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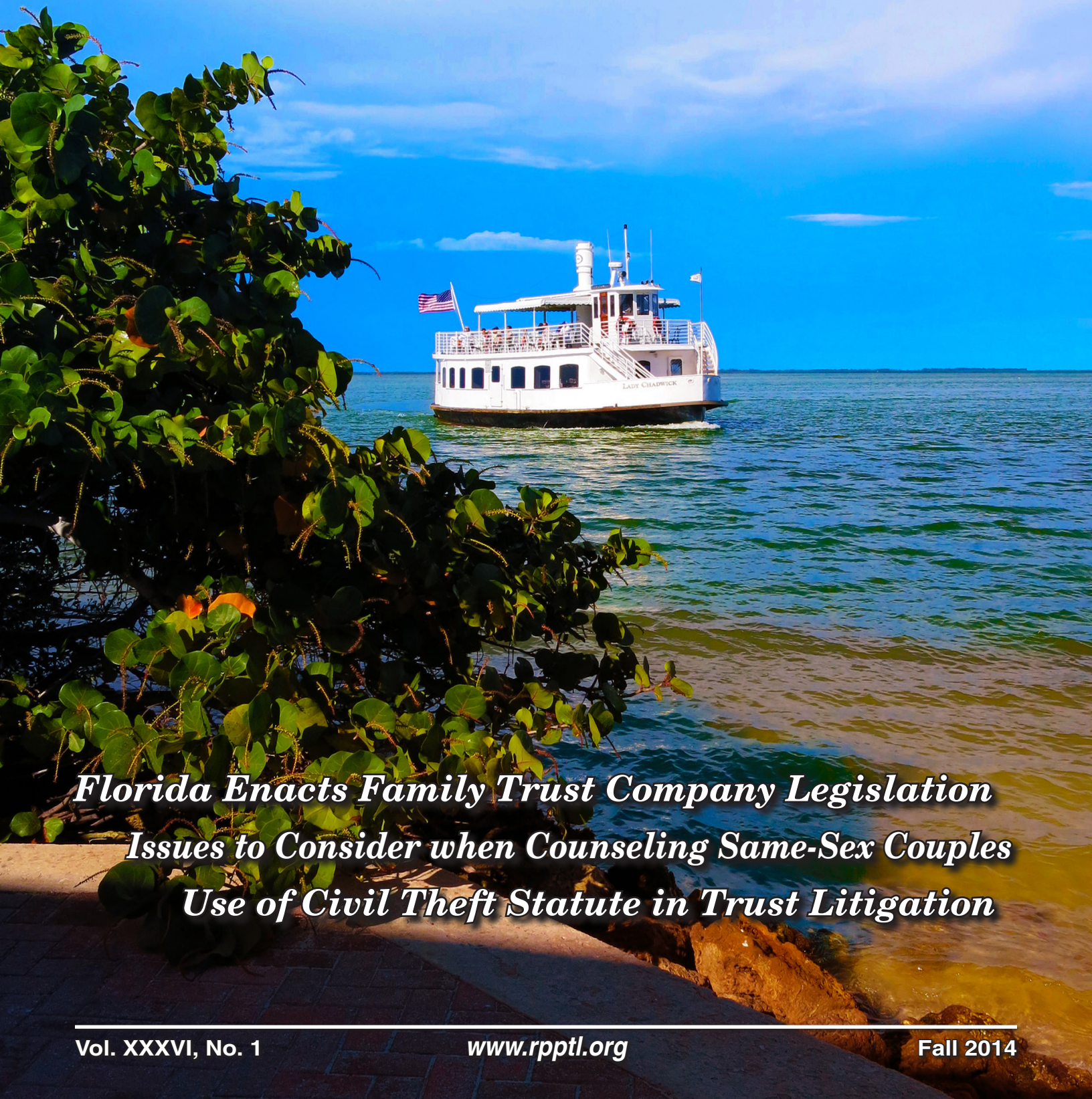
A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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The RPPTL Strategic Planning Committee Creates a Blueprint for the Future



CHAIR'S COLUMN

By Michael A. Dribin

Section Chair, 2014- 2015

Nothing makes an organization become stale or irrelevant more quickly than the assumption that it can just continue its operations the same way it has been. Some program of self-evaluation and review is vital to keep the organization relevant and dynamic. Undertaking a process of self-analysis doesn't mean that the old sawhorse "if it ain't broke don't fix it" may not apply. But those comforting words should not act as a barrier to at least assessing current practices, even if the conclusion is that something ain't broke and it need not be fixed. This evaluation is particularly crucial when the impact on the organization of the ever-evolving world of technology is considered. After all, the rotary-dial telephone wasn't broken and didn't need to be fixed. But they have gone the way of the dinosaurs, along with land lines. (How many of those reading this article know what a rotary-dial telephone was?)

As a reflection of the importance of being a dynamic organization, the RPPTL Section many years ago created a General Standing Committee which is named the "Strategic Planning Committee". The Committee, chaired by the Section's Chair and Chair-Elect, goes into action every five years and takes a hard and critical look at everything the Section does, including its organization structure and operations.

Such was the case this past year, resulting in the development of a proposed new Strategic Plan (the "Plan") in April 2014, which was adopted by our Executive Council at our meeting in Palm Beach in August. The process which led to the production of this Plan started in July 2013, when our then-Chair, Peggy Rolando, and I extended an invitation to 40 Executive Council members to participate in the process by serving on the Long Range Planning Committee. Five subject matters for task forces to consider were then identified. Facilitators for each task force were selected and each member of the committee was appointed to one task force. The names of the task forces and their facilitators are as follows:

1. **Technology and Membership Communication** –Michael Bedke; Nicole Kibert; Silvia Rojas
2. **Meeting, Finances, Facilities and Logistics**—Debra Boje, Katherine Frazier; George Meyer
3. **Section Structure, Management, Leadership and Succession Planning** –Deborah Goodall; Andrew O'Malley; Sandra Diamond
4. **Committee Structure, Leadership and Succession Planning and Training**—Tae Kelley Bronner; Arthur Menor; Steven Mezer
5. **Legislation and Section Official Positions**—William Hennessey; Robert Swaine

Each task force met several times, either in person or telephonically and started the groundwork for its final report. Preliminary reports were prepared and circulated, which identified issues and potential goals and solutions. The latest version of these were circulated to the full committee prior to our final retreat weekend.

In addition, in order to provide some data to assist the Committee in its deliberations, a survey was prepared by members of the Committee and sent to the Section's Executive Council. The appearance and content of the survey was very ably facilitated by Mike Garcia, Surveys and Statistics guru at The Florida Bar. The survey was sent to the Executive Council members for the first time on March 18, 2014 and the results were tabulated by Mr. Garcia and made available on April 3, 2014 and distributed to all members of the Committee on April 4.

The full Strategic Planning Committee met in Tampa on Friday and Saturday, April 25-26, 2014. Committee members and Tampa-area practitioners Andrew O'Malley, Debra Boje and Tae Kelley Bronner helped with the logistics of the retreat. On Friday, each task force conducted its own breakout session to consider and advance its tentative report and recommendations. On Saturday, the entire Committee met in plenary session and each task force presented the results of its breakout session from the prior day. Each task force's preliminary report was discussed and critiqued by the full Committee.

Following the retreat in Tampa, each task force was asked to prepare a final report. These reports were then circulated among all members of the Committee, together with a request for consideration of a motion to submit the collective reports as the Section's 2014 Strategic Plan to the Executive Council for consideration. The final reports were approved as the Section's 2014 Strategic Plan.

The reports and their recommendations are wide-ranging in scope and too detailed to describe here. But, by way of example, those aspects of the recommendations of the Meeting, Finances, Facilities and Logistics Task Force relating to financial reporting and budgeting are being dealt with right now. These recommendations reflect long-standing concerns

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ABOUT THE COVER:

View towards Ocean at South Seas Plantation, Captiva, Florida

Photo by Silvia Rojas.

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Get Included in *ActionLine!*

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

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

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

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

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5625, or at mobos@flabar.org. Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

the Section has had regarding the adequacy and timeliness of financial reporting and budgetary information received from The Florida Bar. The Section is now actively working with staff and leadership of the Bar to address these issues to make both short term and long term improvements in this area.

As the names and topics of the task forces suggest, an effort was made to consider how we operate as a Section and, in the case of the Executive Council, how we operate as a governing body, in the 21st century. All of the task force reports are available at the RPPTL website, www.rpptl.org and can be found in the Strategic Planning Committee tab under the General Standing Committees.

A deep sense of gratitude is owed to those who served on the Strategic Planning Committee and put in many hours of work, in addition to the other time they expend on behalf of the RPPTL Section in other areas.

In Memoriam

John Arthur Jones

Not long before the deadline for submitting articles to ActionLine, we learned of the death of our past chair, John Arthur Jones. A tribute to John Arthur will take place at the Section's Executive Council meeting in Naples in November and a more extensive memorial will appear in the next edition of ActionLine. But I did want to take this opportunity to say a few words.

John Arthur Jones was the *de facto* dean of Florida trust and estate practice in Florida. He practiced law for over sixty years. He was a founding partner of Holland and Knight. He mentored hundreds, if not thousands, of attorneys. He influenced thousands of other attorneys who he did not directly mentor, through his work within the RPPTL Section on the Florida probate code, the trust code and every piece of legislation impacting the practice of trusts and estate practice for the last sixty years. He was a force to be reckoned with in committee work within the Section. To paraphrase the old TV commercial, when John Arthur Jones spoke, people listened. Most importantly, as a founding member of Florida Lawyers Support Services, Inc., John Arthur made his versions of standard probate and guardianship pleadings available throughout the state. In fact, the use of his forms became so accepted and commonplace, that it was not uncommon for the first question from an assistant clerk in a probate division to an attorney who was filing pleadings to open a new estate to be: "are these FLSSI pleadings?" In reality, of course, the clerk was asking "are these John Arthur Jones' pleadings"? If they were not, an explanation was called for.

John Arthur was Chair of the RPPTL Section in 1980-1981. He loved his Section work and the relationships he developed. The Section and its members, in turn, loved and respected him and were intensely grateful for his commitments to the Section and the advancement of every category of trust and estate law during his long career. In recognition and gratitude for his lifelong commitment to the Real Property, Probate and Trust Law Section, in 2012 our then Chair, George Meyer, announced the Section's Annual Service Award would thereafter be renamed "The John Arthur Jones Annual Service Award."

As a Section and as individuals, we will miss John Arthur Jones' counsel. Hopefully, the legion of lawyers he helped train and who he influenced will emulate his work and spirit in his absence.

Michael A. Dribin

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Florida Enacts Family Trust Company Legislation

By Brian M. Malec, Dean Mead P.A., Orlando, Florida and
Scott A. Bowman,Proskauer Rose LLP, Boca Raton, Florida

On June 13, 2014, Florida Senate Bills 1238 and 1320 were signed into law creating new chapter 662 of the Florida Statutes. Chapter 662, which becomes effective October 1, 2015, provides a framework for the formation and operation of Family Trust Companies ("FTCs") in Florida. Florida has now joined at least 14 other states[1] that currently have similar legislation. Not all states with FTC legislation, however, are equally as popular. Some states, such as South Dakota, Nevada and New Hampshire, have been proactive in legislating and regulating FTCs in order to remain at the forefront of the race for business. Not surprisingly, these jurisdictions continue to be rewarded when wealthy families create new, or relocate existing, FTCs. Given Florida's favorable trust laws and the absence of a state income tax, Senate Bills 1238 and 1320 should put Florida in contention for FTC business.

What is an FTC?

An FTC (also commonly referred to as a "Private Trust Company" or "PTC") is an entity owned by members of a family for the purpose of providing trustee and other fiduciary services to a limited class of family members or trusts created by or for the benefit of family members. In general, an FTC is similar to a public trust company, except that the FTC is formed in a jurisdiction that exempts the company from certain regulatory and capitalization requirements imposed on public trust companies because the FTC is not providing fiduciary services to the public. The services typically provided by an FTC include serving as trustee, investment advisor, agent or personal representative, as well as tax planning, tax preparation, and family education.

Fla. Stat. § 662.111 defines a "Family Trust Company" as, (i) a corporation or LLC, (ii) that is exclusively owned by family members, (iii) organized or qualified to do business in Florida, and (iv) acts or proposes to act as a fiduciary to serve one or more family members.[2] An FTC serves the particular family; as to non-family members, it may only serve as a fiduciary for up to 35 non-family members who are current or former employees of the FTC or a trust or entity that is a family member. This exception for services to non-family members is not found in all FTC jurisdictions, but it is important. Wealthy families tend to have long-term employees they treat as part of the "family" and want to provide for as such. Florida's limited exception for certain non-family members provides FTC families the opportunity to set up a trust for a valued employee and have the FTC serve as trustee.

Why choose an FTC?

Family trust companies are often created when a family needs an independent trustee, but does not believe that an individual or public trust company is the best fit for their specific circumstances. When this situation arises, it typically involves a family with one or more closely-held entities owned by trusts created for the benefit of family members. The FTC is an attractive option in these scenarios because it permits the ownership interests of the family entity to be managed by multiple family members and key advisors under the protection of an entity without the involvement of a public institution or individual. The advantages of an FTC over each of these other trustee options include:

- Family privacy is protected for both financial and non-financial matters;
- The entity structure of an FTC provides liability protection for decision-makers who would otherwise be personally liable if serving as a trustee in their individual capacity;
- Trustee continuity is maintained upon the death, resignation or removal of a decision-maker;
- The FTC is free to establish its own fiduciary fees; and
- The FTC can be used to establish a resident trustee in a particular jurisdiction (such as Florida) to avoid state income tax on trust assets.

FTCs also have some disadvantages. Perhaps the largest deterrent to using an FTC is that creating and operating an FTC is expensive. The team of professionals for an FTC often will include attorneys with expertise in fiduciary and trust law, business law, banking law and securities law, as well as CPAs. Financial professionals are also necessary if the FTC will provide investment services. Another disadvantage is that the depth of experience in an FTC may not be as extensive as a public trust company. While public trust companies have decades of experience from across the country and even the world to draw upon when handling fiduciary matters, the experience in an FTC may only go as far as that of their team of professional advisors. Finally, the tax issues involved in structuring and operating an FTC are unsettled. As discussed below,[3] the Internal Revenue Service ("IRS") has yet to issue final guidance clarifying the tax treatment of using an FTC to serve as a trustee for a family trust.

Who is a Family Member?

The term "family member" is broadly defined under chapter 662, though not as broadly as other jurisdictions.[4] Relatives within the sixth degree of lineal kinship or ninth degree of collateral kinship to a designated relative[5] are included, as well as spouses and former spouses of a family member and relatives of such spouses within the fifth degree of lineal kinship.[6] Trusts are included as "family members" provided that they are either created and funded exclusively by family members or all non-charitable qualified beneficiaries of the trust are family members.[7] A trust composed exclusively of charitable beneficiaries qualifies as a family member if all of the charitable beneficiaries are charitable entities in which a majority of the governing body is composed of family members.[8] Family entities in

which one or more family members own, control or have the power to directly or indirectly vote more than 50 percent of a class of voting securities of that entity are included as family members[9], as well as charitable entities in which a majority of the governing body is composed of family members.[10]

Types of FTCs in Florida

A family trust company operating in Florida is not required to be licensed, although the decision whether to be licensed will impact the type of services that the FTC will provide.[11] As discussed in detail below,[12] the Securities and Exchange Commission ("SEC") regulates investment advisors. Therefore, an FTC that will not provide investment services may choose to be unlicensed because it should not fall within the SEC's regulatory grasp. If the FTC will provide investment services, however, then the FTC must either register with the SEC or qualify for an exemption from SEC registration. An FTC that satisfies the SEC definition of a "family office" is exempt from registration and, therefore, may choose to be unlicensed. Otherwise, the FTC likely will choose to be licensed in order to seek the SEC exemption for FTCs operating under a state charter or license.

The organizational and operational requirements for licensed and unlicensed FTCs have some differences. Both licensed and unlicensed FTCs are required to maintain a minimum capital account of at least $250,000, have a principal office physically located in Florida, maintain a minimum of 3 directors (if a corporation) or managers (if an LLC) and have a deposit account with a state-chartered or national financial institution that has a principal branch in Florida.[13] However, only a licensed FTC is required to maintain fidelity bonds and an errors and omissions policy of at least $1 million on all active management.[14] In lieu of maintaining fidelity bonds, a licensed FTC may increase its minimum capital account by $1 million.[15] Further, a licensed FTC must file an application with the Office of Financial Regulation ("OFR") and pay an initial fee of $10,000 while an unlicensed FTC must only register with the OFR and pay an initial fee of $5,000.[16]

The class of family members which may be served by a licensed FTC and unlicensed FTC also differs. Specifically, an unlicensed FTC may only serve relatives within the fourth degree of lineal kinship or seventh degree of collateral kinship to a designated relative.[17] A licensed FTC may serve relatives within the sixth degree of lineal kinship and ninth degree of collateral kinship to a designated relative.[18] Moreover, a licensed FTC may have up to two designated relatives while an unlicensed FTC is limited to one designated relative.[19] Permitting a single FTC to serve two families may prove to be a selling point for Florida, as most, if not all, other jurisdictions limit an FTC to a single family.

Authorized and Prohibited Activities

An FTC is authorized to perform a variety of services for family members under chapter 662, including, but not limited to, serving as trustee, advisory agent, conservator, custodian, escrow agent, financial advisor, guardian, investment advisor and investment manager.[20] These services may be performed inside Florida and, in addition, may be performed outside Florida to the extent that other jurisdictions will give full faith and credit to the authority of the Florida FTC. If an FTC is not well equipped to exercise certain authorized powers (such as if the FTC does not employ an investment advisor or investment manager), then it may delegate duties and authority to other professionals or even retain a financial institution's trust department or a public trust company to assist.[21]

There are certain activities that an FTC is expressly prohibited from performing. First and foremost, an FTC may not engage in fiduciary services with the public because such action would directly conflict with a principal purpose of chapter 662 and provide an avenue to avoid the enhanced regulatory requirements that apply to public trust companies under chapter 658.[22] Second, an FTC is prohibited from engaging in commercial banking, such as accepting deposits and cashing checks.[23] This limitation does not prevent an FTC, however, from establishing accounts at financial institutions for its own purposes or on behalf of family members to whom it provides fiduciary services. Finally, an FTC is prohibited from serving as a personal representative of a Florida probate estate or as an agent under a Florida durable power of attorney.[24]

OFR Oversight

The OFR, which generally oversees the operations of financial institutions in Florida, is also tasked with regulating FTCs operating under chapter 662. Generally, the OFR is required to examine an FTC at least once every 18 months.[25] The OFR may, however, accept an audit of an FTC prepared by an independent certified public accountant licensed in Florida in lieu of performing the examination itself, provided that the OFR performs at least every other scheduled examination.[26] Permitting audits in lieu of full examinations are intended to reduce the burden of an examination on both the FTC and OFR. In addition to scheduled examinations, the OFR also has authority to examine or investigate an FTC at any time it deems necessary to confirm that the FTC has not violated any provision of chapter 662 or any rule adopted by the Financial Services Commission to carry out chapter 662.[27] The fees and costs, including travel and salary expenses, incurred by the OFR in conducting any examination must be paid by the FTC.[28]

Although it is too early to determine exactly what an OFR examination will look like, at least with respect to licensed FTCs, it is anticipated that the process will be similar to the examination of a public trust company. Families choosing to form licensed FTCs in Florida likely will do so, at least in part, to claim an exemption from the SEC registration requirements discussed below. A cursory examination process could jeopardize a licensed FTC's exemption with

the SEC, which would certainly deter families from locating their FTCs in Florida.

