client, as well as during the administration of a deceased client's estate or the pendency of a guardianship for an incapacitated client. Being aware of these issues will allow the attorney to ensure that a client's wishes are not frustrated and potentially help the attorney to avoid future liability. Since the law on this subject is still evolving, attorneys in Florida should continue to monitor the status of any legislation which may be proposed.

Travis Hayes *is an estate planning attorney with Cummings & Lockwood LLC in Naples. Travis is a member of the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar, and currently serves as the Vice Chair of the Ad Hoc Digital Assets and Information Study Committee for the Section.*

Endnotes:

1 10 USC 1030(A)(2)

2 Connecticut (Conn. Gen. Stat. § 45a-334a (2005)), Rhode Island (R. I. Gen. Laws § 33-27-1 to -5 (2007)) and Indiana (Ind. Code § 29-1-13-1.1(2007)) laws require direct e-mail service providers to grant an executor or administrator access to a decedent's e-mail account upon receipt of a written request, a copy of the death certificate, a certified copy of the certificate of appointment, and a court order. Oklahoma (Okla. Stat. tit. 58, §269 (2010)) and Idaho (Idaho Code § 15-3-715(28) (2011)) have passed laws giving an executor or administrator of an estate much broader powers over a decedent's online accounts and websites. For more information on these statutes or amendments thereto see: http://www.digitalestateresource.com/law/

3 http://www.uniformlaws.org/



Title Agent "Vetting," The CFPB, and the Real Property Transactional Lawyer

By W. Theodore Conner, Sr. Vice President and General Counsel, Attorneys' Title Fund Services, LLC, and James C. Russick, Vice President and Florida State & Government Affairs Counsel, Old Republic National Title Insurance Company

Title agent "vetting" is an emerging issue with possibly significant ramifications for all agents, both attorneys and licensed agents. In fact these issues may impact the whole business model of delivering title insurance through agents. It is a national issue.

Title agents have been receiving notices over the last several months from various mortgage lenders stating that they have engaged an outside company to "vet" title insurance agents. By "vet" we mean check your license and status with the bar, your professional liability coverage, any fidelity or surety bond, credit and criminal background, and continuing education. Lenders are beginning to require this "vetting" of agents through a company of their selection at the title agent's cost as a condition to allowing an agent to handle any loan closing transaction on behalf of the lender. We have seen annual fees as high as $299 per person within the agency or firm with signatory authority on either the escrow/trust account or commitments and policies. Deadlines for compliance threaten termination of the business relationship with your firm.

The redundant inefficiencies and added expenses necessary to meet these requirements should be apparent to every agent. Most attorneys initially view this development as a threat to their practice. Those that have followed the bigger picture see the issues as more complex.

It is appropriate to ask why lenders have begun to engage these outside vetting companies. The answer stems from the expanded responsibilities federal regulators are placing on the lenders themselves. There is a renewed focus from federal regulators about a lender's obligation to protect the interests of consumers. Specifically, regulators are holding lenders responsible for consumer harm by any third party contractor performing an outsourced function for the lender.

We will address two recent examples. As you review them, it is critical that you appreciate one fundamental fact. In this context, an attorney closing a loan is a third party provider to the lender.

This expanded concept of lender liability began to show itself in the Consent Orders affixing lender responsibility in the "robo signing" foreclosure actions brought by the Office of the Comptroller of the Currency (OCC). For example, in the OCC Consent Order with U.S. Bank, N.A.[1], there are several pages setting forth the obligations the bank assumed to select, monitor, and train third party providers, in this case foreclosure firms and related mortgage servicing providers. The OCC Consent Orders require that lenders have in place consumer records retention and control mechanisms that can be interpreted as the banks undertaking certain responsibilities under the Privacy Act[2] for improper disclosures by third party vendors. The wording of the various OCC Consent Orders is subject to interpretation. At no point is there the imposition of any negligence concept. There is more of an implied strict liability by the lender for any lack of diligence in the execution of the listed third party responsibilities that would result in harm to a consumer.[3]

Similar liability was placed on Capital One via a Consent Order with the Consumer Financial Protection Bureau (CFPB) in July of this year[4]. Capital One contracted for outside call center services to aid in the bank's credit card business. As part of that engagement, Capital One provided a script for the call center's employees to follow. It was alleged that the bank failed to monitor the call center to ensure compliance with the script resulting in financial harm to consumers. More specifically, the CFPB alleged that the independent contractor violated federal consumer protection laws by deviating from the script and implying to consumers that payment protection and credit monitoring services were both required by Capital One and that they were free. Per the CFPB Consent Order, Capital One agreed to pay $210 Million in settlement of these allegations.

On April 13, 2012, the CFPB published a Bulletin entitled "Service Providers."[5] It stated, "The Consumer Financial Protection Bureau (CFPB) expects supervised banks and non-banks to oversee their business relationships with service providers in a manner that ensures compliance with Federal consumer protection finance law, which is designed to protect the interests of consumers and avoid consumer harm." The bulletin goes on to approve the use of third party providers but hastens to add that doing so "…does not absolve the supervised bank or non-bank of responsibility for complying with Federal consumer financial law to avoid consumer harm." The CFPB went on to set forth its expectation that lenders have "an effective process for managing the risks of service provider relationships." Lenders "should take steps to ensure that their business arrangements with service providers do not present unwarranted risks to consumers."

The crux of the CFPB memo delineates the steps expected of their lenders when considering or entering into third party provider arrangements. "These steps should include, but are not limited to:

- Conducting thorough due diligence to verify that the service provider understands and is capable of complying with Federal consumer financial law;

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- Requesting and reviewing the service provider's policies, procedures, internal controls, and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;
- Including in the contact with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive, or abusive acts or practices;
- Establishing internal controls and on-going monitoring to determine whether the service provider is complying with Federal consumer financial law; and
- Taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate."

So what we are presented with is a situation that does not mandate the use of vetting companies, but does, in a way, encourage their use. The April 13, 2012, memo is arguably directed to the activities of mortgage servicing companies but is instructive for all third party service providers. Consider for a moment the vast number of title insurer direct offices and independent title agents and attorneys serving the lender community nationwide. If you accept the estimate that in Florida alone there are roughly 7000 title agents, the national number is significant. Lenders are confronted with the problem of how best to comply with these new regulatory expectations.

"…avoiding the implementation of a misdirected effort does not change the very real need for independent title insurance agents, including attorney agents, to demonstrate their compliance with regulator requirements."

Just how the lender marketplace will respond remains an open issue. Will lenders require use of their affiliated title agencies? Will lenders cull their list of acceptable title vendors? Might there be a preference for direct operators? Will these new "vetting" companies be used? Are there other ways the industry can address their responsibilities through expanded bonds, liability coverage, or other licensing related initiatives?

The "vetting" companies are not an effective solution to the issues. Lenders are recognizing that delivering the personal information of principals and employees in the title insurance industry to unlicensed, unregulated and uninsured "vetting" companies carries far more risks than protection for lenders. Several lenders who were early adopters of third party vetting companies have recently altered their requirements. Some title insurance agents have successfully worked with their regular business contacts at lenders to dismiss the "vetting" requirement. However, avoiding the implementation of a misdirected effort does not change the very real need for independent title insurance agents, including attorney agents, to demonstrate their compliance with regulator requirements.

The American Land Title Association recognized that this problem needed to be addressed. We, as title professionals, have an obligation to tell the story of what we do and how we do it. We cannot leave that to others. The

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Association has begun to do so through the development of its "Best Practices" that are designed to focus on the conduct of the title insurance industry exercised to protect lenders and their consumers.

"The best practices serve as a benchmark for the real estate settlement and mortgage lending industries and illuminate the high level of professionalism that ALTA members follow to protect consumers and businesses," said Michelle Korsmo, ALTA's chief executive officer. "The title insurance industry has always been serious about protecting consumers and combating criminal behavior. It is beneficial for those in the title business to promote self regulation through the publication of best practices that meet high professional standards of operation to protect consumers and businesses."[6]

The best practices address seven main areas ranging from controls regarding escrow and trust accounts to protecting customers' personal information and responding to complaints:

Establish and maintain current license(s) as required to conduct the business of title insurance and settlement services. The purpose is to ensure that the company is fully compliant with all applicable laws and regulations.

Adopt and maintain appropriate written procedures and controls for Escrow Trust Accounts allowing for electronic verification of reconciliation. These controls help meet client and legal requirements for safeguarding client funds.

Adopt and maintain a written privacy and information security plan to protect non-public personal information as required by local, state and federal law. Federal and state law requires a written information security plan describing how non-public customer information is protected.

Adopt standard real estate settlement policies and procedures. This can ensure a settlement company can provide a safe and compliant settlement and meet state, federal and contractual obligations governing the settlement process and provide for ongoing employee training.

Adopt and maintain written procedures related to title policy production, delivery, reporting and premium remittance. Appropriate procedures for the production, delivery and remittance of title insurance policies ensures title companies meet their legal and contractual obligations.

Maintain appropriate professional liability insurance and fidelity coverage. Appropriate levels of professional liability ensure that title agencies and settlement companies have the financial capacity to stand behind their professional services.

Adopt and maintain procedures for resolving consumer complaints. A process for receiving and addressing consumer complaints is important to ensure that any instances of poor service or non-compliance do not go undiscovered.

Clearly, every real estate lawyer and title professional has a stake in, and should be part of, the discussion on "vetting." That requires a forum, a proper organization to coordinate and represent your interests. Recognizing that there is a national component to the solution, **please consider opting for full membership in the American Land Title Association (ALTA)** when you receive your form licensing renewal notice. We strongly encourage your membership and participation.


T. CONNER

W. Theodore Conner *is Senior Vice President, General Counsel of Attorneys' Title Fund Services, LLC (The Fund). He earned undergraduate and law degrees from the University of Florida. He was in private practice in the Orlando area for 12 years. Mr. Conner authored chapters in Florida Real Property Title Examination and Insurance and Florida Real Property Sales Transactions (Fla. CLE). He is the chair of the Real Property Certification Review Course Committee and serves on the Executive Council of RPPTL. Mr. Conner is a Florida board certified real estate lawyer.*


J. RUSSICK

James C. Russick *is a Board Certified Real Property Lawyer and the Florida State Regulatory Counsel for Old Republic National Title Insurance Company. He is currently serving as President of the Florida Land Title Association (FLTA). He also serves on the Executive Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) and on the American Land Title Association (ALTA) Forms Committee and Governmental Affairs Committee.*

Endnotes:

1 OCC No. AA-EC-11-18 (April 13, 2011), Office of the Comptroller of the Currency, Consent Order in the matter of U.S. Bank National Association: http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47j.pdf (last visited Dec. 1st, 2012).

2 5 U.S.C. § 552a

3 OCC No. AA-EC-11-19 (April 13, 2011), Office of the Comptroller of the Currency, Consent Order in the matter of Wells Fargo: http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47k.pdf; and OCC, No. AA-EC-11-12 (April 13, 2011), Office of the Comptroller of the Currency, Consent Order in the matter of Bank of America: http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47b.pdf (last visited Dec. 1st, 2012).

4 File No. 2012-CFPB-0001, Consumer Financial Protection Bureau, Files, available at http://files.consumerfinance.gov/f/201207_cfpb_consent_order_0001.pdf (last visited Nov. 28, 2012).

5 CFPB Bulletin 2012-03 (April 13, 2012), Consumer Financial Protection Bureau, Files, available at http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf (last visited Nov. 28, 2012).

6 See http://www.alta.org/news/news.cfm?newsID=19172

RPPTL Section Booth at the Kozyak Minority Mentoring Picnic - a Huge Success!

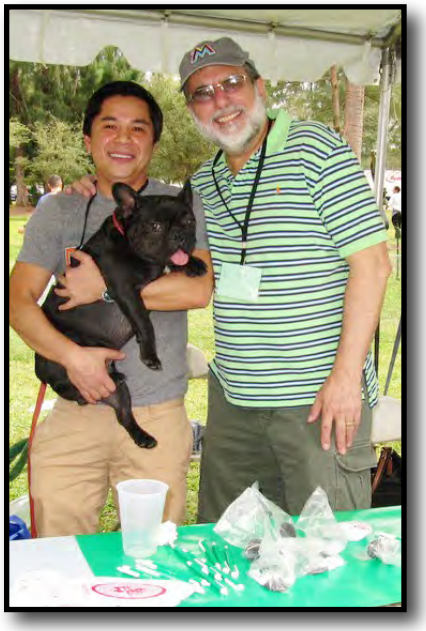


There were many distinguished guests to meet and greet. Here is Silvia Rojas with Student Bar Association President, Christian Sanchelima, and Dean R. Alex Acosta, from Florida International University College of Law.

This was another successful year for the Kozyak Minority Mentoring Picnic held this year on November 10th from Noon to 4:00 p.m. at the Amelia Earhart Park in Miami, Florida. Many attorneys, students, judges, law school administrators and Florida Bar members attended along with their families and pets. There was plenty of delicious food, a wine tasting, domino tournaments, rock climbing, a huge slide, barnyard animals to visit, songs playing on the loudspeaker and line dancing. The grounds were surrounded by booths from law schools, law firms, servicing companies and organizations. Our RPPTL Section booth was very well staffed this year.

A big **THANK YOU** goes to **Sharaine Sibblies** for her leadership in doing such a spectacular job in planning and following through on behalf of the RPPTL Section. The RPPTL Section booth attracted many attendees to visit with us. It was staffed this year by **Jennifer Jones, Marquista Shipman, Silvia Rojas, Stacey Prince-Troutman, David Carlisle, Michael Dribin, Hung Nguyen, Robin King, Tara Rao,** and **Carlos Batlle** on staggered shifts. Sharaine made sure that we all had informational materials and goodies to attract lots of visitors to learn more about the RPPTL Section. We look forward to next year as the event keeps attracting a wider audience.

— Silvia Rojas



Hung Nguyen brought his pet, Napoleon, here with Mike Dribin



Stacey discussing Section membership with Florida Coastal School of Law students



(Above) Robin King, Sharaine Sibblies, David Carlisle, Jennifer Jones and Mike Dribin



Marquista Shipman, Sharaine Sibblies, Jennifer Jones, Stacey Prince-Troutman and Stacey's mom, Inez Joan Prince, sitting and enjoying the picnic.

"Till Divorce Do Us Part" The Beneficiary Designation Legislation

By Linda S. Griffin, J.D., LL.M., CPA and J. Allison Archbold, LL.M., Submitted on behalf of the IRA, Insurance and Employee Benefits Committee

Until July 1, 2012, much confusion (meaning many cases) arose from situations in which a couple divorced and the former spouse continued to be named as a beneficiary of a life insurance contract or an individual retirement account ("IRA"). Did that former spouse remain a beneficiary upon divorce?

