ActionLine

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



Is a Construction Defect Plaintiff Entitled to Prejudgment Interest for Unrepaired Defects?

What Attorneys Should Know When Dealing With Client Capacity Issues

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Our Financial Resources— From Whence Cometh? To Where Goeth?



CHAIR'S COLUMN

By Michael A. Dribin

Section Chair, 2014- 2015

I thought I would use this column as an opportunity to provide information about our Section's finances and the budgetary process. What are the sources of our revenue? How do we spend it? How do our members benefit from the ways in which we decide to allocate our disbursement of funds?

The budgetary process begins each year, with the preparation of the Section's budget for the next fiscal year and its submission to The Florida Bar. The Section recently fulfilled this responsibility with the approval by the Executive Council of the Budget Committee's proposal for the Section's July 1, 2015-June 30, 2016 fiscal year.

This year and last, the Section's Budget Committee was chaired by our Section Treasurer, Katherine Frazier. The Committee is co-vice chaired by Dan DeCubellis, Drew O'Malley, Pam Price, Lee Weintraub and Cary Wright. Other members include several past chairs, our Chair-Elect, our CLE Section Co-Chairs and myself. In addition, our Section Program Administrator, Mary Ann Obos, offers important input and serves a vital role in obtaining needed input from The Florida Bar staff.

Beginning at the end of July, the Budget Committee meets several times, either in person or telephonically. Every line item of revenue and expense is considered in the process. The Committee makes a concerted effort to consider trends, such as increased use of technology in CLE programming, to assess areas where either greater expenditures would be useful or reduced (such as printing expenses for hard copies). The process is intense, sincere and thoughtful.

Once the Budget Committee completes its work, the proposed budget is submitted to a vote of the Section's Executive Council. This year, the 2015-16 budget was approved by vote of the Executive Council in Naples on November 15, 2014 and is available at the Section website.

What are the sources of our revenue? The largest source is the annual dues paid by our membership. Then, in order of their size: revenue from CLE programs and conferences, sponsorship revenue, and exhibitor fees and advertising (such as advertising in this publication). Our reserve funds are invested through The Florida Bar and we receive an annual allocation of the investment return.

How is this revenue allocated? Perhaps the most important function that we, as a Section, can provide to our membership is information that is relevant to our practices. We focus a great deal on how best to deliver this material, both in terms of substantive content and via different vehicles. Of course, our CLE programming is in the forefront of these efforts. While the traditional means of delivering CLE still applies, *i.e.*, the half-day or full-day live presentation, we also offer two institutes, the Attorney-Trust Liaison Conference and the Construction Law Institute. In addition, we offer annually the Legislative Update, which is a down and dirty summary of statutory and case law developments of interest to both the real property and probate sides of our membership.

But our Section CLE co-chairs, Tae Kelley Bronner and Bob Swaine are always looking for ways to deliver CLE programming in less traditional and less costly ways, especially in recognition of technological advancements. For example:

- We offer several free or reduced cost CLE programs each year to provide members with cutting edge information or ethics credits;
- We have developed a program of short electronic CLE programs that attorneys can attend over a lunch hour at a lower cost than a full day seminar with topics designed to keep them on top of "breaking news" without interrupting their already busy day;
- We have started to provide power strips at seminars to assure laptops and iPads are fully powered with ready access to electronic materials during live seminars; and,
- At larger seminars we have begun to utilize technology to allow interactive presentations where the audience can ask questions and make comments during select panel discussions.

The Section's quarterly newsletter, *ActionLine*, provides important articles of very current topics and case summaries, as well as information about areas the Section is studying through its committees for possible future legislation.

All of this educational process involves a significant allocation of our cash resources.

Another important area of allocation of Section revenue is the maintenance and upkeep of our Section website. Increasingly, Section leadership and committee chairs are making use of the website to post current developments, committee agenda and minutes, including proposed

continued, page 5

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

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ABOUT THE COVER:

Evening view of Chicago from Shedd Aquarium

Photo by Mike Gelfand

IN THIS ISSUE:

Chair's Column: Our Financial Resources—From Whence Cometh? To Where Goeth? 3
Reptiles Take Over the Windy City 5
Resolution – John Arthur Jones 8
Is a Construction Defect Plaintiff Entitled to Prejudgment Interest for Unrepaired Defects? 10
What Attorneys Should Know When Dealing With Client Capacity Issues 13
Check Your Dec—Is Your Right of First Refusal at Risk of Being Refused? 16
Frank Aragona Trust: A Way Around the Imposition of the NII Tax for Trusts? 19
Fellowship Program Open to All Young RPPTL Section Attorneys 21
Stone v. Stone: Is the Fourth DCA Catching Habeeb?
A Deed does not a Waiver Make 22
Transfer by Deed does the Job 24
RPPTL Section Executive Council Meeting, The Breakers, Palm Beach, July 31 - August 2, 2014 27
Photos: The Breakers, Palm Beach 28
Photos: Sofitel Chicago Water Tower Hotel, Chicago, Illinois 29
Roundtables 30
Should I Stay or Should I Go: The Clash of Issues for 401(k) Owners Deciding Whether to Rollover into an IRA 33
Florida Realtors/Florida Bar (FR/BAR) Residential Contract Documents Revised Effective September 2014 38
Spotlight on the Real Property Finance & Lending Committee 41
The Annual Kozyak Minority Mentoring Picnic was a Huge Success! 43
Real Estate Case Summaries 44
Probate Case Summaries 49
Eighth Annual Construction Law Institute Set for March 12-14, 2015 53
What's Happening Within the Section 55
ActionLine Bulletin Board 56

Get Included in *ActionLine!*

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

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

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

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

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

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact 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.

legislation. Executive Council agendas are posted as well, including materials associated with proposed legislative positions and cases of interest.

One of the Section's most important functions is the submission of proposed legislation to the Florida Legislature. The work of producing the legislation begins at our committee and subcommittee levels, often over several years. At the point at which our Executive Council approves a committee-recommendation as a Section legislative position, our contracted legislative consultants, Pete Dunbar and Martha Edenfield, and their colleagues at Dean Mead, in Tallahassee, find sponsors and shepherd the proposed legislation through the committee and floor process in both houses of the Legislature. This expenditure of Section resources is critical to maintaining our impressive success and credibility in the enactment of laws which advance sound public policy.

The Section also provides funds to support diversity initiatives, including sponsorship of the annual Kozyak Minority Mentoring Picnic in Miami. We also expend funds locally and statewide to support the enhancement of other groups with whom we work closely for the common good, including our realtors, the title insurance industry and professional fiduciaries. In an effort to support our state law schools and to encourage Section membership and activity, we actively promote special law student membership in the Section and provide liaisons to the Section in Florida's law schools.

Section funds go to the support of our committee and Executive Council meetings, held five times a year. Executive Council activities are supported by registration fees, individual events and sponsorship funds. All of the activities described in this article in one way or another are considered and revised and created as a consequence of these meetings.

I hope this article has provided a brief summary of the sources of our revenue, how we spend our revenue and the process by which that is all determined.

Reptiles Take Over the Windy City

By Theo Kypreos, Jones Foster Johnston & Stubbs, P.A., West Palm Beach, Florida

We enjoyed yet another fun-filled, out-of-state meeting of the Real Property, Probate and Trust Law ("RPPTL" or "Reptiles") Section of The Florida Bar this past September in Chicago. RPPTL Section Chair Mike Dribin proudly calls the "Windy City" his hometown. Our gracious host planned a number of memorable excursions and events for his "Death" and "Dirt" RPPTL friends. I think I speak for all of us when I say that the experience Mike created fully encompassed the history and culture of one of the country's great cities, leaving each of us with a real appreciation of all that Chicago has to offer. The 2014 meeting took place September 17 through September 21. The Reptiles enjoyed headquarters in the heart of downtown Chicago at the Sofitel Chicago Water Tower hotel.

Many Reptiles arrived on Wednesday, so Mike arranged for a convenient and casual family-style dinner at Lou Malnati's Pizzeria, which was just a short walk from the Sofitel.



Lou Malnati's Chicago-style deep dish pizza showcased the best Chicago has to offer when it comes to pizza…not to mention other Italian favorites and plenty of drinks to compliment the cuisine. As old and new friends mingled and indulged, Mike welcomed the group and forecasted the week's events. During our pizza extravaganza, the RPPTL Section presented Mike and his wife Lori with a token of appreciation to thank them for their efforts in planning the week's festivities. Mike and Lori's wardrobes are now complete with personalized Chicago Cubs apparel. They proudly supported their hometown team and sported their new apparel later in the week at Thursday night's Cubs game.

After pizza, the Reptiles slithered back to the Sofitel and continued the evening's festivities with libations and dessert at the RPPTL hospitality room. After closing down the hospitality suite, some of the more adventurous Reptiles took to the lively Chicago downtown nightlife. Several Reptiles (who shall remain nameless) were reportedly seen leading the singing at the crowded Redhead Piano Bar until closing time.

Thursday morning, the Reptiles loaded up a few buses and headed to the docks along the Chicago River and boarded the "InnisFree" for an architectural boat tour through downtown Chicago. The tour treated sightseers to an in-depth tour of Chicago's rich architectural perspective. Our members



gained authentic insight about the Windy City's architecture, builders and history. After the boat tour, folks had plenty of time to roam the city, enjoy the extraordinary weather (which I'm certain Mike arranged just for our group), have lunch among the many culinary standouts in the downtown area, and do some shopping along the "Magnificent Mile" of Michigan Avenue.

Late Thursday afternoon, members attended a welcome reception at the Sofitel's beautiful Café des Architectes restaurant…a pre-game celebration offering Reptiles adult beverages, mini milkshakes and tasty hors d'oeuvres before departing for the Cubs-Dodgers baseball game. After a short walk from the hotel, the group did what the locals do…boarded the subway and traveled to historic Wrigley Field, home of the Cubs. What a welcome! The Wrigley Field marquee greeted the Reptiles with a personal welcome message. The game itself was an eventful and engaging competition between the Cubs and Dodgers. Unfortunately, the hometown Cubs couldn't hold on to the victory. As Mike Dribin colorfully explained, the Cubs were successful in continuing their tradition of "snatching a loss from the mouth of victory." Notwithstanding the game's outcome, it was a great evening of fun among colleagues



and friends. After the game, many folks retreated to the hospitality room to enjoy each other's company and some late night beverages and snacks.

With Friday morning upon us, buses arrived at the Sofitel to pick up the Reptiles for a short trip across town to the world famous Chicago Art Institute and Millennium Park. We enjoyed spectacular weather in the park's stunning gardens. The gardens are chock full of sculptures, artwork and other sites such as the Crown Fountain, the Wrigley Square and



Millennium Park Monument, and the Cloud Gate (a/k/a the "Bean"). As an added bonus, the Chicago Symphony Orchestra rehearsed on the lawn. As it was prepping for its opening concert of the season later that evening, those of us who were lucky enough to pass through at the right time listened to perfectly pitched melodies as we strolled the park. Next, it was on to the Chicago Art Institute, which houses exhibits of all kinds. In fact, the challenge is to prioritize your time among the numerous exhibits so you see all the highlights. It would be impossible to see everything in the Art Institute in a day (much less a few hours), but the Reptiles did their best to survey as many exhibits as possible including the contemporary art, still art, miniature houses, Greek/Roman sculpture, textiles, and other unique exhibits. Several of us focused our tour in the Modern Wing of the Art Institute, which is a must-see for any RPPTL members who could not join us for the trip but find themselves in Chicago in the future. By mid-afternoon we re-boarded the buses and traveled back to the Sofitel.