The OFR has a variety of enforcement powers to penalize an FTC should it discover a violation. Specifically, the OFR may revoke a company's license, issue a cease and desist order, levy monetary fines and remove a family trust company-affiliated party.[29] A company charged with a violation has the opportunity for a hearing pursuant to Sections 120.569 and 120.57 of the Florida Statutes to dispute or mitigate the claim. In addition to imposing penalties for violations of chapter 662, the OFR has authority to penalize an FTC if it discovers that the company has committed a breach of fiduciary duty in providing services to the family members.[30] Therefore, an FTC will not only have to answer in a court proceeding to a beneficiary who is damaged by a breach, but it may also have to answer in an administrative proceeding to the OFR and potentially risk losing its ability to operate in Florida.

Existing FTCs Must Convert

Prior to the enactment of chapter 662, an entity seeking to operate as a family trust company in Florida had to either, (i) comply with the regulatory requirements to be a public trust company under chapter 658, or (ii) obtain an exemption letter from the OFR to be exempt from certain regulatory requirements applicable to a public trust company. This exemption letter process is not well-known to many Floridians and the requirements to receive an exemption are not clearly defined.

At the eleventh hour of bill drafting, the OFR requested the addition of Section 662.151(3), which provides that all companies in operation as of the effective date of chapter 662 (i.e., October 1, 2015) that meet the definition of a family trust company shall have ninety (90) days to apply for licensure as a licensed family trust company, register as a family trust company or foreign licensed family trust company, or cease doing business in Florida. It seems that the OFR's goal in adding this subsection is to create a uniform set of rules for all family trust companies operating in Florida and to streamline regulation. Accordingly, it appears that any family trust companies currently operating under an exemption letter from the OFR must convert to a chapter 662 FTC within 90 days after October 1, 2015, if they wish to continue operations in Florida.

Securities Issues for FTCs

An FTC that provides investment services must be sensitive to its classification as an investment adviser for SEC regulatory purposes. The SEC regulates "investment advisers" primarily under the Investment Advisers Act of 1940. SEC registration requirements for investment advisers include, (i) filing a Form ADV with the SEC, which must be kept current, (ii) annual filings with the SEC of an audited balance sheet, (iii) undergoing an annual examination by an independent public accountant to verify client assets, and (iv) inspections and examinations by SEC staff.[31] An "investment adviser" is defined as any person or firm who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities.[32]

…any family trust companies currently operating under an exemption letter from the OFR must convert to a chapter 662 FTC within 90 days after October 1, 2015…

An FTC that provides investment services generally falls within the definition of an "investment adviser" and, therefore, would be required to register with the SEC. However, there are two notable exemptions.

The first is known as the "family office" exemption. Based on a SEC ruling from June 2011,[33] "family offices" are excluded from the definition of an investment adviser and thus are not subject to regulation under the Investment Advisers Act of 1940. To constitute a family office, an FTC generally must, (i) have no clients other than family clients (with a one year transition period for certain successors in interest), (ii) be wholly owned by family clients and exclusively controlled (directly or indirectly) by one or more family members and/or family entities, and (iii) not hold itself out to the public as an investment adviser. Importantly, as to chapter 662 FTCs, a family office serving more than one family cannot qualify under this definition.

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The second is a state regulation exemption. Under this exemption, an FTC may avoid SEC registration if it operates under a state charter or license, regardless of whether it qualifies as a "family office" under the SEC definition.[34] Effectively, the FTC is trading SEC regulation for state regulation. In drafting chapter 662, it was intended that a licensed FTC formed and operating under chapter 662 be exempt from SEC registration by virtue of this state regulation exemption. Even though an FTC serving two families could not qualify under the SEC "family office" definition, it could, however, be exempt under the state regulation exemption as a result of being licensed.

Tax Issues Related to FTCs

The use of an FTC as a fiduciary of family trusts presents some unresolved issues from a federal transfer tax perspective. Although the IRS initially issued private letter rulings[35] in this area, it has stopped doing so in anticipation of issuing public guidance.

Importantly, IRS Notice 2008-63 contains a proposed revenue ruling that provides safe harbor guidance on income, gift, estate and GST tax consequences of using a family trust company to serve as the trustee of trusts in which family members are grantors and beneficiaries. As provided in the notice, the intent of the proposed revenue ruling is "to confirm certain tax consequences of the use of a private trust company that are not more restrictive than the consequences that could have been achieved by the taxpayer directly, but without permitting a taxpayer to achieve tax consequences through the use of a private trust company that could not have been achieved had the taxpayer acted directly."

The proposed revenue ruling addresses two situations. Under Situation 1, a private trust company is created in a state that requires a Discretionary Distribution Committee (DDC) to make all decisions regarding discretionary distributions from each trust for which it serves as trustee. In addition, state law has the following "firewalls":

1) No family member serving on the DDC may participate in making discretionary distribution decisions with respect to any trust of which that person or his or her spouse is either a grantor or a beneficiary, or with respect to any trust of which the beneficiary is a person to whom the family member or his or her spouse owes an obligation of support;
2) Only officers and managers may participate in decisions regarding personnel of private trust company;
3) Nothing in state statutes or in the company's governing documents may override a more restrictive provision in the trust instrument of a trust for which the private trust company is acting as trustee; and
4) No family member may enter into any reciprocal agreement regarding discretionary distributions from any trust for which the private trust company is serving as trustee.

Under Situation 2, a private trust company is created in a state that does not have legislation governing the formation and operation of a private trust company. However, the governing documents of the private trust company have the same "firewalls" that are imposed under state law in Situation 1. In addition, the governing documents create an "Amendment Committee," a majority of which must be neither family members nor related or subordinate to family members, and, by majority vote, can make changes to the governing documents regarding the creation, function or membership of the DDC or the Amendment Committee, and any of the firewalls.

Based on the firewalls and the facts in the proposed revenue ruling, which address various family trusts along with family members serving on the DDC and as officers of the company, the IRS proposed to rule that:

1) The appointment of the private trust company as trustee of the family trusts will not alone cause the value of trust assets to be included in a grantor's gross estate under I.R.C. § 2036(a) or 2038(a);[36]
2) The appointment of the private trust company as trustee of the family trusts will not alone cause the value of trust assets to be included in a beneficiary's gross estate under I.R.C. § 2041;
3) The appointment of the private trust company as trustee of the family trusts in which the trustee has discretionary power to distribute income and principal to the grantor's descendants will not alone cause the grantor's transfers to the trust to be treated as incomplete gifts under I.R.C. § 2511, or any distribution from the trust to be a gift by any DDC member;
4) The appointment of the private trust company as trustee of the family trusts will not alone affect the GST exempt status of the trust under Treas. Reg. § 26.2601-1(b)(1)(i), or change the inclusion ratio; and
5) The appointment of the private trust company as trustee of the family trusts will not alone cause the grantor or beneficiary to be treated as the owner of the trust under I.R.C. §§ 673, 676, 677, or 678. The IRS stated the application of I.R.C. § 674 will depend upon the particular powers of the trustee and may depend on the proportion of the members of the DDC with authority to act with regard to that trust who are related or subordinate to the grantor. The IRS also stated that the operation of the private trust company could cause a grantor to be treated as an owner under I.R.C. § 675; however, it would depend upon the specific facts and circumstances.

Final guidance relating to the tax consequences of using an FTC to serve as trustee of a trust for a family member has yet to be issued by the IRS, although it could be at any time. This project has been listed on the IRS Priority Guidance Plan for several years. Until final guidance is released or the IRS begins issuing private letter rulings again on this issue, families cannot be certain how the IRS will treat the use of a family trust company for income and transfer tax purposes.

Conclusion

Florida's family trust company legislation is a significant development in Florida trust law and in the promotion of trust business within the state. The breadth and flexibility of the statutes should allow Florida to be competitive with others states that have enacted family trust company legislation. Although, family trust companies may present some challenging securities law and tax law considerations, many families will find them attractive solutions for the management and preservation of multigenerational wealth.


S. BOWMAN

Scott A. Bowman practices in the Personal Planning Department of Proskauer Rose LLP, in its Boca Raton, Florida office. He focuses on developing and implementing advanced estate planning techniques for high net worth individuals and their families. His experience also includes complex international income tax and estate planning. He currently serves as the Co-Vice Chair of the International Tax Planning Committee of the American Bar Association Real Property, Trust and Estate Section and is board certified by the Florida Bar in Taxation.


B. MALEC

Brian Malec is a Board Certified Wills, Trusts & Estates attorney in the Orlando office of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A. He is active in RPPTL as a member of the Executive Council and the Family Trust Company Subcommittee, which drafted the Family Trust Company legislation for Florida. He also currently serves as Director of the Federal Tax Division of the Florida Bar Tax Section. Brian received his Master of Laws (LL.M.) in Taxation from the University of Florida Levin College of Law in 2008.

Endnotes

1 States other than Florida that currently have FTC legislation include: Alaska, Arkansas, Colorado, Delaware, Louisiana, Mississippi, Nevada, New Hampshire, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia and Wyoming.
2 F.S. § 662.111(12).
3 See section entitled "Tax Issues Related to FTCs."
4 Compare F.S. § 662.111(11) with NRS § 669A.070.
5 The term "designated relative" means a common ancestor of a family, who may be a living or deceased person, and who is so designated in the application for a license or annual license. F.S. § 662.111(9). A licensed family trust company may have up to two designated relatives, while an unlicensed family trust company is limited to one designated relative. F.S. § 662.120.
6 F.S. § 662.111(11).
7 *Id.*
8 *Id.*
9 F.S. § 662.111(e).
10 F.S. § 662.111(j).
11 An FTC licensed in another jurisdiction may operate in Florida if it becomes licensed in Florida or registers with the Office of Financial Regulation. See F.S. §§ 662.150 and 662.151.
12 See section entitled "Securities Issues for FTCs."
13 F.S. §§ 662.121 – 662.1225.
14 F.S. § 662.126.
15 *Id.*
16 Compare F.S. §§ 662.121 and 662.122(3).
17 F.S. § 662.111(11).
18 *Id.*
19 F.S. § 662.120.
20 F.S. § 662.130(1).
21 *Id.*
22 F.S. § 662.131(2).
23 F.S. § 662.131(1).
24 F.S. §§ 662.131(3) and (4).
25 F.S. § 662.141(1).
26 F.S. § 662.141(2).
27 F.S. § 662.141.
28 F.S. § 662.141(5).
29 F.S. §§ 662.143-145.
30 F.S. §§ 662.142(1)(i), 143(1)(h) and 145(1)(i).
31 15 U.S.C. § 80b-3.
32 15 U.S.C. § 80b-2(a)(11).
33 SEC Release No. IA-3220; File No. S7-25-10 (June 22, 2011); 17 C.F.R. 275.202(a)(11)(G)-1.
34 15 U.S.C. §80b-2(a)(11)(A) and §80B-2(a)(2)(C).
35 See e.g., PLR 200523003, 200546055 and 200548035.
36 References to "I.R.C." are to the Internal Revenue Code of 1986, as amended.

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Changes from the 2014 Legislative Session

Peter M. Dunbar, Esq., Dean Mead, Tallahassee, Florida


P. DUNBAR

The 2014 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The presiding officers in both the House and the Senate were very helpful in assisting with the Section's program this year, and a special acknowledgement goes out to Senate President Don Gaetz and House Speaker Will Weatherford for the special assistance from their respective offices.

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

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

LEGISLATION CONTAINING SECTION POSITIONS AND INITIATIVES

Trusts—Liability: CS/CS/HB 405 by Representative Peters is an initiative of the Florida Bankers Association ("FBA") and would permit a trust to provide exculpation of an excluded trustee when an excluded co-trustee does not have the power and did not have actual knowledge of willful misconduct of the co-trustee. The Section worked out amendments with the FBA that were included in the final version of the legislation and resolved potential problems that may have resulted in the application of the original provisions in the legislation. **(*Chapter 2014-115, Laws of Florida.*)**

Condominiums—Non-Residential: CS/CS/SB 440 by Senator Altman and Representative Rodriquez contains the Section's initiative to differentiate the operational standards between residential and non-residential condominiums, effectively exempting non-residential condominiums for portions of the Condominium Act. It effectively exempts non-residential condominiums from most of the operational standards imposed on condominium associations; it will allow more flexibility in creating commercial and industrial condominium developments; and it provides the opportunity for more continuity in management and more cost-effective operation of non-residential condominium property. The legislation also extends Part VII of the Act until July 1, 2015. **(*Chapter 2014-74, Laws of Florida.*)**

Residential Property Sales—Disclosures: CS/CS/CS/HB 489 by Representative Spano requires new disclosures when subsurface mineral rights interests in real property are being reserved by the seller. In such circumstances, the legislation requires that notification to the buyer of the retained rights by the seller be made in writing; and legislation provides for cancellation rights by the purchaser and penalties against the seller when intentional violations of the new disclosure requirements occur. **(*Chapter 2014-34, Laws of Florida.*)**

Guardianship—Clerk Audits: CS/HB 635 by Representative Passidomo authorizes the Clerk of Court to obtain and review records impacting guardianship assets, and it requires non-professional guardians to submit to a credit history to the Clerk. The Section had technical concerns with the bill as initially filed, but worked with the Florida Clerks Association to resolve the issues, and amendments to address the concerns were adopted prior to final passage of the legislation. **(*Chapter 2014-124, Laws of Florida.*)**

Estates—Public Records Exemption: CS/SB 650 by the Senate Judiciary Committee makes the Section's initiative exempting filing for estates and elective share made under Sec. 733.604 permanently exempt under Florida's public records law. **(*Chapter 2014-82, Laws of Florida.*)**

Nursing Home Litigation—Public Records Exemption: CS/SB 670 by Senator Thrasher revises the liability standards for nursing homes and provides for the availability of patient records in proceedings involving nursing home litigation. The Section had technical concerns that the impact of the legislation might have on the records availability for court appointed fiduciaries and patients, and the legislation was amended prior to final passage to remove the objectionable language. **(*Chapter 2014-83, Laws of Florida.*)**

Probate Revisions: CS/CS/HB 757 by Representative Spano and Senator Hukill contains four of the Section's Probate initiatives, including (1) the "Morey fix" language; (2) the anti-lapse provision; (3) corrective effective date for the provision prohibiting gifts to lawyers; and (4) the burden of proof revision in trust contests. **(*Chapter 2014-127, Laws of Florida.*)**

Electronic Publication: CS/HB 781 by Representative Powell and Senator Latvala contains a variation of the Section's initiative to revise the statutory provision governing electronically constructive notice. It clarifies the title of the webpage used by a newspaper for the electronic publication of legal notices; it provides that no additional fee may be charged for a person viewing the legal notices on the electronic webpage; it provides that the electronic version of the notice must also appear on a statewide searchable website for a period of at least 90 days; and it repeals language providing that mistakes on the website are "harmless error" and preserves the validity of the electronic version of the legal advertisement in the same manner as the printed version of the advertisement. **(*Chapter 2014-281, Laws of Florida.*)**

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Legislator Supporters of the Real Property, Probate and Trust Law Section During the 2014 Legislature

By Ashley E. Gault, Esq., Dean Mead, Tallahassee, Florida

The 2014 Florida Legislative Session saw many of the Section's initiatives and items of interest pass favorably in the halls of the Senate and the House of Representatives. The Section members extend sincere gratitude and appreciation to the following fourteen legislators for their important contributions to the Section's successful 2014 Session initiatives.



Representative Kathleen Passidomo sponsored House Bill 635, which authorizes the Clerk of Court to obtain and review records impacting guardianship assets and requires non-professional guardians to submit a credit history.

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

Representative Passidomo is a partner in the law firm of Kelly, Passidomo & Alba, LLP in Naples. Her practice centers on real estate, corporate and business law, and she is a member of the Section. Representative Passidomo is a Florida Bar Board Certified Real Estate Lawyer. She has been a member of the Florida House of Representatives since 2010.



Senator Garrett Richter sponsored Senate Bill 1238, which was the Section's initiative to create and regulate family trust companies in Florida. Senator Richter also sponsored Senate Bill 1320, which is a public records exemption bill for family trust companies.

Senator Richter is the President Pro Tempore for 2014 and Chair of the Gaming Committee. He also serves on the Appropriations Committee, the Appropriations Subcommittee on Education, the Appropriations Subcommittee on Health and Human Services, the Banking and Insurance Committee, the Commerce and Tourism Committee, the Judiciary Committee, the Rules Committee, the Transportation Committee, and the Joint Legislative Budget Commission.

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

Representative Charles McBurney sponsored House Bills 1267 and 1269, which were the companion bills relating to family trust companies.



Representative McBurney is the Chair of the Justice Appropriations Subcommittee, and also serves on the Judiciary Committee, Appropriations Committee, Education Committee, the Joint Legislative Budget Committee, and the Select Committee on Gaming.

Representative McBurney is an attorney from Jacksonville practicing business law. He was elected to the House of Representatives in 2007. He has also served as the President of the Florida Association of Tiger Bay Clubs, Chairman of the Mandarin Oaks School Advisory Committee, the Board of Governors for the Jacksonville Chamber of Commerce, and President of the Jacksonville Jaycees.



Representative Kathleen Peters sponsored the Section's Directed Trust initiative, House Bill 405. House Bill 405 permits a trust to provide for the exculpation of an excluded trustee who acts in accordance with the direction of another trustee having the power to direct the actions of the excluded trustee, except in cases of willful misconduct on the part of the excluded trustee.

Representative Peters serves on the Education Committee, Ethics and Elections Subcommittee, Government Operations Appropriations Subcommittee, Health Families Subcommittee, Select Committee on Gaming, and the Transportation & Economic Development Appropriations Subcommittee.

Representative Peters' career is in public affairs in South Pasadena. She is affiliated with the Rotary Club of St. Petersburg and the South Pasadena Planning and Zoning Board. Representative Peters received the Woman of Distinction Award from the St. Petersburg Chamber of Commerce and an outstanding community service award from Princess of the Queen of Hearts Royal Court. She is a past advisory board member of the Pinellas Juvenile Assessment Center and chairs major fundraising events.



Representative Elaine Schwartz sponsored the Section's guardianship initiative, House Bill 123, and its accompanying public records exemption, House Bill 125. House Bill 123 deals with the payment of examiner fees and attorney fees in guardianship proceedings. House Bill 125 is the free-standing guardianship legislation that provides a public records exemption for settlements entered into by a guardian on behalf of a ward.

Representative Schwartz serves on the Judiciary Com-

mittee, the Select Committee on PPACA, the Health Care Appropriations Subcommittee, the Justice Appropriations Subcommittee, and the Select Committee on Health Care Workforce Innovation.

Representative Schwartz is an attorney practicing elder law in Hollywood, Florida. She has served as an attorney for the City of Hollywood, the Federal Reserve Bank of New York, and the Long Term Care Ombudsman. Representative Schwartz was the Commissioner of the Hollywood Housing Authority. She is affiliated with the Academy of Florida Elder Law Attorneys, the National Academy of Elder Law Attorneys, and she is the founder of the Share-A-Meal Homeless Feeding Program.



Senator Arthenia Joyner sponsored the companion guardianship legislation with Senate Bill 120 and Senate Bill 108. Senator Joyner also sponsored Senate Bill 826, Directed Trusts, which was the companion bill to House Bill 405 sponsored by Representative Peters.

Senator Joyner is the Vice Chair of the Appropriations Subcommittee on Criminal and Civil Justice. She also serves on the Appropriations Committee, the Appropriations Subcommittee on General Government, the Ethics and Elections Committee, the Health Policy Committee, the Judiciary Committee, the Transportation Committee, and is the alternating chair of the Joint Committee on Public Counsel Oversight.

Senator Joyner is a practicing probate attorney from Tampa. She has represented the Tampa Bay area in the Florida Senate since 2006 and previously served in the Florida House of Representatives from 2000 to 2006. Senator Joyner has received many awards through her years of service, including awards from The Florida Bar, Florida Association of Counties, Florida Justice Association, Florida Police Benevolent Association, Inc., Florida Watch Action, Florida A&M University, University of South Florida, American Cancer Society, and the Florida League of Cities.



Senator Jack Latvala was involved in a number of successful Section initiatives and bills of interest during the 2014 Session. Senator Latvala sponsored the electronic notice bill, Senate Bill 834. Senate Bill 834 contains a variation of the Section's initiative to revise the manner for providing constructive notice electronically.