Under the Florida Trust Code and the Florida Probate Code, a provision of a will or trust which affects the decedent's spouse is void upon a dissolution or annulment of marriage.[1] Prior to July 1st, 2012, no such statute existed for non-probate or non-trust assets, such as IRAs, life insurance policies or payable-on-death ("POD") accounts.

Several Florida courts determined that when a beneficiary designation is not changed after a divorce, the beneficiary designation is still valid. In *Crawford v. Barker*[2] the court provided that "absent the marital settlement agreement providing who is or is not to receive the death benefits or specifying who is to be the beneficiary, courts should look no further than the named beneficiary in the separate document of the policy, plan, or account."[3] The court pointed out that general language in a marital settlement agreement (such as who is to receive ownership) is not specific enough. The decedent was free to name whomever he or she wanted and, if the decedent did not change the beneficiary designation and the former spouse was named beneficiary, then the former spouse would receive the benefits.

In *Smith v. Smith,*[4] the court held that the former spouse was entitled to insurance, IRA and retirement plan proceeds even though the marital settlement agreement identified the assets (but did not specifically refer to the proceeds of these assets), and in *Cooper v. Muccitelli,*[5] the court held that a former spouse was entitled to insurance proceeds even though a general release clause was included in the marital settlement agreement. In *Luszcz v. Lavoie,*[6] the court also held that the former spouse was entitled to the proceeds of an IRA. However, the dissenting judge pointed out that "the legislature may wish to consider enacting a law similar to sections 732.507 and 737.106 to cover assets passing outside an estate or trust."[7] Thus, the IRA, Insurance and Employee Benefits Committee of The Florida Bar needed to create a solution.

The Solution

New Fla. Stat. § 732.703 is effective July 1, 2012, and governs the effect of divorce, dissolution or invalidity of marriage on disposition of certain assets at death. This statute applies to ALL beneficiary designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made. Thus, it is very important to check all beneficiary designations, especially if you want a former spouse to be a beneficiary.

A designation made by a decedent is considered void as of the time the marriage is dissolved or declared invalid by court order if the designation is made prior to the dissolution or court order, and the decedent's interest in such asset will pass as if the former spouse predeceased the decedent. This statute applies to assets as described in the statute and includes life insurance, qualified annuities and similar tax-deferred contracts held within employee benefit plans; employee benefit plans; IRAs; POD accounts; securities or other accounts held in a transfer-on-death ("TOD") form; and life insurance, annuities or similar contracts that are not held within an employee benefit plan or tax-qualified retirement account. A diagram to use as a guide to determine the applicability of the statute depending on the type of asset can be found at the end of this article.

The statute does not apply:

- to the extent federal law controls (e.g., ERISA);
- if the beneficiary designation is signed after divorce and explicitly provides for the former spouse to be a beneficiary;
- to the extent provisions of a will or trust apply;
- if the order of dissolution or order declaring the marriage invalid requires the decedent to acquire or maintain the asset for the former spouse or children, only if other assets fulfilling such a requirement do not exist at the death of the decedent;
- if the order of dissolution or order declaring the marriage invalid states that the decedent could not have unilaterally terminated or modified the ownership of the asset or its disposition upon the decedent's death;
- to an asset held in two or more names when death vests the ownership of such asset in the surviving co-owner(s) (e.g., tenancy by the entirety, joint tenancy with right of survivorship);
- if the decedent remarries the former spouse and the decedent is still married to such spouse at the decedent's death;
- if the designation of the former spouse is irrevocable;
- if the instrument directing the disposition of the asset at death is governed by the laws of a state other than Florida;[8] and
- to state-administered retirement plans.

Protection to Payors

The holders and payors of the decedent's interest in the assets have legal liability protection for paying out

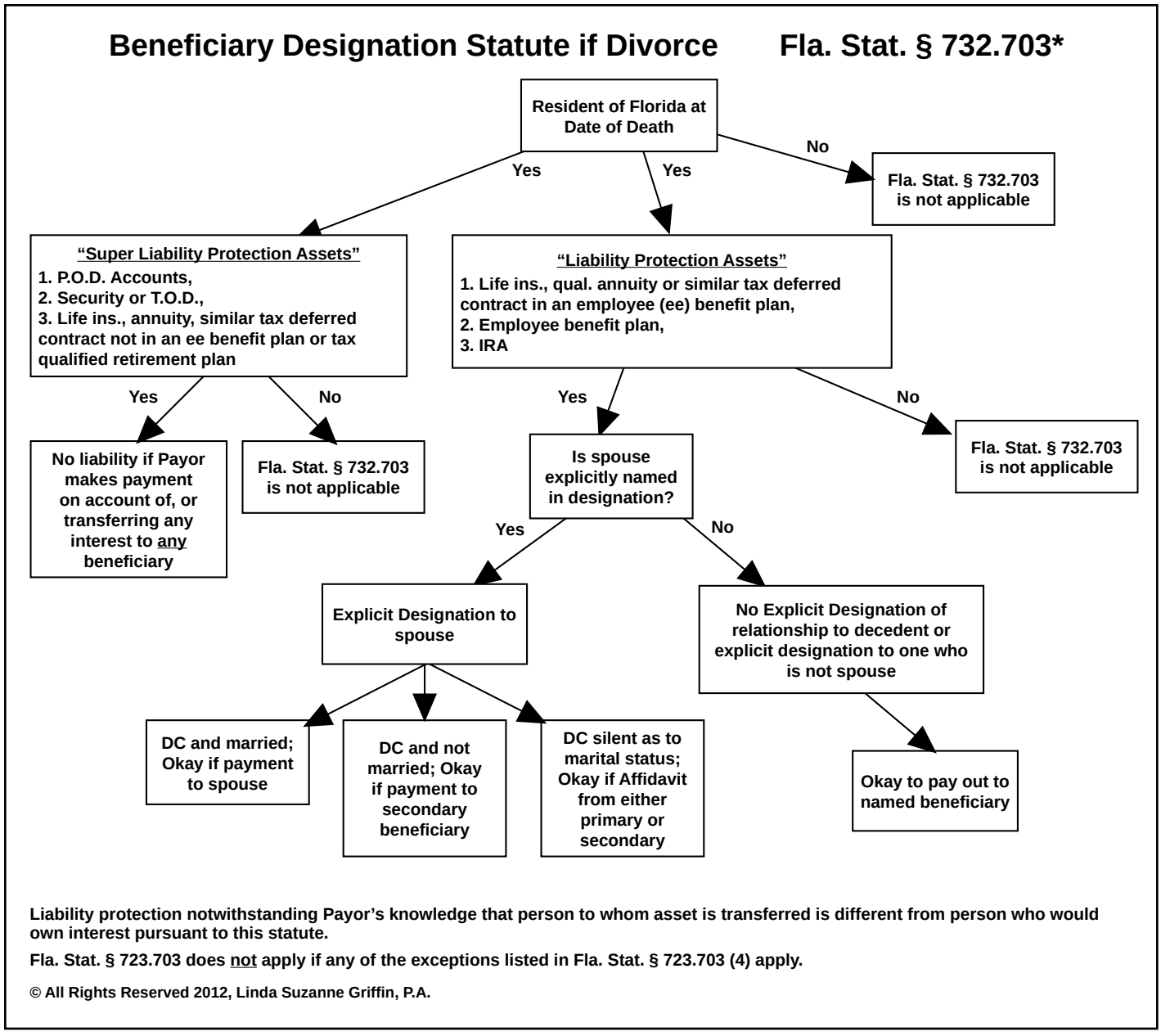
such interests depending on the type of asset. "Liability Protection Assets" (the author's name for these assets) include life insurance, qualified annuity plans and similar tax-deferred contracts held within employee benefit plans, employee benefit plans, and IRAs and Roth IRAs. "Super Liability Protection Assets" (the author's name for these assets) include POD accounts, securities or other accounts held in a TOD form, and life insurance, annuities or similar contracts not held within an employee benefit plan or tax-qualified retirement account.

Liability Protection Assets

Unless doing so would violate a court order, the payor has no liability for payment of the decedent's interest in the Liability Protection Assets if the payor makes such payments if there is no explicit language included in the governing instrument specifying the relationship of the beneficiary to the decedent or if the governing instrument explicitly says the beneficiary is not the decedent's spouse. Examples include "to my sister Joan" or "to Joan," even if Joan is the decedent's spouse. The payor also has no liability for payment of the decedent's interest in the Liability Protection Assets if the decedent's spouse is explicitly named as primary beneficiary in the governing instrument (e.g. "to my spouse, Jane") and if the death certificate:

- states the decedent was married to that spouse at the

continued, next page



Liability protection notwithstanding Payor's knowledge that person to whom asset is transferred is different from person who would own interest pursuant to this statute.

Fla. Stat. § 723.703 does not apply if any of the exceptions listed in Fla. Stat. § 723.703 (4) apply.

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time of his or her death, and the payment is made to such spouse.

- states the decedent was not married or was married to someone other than the spouse designated as the primary beneficiary at the time of his or her death, and the payment is made to the secondary beneficiary.
- is silent as to marital status, and the payment is made to the primary beneficiary, who executes an affidavit which includes: a statement regarding the date of death, a statement that the affiant is the primary beneficiary and a statement including the date of marriage and that the affiant and decedent were legally married at the death of the decedent (a form for such affidavit is included in the statute).
- is silent as to marital status, and the payment is made to the secondary beneficiary who executes an affidavit which includes: a statement regarding the date of death, a statement that the affiant is the secondary beneficiary, and a statement that at the decedent's date of death the decedent was not legally married to the spouse designated as primary beneficiary (a form for such affidavit is included in the statute).

Super Liability Protection Assets

The payor has no liability for payment of the decedent's interest in Super Liability Protection Assets if the payor makes a payment on account of, or transfers any interest in, the asset to any beneficiary.

The protection of payors for any distribution of the decedent's interest in either Liability Protection Assets or Super Liability Protection Assets applies even if the payor has actual knowledge that the person to whom the asset is transferred is different from the person who would own the interest pursuant to the statute.

ActionLine Now Searchable!

Check out the new *ActionLine* **WORD SEARCH FEATURE** on our Section Website at **http://www.rpptl.org/.** After logging in, go to "Publications" and choose "ActionLine." You can now search for articles and authors by word(s) through the "ActionLine Search" window powered by Google. The search engine button will direct you to the issues that contain the word(s) you insert in the search window. The search can be expanded by following the directions online. You can locate the word(s) within the chosen ActionLine issue by utilizing its pdf search engine.

Conclusion

Much of today's wealth is being passed in the form of life insurance, payable on death accounts, IRAs and Roth IRAs. After a divorce, most individuals would not want their former spouse to be included as a beneficiary of such assets. Until July 1, 2012, Florida law only reflected such intent in the wills and trusts arena. Now that Fla. Stat. § 732.703 has been created, the Florida Legislature has properly applied such intent to other assets.



L. GRIFFIN

***Linda Griffin,** a Florida board certified attorney in both taxation and wills, trusts and estates, practices in Clearwater, Florida in her own firm, Linda Suzzanne Griffin, P.A. She is also a Fellow of the American College of Trusts and Estates Counsel ("ACTEC"). In 2012, she was selected by her peers as a Florida Super Lawyer and the Top 50 Women Florida Super Lawyers, as mentioned in the Wall Street Journal. She recently published the book… "The Survivor's Navigator – A Practical Guide to Dealing With The Death of a Loved One in Florida" which is available on Amazon.*

*Ms. **Griffin** gives special thanks to her associate, **Nicholas J. Grimaudo,** Esquire, for his help in the preparation of this article.*



A. ARCHBOLD

***J. Allison Archbold** is board certified in wills, trusts & estates and practices in Sarasota with Fergeson, Skipper, Shaw, Keyser, Baron and Tirabassi, P.A. She received her A.B. from Cornell University and her J.D. and LL.M. in estate planning from the University of Miami. She was the Executive Editor of the University of Miami Law Review. Prior to becoming an estate planning attorney, she was a judge advocate in the U.S. Marine Corps*

Endnotes:

1 Fla. Stat. § 732.507(2) and Fla. Stat. § 736.1105.

2 *Crawford v. Barker*, 64 So. 3d 1246 (Fla. 2011).

3 *Id.* at 1248.

4 *Smith v. Smith,* 919 So. 2d 525 (Fla. 5th DCA 2005)

5 *Cooper v. Muccitelli,* 682 So. 2d 77 (Fla. 1996).

6 *Luszcz v. Lavoie,* 787 So. 2d 245 (Fla. 2d DCA 2001).

7 *Id.* at 250 n.4.

8 The language "instrument directing the disposition of the asset at death" in Fla. Stat. § 732.703(4)(g) is being changed to "governing instrument," which is a specifically defined term in the statute. This change is part of a "glitch bill" that will be presented to the Florida Legislature in 2013.

RPPTL Section Executive Council Meeting

The Ritz Carlton, Key Biscayne, September 13-16, 2012

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

The fall meeting of the Real Property, Probate and Trust Law Section of the Florida Bar was held at The Ritz Carlton in Key Biscayne. It's not too long ago that the Section met at the same Ritz Carlton and it is very clear why this would be a repeat location. The Ritz Carlton is really an outstanding venue, located immediately adjacent to the Atlantic Ocean. The Ritz offers all kinds of wonderful activities right on site including a fabulous spa and pool.

Meetings started at 1 o'clock on Thursday, September 13th, 2012. A new feature at this meeting was a CLE workshop presented by Rob Freedman with the assistance of lots of committee chairs. This CLE workshop provided assistance on preparing for major CLE programs presented by the individual committees but also provided to the committee chairs and co-chairs strategies for obtaining CLE approval for committee meetings.

The social event Thursday evening was the welcome reception from 7:00 p.m. to 8:30 p.m. As always, the welcome reception was well attended and there was good food and drink and convivial conversation. One of the great things about these Section meetings is the opportunity to meet with colleagues and exchange all kinds of ideas in a social setting.

Committee meetings began again on Friday morning at 8:00 a.m. Don't forget that all members of the Section are entitled to attend any committee meeting and are invited to do so. The committee agenda is always posted on the Section website.

On the important issue of providing food to all our attendees, on Friday both breakfast and lunch were provided complimentary.

The Friday evening reception and dinner was held on site at the beautiful Ritz Carlton. The entertainment was provided by the well loved group, "Roadkill", led by our very own Burt Bruton. It was obvious from the folks hitting the dance floor and the stage that Burt and his group are very popular with our Section members.

Saturday started bright and early with the two Roundtables. The real estate group convened separately from the probate and trust group, enjoying a hardy breakfast and lively debate. Again, breakfast was provided complimentary as well as lunch at the Executive Council Meeting.

Fletcher Belcher, this year's chair of the Section, called the Executive Council meeting to order at 10:00 a.m. at the conclusion of the Roundtables. Some very important legislation was considered by the Section at that time. (Please be sure to review the minutes from the Executive Council meeting which are posted on the Section website under "Section Information" - "Executive Council" tab.)