One of the highlights of the week was the Friday night reception and dinner held at the Shedd Aquarium. Buses again picked everyone up from the Sofitel and traveled through downtown Chicago to the Shedd, which is situated along Lake Michigan. The Reptiles had the Shedd to themselves, which allowed us to explore at our leisure through the Oceanariums. We watched dolphins, sea lions, otters, beluga whales, penguins and other sea creatures gracefully entertain us from below the surface. Then, we moved onto the Shedd's outdoor terraces for local brews, cocktails and hors d'oeuvres, with a breathtaking panorama of the Chicago skyline and Lake Michigan as the sun set. Mike Dribin sure pulled out all the stops for our crew!

After the cocktail reception, we retreated to the Shedd's main aquarium for dinner. The theme for dinner was a "taste of Chicago," featuring Greek, Mexican and Chinese cuisine



representative of three of the Windy City's neighborhoods. Seating for dinner encompassed the Shedd's huge, central Caribbean Reef tank so we could observe the many species of fish and other sea life in the tank as we enjoyed the evening. During dinner, a reef diver fed the fish and other inhabitants of the reef tank. After the reef dive, a Shedd representative presented us with a brief history of the Shedd and its methodically chosen architecture. After enjoying the dessert station and singing "Happy Birthday" to RPPTL Executive Committee member Bob Swaine in celebration of his 40th birthday, we re-boarded the buses and returned to the Sofitel. Of course, our favorite late night retreat, the hospitality room, was ready for night caps and fellowship.



Saturday morning began with a buffet breakfast at the Sofitel. After breakfast, we walked one block to Loyola University School of Law, Mike Dribin's alma mater, for our Executive Council meeting and CLE. Florida Bar President Greg Coleman attended, as did many RPPTL section members who reside in the Chicago area. Following the meeting and CLE program, the Reptiles headed to the Lincoln Park Zoo, where we were free to explore the zoo and see its wonderful animal exhibits and the surrounding botanical gardens. Meanwhile, back at the Sofitel, Mike Dribin moved mountains to ensure that the Florida-Alabama football game would be featured in the hotel bar for the heavy contingent of faithful Gators in attendance. If we knew then what we know now, we might have asked Mike to have the cable disconnected at the hotel during the game. Well, at least the game was competitive for the first half!



On Saturday night, the Reptiles split up and dined at three restaurants – Adobe Grill (Mexican), the Fireplace Inn (steak and ribs) and Orson's (Italian), hosted by former Chicagoans Michael Gelfand, Stuart Altman, and Mike Dribin, respectively. After dinner, the three dinner groups rendezvoused at The Second City comedy club and theatre for some late night entertainment. With roots dating back to the 1950's, The Second City groomed famous comedians and actors such as John Belushi, Mike Myers, Bill Murray, John Candy, Tina Fey, Steve Carrell, Stephen Colbert, and Gilda Radner. Following in the footsteps of their famous alumni, The Second City kept the Reptiles thoroughly entertained and laughing out loud. What a great way to end the week! Afterwards, it was back to the Sofitel and the, by now, infamous hospitality room for one last night of mingling to wish each other well before traveling home on Sunday.



Mike, thank you again for such a thoughtful tour of a truly special city! Also, as Mike reminded us many times during the trip, a special thank you is owed to RPPTL Section Administrator Mary Ann Obos, whose tireless efforts led to the week's many events going off without a hitch. With such an extraordinary trip behind us, I know we are all now looking forward to see how Michael Gelfand tries to top this recent Chicago trip when he takes us all to Berlin next year for the 2015 out-of state meeting!

See the photo galleries located on the RPPTL website for more photos of the events.

Resolution

Of

The Executive Council of the Real Property, Probate & Trust Law Section
The Florida Bar
Recognizing the Service and Contributions of

John Arthur Jones

Whereas,

JOHN ARTHUR JONES ("John Arthur") of Tampa, Florida, was a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar who passed away on August 12, 2014, predeceased by his wife of 64 years, Sally, and survived by his four children, Matthew, Lisa, Malcolm and Darby, seven grandchildren, Melisa, Emily, Troy, Loren, John Arthur, Charlie, and Bobby, and two great-grandchildren, Benjamin and Ellie; and

Whereas,

John Arthur was born in San Antonio, Florida on October 9, 1921, the youngest of six children, graduated from DeSoto County High School in 1939 and enlisted in the Florida National Guard following graduation, served his country with distinction as a member of General Patton's 3rd Army in the European Theatre during World War II and received a bronze star for his actions in the Battle of Metz; and

Whereas,

After returning from war, John Arthur earned his undergraduate and law degree from the University of Florida and was admitted to The Florida Bar in 1949; and

Whereas,

For a brief period of time after his graduation in 1949, John Arthur practiced law in Dade City but in September of that year accepted a job at Knight, Thompson & Turner, which ultimately became the international law firm of Holland & Knight due, in large part, to the efforts of John Arthur and his friend, Chesterfield Smith; and

Whereas,

John Arthur, throughout his remarkable legal career, practiced and excelled in many areas of the law, most notably, estate and trust law, real estate law, corporate law and banking law; and

Whereas,

John Arthur is the only Florida attorney to have been elected as a fellow to both the American College of Trust and Estate Counsel ("ACTEC") and the American College of Real Estate Lawyers ("ACREL") and was an Academician in the International Academy of Estate and Trust Law; and

Whereas,

John Arthur was the editor of the Florida Banking Code and served as a member of the faculty of the Florida School of Banking at the University of Florida from 1969 until 1981, teaching members of the Florida Banking Association about banking and commercial law; and

Whereas,

John Arthur was a member of the Real Property, Probate & Trust Law Section of The Florida Bar for 60 years, served as Chair of the Section from 1980 – 1981, was considered the "Dean of Probate Law" in the State of Florida, was a founding member of Florida Lawyer Support Services, Inc. ("FLSSI") and developed what is widely recognized as the most comprehensive set of probate and guardianship forms in the country, served on countless Real Property, Probate and Trust Law Section committees and assisted with rewriting the Florida Probate Code (twice), the Florida Trust Code, and most recently, the Florida Power of Attorney Act, was a frequent lecturer at many Continuing Legal Educations seminars, authored several chapters in various publications of The Florida Bar Continuing Legal Education manuals and was co-author of Florida Wills and Trusts for LAWGIC; and

Whereas,

In 1985, John Arthur was the first recipient of the Robert C. Scott Memorial Award, a recognition which is awarded by the Real Property, Probate & Trust Law Section to a member who best exemplifies devotion and service to the Section and eighteen years later, in 2003, became the first recipient of the William S. Belcher Lifetime Professionalism Award awarded by the Section to a member in recognition of lifetime contributions to promoting the highest standards of ethics and professionalism; and

Whereas,

In 2012 in recognition and gratitude for John Arthur's lifelong commitment to the Real Property, Probate and Trust Law Section of The Florida Bar, the Section's Annual Service Award was renamed "The John Arthur Jones Annual Service Award" in dedication to John Arthur, a man who personified the meaning of the word "service"; and

Whereas,

John Arthur's lasting contributions to the legal community will continue on through the work of the countless number of attorneys he mentored - all of whom proudly called him "friend" and all of whom will remember him always in their hearts and minds; and

Whereas,

The Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar recognizes the extraordinary dedication and unselfish service and contributions that John Arthur has given to the nation, his community, his family, his friends, The Florida Bar, particularly its Real Property, Probate and Trust Law Section, and acknowledges that he will be eternally missed.

Now, Therefore,

Be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar that the loss of John Arthur Jones is mourned, and that his distinguished service and rich contributions to the practice of law, particularly to the practice of estate and trust law, are respected, appreciated, acknowledged and will be remembered forever.

Unanimously adopted by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar at Chicago, Illinois, this 20th day of September, 2014.

Michael A. Dribin, Chair
Real Property, Probate & Trust Law Section
The Florida Bar

Debra L. Boje, Secretary

Is a Construction Defect Plaintiff Entitled to Prejudgment Interest for Unrepaired Defects?

By Maritza Peña, Esq., Marlow Adler Abrams Newman & Lewis, Coral Gables, Florida


M. PEÑA

Benjamin Franklin is famously quoted as saying that "[a]n investment in knowledge pays the best interest." Most of us would be hard-pressed to disagree with that truth. We are, after all, members of a profession that demands our continual education. Yet, we often, absentmindedly and with little analysis, gloss over the basics we learned in our first year of law school. We all know that, more often than not, a prevailing party will be entitled to prejudgment interest on a judgment. However, prejudgment interest is usually no more than an afterthought after a verdict is reached. This is a mistake. The truth is that in certain cases, particularly construction defect cases, the promise of a prejudgment interest award can be a prosecuting attorney's primary motivation in filing suit. And for a construction lawyer defending a developer, general contractor, or subcontractor, a plaintiff's claim for prejudgment interest can often become an expensive element of damages.

The goal is to make a plaintiff whole, not to award the plaintiff a windfall.

Florida adopts the "loss theory" in awarding prejudgment interest. As confirmed in 2010 by the Florida Supreme Court in *Bosem v. Musa Holdings, Inc.,*[1] the distinction between liquidated damages, or "out of pocket" expenditures, and unliquidated damages is irrelevant to the determination of whether prejudgment interest is available. The "loss" is the wrongful deprivation of the plaintiff's property. Liquidated damages need not be proven. If a jury's verdict or a trier-of-fact's findings fix damages as of a prior date, prejudgment interest must be awarded as of that prior date. There is no discretion. Prejudgment interest must be awarded even if there are no incurred "out of pocket" damages.

Under the "loss theory" of recovery for pecuniary damages, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property. Under this theory, "out of pocket" expenses need not exist for there to be an award of prejudgment interest. The plaintiff must be made whole from the date of loss if a finder of fact has determined the amount of damages and defendant's liability for those damages.[2]

In *Bosem*, the plaintiff physician and his professional association brought an action for injunctive relief, fraud, false advertising, and compensatory damages against Musa Holdings, Inc. d/b/a Eyeglass World and other claims for Musa's alleged unauthorized use of Dr. Bosem's image or likeness in violation of the Lanham Act. Dr. Bosem claimed he suffered lost profits because of Musa's unauthorized use of his image. Dr. Bosem also claimed he was forced to reduce the price of his Lasik eye surgery procedure to retain patients who had seen advertisements in which Musa claimed Dr. Bosem would perform the same surgery for less at its centers. Dr. Bosem prevailed on summary judgment on the liability issues raised. Then, the trial court, after a bench trial on damages, found that Dr. Bosem and his professional association sustained lost profits in the amount of $93,306. According to the court, the period of infringement was from July 2000 to December 2001. In addressing whether the plaintiffs would be entitled to prejudgment interest, the trial court reviewed *Air Ambulance Professionals, Inc. v. Thin Air*[3]; and *Argonaut Ins. Co. v. May Plumbing Co.*[4] The trial court acknowledged the conflicting principles between *Air Ambulance and Argonaut. In Air Ambulance*, the Fourth District held that only liquidated damages claims generate prejudgment interest. In the 1985 case of *Argonaut*, a construction defect case, the Florida Supreme Court previously concluded that Florida followed the "loss theory," where the "loss" was considered the wrongful deprivation of plaintiff's property, and plaintiffs were entitled to be made whole from the date of loss once the finder of fact had determined the amount of damages. The trial court reasoned that *Argonaut* remained good law and the *Bosem* plaintiffs were entitled to interest on the $93,306 lost profits dating back to the period of infringement.