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

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



Representative Bobby Powell sponsored the companion electronic notice legislation, House Bill 781.

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

Representative Powell is an urban planner from Riviera Beach. He is affiliated with the American Institute of Certified Planners, the American Planning Association, the Leadership Board of Palm Beach County, Riviera Beach Library Advisory Board, and the Salvation Army Northwest Community Center Advisory Board.



Representative Ross Spano sponsored House Bill 757, which contained three of the Section's probate initiatives, including: (1) the "Morey fix"; (2) revisions to the anti-lapse provision; and (3) revisions to the burden of proof in trust contests.

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

Representative Spano is an attorney from Dover where he is growing a small business and raising his family of six. He received his history degree from the University of South Florida and his Juris Doctorate from Florida State University College of Law, with honors. Representative Spano is the founding member and President of the Brandon Business Network International Chapter. He has also chaired the Teacher of the Year Celebration.



Senator Dorothy Hukill has been a longtime sponsor of Section initiatives and is an enthusiastic supporter of the Section. During the 2014 Session, Senator Hukill sponsored the companion estates legislation, Senate Bill 998.

Senator Hukill is Chair of the Appropriations Subcommittee on Finance and Tax. She also serves on the Appropriations Committee, the Appropriations

Subcommittee on Education, the Commerce and Tourism Committee, the Communications, Energy, and Public Utilities Committee, the Community Affairs Committee, the Governmental Oversight and Accountability Committee, and the Joint Committee on Public Counsel Oversight.

Senator Hukill served as Mayor of the City of Port Orange from 2000-2004. She is a practicing attorney in Daytona Beach, where she practices Business, Real Estate, and Probate law. Senator Hukill has been recognized for her distinguished service by County Veterans Service Officers Association of Florida, Florida Chamber of Commerce, and the Volusia County Association for Responsible Development.



Representative George Moraitis, Jr. was involved in a number of successful Section initiatives and bills of interest during the 2014 Session. Representative Moraitis sponsored the omnibus community association bill, House Bill 807. This legislation contained six important provisions: (1) emergency powers for Cooperative Associations and Homeowners Associations; (2) a series of changes to the Cooperative Act; (3) expansion of the technology permitting absent board members to participate in meetings; (4) imposition of a 5-day deadline for outgoing board members to turn over records to newly elected board members; (5) modifications to MRTA; and (6) extension of the Bulk Buyer provisions.

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

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



Senator Jeremy Ring sponsored the companion to the omnibus community association bill, Senate Bill 798.

Senator Ring is the Chair of the Governmental Oversight and Accountability Committee and the Vice Chair of the Appropriations Subcommittee on Finance and Tax. He also serves on the Appropriations Committee, the Appropriations Subcommittee on Transportation, Tourism, and Economic Development, the Banking and Insurance Committee, the Commerce and Tourism Committee, the Judiciary Committee, the Rules Committee, and the Joint Legislative Auditing Committee.

Senator Ring is an entrepreneur with four children from Broward County. He is the co-founder of SUPERB (Students United with Parents and Educators to Resolve Bullying) and has served on the Board of Directors for the Florida Ocean Sciences Institute, the Advisory Committee for Nova Southeastern University Graduate School of Humanities and Social Sciences, the Senate Club for American Israeli Public Affairs Committee, and the Daniel Cantor Senior Center.



Senator Thad Altman sponsored Senate Bill 440, which contained the Section's initiative to differentiate the operational standards between residential and non-residential condominiums, effectively exempting non-residential condominiums from most of the operational standards imposed on condominium associations.

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

Senator Altman has been a member of the Senate since 2008 and previously served in the House of Representatives from 2003 to 2008. He is the President of the Astronauts Memorial Foundation, and the President of the American Lung Association for Brevard and Volusia Counties. Senator Altman has received awards for his legislative service from Rollins College, Brevard Community College, Florida Association of Counties, Florida Jaycees, and Mothers Against Drunk Driving.



Representative José Javier Rodríguez sponsored the companion bill for non-residential condominiums, House Bill 425.

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

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

Issues to Consider When Counseling Same-Sex Couples

By George D. Karibjanian, Boca Raton, Florida and Jeffrey R. Dollinger, Gainesville, Florida

In June 2013, on the issue of same-sex marriage, the United States Supreme Court issued two opinions, *United States v. Windsor*, 133 S.Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In *Windsor*, the U.S. Supreme Court held that a federal law defining marriage as the union between a man and a woman as husband and wife, and that prohibited the recognition of same-sex marriages, was unconstitutional as a deprivation of the equal liberty of persons protected by the Fifth Amendment. The U.S. Supreme Court in *Windsor*, however, was concerned solely with federal law; it did not address State law with respect to allowing or recognizing same-sex marriages. This was the subject of the second case, *Perry*, which came before the U.S. Supreme Court on what appeared to be the issue of whether Proposition 8, the California constitutional provision adopted by ballot initiative that defined marriage as the union between a man and a woman, was unconstitutional (for the reasons the U.S. Supreme Court would express in *Windsor*). The U.S. Supreme Court, however, held that it could not rule on that issue because the Petitioners, who were individuals that had supported the Proposition 8 ballot initiative, did not have standing to bring the case before the U.S. Supreme Court. The standing issue arose in *Perry* because the true party with standing – the State of California – elected not to appeal the initial ruling from the Northern District Court of California that Proposition 8 was unconstitutional.

Florida Case Law May Force a Change in the Law

Based upon the limits of the holdings in *Windsor* and *Perry*, States can enforce laws and constitutional provisions that define marriage as the union between a man and a woman, and States can refuse to recognize same-sex marriages performed under the laws of another State. However, the status of this view of the law may be changing. There have been several recent trial court decisions holding that Florida's constitutional provision and statute that define marriage as the union between a man and a woman are unconstitutional.[1] In addition, in response to the appeal of a trial court order denying a divorce of a same-sex couple, the Second District Court of Appeal is seeking to bypass appellate level review and have the issue determined directly by the Florida Supreme Court.[2] While the impact of these trial court decisions are stayed pending appellate review, similar laws in other States are also subject to decisions holding such laws are unconstitutional and therefore it may result in the U.S. Supreme Court addressing this topic once again.

Article I, Section 27 of the Florida Constitution was added by a ballot initiative in 2008 and defines "marriage" as "the legal union of only one man and one woman as husband and wife" and clarifies that definition by stating "no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." This same provision is repeated in Sec. 741.212, F.S., which was enacted in 1997. As a result, Florida law currently prohibits a same-sex couple from marrying under Florida law, and prohibits the recognition in Florida of the marriage of a same-sex couple who had been lawfully married in another State.

However, even under Florida's current laws, a same-sex couple who are Florida residents are free to marry in other States. Similarly, same-sex couples who have married in another State, or who may get married in another State, may own real property in Florida, may reside in Florida and establish their homestead in Florida, may plan to purchase real property in Florida, or may plan to move to Florida to do all of the foregoing. Based upon these potentials alone, it is likely real estate and estate planning/probate practitioners will need to address a variety of issues when counseling their same-sex couple clients due to these differences in State laws that regulate marriage. Now that several trial courts in Florida have held that Florida's constitutional provision and statute are unconstitutional, the counseling of the same-sex couple as a client has become that much harder due to the uncertainty of the future of Florida's law.

Effect on Tenants By The Entirety

One problem with counseling the married same-sex couple is the impossibility of predicting the future of Florida's laws. One important question in any case addressing whether Florida's constitutional provision and statute are unconstitutional, whether from a direct challenge to Florida's laws or as a result of a U.S. Supreme Court opinion that would be controlling precedent, is the question of timing. If Florida's laws are determined to be unconstitutional, would such a determination be retroactive such that both Florida's constitutional provision from 2008 and statutory prohibition from 1997 would be deemed never to have existed.[3] If the effect on Florida law is retroactive, a practitioner could easily see how such a ruling would impact the title to real property already owned by a same-sex couple who had been married in another State. The question then becomes whether there be a "springing" *tenants by the entirety* if all of the other unities of title were present when the same-sex couple acquired their Florida real property after their lawful marriage under the laws of another State. A similar impact would arise in the ownership, conveyance, devise, and descent of Florida property that is or was the homestead of the married same-sex couple. The impact may even be greater when attempting to establish an estate plan for the married same-sex couple

who may or may not have minor children.

Presently, Sec.689.15, F.S., provides that a devise, transfer or conveyance made to two or more shall be held as *tenants in common* unless the deed expressly provides for the right of survivorship. Further, Sec. 689.11, F.S., provides that a conveyance from one spouse to both spouses in a marriage is held as *tenants by the entirety.* As a result, in a conveyance to both spouses in a same-sex couple (even if they had been lawfully married in another State), current Florida law would disregard the marriage of the same-sex couple and the title to the Florida property held by the two spouses would likely be held as *tenants in common*, even if the deed recites that the grantees are "married." If it seems there is an uncertainty about title to Florida real property that is held by a married same-sex couple, that uncertainty will likely continue until it has been determined whether Florida's laws are constitutional. That seeming uncertainty is magnified due to the issue of whether such a determination would be retroactive.

For example, a practitioner may be requested to counsel a same-sex couple on their purchase of a Florida homestead or of other Florida real property. One important issue that may arise is the form of ownership of the Florida homestead or of other Florida real property. Under Florida's definition of marriage, a married same-sex couple can only own Florida real property as *tenants in common* or as *joint tenants with right of survivorship*, and cannot own real property as *tenants by the entirety*. As a result, under present Florida law, the protections and benefits built into the *tenants by the entirety* form of ownership, including the requirement of joinder to convey or mortgage the real property owned as *tenants by the entirety*, and including certain protections from creditors, are not available to a same-sex couple who have been lawfully married in another State. Counseling married same-sex clients may require a discussion and comparison of the different forms of tenancies so that the clients can determine how they wish to hold title to their Florida real property and how they wish the property to descend or devise upon the death of one spouse.

At first glance, the inability of a same-sex couple to own real property as *tenants by the entirety* may not seem to be a big problem, but upon closer inspection, the protections given to ownership of real property as *tenants by the entirety* is difficult to replicate under ownership of real property as *tenants in common* or as *joint tenants with right of survivorship*. While the *joint tenants with right of survivorship* form of ownership can provide the same result as *tenants by the entirety* form of ownership upon the death of the first spouse, i.e. the surviving spouse becomes the sole owner of the real property upon the death of the first spouse, the *joint tenants with right of survivorship* form of ownership can be terminated by one spouse without the consent or joinder of the other spouse, thereby preventing the surviving spouse from sole ownership upon the death of the other spouse. Similarly, with individually owned property or property owned as *tenants in common*, a Will (or other document of testamentary disposition, such as a revocable trust) can be drafted to provide the same results as the *tenants by the entirety* form of ownership, but, again, a Will (or trust) can be changed or destroyed by the one spouse, without the consent of the other spouse, thereby preventing the surviving spouse from sole ownership upon the death of the other spouse. Irrevocable trusts or an entity (i.e. corporation, limited liability company, or some form of partnership) may be formed for ownership of real property with the intent to provide the same protections given by *tenants by the entirety*, but that may be difficult as well. Even Cohabitation Agreements and Domestic Partner Agreements can provide some of the protections provided by the *tenants by the entirety* form of



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ownership, but agreements can be changed, breached, or deemed unenforceable for a variety of reasons.

Effect on Homestead

These same considerations may impact how a Florida lawyer provides estate planning and asset protection counseling. Consider Article X, Section 4 of the Florida Constitution, the homestead and exemption provision. While Section 4(a) provides for the homestead protection from forced sale, which has repeatedly been upheld by the Florida Supreme Court,[4] Section 4(b) states "[t]hese exemptions shall inure to the surviving spouse or heirs of the owner." This protection is not available to the surviving spouse in a same-sex marriage. For example, suppose that, (a) a spouse in a same-sex marriage dies a Florida resident, (b) the decedent's only living family member is the surviving spouse, (c) the decedent owned the house in which the couple resided, all of which is classified as the decedent's homestead, (d) the decedent's Will devises all assets to the surviving spouse, and (e) a claim against the decedent's estate is reduced to a judgment. If the couple were an opposite-sex couple, the homestead would be protected from the judgment because the recipient of the homestead, i.e., the surviving spouse, would be a protected recipient under Florida law, and thus the homestead protection from creditors is preserved. However, with the same-sex married couple, because Florida does not recognize the marriage, the surviving spouse is neither a "spouse" nor a protected heir, and the judgment can then become a lien upon the title to the homestead owned by the deceased spouse.

Similar results occur under Section 4(c), which states, in part, "[t]he homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." Suppose that one spouse in a marriage dies owning the family's homestead. The decedent is survived by a spouse and adult lineal descendants, who are not the lineal descendants of the spouse. The decedent attempts under his Will to devise the property to the adult lineal descendants. If the marriage were an opposite-sex marriage, the devise is invalid because the only permissible devise of homestead property when a decedent dies survived by a spouse and adult lineal descendants is a fee simple devise to the surviving spouse. Under these circumstances, the devise fails and the surviving spouse receives a life estate with a vested remainder in the adult lineal descendants (with a 50% *tenants-in-common* severance option). If the marriage is a same-sex marriage, the spouse is not considered to be a "spouse" under Florida law, and so, for homestead purposes, the decedent was not survived by a spouse or minor child, so the homestead is freely devisable to anyone. Thus, the devise is upheld and the surviving spouse has no right of recourse.

Conclusion

While this article is not intended to be a discussion of what is right or wrong about Florida law, or about the constitutionality of Florida's law and the definition of marriage, this article is intended to address the type of counseling that could or should be provided to a member or to both members of a same-sex couple. Clearly, ownership of real property in Florida by a married same-sex couple as *tenants in common*, as *joint tenants with right of survivorship*, or via a trust or other entity, or under a Cohabitation or Domestic Partner Agreement, may not provide all of the protections that the same-sex couple desires or needs. The married same-sex couple should be well advised of these issues so that they can make an informed decision on how they wish to own their Florida real property, how they wish to protect it, and how they wish to establish their estate plan.


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Endnotes

1 *Huntsman et. al. v. Heavilin et. al.*, Monroe County Circuit Court, Case No. 442014CA000305A001KW (July 17, 2014); *Pareto et. al. v. Ruvin et. al.*, Miami-Dade County Circuit Court, Case No. 2014-1661-CA-01 (July 25, 2014); *Brassner v. Lade*, Broward County Circuit Court, No. 13-012058 (37) (August 4, 2014); *Estate of Bangor*, Palm Beach County Circuit Court. Case No. 502014CP001851XXXXMB (August 5, 2014); *Brenner et. al. v. Scott et. al.*, N.D. Fla. Case No. 4:14cv107-RH/CAS (August 20, 2014); *Grimsley et. al. v. Scott et. al.*, N.D. Fla., Case No. 4:14cv138-RH/CAS (August 20, 2014).

2 *See* Shaw v. Shaw, Fla. 2 Dist. Ct. App. Case No. 2D14-2384 (August 27. 2014).

3 For a more detailed analysis of the potential retroactivity issue, *see* George D. Karibjanian, *State Law DOMA: What if Unconstitutionality Becomes a Reality, Part Three*, LISI Estate Planning Newsletter #2219 (April 29, 2014) http://www.leimbergservices.com.

4 *Butterworth V. Caggiano*, 605 So.2d 56 (Fla. 1992); *Tramel v. Stewart*, 697 So. 821 (Fla. 1997); *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001); *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007).

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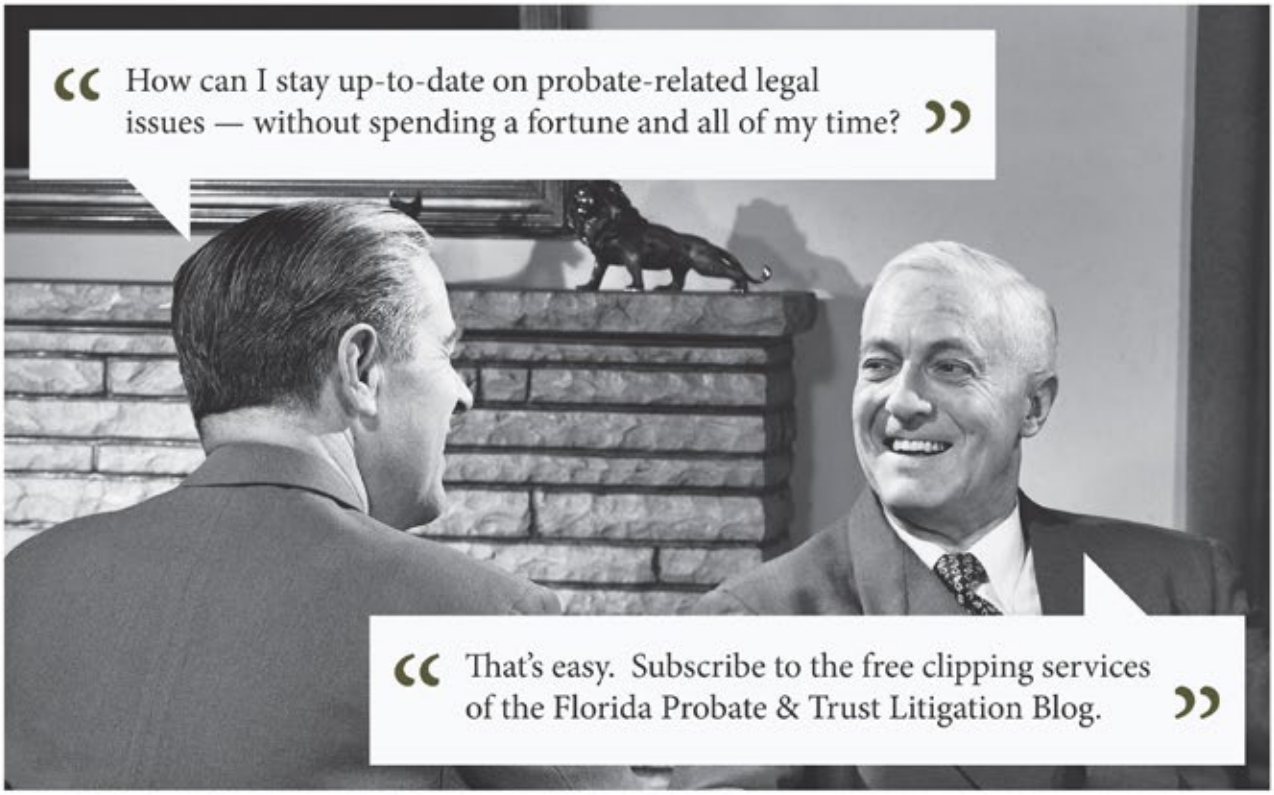

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The Dodd-Frank Act and the Residential Owner-Occupant Purchase Money Mortgage in Favor of Seller Financers

Or

I'm here from the Government and I'm here to help you

By Arlene C. Udick, The Villages, Florida

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[1] is the result of recent efforts to overhaul the United States financial regulatory system. It represents a fundamental shift in the regulation of consumer financial services. Title X of the Dodd-Frank Act created the Bureau of Consumer Financial Protection ("CFPB")[2] empowered to enforce existing and new federal consumer finance law.

This article warns attorneys and other participants of a significant change in the marketplace involving residential closings with purchase money mortgages to intended buyer-occupants. Many initial evaluations of the Act conclude that these individual residential purchase money mortgage lenders must register to avoid penalties.

The stated purpose of the legislation is to promote the financial stability of the United States by improving accountability and transparency in the financial system; to end "too big to fail"; to protect the American taxpayer by ending bailouts; to protect consumers from abusive financial services practices; and for other purposes.[3] Under this broad purpose, the CFPB seeks to protect a buyer/borrower from abuse by a seller financer. The penalties can be severe for an abusive seller financer as the last section of this article explains.

July 21, 2011 was the official date on which the function and authority was transferred from other federal regulatory agencies to the CFPB.[4] On that same date, the Real Estate Settlement Procedures Act ("RESPA") and the Truth in Lending Act of 1968 ("TILA"), among other federal laws and regulations, were transferred from the Department of Housing and Urban Development and the Federal Reserve Board, respectively, to be administered and enforced by the CFPB.