Saturday afternoon was open for whatever activities folks might choose. Lots of bicycling went on even though it was a really warm day.

The Saturday evening reception was held at a local restaurant called the Rusty Pelican. Bus transportation was provided to and from the Rusty Pelican for all who attended. The Rusty Pelican is located immediately overlooking a marina and the bay and the sunset that evening was gorgeous. Again, there was more good food and chats.

Finally, the weekend ended with a continental breakfast Sunday morning and folks headed on back home to their respective neighborhoods.

The Section meetings are always a really great opportunity to become acquainted with colleagues throughout the state as well as exchange ideas and learn about recent and proposed developments in Florida law. I think it would be fair to describe the Section meetings as "networking on steroids."

The next Section meeting is in **Ashville, North Carolina** to be followed by Tallahassee in February. I hope to see lots of new faces at future meetings.

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Gayla and Fletch Belcher at the reception – Thank you for an educational and entertaining weekend!



Michael Bedke with Section Fellows: Tara Rao, Noelle Melanson, and Brian Hoffman



Our fantatic lobbyist, Pete Dunbar with Josh Aubuchon

RPPTL Section Executive Council Meeting

Key Biscayne Sept. 13-16



The Roadkill Band on stage Friday night with some Section "groupies."



Ellie Goodall at The Rusty Pelican



Our distinguished Section Chair, Fletch Belcher, at the Executive Council meeting



Sandy Diamond, George Myer and Mary Arpe



Mary Arpe, Sheri and Rob Freedman, Kathy Neukamm and Lauren Batlle at The Rusty Pelican



Alex and William Parady, Kathy Neukamm and Salome Zikakis on a Saturday afternoon bicycle ride near The Rusty Pelican

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



Meeting of the Residential Real Estate and Industry LIaison Committee, Fred Jones presiding



John Scuderi, Lauren and Carlos Batlle and Mark Middlebrook



Michael and Lynne Foreman, Joan and Bill Kayser awaiting a night of dinner and great music.



Leena and Sanjay Kurian with Bryan Rendzio



Executive Council meeting during discussions



David Brittain and wife, Beverly, up front, with Kathy and John Neukamm and friends enjoying the evening



George Lange and Elena Bass from one of our sponsors, Regions Private Wealth Management, with Chair-Elect, Peggy Rolando



Presentation by Arlene Udick at the At Large Members meeting



Lynwood Arnold discussing the latest activities of the Membership, Diversity and Law School Liaison Committee, at the Executive Council meeting on Saturday morning

Photos by Michael Gelfand and John Neukamm.

Roundtables

Saturday, September 15, 2012
Key Biscayne, Florida

Prepared by Amber Jade F. Johnson, Esq., Maitland, Florida, and Jane L. Cornett, Esq., Stuart, Florida

The following briefly identifies for future reference some notable presentations at the Division Roundtables. For more information on Roundtables, see the Summer 2012 issue of ActionLine, Page 23.

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

Thank you to the Roundtable Sponsors: Suntrust, Stout Risius Ross, Inc. (SRR) and HFBE, Inc.

The meeting was called to order by the **Division Chair, Michael Dribin**.

The following action items, information items and committee reports were discussed at the Roundtable. The meeting began with **Michael Dribin, Division Chair,** *asking for volunteers for Bay Area Legal Services who currently need more pro bono probate attorneys for summary administration.* Please contact Tasha Dickinson, tdickinson@jonesfoster.com if interested. Bay Area Legal Services serves Hillsborough, Manatee, Pasco, Pinellas and Sarasota counties.

Action items

Guardianship and Power of Attorney Committee – Sean W. Kelly, Chair: The committee reported on three action items: (1) the committee proposed legislation amending Sec. 744.108 Fla. Stat., to provide that expert testimony is unnecessary in proceedings to determine compensation of a guardian or an attorney rendering services to a ward, though such expert testimony may be offered after notice to interested persons; (2) the committee proposed legislation dealing with the process to appoint a guardian ad litem to represent the interests of the minor, make settlement agreements involving minors and incapacitated persons confidential, and that pleadings seeking court approval of a settlement may only be inspected under limited circumstances, amending Sec. 744.3025 Fla. Stat., Sec. 744.387 Fla. Stat., and Sec. 744.3701 Fla. Stat. ; and (3) the committee proposed legislation amending Sec. 744.331 Fla. Stat. providing guardianship examining committee members are to be paid from state funds as court appointed expert witnesses in limited circumstances when a petition for incapacity is dismissed and no bad faith is involved.

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 Chair, Michael Gelfand**.

The following action items, information items and committee reports were discussed at the Roundtable.

Action Items

Florida Land Trust Act and Florida Trust Code: Real Estate Entities and Land Trusts Committee – Wilhelmina ("Willie") Kightlinger, Chair: Willie advised us that the latest version of the amendments to harmonize land trusts and the trust code and to clarify existing practices is the final version. Willie moved for approval of the legislative position supporting the latest version of the proposed amendments and it was unanimously approved without discussion.

Condominium & Planned Development Committee – Steven H. Mezer, Chair: Regarding the Condominium and Planned Development Law Sub-Specialty Certification, Steve requested and received unanimous approval for a proposal for Condominium & Planned Development Law as an area of specialization pursuant to Florida Bar Rules. Also approved unanimously was a proposal to adopt a legislative position with regards to amendments to the Condominium Act dealing with phantom units in condominiums and as clarification of existing law.

Electronic Publications: Real Property Litigation Committee – Martin S. Awerbach, Chair: Marty requested approval for a proposal supporting the creation of requirements for electronic publication and addressing due process concerns, including amendments to Sections 50.0211, 50.041 and 50.061, Fla. Stat. This has been addressed before but was opposed by the print media. This current proposal has been drafted in cooperation with the print media, specifically the Florida Press Association. The proposal to adopt the proposed legislative position was

See "Real Property Division," next page

PROBATE & TRUST DIVISION

IRA, Insurance and Employee Benefits Committee – Linda S. Griffin, Chair: There is a glitch in Sec 732.703 Fla. Stat.; it has a reference to a statute that is incorrect. The committee drafted legislation to correct the reference from Sec. 732.1005 to 732.1105 Fla. Stat.

Trust Law Committee – Shane Kelly, Chair: The committee proposed legislation amending Sec. 736. 0103 Fla. Stat. to define "distributee" and "permissible distributee" under the Florida Trust Code. Applying the definition of "distributee" in the Probate Code to the Florida Trust Code results in unintended consequences that conflict with the intent of the Trust Code.

Information Items

Ad Hoc Study Committee on Estate Planning Attorney Conflict of Interest – William T. Hennessey, III, Chair: This information item on the proposed legislation on gifts to lawyers, Sec. 736.0103, Fla. Stat., was deferred for further review and discussion with the Professional Ethics Committee of the Florida Bar.

Asset Protection Committee – Brian Sparks, Chair: The committee reported on the case of *Morey v. Everbank and Air Craun, Inc.*, Case 1D11-1401 (1st DCA, 2012). A life insurance policy named a revocable trust as beneficiary. The specific language of Sec. 222.13(1) Fla. Stat., says "insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy, and the proceeds thereof shall be exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise." The revocable trust contained language directing the trustee to turn over any funds the personal representative certified and included "enforceable debts." The estate was insolvent. The court found that Sec. 733.808(1) Fla. Stat., providing that life insurance proceeds are payable to a trustee under a trust does not require the policy's owner to take advantage of the exemption found in Sec. 222.13(1) Fla. Stat. The court further found that the exemption of life insurance from creditors can be waived and it was waived by the clear and explicit terms of the trust making the policy proceeds available to satisfy the obligations of the estate. There was a lively discussion about Florida attorneys who may have relied on Sec. 733.808(1), Fla. Stat., assuming life insurance was exempt and now, it has become a trap for the unwary practitioner. It was recommended that the Section adopt a provision that a general statement does not waive the exemption. You need a specific reference.

Chairman Dribin will appoint an ad hoc committee to study the *Morey* case. The earliest opportunity for legisla-

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

approved unanimously.

Real Property Litigation Committee – Martin S. Awerbach, Chair: Discussed were amendments to the constructive service statute, Sec. 49.021, Fla. Stat., to specify language for ad litems since some judges have stated they do not currently have legal authority. The matter was tabled for further discussion with the probate division.

Ad Hoc Foreclosure Reform Committee – Jerry Aron, Chair: Discussed was the same proposal to expedite and streamline the judicial foreclosure process as was advanced last year, except that the reference to abandoned property was deleted. The legislation was passed by the House but not by the Senate last year. The motion to adopt the proposed legislative position was passed.

Information Items

Residential Real Estate and Industry Liaison Committee – Frederick W. Jones, Chair: An error in the FAR/BAR Residential Real Estate Contract, Condominium Rider, paragraph 5, is being corrected to have certain language printed in bold as statutorily required.

Ad Hoc Trust Account Committee – Roland "Chip" Waller, Chair: With regards to trust account checks, Chip presented two questions. The first question was: does our Section want to make recommendations to the Florida Bar on how to control who signs on a trust account and how to protect against unauthorized signatories in a situation where a non-lawyer can sign the trust account? The response was in the affirmative without objection. The second question was whether or not to support adoption of the ABA Model Rules for Client's Trust Account Records which addresses the signatories of non-lawyers being authorized as signatories on the trust account. The response was also in the affirmative.

Lynwood Arnold Jr. discussed Sec. 626.8473(8), Fla. Stat., with the conclusion that according to that statute, a trust account separate from a general trust account was required for real estate transactions but only one account was required for multiple transactions. Lynwood also discussed

See "Real Property Division," next page

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PROBATE & TRUST DIVISION

tion is 2014.

Committee reports

Ad hoc Committee on Creditors Rights to Non-Exempt, Non-Probate Assets – Angela Adams, Chair: The committee drafted legislation regarding non-exempt assets passing outside of probate. Several years ago, it was the unanimous decision of the probate roundtable to create an orderly procedure to pay creditors from non-exempt assets when you have a probate estate and/or a revocable trust that are insufficient to pay creditors and there are non-exempt assets passing outside of probate and trust. Transferees take these assets and do not realize they have liabilities and creditors have not been clued in that they have a right to go after them. The creditors may not have access to information on locating those assets. The chair discussed the points of the draft legislation and there was a lively discussion that followed.

Ad Hoc Study Committee on Estate Planning Attorney Conflict of Interest – William T. Henessey, III, Chair: The committee is now studying the issues that are raised when attorneys name themselves as a fiduciary in a document. The only ethical guidance is a comment in the Florida Bar Rule of Professional Conduct 4-1.8: if a lawyer's professional judgment would be impacted, then it is optional whether the lawyer should inform the client that he/she will earn fees as fiduciary. The committee is discussing whether the fee should be affected if an attorney did not make certain disclosures.

Ad hoc Committee on Personal Representative Issues – Jack Falk, Chair: The decision in the Florida Supreme Court case of *Hill v Davis*, 70 So. 3d 572 (Fla. 2011) regarding Sec. 733.212 Fla. Stat., in which there is a 3 month period to object was discussed. The committee is drafting legislation to close a loophole available in Will contests to not comply with the 3 month period. Thereafter, the committee will turn to the issue of objections to qualifications of a personal representative, for example, when a personal representative begins as qualified and becomes unqualified.

Asset Protection Committee – Brian Sparks, Chair: There will be a joint seminar with the Estate & Trust Tax Planning Committee in Tampa on November 30. There will be several national speakers, some from ACTEC. There will be a discussion about the implications of the presidential election on estate planning.

Estate and Trust Tax Planning Committee – David Akins, Co-Vice Chair: The proposed family trust company

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

a draft amendment to clarify the statute which calls for separate trust accounts for each title insurer.

Budget Committee of the Section – Andrew M. O"Malley, Treasurer: Drew gave his report on the 2013/2014 budget for the Section. He reported that there's been suggested a $10.00 per member dues increase which would be the first increase in 10 years.

Report on technology available to committees - Scott Pence made a very interesting presenting on the use of technology tools such as "Google Docs" available for the management of committee function. Robert Freedman made a presentation on the use of "Survey Monkey" which he will cover in more detail at the next meeting.

Committee Reports

Condominium & Planned Development – Steven H. Mezer, Chair: Steve reported that the committee is considering legislation as well as dealing with unlicensed practice of law issues.

Property & Liability Insurance Committee – William Cary Wright, Co-Chair: It was reported that currently there are over 50 members and a handout was provided of a current newsletter on insurance. The goal of the committee is to produce the newsletter 4 times a year and to be a resource for all the committees.

Real Estate Certification Review Course Committee – W. Ted Conner, Chair: It was reported that the next course will be presented in February, 2013.

Real Property Finance and Lending Committee – David R. Brittain, Chair: This is a new committee that had its first meeting with approximately 40 people in person and 20 by phone. The committee featured a presentation on securitization of mortgages. The committee intends to apply for CLE credits for its attendees.

Title Issues and Standards Committee – Christopher W. Smart, Chair: The Chair reported that all standards were updated last year and are posted on the website so the committee's current goal is to make sure folks know and use them.

Before the meeting was closed, Michael reported that the **Member Communications & Information Technology Committee** will be sending out a survey soon.

PROBATE & TRUST DIVISION

legislation (Ch. 659, Fla. Stat.) is moving forward. The committee is also working: (1) on amending Florida Uniform Transfer to Minors Act ("FUTMA") legislation to increase the distribution age to 25, with an opt out at age 21; (2) on estate tax apportionment draft legislation; (3) with the Ad Hoc LLC Monitoring Committee; and (4) on the joint seminar with the Asset Protection Committee. The committee had a presentation about estate planning for the remainder of 2012 by Lauren Detzel and Diana Zeydel.

IRA, Insurance and Employee Benefits Committee – Linda S. Griffin, Chair: Recommendation to place a cheat sheet for dealing with IRAs on the committee webpage and talking with bankers on having lunch and learn seminars to discuss the new IRA divorce statute, Sec. 732.703, Fla. Stat.

Liaison to Elder law Ssection – Charles F. Robinson, Liaison: Charlie reported that the Elder Law Section will be opposing the legislation proposed by the Ad hoc Committee on Creditors Rights to Non-Exempt, Non-Probate Assets in its current form.

Probate & Trust Litigation Committee – Thomas Karr, Chair: The committee finished its work on the burden of proof contest statute, Sec. 733.107(2) Fla. Stat. This will be an action item at the Tallahassee meeting. The committee discussed a clean up of the language regarding attorney's fees being paid and started addressing what standard will apply for an award of attorney's fees against a specific beneficiary's interest. There is no standard now.

Probate Law & Procedure Committee – Tae Kelley Bonner, Chair: The committee reported they are working on three projects: 1) tweaking Sections 702 and 705 Fla. Stat. regarding the procedure for filing creditors' claims; 2) working on statutes to address artificial reproductive technology; and 3) reviewing summary administration procedures and what we should do with them.