On appeal, the Fourth District reversed the award on prejudgment interest, citing to its previous ruling in *Air Ambulance* and rejecting the idea that Florida had adopted the "loss theory" in *Argonaut*. The Florida Supreme Court disagreed. In reversing the Fourth District, the Supreme Court confirmed, 25 years after *Argonaut*, that Florida followed the "loss theory." According to the Court, "the loss itself is a wrongful deprivation by the defendants of the plaintiff's property," and the plaintiff is to be "made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability" for those damages.[5] The trial court found that lost profits under $100,000 were sufficient "liquidated damages" to entitle Dr. Bosem and his practice to a prejudgment interest award as a matter of law.

Unlike *Bosem,* which was at its heart a lost profits case, *Argonaut*, on which the *Bosem* Court relied, contained a fact pattern typical in construction suits. In that case, Argonaut Insurance Company paid nearly $250,000 to the owners of the Colony Club Apartments for damages from a fire caused by the negligence of a May Plumbing Company employee. Argonaut sued May Plumbing and its carriers for subrogation. Argonaut was awarded just over $187,000 after the Colony Club unit owners were found to be 25%

comparatively negligent for the fire. The trial court awarded prejudgment interest on the judgment, but the Fourth District Court of Appeal reversed, holding that the comparative negligence allotted to the unit owners made the award uncertain and, therefore, "unliquidated." The Fourth District concluded, "[w]here the judgment is for damages, interest may not be added to the principal award unless there can be a conclusive determination of an exact amount due and a date from which interest can be computed."[6] The Florida Supreme Court disagreed and reinstated the $187,000 prejudgment interest award, stating:

> …[S]ince at least the turn of the century, Florida has adopted the position that prejudgment interest is merely another element of pecuniary damages… While doing so, the Court recognized and rejected an alternative but traditional rationale – that prejudgment interest was to be awarded as a penalty for defendant's "wrongful" act of disputing a claim found to be just and owing. This view is still the rule of some jurisdictions. *See, e.g., Home Insurance Co. v. Olmstead*, 355 So.2d 310 (Miss. 1978). The distinction between liquidated and unliquidated claims is closely linked to this "penalty theory" of prejudgment interest. To punish a defendant for failure to pay a sum which was not yet certain or which he disputed would be manifest injustice. But where the amount is certain and the defendant refuses to surrender it because of defenses determined to be meritless, the defendant may properly be punished for abuse of privilege to litigate …. Once a verdict has liquidated the damages as of a date certain, computation of prejudgment interest is merely a mathematical computation. There is no "finding of fact" needed. Thus, it is purely a ministerial duty of the trial judge or clerk of the court to add the appropriate amount of interest to the principal amount of damages awarded in the verdict.[7]

Although "loss theory" was given the stamp of approval by *Argonaut* in 1985, it would be twenty-five years before the *Bosem* Court would cement the scope of the *Argonaut* decision to include prejudgment interest awards for damages whether or not liquidated, and certain, as of the time of filing.

Following *Argonaut*, other construction defect cases in Florida continued to confirm that whether damages are unliquidated is irrelevant to a determination of whether prejudgment interest is available. *See Pine Ridge at Haverhill Condominium Association, Inc. v. Hovnanian of Palm Beach II, Inc.*[8] (where the court, based on the jury's verdict and the loss theory, awarded prejudgment interest on the award dating back to 1985) and *Centex-Rooney Construction Co., Inc. v. Martin County*[9] (where the Fourth District rejected Centex's and the sureties' arguments that the award was in error because the County did not incur any out of pocket expenses for the repairs until several years after December 1988; and where according to the court, the jury's verdict "liquidated the damages as of a date certain"). Florida federal courts have also adopted *Bosem*. Only a year after the *Bosem* ruling, the Middle District of Florida adopted its holding. *See Tampa Bay Water v. HDR Engineering, Inc.*,[10] (where the Middle District agreed that an award of prejudgment interest would be computed, even on repairs that still needed to take place in the future, if the jury verdict fixed the plaintiff's damages as of the date of loss).



Although Florida's "loss theory" is seemingly lenient in its interpretation of what constitutes "liquidated damages," and subsequently in awarding prejudgment interest, courts have carved out scenarios when prejudgment interest awards can be reduced or even denied altogether.Considerations that may affect an award of prejudgment interest include the following: (1) in choosing between innocent victims, it would not be equitable to put the burden of paying interest on the public; (2) it is inequitable to allow an award of prejudgment interest when delay between injury and judgment is the fault of the prevailing party; and (3) it is inequitable to award prejudgment interest to a party who could have, but failed to, mitigate its damages. Therefore, scenarios will arise where the equities prohibit an award of prejudgment interest. This makes a trial court's decision to award, or not award, prejudgment interest very fact specific.

For example, after *Bosem*, defendants throughout the State of Florida rely on the 1997 decision of *CH2M Hill Southeast, Inc. v. Pinellas County,*[11] to argue that prejudgment interest should not be awarded for construction defect claims. In that case, the court after two appeals, ultimately decided against prejudgment interest on a jury award of $10,000,000 retroactive to a date of loss twenty years prior. It can be argued that the *CH2M* decision may have been one of Florida's first examples of equity considerations precluding an interest award. In *CH2M*, Pinellas County filed a negligence action against an engineering firm, CH2M Hill Southeast, Inc., for defectively designing a water-bearing pipeline for the County. The pipeline was completed in October 1978, and in November 1979 one section of the pipeline broke. A second and third rupture occurred in December 1980 and May 1991 respectively. The fourth and final rupture occurred in 1994. The first trial of the case was a bench trial and resulted in a final judgment in favor of Pinellas County. On appeal, the first judgment was reversed and remanded for retrial. The case was tried again, this time before a jury. The jury awarded final judgment in favor of the County in the amount of $10,000,000, which represented the replacement cost of the pipeline. The trial court, following *Argonaut*, awarded prejudgment interest. The case was appealed a second

time. CH2M Hill argued that the interest award was improper because the County had not expended funds to replace the pipeline. Despite *Argonaut*, the Second District reversed the award of prejudgment interest on $10,000,000 awarded to Pinellas County to replace the pipeline because the $10,000,000 figure did not represent out of pocket expenditures by the County.

Although perhaps the *CH2M* court simply misread *Argonaut* to mean only actual expended repairs sums would be entitled to an award of prejudgment interest, one can also argue that, although the Second District did not raise any equity considerations in its final opinion, it may have concluded that awarding prejudgment interest retroactively to 1978 would be an inequitable windfall given repairs were never performed. According to the opinion, the pipeline had been in use for over two decades without any repairs ever being performed.

Lastly, like any other right, the right to recover prejudgment interest can be waived. For example, if anaggrieved plaintiff insists on calculating damages in present day dollars, he or she would arguably not be entitled to prejudgment interest on those present day valued damages. The goal is to make a plaintiff whole, not to award the plaintiff a windfall.[12]

In the end, if knowledge does yield the best interest, we in the legal profession will be best served by analyzing prejudgment interest as a significant element of damages in the cases we are handling for our clients. Serious thought and analysis should be given to the possibility of a prejudgment interest award early on in our clients' cases and as part of our overall litigation strategy.

Maritza Peña *is a partner at Marlow, Adler, Abrams, Newman & Lewis in Coral Gables, Florida. Her practice involves representing developers, general contractors, subcontractors and/or their insurance companies, in complex construction defect litigation arising from private projects (mostly residential projects and specifically luxury condominiums and/or family dwellings) throughout the State of Florida. Ms. Peña is AV-rated by martindale.com, and practices in state and federal court throughout the State of Florida.*

Endnotes

1 46 So. 3d 42 (Fla. 2010).
2 *See* 46 So. 3d at 44-46.
3 809 So. 2d 28 (Fla. 4th DCA 2002).
4 474 So .2d 212 (Fla. 1985).
5 *See* 46 So. 3d 42, 45-46.
6 *See* 474 So. 2d at 213.
7 *See* 474 So. 2d at 215-16.
8 629 So. 2d 151 (Fla. 4th DCA 1993).
9 *Centex-Rooney*, 706 So. 2d 20 (Fla. 4th DCA 1997).
10 2011 WL 3101803 (M.D. Fla. July 25, 2011).
11 698 So. 2d 1238 (Fla. 2d DCA 1997).
12 *Supra* note 9, at 20 (where the court found that if a defendant argues in favor of deflating the aggrieved plaintiff's damages numbers to their value at the time of the loss, he or she waives any right to contest the prejudgment interest award).

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What Attorneys Should Know When Dealing With Client Capacity Issues

By Jenna G. Rubin, Esq.
Gutter, Chaves, Josepher, Rubin, Forman, Fleisher, Miller P.A.
Boca Raton, FL


J. RUBIN

Today's aging population, coupled with the nature of our work and the demographics of our state, make it a common occurrence for us to represent clients well into old age. Whether in an initial intake interview or years into the representation, with old age often come questions about a client's ability to understand your representation of him or her, and the goals you are trying to accomplish on his or her behalf.

Unfortunately, law schools do not offer courses on assessing capacity during their traditional first year curriculums of torts, civil procedure and the like. While many argue it is not the attorney's job to make decisions regarding the capacity of a client, a condition precedent to representing a client is often the attorney's belief that the client has capacity to hire the attorney. Many ethical rules under which attorneys practice mandate that they make certain threshold determinations regarding a client's capacity throughout the representation.

The signs of diminished capacity are complex and confusing to identify and understand. An attorney facing these issues is also faced with a myriad of legal authorities that attempt to delineate an attorney's duties in this scenario, each of which takes a different approach. A Florida attorney should first look toward The Florida Bar Rules of Professional Conduct and Florida Bar ethics opinions, but may also consider sources such as the American Bar Association (ABA) Rules of Professional Conduct, the National Academy of Elder Law Attorneys' (NAELA) Aspirational Standards for the Practice of Elder Law, the Model Rules of Professional Conduct and the American College of Trust and Estate Counsel's (ACTEC) Commentaries on the Model Rules of Professional Conduct.

Under most authorities, and specifically under Florida law, we must first presume the competency of our clients.[1] We must presume that an adult client has the capacity to undertake any legal task unless a court has adjudicated the client incapacitated or someone challenges the client's capacity and can put forth enough evidence to meet a requisite burden of proof.[2] In 1949, the Florida Supreme Court found it appropriate for an attorney to prepare a codicil for a client and have that client execute the codicil on his death bed while knowing that the client did not read the codicil and likely did not understand its contents. The Court held that "these circumstances did not make it necessary that the attorney constitute himself a court to pass on the medical and legal question whether he was in fact capable of executing a valid codicil" and that it would be the role of the probate court to later determine whether that codicil should be admitted to probate.[3] Yet, in 1988, the Florida Supreme Court affirmed a decision to publicly reprimand an attorney who improperly coerced an apparently incompetent client into executing a codicil, even though the court specifically found that the attorney did not benefit from the action and was only acting based on his belief that the client should not disinherit his family. The Florida Supreme Court found that the attorney's duty was to execute his client's wishes and not his own.[4]

There are many ways an attorney can help optimize an elderly client's capacity and maintain the client's focus to avoid situations like those described above. The attorney can interview the client alone, adjust the interview environment to make the elderly client more comfortable, speak slowly and loudly, give older clients extra time to comprehend what is being said and meet with the client more than once. Meeting with clients in the morning may be particularly helpful, as elderly clients may experience what has been identified as "sundowning," a term referring to the state of confusion that patients with diminished capacity tend to face in the late afternoon and at night.[5] With long-standing clients, simply knowing your client can go a long way. Were they always cantankerous and difficult to deal with, or has there been a drastic change in their demeanor?