As of January 10, 2014, all residential mortgage transactions[5] in the United States are now regulated by the Dodd-Frank Act and the CFPB. The scope of this article is limited to the impact of the Dodd-Frank Act on a seller financer who extends credit through a purchase money mortgage[6] to an owner-occupant in a residential transaction. Exempted from CFPB oversight is the extension of credit primarily for a business, commercial or agricultural purpose or an extension of credit to someone other than a natural person.[7]

A seller financer could be required to register under the SAFE Act.

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008[8] ("SAFE Act") was enacted on July 30, 2008. The CFPB re-codified the SAFE Act regulation as Regulations G and H under TILA.[9] Regulation H mandates a nationwide licensing and registration system for residential mortgage loan originators ("MLOs"). The SAFE Act prohibits individuals (natural persons with certain exceptions as discussed below)[10] from engaging in the business of residential mortgage loan origination without first obtaining and maintaining annually: (1) employees of a covered financial institution, registration as a mortgage loan originator and a unique identifier (federal registration); or (2) for all other individuals, a state license and registration as a mortgage loan originator, and a unique identifier.[11]

For knowingly violating this federal consumer financial law, the seller financer could be subject to civil penalties of $1 million per day.

So when does a seller financer become an MLO for purposes of the SAFE Act? The SAFE Act under Appendix B to 12 C.F.R. §1008 provides that an individual who engages in origination activities with a degree of habitualness or repetition, including a seller financer, could be deemed to be in the business of an MLO. This definition has been further refined by other regulations issued under the umbrella of the CFPB.

When is a seller financer a loan originator and what are the exclusions?

To determine whether Regulation H requires registration, we must first turn to a more detailed definition of a loan originator and seller financer exclusions in Regulation Z under TILA, also under the umbrella of the CFPB. The definition of a "loan originator" under the Dodd-Frank Act is broad in scope and includes activities such as taking an application, offering, arranging, negotiating, or otherwise obtaining an extension of consumer credit for another person. Though a seller financer under this broad definition could be considered a loan originator, the Regulation under 12 C.F.R. 1026.36(a)(4) and (5) identifies two categories of seller financers excluded from the "loan originator" definition:

1. Seller is a natural person, estate, or trust and seller

provides seller financing for only one property in any 12-month period, or
2. Seller is a natural person or organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit, and seller finances the sales of three or fewer properties in any 12-month period.[12]

The first exclusion to the definition of a loan originator requires that: (1) the seller originates financing for only one property in any 12-month period; (2) the seller is a natural person, estate or trust; (3) the seller did not construct the residence on the property; (4) the financing does not result in negative amortization; and (5) the financing has a fixed rate or does not adjust for the first five years.[13]

Requirements of the second exclusion include: (1) the seller originates financing for no more than three residential properties in any 12-month period; (2) the seller is a natural person or organization, including a partnership, corporation, proprietorship, association, cooperative, trust, estate, or government unit; (3) the seller did not construct the residence on the property; (4) the loan is fully amortizing; (5) the financing has a fixed rate or does not adjust for the first five years; and (6) the seller has determined that the borrower has the reasonable ability to repay ("ATR") the loan according to its terms.[14] The ATR/Qualified Mortgage (QM) Rules under Regulation Z of TILA were covered in the 2014 summer issue of ActionLine and should be referred to for further information.

Home Ownership and Equity Protection Act (HOEPA)[15]

Effective January 10th, 2014, the CFPB, under the authority granted by the Dodd-Frank Act, amended Regulation Z[16] by expanding the types of mortgage loans, now including a purchase money mortgage, that are subject to the protections of the Home Ownership and Equity Protections Act of 1994 ('HOEPA'), revising and expanding the test for coverage under HOEPA, including a pre-loan counseling requirement.[17] A seller financer is deemed to be a creditor who regularly extends credit under Regulation Z if that person originates more than one credit extension that is subject to the requirements of HOEPA.[18] Such an extension of credit would no longer be covered under the 3 transactions exclusion and the seller financer would be subject to the loan originator requirements in 12 C.F.R. §1026.36 (f) and (g) and be required to register under the SAFE Act and determine the borrower's ATR. [19]

HOEPA applies to a high-cost mortgage, which is any consumer credit transaction secured by the consumer's principal dwelling, and in which:[20]

1. The transaction's annual percentage rate (APR) exceeds the applicable average prime offer rate by more than 6.5% for most first-lien mortgages, or by more than 8.5% for a first mortgage if the dwelling is personal property[21] and the transaction is for less than $50,000.00;
2. The transaction's APR exceeds the applicable average prime offer rate by more than 8.5% for subordinate or junior mortgages;
3. The transaction's points and fees exceed 5% of the total transaction amount or, for loans below $20,000.00, the lesser of 8% of the total transaction amount or $1,000.00 (with the dollar figures also adjusted annually for inflation); or
4. The credit transaction documents permit the creditor to charge or collect a prepayment penalty more than 36 months after the transaction closing or permit such fees or penalties to exceed, in the aggregate, more than 2% of the amount prepaid.[22]

The Dodd-Frank Act implements new restrictions and requirements concerning loan terms and origination practices for mortgages falling within HOEPA's coverage test. Some of the restrictions specifically apply to "creditors" and some are of a general nature. For example:

1. A creditor must make a determination of ATR.[23]
2. Balloon payments are generally banned, unless they are to account for the seasonal or irregular income of the borrower, they are part of a short-term bridge loan, or they meet certain other criteria set forth in the regulations;[24]
3. Creditors are prohibited from charging prepayment penalties and financing charges that are required to be included in the calculation of points and fees;[25]
4. Late fees are restricted to 4% of the past due payment, fees for providing payoff statements are restricted, and fees for loan modification or payment deferral are banned;[26]
5. Creditors and mortgage brokers are prohibited from recommending or encouraging a consumer to default on a loan or debt to be refinanced by a high-cost mortgage;[27] and
6. Before making a high-cost mortgage, creditors are required to obtain confirmation from a federally certified or approved homeownership counselor that the consumer has received counseling on the advisability of the mortgage.[28]

Which restrictions will be enforced against seller financers who originate only one consumer credit extension a year may depend on the interpretations given to the regulations as they relate to each other.

Enforcement by the CFPB

The Dodd-Frank Act provides litigation authority to the CFPB to enforce violations of the federal consumer financial laws. The civil remedies can be severe and enable courts to provide any appropriate legal or equitable relief which may include, without limitation, (A) rescission or reformation of the contract; (B) refund of moneys or return of real property; (C) restitution; (D) disgorgement; (E) payment of damages and other monetary relief; (F) public notification regarding the violations, including the costs of notification; (G) limits on the activities or functions of the person[29]; and (H) civil money penalties.[30] Except as otherwise permitted

by law or equity, no action may be brought more than 3 years after the date of discovery of the violation to which an action relates.[31]

The civil penalties consist of the following:

First tier-for any violation of a law, rule or final order or condition imposed in writing by the CFPB-up to $5,000 per day during which the violation or failure to pay continues.

Second tier-for recklessly engaging in a violation of a federal consumer financial law-up to $25,000 per day during which the violation continues.

Third tier-for knowingly violating a federal consumer financial law-up to $1 million per day during which the violation continues.[32]

The CFPB, the state attorneys general, and state regulators have civil enforcement authority of violations of the Dodd-Frank Act.[33] The regulations authorize the CFPB to bring a civil action for penalties, but are silent regarding a private cause of action. However, a violation of the law may be sufficient for a private cause of action under Florida's unfair and deceptive trade practices laws and mortgage lending laws[34] under Ch. 501 and Ch. 494, F.S..

The purpose of this article is to provide an overview and starting point for the lawyer who may have a client who will be financing the purchase of a buyer's residence. This article is not meant to be a full tutorial on the Dodd-Frank Act and seller financing in residential situations. The regulations' effects have not been felt by most consumers yet. They are new and complex and may be subject to a variety of interpretations by the courts. The audio CD from a seminar sponsored by the RPPTL Section on seller financing and private money lenders is available for further instructions and information on this topic.



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Endnotes

1 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L No. 111-203, 124 Stat. 1376 (2010) 12 U.S.C. §§ 5301-5641 [hereinafter Dodd-Frank Act].

2 12 U.S.C. §§ 5481-5603.

3 H.R. 4173, 111th Cong. (2010).

4 12 U.S.C. § 5582 (2010).

5 "Residential mortgage transaction" means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling. 12 C.F.R. §1026.2(a)(24) (2011).

6 "Purchase Money Mortgage" means a mortgage that the buyer gives the seller, when the property is conveyed, to secure the unpaid balance of the purchase price. Black's Law Dictionary 1103 (9th ed. 2009).

7 12 C.F.R. § 1026.3(a) (2011).

8 12 U.S.C. §§ 5101-16, Title V of the Housing and Economic Recovery Act of 2008 (Pub. L. 110-289, 122 Stat. 2654) as amended by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) Pub. L. No. 111-203, 124 Stat. 1376 (2010).

9 12 C.F.R. § 1008 (2014). Regulation G (12 C.F.R. § 1007) covers financial institutions while Regulation H is broader. Effective July 16, 2014, the regulations were removed from Title 24 as the Dodd-Frank Act transferred the authority to the CFPB to administer the SAFE Act and the CFPB had issued its own regulations under Title 12.

10 Under the SAFE Act there are licensing requirements such as examinations that a natural person must complete. See 12 C.F.R. §1008.15.

11 To obtain information about the registration process, visit http://mortgage.nationwidelicensingsystem.org. Additional information from the Florida Office of Financial Regulation: http://www.flofr.com/staticpages/loanoriginators.htm. Ch. 494 of the Florida Statutes also covers licensing, registration and activities authorized and prohibited regarding loan originators but that is outside the scope of this article. A loan originator under Ch. 494, F.S., does include individuals required to be licensed under the SAFE Act. The Florida Fair Lending Act (Part IV of Ch. 494, F.S.,) was repealed effective July 1st, 2014.

12 12 C.F.R. § 1026.36(a) and 12 C.F.R. §1026.2(a)(22) .

13 12 C.F.R. § *1026.36(a)(5).*

14 12 C.F.R. § 1026.36(a)(4).

15 P.L. 103-325, 108 Stat. 2160 (1994), amending 15 U.S.C. § 1601 et seq. (TILA)

16 12 C.F.R. § 1026 et seq.

17 2013 Home Ownership and Equity Protection Act (HOEPA) Rule. Small Entity Compliance Guide, p.5 (2013).

18 12 C.F.R. § 1026.2(17)(v) a creditor under this regulation is a person who regularly extends consumer credit that is subject to a finance charge. Consumer credit under 12 C.F.R. §1026.2(12) includes credit extended to a consumer for a household purpose and a consumer under 12 C.F.R. §1026.2(12) includes a natural person in whose principal dwelling a security interest is or will be retained or acquired. Refer to all of these definitions for a clearer and more complete understanding of what a creditor and extending credit mean under § 1026.

19 12 C.F.R. § 1026.34 (4)

20 12 C.F.R. § 1026.32(a).

21 Under 12 C.F.R. § 1026.2(19) a mobile home or trailer is considered a "dwelling" if used as a residence.

22 12 C.F.R. § 1026.32.

23 12 C.F.R. § 1026.34 (4).

24 12 C.F.R. § 1026.32(d).

25 12 C.F.R. § 1026.34(10).

26 12 C.F.R. § 1026.34(7) and (8).

27 12 C.F.R. § 1026.34(6).

28 12 C.F.R. § 1026.34(5).

29 Though the regulation does not specify examples of limits of activities and functions, an injunction to cease and desist committing a violation should fit under this category.

30 12 U.S.C. § 5565(a)(2) (2010).

31 See 12 U.S.C. § 5564(g)(1). Due to the general nature of "unless otherwise permitted by law or equity, this regulation may be subject to further interpretation by the courts.

32 12 U.S.C. § 5565(2) (2010).

33 12 U.S.C. § 5552 (2010).

34 Chapters 501 and 494, F.S.

The Disclosure Dilemma: Navigating the Rules When Confidentiality Hurts the Client

By Matthew Triggs and Jessica D. Zietz, Boca Raton, Florida

It is a frightening but plausible scenario: a wealthy, elderly woman—we'll call her Judy—shows increasing signs of dementia. Judy's husband of one year, Jack, curiously neglects to seek medical help for her. Instead, he pressures Judy into transferring all of her assets into his individual name. Further, he ignores all communications from her friends and family and suspicions are raised that he is physically abusing her.

Judy's son, Steve, watches these events with increasing alarm. Concerned for his mother, he retains a lawyer to initiate an incapacity proceeding that will lead to an eventual guardianship. Steve hopes that the court will ultimately find Judy to be incapacitated and appoint him as the guardian of her person and property so that he can protect her.

As Steve's lawyers prepare the incapacity and guardianship petitions, Steve remembers that his mother has been represented for over thirty years by Smith & Johnson, a local law firm, in connection with her estate planning matters. He suspects that the firm's lawyers may have witnessed signs that his mother may be incapacitated as well as Jack's abusive and unduly influential behavior towards his mother. Steve contacts Smith & Johnson with the hope that its lawyers will share their observations and strengthen his incapacity argument. In his communications to the firm, Steve is clear that he does not want his mother learning of the impending proceedings because he is certain that she would tell Jack and, as a result, Jack would further mistreat her and isolate her from the family.

At Smith & Johnson, attorney Ann Smith nervously considers how to respond to Steve's requests. Ann has represented Judy for years and has, in recent months, witnessed her neglect at Jack's hands. Ann worries, however, that ethical considerations could preclude her from assisting Steve in his case.

Through this article, we will address what are probably Ann's two most pertinent ethical considerations:

1. *May* Ann reveal to Steve and his lawyers her observations of Judy's deteriorating physical and mental condition, Jack's mistreatment of, and undue influence over, Judy and other information relevant to the impending guardianship proceedings?
2. *Must* Ann inform Judy of Steve's plans to bring the incapacity and guardianship petitions?

Ann's Observations of Judy and Jack
Rule 4-1.6

With respect to confidential information, the starting point is Rule 4-1.6 of the Florida Bar Rules of Professional Conduct (the "Rules"). Rule 4-1.6(a) provides that "a lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent." Based on this Rule, lawyers have a duty to preserve client confidences. This Rule "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[1] Members of the public "are more likely to seek legal advice, and thereby heed their legal obligations, when they know that their communications will be private."[2] Absent certain specified exceptions, the lawyer is not allowed to reveal information about the representation of a client unless the client gives informed consent. The comments to this Rule explain that maintaining confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship."

maintaining confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship."

While the general rule mandates preservation of confidences, the Rule provides for certain exceptions. Rule 4-1.6(b) dictates two circumstances under which a lawyer must reveal confidential information. These circumstances are: (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another.[3]

As to when a lawyer may reveal confidential information, Rule 4-1.6(c) lists five circumstances: (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed; (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client; (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (5) to comply with the Rules Regulating The Florida Bar. For Ann's purposes, the pertinent exception is (1), where such disclosure would be appropriate if she reasonably believes it necessary to serve Judy's interests, unless it is information that Judy specifically required her not to disclose.

Recent Professional Ethics opinions of the Florida Bar have analyzed the availability of this exception.[4] In Opinion 10-3, the Bar considered "[a] lawyer's ethical obligations regarding a request for confidential information of a deceased client by the personal representative, beneficiaries or heirs-at-law of a decedent's estate, or their counsel." The opinion provided two examples of situations in which disclosure might serve the deceased client's interests. First, a lawyer can properly disclose confidential information relating to the decedent's estate plan if "the decedent's lawyer determines that disclosure of the information would aid in the proper distribution of the decedent's estate according to the decedent's wishes ..." Second, "if a beneficiary or heir-at-law asks for

specific information and the decedent's lawyer determines that voluntary disclosure of the information would serve the decedent's interests, the lawyer may disclose that specific information." The opinion stressed, however, that a lawyer must keep information confidential if the client required that it not be disclosed, regardless of whether disclosure would serve the client's interests. Furthermore, "[d]oubt should be resolved in favor of nondisclosure."

Ann can draw several analogies from these opinions. For example, if Jack's mistreatment of Judy has forced what appears to be an inconsistent and undesirable deviation from Judy's long-established estate plan, disclosure of that mistreatment could assist with the distribution of Judy's estate according to her wishes. Likewise, if Judy's diminished capacity renders her susceptible to undue influence, disclosure of information to support the incapacity determination and resulting guardianship would also serve Judy's interests. Assuming that Judy never previously instructed Ann to withhold and not disclose the requested information, Ann has some authority for the proposition that disclosure to Steve and his lawyers would serve Ann's interests by bolstering support for an incapacity determination and eventual guardianship.[5]

What happens, however, if Judy learns of the proceedings and asks Ann not to provide information to Steve? In that case, could Ann argue that, pursuant to Rule 4-1.6(b), she must reveal the information to prevent Judy's serious bodily harm? While it would appear that this situation falls squarely within Rule 4-1.6(b), a closer reading of the Rule would conclude otherwise. The specific exception within the Rule allows for disclosure to prevent the death or serious bodily harm *of another*. The Rule is *silent* as to disclosure to prevent the death or serious bodily harm *of the client*. The comments suggest that the harmful act must be the client's, and not to be committed *against* the client, stating, "Rule 4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed." In our scenario, because Ann represents Judy and not Steve, the Rule appears to foreclose Ann's disclosure of this information if Ann's intent is to prevent bodily harm to Judy.

Rule 4-1.14

Assuming Judy has not specifically foreclosed disclosure of confidential information,[6] Rule 4-1.14(b) provides additional justification for Ann to supply information that will support Steve's incapacitation and guardianship petitions. It states, "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." While the comments to Rule 4-1.14 do not provide guidance on what is encompassed by "other protective action," Ann could argue that providing information in support of an incapacitation petition is protected by the Rule, especially since the Rule makes clear that Ann herself could have initiated the guardianship proceedings. Indeed, the comments state that "[i]f a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests."[7] The Florida Bar has also made clear that "[a] lawyer has a duty to safeguard the interests

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Stout Risius Ross, Inc.	Garry Marshall	713-225-9580
The Florida Bar Foundation	Jane Curran	407-451-9187
Wells Fargo Private Bank	Mark Middlebrook / George Lange / Alex Hamrick	813-225-6544

of a client who is mentally incompetent, including making decisions on behalf of the client such as whether to waive or fail to assert a right or position, or whether to petition the court for appointment of a legal representative."[8]

Ann's Knowledge of Steve's Guardianship Petition

With respect to the question of whether Ann has a duty to advise Judy of the impending incapacity and guardianship petitions, the starting point for the analysis is Rule 4-1.4, which dictates how and when a lawyer must inform a client of the status of her representation. Under this Rule, a lawyer must, among other things, "keep the client reasonably informed about the status of the matter" and "promptly comply with reasonable requests for information." Furthermore, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[9] In other words, under the general rule, a lawyer should keep a client informed. However, it should be noted that the Rule refers to providing information regarding the "status of the matter" and "representation." In context, that should normally be construed to apply with respect to providing information regarding Judy's estate plan. Judy, unaware of Steve's plans, can hardly request information on these planning matters. The comment to Rule 4-1.4 suggests that, were Judy to later seek this information, Ann would be justified in withholding it. As the comment explains, "In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client." Here, Steve is convinced that the information should be withheld because Judy would share it with Jack—to her detriment. If Ann shares this belief, she could be justified in declining to share this information with Judy.

Conclusion

It appears that, absent Judy's proscription, a combination of Rules provide support for the notion that Ann can respond to Steve's requests. Nevertheless, her dilemma raises difficult questions for lawyers and clients alike. A lawyer should always proceed cautiously when potentially revealing client confidences. A client could later disagree with his attorney's decision on what served the client's interests. A well-meaning third party may seek disclosure from a lawyer based on concerns that are later dispelled. Though Ann's scenario demonstrates that confidential information may sometimes be disclosed, attorneys should engage in a thoughtful analysis (and brush up on the Rules) before making any disclosures of their own.