Wills, Trusts & Estates Certification Review Course Committee – Richard Gans, Chair: The next course is scheduled for April 5-6 in 2013 at the Orlando Airport Hyatt.

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Don't Forget the QPRT – Taking Another Look at Qualified Personal Residence Trusts

By Scott L. Goldberger, Esq., Kaufman Rossin & Co., P.A., Boca Raton, Florida
and
Janice L. Mitchell, Esq., Proskauer Rose LLP, Boca Raton, Florida

A Qualified Personal Residence Trust ("QPRT") is a low risk and potentially high reward method of transferring a personal residence to beneficiaries at a reduced value for estate and gift tax purposes. The technique tends not to be as popular when interest rates are low, due to the perception that it results in the greatest tax savings only when interest rates are high. However, notwithstanding the current environment of historically-low interest rates, now may be the optimal time for a QPRT, given that home values are still depressed. Furthermore, while advisors for Florida residents may have traditionally shied away from using homestead property in a QPRT for fear of ultimately losing the homestead property tax exemptions, a 98-year lease can ensure that the property retains its homestead status.

Basics of a QPRT

A QPRT generally involves the donor transferring his or her primary or vacation residence to an irrevocable trust. A QPRT can be broken down into two distinct interests: the "QPRT term," in which the donor retains a right to use the residence rent-free for a specified term of years, and the "remainder interest," which applies after the QPRT term expires and typically provides that the residence passes into a further trust for the donor's spouse, or, if there is no spouse, either outright to, or in further trust for, the donor's children.

Estate Planning Elements

The primary benefit of a QPRT is that, for gift tax purposes, the transfer of the residence is treated as a gift only to the extent of the actuarial value of the remainder interest, which is determined under Internal Revenue Service ("IRS") tables. The gift tax transfer is determined upon the creation of the QPRT, so that if the donor survives the QPRT term, the value of the residence, including any appreciation after it is transferred to the QPRT, is not included in the donor's estate for estate tax purposes. Thus, a QPRT allows a donor to realize estate tax savings by removing the residence from his or her estate at a fraction of its current value. Unlike some other planning techniques, the QPRT is expressly authorized by the Code and Treasury Regulations.[1]

The value of the donor's right to use the residence is based on the donor's age,[2] the length of QPRT term and the valuation rate as determined under § 7520 (the "7520 Rate") for the month of the transfer. For example, assume a 65-year-old homeowner transferred his residence, with a value of $1 million, to a QPRT with a 10-year QPRT term in October, 2012. Applying the applicable 7520 Rate of 1.2%, the value of the donor's QPRT term is $303,110 and the value of the remainder interest, or the amount of the taxable gift, is $696,890. Thus, using the QPRT allows the donor to generate a 30.31% discount on the value of the residence for gift tax purposes.

The value of the remainder interest is a direct result of the length of the QPRT term. The longer the QPRT term, the greater the actuarial value of the QPRT term and the lower the amount of the taxable gift. For example, assume the same facts as above, except that the QPRT term is 15 years, rather than 10 years; the result is that the actuarial value of the remainder interest is reduced to $516,800.

There is no required maximum (or minimum) term; however, the donor should be careful to choose a term that he or she is likely to outlive. If the donor dies during the term, the value of the entire property at the time of the donor's death will be included in his or her estate for estate tax purposes. This would nullify the tax savings that the QPRT was intended to accomplish; however, the result to the donor is the same as if the donor had never created the QPRT.[3] For this reason, the QPRT is sometimes referred to as a "heads you win, tails you break even" technique.

Valuation is also affected by the 7520 Rate. A higher 7520 Rate assigns a greater value to the QPRT term, which necessarily lowers the value of the remainder interest. Assume the same facts as in the preceding example except that the transfer occurs in October 2007 when the 7520 Rate was 5.2%. A QPRT with a 10-year QPRT term using a 5.2% 7520 Rate generates a taxable gift of only $276,800, which is $240,000 less than when the 7520 Rate was 1.2%. Because the gift portion of the transfer is less when the 7520 Rate is high, conventional wisdom says to wait until interest rates increase before implementing a QPRT. However, such wisdom fails to consider changes in home prices. Because a QPRT removes appreciation on the residence from the donor's estate, greater tax savings may be available by creating a QPRT now, particularly if home prices increase more rapidly than the 7520 Rate.

Whether the donor decides to proceed with a QPRT during a low interest rate environment, the donor should be aware of some of the potential disadvantages of a QPRT.

First, as mentioned above, a QPRT must be irrevocable; once it is created, it cannot be changed or unwound without causing adverse tax consequences.

Second, if the residence is sold during the QPRT term, the donor may not receive the proceeds; instead, the proceeds could be reinvested in another personal residence, and, to the extent the proceeds are not reinvested, the QPRT must be converted into a grantor retained annuity

trust (a "GRAT"), requiring annual annuity payments to the donor for the balance of the term.[4]

Third, assuming the donor survives the QPRT term, the beneficiaries will take a "carryover" income tax basis in the residence equal to the donor's basis.[5] On the other hand, if the donor retains the residence and devises it to the beneficiaries upon his or her death, the beneficiaries would take a "stepped-up" basis in the residence equal to its date of death value, thus eliminating any potential capital gain on the appreciation of the residence prior to the donor's death.[6]

A fourth and final disadvantage is that, at the end of the term, the donor's right to the rent-free use of the residence ceases. If the donor is then married and a trust for the donor's spouse has been designated as the initial remainder beneficiary, the donor will have the right to use the residence indirectly through the donor's spouse. If, however, there is no spouse or if the spouse is not designated as the beneficiary, the residence will pass to the ultimate beneficiaries, who are typically the donor's children or one or more trusts for their benefit. If the donor wants to continue to use the residence, he or she will be required to pay fair market rent to the ultimate beneficiaries. The concept of paying rent to his or her children may not be appealing to the donor, but, from a tax perspective, it has a very appealing side effect: if the ultimate beneficiary is a trust, the trust can be structured as a "grantor" trust for federal income tax purposes, which ensures that the rental payments are not treated as gifts by the grantor nor as income to the beneficiaries. Thus, through the rental payments, the grantor can transfer additional wealth to the beneficiaries, free of estate and gift taxes.

Real Property Elements

The creation of a QPRT is not just the domain of the estate planning attorneys. Because a QPRT involves real property, it is prudent to involve real estate attorneys to deal with any title issues involved in conveying the real property.

Before conveying real property to a QPRT, it is recommended that a real estate attorney obtain a title insurance commitment on the real property to determine the correct ownership prior to the conveyance and to determine if there are any title issues that must be addressed in conveying the real property to the QPRT. Once the existing ownership is determined and all requirements to transfer clear title are met, a deed conveying the real property to the trustee of the QPRT is prepared, executed and recorded. The deed should include a specific provision granting the trustee of the QPRT power and authority to convey and manage the real property pursuant to Florida Land Trust

continued, next page

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Act § 689.071(3). Provided the trustee powers are properly set forth in the deed, typically no inquiry into the contents of the trust agreement is necessary.

Upon conveyance of the real property to the trustee of the QPRT, legal and equitable ownership of the real property is vested in the trustee of the QPRT. When conveying the real property out of the QPRT, whether for a sale or at the termination of the QPRT term, a real estate attorney should once again obtain a title insurance commitment to ensure that no instruments have been recorded against the real property since the time of the conveyance to the QPRT.

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In addition, the real estate attorney should inquire as to whether the trustee of the QPRT has changed since the date that the real property was conveyed into the QPRT. If, (1) the trustee of the QPRT has not changed, and (2) the deed complies with Florida Land Trust Act § 689.071(3), typically no additional documentation concerning the trust is required (although some title insurers may require an affidavit from the trustee confirming certain facts.) However, if the requirements in the preceding sentence are not satisfied, the real estate attorney should review a copy of the trust agreement and a certificate of trust should be prepared, executed and recorded with the deed conveying the real property from the QPRT.

It is recommended that a title insurer verify that the deed conveying the real property to or from the QPRT is insurable. Title insurers may differ in opinion on what is required in connection with conveyances to and from a QPRT.

Another real estate element to a QPRT is that care must be taken to ensure that the donor does not lose the benefit of Florida's homestead exemptions for real property tax purposes, i.e., the valuation exemption and the "Save Our Homes" cap. The Save Our Homes cap limits the annual increase in a homestead property's assessed value to 3% per year (or, in some cases, a smaller percentage based on the Consumer Price Index); the cap continues for as long as there is no "change in ownership" for the property.[7] Since 1995, it has been established that because the donor retains beneficial title to the residence held in a QPRT, there is no change in ownership during the QPRT term.[8] When the QPRT term ends, there also is no change in ownership if the property passes to a trust for the benefit of the donor's spouse under which the spouse is deemed to have beneficial title (i.e., if the spouse is given the exclusive right to use the property for his or her life).[9]

To avoid a deemed change in ownership upon the spouse's death, or, upon the end of the QPRT term if the donor is unmarried or the spouse is not then living, the donor and the beneficiaries of the remainder interest can enter into a lease of 98 years or more, as the lessee under such a lease is deemed to have beneficial ownership under Florida law.[10] Using a 98-year lease as a means of continuing the donor's beneficial title in homestead property is far from new, but it was only a few years ago that the Florida courts blessed the technique in the context of a terminating QPRT.[11] To ensure that there are no gaps in the donor's beneficial title to the property, the lease should be entered into and recorded prior to the end of the QPRT term.[12] If the property is to be held in a trust for the benefit of the donor's spouse from the end of the QPRT term until the spouse's death, the lease should still be signed and recorded prior to the end of the QPRT term, but its effective date should be the day immediately preceding the later of the end of the term and the spouse's death.

Conclusion

When considering estate planning strategies, don't forget the QPRT. Even in today's low interest rate environment, the QPRT may make sense, particularly for a residence with a depressed value that is poised for an increase. In the case of Florida residents, don't limit the discussion to only the resident's vacation home, as in light of recent Florida case law, as long as there is a properly structured and implemented 98-year lease, advisors and their clients should be comfortable using a QPRT in connection with Florida homestead property. Finally, the estate planning attorneys should consult with competent real estate counsel to effectuate the property transfers into the QPRT and from the QPRT to the remainder beneficiaries.


S. GOLDBERGER

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Janice L. Mitchell*, an Attorney in the Boca Raton office of Proskauer Rose LLP, handles commercial and residential real estate transactions. Janice has handled a variety of transactions involving sales, acquisitions, leasing and financing of various types of commercial properties in Florida. Her experience also includes sales, acquisitions and financing of luxury residential properties. Janice earned a B.A. degree from the University of Hartford and her J.D. degree from the Nova Southeastern University Shepard Broad Law Center.*


J. MITCHELL

Endnotes:

1 §2702(a)(3)(A)(ii); Treas. Reg. §§25.2702-1(c)(2) and 25.2702-5(c). For all purposes of this Article, unless otherwise indicated, all section references shall be to the Internal Revenue Code of 1986, as amended (the "Code").

2 The grantor's age is part of the computation only if the grantor has a contingent reversion – that is, the QPRT is structured to provide that, if the grantor dies during the QPRT term, the residence will be distributed back to the grantor's estate. If the QPRT is structured in this manner, it increases the value of the grantor's retained right to use the residence, and, thus, reduces the gift. Therefore, for purposes of this article, it is assumed that the grantor would retain a contingent reversion.

3 The only harm to the grantor is the loss of the legal fees incurred in setting up the QPRT and the benefits of any other estate planning technique that may have been forgone in favor of the QPRT.

4 Treas. Reg. §25.2702-5(c)(8).

5 *See* §1015(a).

6 *See* §1014(a)(1).

7 *See* Fla. Stat. §193.155.

8 *See Robbins v. Welbaum*, 664 So. 2d 1 (Fla. 3d DCA 1995); *see also Nolte v. White*, 784 So. 2d 493 (Fla. 4th DCA 2001).

9 *See* Fla. Stat. §193.155(3)(a)2.

10 *See* Fla. Stat. §196.041(1).

11 *See Higgs v. Warrick*, 994 So. 2d 492 (Fla. 3d DCA 2008).

12 *See* Fla. Stat. §196.031.

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GROCERY WARS

By Arthur J. Menor, Shutts & Bowen LLP, West Palm Beach, Florida


A. MENOR

On August 13, 2012, Judge Donald L. Middlebrooks of the Southern District of Florida issued his opinion in *Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc.*, – F.Supp.2d –, 2012, 2012 WL 3292001 (S.D. Fla., Aug. 13, 2012). This case illustrates some very interesting issues in the realm of exclusive use provisions in retail leases.

Background

Winn-Dixie has been in a "war" with the "dollar store" brands for over ten years regarding violations of Winn-Dixie's "grocery exclusive". This war has already resulted in several appellate decisions in Florida.[1]

Initially, Winn-Dixie filed suits against individual dollar stores that it alleged were violating exclusives. In most cases, for business reasons, Winn-Dixie did not sue the landlords of the shopping centers in which the offending dollar stores were co-located, instead opting for actions against the co-tenants only.

In 2007, Winn-Dixie won a significant victory in *Dolgencorp*. This case held that the "grocery exclusive" at issue was a valid and enforceable covenant running with the land that was enforceable against a co-tenant not in privity of contract with Winn-Dixie.

Winn-Dixie later decided to pursue a more comprehensive strategy and filed the instant case in Federal Court in the Southern District of Florida in West Palm Beach against Big Lots Stores, Inc., Dolgencorp, LLC, and Dollar Tree Stores, Inc., in connection with shopping centers located in five states -- Florida, Georgia, Alabama, Mississippi, and Louisiana. This case initially involved 69 Dollar General, 48 Dollar Tree, and 19 Big Lots stores. The plaintiff ultimately went to trial on a total of 97 of these stores. The defendants will be referred to in this article collectively and generically as the "dollar stores".

The typical Winn-Dixie grocery exclusive reviewed in this case contains the following key provisions:

> "Landlord further covenants and agrees not to permit or suffer any property located within the shopping center to be used for or occupied by any business dealing in or which shall keep in stock or sell for off-premises consumption any **staple or fancy groceries**, meats, fish, vegetables, fruits, bakery goods, dairy products or frozen foods without written permission of the tenant; except the sale of such items in not to exceed the lesser of 500 square feet of **sales area** or 10% of the square foot area of any storeroom within the shopping center, **as an incidental only to the conduct of another business** ... shall not be deemed a violation hereof." [emphasis added]

Findings of the Court

Covenants Running with the Land. The Court found that because the dollar stores were not parties to the leases containing the grocery exclusive, the exclusive could only be enforced against them if it is a real property covenant running with the land. The Court further found that the exclusive was a real property covenant running with the land under Florida law. This included a finding that the dollar stores had actual, constructive, or implied actual notice of the exclusive.

Defining the Terms of the Grocery Exclusive. The grocery exclusive contains two key terms that were crucial to the outcome of this case – "staple or fancy groceries" and "sales area". In addition, the Court had to construe the terms "10% of the square foot area of any storeroom" and "as an incidental only to the conduct of another business".