Beyond taking measures to optimize a client's capacity, we also have the opportunity to take certain affirmative protective measures *before* a client's capacity becomes diminished. Estate planning attorneys may give a client information regarding devices the client could use to protect his interests in the event of diminished capacity, including ways to avoid the necessity of a guardianship proceeding through the use of durable powers of attorney, revocable trusts and designations of pre-need guardians.[6] The ACTEC Commentaries to the Model Rules of Professional Conduct recommend asking the client to execute a letter that would authorize the attorney to communicate to designated parties when the attorney has concerns regarding the client's capacity.[7] Similarly, the client's durable power of attorney could include an authorization allowing the attorney-in-fact to waive on behalf of the client certain attorney-client or physician-patient duties of confidentiality in appropriate circumstances.[8]

An attorney must also understand that under law, varying degrees of mental capacity may be required for different legal actions. For example, to make a will, a client must

understand the extent and value of his property, the persons who are the natural object of his estate and the practical effect of the will as executed.[9] To marry, a client must have the capacity to understand the nature of the marriage contract and the duties and responsibilities it creates.[10] An attorney should keep these varying standards in mind throughout the representation of a client because the client may have capacity to make certain decisions but not others.

At some point, however, despite taking protective actions and attempting to maximize capacity, an attorney may begin to have serious concerns about a client's capacity. Rule 4-1.14 of The Florida Bar Rules of Professional Conduct requires an attorney to maintain a normal relationship with the client as far as reasonably possible, even when the client's ability to make adequately considered decisions is impaired.[11] Yet, The Florida Bar Rules of Professional Conduct do not provide much guidance to attorneys about how to recognize the extent of a client's diminished capacity, nor do they impose a duty on attorneys to identify the signs of diminished capacity.

In a comment to the ABA Rules of Professional Conduct upon which Rule 4-1.14 of The Florida Bar Rules of Professional Conduct is modeled, the ABA makes several recommendations for attorneys faced with determining the extent of a client's diminished capacity. The ABA recommends that an attorney consider and balance such factors as the client's ability to articulate reasoning leading to a decision, the variability of the client's state of mind, the client's ability to appreciate the consequences of a decision, the substantive fairness of the client's decision, and the consistency of the decision with the known long-term commitments and values of the client.[12]

There are also a variety of tests available that an attorney could theoretically administer to a client to determine capacity, such as the Mini-Mental Status Exam (MMSE), which is often used by examining committees in guardianship proceedings. However, the ABA along with the American Psychological Association, dissuades attorneys from using such examinations unless the attorney is professionally trained in such testing.[13] As an alternative, these organizations publish a handbook for attorneys dealing with the assessment of older adults with diminished capacity. The handbook lists the following "red flags" which an attorney might witness that would raise concerns about a client's capacity: short-term memory loss, communication problems, comprehension problems, lack of mental flexibility, calculation problems, disorientation, significant emotion distress, emotional liability/inappropriateness, delusions, hallucinations, and poor grooming/hygiene. The handbook warns practitioners, however, that certain mitigating factors, such as stress, grief, depression and reversible medical conditions may be the reason for these red flags.[14] Understanding these factors may alleviate the concerns about a client's capacity.[15]

Ultimately, the attorney has some legal duty to make a determination about the capacity of his client when deciding whether to take protective action under Rule 4-1.14. This duty appears to exist despite the Rule only stating that an attorney may seek the appointment of a guardian or "take other protective action" when the attorney reasonably believes that a client cannot adequately act in the client's own interest.[16]

While The Florida Bar Rules of Professional Conduct do not define "other protective action," the ABA Rules of Professional Conduct recommend consulting with individuals or entities that can protect the client,[17] consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as a durable power of attorney, or consulting with a support group, professional services, adult protective agencies or other individuals or entities that can protect the client.[18] NAELA recommends that when taking any measures to protect the client, the attorney should be guided by the wishes and values of the client and the client's best interest, seek to minimize the intrusion into the client's decision-making autonomy and maximize the client's capacity, respect the client's family and social connections, and consider a range of actions other than court proceedings and adult protective services.[19]

What else can (and should) an attorney do once he recognizes the signs of diminished capacity? In a 1974 ethics opinion, The Florida Bar states that if an attorney has a good reason to doubt his client's competency, the attorney has a duty to express his doubts to the client and seek permission from the client to obtain a judicial determination of the competency issue. If the client refuses to consent to a competency determination, the attorney should move for leave to withdraw from the representation, but should continue to protect his client's rights until the court permits withdrawal.[20] A 1985 Florida Bar ethics opinion subsequently modified the 1974 opinion, stating that an attorney does not have to withdraw from the case, and should do what he can to safeguard the interests of the client, which would include making prudent decisions on behalf of the client. The attorney may, but is not required to, seek the appointment of a legal guardian for the client, even over the client's objection.[21]

It is clear that an attorney can and should take measures to optimize a client's capacity, and be aware of the signs of diminished capacity and the potential legal consequences of representing a client with diminished capacity. There are no clear answers for attorneys about how to behave in these situations, however, because capacity is such a subjective term and manifests itself differently with each client. An attorney in these situations should consider The Florida Bar Rules of Professional Conduct and Florida Bar ethics opinions, as well as the other authorities described herein. The Florida Bar Ethics Hotline for Lawyers is particularly helpful in dealing with client-specific situations as

they arise. As our population ages, we must remain aware of these issues and proceed with caution to protect our clients and properly represent their best interests.

Jenna G. Rubin *focuses on probate, trust and guardianship litigation at Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A. in Boca Raton, Florida. She is a graduate of Harvard Law School and Northwestern University, a Florida Bar William Reece Smith, Jr. Leadership Academy Fellow and an active member of the Real Property, Probate and Trust Law Section.*

Endnotes

1 *Travis v. Travis*, 87 So. 762, 765 (Fla. 1921); *See also* Uniform Health Care Decisions Act (1993), § 11 ("An individual is presumed to have capacity to make a health-care decision, to give or revoke an advance health-care directive, and to designate or disqualify a surrogate."); Uniform Guardianship and Protective Proceedings Act (1977) § 310 (Reinforces a presumption of capacity by requiring "clear and convincing evidence" of incapacity and need before a guardian may be judicially appointed.).

2 ABA Comm. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005),* 5.

3 *Vignes v. Weiskopf*, 42 So.2d 84 (Fla. 1949).

4 *The Florida Bar v. Betts*, 530 So.2d 928, 929 (Fla. 1988).

5 Glenn Smith, Ph.D., *Alzheimer's disease*, Mayo Clinic, http://www.mayoclinic.org/diseases-conditions/alzheimers-disease/expert-answers/sundowning/faq-20058511.

6 ACTEC Commentary on the Model Rules of Professional Conduct 1.14 at 216-217.

7 *Id.*

8 *Id.*

9 *American Red Cross v. Estate of Haynesworth*, 708 So.2d 602 (Fla. 3d DCA 1998).

10 *Mahan v. Mahan*, 88 So.2d 545 (Fla. 1956).

11 Florida Bar Rules of Professional Conduct, Rule 4-1.14(a).

12 ABA Model Rules of Professional Conduct, Comment No. 6 to Rule 1.14.

13 *Supra* note 2 at 3.

14 *Supra* note 2 at 14-16.

15 *Supra* note 2 at 16-17.

16 Rules Regulating The Florida Bar, Rule 4-1.14(b).

17 ABA Model Rules of Professional Conduct, Rule 1.14.

18 ABA Model Rules of Professional Conduct, Comment No. 5 to Rule 1.14.

19 NAELA Aspirational Standards for the Practice of Elder Law with Commentaries (Nov. 21, 2005), *available at* http://www.naela.org/app_themes/public/pdf/media/aspirationalstandards.pdf.

20 Florida Bar Ethics Opinion 73-25 (1974).

21 Florida Bar Ethics Opinion 85-4 (1985).

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Check Your Dec—Is Your Right of First Refusal at Risk of Being Refused?

By Kathryn Yankowski, Esq., Katz Barron Squitero Faust Friedberg English & Allen, P.A.


K. YANKOWSKI

It is no question that provisions granting a right of first refusal (ROFR) have found their way into the declarations of nearly every homeowner's association and condominium association (collectively, "associations") across the country. Amid its increasing popularity, however, lay unforeseen complications in what has now become the boilerplate language of a ROFR. One of the more perplexing of these issues arises when associations wish to exercise their ROFR in the context of a foreclosure sale at which title passes to a third party non-mortgagee. Without guidance from Chapters 718 or 720 of the Florida Statutes or from the Florida courts, associations and their attorneys must depend on their drafting skills and language of their governing documents to ensure their rights are in fact enforceable during judicial foreclosure auctions or thereafter.

Although rarely exercised, associations should include a ROFR in their governing documents for three principle reasons: (1) to prevent buyers with criminal backgrounds and/or less than exemplary financial backgrounds from moving into their communities; (2) to sustain their existing members' property values; and (3) to possibly make a profit for itself if the opportunity arises. These considerations are even more important to associations in the context of a foreclosure sale where the price is below market and the demand pool is unpredictable. Although the ease of online bidding has facilitated the foreclosure process, it has also opened up a larger market of anonymous buyers. Now more than ever it is critical for associations to review their governing documents and ensure that their ROFR is an enforceable tool to counter the risks inherent in the foreclosure process.

The scope and procedure of an association's ROFR is typically controlled by the language used in the declaration. Where the declaration fails to provide for specific procedures or rights, default provisions from the Florida Statutes fill the gaps and binding case law supplements the entirety. Although many declarations and bylaws carve out an exception to the association's ROFR where it is the foreclosing institutional lender or mortgagee that acquires title to the subject property, a similar exclusion is rarely found for third party bidder acquisitions. Adding to the uncertainty, there is no Florida case or statute directly addressing whether an association's ROFR is triggered by a foreclosure sale. Other jurisdictions dealing with this issue are split, with the majority finding that a ROFR does not apply in the context of foreclosure.

Holes in Florida law leave HOAs and condominium associations questioning whether or not they can exercise their ROFR against third party bidders at foreclosure sales.

Jurisdictions Finding That Foreclosure Sales Do Not Trigger ROFRs

Jurisdictions refusing to enforce a ROFR within a foreclosure or other forced sale begin their analysis by looking to the language creating or granting the right.[1] The triggering events for most ROFRs are couched in terms of free will, such as "Should the owner *elect to sell*"[2]; "If the holder *desires to sell*"[3]; or "Should the party *offer the property for sale*"[4]. In all of these provisions, the various courts found voluntariness to be the dominant element of the triggering event. Because there is no intent for the owner to sell at foreclosure, the ROFR has been deemed not to apply to such involuntary transfers of title.[5]

Courts taking this position further support their decision with economic policy considerations. For example, they reason that allowing associations to invoke their ROFR would not adequately protect foreclosing lenders because the likelihood of potentially losing title to a ROFR-holder after a drawn out lawsuit would deter spirited bidding at foreclosures. Furthermore, if the holder of a ROFR truly wishes to purchase the property, they can simply participate in the bidding process, thus raising the final sale price closer to its true fair market value.