M. TRIGGS



J. ZIETZ

Matt Triggs is a partner in the litigation department of Proskauer Rose LLP and the head of the department in Boca Raton. He concentrates his practice in commercial and probate litigation.

Jessica D. Zietz is an associate in the litigation department of Proskauer Rose LLP in Boca Raton. She concentrates her practice in probate and commercial litigation.

Endnotes

1 Comment to Rule 4-1.6, Florida Rules of Professional Conduct.
2 Preamble, Florida Rules of Professional Conduct.
3 Rule 4-1.6(b), Florida Rules of Professional Conduct.
4 *See, e.g.*, Florida Ethics Opinion 12-4 (Aug. 21, 2013); Florida Ethics Opinion 10-3 (Feb. 1, 2011).
5 Interestingly, this subsection omits any requirement that the disclosure serve the client's interests with respect to the particular matter in which the lawyer represents the client. Instead, it appears that the disclosure need only generally serve the client's interests.
6 The comments to Rule 4-1.6 suggest that, while other Rules in various circumstances permit disclosure of information related to a representation, a presumption should exist against disclosure. *See* Comment to Rule 4-1.6, Florida Rules of Professional Conduct.
7 Comment to Rule 4-1.14, Florida Rules of Professional Conduct (emphasis added).
8 Florida Ethics Opinion 85-4 (Oct. 1, 1985).
9 Rule 4-1.4(b), Florida Rules of Professional Conduct.

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RPPTL Section Executive Council Meeting South Seas Island Resort, Captiva May 28 – June 1, 2014

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

The annual meeting of the Real Property, Probate & Trust Law Section of the Florida Bar was special and unique, not just for its location at the South Seas Island Resort but also for some of the events that took place.

A number of us hearty souls assembled Wednesday evening at the South Seas Island Resort golf course for golfing in the dark. Organized by George Meyer, we played nine holes with "glow in the dark balls" on a moonless night. Believe me, it was plenty dark and plenty fun. Each tee and hole was lit with glow sticks of one assortment or another and most of the flags were also decorated with flashing lights. Nevertheless, it was pretty dark and some of us got lost more than once. Fortunately there were golf carts circling the area to send us in the right direction and bring beverages as required. It was quite fun and entertaining (and I got my first ever birdy!!). Prizes, including best heckler, were awarded in a number of categories at the Executive Council Meeting on Saturday.



Michael Gelfand accepting the swimwear award from Rob Freedman

Committee meetings started at 8:00 a.m. on Thursday, May 29th and continued throughout the day with 26 different committee meetings on a broad variety of topics. That evening we attended a special welcome reception for our sponsors held off site at the Captiva Yacht Club. We traveled to the Yacht Club by motor coach – it was just down the road. Everyone was treated to a lovely view of the sunset, as well as an excellent buffet. Around 9:00 p.m. we returned to the resort and the hospitality suite was open for beverages and desserts.


Jerry Wells accepting the liquid award from Eric Virgil

Friday morning started off with a seminar "Bursting Through the Technology Barrier-the RPPTL Edition." The seminar ran into lunch time. At lunch, where our spouses and guests were welcomed, the official election of officers took place and annual awards were presented. In addition to the serious awards that recognize contributions to the Section by active, hardworking Section members, there were a number of new and unusual awards that were presented by Rob Freedman and Eric Virgil. The first new award was "Most Interesting Man in RPPTL" which went to Jerry Wells. The next award was "I stayed at a Holiday Inn Express Last Night" which went to Chip Waller. Angela Adam was a recipient of the "Better Luck Next Time Award" for heading up a subcommittee on a controversial issue. The "Peggy Rolando Time for a New Car Award" went to Rohan Kelley. The "Defender of the Constitution Award" went to Aaron Miller and the "Michael Gelfand Honorary Pool Boy Award" went to Michael Gelfand.



Eric Virgil and Rob Freedman introducing the "Better Luck Next Time Award"

Friday afternoon saw some more committee meetings and some down time which was welcomed by many of us to our hotel rooms and condo units were located right on the Gulf with a beautifully wide, white beach with lots of shells.

The Friday evening event was a reception dinner with entertainment, held on site at the resort. The hospitality suite was open until 11:30 p.m., although there were very few reptiles who were able to stay up that late.

Saturday morning started bright and early with the Probate and Real Estate Roundtable breakfasts. Food service started at 7:30 a.m. and the meetings commenced right around 8:00 a.m. The Executive Council meeting was from 10:00 a.m. until 12:30 p.m., followed by an afternoon cruise on the Lady Chadwick Boat from 2:30 p.m. until 4:30 p.m., where lots of dolphins were spotted.

Dinner that evening was offsite and further down the island at Sweet Melissa's Café. Sweet Melissa's offered a sit-down dinner in a very elegant setting. There were a number of menu options and the food was outstanding. The motor coaches brought everyone back by 9:30 p.m. and the hospitality suite was open, although by the end of the weekend everyone was pretty tired.

Following Sunday morning's brunch, everyone checked out and headed home after a truly lovely weekend. As you can see, these meetings are loaded with opportunities to expand your knowledge of the law and be actively involved with the development of the law through the various committees, while networking and socializing with outstanding attorneys in all areas of real estate, probate and trust law. If you are not a regular attendee, be sure to mark your calendar for the next meeting in your part of the state.

Captiva



Peggy Rolando and sis, Dee Dee Nye, planned the welcoming Thursday night reception



Always a pleasure to greet and meet: Judge Maria Korvick and Judge Norma Lindsey



Krysten with Pat Hancock and Deborah Boyd from Fidelity National, both also very active Executive Council members



Learning about security and privacy concerns at convention seminar



Setting up to honor our much appreciated sponsors



Krysten Lynch from our Sponsors Committee with two of the many honorees, Joe Gitto and Roy Meyers from MPI





To the Officers of the Executive Council serving with Peggy Rolando - *a Special Thanks*



One of our sponsors addressing the Executive Council meeting on Saturday morning

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

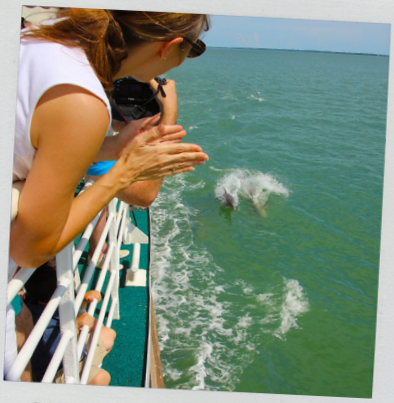
Captiva



We were treated Friday evening to lively music by JP Goldman and Dan Signor



Peggy Rolando with Laura Sundberg, recipient of the 2014 Service Award



Watching the dolphin show Saturday afternoon



Diana Zeydel at the Executive Council meeting discussing one of the proposals



Reviewing real estate issues at the RP Problems Study Committee



Debbie Goodall and Sancha Whynot relaxing with some fine wines

For more photos, log into www.rpptl.org and view the photo galleries



Alex and Christine Hamrick with their beautiful daughter, Gwen, relaxing during the boat tour



Attendees at one of our very large and active committees: Probate Law & Procedure





Peggy thanking our multi-tasking Bar staff, Dixie Teel and Mary Ann Obos

Roundtables

Saturday, May 31, 2014
South Seas Island Resort
Captiva, Florida

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

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

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

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

The Director of the Probate and Trust Law Division, Debbie Goodall, called the meeting to order on Saturday morning, May 31, 2014, at 8:00 am in Salon A/B of the South Seas Resort in Captiva, Florida. Debbie welcomed and introduced the many visitors and law students in attendance. She also welcomed our new section administrator, Mary Ann Obos.

Action Items

Ad Hoc Committee on Personal Representative Issues - Jack A. Falk, Jr., Chair: Jack Falk discussed a proposal concerning: (1) the time period within which to file objections to probate after a notice of administration is served and the content of the notice of administration; and (2) the personal representative's and interested person's rights and duties when a personal representative is unqualified to act or is no longer qualified to act as personal representative. The proposal was discussed in detail at the Roundtable in Amelia Island. Jack concluded by thanking his Committee members for their hard work. NOTE: This Action Item was passed by the Executive Council later that day.

Estate and Trust Tax Planning - Elaine M. Bucher, Chair: The Estate and Trust Tax Planning Committee is working on a proposal to amend F.S. §§ 710.105, 710.111 and 710.123 in order to permit a donor or a holder of a power of appointment to provide in the instrument creating the custodianship that the custodianship does not terminate until the minor's attainment of age 25. Debbie Goodall reported that the Committee had received some comments on the proposal and to allow for further refinement, this would not be an Action Item at today's Executive Council meeting.

Information Items

Guardianship & Power of Attorney - Sean W. Kelley, Chair: Sean Kelly discussed the recent Florida Supreme Court Order which quashed the Ninth Judicial Circuit's Ad-

See "Probate & Trust Division," next page

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

Thank you to the Roundtable Sponsor, Fidelity National Title Group

After a hearty breakfast over which Division members touched base with peers from all parts of the State, the Roundtable meeting of the Real Property Division of the RPPTL Section was called to order shortly after 8:00 a.m. on May 31, 2014, at South Seas Island Resort in Captiva. The Real Property Division Director, Michael J. Gelfand, opened the meeting by thanking the Real Property Roundtable Sponsor, Fidelity National Title Group.

Action Item

Residential Real Estate & Industry Liaison (RREIL) Committee – Frederick W. Jones, Chair: Fred reported on proposed amendments to the Residential Contract For Sale And Purchase and Its Comprehensive Rider. The proposed amendments to the Contract were to Paragraph 9(c) under Title Evidence, Insurance and Paragraph 10(d) under Flood Zone Elevation Certificate. The proposed amendments to the Comprehensive Rider were to Sections: C. Seller Financing, E. Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA), and H. Homeowner's/Flood Insurance.

The Committee received numerous comments about the proposed amendments. As a result and to permit further consideration and drafting, the Committee did withdraw these proposed amendments. The comments emphasized concerns about the effects of the Dodd-Frank Act relative to seller financing. Because of these concerns, the Committee will send an email to all Section members reminding them to be aware of the implications of the Dodd-Frank Act on seller financing. The Committee anticipates bringing these amendments as a revised Action Item at the Breakers' Meeting in July.

Information items

Condominium & Planned Development – Steven H. Mezer, Chair: Steve reported on recent action by the

See "Real Property Division," next page

PROBATE & TRUST DIVISION

ministrative Order relating to professional guardians. Sean also reported that the Executive Committee had approved the Section sending a letter to the Clerk of the Florida Supreme Court expressing the Section's continued interest in opposing the Ninth Judicial Circuit's proposed Local Rule 9 relating to professional guardians and requesting a hearing if the Florida Supreme Court considers Local Rule 9 in the future. He reported on the current status of litigation that challenges the constitutionality of the provision in the Florida Power of Attorney Act stating that only a "qualified agent" is entitled to compensation for services rendered as an agent. The Committee will continue to monitor the status of the litigation and will report to the Section regarding any developments.

Ad Hoc Study Committee on Estate Planning Conflict of Interest - Bill Hennessey, Chair: Bill Hennessey reported that the Committee is very close to completing its work on the lawyer-fiduciary statute. Bill stated that the proposal gives full discretion to clients to select fiduciaries, and it does not prevent lawyers from serving as fiduciaries. The proposal provides that a lawyer who does not make the required disclosures to the client will not be able to receive a fiduciary fee, but will be able to receive payment for attorney's fees. He anticipates that the proposal will be an Action Item at the Breakers meeting in July and it will be discussed as an information item at the Executive Council meeting today.

Digital Assets and Information Study Committee – J. Eric Virgil, Chair: Eric Virgil reviewed the Committee's proposal regarding granting fiduciaries the authority to have access, control or copies of digital assets and accounts and removing barriers to fiduciaries' access to electronic records. The proposal titled "Florida Uniform Fiduciary Access to Digital Assets Act" is based upon the Uniform Law Commission Act entitled the Uniform Fiduciary Access to Digital Assets Act. Debbie advised that Eric had been busy making presentations at many different committee meetings over the past days in order to reach as many section members as possible because not all committee members are on the Executive Council.

Presentation:

Estate & Trust Tax Planning – Elaine Bucher, Chair: Pam Price presented an overview of the Committee's proposed revisions to the Florida Estate Tax Apportionment statute that is anticipated to be an Action Item at the Breakers Executive Council meeting in July. Elaine discussed the Family Trust Company legislation (Chapter 662, F.S.) which was passed during the past legislative session. As a result of various changes to the Act which were made by the Florida Office of Financial Regulation (OFR) during the legislative process, the Committee has prepared a "glitch bill" to address the changes which were made.

Announcements:

Legislation Review: Debbie reviewed the process for legislative review of section initiatives and indicated that it is a

continued, next page

REAL PROPERTY DIVISION

Executive Committee. During this legislative session, a bill sought to change the definition of the practice of law to exclude a number of items traditionally performed by attorneys and permit performance by community association managers. These included interpretation of governing documents or statutes which govern the community association, determination of title to real property and completion of documents that require interpretation of statutes. The Executive Committee approved a position in opposition to these bills, SB1466, SB1496, HB7037 and CS/HB7039. Unfortunately, the legislation passed both houses so the Section is taking reasonable efforts to encourage the Governor to veto the bills.

Ad Hoc Trust Account Committee – John B. Neukamm & Jerry E. Aron, Co-Chairs: Ted Conner, on behalf of the Committee, provided a review and overview of new Rule 5-1.2(c), *Florida Rules of Professional Conduct*, which requires multi-lawyer firms to have a written supervision and compliance plan for each trust account. The rule was approved by the Florida Supreme Court on March 27, 2014, effective June 1, 2014.

Upcoming Issues

Michael Gelfand noted that a key benefit of RPPTL participation is a heads up on what is anticipated to occur. Thus: Steven Mezer of the Condominium & Planned Development Committee reported on efforts to fine tune the Condominium Act's termination provisions under § 718.117, F.S. Manny Farach presented, on behalf of the Real Property Litigation Committee, the recent decision of *Dingle v. Dellinger*, 37 Fla. L. Weekly D322 (Fla. 5th DCA, February 7, 2014) and shifting professional liability standards. This triggered significant discussion concerning the potential of the Section being involved as an *amicus*. An emissary from the Probate and Trust Division addressed the garnishment of an ex-spouse's discretionary trust following a contempt order against the ex-spouse who failed to pay alimony, in light of strong public policy favoring enforcement of alimony.

Recognition

Michael introduced several local law students who were attending the meeting and encouraged them to continue their attendance. Michael also introduced RPPTL members who were recently inducted as Fellows of the prestigious American College of Real Estate Lawyers: Rick Eckhard, Doug Christy and Jim Robbins. This honor is the result of a rigorous peer review process; thus, the Fellows should be honored.

Not the least, Michael introduced and congratulated Andrew O'Malley as the Real Property Division Director-Elect. Drew's significant contributions to the profession were briefly recounted and the Division welcomed him.

continued, next page

PROBATE & TRUST DIVISION

goal that any proposed legislation would appear two times in an Executive Council Agenda - first as an information item and later as an action item. This will provide ample opportunity for review and comment by as many interested parties as possible.

New Committee and Executive Council Roster for 2014 - 2015: Debbie announced that a new Probate and Trust Law Division Committee has been formed – the Ad Hoc Study Committee on Spendthrift Trust Issues. The new committee will be chaired by Lauren Detzel and Jon Scuderi. She also advised that the roster for the Executive Council for the 2014-2015 year was published in the Supplemental Agenda materials. Debbie thanked Shane Kelley for his hard work as the outgoing chair of the Trust Law Committee and congratulated him on his new role as Director of ALMS and newest member of the RPPTL Executive Committee. She also congratulated Sean Kelley for his appointment as incoming Chair of the Florida Bar Probate Rules Committee and thanked him for his work as outgoing chair of the Guardianship & Power of Attorney Committee. Debbie reminded the committee chairs to be aware that as issues are discussed, some matters are more appropriately referred to the Probate Rules Committee.

Committee Reports: Each committee chair or vice chair was given an opportunity to present a summary of his or her committee meeting. Detailed minutes of the committee meetings can be found on the section website at www.rpptl.org.

The meeting was adjourned at 10:00 AM.

REAL PROPERTY DIVISION

Legislation

Legislation Committee – Robert Swaine and Robert Freedman. Rob Freedman reported on the actions of the Legislative Committee, its goals for the next legislative session, and the intent of the Committee to ensure that proposed legislation is reviewed by multiple committees to allow all stakeholders to have input and an opportunity to reach consensus prior to presentation to the Executive Council.

Goals of Committees

Michael led a discussion on the important role of committees, their function and goals, including education of lawyers, CLEs, enhancement of professionalism, and the many facets of committee involvement. Michael encouraged and suggested methods to involve diverse participation in committee processes. Michael promoted the efficient use of the website (be sure to post committee notices and minutes) and urged all committees to contribute regularly to ActionLine, allowing potential leaders to publish and "Be a Star." He suggested methods and processes for enhancement of committee CLE programs and recruitment of new members, incorporating their energies in committee efforts.

Time being very short, there were no further committee reports and the meeting was adjourned at 10:00 a.m.

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Two Ways to Improve Your Trust & Estate Practice

A Tribute to Margaret "Peggy" Rolando

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

The May 2014 meeting of the Real Property, Probate and Trust Law Section of The Florida Bar was the final occasion for Peggy Rolando to serve as the Section Chair. Peggy has had a long and illustrious career in the legal profession and in service to the Real Property, Probate and Trust Law Section.

Peggy started her professional career in 1972 when she graduated from Spring Hill College. Peggy continued her education at Florida State University earning a Master's Degree in 1974 and her law degree with honors in 1978. After graduation, Peggy moved far away from Tallahassee, back to her hometown in Miami, where she joined the firm of Shutts & Bowen where she still practices today. In 1984, Peggy became a partner in Shutts & Bowen's real estate department. She concentrates her practice on acquisitions, development, sales, financing, and operation of large scale real estate projects. Her experience with condominiums, planned developments, mixed use projects, resorts, clubs, and hotels is extensive. Peggy has been a long and devoted member of the Section's Condominium and Planned Development Committee. As part of her involvement with the committee, Peggy has been a regular speaker for The Florida Bar on condominium and real estate related matters as well as being involved in ALI-CLE seminars. Peggy has also spoken at the Institute on Condominium & Cluster Developments sponsored by the University of Miami School of Law. In addition to her many speaking engagements, Peggy has been a regular contributor to real estate related publications, co-authoring Chapter 2 of the book entitled Florida Condominium and Community Association Law. Peggy also maintains strong ties to her alma mater, Florida State University, having served on the College of Law's Board of Visitors since 1994 and the University's Board of Trustees since 2010. Of course, Peggy is actively involved in several community organizations and the American College of Real Estate Lawyers.



Peggy was a natural at the helm

So, now you ask, how did she ever find time to serve as Chair of the Section? I put just that question to Peggy and she answered that two things allowed her to have a successful year as Section Chair: working weekends and working with fabulous people.

Peggy relayed her feelings that the Section in general and Peggy specifically, are so fortunate to have so many devoted Section committee members and chairs who generously volunteer so many hours. Peggy was especially appreciative of our Section Committee system and our outstanding Section officers.

Peggy pointed out that the long leadership track to being the Section Chair, which can take five or six years to navigate, provides excellent training to those finally taking "the helm".

Additionally, once a person rises to the position of Chair, he or she has phenomenal support from those who have been there before, as well as those following.

Peggy commented that the high volume of communication to the Chair, both calls and emails, can be almost overwhelming, but they lead to so many opportunities to direct folks to the correct resource, to recruit attorneys for committee involvement to solicit ideas, and to build consensus. Peggy relayed that another advantage of the long track to chairmanship is the opportunity to start ideas or projects when you are in a role like secretary, division director, or chair elect and to see it come to fruition. For example, Peggy was very interested in seeing ActionLine become a premier publication, and over the past few years under the guidance of Silvia Rojas, Peggy feels that goal has been accomplished. Another important focal point to Peggy was the improved Section website, which was launched during her tenure but started in 2012. A long term goal for Peggy, which has been achieved to a significant degree, but still deserves more attention, is making our Section a younger and more diverse group. Peggy is quick to point out that none of these goals could have been met or even attacked without the help and dedication of so very many hardworking members of the Section's Executive Council.