Grocery Items. Winn-Dixie argued that the term "staple or fancy groceries" should be interpreted to include all items listed in the Consumer Expenditure Study published annually by the Progressive Grocer. This definition includes both food and non-food items. The dollar stores argued that this term should be interpreted to include only food items, excluding beverages, snacks, and candy. The Court sided with the dollar stores and found that the term was ambiguous because it was not defined in the leases and can be interpreted in more than one way. The Court also applied the principal that covenants running with the land "must be construed in favor of the free and unrestricted use of property…"[2] Because the term "staple or fancy groceries" is followed by several examples of food items, but no non-food items, the Court found that it applied to food items only. Further, the Court decided that beverages, excluding alcoholic beverages, were "food items" and thus grocery items. This finding is at odds with another Winn-Dixie case in which it was found that grocery items included non-food items.[3] The Court distinguished the *99 Cent* case on the basis that it involved only one lease executed in 1986, while the present case involved over 100 leases dating back to 1957, and that the items sold in grocery stores and supermarkets had evolved between 1957 and 1986.

Sales Area. Winn-Dixie argued that "sales area" includes both the footprint of the display units on which the grocery items were displayed and one half of the adjacent aisle space. The dollar stores countered that the aisle space should not be included. The Court sided with the dollar stores again having to distinguish a contrary ruling in the *99 Cent* case.

10% of the Square Foot Area of any Storeroom. Similar to the "sales area" determination, the Court found that this term should be interpreted by measuring the area of the storeroom used for sale of grocery items by including the area containing the footprint of the display units only and not any adjacent aisle space.

As an Incidental Only to the Conduct of another Business. Winn-Dixie argued that the dollar stores' sales of grocery items were not merely "incidental to their business". They contended that the "incidental to their business" limitation is a separate restriction that applies regardless of the size of the area used for the sale of grocery items. The Court rejected these arguments finding (i) this clause not to be an independent restriction but rather coextensive with the clauses referring to the amount of space that could be devoted to the sale of grocery items; and (ii) that the clause is ambiguous and impossible to be practically enforced by injunction.

Damages. The Court found that the proposed economic model and regression analysis proposed by Winn-Dixie's expert to prove damages from a breach of the grocery exclusive was not sufficiently reliable. The Court found the proposed proof of damages "not calculable to a reasonable certainty" and "too speculative". Alternative evidence of damages offered by Winn-Dixie was also found by the Court to fail the burden of proof. Thus, Winn-Dixie's damage claim was denied.

Injunctive Relief. The Court pointed out that under Florida law, the elements that must be proved to obtain injunctive relief are: (1) a clear legal right; (2) the inadequacy of a remedy at law; and (3) that irreparable injury will occur if such relief is not granted.[4] However, it is not necessary to show irreparable injury to obtain injunctive relief to remedy the violation of a restrictive covenant.[5] Therefore, Winn-Dixie needed to show that it had a clear legal right and that a remedy at law would be inadequate. The Court found that these burdens were met and granted injunctions as to each store found to be in violation of the grocery exclusive after measuring the sales area devoted to grocery items as provided in the opinion.

Affirmative Defenses. The Court rejected all of the affirmative defenses raised by the dollar stores. In particular, the Court found that the continuing tort theory applied to the breach of an exclusive use provision so that the statute of limitations had not run. The affirmative defense of laches was denied since laches does not come in to play until the statute of limitations has run unless strong equities favor the application of laches and that burden was found not to have been met. Dollar Tree introduced numerous estoppels that Winn-Dixie had executed advising of no known lease violations. The Court found that Dollar Tree had not relied on these estoppels or other conduct of Winn-Dixie in executing or renewing leases.

Next Acts

Winn-Dixie is appealing this decision. According to their lead counsel, they feel that the *99 Cent* case was binding on the Court under *res judicata*. This should have resulted in the Court adopting their positions on the definitions of grocery items and sales area. They also feel the Court erred in its interpretation of Louisiana law on covenants running with the land. Finally, they intend to challenge the Court's rejection of their damages theories.

Lessons Learned

- **Define key terms** with as much precision as possible.
- **Grocery Items.** Refer to a definition such as the Consumer Expenditure Study published annually by the Progressive Grocer. Exclude or add non-food items depending on the intent.
- **Sales Area.** Be clear as to how to measure the affected area including adjacent aisle space.
- **Incidental Use.** If it is the intent that limited uses in violation of the exclusive will be permitted so long as the primary use of the store in question does not violate the exclusive, be very clear in describing this as a limitation that is separate from the sales area limitations. However, it is likely a very difficult challenge to define this concept with the type of specificity that will pass legal muster for enforcement by injunction.
- Consider adding specific remedies for breach of the exclusive use.

This case illustrates just how difficult it is to prove damages resulting from a breach of an exclusive use provision. It is likely that the presence of the dollar stores in the same shopping centers as Winn-Dixie did in fact reduce the sales of Winn-Dixie but clearly measuring the extent of the reduction in sales is very difficult. This difficulty is significantly compounded by allowing limited exceptions to the exclusive for sales in defined limited portions of the stores of co-tenants. As this decision discussed, a loaf of bread purchased in a dollar store will not be bought at the Winn-Dixie store in the same center; but how can you determine whether that loaf of bread was purchased from the 500 feet of sales area for grocery items that the dollar store was permitted to have under the exclusive?

Perhaps, the difficulty of proving damages can be addressed by valid liquidated damages provisions. It is common for exclusive use provisions to provide the tenant with a right to reduce its base rent in a specified percentage if its exclusive is violated. This is an effective remedy against the landlord but what can be done against a breaching co-tenant? Could there be a per day stipulated damages sum? Could this type of liquidated damages provision also "run with the land" and thus be applicable to breaches of the exclusive by co-tenants without privity of contract with the grocery store?

Consider providing in shopping center leases for liquidated damages in favor of the landlord for breach of an exclusive in the center by a tenant. Consider also giving

continued, next page

the landlord the right to assign to the tenant benefitted by the exclusive the landlord's rights against breaching co-tenants.

Tenant estoppel certificates have a much more limited effect than many practitioners realize. The doctrine of estoppel is grounded in common-law principles of equity. Before any party can claim an "estoppel" against another, that party must be able to prove five things:

- lack of knowledge of the facts in question;
- lack of any means of obtaining such knowledge;
- reliance on the words or conduct of the party to be estopped;
- reasonableness and good faith in so relying; and
- action, based on such reliance, resulting in a prejudicial change to the party's position.

Because estoppel is an equitable principle, the party seeking its benefit must be innocent and must act in good faith. A party cannot assert estoppel in good faith where it is charged with actual knowledge of the matters in the estoppel certificate. In some jurisdictions, ignorance of the truth of the matter in question is good enough to allow enforcement of an equitable estoppel. Other courts, though, will require the party relying on the estoppel certificate to exercise some degree of due diligence, reasonable care and circumspection in ascertaining the underlying facts. Furthermore, a party put on "inquiry notice" as to the truth of the matter in question or who had the means and opportunity to discern the truth generally cannot assert an estoppel. Similarly, where both parties are equally informed of the matters at hand and have equal avenues of obtaining the necessary knowledge, an estoppel will not be given effect and if the party seeking the estoppel has obtained knowledge which reveals information contrary to that stated in the estoppel certificate, reasonable reliance cannot be established."[6]

Tenants are well advised to perform title searches before they sign leases. There may be restrictions that run with the land and will be enforceable against the tenant and materially interfere with the tenant's business. Based on the cost of the litigation with Winn-Dixie many of the dollar stores have made the business decision to no longer locate in grocery anchored shopping centers. It would be better for a tenant to know of problematic restrictions before making a large investment in a location. AL

Arthur J. Menor *is a partner in the West Palm Beach office of the firm of Shutts & Bowen LLP. He earned his undergraduate and J.D. degrees from the University of Florida. Mr. Menor is a Florida Bar Board Certified Real Estate Lawyer and a fellow in the American College of Real Estate Lawyers. He is active in the RPPTL Section including serving as the current chair of the Commercial Real Estate Committee and as former chair of the Landlord/ Tenant Committee.*

Endnotes:

1 *Winn–Dixie Stores, Inc. v. 99 Cent Stuff–Trial Plaza, LLC,* 811 So. 2d 719 (Fla. 3d DCA 2002) (hereafter, "*99 Cent*"); *Winn–Dixie Stores, Inc. v. Dolgencorp,* 964 So. 2d 261, 265 (Fla. 4th DCA 2007) (hereafter, "*Dolgencorp*"); *Dolgencorp, Inc. v. Winn–Dixie Stores, Inc.,* 2 So. 3d 325, 327 (Fla. 4th DCA 2008).

2 *Sweeney v. Mack,* 625 So. 2d 15, 17 (Fla. 5th DCA 1993) (citing *NorwoodNorland Homeowners Ass'n v. Dade County,* 511 So. 2d 1009, 1014 (Fla. 3d DCA 1987).

3 Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trial Plaza, LLC, 811 So. 2d 719 (Fla. 3d DCA 2002).

4 *Lee County, Florida v. Fort Myers Airways, Inc.,* 688 So. 2d 389, 390 (Fla. 2d DCA 1997).

5 *Autozone Stores, Inc. v. Northeast Plaza Venture, LLC,* 934 So. 2d 670, 673 (Fla. 2d DCA 2006).

6 Herz, *The Use and Misuse of Estoppel Certificates*, E-Dirt Newsletter (Summer 2000).

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Malpractice Risks Under the Fair Debt Collection Practices Act: A Word to the Wise – "Be Aware"

By Nancy Stuparich, Esq., Risk Manager, and Lewis W. Murphy, Jr., Esq., Claims' Counsel, for Florida Lawyers Mutual Insurance Company

Introduction - Growth of Legal Malpractice Claims

During the frenzied peak of Florida's real estate boom, a significant number of attorneys transitioned their practice to representing buyers, sellers, lenders and investors in residential and commercial transactions. As a result, the number of attorneys practicing in the area of real estate grew exponentially in a short period of time. Many of the attorneys who made this transition did so without the appropriate experience, education and mentoring necessary to competently practice law in an area in which these attorneys had little familiarity. Not surprisingly, a recent study by the American Bar Association Standing Committee on Lawyers' Professional Liability ("ABA Study") of a select number of legal malpractice claims filed from 2008-2011 confirmed that the area of law with the highest number of legal malpractice claims was real estate.[1] It is believed many of these claims may fundamentally be the result of attorneys dabbling in unfamiliar practice areas when market forces created a demand for such representation.

Similarly, in response to the decline of the real estate market, many former real estate attorneys have migrated into other areas of practice in an effort to compensate for declining business previously available to the transaction practitioner. Foreclosure litigation, bankruptcy and collections' law appear to be practice areas in which former real estate attorneys are now representing clients. Again, participating in an unfamiliar practice area can subject the unwary practitioner to significant liability risks due to a lack of substantive knowledge and experience. In fact, the recent ABA Study also recognized a marked increase in the claims studied that were associated with collections' practice. A significant factor for the increase in collection liability exposure may be a direct consequence of a practitioner's unfamiliarity with the stringent obligations set forth in the Fair Debt Collection Practices Act (FDCPA) as codified at 15 U.S.C. Sec. 1692 and the Florida Consumer Collection Practices Act set forth under Sections 559.55 through 559.785, F.S. (FCCPA). What lessons can we learn to manage practice risks and avoid legal malpractice claims? This article will highlight several aspects of the FDCPA that attorneys should know to mitigate the risk of being subject to a legal malpractice claim under the FDCPA and end with a brief comparison of it to the FCCPA.

Application of the FDCPA to Attorneys

The FDCPA applies to a "debt collector," which is broadly defined as "a person whose principal business is the collection of a debt, or who regularly collects debts or attempts to collect, directly or indirectly, the debt . . . due another" through ". . . any instrumentality of interstate commerce or the mails. . . ."[2]

To be certain, attorneys engaged in consumer debt collection litigation on behalf of a creditor client are subject to the FDCPA's requirements. See *Heintz v. Jenkins*, 115 S.Ct. 1489 (1995). The FDCPA provides that unless the requisite information is contained in the initial communication, the debt collector shall, no later than five days after the initial communication with a consumer, advise in writing the amount of the debt, the name of the creditor, a precise statement relating to the debt's validity, and the right to dispute the validity of the debt.[3] The FDCPA provides sanctions for any person who fails to comply with the specific provisions of the FDCPA.[4] Successful plaintiffs are entitled to recover "actual damage[s]," in addition to costs and a reasonable attorney's fee. Moreover, a court may award "additional damages" subject to a statutory cap of $1,000 for individual actions or, for class actions, the lesser of $500,000 or 1% of the debt collector's net worth.[5] The court must consider the "frequency and persistence" of the debt collector's noncompliance, the nature of the noncompliance, and the extent to which the noncompliance was intentional.[6]

Attorneys engaged in consumer debt collection litigation on behalf of a creditor client are subject to the FDCPA's requirements.

Specific Defenses under the FDCPA

Practitioners have often maintained that the bona fide error defense recognized by Sec. 1692k(c) allows attorneys a "safe harbor" for noncompliance with the FDCPA's specific requirements. However, the United States Supreme Court recently held that this defense is inapplicable if the violation results from the attorney's mistaken interpretation of the FDCPA's legal requirements. See *Jerman v. Carlisle, McNellie*, 130 S.Ct. 1605 (2010). It would appear that the only recourse available to attorneys under the bona fide error defense would be in those situations in which the violation results from a qualifying factual error.[7] Because of this, defense of attorney error under the FDCPA can be very challenging. An attorney's ability to adequately investigate

continued, next page

and evaluate a collection client's claim is further curtailed given restrictions prohibiting the attorney from contacting other parties to obtain information about a debtor.[8] Absent a debtor's prior consent or the express permission of a court, an attorney may not communicate with a debtor regarding the collection of any debt said to be "inconvenient" to the debtor, although it is assumed that communications between 8:00 a.m. and 9:00 p.m. would qualify as an appropriate time to communicate with the debtor.[9]

From a practical standpoint, it is extremely difficult to defend alleged violations of the FDCPA's rather onerous requirements since the obligations under the FDCPA are clear. Thus, all attorneys engaged in a collections' practice should invest the necessary time to become well versed in the broad and far-reaching standards set forth in the FDCPA. Alternatively, the attorney should associate with co-counsel who has the requisite experience and mastered the provisions of the FDCPA.