Jurisdictions Finding Foreclosure Sales Trigger ROFRs

Taking the opposing stance, jurisdictions enforcing ROFRs despite the "involuntary" nature of foreclosure sales focus less on form and language and more on the autonomy to contract and protection of bargained-for rights. The courts reason that the intention of the parties to include a ROFR in the association documents (for whatever reason) is paramount to the interest of the holder of a certificate of title.[6] Moreover, the substantive protections afforded by a ROFR should not hinge on mere technicalities, but rather on the true expectations of the parties.[7] Courts taking this side reject the argument that enforcing a ROFR within a foreclosure context would depress bidding by explaining that holders are not bound to purchase the property every time and in fact will elect not to do so if the final bid is too high.[8]

How Florida Courts May Rule

The most relevant Florida case on whether a ROFR is triggered by an ordered foreclosure sale came from the Third District Court of Appeal in *Pecora v. Berlin*[9]. There, the court held that a ROFR in a Distribution Agreement was not triggered when a court-appointed receiver procured a buyer of a partnership's assets during the statutory dissolution of the partnership. Relying on the cases cited therein, the court first looked to the wording of the instrument and the involuntary nature of the sale and found that the willingness to sell that is inherent in a ROFR is absent when the sale is required by law. Although at issue in that case was the applicability of a ROFR to partnership assets and shares upon the partnership's statutory dissolution, the cases and reasoning invoked by the court may be helpful in predicting how a court would rule on the enforceability of associations' ROFRs upon judicial foreclosure.

What Can Associations Do To Protect Themselves?

It appears likely, at least in the Third DCA, that courts will closely scrutinize each and every word in an association's declaration to determine the enforceability of a ROFR upon judicial foreclosure. Therefore, if an association wishes to retain its ROFR and ability to screen prospective occupants and potential members of its community during the unpredictable foreclosure process, it is imperative that the governing documents expressly establish a procedure for this situation.

Assuming an association's declaration specifically provides for a ROFR in the foreclosure context when a third party acquires title, the next step is determining the requisite procedures to exercise the ROFR. The first question is when must notice be given to the association where there is no formal "offer" for sale or purchase—from the date the association is joined in the foreclosure complaint, the date of final judgment, date of foreclosure sale, date of issuance of certificate of sale, date of issuance of certificate of title, or date the winning bidder approaches the association for access to its new unit? Because the terms and price of the foreclosure sale are not final until the certificate of title is issued, the association's governing documents should explicitly set forth which event triggers its ROFR. If the declaration remains silent on this issue and an association waits too long to exercise its ROFR, a court may find the association's lack of presence and involvement in a foreclosure proceeding as a waiver of the association's ROFR. Otherwise, if the association did intend to exercise its ROFR, it had sufficient notice from the time of the complaint to actively seek more information about the ensuing sale.

The passage of time may also affect the association's ability to properly notice meetings and obtain the requisite approvals of the board of directors and members to finance the acquisition of the foreclosure property and/or to specially assess the members for such purchase. The declaration should also provide for the right of the association to approve the new owner to the same extent the association can approve owners pre-closing in the normal course of a sale and purchase transaction and incoming tenants.

Another risk in pursuing a ROFR when the procedure is not fully set forth in the declaration is the possibility of a damages claim against the association. Specifically, if an association exercises its ROFR and is thereafter unable to close or a court finds it was not drafted to apply in this context, the existing *and* new owner and even the mortgagee may possibly have claims for damages (i.e., moving expenses, loss of access, lost profits from other offers, need to pay rents for temporary space, etc.). The members of the association may also have a claim against the board of directors of the association for a breach of fiduciary duty to the extent the declaration is silent on the ROFR procedure and the board does not act in the best interests of the association members in exercising the ROFR.

Until the Florida legislature or courts address this issue, associations and attorneys need to be proactive by amending their governing documents to protect the association's ROFR in the context of a foreclosure sale to third party bidders. By spelling out the scope and procedure of the right in the governing instrument, the association greatly reduces the risk that a court will refuse to honor its ROFR upon involuntary foreclosure sales—a context where a ROFR may likely prove to be most valuable to associations' interests.

Kathryn Yankowski *is a first year associate at Katz Barron Squitero Faust Friedberg English & Allen, P.A. located in Miami, Florida. She focuses on general real estate transactions, including the acquisition, disposition, financing and leasing of retail, office and hotel property. Kathryn graduated from the University of Miami School of Law, magna cum laude, in May 2014 where she was published in Volume 67, Summer 2013, of the University of Miami Law Review.*

Endnotes

1 *Henderson v. Millis*, 373 N.W.2d 497, 503 (Iowa 1985) ("Several courts have considered the question whether an involuntary sale triggers a right of preemption. We think the answer in a given case turns on the language creating the right."); *Huntington National Bank v. Cornelius*, 80 A.D.3d 245, 249 (N.Y. App. Div. 2010) ("We begin our analysis of this issue … by examining the language creating the right of first refusal.").

2 *Henderson*, 373 N.W.2D at 502.

3 *Draper v. Gochman*, 400 S.W.2d 545 (Tex. 1966).

4 *Cornelius*, 80 A.D.3d at 246-47.

5 *Draper*, 400 S.W.2d at 547 (finding that the grantee lacked the requisite "desire to sell" to enforce his ROFR after foreclosure sale when the grantee's only affirmative desire was to borrow money that could not later be repaid).

6 *Price v. Town of Ruston*, 19 La. App. 356 (2d Cir. 1932) (holding that violence would be done to the intention of the parties if "desires to sell" was read too liberally).

7 *Cities Service Oil Co. v. Estes*, 208 Va. 44, 155 S.E.2d 59 (1967) (interpreting the ROFR instrument in conjunction with its overall purpose of protection).

8 Id. at 64.

9 62 So. 3d 28 (Fla. 3rd DCA 2011).

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Frank Aragona Trust: A Way Around the Imposition of the NII Tax for Trusts?

By Matthew Evans, J.D., LL.M., Regions Private Wealth Management, Tampa, Florida



M. EVANS

Introduction

In March of 2014, the United States Tax Court rendered its decision in *Frank Aragona Trust v. C.I.R.*[1], a case which is perhaps most notable for what it did not address. While the court's holding that a trust can satisfy the exception to the per se passive activity rule of I.R.C. § 469(c)(2) is undoubtedly important, the broader impact of the court's holding may be felt in a different area altogether. Specifically, while never once mentioned in the opinion, *Aragona Trust* presents a compelling method by which trusts may avoid the imposition of the Net Investment Income ("NII") tax on passive income under I.R.C. § 1411.

Statutory and Caselaw Framework of I.R.C. § 469

I.R.C. § 469 establishes a *per se* rule under which any rental activity is considered to be a passive activity,[2] and thus any losses incurred in connection therewith are disallowed[3] as to a specifically enumerated set of taxpayers. Included in the said set of taxpayers are trusts.[4] However, I.R.C. § 469(c)(7) presents an exception to this categorical rule, whereby the *per se* passive activity rule does not apply to the rental real estate activities of any taxpayer who satisfies the requirements of I.R.C. § 469(c)(7)(B).

Section 469(c)(7)(B) contains two tests, both of which must be met in order to qualiify for the exception. Under the first test, more than one-half of the "personal services" performed in at least one trade or business by the taxpayer during the taxable year must be performed in at least one real property trade or business in which the taxpayer "materially participates."[5] Under the second test, the taxpayer must perform at least 750 hours of "services" during the year in at least one real property trade or business in which the taxpayer materially participates.[6] Consequently, I.R.C. § 469(c)(7)(B) can be satisfied only if the taxpayer "materially participates" in a real property trade or business.

Prior to the issuance of the *Aragona Trust* decision, only one judicial opinion addressed the issue of whether a trust can "materially participate" for purposes of I.R.C. § 469, which was the Northern District of Texas in its 2003 opinion in *Mattie K. Carter Trust v. U.S.*[7] In holding for the taxpayer-trust, the court explained that the "material participation" determination should be made on the basis of the activities performed by all persons who conducted business on behalf of the trust, without reference to whether such activities are performed by fiduciaries or employees. Despite this ruling, in a series of Technical Advice Memoranda (TAM) and Private Letter Rulings (PLRs) the Internal Revenue Service ("IRS") maintained its position that a trust cannot "materially participate" for purposes of I.R.C. § 469.[8]

I.R.C. § 1411: The Net Investment Income Tax

The issue of whether a taxpayer involved in rental activities can avail itself of the exception to the *per se* passive activity rule of IRC 469(c)(2) has assumed increased importance recently in light of the imposition of the Net Investment Income ("NII") tax under I.R.C. § 1411. Effective for tax years beginning after December 31, 2012, the NII tax generally applies to trusts and imposes a 3.8% tax on the lesser of, (1) the undistributed net investment income for the tax year or (2) the excess (if any) of (a) the adjusted gross income for the tax year over (b) the dollar amount at which the highest tax bracket in I.R.C. § 1(e) begins for the tax year ($12,150 for 2014).[9] Pursuant to I.R.C. § 1411(c)(2)(A), "net investment income" includes income derived from a trade or business that is a passive activity within the meaning of I.R.C. § 469. Hence, the statutory linkage between the imposition of the NII tax of I.R.C. § 1411 and the passive activity rules of I.R.C. § 469 dictates that income generated by a trust involved in rental real estate activities will be subject to the NII tax, unless such trust can qualify for the exception contained in I.R.C. § 469(c)(7). Thus sets the stage for the Tax Court's decision in *Aragona Trust*.

Facts of *Aragona Trust*

Background

Grantor and Trustee Frank Aragona established a complex residuary trust in Michigan that owned multiple rental real estate properties and was also involved in holding and developing real estate. Mr. Aragona had five children, each of whom was a beneficiary of the trust and was involved in the trust's businesses in various capacities. Upon Mr. Aragona's death, his five children succeeded him as trustees in addition to one independent trustee. Mr. Aragona's son, Paul, was designated the "executive trustee," to whom all the other trustees' powers were formally delegated; however, all six trustees acted together as a management board and made all major decisions. The six trustees each received a fee, which, in the aggregate, amounted to $374,000 (of this, one such fee of $72,000 was reported as a distribution from the trust for tax purposes). Three of the five children-trustees also worked full time for Holiday Enterprises, LLC, which was wholly owned by the trust and was responsible for the management of most of the trust's rental real estate properties. These three children-trustees also received a salary from Holiday Enterprises.

2005-2006 Tax Years

For the 2005 and 2006 tax years, the trust incurred losses in connection with its rental real estate properties, which were reported on the trust's income tax returns. The trust treated these rental real estate activities, in which it participated both directly and through its ownership in Holiday Enterprises, LLC, among others, as non-passive activities, which had the effect of increasing the trust's net operating losses. Such losses were carried back to the 2003 and 2004 tax years.

In its notice of deficiency, the IRS determined that the trust's rental real estate activities were not non-passive but were passive, for which the resultant effect increased the trust's passive activity losses for the 2005 and 2006 tax years, thereby decreasing the amount of net operating loss carrybacks available for 2003 and 2004. The IRS further found that the $302,400 in trustees' fees was properly classified as fiduciary fees rather than expenses to be deducted against rental income.

Tax Court Decision

The IRS advanced two arguments before the Tax Court in support of its position. First, it argued that based on the legislative history of I.R.C. § 469(c)(7), a trust is incapable of performing "personal services," as that term is defined by Treas. Reg. § 1.469-9(b)(4,)[10] and thus cannot avail itself of the I.R.C. § 469(c)(7) exception to the I.R.C. § 469(c)(2) per se passive activity treatment of rental activities.