Another goal for Peggy is utilization and continual refinement of the strategic plan, including working together with the "Big Bar", to bring more transparency to financial accountability and reporting.

When asked to describe a strength of the Section, Peggy cited the willingness of the Executive Council and committee members to debate, collaborate, and compromise, as well as to seek ways to improve and strengthen the law. Peggy fully intends to be around for many years to be involved in the Section and that creative process.



Welcome to the back row!

So, Margaret "Peggy" Rolando, welcome to your honored place at the back row. To all Section members, when you see Peggy, give her a big, warm thank you for all of her time and effort as Section Chair for the 2013-14 year. Thanks Peggy!

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Use of Civil Theft Statute in Trust Litigation

By: Jennifer C. Lester and Shannon M. Miller, Gainesville, Florida

Florida law provides a mighty tool for a wronged beneficiary in trust litigation. § 722.11, the Florida Civil Theft Statute, provides a procedure for a beneficiary to recover stolen trust funds and charge treble damages against a trustee who has a wrongly failed to distribute the trust to the proper beneficiary. This powerful but underutilized statutory weapon can provide an incentive for a trustee to follow trust dictates, make distributions and otherwise be accountable for depriving a beneficiary of the benefits of a trust. Civil theft is based on the common law action for conversion. The Florida Statutes have converted this common law into a statutory device. Under Florida law, conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time.[1] The Civil Theft Statute provides civil penalties for doing so.



Attorneys representing wronged trust beneficiaries must carefully follow statutory dictates before making use of the Civil Theft Statute. First, the wronged beneficiary must make a written demand for the funds 30 days before filing an action for damages.[2] Once the time period expires without payment, a complaint can be filed for civil theft. The claim for civil theft can be used along with a claim for conversion, but is different and has a heightened evidentiary burden.[3] However, Florida law is clear that a trust beneficiary can assert a claim for civil theft against a trustee.[4] Of course, the civil theft can also be the basis for a claim to remove a trustee and for breach of fiduciary duty. It can be combined with an action for exploitation under § 415.1111, Florida Statutes, which provides for actual and punitive damages, if the beneficiary is a vulnerable adult.

The theft must be proven by clear and convincing evidence before a plaintiff is entitled to treble damages under the statute.[5] A general allegation is insufficient. Specificity is required for the claim to succeed. The complaint, in the count for civil theft, must allege a "felonious intent to steal."[6] The elements of this claim are that the trustee intended to deprive beneficiary of property in trust and that the trustee intended to appropriate trust property to his own use, or the use of another, non-beneficiary.

In trust litigation, it is not unusual to find that a trustee has misappropriated funds to his own benefit. What is more unusual, but still occurs, is when the trustee directs funds intended for one beneficiary to another beneficiary or to a non-beneficiary. In that event, the civil theft statute still applies and can be used to force the trustee to repay the funds to the proper beneficiary.

There are many benefits of the Civil Theft Statute. Most importantly, § 772.11, Florida Statutes, provides for treble damages.[7] The statute also provides for attorneys' fees and costs for the prevailing party.[8] In some cases, the trustee is elderly, and it is important to note that a claim for civil theft provides more benefits than a similar claim for punitive damages. First, the death of the elderly person does not result in lost jurisdiction for claims made for civil theft.[9] Second, unlike a claim for punitive damages, no evidentiary showing must be made to the court before alleging civil theft. Third, treble damages for civil theft can be awarded against an estate, unlike punitive damages, as civil theft damages are remedial and not punitive, in nature.[10] Finally, such a case can be "fast-tracked" if a beneficiary or trustee meets the requirements of § 415.1115, Florida Statutes.

Florida courts have found that a claim for civil theft is appropriate when the plaintiff claims that the defendant has misappropriated or taken trust funds.[11] Importantly, treble damages are mandatory once a jury finds that the defendant committed civil theft.[12] Further, attorneys' fees and costs are mandatory once a jury finds a civil theft has occurred. Obviously, these provisions have a great potential to increase the value of an award as well as increasing the settlement value of the case.

In order to obtain relief for a trust beneficiary, the beneficiary must prove several things. First, the court must determine that trustee has feloniously deprived a beneficiary of trust proceeds to which the beneficiary is entitled. Next, the beneficiary must prove that the funds were taken for the trustee's own benefit or for the benefit of another. Finally, the beneficiary must show that the trust distribution was not paid to the beneficiary and that the trustee had the intent to permanently deprive the beneficiary of the trust benefits.

Once the letter is sent and the 30 days expires without payment, the beneficiary can file the action. The attorney should consider other potential claims including trustee removal; exploitation, and almost certainly, breach of fiduciary duty. If a claim for civil theft isn't clear at the beginning of the case, a complaint can be filed without it. A collateral benefit in proceeding in this manner is that the plaintiff/beneficiary can take discovery on pending claims and to determine if civil theft action is warranted. At that point, the plaintiff can write the civil theft letter and move to amend complaint at the same time to add the count for civil theft. If the benefits are not paid, the plaintiff can then move to amend the complaint to include the separate count for civil theft.

However, the Civil Theft Statute has risks and claims under it should not be taken lightly. The defendant has the right to recover attorneys' fees and costs if the claim was raised without substantial factual or legal support.[13] Further, the evidentiary standard is high. Civil theft must be proven by clear and convincing evidence.

If a trust beneficiary loses the claim for failing to show

adequate support for the civil theft claim, fees and costs must be awarded to the defendant without considering whether the beneficiary has the financial ability to pay.[14] Civil theft is not a claim that can be pled broadly. The plaintiff must accurately plead what has been stolen. Also, if the defendant pays the stolen funds back within 30 days, the plaintiff must release him from further liability.[15] Finally, punitive damages are not awardable under this civil theft statute,[16] but can be awarded pursuant to a separate claim for exploitation if the plaintiff is a vulnerable adult.[17]

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Endnotes

1 Senfeld v. Bank of Nova Scotia Trust Co., 450 So. 2d 1157, 1160 (Fla. 3d DCA 1984).
2 Fla. Stat. § 772.11(1) (2013).
3 Fla. Stat. § 772.11(1) (2013).
4 Weiss v. Courshon, 618 So. 2d 255 (Fla. 3d DCA 1993).
5 Fla. Stat. § 772.11(1) (2013).
6 Lewis v. Heartsong, 559 So. 2d 453 (Fla. 1st DCA 1990).
7 Fla. Stat. § 772.11(1) (2013).
8 Fla. Stat. § 772.11(1) (2013).
9 Fla. Stat. § 772.11(4) (2013).
10 Snyder v. Bell, 746 So. 2d 1096 (Fla. 2d DCA 1999).
11 Hofrichter, P.A. v. Zuckerman &Venditti, P.A., 710 So. 2d 127 (Fla. 3d DCA 1998).
12 See Anton v. Anton, 763 So. 2d 404 (Fla. 4th DCA 2000).
13 Fla. Stat. § 772.11(1) (2013).
14 Fla. Stat. § 772.11(1) (2013).
15 Fla. Stat. § 772.11 (2013).
16 Fla. Stat. § 772.11(1) (2013).
17 Fla. Stat. § 415.1111 (2013).



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Community Associations: CS/CS/HB 807 by Representative Moraitis and Senator Ring is the omnibus community association legislation of the 2014 Session. The final version of the bill includes Section initiatives that provide for: (1) the notice revisions to MRTA; and (2) the extension for Part VII of the Condominium Act. The legislation also includes:

Timeshares: The bill clarifies the status of timeshare communities under Chapter 509 of the Florida Statutes.
Emergency Powers: The legislation provides Cooperative Associations and Homeowners Associations with the same emergency powers during a natural disaster that currently exist for Condominium Associations.
Access to Abandoned Property: The legislation establishes procedures that permit an association to take control of abandoned property in a condominium community.
Coops: The bill makes a series of changes to the Cooperative Act conforming provisions to current provisions in the Condominium Act and Chapter 720.
Board Meetings: The legislation expands the use of technology, permitting absent board members to participate in meetings using Skype, Facetime or other modes of electronic and video communication.
Records: The bill imposes a new 5-day deadline for outgoing board members to turn over records to newly elected board members.
Meeting Accessibility: The legislation also requires all homeowners' association meetings to be held at locations accessible to physically handicapped persons upon request. **(*Chapter 2014-133, Laws of Florida.*)**

Family Trust Companies: CS/SB 1238 by Senator Richter and Representative McBurney is the Section's initiative to create the authorizing legislation for the creation and regulation of family trust companies in Florida. The legislation has a delayed effective date and does not take effect until October of 2015. The Section anticipates additional revisions to the new chapter prior to its effective date. **(*Chapter 2014-97, Laws of Florida.*)**

Family Trust Companies—Records Exemption: CS/CS/SB 1320 by Senator Richter and Representative McBurney is the separate public record exemption bill that accompanies the substantive family trust company legislation in CS/SB 1238. The legislation has a delayed effective date and does not take effect until October of 2015. **(*Chapter 2014-102, Laws of Florida.*)**

Community Association Managers: CS/CS/HB 7037 by the House Civil Justice Committee amends the regulations governing community association managers and authorizes managers to provide specific advice concerning the management and operation of community associations. It creates new forms in Chapters 718, 719 and 720 for notifying delinquent unit owners of their past due assessment balances, and it will authorize community managers to complete certain statutory forms. The Section opposed the bill in any form. **(*Chapter 2014-146, Laws of Florida.*)**

II. INITIATIVES OF INTEREST

Title Insurance Rates: CS/CS/HB 321 by Representative Passidomo makes a series of changes to Chapter 626 regulating title insurance agents and title insurance

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companies, including a limitation on the use of names; limitations on remedies available for breach of duty; terms relating to insurability; and the preservation of evidence of title searches and examinations prepared by title agents and companies. **(*Chapter 2014-155, Laws of Florida.*)**

Short-Term Rentals: SB 356 by Senator Thrasher partially repeals the state preemption of the regulation of short-term rentals by local government; and the legislation limits local ordinances that attempt to regulate short-term rentals for a period greater than 7 days in duration. **(*Chapter 2014-71, Laws of Florida.*)**

Growth Management: SB 374 by Senator Detert revises the restrictions on the initiative or referendum process involving local comprehensive plans and map amendments, and it prohibits the process unless expressly authorized in the local government charter in effect on June 1, 2011. **(*Chapter 2014-178, Laws of Florida.*)**

Foreign Law and Contract Provisions: SB 386 by Senator Hays creates new Sec. 61.040 to provide that a "choice of law" provision in a contract involving the dissolution of marriage or child support that selects the law of a foreign jurisdiction is not enforceable in a Florida court if: (1) the foreign law is deemed to be unjust or unreasonable in Florida; (2) if the foreign forum is deemed to be unreasonable or unjust; or (3) when public policy would prohibit enforceability of an applicable contract provision in Florida. **(*Chapter 2014-10, Laws of Florida.*)**

Abuse of Vulnerable Persons: CS/CS/HB 409 by Representative Passidomo provides new and clarified criteria when determining the abuse and exploitation of vulnerable persons. The legislation also defines the unauthorized appropriation of the assets or identity theft of a vulnerable person by a trustee, guardian or agent under a power of attorney; and it provides for enhanced penalties for abuse and exploitation of vulnerable persons. **(*Chapter 2014-200, Laws of Florida.*)**

Flood Insurance—Residential Property: CS/CS/CS/SB 542 by Senator Brandes creates new statutory authority for an admitted insurance company or insurance carrier to provide standard and supplemental flood insurance coverage for personal residential properties in Florida. **(*Chapter 2014-80, Laws of Florida.*)**

Service of Process: HB 627 by Representative Pilon establishes a uniform $40 fee for service of process by the sheriff; it requires an employer to permit the service of process on an employee of the business; and it imposes a $1,000 fine on an employer for the failure to permit service on an employee; and it permits the sheriff to rely on an affidavit given by a levying creditor when disbursing proceeds from the sale of levied property. **(*Chapter 2014-207, Laws of Florida.*)**

Title Insurance—Agent-in-Charge: CS/CS/HB 633 by Representative Ingram revises the licensing requirements for title insurance agents and title insurance agencies; it provides for the suspension of licenses of agents and companies; it provides for temporary customer representative licenses; and it provides for the designation of title agents-in-charge. **(*Chapter 2014-123, Laws of Florida.*)**

Business Organizations—Distinguishable Names: CS/CS/HB 685 by Representative Rooney creates new criteria for distinguishing the names of LLCs, General Partnerships, and Corporations, and it creates an enumeration of what does not distinguish the names. The legislation also creates a new Part II for Chapter 607 that authorizes the creation and operation of "Social Purpose Corporations." Social Purpose Corporations are defined in the bill as entities intended to promote economic opportunity; restore the environment; provide benefits to low-income individuals or communities; or provide other societal benefits. **(*Chapter 2014-209, Laws of Florida.*)**

Residential Property Insurance: CS/CS/SB 708 by Senator Bean revises the regulations governing residential property insurance, and it provides for a "Homeowner Claims Bill of Rights." The "Bill of Rights" will now be required to be provided to owners after a claim has been filed with the insurer, and the legislation also provides for regulatory oversight of emergency mitigation services after a fire, water casualty or other catastrophic event has affected the residential property. **(*Chapter 2014-86, Laws of Florida.*)**

Tax Certificates: CS/CS/HB 797 by Representative Pilon makes a series of revisions to the procedures and operations in the office of the Clerk of Court relating to tax certificates. The bill's provisions:

1) Provide that a tax certificate may not be redeemed prior to the issuance of a tax deed if the certificate holder has made full payment for the deed, including documentary taxes and recording fees;
2) Provide that failure of the holder of a tax certificate to pay the costs of resale will cause the property to be placed on the "lands available for taxes" list; and
3) Establish a procedure for the Clerk to follow when maintaining excess funds for unresolved claims against the property. **(*Chapter 2014-211, Laws of Florida.*)**

Title Insurance—Reserves: CS/CS/HB 805 by Representative Moraitis modifies the statutory reserves required to be maintained by a title insurance company doing business in the state of Florida. **(*Chapter 2014-132, Laws of Florida.*)**

Ethics and Lobbying: CS/CS/CS/SB 846 by Senator Latvala makes a variety of changes to the ethics and lobbying laws, including the requirement that a direct-support organization adopt a code of ethics. The legislation also extends executive agency lobbying registration and reporting requirements to individuals interacting on behalf of others at one of the state's water management districts. **(*Chapter 2014-183, Laws of Florida.*)**

Condominium Act—Technical Correction: SB 934 by Senator Thrasher is considered a "revisers" bill that makes technical corrections to the current Florida Statutes. One of the changes in the legislation reenacts the provisions of Sec. 718.301 to restore the "flush left" language at the end of subsection (1). The subsection was modified inadvertently by Chapter 2013-122, Laws of Florida, during the last legislative

session. (***Chapter 2014-17, Laws of Florida.***)

Condominiums—Citizens Insurance: CS/CS/HB 1089 by Representative Rachein revises coverage eligibility from the state-backed Citizens Property Insurance Corporation for residential condominiums. Prospectively, the legislation provides that condominiums will not be eligible for coverage from Citizens if 50% or more of the units in the condominium are rented more than 8 times in a calendar year for a rental period of less than 30 days. (***Chapter 2014-140, Laws of Florida.***)

Information Protection Act: CS/CS/SB 1524 by Senator Thrasher imposes new requirements on business entities to protect client and customer records stored and maintained in digital formats, including the names, addresses, social security numbers, medical histories, computer passwords allowing access to online accounts and other personal identification numbers. The legislation requires reporting of breaches in security that access electronically-stored personal data to the Department of Legal Affairs; it requires that notice be provided to clients and customers potentially affected by the security breach; it imposes obligations to rectify the breach; and it places new requirements on the business or law firm when disposing of personal information maintained in the records of the firm or business. (***Chapter 2014-189, Laws of Florida.***)

Citizens Property Insurance: CS/CS/SB 1672 by the Senate Banking and Insurance Committee reduces the size and exposure of the government run Citizens Property Insurance Corporation. As a part of the reduction initiative, Section 3 of the bill provides new limits on the ability of residential condominiums to obtain coverage from Citizens, and it will restrict policies to "wind-only" coverage. (***Chapter 2014-104, Laws of Florida.***)

Economic Development—Employment: CS/HB 7023 by Representative Hutson provides a few eclectic incentives for clients developing in rural areas and small communities. Its provisions:

1) Provide for a tax refund on the purchases of electricity for businesses engaged in rural job creation (Section 2 of the bill);
2) Authorizes a block grant program for economic development and commercial revitalization in small communities (Section 5 of the bill); and
3) Includes an automatic extension of development permits issued by DEP or a water management district, as well as related local government permits, that would otherwise expire between 1/1/14 and 1/1/16 for a period of two years (Section 46 of the bill). (***Chapter 2014-218, Laws of Florida.***)

Survey Standards: CS/CS/HB 7051 by Representative LaRosa is a comprehensive bill dealing with the Department of Agriculture. Sec. 23 of the bill amends Sec. 627.7842 requiring surveys certified to a title insurer to the meet the practice standards required by the Department of Agriculture and Consumer Services. Section 24 of the bill amends Sec. 718.104(4)(e), and requires that a condominium plot plan and survey meet the practice standards established by the Board of Professional Surveyors and Mappers. (***Chapter 2014-147, Laws of Florida.***)

Economic Development—Ad Valorem Tax Exemption: CS/S/HB 7081 by Representative Caldwell is a comprehensive tax administration initiative. Section 1 of the bill limits ad valorem tax exemptions for improvements made to property by new businesses to those improvements that were made after an affirmative approval was made by the local governing body. (***Chapter 2014-40, Laws of Florida.***)

Ad Valorem Taxes—Agriculture: CS/HB 7091 by Representative Pigman is a comprehensive bill dealing with agriculture issues, and it contains one real property issue of interest. The provision is found in Section 2 of the legislation, and it provides for ad valorem tax incentives when a property owner is participating in dispersed water storage programs with agencies of state government. (***Chapter 2014-150, Laws of Florida.***)

Title Data Insurance—Call: HB 7097 by Representative Steube ratifies the rules of the Office of Insurance Regulation requiring title insurance agencies and retail offices of title insurance underwriters to electronically file their statistical data with the Office. (***Chapter 2014-152, Laws of Florida.***)

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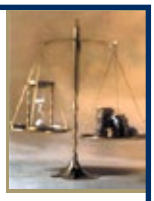

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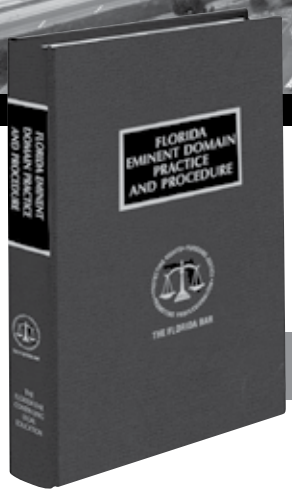

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The Five Most Troublesome Contract Provisions on Private Construction Projects

By: Sean A. Mickley, Esq., Vero Beach, Florida

INTRODUCTION

In the field of construction law, an attorney often encounters contractors that have entered into construction contracts without properly allocating risk, because either the owner wants to get the work underway or the contractor wants to secure the work before the owner changes his or her mind. Unfortunately, the failure to properly negotiate certain contract provisions will dramatically increase the likelihood of litigation or, at the very least, impose a greater financial burden on the contractor. This article addresses the five most troublesome contract provisions between an owner and contractor in the private construction setting and suggests ways to properly negotiate risk allocation.

1. SCOPE OF WORK

The scope of work is a critical contract term and is very often neglected. A properly written scope of work provision will minimize disputes and provide a clear description of the work to be performed, as well as determine which parties bear which risks for unforeseen circumstances on the project. When a scope of work provision is unclear, there are often disagreements about the completeness of the design documents, extent of scope of the contractor's duties, and the quality of work to be performed, which may ultimately prevent the project from being completed on time and on budget.