The Florida Consumer Collection Practices Act (FCCPA)

It is similarly important that attorneys participating in collections' efforts also closely review the FCCPA and those prohibitions set forth in Sec. 559.72, F.S. An attorney seeking recovery for unpaid attorney's fees under the FCCPA may be subject to sanctions similar to those under the FDCPA for alleged abusive conduct in seeking to collect a fee that qualifies for a "consumer debt." See *Morgan v. Wilkins*, 74 So. 3d 179 (Fla.1st DCA 2011). Although the FCCPA is similar to the FDCPA, practitioners should be knowledgeable of the existing differences. For example, the FCCPA prohibits unscrupulous debt collection practices by any person,[10] while the FDCPA application is limited to a person who regularly collects or attempts to collect debts owed another. Also, while the FDCPA requires disclosure of the identity of the caller, the FCCPA requires disclosure only if requested by the debtor. The FDCPA and FCCPA are not fungible and violations must be pled under the specific Act.[11]

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Conclusion

Risk avoidance would suggest that practitioners unfamiliar with the statutory restrictions set forth in the FDCPA and FCCPA avoid participating in any collections' activity to mitigate against the risk of a potential malpractice claim. Risk management would suggest a practitioner be aware of the specific requirements of the FDCPA, and its Florida counterpart, associate with seasoned co-counsel and proceed cautiously. Despite the implementation of best practices, errors can and do happen. If you find yourself in that situation, the best practice to follow is to notify your professional liability insurance carrier immediately of any threatened claim or incident so that defense counsel can evaluate and present the appropriate strategies available.



N. STUPARICH



L.W. MURPHY

Nancy Stuparich *has over 25 years of experience as a licensed Florida attorney. She has represented both public and private clients and currently serves as the Risk Manager for Florida Lawyers Mutual Insurance Company ("FLMIC"). FLMIC was created by The Florida Bar in the late 1980s to provide a perpetual source of professional liability insurance for Florida attorneys and is now a mutual company owned by its policyholders.*

Lewis W. "Wil" Murphy, Jr. *is a 1991 graduate from the University of Florida Law School, is Board Certified by The Florida Bar in business litigation and civil trial law, and practices in the area of professional liability and commercial litigation in Vero Beach, Florida.*

Endnotes:

1 A copy of the ABA Study is available from the ABA website. See: http://www.americanbar.org/groups/lawyers_professional_liability.html under "Publications & CLE."

2 Sec. 1692a(6)

3 Sec. 1692g.

4 Sec. 1692k(a).

5 Sec. 1692k(a)(2).

6 Sec. 1692k(b).

7 *Jerman,* 130 S.Ct. at 1607

8 Sec. 1692c(b).

9 Sec. 1692c(a)(1).

10 *Schauer v. General Motors Acceptance Corp.*, 819 So. 2d 809 (Fla. 4th DCA 2002)

11 See *Read v. MFP, Inc.*, 85 So. 3d 1151 (Fla. 2d DCA 2012)

In Summary (Administration), There Are Problems

By Sarah Butters, Esq., Private Wealth Services, Holland & Knight, Tallahassee, Florida
Submitted on behalf of the Probate Law and Procedure Committee


S. BUTTERS

For many estates, a summary administration provides a fast and efficient way to settle the affairs of a loved one, without the expense of a formal administration. Summary administration's shortened probate procedure can provide some much needed relief to already clogged dockets and an overstretched judiciary. For example, summary administration is often opened and closed with the filing of just a few documents (the petition, death certificate and a proposed order), and orders of summary administration are often entered without need for a court hearing or any extensive judicial labor. However, the statutes and rules governing summary administration of estates also leave a lot of unanswered questions for practitioners and the courts, and a general uncertainty regarding the law.

The current Florida statutes and probate rules governing probate administrations allows for summary administration when certain criteria are satisfied. Chapter 735 Part I of the Florida Statutes sets forth the requirements for summary administration.[1] An estate may be administered in a summary fashion provided that the will does not require formal administration, and when:

a. more than 2 years since the date of death have passed; or
b. when the assets of an estate are worth less than $75,000, excluding exempt property.

No Requirement for Counsel

No party is required to be represented by counsel in order to petition the Court for summary administration. So, while an attorney is required to commence a formal probate administration, any beneficiary or person nominated as personal representative in the decedent's will may petition for a summary administration without the need for hiring counsel, making it cheaper to obtain an order for a summary administration.[2] However, cheaper is not always better. Often times, petitions are filed with erroneous or even false information. And while requiring counsel in a summary administration might not remedy the problems created by petitioners who provide false information, it would eliminate most filings that include erroneous information.

Notice to Creditors

In a summary administration, no personal representative is appointed to administer the estate. Accordingly, the law is vague regarding whether the petitioner owes any fiduciary duties to creditors other than to conduct a diligent search. For this reason, too often creditors are either intentionally ignored or accidently overlooked when the petitioner is sending notice regarding the petition for a summary administration. To compound this problem, the law also offers no clear guidance on how a creditor can file a claim after an order of summary administration has been entered. Technically, the clerk's summary probate case file is closed upon the entry of the summary administration order. As such, clerks should not be accepting creditor's claims after the file has been closed, and instead should require the creditor to open a formal probate and seek redress from the probate court. However, some clerks do accept claims after a summary administration has concluded, leaving open the question of who the clerk is required to serve that claim upon or whether they are required to serve it. Further, if a beneficiary disputes the validity of that claim, there is not a clear process in a summary administration for handling contested creditor's claims.

In some courts, creditors have successfully petitioned to set aside the order of summary administration due to the petitioner's failure to notify a known creditor. In such cases, it is difficult for the court to procedurally handle the dispute in what should be a summary proceeding, not a litigated probate matter.

Notice to Heirs at Law

Similarly, courts too often discover that a petitioner has intentionally or accidentally misstated the identity of the decedent's heirs at law in an intestate estate. Application of Florida's intestate code can be confusing to a pro se petitioner, and often times lay persons confuse the terms "heirs at law" with those who would be considered "next of kin." But again, the Florida Probate Code and the Florida Probate Rules do not provide a clear procedure for preventing or correcting such errors.

Inconsistency

As a result, many judicial circuits are implementing their own safe guards and provisions to prevent abuses in the summary administration process. Although the code and rules do not require publication of a notice to creditors in summary administrations, many circuits now require proof of publication before the order of summary administration will be entered.[3] Similarly, many circuits will not enter an order of summary administration until a sufficient time period has elapsed from the date of death in order to allow creditors and beneficiaries time to make themselves known to the court. Even in testate administrations, some courts,

continued, next page

before issuing an order of summary administration, have required a hearing to allow the Court to advise the petitioner and beneficiaries regarding the effect of the order should a creditor's claim be subsequently filed.

In some circuits, although the law requires that all persons benefitting from an order of summary administration consent to the entry of the order of summary administration or receive formal notice, courts are implementing additional requirements to ensure that the persons named as beneficiaries in intestate estates are actually the heirs at law under the intestate code. For example, some courts require the petitioner to fill out an affidavit attesting to the decedent's family tree. Where the affidavit illustrates that all of the heirs at law entitled to a share of the estate are not included in the order of summary administration, no order will be issued until the petition is corrected and the heir notified.

Conclusion

Given these concerns and the variety of ways that the Courts are dealing with them, perhaps it is time to revisit the Probate Code and Probate Rules in order to address these concerns. If we are going to permit summary administration and expect petitioners to be able to administer these estates *pro se*, then our rules and statutes should be clear and concise. Further, there is much to be gained in terms of efficiency and consistency in ensuring that our laws and procedures are clear so that our circuit courts are handling summary administrations in a similar, consistent manner. After all, if a summary administration cannot be obtained without excessive judicial labor caused by unclear rules and statutes, then a summary process is hardly more efficient then a formal administration.

Sarah S. Butters *is an attorney in Holland & Knight›s Private Wealth Services department. She is also an Adjunct Professor at Florida State University's College of Law, where she teaches Gratuitous Transfer Law. She is experienced in trust and estates litigation; the preparation of wills, trusts, prenuptial agreements and complex estate plans; the administration of probates and trusts; and the formation and administration of charitable organizations.*

Endnotes:

1 F.S.§735.201
2 F.S. §735.203
3 F.S.§735.2063

Spotlight on the Probate and Trust Litigation Committee

By Hung V. Nguyen, Esq., Welbaum Guernsey

In *Actionline's* continuing Spotlight series, the focus is on the Probate and Trust Litigation Committee (the "Committee"). The Committee is chaired by **Thomas Karr** and is one of the largest and most important RPPTL Section committees.


T. KARR

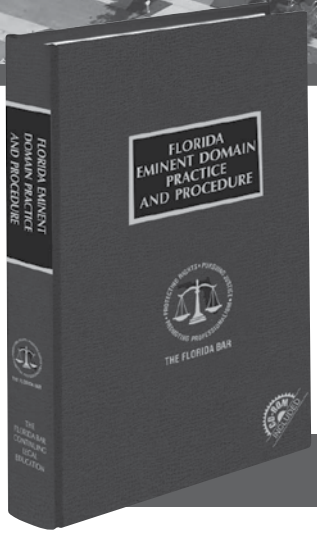
The Committee is charged with reviewing issues relating to litigation in the probate and trust practice areas and with formulating solutions to those issues to advance the law. As the main litigation committee on the "death" side, the Committee is often requested by other committees and the Section leadership to study litigation related issues. Committee members often find themselves working with other Section committees because of the breadth and expansive scope of the Committee.

Tom Karr believes that, "One of the most important functions of the Committee is that it provides a forum for practitioners to address and reach solutions to problems encountered in the practical application of the law and rules governing trusts and estates in a collegial setting that allows practitioners to productively debate competing policy considerations implicated by the problems being faced." His goal as chair is to foster that environment and broaden participation to advance the law.

Some current issues that the Committee is working on include clarifying the broad application of the shifting burden of proof when the necessary elements have been established to invoke the presumption of undue influence whether it be in the context of a will or trust contest or any other context like the creation of a joint account or some other pre-death transfer of property; clarifying and improving the application of the Trust Code provisions related to when and under what circumstances a trustee can pay his counsel out of trust funds when the trustee has been accused of a breach of trust; and reviewing the possibility of establishing a standard to be articulated in both the Probate and Trust Code as to when and to what degree attorney's fees and costs may be taxed against a particular beneficiary's share. The work the Committee does is exciting, intellectually stimulating, and has a real and profound impact on probate and trust litigators across the state.

RPPTL Section members are encouraged to attend and participate in the meetings. Questions about the Committee can be directed to Thomas Karr at tkarr@gunster.com.





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Real Estate Case Summaries

**Prepared by Nishad Khan, Esq., Orlando, Florida
and Navin Pasem, Esq., Tampa, Florida**

Section 48.031(5) of the Florida Statutes requires strict compliance in that service must include the date and time of service or the identification number of the process server on any of the documents served.

Walker v. Fifth Third Mortg. Co., 2012 Fla. App. LEXIS 19554, 2012 WL 5457220 (Fla. Dist. Ct. App. 5th Dist. Nov. 9, 2012)

David and Julianne Walker ("Walkers") appealed a trial court order denying their motion to quash service of process. The Fifth District Court of Appeals reversed on the grounds the process server failed to strictly comply with Section 48.031(5) of the Florida Statutes.

Fifth Third Mortgage Company ("Fifth Third") filed a foreclosure action against the Walkers. The process server personally served the Walkers with a summons and a copy of the complaint. The process server failed to include the date and time of service, or his identification number on any of the documents served upon the Walkers. The Walkers filed a motion to quash service contending that the process server failed to comply with the requirements of Section 48.031(5), Fla. Stat. which provides that "[a] person serving process shall place, on the first page of at least one of the processes served, the date and time of service and his or her identification number and initials for all service of process." § 48.031(5), Fla. Stat. (2012). The trial court denied the motion.

The Fifth District Court of Appeals, siding with the Walkers' argument, referenced *Schofield v. Wells Fargo Bank,* N.A., 95 So. 3d 1051 (Fla. 5th DCA 2012), a similar case that held service of process must strictly comply with all relevant statutory provisions. The case was remanded for further proceedings consistent with this opinion.

The plain language of RESPA provides no basis for successor liability. RESPA prohibitions apply only to the actual persons or entities who engage in such activities.

Good v. Deutsche Bank Nat. Trust Co., 2012 Fla. App. LEXIS 12089, 2012 WL 3021580 (Fla. 4th DCA 2012) rehearing 98 So. 3d 1255 (Fla. 4th DCA 2012)

The trial court granted summary final judgment of foreclosure in favor of the Plaintiff, Deutsche Bank National Trust Company ("Deutsche Bank"). Harvey Good and Monica Cornejo (collectively the "Goods"), Defendants in that action, appealed to set aside the summary final judgment of foreclosure asserting that Deutsche Bank failed to negate their affirmative defenses.

The Goods filed an Answer in response to a foreclosure complaint filed by Deutsche Bank. In the Answer, the Goods asserted three affirmative defenses: (i) recoupment for violation of the Federal Real Estate Settlement Procedures Act (RESPA); (ii) unclean hands based on the RESPA violation; and (iii) violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"). The Goods sought dismissal of the complaint or reduction in the amount owed, equivalent to the amount of damages available under RESPA. Upon Deutsche Bank's motion to strike the affirmative defenses, the trial court declined to strike the first two, but struck the third affirmative defense based on a FDUPTA violation with leave for the Goods to file a counterclaim.

Deutsche Bank filed a motion for summary judgment, supported with an affidavit asserting that the Goods' RESPA affirmative defense was improper because they failed to allege the violations with specificity and particularity as required by the Florida Rules of Civil Procedure. Deutsche Bank further argued that the statutes cited by the Goods regulated loan servicing, and Deutsche Bank was not a servicer. Deutsche Bank also argued the Goods did not allege any specific intentional acts or any other conduct suggesting fraud, and therefore their "unclean hands" defense was without merit. Lastly, Deutsche Bank claimed the Goods failed to allege any facts supporting the allegation of intentionally misleading and reckless conduct or unfulfilled conditions.

In response, the Goods filed an affidavit of Harvey Good, stating that Option One paid a yield spread premium to Guardian Financial Network ("Guardian"), even though a broker's fee was paid to Guardian. The affidavit also contained the same RESPA defenses raised in their original answer. The trial court granted final summary judgment of foreclosure and the Goods appealed.

The Fourth District Court of Appeals on re-hearing affirmed the trial court's decision on the basis that a plain reading of 12 U.S.C. §2607 (d)(1)(2006) provides no basis for successor liability. RESPA violations apply only to persons or entities who engage in such activities.

Attorney's fees can be awarded pursuant to provisions in the note and mortgage when the action is dismissed for failure to provide proper notice of intent to foreclose.

J.P. Morgan Mortg. Acquisition Corp. v. Golden, 98 So. 3d

220 (Fla. Dist. Ct. App. 2d Dist. Sept. 28, 2012)

J.P. Morgan Mortgage Acquisition Corporation ("JP Morgan") brought a foreclosure action against Gideon and Gilana D. Golden (collectively "Goldens") which was subsequently dismissed by the Circuit Court of Pinellas County. The trial court awarded attorney's fees to the Goldens in the amount $37,500.00. JP Morgan appealed this decision.