The Tax Court roundly rejected the IRS's first argument, stating that "[a] trust is an arrangement whereby trustees manage assets for the trust's beneficiaries,"[11] and consequently, "[i]f the trustees are individuals, and they work a trade or business as part of their trustee duties, their work can be considered 'work performed by an individual in connection with a trade or business.'"[12] Further addressing the IRS's reliance on the legislative history, the Tax Court contrasted the verbiage used in I.R.C. § 469(c)(7) with that employed in I.R.C. § 469(i), noting that if Congress had intended to preclude a trust from qualifying for the I.R.C. § 469(c)(7) exception, it could have limited the applicability of the exception to a "natural person," as is the case in I.R.C. § 469(i), rather than simply a "taxpayer." Finally, the Tax Court noted that while the accompanying House Ways and Means Committee Report makes I.R.C. § 469(c)(7) expressly applicable to individuals and closely-held C corporations, it does not in fact limit the exception exclusively to those entities.

The Tax Court then addressed the IRS's alternative contention that even if some trusts may qualify for the I.R.C. § 469(c)(7) exception, this particular trust does not so qualify because it did not "materially participate" in at least one real property trade or business.[13] In holding that the trust actually "materially participated," the court noted that the operative section of the Internal Revenue Code and accompanying Treasury Regulations do not "provide a method for determining how a trust may materially participate in an activity, and no regulations have yet been promulgated for taxpayers that are trusts."[14] Given the lack of such guidance, the Tax Court embarked on its own determination of whether the trust's activities rose to the level of material participation. In so doing, the court rejected the IRS's argument that the material participation determination must be made by reference solely to the activities of the trustees and by excluding those of the trust's employees. The court found that the use of such a restricted scope would have resulted in the exclusion of not only the trust's non-trustee employees but also those of the three trustees who were also employees of Holiday Enterprises, LLC (which is the wholly-owned rental real estate management arm of the trust).

Rather, while refraining from deciding whether the activities of the trust's non-trustee employees should be considered, the court held that the activities of the trustees, including those undertaken in their capacity as employees of Holiday Enterprises, LLC, should be considered in making the "material participation" determination. Specifically, the court relied upon the fact that Michigan statutory law required the trustees to "administer the trust solely in the interests of the trust beneficiaries,"[15] and that such trustees are not relieved of this duty of loyalty to beneficiaries simply by virtue of "conducting [their] activities through a corporation wholly owned by the trust."[16] As a consequence, the activities of the trustees in their capacity as employees of Holiday Enterprises, LLC should properly be considered in evaluating whether the trust "materially participated" in its real estate operations.

Examining the activities of the trustees through this lens, the Tax Court found that the trust satisfied the "material participation" component of the exception. First, three of the trustees participated full-time in the trust's real estate operations. Second, the trust's real estate operations were "substantial."[17] Indeed, the court stated that the trust had "practically no other types of operations."[18] Finally, according to the court, the trustees handled "practically no other businesses on behalf of the trust."[19]

In reaching the conclusion that the trust "materially participated" in the real estate activities, the court consciously disregarded the fact that two of the trustees held minority interests in the entities through which the trust conducted its real estate operations on the grounds that the combined ownership interest of both trustees in each entity was not a majority one, nor was it ever greater than the trust's ownership interest therein. Additionally, the court found that the interests of both trustees as owners were "generally compatible" with the trust's goals (i.e., both they and the trust wanted the enterprises to be successful), and that both trustees were involved in the day-to-day management operations of the trust's real estate businesses.[20]

As the IRS limited its arguments to the two discussed above, the Tax Court did not examine whether more than one-half of the personal services performed in each trade or business by the trust during the year were performed in at least one real property trade or business or whether the trust performed more than 750 hours of services during

the year in at least one real property trade or business. Consequently, the court held that the trust met the I.R.C. § 469(c)(7) exception to the passive activity rule.

Conclusion

While the Tax Court's opinion in *Aragona Trust* left some issues unresolved, such as whether the activities of a non-trustee fiduciary, employee or agent can be considered in making the "material participation" determination (as was held in *Carter Trust*), it is nonetheless notable for its potential effect on trust and estate planning going forward. Specifically, in order to insulate a trust from the reach of the NII tax, practitioners may want to consider naming a person who is involved in running the trust's business as trustee or co-trustee. It remains unclear whether the IRS will appeal the decision in *Aragona Trust*, but, given the stakes involved and the potential resultant loss of tax revenue, it is certainly not beyond the realm of possibility.

Matthew Evans *is a Trust Advisor with Regions Private Wealth Management, where he assists families in identifying and accomplishing their tax, investment, and estate planning goals. He received his J.D. from the Florida State University College of Law and his LL.M. in Taxation from the University of Florida Levin College of Law.*

Endnotes

1 142 T.C. No. 9 (2014)
2 I.R.C. § 469(c)(2)
3 I.R.C. § 469 (a)(1)
4 I.R.C. § 469(a)(2)
5 I.R.C. § 469(c)(7)(B)(i)
6 I.R.C. § 469(c)(7)(B)(ii)
7 256 F.Supp.2d 536 (N.D. Tex. 2003)
8 *See, e.g.*, TAM 200733023; PLR 201029014; TAM 201317010.
9 I.R.C. § 1411(a)(2)
10 Treas. Reg. § 1.469-9(b)(4) defines "personal services" as "any work performed by an individual in connection with a trade or business."
11 *Supra* note 1, at 17.
12 *Id.* at 18.
13 The IRS conceded that the trust's real estate operations did indeed qualify as "real property trades or businesses." Therefore, the sole issue before the court was whether the trust "materially participated" in such real estate operations. *See id.* at 20.
14 *See id.* at 21 (noting that a place for a regulation to be titled "Material participation of trusts and estates" has been reserved but not yet promulgated).
15 *Id.* at 23.
16 *Id.* at 24.
17 *Id.* at 25.
18 *Id.*
19 *Id.*
20 *Id.*



Fellowship Program Open to All Young RPPTL Section Attorneys

The Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) is pleased to announce that it is currently accepting applications for the 2015-2016 Fellowship class. The Fellowship Program is designed to attract and retain young lawyers to the RPPTL Section. The Fellowship program allows young lawyers to become substantially involved in Section work, receive leadership training and work closely with leading attorneys in their field. The RPPTL Section program is designed to cultivate and develop future leaders to continue the strong presence of the Section as a leader in The Florida Bar.

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Stone v. Stone: Is the Fourth DCA Catching *Habeeb*?

Statements, or expressions of opinion, or comments appearing in ActionLine are those of the authors and not the RPPTL Section or The Florida Bar. In the interest of presenting different perspectives, the following two articles express opposing opinions on the same issue.

A Deed does not a Waiver Make

By Charles Ian Nash, Nash & Kromash, LLP, Melbourne, Florida


C. NASH

In a recent decision of the Florida Fourth District Court of Appeal (the "4th DCA"), *Stone v. Stone*, 39 Fla. L. Weekly D2353, (4th DCA November 12, 2014), the ruling hinged on whether the restriction on the devise of homestead real property ("homestead") as set forth in Article X, Section 4(c) of the Florida Constitution and Section 732.401, Florida Statutes, was waived. The basis for the waiver claim is twofold: first, the fact that both spouses signed a deed instrument conveying a one-half undivided interest in the couple's homestead to the husband's qualified personal residence trust ("QPRT"), and second, the deed contained the language that the one-half undivided interest in the couple's homestead was transferred "together with all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining."

The facts in *Stone* are fairly straightforward. Jerome and Alma Stone were married to one another, and they had two children, Nancy and Ross. Relative to all issues that arose under this case, Nancy and Ross were adults.

Jerome and Alma conveyed their homestead by warranty deed dated March 27, 2000, from themselves as tenants by the entirety, to themselves as tenants in common, each as to a one-half undivided interest in their homestead. Immediately thereafter, Jerome conveyed "his" one-half undivided interest in the homestead to a QPRT that he established of which he and Alma were the initial co-trustees, and Alma conveyed "her" one-half undivided interest in the homestead to a QPRT that she established of which she and Jerome were the initial co-trustees.

The term of Jerome's retained interest in his QRPT was five years. Unfortunately, Jerome died on February 10, 2005, which was prior to the expiration of the five-year retained interest term.

Pursuant to the terms of the trust agreement governing Jerome's QPRT, due to Jerome's untimely death, the one-half undivided interest in the homestead was transferred by the trustee of Jerome's QPRT to Jerome's estate. Under the terms of Jerome's Will, the one-half undivided interest in the homestead comprising Jerome's estate was devised by Jerome's Will to a revocable living trust (which, as a result of Jerome's death, was now irrevocable) created by Jerome during his lifetime.

Jerome's revocable (now irrevocable) trust provided that the assets held in the trust would be held in further trust for Alma's benefit during her lifetime and, upon her death, the balance of the trust was to be distributed to the couple's daughter, Nancy. The couple's son, Ross, was not to receive any financial benefit from Jerome's trust.

Alma died on June 18, 2009, survived by Nancy and Ross.

During the proceeding to administer Jerome's estate, Ross filed pleadings challenging the effectiveness of the devise of Jerome's one-half undivided interest in the homestead to Jerome's revocable (now irrevocable) trust. The basis for the claim was the premise of Section 732.4015, Florida Statutes, which provides that if an individual dies survived by a spouse (but no minor children), such deceased individual can only devise his or her interest in homestead outright to his or her surviving spouse. Reading further into the statute, the statutory devise restrictions apply if the deceased individual is survived by a spouse and only adult children. So long as the deceased individual is survived by a spouse and no minor children, the only valid devise is a full fee interest to the spouse. Ross claimed that because Jerome was survived by Alma (his spouse) and adult children, the devise to Jerome's revocable (now irrevocable) trust was improper under Section 732.4015, Florida Statutes, because it was not a devise of the full fee interest to Alma.

The first issue confronting the 4th DCA was whether the devise to Jerome's revocable (now irrevocable) trust was a devise of homestead property. The issue as presented centered on the chain of transfers and who owned the property at the moment of Jerome's death.

One argument, put forth by the couple's adult daughter, Nancy, advocated that the homestead restrictions on devise were not applicable due to the fact that the one-half undivided interest in the homestead was held by Jerome's QPRT at the moment of his death. Under this logic, since Jerome's QPRT owned the property at the moment of death, by definition the property was not owned by Jerome individually so the property could not be homestead property for descent and devise purposes. Since the property is not homestead owned by Jerome, the property is freely devisable even if the chain of transfers passes through Jerome's estate to his revocable (now irrevocable) trust.

The counter-argument, which was supported by the Real Property Probate & Trust Law Section of The Florida Bar ("RPPTL") in an amicus brief, stated that because Jerome's QPRT returned the property to Jerome's estate at the

moment of Jerome's death, the property was his homestead property and thus all restrictions on devise would be applicable. As a result, because Jerome was survived by a spouse and adult descendants, the property was not devisable to Jerome's revocable (now irrevocable) trust.

The 4th DCA held in favor of the second argument and determined that the one-half undivided interest in the property was Jerome's homestead, albeit received from Jerome's QPRT, and was subject to the restrictions on the devise of homestead under applicable Florida law. The rationale for this ruling is that the disposition of the one-half undivided interest in the homestead comprising Jerome's estate was to be controlled by Jerome's Will or, absent a Will, by the Florida intestacy laws. In this author's opinion, this is the correct decision because the property was returned to Jerome's estate so it technically became his property at the moment of his death. Under this logic, if it is his property at the moment of his death and if the property otherwise qualifies as Florida Constitutional homestead, the homestead restrictions on descent and devise should apply.