Typical scope of work issues include inadequately defined areas of work and lack of clarity on which elements of work are excluded. These failings often lead to disputes concerning the adequacy of the design documents, responsibility for incomplete and/or defective work, and coordination responsibilities during the project.

Before signing a construction contract, it is always important for both sides to carefully review the scope of work provision to ensure it includes any and all aspects of the project to be completed, including (1) incorporating by reference the project design documents and specifications; (2) ensuring that the design documents and specifications are complete and clearly drafted, to the extent that they can be complete at the time of signing; (3) containing an express warranty in the contract that the construction documents are adequate and sufficient to build the project; and (4) including any heightened standard of workmanship on the project expected of the contractor and its subcontractors, to the extent one is expected.

2. INDEMNIFICATION

Indemnification means that one party, either by way of common-law or contract, agrees to assume responsibility for certain judgments or liabilities resulting from third-party claims against the other party.

An example of an indemnification provision commonly used in the construction industry is found in the AIA A201-2007 (General Conditions) contract, Paragraph 3.18.1, which states in part that "the Contractor shall indemnify and hold harmless the Owner…from and against claims, damages, losses and expenses…arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable." Effectively, this provision requires a contractor to indemnify and hold the owner harmless from the claims caused by the negligent actions or omissions of the contractor or any of its subcontractors.

Importantly, in Sec. 725.06, F.S.. (2013), Florida law provides limitations on indemnification provisions in construction contracts. Before the enactment of Sec. 725.06, F.S., it was not uncommon for an owner and contractor to enter into a construction contract wherein the contractor would have to indemnify the owner for liability for damages to persons or property caused in whole or in part by the acts or omissions of the owner arising out of the contract.[1]

Now, under Sec. 725.06, F.S., such indemnification agreements are **void** and **unenforceable *unless*** the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable relationship to the contract ***and*** is part of the project plans and specifications or bid documents. The indemnification limitation must also not be less than $1 million, unless otherwise agreed by the parties. Further, of importance, ***no*** indemnification provision in a construction contract in Florida may require the indemnification of the other party resulting from that party's gross negligence or willful, wanton or intentional conduct.

Practically, the contractor should at least attempt to limit its indemnity and hold harmless obligations to items for which it can obtain insurance coverage such as personal injury or property damage caused to third-parties by the negligent acts or omissions of the contractor or its subcontractors. The contractor should further negotiate a "flowdown" provision in each of its subcontracts to spread the risk to its subcontractors that may have caused or contributed to the injury sustained by the owner. A narrowly drafted indemnification provision as suggested above may make most claims by the owner for indemnification subject to pass-through to the subcontractor.

3. PROJECT CHANGES AND CHANGE ORDERS

Private construction projects often begin with the owner providing plans and specifications, followed by the contractor agreeing to build consistent with them for a lump sum, or for actual cost plus an agreed fee. In some cases, the plans and specifications that were once thought to be

complete or free of defects end up being the opposite. Some typical issues that arise during a project include (1) plans and specifications that are inconsistent with one another or don't include all information that is required to complete the project; (2) the owner or the owner's design team wants to add/delete certain items; and (3) existing site conditions differ from what is expected or represented in the design documents.

The contract documents should address these situations through change order or project change of work provisions which specify timing, notifications, and procedures for requesting and issuing change orders and for dealing with disagreements between the contractor and owner as to value of the changed or additional work. Included within these provisions are generally the requirement that all changes be approved by the owner, owner's representative or the owner's architect and be in writing. Unfortunately, in an effort to keep the project on schedule, the owner and contractor will oftentimes orally agree to the change in or addition to the work without putting it in writing, which in turn induces the contractor to perform the work. Thereafter, the contractor and owner will often disagree on payment for the additional or changed work or whether there was ever an agreement to perform the work as an addition to the contract. This is obviously a problem for both parties and can inevitably lead to litigation.

The contractor would benefit from including a form change order in the contract documents to be used during the course of the project. The contractor may also benefit from negotiating a change order allowance into the contract at its inception to mitigate risk associated with the changes; however, the owner will understandably have a legitimate interest in receiving reasonably timely notification of a contractor's contentions concerning changes in order to monitor the project, budget, and schedule. As such, the contractor may not be able to negotiate such an allowance. As a concession, the contractor should, at a minimum, ensure that the construction contract contains sufficient time to provide notices and documentation (at least 10 business days). The owner and contractor may want to also consider negotiating at the time of contract for a third-party neutral, such as the project architect or a dispute resolution board, to decide any future disputes between the owner and contractor concerning payment for the changed or additional work while the work is on-going in order to avoid future litigation.

4. TERMINATION

Sometimes in construction projects, the owner will decide either that the contractor has defaulted on its duties and responsibilities under the construction contract or the owner no longer wants to use the contractor to complete the work. In either event, the owner will terminate the contractor, for convenience in the latter instance or for cause in the former. Each type of termination has its own inherent dangers for both the owner and the contractor.

A typical termination-for-cause clause can be invoked when a contractor: (1) persistently refuses or fails to supply enough properly skilled workers or proper materials; (2) fails to pay subcontractors; (3) persistently disregards laws, ordinances, rules, or regulations; or (4) substantially breaches the contract. These actions or omissions are typically called "defaults" and allow the owner to terminate the contractor; however, the termination-for-default clause often requires the owner to provide notice and an opportunity to cure the default prior to termination. If the owner does not follow these steps and terminates the contractor anyway, any termination will arguably be deemed wrongful and expose the owner to the contractor's damages associated with such termination. Following a contractor's default, the owner may require the surety (if one exists) or another contractor to complete the work. A termination for default allows the owner to apply the unpaid contract balance towards completion costs and seek damages associated with increased completion costs or deficient work beyond the applied contract price associated with the default and performance of the terminated contractor.

A private construction contract may also have a clause that allows the owner to terminate the contract for the owner's own convenience. Upon a typical termination for convenience, the contractor can recover costs for all work performed to the date of termination and may also be entitled to recover certain "termination costs."[2] Unlike a termination for default, there is no case law in Florida that provides that an owner can or cannot back charge the contractor for the cost to complete its work or repair deficient work on the project[3]. As such, the issue of whether the owner may seek reimbursement from or back charge the contractor is in flux and leaves in doubt whether the owner could reasonably do so. However, the terminated contractor may have a strong argument that the owner waived his/her/its right to pursue the contractor for damages or assess back charges to the contractor resulting from incomplete or deficient work due to the termination for convenience and failure to place the terminated contractor on notice of the defective work.

The risk associated with a termination for convenience clause is highlighted in *Vila & Son Landscaping v. Posen Constr. Inc.*, 99 So. 3d 563 (Fla. 2d DCA 2012). In *Vila & Son*, a roadway contractor entered into a contract with the Florida Department of Transportation ("FDOT") and thereafter entered into a subcontract with Vila & Son Landscaping, Inc. ("Vila") to perform the landscaping and irrigation portion of the contractor's work.[4] The subcontract contained a "Termination for Convenience" clause which allowed the contractor to terminate Vila upon delivery to Vila of written notice of termination.[5] After the FDOT approved the subcontract between the contractor and Vila, the contractor sought and obtained a better price for the same work from another subcontractor.[6]

As a result, the contractor terminated the contract with Vila and awarded the work to the subcontractor with the lower contract price.[7] After trial and a verdict in favor of Vila, the trial court granted the contractor a new trial.[8] On appeal, Vila's argument that the contractor wrongfully terminated the contract was three-fold: (1) the contractor had acted in bad faith by terminating the contract solely to obtain a better price and therefore could not rely upon the termination for convenience provision; (2) that termination to obtain a better price was a breach of the implied covenants of good faith and fair dealing; and (3) without good faith limitations, the termination for convenience provision reduced the contract to an illusory promise, lacking in consideration.[9] The appellate court found that because the contractor followed the procedures under the contract's termination for convenience clause, there was no need to impose an additional limit of bad faith and the contractor did not breach the implied covenants of good faith and fair dealing.[10] The appellate court further found that the termination for convenience clause was not illusory because termination requiring written notice prevents the promise made by the party with the right of termination from being illusory in nature.[11]

When carefully drafted, a termination for convenience clause will be enforceable and can be financially devastating to a contractor.

The holding in *Vila & Son* reflects the deference Florida courts provide contracting parties when entering into a written agreement and, in particular, termination for convenience clauses. When carefully drafted, a termination for convenience clause will be enforceable and can be financially devastating to a contractor. Contractors should be mindful to protect their rights in the event of a termination for convenience. Generally, a contractor has very little control over the owner's ability to invoke a termination for convenience clause. As such, the contractor should try to negotiate fair compensation in the event of a termination for convenience, including the cost of construction services rendered up to the date of termination, demobilization costs, labor costs associated with reassigning its workforce to different projects, and costs associated with cancelling materials and equipment to be used for the project.

5. PAYMENT PROVISIONS

Next to change orders, the payment provisions in construction contracts are the most heavily litigated in the private construction context because they dictate how the contractor or the trade contractors get paid.

Common payment provisions require a schedule of values allocating the contract price among different items of work. As the project progresses, the contractor submits a payment application, certifies that a given percentage of each item of work is completed during each month, and seeks payment. Payment applications typically identify each schedule of value item, the percentage completed, and the value of that percentage based upon the schedule of values. The owner is then responsible to make that payment less the assigned amount of retainage unless one or more withholding events have occurred.

Each construction contract's payment provisions have different variables depending on the project. These variables include (1) the line items in the schedule of values; (2) the amount of retainage to be withheld by the owner from each payment; and (3) whether there are any events agreed to amongst the owner and contractor that allow withholding from the monthly payment such as incomplete or deficient work.

The schedule of values is an important document that the contractor should carefully prepare ***before*** submitting its bid on the project. Although the document may change throughout the project based upon change orders, it is still vital to the contractor's profitability that the schedule of values be as accurate as possible at the outset. This is because if any line item value is not sufficient to cover the contractor's cost for that work, then the contractor will be forced to submit a change order and the owner may not be inclined or required to accept the increased cost particularly where the project is financed by a lender. The contractor should attempt to build "general conditions" into the schedule of values early. General conditions are non-specified costs, such as bonding, mobilization and similar items, that are grouped together in one line item on the schedule of values. This is important because otherwise the contractor may find itself the sole financer of these costs in the future. At the same time, the contractor must make sure not to load the contract up front with costs which could deter an owner from accepting the contractor's bid. Simply put, a balance is needed.

Retainage is a portion of the payment otherwise due to the contractor retained by the owner until the end of the job to ensure there are sufficient funds for completing the work in the event of a contractor default. The amount of retainage is often contested on private construction projects. There is no requirement for same; however, the industry standard is 10% of the monthly payment to be retained by the owner. The 10% retainage will sometimes be reduced to 5% of the monthly payment after the project has reached 50% completion so the retainage would not become an increased financial burden on the contractor. Given the importance of obtaining payment from the owner, the contractor should attempt to negotiate either (1) the release of some portion of retainage for earlier work once that earlier work has been fully incorporated into the project and accepted by the owner; or (2) reduction in the percentage of retainage from 10% to 5% upon completion of 50% of the project. This will assist the financial

position of the contractor and limit the arguments that the contractor cannot complete certain portions of work due to insufficient funds.

Lastly, the owner will often require contract terms that allow the owner to withhold payment or portions of payment upon the occurrence of some particular events, including, but not limited to, the failure of the contractor to complete a certain portion of work timely, the contractor performing defective work, and/or the contractor performing work that is not accepted by the owner, owner's representative, building inspector, or code enforcement official. It is necessary for the contractor to have these particular events clearly delineated in the construction contract and provide a mechanism whereby any withheld monies will be released upon curing the event.

CONCLUSION

The construction industry is inherently complex and the contracts that govern the relationships between the owner and contractor are likewise complex and require careful attention and negotiation during the pre-project phase. Although the five provisions discussed above are the more troublesome ones on private construction projects, many other contractual issues cause financial headaches, including delay clauses, insurance coverage or lack thereof, default provisions, and warranties. With a little guidance and forethought at the outset, disputes and litigation can possibly be avoided, even on the most difficult of projects.



S. MICKLEY

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Endnotes

1 Although this article is limited to private projects, Sec. 725.06(2), F.S., provides that on a public project an indemnification agreement may not provide indemnification for the indemnitee's negligence, gross negligence, or willful and wanton misconduct.

2 *Vila & Son Landscaping Corp. v. Posen Constr. Inc*, 99 So. 3d 563 (Fla. 2d DCA 2012).

3 But see, *Shelter Products, Inc. v. Steelwood Constr. Inc.*, 307 P.3d 449, 458-460 (Ore. Ct. App. 2013) and *Paragon Restoration Group, Inc. v. Cambridge Square Condominiums*, 42 A.D. 3d 905 (NY Sup. Ct. 2007) (both holding that an owner cannot offset cost of curing default when it terminates for convenience).

4 *Vila & Son Landscaping Corp.,* 99 So. 3d at 564-565.

5 Id.

6 Id.

7 Id.

8 Id. at 565.

9 Id. at 565-566.

10 Id. at 568-569.

11 Id. at 568.

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Probate Case Summaries

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The Decedent died and left no will or other written recitation of his burial wishes. After his death, the Decedent's parents agreed to have the body cremated. However, no agreement could be reached as to the final disposition of those ashes. So that the ashes could be split into two equal parts, the father sought to have them identified as "property" and sought to enforce the definition enunciated in § 731.201(32), Fla. Stat. (2012). The Court found that ashes are not property and cannot be split; the next of kin have only a limited possessory right to the remains for disposition purposes. Therefore, decisions about burial or distribution of remains are left to the Personal Representative or next of kin as law may require.

Wilson v. Wilson, 138 So.3d 1176 (Fla. 4th DCA 2014)

The Fourth District Court of Appeal affirmed the trial court in this case of first impression in Florida and found that ashes are not "property" as defined by §731.201(32), Fla. Stat. (2012). Therefore, ashes are not considered probate assets and cannot be split among beneficiaries.

The son of two parents died in a car accident. The father and mother were appointed as the co-personal representatives of the Estate. There was no issue regarding the manner that the Decedent's body was to be handled and he was promptly cremated. No agreement could be reached as to the final resting place for the Decedent's ashes. For religious reasons, the mother opposed having the ashes divided.

The father filed pleadings which proposed splitting the ashes in half so that each of the mother and father could make an independent decision about the final resting place. After an evidentiary hearing, the Court found that ashes are not "property" and therefore fall outside of the probate administration. The Court gave the co-personal representatives 30 days "to carry out their duties and responsibilities to finally dispose of [their son's] remains..." If they were unable to reach agreement, the Court indicated that it might appoint a curator or other suitable person to carry out the task.

On appeal, the Fourth District Court of Appeal affirmed. After reviewing historical law and similar law from other states, the Court found that that the ashes were not property subject to probate. The Court further held that the duty to distribute assets fell solely with the co-personal representatives unless the legislature enacted further law on the issue. According to the Court, "given the sensitive nature of the subject matter, and the fact that, historically, cremated remains have been treated the same as a body, neither constituting "property," we decline to craft a policy at odds with our history and precedent."

Bernard Peck died and his will created a marital trust for the benefit of his wife Marjorie. Bernard and Marjorie had two children—Daniel and Constance. Marjorie utilized the assets of the marital trust until her death. Upon Marjorie's death, the trustee was to equally transfer any remaining trust assets to separate residual trusts for their children. Constance and Daniel's trusts were funded, but Constance sought to terminate her trust. Daniel, as co-trustee, objected to the termination of Constance's trust. Citing that §736.04113, Fla. Stat. (2007), does not limit the trial court's common-law authority to terminate a trust, the Court found that the settlor of an irrevocable trust is permitted to terminate a trust with the consent of the interested parties.

Peck v. Peck, 133 So.3d 587 (Fla. 2d DCA 2014)

The Second District Court of Appeal affirmed the trial court in finding that, even though statutory termination requirements had not been met and principal distribution was not in accord with trust provisions, common law allowed modification or termination of a trust if the settlor and all beneficiaries consented.

Daniel and Constance were both the beneficiaries of their father's estate plan. In accordance with the plan, two separate irrevocable trusts were to be created by the children. The sole purpose of the separate trusts was to hold Daniel's and Constance's inheritance after their mother died. The trusts were to be "irrevocable and shall not be subject to amendment, and no portion of the Trust Estate may be withdrawn from the operation of this Trust except in accordance with the terms herein before set forth." Constance's trust was created and funding began even before her father died. Constance exercised a power of appointment and named her children as beneficiaries. After the death of Constance's father, Daniel became co-trustee of her trust.

Constance sought to terminate her trust after her mother's death and filed appropriate pleadings to do so. Her children agreed to the termination as well. Daniel, in his capacity as the co-trustee, objected because he feared Constance might waste the assets. In crafting his estate plans, there was evidence that the father also had concerns about her ability to manage/preserve assets. The trial court disagreed with Daniel and terminated Constance's trust.

On appeal, the Second District Court of Appeal affirmed. In support of their opinion, the Court noted that all of the interested parties in Constance's trust had agreed to the termination and there was no provision in Ch. 736, F.S., that would prevent the requested termination. Another fact contributing to the Court's holding was that the original plan lacked provisions to prevent Constance from modifying/terminating by common law after her father's death or if he objected while living. For these reasons, the Court supported Constance's request to terminate the trust, with the beneficiaries' consent, even if it defeated her father's intent.

Irby died, a Petition for Administration was filed by Ford, and Ford was appointed as the Personal Representative. Davidson was retained by Ford to act as her counsel. Bookman was appointed as the Successor Personal Representative after Ford resigned. Allegations arose that Davidson had committed malpractice in his representation of Ford. Without addressing the issue of privity and couching their opinion on several of the statutes found in Ch. 733, F.S.; the Court held that, standing existed for the Successor Personal Representative to bring an action on behalf of the Estate against Davidson. The Court further recognized that the filing of the malpractice action was not only permissible on the part of the Successor Personal Representative, but was required in light of Bookman's fiduciary duty to the Estate.

Bookman v. Davidson, 136 So. 3d 1276 (Fla. 1st DCA 2014)

The First District Court of Appeal affirmed the trial court's granting of summary final judgment and held that the Successor Personal Representative had not only the ability, but the duty, to file a malpractice claim against counsel for a personal representative who previously resigned.

Ford acted as the personal representative for almost three years. During her time as the personal representative, she was represented by Davidson. After Ford resigned, Bookman was appointed as the Successor Personal Representative. Bookman made allegations that Ford improperly disclaimed assets and/or made transfers. Further allegations were made that, if such actions were taken by Ford, it was as a result of Davidson's improper representation and malpractice.

Bookman, as the Successor Personal Representative, filed suit against Davidson for malpractice. Davidson alleged that there was no privity between him and the Successor Personal Representative. Without such privity, Davidson alleged that Bookman could not file suit against him for malpractice. Davidson filed a Motion for Summary Final Judgment. The trial court found, as a matter of law, that Bookman did not have standing to bring a legal malpractice action against Davidson.

On appeal, the First District Court of Appeal reversed. The Court dismissed the issue of privity as irrelevant and instead focused on the statutory duties of the personal representatives and their successors. According to § 733.602(1), Fla. Stat. (2009), § 733.612(19), Fla. Stat. (2002), and § 733.614, Fla. Stat. (2002) the same powers afforded to a personal representative flow to their successor. According to §733.602, Fla. Stat. (2009), § 733.603, Fla. Stat. (2002), and §733.612(20), Fla. Stat. (2002), a personal representative has a fiduciary duty to collect assets and maximize their value. Causes of action against counsel for a predecessor personal representative are assets of the estate. By the plain meaning of statutes in Ch. 733, F.S., even without privity, there is legal support for a successor personal representative to file a malpractice action against former counsel of the estate. Filing suit for malpractice is consistent with the successor personal representative's powers and duty to preserve/maximize assets for the benefit of the estate.