JP Morgan had filed a foreclosure action against the Goldens in Pinellas County. Initially, the Goldens did not file a response within the prescribed time, and a default was entered. The Goldens then retained Attorney Leslie Conklin ("Conklin") to represent them in the foreclosure action. Attorney Conklin agreed to accept the case on a contingency basis, in which the Goldens were not obligated to pay any fees, and Conklin would only receive a fee if he was able to defeat the complaint and his fees were awarded by the court.

Conklin successfully set aside the default, and filed an answer with affirmative defenses on the Goldens' behalf, which included a request for attorney's fees pursuant to Sec. 57.105(7), Fla. Stat., and the prevailing party provision in the mortgage and note and sanctions against JP Morgan. Conklin subsequently had the case dismissed on the grounds that JP Morgan failed to provide proper notice of its intent to foreclose, as required by the Note and Mortgage.

The trial court determined that the Goldens were entitled to attorney's fees and sanctions against JP Morgan. A hearing for determination was subsequently set and Conklin filed an affidavit detailing his time and alleging his normal fee for such matters was $300 an hour. At the hearing, JP Morgan objected to time spent by Conklin and the application of a multiplier to calculate fees. The Goldens presented expert witnesses who testified that Conklin was the only attorney handling foreclosure defense work on a contingency basis and both the time and application of a multiplier was appropriate. The trial court agreed and awarded the Goldens attorney's fees of $37,500.00, half to be paid by JP Morgan and the other half by its counsel. JP Morgan then filed a motion for rehearing objecting to the use of a multiplier and the division of fees. In response, the court amended its order awarding the same amount but this time requiring JP Morgan to pay the entire fee.

On appeal, JP Morgan argued that (1) the trial court erred in awarding attorney's fees pursuant to Sec. 57.105(7), Fla. Stat., because the Goldens were not the prevailing party, (2) that the trial court erred in granting attorney's fees without making the requisite findings of fact, and (3) that the trial court grossly abused its discretion in applying a 2.5 multiplier in this case.

After reviewing the record, the Fourth District Court found that the Goldens never asked for fees under Sec. 57.105(1), Fla. Stat., but did ask for sanctions. The court then noted that the trial court's initial order may have suggested that fees were awarded under Sec. 57.105, Fla. Stat., but after JP Morgan moved for reconsideration arguing that the Goldens never sought fees under this section, the court amended its order placing the total responsibility of the fees on JP Morgan, which further evidences the fees were not a sanction. As such, the Court affirmed the trial court's decision.

The District Court then addressed whether the Goldens are entitled to attorney fees under Sec. 57.105(7), Fla. Stat., based on the provisions of the note and mortgage and whether the Goldens can be considered a prevailing party when the case was dismissed. JP Morgan argued that the Goldens were not the prevailing party because the complaint was dismissed and there wasn't a determination of the merits, only a dismissal based on a condition precedent.

Referencing *Bank of New York v. Williams,* 979 So. 2d 347, 348 (Fla. 1st DCA 2008), in which the First District Court stated that "[t]he refiling of the same suit after the voluntary dismissal does not alter the [mortgagor's] right to recover prevailing party attorney's fees incurred in defense of the first suit", the Fourth District Court of Appeals took the position that the Goldens were the prevailing party and entitled to attorney's fees under the provisions of the note and mortgage.

Lastly, the 4th DCA affirmed the trial court's use of a 2.5 multiplier based on the requirements set forth in *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990) in which the Supreme Court states "[i]f the trial court determines that success was unlikely at the outset of the case, it may apply a multiplier of 2.0 to 2.5." The Court noted that Conklin had accepted the case on a contingency basis 6 months after a default had already passed, and Golden, who was unemployed and divorced, had no ability to pay Conklin. As such, the court held the likelihood of success was very low and the use of the 2.5 multiplier was justified.

The trial court's judgment was affirmed by the Fourth District Court of Appeals.

Summary judgment was prematurely entered in favor of plaintiff in commercial foreclosure action where defendant had an outstanding and material discovery request.

Almond Entertainment, Inc. v. Bayview Loan Servicing, LLC, 98 So. 3d 723 (Fla. 2d DCA 2012)

Bayview Loan filed a commercial foreclosure action against Almond and guarantors and eventually moved for summary judgment. Almond filed a motion to compel the deposition of Bayview Loan's corporate representative. Almond's motion alleged that Almond had been unable to secure dates for the deposition. Prior to taking the deposition, the circuit court granted final summary judgment in favor of Bayview Loan.

continued, next page

This court reversed and remanded the circuit court's final summary judgment ruling and referenced *Brandauer v. Publix Super Markets, Inc.,* 657 So. 2d 932, 933 (Fla. 2d DCA 1995). In that case, the court advised against entering summary judgment when the opposing party has not completed discovery.

In the present case, Almond informed the circuit court of its outstanding discovery request in its memorandum in opposition to Bayview Loan's summary judgment. Almond argued that the deposition pertained to a question central to the validity of the suit, namely whether Bayview Loan was the owner of the note and mortgage on the date it filed suit. The district court agreed that Almond had shown a good faith basis for questioning this point, and concluded that the circuit court erred by granting summary judgment when the facts of the case at issue had not been sufficiently developed.

Proponents of a lis pendens failed to establish a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit.

Blue Star Palms, LLC v. LED Trust, LLC, et. al., 37 Fla. L. Weekly D2501, 2012 WL 5232954 (Fla. 3d DCA 2012)

LED Trust, LLC and partners ("LED") brought a complaint for damages and filed a notice of lis pendens on condominium units owned by Blue Star. The complaint resulted from prior negotiations between LED and Blue Star for LED to become investors in Blue Star. The negotiations were primarily verbal and, according to LED's complaint, it was never contemplated that LED would have any ownership interest in, or lien over, the actual condominium units themselves. Furthermore, the verbal negotiations never resulted in any signed agreements between the parties. The various counts of the complaint referenced these negotiations and alleged certain verbal agreements, fraud, conspiracy to commit fraud, etc. None of LED's theories involved claims against the underlying condominium units themselves. As a result, Blue Star responded with a motion and memorandum seeking dissolution of the lis pendens, however, the trial court denied the motion.

The District Court reviewed and highlighted the case of *Conseco Servs., LLC v. Cuneo, 904* So. 2d 438, 439 (Fla. 3d DCA 2005). That court held that a "court must dissolve a lis pendens that is based on an unrecorded document unless the proponent establish[es] a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit." Further, "a complaint which will not support a claim against the specific property at issue cannot provide a basis for tying it up by filing a notice of lis pendens." See *Lake Placid Holding Co. v. Paparone,* 414 So. 2d 564, 566 (Fla. 2d DCA 1982).

In citing these cases, the District Court ruled that LED failed to show that any of its allegations are connected to the title of the condominium units held by Blue Star. The court stated that the lawsuit for damages and membership interests in the parent company does not directly affect the real estate, and a lis pendens cannot be maintained. The court opined that "[a]s proponents of the lis pendens, the plaintiffs / respondents failed to 'establish a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit.' See *Chiusolo v. Kennedy,* 614 So. 2d 491, 492 (Fla. 1993)." Accordingly, the District Court ruled that the motion to dissolve the lis pendens should have been granted.

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Probate Case Summaries

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

The trial court abused its discretion in reducing, without competent, substantial evidence, the attorney's hourly fee award for a guardianship.

In Re Guardianship of Josefa Kesish, Joan Nelson Hook v. Paula Rego, No. 2D11-3914 (Fla. 2d DCA, Sept. 7, 2012)

The Second District Court of Appeal reversed the decision by the trial court that reduced the hourly fee awarded to the attorney for the guardian without competent, substantial evidence.

Appellee, Joan Nelson Hook, serving as the attorney for the Guardianship of Josefa Kesish, challenged the trial court's order setting attorney fees. In this voluntary guardianship, Attorney Hook, who has been board certified in Elder Law since 1999, succeeded in obtaining a full refund on behalf of the guardianship from an insurance company of more than $1 million dollars without having to file suit. Attorney Hook petitioned the court for attorney fees, indicating that she expended forty-seven hours on behalf of the guardianship at a rate of $250 per hour. The billing records submitted to the court also reflected time expended by paralegals; however, Attorney Hook did not seek compensation for paralegal time. After the trial court awarded Attorney Hook compensation for forty-seven hours at $200 per hour, Attorney Hook filed a motion for reconsideration which contained her own affidavit and that of two other attorneys in support of her motion. At the hearing, Attorney Hook presented testimony from two attorneys, one who specialized in suits against insurance companies and another from a guardianship attorney. Both attorneys testified that $250 per hour was a reasonable rate. The trial court denied her motion for reconsideration and affirmed its prior award of $200 per hour for forty-seven hours without indicating what the trial court considered in reaching the decision.

On appeal, the Court referenced Sec. 744.108(1), F.S., citing that "[A]n attorney who has rendered service to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered" and Sec. 744.108(2)(a)-(i), F.S., indicating that it sets forth the criteria that the court shall consider in determining a reasonable attorney's fee, including but not limited to "[t]he time and labor required," "[t]he fee customarily charged in the locality for similar services," "[t]he results obtained," and "[t]he experience, reputation, diligence, and ability of the person performing the service." Citing *Thorpe v. Myers*, 67 So. 3d 338, 346 (Fla. 2d DCA 2011), the Court further explained that "the order awarding fees "must set forth the basis for the award, including [(1)] the hours determined to be compensable, [(2)] the hourly rate, and [(3)] the other factors considered in arriving at the award."

While the trial court record indicated that the judge referred to local rules on guardianship fee awards and provided commentary suggesting that the award of $200 per hour for certified attorneys was reasonable prior to the judge taking the bench, the Court found that neither provided competent evidence that the trial court could rely on in making its determination. The Court, citing *Moore v. Gillett*, 37 Fla. L. Weekly D1683, D1685 (Fla. 2d DCA July 18, 2012), indicated that "[A] ruling that is unsupported by the record constitutes a clear abuse of discretion" and remanded the trial court to enter an amended order awarding Attorney Hook $250 per hour for the forty-seven hours expended.

Failure to comply with service of process requirements in accordance with Sec. 48.031(1)(a), F.S., or obtain a waiver of service of process, renders a judgment on such petition void.

Norma Griffith v. Marlene Slade, Patricia Gash and Anita Hoyle, No. 2D11-2153 (Fla. 2d DCA, Aug. 22, 2012*)*

The Second District Court of Appeal reversed the trial court's order denying a motion to strike and setting aside an order terminating a power of attorney for lack of service of process.

Norma Griffith, one of five siblings, was appointed as the attorney-in-fact under a power of attorney for her mother, Antonia Melhorn. Three of Griffith's siblings petitioned the court, pro se, to have the power of attorney terminated. A hearing on the petition was set and the circuit court and petitioner sent notice of the hearing to Griffith; however, no summons or other process were ever issued or served. Mrs. Griffith failed to appear and the circuit court granted the petition to terminate the power of attorney. The motion to strike and set aside the circuit court's order, filed by Griffith, was denied.

The Court found that although Sec. 709.08, F.S. provides notice requirements related to powers of attorney; it does not contemplate an alternative method of service of process nor does it suggest that it is available for use in lieu of service of process and, therefore, such notice is insufficient to invoke the court's jurisdiction over that person with regard to the legal proceeding.

Entry of an award for attorney fees requires competent, substantial evidence in the record to support the award.

In Re Guardian of William Ansley, Brad Sanford and

continued, next page

Candice Fager, Stephen M. Martin, and Stephen M. Martin, P.A., v. Fay Howard, Case No. 2D11-3138 (Fla. 2d DCA, Aug. 17, 2012)

The Second District Court of Appeal reversed and remanded the case to the trial court for entry of a new order that would set forth the basis for the award of attorney's fees, including compensable hours, the hourly rate and any other factors bearing on the award of fees as well as an itemized list of costs allowed.

The former Co-Guardians of William Ansley and their attorney, Stephen M. Martin, appealed an order awarding attorney's fees and costs to Attorney Martin as the award was reduced from the amount for which Attorney Martin originally petitioned. In his petition for award of fees, Attorney Martin sought fees and expenses in the amount of $21,694.52 as the result of 54.48 hours of attorney time at $350 per hour, 20.33 hours of paralegal time at $125 per hour and $114.63 for costs. At an evidentiary hearing, the circuit court heard testimony about the reasonableness of Attorney Martin's hourly rate and cross examination regarding the necessity of several of the tasks Attorney Martin performed on behalf of the ward. The circuit court returned an order finding "54.48 attorney hours at a rate of $350.00 per hour, 20.33 paralegal hours at the rate of $125.00 per hour, and expenses in the amount of $114.64" to be reasonable; however, the amount authorized by the court was $16,520.00, without further explanation.

The Court found that the internal conflict in the circuit court's order made it impossible for appropriate appellate review and the Court was not able to determine a basis for the reduced fee award because the record did not contain competent, substantial evidence to support the award.

Entry of an award for attorney fees must include a basis for the award, including reasonable hours expended, reasonable hourly rate, itemized costs and other factors the court considered in reaching the decision.

Ronald Mitchell v. Mary Mitchell, Case No. 4D11-2572 (Fla. 4th DCA Aug. 15, 2012)

The Fourth District Court of Appeal reversed the trial court's award of attorney's fees and remanded the case to the circuit court to make findings as to which fees were specifically compensable and which fees were non-compensable.

Ronald Mitchell, as father and co-guardian of Joseph P. Mitchell, appealed a global order on attorney's fees and costs which indicated that only 60% of the services of Mr. Mitchell's attorney benefitted the ward.

Citing *Thorpe v. Myers*, 67 So 3d 338, 345 (Fla. 2d DCA 2011) and Sec. 744.108, F.S., the Court found that while the circuit court's conclusion (that the legal services rendered by the attorney must benefit the ward to be compensable) was the correct legal standard, a blanket reduction of the attorney's fee award did not meet the standard of express findings regarding the number of hours reasonably expended, a reasonable hourly rate for the attorney, other factors taken into consideration in arriving at the award, and an itemized list of costs allowed.

Attorney's fee award is not applicable where the action was not related to a challenge to the exercise of a personal representative's power, nor related to the failure to exercise a personal representative's power, nor related to the breach of a fiduciary duty, nor considered a service rendered to the estate.

Jeanne Bonney v. James Bonney, Case Nos. 4D10-4041, 4D10-4042, 4D10-4319 and 4D10-4322 (Fla. 4th DCA, Aug. 15, 2012)

The Fourth District Court of Appeal reversed an award of attorney's fees in the defense of a voluntarily dismissed third party complaint and affirmed the award for taxable costs.

Jeanne Bonney, co-personal representative of her aunt's estate, sued her brother, James Bonney, for conversion and unjust enrichment for allegedly taking funds from their aunt's bank account and later voluntarily dismissed the complaint. The trial court awarded Mr. Bonney's attorney's fees against Ms. Bonney under Sections 733.609 and 733.106(3), F.S.