However, this is only part of the 4th DCA's holding. A second issue to be decided was whether Alma, by signing the warranty deed conveying a one-half undivided interest in the homestead to Jerome that contained the phrase "together with all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining," effected a waiver of her rights in Jerome's homestead. If it were such a waiver, then Jerome would not technically be survived by a spouse or minor child, so the homestead property would be freely devisable. If it were not such a waiver, the homestead would have passed with a life estate to Alma and a vested remainder in Nancy and Ross in equal shares as tenants-in-common (because Jerome's death occurred in 2009, the "50% election" provision of Section 732.401(2), Florida Statutes, adopted in 2010, was not applicable).

The 4th DCA reasoned that such language was effectively a waiver of all spousal rights in the property pursuant to Section 732.702, Florida Statutes. Because the couple did not have any minor children (i.e., under the age of 18), and because Alma was deemed to have waived all spousal rights, including, but not limited to, her homestead rights, the property was freely devisable by Jerome. Therefore, the devise under Jerome's Will to his revocable (now irrevocable) trust, and subsequently devised in trust for Alma with the remainder to Nancy and her descendants, was upheld.

The concern with this ruling is whether we are now seeing the reasoning from an older opinion, *Habeeb v. Linder*, 36 Fla. L. Weekly D300, (3d DCA February 9, 2011), raise its ugly head. In *Habeeb*, the Florida Third District Court of Appeal (the "3d DCA") had initially ruled that a spouse waived the homestead restrictions by virtue of signing a deed conveying the couple's homestead to the wife, due to the fact that the deed included the term "hereditaments" relative to what was being transferred by the couple to the wife. Subsequently, in an order entered by the 3d DCA, *sua sponte*, the court withdrew its decision in *Habeeb*.

Florida law clearly allows a spouse to waive the restriction

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sseaford@oldrepublictitle.com

Wilhelmina "Willie" Kightlinger, Esq.
wkightlinger@oldrepublictitle.com

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on the devise of homestead if, at the time the devise occurs, the deceased spouse is not survived by a minor child. The 4th DCA in *Stone* referred to Section 732.702, Florida Statutes, as well as to the decisions of the Florida Supreme Court in *City National Bank of Florida v. Tescher*, 578 So. 2d 701 (Fla. 1991) and in *Hartwell v. Blasingame*, 584 So. 2d 6 (Fla. 1991).

One major concern with this opinion is that Section 732.702(2), Florida Statutes, requires that if a waiver is signed while the parties are married, each spouse must also make a fair disclosure of their respective estates to the other. This is understood to mean that even though the statute may allow for general, all encompassing, waivers, the waivers should nevertheless be "knowing" in the sense that the spouse should know that he or she is waiving rights. The opinion of the 4th DCA in *Stone* did not indicate whether Jerome and Alma adhered to this requirement.

Thus, it is unsettling that the 4th DCA was willing to rule that the warranty deed signed by Jerome and Alma was sufficient to constitute a waiver of the restrictions on the devise of homestead merely because of the inclusion in the deed instrument of the standard phase that the grantor is conveying to the grantee not only the underlying interest in the real estate but also all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining. In the real estate practice in Florida, this language appears in almost every deed and would appear to be merely boilerplate language. Such use would not appear to establish that a knowing waiver occurred or that all of the requirements of Section 732.702, Florida Statutes, were met.

As of this writing, a motion for reconsideration has been filed with the 4th DCA. In any event, any practitioner who wishes assurance that his clients are waiving marital rights should not rely on the sufficiency of the language appearing in a deed. Rather, the better approach is to adopt the only waiver method approved by the Florida Supreme Court which is the use of a postnuptial agreement that clearly complies with the requirements of Section 732.702, Florida Statutes. Waiving rights pursuant to a postnuptial agreement ensures that the waiver of the restrictions on the devise of homestead are documented as being knowing and intentional.

As a final caveat, practitioners should remember that an attempted spousal waiver of the homestead rights in order to freely devise the property will not be successful if the deceased spouse is survived by a minor child. In such an event, upon the property owner's death, the minor children would receive a full fee interest in the property despite the spousal waiver.

Charles Ian Nash *is a Board Certified Wills, Trusts & Estates attorney. He received his LL.M. in taxation from the University of Florida Graduate Tax Program. Mr. Nash is a partner in the Brevard County law firm of Nash & Kromash, LLP. He is a Fellow and Regent of the American College of Trust and Estate Counsel. He serves on the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar. Mr. Nash is a contributing author to Basic Estate Planning in Florida, Litigation Under Florida Probate Code, Ninth Edition, Administration of Trusts In Florida, and Asset Protection in Florida.*

Transfer by Deed does the Job

By Robert W. Goldman, Goldman, Felcoski & Stone, P.A., Naples, Florida


R. GOLDMAN

The *Stone* court correctly decided the initial homestead issue it considered. The court also correctly decided the so-called "waiver" issue, even if it did so as a "tipsy coachman."

The only policy under siege in *Stone v. Stone* is our collective resolve that a grantor means what he or she says and his or her stated intentions are sacred and should be upheld whenever possible.

In the *Stone* case, Alma memorialized in a warranty deed her promise and intent to transfer away and release every interest she had in specified real estate, whether it was vested, inchoate, an inheritance, or any other interest, thereby establishing marketable title in the grantee. She even promised to defend the grantee "…against any lawful claims made whatsoever…." (which should include the claims of her heirs to a homestead interest in property that she conveyed away). In *Stone*, one of Alma's heirs questioned her apparent expressed and unambiguous intent.

The intent of the parties to a deed is gleaned from the terms of the deed. The parties to a deed have a duty to understand the terms of the deed before signing it. See *Rivero v. Rivero*, 963 So. 2d 934, 938 (Fla. 3d DCA 2007). By signing the deed, Alma was presumed to know the applicable law. See *Ellis v. Hunter*, 3 So. 3d 373, 379 (Fla. 5th DCA 2009). Alma's warranty deed, like so many of its kind, expressed that Alma, as a grantor, was giving up every claim she might have to the described real estate.

She was giving the grantee fee simple absolute title, free of all claims including any hereditaments she might have had. "Hereditaments" are interests that a person might have in an intestate share of the property and the definition is broad and virtually as all-consuming as the term "property." See C.J.S. Property §26. No homestead rights were reserved, nor were any homestead-related conditions included in the deed.

Where language of a deed is unambiguous it is not subject to judicial interpretation. See *Cohen v. Pan Am. Aluminum Corp.*, 363 So. 2d 59 (Fla. 3d DCA 1978). Further, the court must consider the "language of the entire instrument in order to determine the intent of the grantor, both as to the character of estate and the property conveyed…." See *Thrasher v. Arida*, 858 So. 2d 1173, 1175 (Fla. 2d DCA 2003). If the terms of a deed are construed, they should be construed most strongly against the grantor and most beneficially for the grantee. See *Central and Southern Florida Flood Control Dist. v. Surrency*, 302 So. 2d 488 (Fla. 2d DCA 1974).

In order to transfer property in fee simple absolute, no special words are necessary. By statute, all deeds are presumed to grant all the rights, title and estate of the grantor to the grantee unless stated otherwise. Section 689.10, Fla. Stat.. Also, a deed like the one in *Stone*, which is substantially in the form described in Section 689.02, Fla. Stat., is a warranty deed and transfers to the grantee the grantor's entire interest in the property. See Section 689.03 Fla. Stat.

Interestingly, if Alma had owned the homestead real estate in her own name, a transfer by her to Jerome via warranty deed would have passed marketable title to Jerome (eliminating Alma's homestead interest). Section 689.11(1), Fla. Stat., provides that "[a] conveyance of real estate, including homestead, made by one spouse to the other shall convey the legal title to the grantee spouse in all cases in which it would be effectual if the parties were not married… ." The circumstances of this case were substantially the same and warranted the same result.

Focusing on the "waiver" aspects of homestead, Section 732.702(1), Fla. Stat., provides, in general, that homestead rights can be waived, in whole or in part, by a written contract, agreement or waiver. Section 732.702(2), Fla. Stat., provides, further, that if the agreement, contract or waiver is executed after the marriage, each spouse shall make a fair disclosure to the other of that spouse's estate. Assuming that the waiver or release of homestead rights had occurred in a nuptial agreement, then that agreement would be presumed valid and the party attempting to avoid the terms of the instrument would have the burden to prove that a fair disclosure of assets had not occurred. See *In re Macarell's Estate*, 254 So. 2d 240 (Fla. 4th DCA 1971). Although the "fair disclosure" requirement of Section 732.702(2), Fla. Stat., was not discussed in *Stone*, by declaring that the homestead rights had been properly waived, the court must have believed that the deed sufficiently disclosed the property and property interests to which the release of rights pertained and the parties each knew the asset well. It must be emphasized that §732.702, Fla. Stat., only requires *fair* disclosure and not *full* disclosure.

Section 732.702, Fla. Stat., does not require any magic words to affect a waiver or release and the waiver or release need not apply to all rights of a surviving spouse. In fact, it need not be a "waiver" at all. A mere agreement releasing or transferring an interest is enough. There should not be any concern that a regularly used word like "hereditaments" and clear statutes and cases on the meaning of deeds is not enough for Alma to have understood the transfer of property she made. Section 732.702, Fla. Stat., does not require use of the word "waiver" and waivers of sovereign immunity do not even require magic words. See *Klonis v. Dept. of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000). Waiver of arbitration clauses and even personal jurisdiction can occur silently, though the actions of litigants who are usually shocked to learn of their waivers. Apparently one can even waive one's right to counsel in a criminal proceeding without being instructed through an incantation of magic words. See *Edenfield v. State*, 45 So. 3d 26 (Fla. 1st DCA 2010).

Applying these principles to the deed involved in this case, Alma released all of her rights pertaining to the real property described in the deed, including homestead. Article X, section 4(c), Florida Constitution, expressly permits the alienation of homestead by husband and wife, as was accomplished by the deeds in this case. *Stone* was a simple deed case with one legally appropriate outcome: affirmance of the trial court decision.

Robert Goldman (Bob) *practices in the area of trust and estate litigation. He is a Fellow in the American College of Trust and Estate Counsel (ACTEC) and formerly served on its Board of Regents. He is past Chair of ACTEC's National Task Force on Arbitration of Trust & Estate Disputes. He is past Chair of the RPPTL Section, the current Chair of its Amicus Coordination Committee and a member of the Section's Probate Law & Procedure and Probate & Trust Litigation Committees. Bob was named as one of the top 100 attorneys in Florida by Florida Super Lawyers and he is listed in Best Lawyers in America and in Florida Trend's Florida Legal Elite.*

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RPPTL Section Executive Council Meeting The Breakers, Palm Beach July 31 - August 2, 2014

By Jane L. Cornett, Esq., Stuart, Florida

For just about as long as anyone can remember, the July meeting of the RPPTL Section of the Florida Bar has been held at The Breakers in Palm Beach. Despite this repetition, The Breakers continues to be a very popular location for this meeting. In fact, if you haven't made your reservation for 2015, you probably need to do it soon.

The first event on Thursday morning was the Reptile Run/Walk from 6:30 a.m. to 7:30 a.m. This was a very invigorating way to start the day on a pre-planned route through beautiful Palm Beach. A surprising number of folks showed up to make it quite successful. There are plans to repeat this event at future Reptile meetings.