Maher fathered two children during his lifetime and executed a will in July 2001. The two children were minors who had different mothers. Taran is the mother of a son born in 1999 and Iglikova is the mother of a daughter born in 2000. The Decedent did not confirm paternity of his daughter until 2003. The Decedent thereafter made monthly child support payments for his daughter until his death. Iglikova sought to have her daughter identified as a pretermitted child. The Court held that a child born before, but legitimized after, the execution of the will was not a pretermitted child.

Estate of Maher v. Iglikova, 138 So.3d 484 (Fla. 3d DCA 2014)

The Third District Court of Appeal reversed the trial court and interpreted the clause that "a pretermitted child must be born or adopted after the making of the will" to mean that paternity must be proven *before* the death of a decedent if a child is to be recognized as pretermitted.

Maher had two children with two different women, both children were born before the Last Will and Testament was executed in 2001. The will provided a class gift for the children of the decedent. The son was born in 1999 and the daughter was born in 2000. Maher did not know of his daughter until 2002 and obtained confirmation of parentage shortly thereafter when a genetic test was undertaken. Maher also began making child support payments once he became aware of her. In 2005, a court order directed that the daughter's birth certificate be amended to reflect Maher as the father. Maher disappeared in 2004 and was declared dead in 2009 by a Florida probate court, at which time his will was admitted to probate.

In 2010, Iglikova filed a Petition to Determine Status as a Pretermitted Child, Challenge Construction of Will and Determine Beneficiaries in the trial court. Taran objected on her son's behalf, but the Motion for Summary Final Judgment was denied. The trial court found that the daughter to be a pretermitted child under the Statute.

On appeal, the Third District Court of Appeal reversed. There are three elements of a pretermitted child: (1) omitted from the will, (2) born or adopted after the making of the will, and (3) has not received a part of the testator's property equivalent to a child's part by way of advancement. See §732.302, Fla. Stat. (2010). Citing *J.E.W. v. Estate of Doe,* 443 So.2d 249 (Fla. 1st DCA 1983), the Court found that "a child legitimized by a determination of paternity after the execution of a will is not a pretermitted child." The Court found that the daughter was not pretermitted by the plain language of §732.302, Fla. Stat. (2010) because she was born *before* the execution of the Last Will and Testament. The reversal was further supported because the daughter was not omitted and had been provided for through the class gift for children.

Correction: Page 51 of the print version of ActionLine, Summer 2014, incorrectly stated the name of the preparer of the Probate Case Summaries. The Probate Case Summaries were prepared by Sean M. Lebowitz, Esq., Gutter Chaves Josepher Rubin Forman Fleisher Miller, P.A., Boca Raton.

Real Estate Case Summaries

By Douglas G. Christy, Wetherington Hamilton, P.A., Tampa, Florida

There is a common law qualified riparian right or privilege to construct piers or wharves from riparian owner's land onto submerged land to the point of navigability but not beyond the lower water line regardless of whether the submerged lands are public or private, subject to superior and concurrent rights of the public and to applicable regulations. It was error to find plaintiff's claims were barred by collateral estoppel doctrine based upon two circuit court cases involving plaintiff's predecessor in title where defendants were not parties to either of the prior actions and were not in privity with any party that was involved in the prior actions.

5F, LLC v. Dresing, 39 Fla. L. Weekly D1473a (Fla. 2d DCA 2014)

Owners of a lot adjacent to submerged lands obtained the necessary permits to construct a pier extending onto submerged lands owned by a private party. The pier was constructed after revisions were made to the permit and the construction was completed by the lot owners without any approval from, or objection by, the owner of the submerged lands to the construction of the pier. Shortly after the pier was completed, the submerged lands were conveyed to another party and approximately seven months after the conveyance of the submerged lands was completed, the new owner of the submerged lands objected to the construction of the pier in writing to the lot owners that constructed the pier. Approximately one year after the new owner of the submerged lands first notified the lot owners in writing of its objection to the construction of the pier, the new owner of the submerged lands filed suit against the lot owners for declaratory relief, ejectment, trespass and trespass damages. The lot owner raised defenses in response to the lawsuit on the bases of a riparian right to construct the pier, collateral estoppel, equitable estoppel, and balancing of the conveniences. After both parties moved for summary judgment, the trial court rules in favor of the lot owner, finding that the lot owner had a riparian right to build the pier at common law and that the new owner of the submerged lands was collaterally estopped from raising its claims due to earlier litigation.

The Second District Court of Appeal, in reviewing the submerged land owner's appeal, undertook an extensive review of the extent of the common law right to "'wharf out" under several prior Florida Supreme Court decisions and some additional decisions of the Fourth District Court of Appeal and the Court that addressed the issue of riparian rights. The conclusion reached by the Court following its review of these prior decisions was that a common law qualified riparian right or privilege exists to construct piers or wharves from the riparian owner's land onto submerged lands, whether public or privately owned, to the point of navigability but not beyond the low water line, subject to the superior and concurrent rights of the public and any applicable regulations. However, the Court found that it was error to rule in favor of the lot owner on the basis of its collateral estoppel defense since the prior litigation identified did not meet the general rule of mutuality of parties nor any exception to this general rule, "such as where 'special fairness or policy considerations appear to compel'" the outcome and because there was no relationship between the lot owners and the prior litigants.

Trial court erred in denying request for statutory easement over private road which provided the only vehicular access to public road from side of acreage in one county which straddled border between two counties and which included, in the middle of the parcel, swamp and wetland. Trial court further erred in finding that § 704.01(2), Fla. Stat., did not apply because owners had not established an "absolute necessity" for the easement and § 704.01(2), Fla. Stat.. applies even when owner is in the process of selling its parcel when the agricultural purposes requirement of the statute was met.

Messer v. Sander, 39 Fla. L. Weekly D1415a (Fla. 1st DCA 2014)

Owners purchased a 45-acre parcel that straddled the border between Leon and Jefferson Counties. The middle of the parcel was described as swamp and wetlands and the deed conveying the parcel to the owners included an easement that provides access to a public highway for the portion of the parcel in Jefferson County. The only vehicular access to a public highway for the portion of the parcel in Leon County was via a private roadway, which was owned by several parties. One of these parties that owned the private roadway declined to grant an easement to the owners of the parcel. The owners of the parcel filed suit against the owners of the private roadway that declined to grant an easement seeking to have a statutory easement granted pursuant to **§** 704.01(2), Fla. Stat., or, in the alternative, to obtain a prescriptive easement or a common law easement. The trial court denied all requests for relief at a bench trial, and the owners of the parcel appealed as to their claims for a statutory easement or a prescriptive easement.

Reviewing the matter de novo, the First District Court of

Appeal held that the trial court erred in several respects on the issue of the statutory easement. First, the Court recognized that § 704.01(2), Fla. Stat., applies to any land or any portion thereof, so that any reliance by the trial court on the fact that the parcel had access from one portion of the parcel was inconsistent with the application of the statute to a portion of land. Next, the Court determined that the trial court had misapplied the "absolute necessity" standard because the statute provides that the right to an easement should take into account "public policy," convenience and necessity' factors and the trial court had failed to recognize the uncontroverted evidence about the expense of, and unlikely chance that the owners could obtain, the permits necessary to construct a roadway across the swamp and wetlands area of the parcel to traverse from the Leon County side of the parcel to the Jefferson County side of the parcel.

The Court then analyzed the statutory text and determined that the statute could apply when land, fencing or other improvements cuts off a portion of another's land from access rather than when the entire property is shut off on all sides from access by other persons. Finally, the Court noted that the trial court had erred in overlooking unrefuted evidence that there was a forest management plan for tree growth in effect for the parcel, thus meeting the agricultural purposes element of the statute, and that the fact that the parcel owners intended to sell the parcel does not nullify the application of the statute.

Where plats for subdivision indicated some roadways would be private for the use of the lot owners within the subdivision but the roadways were subsequently conveyed several times and resulted in the roadways being under the control of public entities prior to the acquisition of the lots by the owners, summary judgment was proper and the owners were only entitled to an easement of use of the roadways rather than fee simple title to the portions of the roadways extending out to the middle of the street abutting each lot.

Bellizzi v. Islamorada, Village of Islands, Florida, 39 Fla. L. Weekly D1657a (Fla. 3d DCA 2014)

The Venetian Shores subdivision consisted of several plats and the plats at issue included select roadways that were dedicated to the public but the majority of the roadways depicted on the plats at issue were reserved as private roadways for the use of the owners of property in the subdivision. After a series of conveyances and litigation spanning a period of over 30 years, the roadways within the plats at issue came to be the responsibility of the Village of Islamorada in 1998. A group of lot owners within the subdivision brought suit against the homeowners' association for the subdivision and the Village of Islamorada seeking: a declaratory judgment that the owners owned the fee simple interest in several of the roadways that were private roadways according to the plats; to quiet title to those areas within the roadways and canals; for statutory and common law inverse condemnation compensation for those areas within the roadways in the event that the Village of Islamorada was determined to be the legal owner of the roads; and for a declaratory judgment that the lot owners owned the canals shown on the plats "to their midpoints, directly adjacent and abutting Plaintiffs' respective properties." The trial court entered judgment in favor of the homeowners' association and the Village of Islamorada following their motion for summary judgment regarding the ownership of the roads in question by the Village of Islamorada.

The Third District Court of Appeal analyzed the legal argument of the lot owners and concluded that their theory misconstrued the dedications on the plat and the subsequent conveyances of the private roadways in question. The Court concluded that the limited right created in favor of the owners of lots within the subdivision was an easement of use for the roadways rather than fee simple title to the portions of the roadways extending out to the middle of the street that abuts each lot. The Court also noted that the lot owners took title to their lots after the public records reflected the public control over the roadways in question following a series of decisions by the initial developer of the subdivision and its successors leading to the roadways becoming the responsibility of the Village of Islamorada.

It was improper to deny a motion to dissolve a lis pendens without a showing of a fair nexus between the title to the property and the lawsuit by the proponent of the lis pendens; and it was a departure from the essential requirements of the law for the trial court to require the opponent of the lis pendens to require a bond to be posted rather than the proponent of the lis pendens.

Nobe Bay Holdings, LLC v. Garcia, 140 So. 3d 693 (Fla. 3d DCA 2014)

A doctor contracted to purchase two condominium units and placed a deposit into escrow under the contract for the condominium units. The contract was amended subsequently to create separate contracts for the same two condominium units with two separate entities. The contract for the unit that became subject to litigation was never recorded and the doctor also never paid an additional deposit that was required for the unit under the contract. The unit subsequently was foreclosed upon and the unit was acquired by another party after the foreclosure case went to judgment and then to sale. The doctor then filed suit against the new owner of the unit for specific performance, breach of contract and an equitable lien. The doctor later agreed to limit its complaint to money damages and dropped the claim for specific performance but obtained a lis pendens for the unit at issue in the lawsuit. In response to the lis pendens, the unit owner asked the trial court to dissolve the lis pendens. The trial court denied the unit owner's motion but would allow the lis pendens to be removed upon the posting of a bond by the unit owner equal to the amount of the doctor's deposit. The unit owner filed a petition for writ of certiorari

challenging the trial court's denial of the unit owner's motion.

The Third District Court of Appeal held that the trial court should have dissolved the lis pendens and should not have required the unit owner to post a bond for several reasons. The Court initially recognized that the doctor failed to establish a fair nexus between the title to the property and the lawsuit. The only document that tied the doctor's claim to the property was the purchase agreement, which had not been recorded and had been terminated after the doctor failed to make a required deposit. The doctor's claim to any fair nexus was ruined when the doctor agreed to limit his claim to money damages and dropped his claim for specific performance in relation to the condominium unit. The Court also noted that the purchase agreement waived any of the doctor's claims in relation to the condominium unit.

The Court further noted that the trial court had departed from the essential requirements of the law in having the unit owner post the bond rather than the doctor after the unit owner presented evidence that the lis pendens prevented a closing on the condominium unit. Under the decision by the Florida Supreme Court in *Medical Facilities Dev., Inc. v. Little Arch Creek Properties, Inc.,* 675 So. 2d 915, 916 (Fla. 1996), the Court noted that the doctor, as the proponent of the lis pendens, would have been required to post the bond rather than the unit owner. For these reasons, the Court quashed the trial court's order and directed the trial court to discharge the lis pendens and the bond that the unit owner was ordered to post.

The litigation privilege defense is not valid in, or a sufficient basis on which to dismiss, a quiet title action filed by the buyer of property against the bank following the bank's voluntary dismissal of a foreclosure action against the same property's prior owner.

R.H. Ciccone Properties, Inc. v. JP Morgan Chase Bank, N.A., 141 So.3d 590 (Fla. 4th DCA 2014)

After an owner filed suit seeking to quiet title to the owner's property against several parties, the bank sought to dismiss the quiet title action on the grounds that the litigation privilege would apply as a defense under the theory that the quiet title action was based entirely on actions and statements which occurred during the foreclosure action that had previously been filed, and later dismissed, by the bank in relation to the same property and the prior owner. The trial court granted the bank's motion to dismiss with prejudice on the basis of the bank's argument.

Reviewing the trial court's decision de novo, the Fourth District Court of Appeal disagreed with the trial court's decision for two reasons. First, the Court recognized that the litigation privilege has only been recognized as a defense to bar actions arising from misconduct that constitutes a tort at common law or a statutory violation such that the litigation privilege had never been used to bar a quiet title action. Second, the Court recognized that the litigation privilege would not serve its intended purpose in the context of this quiet title action because the intended purpose of the litigation privilege is to "free [participants in litigation] to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct." In the quiet title action, the bank would not have to defend its actions in the prior foreclosure action and would only have to defend the validity of its mortgage. The Court reversed the trial court's dismissal with prejudice of the owner's quiet title action and remanded for further proceedings as to that action.

A real estate broker may place a lien on real property to secure the broker's commission when such a lien is permitted by contract and the right to lien the proceeds of a sale under the Florida Commercial Real Estate Commission Lien Act is not an exclusive remedy for a real estate broker.

J. Milton Dadeland, LLC, v. Abala, Inc., 39 Fla. L. Weekly D1602b (Fla. 3d DCA 2014)

An owner of commercial real estate entered into a commission agreement with a real estate broker that contained language permitting the broker to place a lien on the subject real property to secure the 6% commission due to the broker under the commission agreement. The subject real property subsequently went under contract and was a short sale with the approval of the owner's lender but before the closing on

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the property took place, the broker recorded a lien against the property to secure its commission due under the commission agreement. After learning of the lien, the potential purchaser sued the owner and the owner's lender to have the broker's lien removed. That lawsuit was settled with the purchaser receiving a reduction in the purchase price for the property and additional funds at the closing. The closing on the property subsequently took place but the lien had not been satisfied and the warranty deed conveying title to the property expressly acknowledged the broker's lien claim for its commission. Following the closing, the purchaser of the property filed suit against the broker seeking to have the broker's lien removed and the broker counterclaimed against the purchaser. After a bench trial, the trial court entered judgment in favor of the broker and the purchaser appealed the judgment, arguing that the trial court had erred in recognizing that the broker's lien was permitted under the Florida Commercial Real Estate Sales Commission Lien Act (the "Act").

The Third District Court of Appeal rejected the purchaser's argument for three reasons. First, the Court concluded that the Act is not intended to limit a broker's remedy to placing a lien on the proceeds from a sale. Second, in the case of a short sale, the owner's argument would leave the broker without any remedy because there are no net proceeds from a short sale. Third, the Court recognized that the provisions of the Act clearly permit a broker to lien the property itself when such a lien is "expressly permitted by contractual agreement or otherwise allowed by law" and is not false. Given that the lien in this case was expressly permitted by contractual agreement between the former owner and the broker, the Court ruled that the lien was proper under the Act, citing to **§** 475.42(1)(j), Fla. Stat., and affirmed the judgment of the trial court in favor of the broker.

An accord and satisfaction may take place in the context of payment of condominium assessments and other related amounts under § 673.3111, Fla. Stat., notwithstanding the statutory provisions in section §718.116, Fla. Stat., when the payor tenders its payment to the claimant as full satisfaction of the claim and the condominium association accepted the payment.

St. Croix Lane Trust v. St. Croix at Pelican Marsh Condominium Ass'n., Inc., 39 Fla. L. Weekly D1679b (Fla. 2d DCA 2014)

The condominium association foreclosed on its claim of lien and the unit was sold to a third-party at the association lien foreclosure sale for a winning bid in the amount of $100.00. The condominium association subsequently demanded that the new unit owner pay the condominium association all unpaid assessments, interest, administrative late fees, unpaid water bills, costs and attorney's fees that had been owed by the immediate prior unit owner. The new unit owner disputed that it owed any of the amounts demanded by the condominium association and tendered a payment of the amount of the most recent quarterly assessment to settle the matter. The payment was accompanied by a letter from the attorney for the new unit owner stating that it was the new unit owner's intent for the payment to act as full and final settlement of all claims and that the negotiation of the payment by the condominium association would be considered acceptance by the condominium association of the new unit owner's offer. The condominium association negotiated the new unit owner's payment, continued to claim that additional amounts were owed to it by the new unit owner and threatened to sue the new unit owner for the amounts claimed by the condominium association. The new unit owner filed suit in response, seeking declaratory relief as to the amounts owed, if any, to the condominium association; a discharge of the claim of lien recorded by the condominium association against the condominium unit; attorneys' fees and costs; and money damages due to the loss of rental value of the condominium unit. After cross-motions for summary judgment were filed, the trial court ruled in favor of the condominium association, finding that the new unit owner was jointly and severally liable for all amounts that were due by the immediate prior unit owner pursuant to **§** 718.116(1)(a), Fla. Stat., and that the accord and satisfaction argument of the new unit owner did not apply in light of the provisions in **§** 718.116(3), Fla. Stat.

Reviewing the matter de novo, the Second District Court of Appeal concluded that the elements of **§** 673.3111, Fla. Stat. regarding accord and satisfaction were met in this case, that none of the exceptions set out in **§** 673.3111, Fla. Stat. applied, and that the provisions in **§** 718.116(3), Fla. Stat. requiring payments to be applied in a specific, prescribed manner notwithstanding any "restrictive endorsement, designation, or instruction placed on or accompanying a payment" did not apply in this instance. The Court discounted the unambiguous provisions in **§** 718.116(3), Fla. Stat. after reviewing the staff analyses by the Senate and House that discussed the intent of the provisions in **§** 718.116(3), Fla. Stat. to confirm that the legislative history of the statutory provision was consistent with the interpretation of the statute by the Court. The Court also distinguished the holding in *Ocean Two Condominium Ass'n., Inc. v. Kliger*, 983 So. 2d 739 (Fla. 3d DCA 2008) by recognizing that the amounts owed in that matter were not in dispute, unlike the amounts that were subject to dispute in the matter under review, and concluded that the portion of the holding supporting the position advocated by the condominium association was dicta. The Court reversed the summary judgment order and instructed the trial court to enter a partial summary judgment in favor of the new unit owner as to there being an accord and satisfaction for the amounts that were claimed by the condominium association and that had come due prior to the time of the new unit owner's acquisition of title to the condominium unit. The Court further declared that the new unit owner was entitled to have the condominium association's claim of lien discharged and vacated, and that the new unit owner's claim for lost rental value of the unit was to be resolved on remand.

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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 listservs that discuss issues and current hot topics available to committee members.

SCHEDULE

2014 EXECUTIVE COUNCIL MEETINGS

November 13 – 15, 2014

Executive Council Meeting

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

March 18 – 22, 2015

Executive Council Meeting

Ritz Carlton Grande Lakes
Orlando, Florida
Reservations: 1-407-206-2400
http://www.grandelakes.com/About-Grande-Lakes-50.html
Rate: $269.00
Cut-off Date: February 27, 2015

2014 CLE SCHEDULE:

Check the RPPTL Section website www.rpptl.org under the CLE tab's dropdown menu for topics, dates and locations for upcoming CLE seminars. Check The Florida Bar website www.floridabar.org/CLE for detailed information as it becomes available.

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

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See page 17

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