On appeal, the Court found that an award of fees under Sec. 733.609(1), F.S., was inapplicable as the third party action was not related to a "breach of fiduciary duty or challenging the exercise of or failure to exercise a personal representative's powers." The Court also found that under Sec. 733.106(3), F.S., defense of an unjust enrichment claim by Mr. Bonney was not considered a service rendered to the estate.

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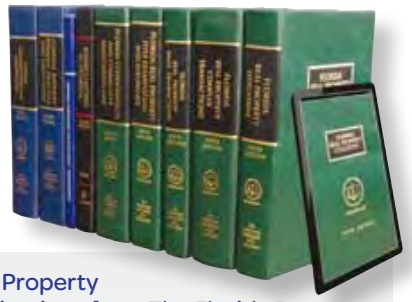
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Welcome and Introductions
Lee Weintraub, Ft. Lauderdale

1:15 p.m. – 1:30 p.m.
Intro by Past Exam Writer
Bruce Alexander, West Palm Beach

1:30 p.m. – 2:20 p.m.
Design Liability
Richard Chaves, West Palm Beach

2:20 p.m. – 3:10 p.m.
Construction Dispute Resolution
Denise Hammond, Orlando

3:10 p.m. – 4:30 p.m.
Differences Between Private and Public Construction Projects and Prompt Pay Acts
Deborah Bovarnick Mastin, Ft. Lauderdale
Belinda Bacon, Miami
Lisa Colon Heron, Ft. Lauderdale

FRIDAY

7:40 a.m. – 8:15 a.m.
Women's Breakfast & General Continental Breakfast

8:15 a.m. – 8:20 a.m.
Comments by the Chair of the Construction Certification Committee
Steven Lesser, Ft. Lauderdale

8:20 a.m. – 9:10 a.m.
Theories of Recovery and Causes of Action
Larry Leiby, Ft. Lauderdale

9:10 a.m. – 10:00 a.m.
Damages and Remedies
James Moye, Orlando

10:00 a.m. – 10:15 a.m. **Break**

10:15 a.m. – 11:05 a.m.
Licensing
Drew Winters, Tallahassee

11:05 a.m. – 11:55 a.m.
Procurement: Substance and Procedure
Glenn Miller, Ft. Lauderdale

12:00 p.m. – 1:45 p.m.
Lunch Presentation and Lifetime Achievement Award (included in registration)
Design & Construction of the Marlins Ballpark: A New Miami Icon
Kenneth Johnson, Executive Vice President, Eastern Division Manager, Hunt Construction Group
Robert K. May, Vice President, Project Executive Hunt Construction Group
Jose M. Pienknagura, General Counsel/ Executive Vice President, Hunt Construction Group

1:45 p.m. – 2:35 p.m.
Administrative Procedure Act
William Cea, West Palm Beach

2:35 p.m. – 3:25 p.m.
Ethics
Mindy Gentile, Miami
Robert Doan, Gainesville

3:25 p.m. – 3:40 p.m. **Break**

3:40 p.m. – 4:30 p.m.
Suretyship: FS 255.05, Miller Act, and Other Bonds
Stephen Reisman, Miami
Bruce King, Miami

4:30 p.m. – 5:20 p.m.
Construction Lending
Ralf Rodriguez, Miami

SATURDAY

7:45 a.m. – 9:15 a.m.
Breakfast with Featured Speaker Chief Justice Ricky Polston

9:15 a.m. – 11:25 a.m.
Florida Construction Lien Law
Lee Weintraub, Ft. Lauderdale

11:25 a.m. – 11:35 a.m.
Grab 'N Go Box Lunch (included in registration)

11:35 a.m. – 12:25 p.m.
Insurance
W. Cary Wright, Tampa

12:25 p.m. – 1:00 p.m.
Chapter 558, Florida Statutes
Bryan Rendzio, Jacksonville

1:00 p.m. – 1:10 p.m. **Break**

1:10 p.m. – 2:00 p.m.
Condominiums and Homeowners Associations
Barry Ansbacher, Jacksonville

2:00 p.m. – 2:50 p.m.
Construction Contracts
Brent Zimmerman, Jacksonville

2:50 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 4:10 p.m.
AIA Form Documents: A101(2007), A102(2007), A201(2007)
Sanjay Kurian, Ft. Myers

4:10 p.m. – 5:00 p.m.
AIA Form Documents: A312 Bond Form (2010) & B101 (2007) Contract Documents, and A133 (2009) and A121CMc(2003)
Reese Henderson, Jacksonville

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8:40 a.m. – 8:50 a.m
Opening Remarks
John C. Moran, West Palm Beach – Program Co-Chair
Paul E. Roman, Boca Raton – Program Co-Chair

8:50 a.m. – 9:40 a.m.
In Summary, There are Problems with Summary Administration
Sarah S. Butters, Tallahassee

9:40 a.m. – 9:50 a.m. **Break**

9:50 a.m. – 10:40 a.m.
30% of What?! Calculating and Prosecuting Elective Share Claims
James R. George, Fort Lauderdale

10:40 a.m. – 11:30 a.m.
Fiduciary Positions and Conduct in Adversary Proceedings and Probate Litigation
Jack A. Falk, Jr., Coral Gables
Jerry B. Wells, Daytona Beach
Mark R. Parthemer, Palm Beach

11:30 a.m. – 12:00 p.m.
Notice, Redact, or File? The Rules of Judicial Administration in Probate Practice
Alexandra V. Rieman, Fort Lauderdale

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

1:00 p.m. – 1:40 p.m.
Planners on the Ground, Assets in the Cloud: Estate Planning and Administration Issues in the Digital Domain
M. Travis Hayes, Naples

1:40 p.m. – 2:30 p.m.
Ten Pounds of Duty in a Five Pound Bag: Ethical Challenges Facing Fiduciaries and Estate and Trust Attorneys
William T. Hennessey, III, West Palm Beach

2:30 p.m. – 2:40 p.m. **Break**

2:40 p.m. – 3:30 p.m.
"It's My Property and I Can Do with It What I Want, Dang It!" Planning for Elderly Clients with Competency and Undue Influence Issues
George D. Karibjanian, Boca Raton

3:30 p.m. – 4:20 p.m.
The ART of the Deal: Artificial Reproductive Technology in Practice and Theory
Paul E. Roman, Boca Raton
Michelle Hausmann, Boynton Beach

REAL PROPERTY, PROBATE AND TRUST LAW SECTION
W. Fletcher Belcher, St. Petersburg — Chair
Margaret Ann Rolando, Miami — Chair-elect
Robert S. Freedman, Tampa — CLE Chair
John C. Moran, West Palm Beach — Program Co-Chair
Paul E. Roman, Boca Raton — Program Co-Chair

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

CLE CREDITS

CLER PROGRAM
(Max. Credit: 7.5 hours)

General: 7.5 hours Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 5.5 hours)

Elder Law: 5.5 hours
Wills, Trusts & Estates: 5.5 hours

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

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

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

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

Register me for the "Probate Law 2013" Seminar

ONE LOCATION: (049) TAMPA AIRPORT MARRIOTT, TAMPA, FL (THURSDAY, FEBRUARY 21, 2013)

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

Name _____ Florida Bar # _____

Address _____ Phone: ( ) _____

City/State/Zip _____ E-mail* _____

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

YDS: Course No. 1510R

ELECTRONIC COURSE MATERIAL NOTICE: Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. The Course Book can be purchased separately. Effective July 1, 2010.

LOCATION (CHECK ONE):

❑ **Tampa - Thursday, February 21, 2013**
(049) Tampa Airport Marriott

❑ **Live Webcast / Virtual Seminar* Thursday, February 21, 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.**



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

REGISTRATION (CHECK ONE)

WEBCAST

❑ Member of the Real Property, Probate & Trust Law Section — $185 ❑ $280

❑ Non-section member — $235 ❑ $330

❑ Full-time law college faculty or full-time law student — $118

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

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

METHOD OF PAYMENT (CHECK ONE)

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Fax to 850/561-9413.)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Exp. Date: ____/____ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

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

COURSE BOOK — AUDIO CD — DVD — ONLINE — PUBLICATIONS

Private recording of this program is not permitted. **Delivery time is 4 to 6 weeks after 02/22/2013. TO ORDER AUDIO CD / DVD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price. Tax exempt entities must pay the non-section member price.** Those eligible for the above mentioned fee waiver may order a complimentary audio CD in lieu of live attendance upon written request and for personal use only.

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

❑ **COURSE BOOK ONLY 1510M**
Cost $60 plus tax
(Certification/CLER credit is not awarded for the purchase of the course book only.)
TOTAL $ _____

❑ **AUDIO CD 1510C**
(includes electronic course material)
$185 plus tax (section member)
$235 plus tax (non-section member)
TOTAL $ _____

❑ **DVD 1510D**
(includes electronic course material)
$250 plus tax (section member)
$300 plus tax (non-section member)
TOTAL $ _____

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

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

Everything You Need to Know About Corporate Entities: Selection, Function and Utilization

1 Hour of BUSINESS LITIGATION now available on audio CD!

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Recorded: Wednesday, December 5, 2012

Course No. 1555R

AUDIO CD ORDER FORM

LLCs and corporations are the primary business entities formed and used in Florida today. Choosing between them can be very simple or very complex, depending on how much you know. This one-hour presentation will focus on when it makes sense to create a separate business entity and the key differences between LLCs and corporations, including basic terminology, types of organizing documents, agency, governance, voting rights, economic rights, taxation, and remedies available to creditors of the business entity's owners.

Corporate Entities: Selection, Function and Utilization

David P. Burke, Tampa, Carlton Fields and

Cristin C. Keane, Tampa, Carlton Fields

CLE CREDITS

CLER PROGRAM	CERTIFICATION PROGRAM
(Max. Credit: 1.0 hour)	(Max. Credit: 1.0 hour)
General: 1.0 hour Ethics: 0.0 hours	Business Litigation: 1.0 hour

TO ORDER AUDIO CD, DVD OR COURSE MATERIALS BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department: 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar **or credit card information filled in below**. If you have questions, call 850/561-5831.

Name_____Florida Bar # _____

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

TO ORDER AUDIO CD OR COURSE MATERIAL, fill out this order form, including a street address for delivery. **Please add sales tax to the price of audio CD. Tax exempt entities must pay the non-section member price.**

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❑ **AUDIO CD** **1555C**
(includes electronic course material)
$75 plus tax (section member)
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TOTAL $ _____

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

REAL PROPERTY FORMS

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

Interactive CD Formatted for both WordPerfect and MS Word

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

(Current update 2008)

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

ONLY $ 100

INCLUDES SALES TAX AND SHIPPING

Firm: _____

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City/State/Zip:_____

MUST CIRCLE ONE: COMMERCIAL Address or RESIDENTIAL Address

Phone: (_____)_____ Fax: (_____)_____

E-mail address: _____

CHECK PAYMENT

I have enclosed check #_____

MAIL CHECK TO:

Florida Lawyers Support Services, Inc.
Post Office Box 568157
Orlando, Florida - 32856-8157

CREDIT CARD PAYMENT

Card (Circle One): Visa or Master Card

Card Number: _____

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

FR/BAR CONTRACTS & RIDERS

FOR THE SALE AND PURCHASE OF RESIDENTIAL PROPERTY

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

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

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

_____ **Package(s) of FR/BAR COMPREHENSIVE RIDERS (Revised June 2010)** **$50.00 per package**
(*a package is ten copies of each rider listed below*)

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

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

Firm:_____

Attn:_____ Attorney Bar #: _____

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

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

Phone: (_____)_____ Fax: (_____)_____

E-mail address:_____

METHOD OF PAYMENT

I have enclosed check #_____, in the amount of $_____

OR

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

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Card Number Exp. Date Signature of Cardholder (REQUIRED)

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Action Line July 2010

Florida Lawyers Support Services, Inc.
PO Box 568157 - Orlando, Florida - 32856-8157 407.515.1501 Fax 407.515.1504 www.flssi.org

PROBATE & GUARDIANSHIP FORMS

The FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2012 FLSSI forms.**

Firm: _____

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

Physical Address: _____

City/State/Zip: _____

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

2012 PROBATE FORMS

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

2012 GUARDIANSHIP FORMS

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

If you would like to order individual forms, please visit www.flssi.org to download our "long" order form which lists each form for separate purchase.

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METHOD OF PAYMENT

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

$ _____ _____ ____/____ _____
Charge **Card Number** **Exp. Date** **Signature of Cardholder**

_____ _____
Credit card billing address (If different from shipping address above) **Printed Name of Cardholder**

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SHIP DATE _____/_____/2012 LB_____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___

AL 2012

What's Happening Within the Section...

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

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

SCHEDULE

EXECUTIVE COUNCIL MEETING

February 7 – February 10, 2013
Tallahassee — Hotel Duval

Reservation Phone: 888-236-2427
http://www.hotelduvall.comn

Room Rate: $149.00 (sold out)

Send request to ysherron@flabar.org to be placed on the wait list for a room.

2013 CLE SCHEDULE:

January 18
RPPTL/ENVIRONMENTAL & LAND USE LAW SEMINAR* (#1455)
Tampa

February 15-16
REAL PROPERTY CERTIFICATION REVIEW COURSE* (#1450)
Orlando – Hyatt Regency International Airport

February 21
RPPTL PROBATE LAW* (#1510)
Tampa

February 28
ALTERNATE DISPUTE RESOLUTION CONSIDERATIONS FOR REAL PROPERTY, CONSTRUCTION, PROBATE AND TRUST LAW PRACTICES* (#1507)
Ft. Lauderdale

March 4-6
CONSTRUCTION LAW CERTIFICATION REVIEW COURSE* (1452)
~ and ~
6TH ANNUAL CONSTRUCTION LAW INSTITUTE* (#1453)
Orlando

April 4 - 6
WILLS, TRUSTS & ESTATE CERTIFICATION REVIEW COURSE* (#1451)
Orlando – Hyatt Regency International Airport

April 12
RPPTL REAL PROPERTY LITIGATION* (#1506)
Tampa

** Webcast & Live*

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).

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

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Scan here for instant access to the Section website.

RPPTL ON THE GO

ACTIONLINE BULLETIN BOARD

WANT INFORMATION ON UPCOMING CLEs?
Go to the Section website homepage for a comprehensive calendar.

JOIN ALTA TODAY
Working to protect your real property practice.
See pg. 28.

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

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

STARTING OUT IN THE PRACTICE?
Need a mentor?
Contact Atty. Guy Emerich, *gemerich@farr.com,* Vice Chair of the Fellows and Mentoring Committee.

LOOKING FOR ARTICLES on topics of interest? *ActionLine* is word searchable. Check out "Publications" - "ActionLine" - on the Section website.

If you are working on an interesting case or memo of law that you'd be willing to turn into an article for *ActionLine*, we would love to publish it for you! No article is too small or too large. (Submission information on page 4 inside.)