Official committee meetings started at 7:30 a.m., extended throughout the day until 6:00 p.m. With almost twenty-six (26) different committees meeting and several special events such as orientation for new Executive Council members, there was something going on throughout the day for everyone, whether you are a dirt lawyer or from the death side.

Thursday evening from 6:30 p.m. until 8:00 p.m. was the welcome reception held onsite in a gorgeous room at The Breakers. The room overlooks the ocean and has an amazing painted ceiling. Michael Dribin welcomed the Section members and their guests. He also expressed the RPPTL Section's appreciation to the sponsors for their support. Some of the sponsors also came forward to talk about their support of the Section's work and the valuable information gathered and imparted at the meetings to benefit Florida residents and visitors. The Thursday evening reception, as well as the Friday evening reception and dinner, are great opportunities to network with other members, their guests and Section sponsors.

Friday morning again started with the Reptile Run/Walk Club before the case law update. From 8:00 a.m. until 4:30 p.m. was the ever popular Annual Legislative & Recent Case Law update seminar. Many of the sponsors that the members met the night before had set up booths at the break room where members could further discuss their products and services. A standing-room only crowd turned out for the seminar. The seminar was divided into a morning and afternoon session. During the luncheon, there was time to chat with old friends and meet new ones while enjoying the visually pleasing and deliciously tasting lunch specialties at the Breakers ballroom.

Even with that busy seminar schedule, there were several committees that packed meetings in during the lunch break and immediately after the completion of the seminar.

The social event Friday evening from 6:30 p.m. until 9:00 p.m. was a reception and dinner onsite at The Breakers. The food at The Breakers is simply outstanding.

Saturday morning started bright and early at 7:30 a.m. with breakfast served to those attending the Probate Roundtable and the Real Estate Roundtable. The Roundtable meetings went from 8:00 a.m. to shortly before 10:00 a.m. At 10:00 a.m. the Executive Council meeting was called to order. Don't forget that if there is an Executive Council meeting in your area, you are invited to attend even if you are not an Executive Council member. As usual, the Executive Council members were well fed, having had a scrumptious buffet breakfast and then a box lunch during the Executive Council meeting.

The Saturday evening event was titled "Reptiles Slither to the Zoo." This was a really fun evening at the Palm Beach Zoo where our reptiles had free run of the facility. The petting zoo portion of the event and face painting was popular with everyone but especially the kids in the group.

As is customary at Executive Council weekends, the hospitality suite was open from 9:00 p.m. to 11:00 p.m. Thursday and Friday evenings for folks to mingle and network.

There is a meeting of the Executive Council scheduled for March, 2015 at the Ritz Carlton Grande Lakes in Orlando. Even if you are not a member of the Executive Council, come and enjoy some of the meetings whenever we are in your town. The committee meetings schedule is always posted on the RPPTL website.

Executive Council Meeting

The Breakers, Palm Beach

July 31 to August 2, 2014



Thursday reception during the welcome presentation



Probate and Trust Litigation Committee meeting



Reptile Run/Walk Club – inaugural group



Paul Perez-Ballaga leading a discussion at the Title Insurance Committee meeting



Real Property Roundtable discussion led by Michael Bedke



Ted Conner and Alan McCall at the Real Property Roundtable



Legislative Update in session



Board Certified Exective Council Members at The Breakers patio



Kid's Committee members at the Zoo

Photos by Michael Gelfand, John Neukamm and Silvia Rojas

Sofitel Chicago Water Tower Hotel

Chicago, Illinois • Sept. 17 - 21, 2014



Pat and Fred Jones enjoying a deep dish pizza at Lou Malnati's



Nishad Khan enjoying the boat tour with his inquisitive son

To see more photos, log into www.rpptl.org



John Neukamm taking one of many photos of the Chicago architectural wonders



Michael Dribin enjoying the moment at Wrigley Field





Dinner at Orson's



Dinner at the Adobe Grill



Michael and Lori Dribin with their son and family at the Shedd Aquarium patio



Some of the Board Certified Executive Council members after the Loyola University seminars

Roundtables

Saturday, August 2, 2014
The Breakers
Palm Beach, Florida

Prepared by Jane L. Cornett, Esq., Stuart, Florida, and Brian M. Malec, Esq., Orlando, 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 at 8:00 a.m. The Division Director welcomed the newest members of the Executive Council: Judge Linda Allan, Allison Archbold, Amy Beller, Judy Bonevac, Charles Callahan, Stacey Cole, Stephanie Harriet Wartenberg, Noelle Melanson, Patrick Mize, Frank Pilotte, Tara Rao, and Alyse Reiser. She also introduced the new fellows, John Costello and Michael Sneeringer, and acknowledged the passing of Cynthia Fallon, who was an active and well-liked member of the Executive Council and a Vice-Chair of the Guardianship Law Committee.

Action Items

Digital Assets and Information Study Committee - Eric Virgil, Chair: Eric Virgil discussed Florida legislation proposed by the Committee to address a fiduciary's ability to access, control and dispose of digital assets and information, which is based on the Uniform Fiduciary Access to Digital Assets Act passed by the Uniform Law Commission on July 14, 2014. If enacted, Florida would be the first state to adopt the Uniform Act. Many internet service providers, such as Facebook and Google, were involved in the drafting process for the Uniform Act. Eric reported that there is currently no clear authority regarding a fiduciary's authority to handle digital assets and information under Florida law or federal law. The proposed Florida Act will facilitate fiduciary access to digital assets while respecting the privacy and intent of the account holder or owner of the digital assets. This proposal was passed by the RPPTL Executive Council immediately following the Roundtable meeting.

Ad Hoc Study Committee on Estate Planning Conflicts of Interest – Bill Hennessey, Chair: Bill Hennessey discussed a proposal to amend Secs. 733.617 and

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

The meeting was called to order by Real Property Division Director Drew O'Malley at 8:00 a.m.

Sponsor Announcement. The Division Director thanked the breakfast Roundtable sponsor Fidelity National Title Group, and recognized as Friends of the Section: North American Title Insurance Company and Business Valuation Analysts.

Welcome to New Executive Council Members - The Division Director welcomed the new Executive Council members, Christene Ertl, Richard McIver, Bradford Petrino, John Redding and Susan Seaford.

Recognition - The Division Director recognized guests and students at the Roundtable meeting: Greg Demers, John Parady, Erin Miller and Susan Seifert. The Division Director introduced two Florida Bar Board of Governors members who are exploring the possibility for running for President-Elect of The Florida Bar Association, David Prather and William Schifino.

Action Items

Real Property Litigation Committee - Susan K. Spurgeon, Chair: The Committee proposed an amendment to Sec. 48.23, F.S., (lis pendens statute). Susan explained that the purpose of a lis pendens statute is to protect those who record a lis pendens from having the property sold or mortgaged during the pendency of their action. However, if the party who filed the litigation fails to record a lis pendens, or the lis pendens expires, is withdrawn, expires, or is discharged, then pursuant to amendments added in 2009, the statute protects the owner of the property, and allows the owner to sell the property to third parties free from any claim in the litigation. Just as an owner is not shackled if no lis pendens exists, the owner should likewise be permitted to mortgage the property when no lis pendens exists. The

See "Real Property Division," next page

PROBATE & TRUST DIVISION

736.0708, F.S., and Rule 4-1.8(c) of the Rules Regulating The Florida Bar concerning the payment of compensation to an attorney who names himself or herself as a fiduciary in a client's estate planning documents. The amendments generally provide that a lawyer, or certain people related to or affiliated with the lawyer, will not be entitled to receive compensation for serving as a fiduciary if the lawyer prepares the instrument making the appointment unless: (a) the lawyer or person appointed is related to the client, or (b) certain disclosures are made to the client before the instrument is signed, and the disclosures are confirmed in a writing signed by the client.

The primary goal of the amendments is to ensure that the client is aware that an attorney appointed as a fiduciary could receive fiduciary fees in addition to attorney fees. There was discussion concerning application of the law to any document republished after the effective date. The proposed statute was revised to reflect that a republication of a document would trigger the applicability of the statute only if the republication changes the fiduciary provisions in the document. The revisions were unanimously approved by Section members at the Roundtable and the proposal, as amended, was passed by the RPPTL Executive Council immediately following the Roundtable meeting.

Estate and Trust Tax Planning Committee – Elaine Bucher, Chair: Elaine Bucher discussed a proposal to amend Sec. 733.817, F.S., which is Florida's estate tax apportionment law dealing generally with the allocation of estate taxes among beneficiaries. The proposal includes several revisions to Sec. 733.817, F.S., which are intended to either clarify existing law or change how estate tax is apportioned under various circumstances. This proposal was passed by the RPPTL Executive Council immediately following the Roundtable meeting.

Report on Real Property Division Action Items

Representatives from the Real Property Division reported on two Action Items to be presented at the Executive Council meeting. Fred Jones reported on behalf of the Residential Real Estate and Industry Liaison Committee regarding a "glitch bill" to revise three riders and two provisions of the Residential Contract for Sale and Purchase (also known as the FR/BAR contract), including changes to the Seller Financing Rider which were made as a result of the Dodd-Frank Act that became effective on January 1, 2014. The Dodd-Frank Act has created roadblocks for seller financing, and also applies to any private financing. Fred stated that estate planning attorneys need to be aware of the Dodd-Frank Act and the need to comply with it since our clients and estates may enter into seller or private financing transactions. Marty Awerbach reported on behalf of the Real Property Litigation Committee regarding amendments to Sec. 48.23, F.S., to include persons

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

proposed change adds lien holders to those who are protected from litigation where a lis pendens is not recorded, has expired, has been withdrawn or has been discharged. The vote was unanimous to take the proposed statute to the Executive Council for approval to support the legislation.

Residential Real Estate Industry Liaison Committee - Salome J. Zikakis, Chair: Salome presented the Roundtable with the proposed changes to the FR/BAR contract regarding consumer financing. Once approved, the proposed changes then go to the Realtors for approval. Salome reminded the Roundtable about an upcoming webinar to be held on September 10, 2014, on the topic of seller financers and Dodd Frank.

Digital Assets and Information Study Committee, a committee of the Probate and Trust Division – Eric Virgil, Chair: Bill Hennessey reported that the Committee is looking at the issue of digital assets of decedents and how the personal representative may access them. Presently it is criminal to allow a third party to access a person's e-accounts, unless the Will provides otherwise. If the personal representative has no ability to access the decedent's accounts, then the personal representative cannot determine if the account has any assets of the decedent. The Committee will be seeking support at the Executive Council meeting for new legislation. See the Highlights of the Probate and Trust Division Roundtable for further details.

Information Item

Title Issues and Standards Committee - Christopher William Smart, Chair: Uniform Title Standards are now in Electronic Format (E-Standards). Brian Hoffman rolled out the new E-Standards, which now include helpful links to cited cases and Florida Statutes. The Fund has permitted limited inclusion of the cited Fund Title Notes in the Uniform Title Standards.

Upcoming Issues

Condominium and Planned Development Committee - Steven H. Mezer, Chair: An amendment to Sec. 718.117, F.S., (condominium termination), was proposed. A subcommittee is working on changes to the termination of condominium statute. The subcommittee is looking for people who have good stories regarding the termination of their condominium. The subcommittee believes there are too many sad stories circulating. The subcommittee is looking for information detailing a successful termination including age of the project, where the condominium is located, and a statement on how to measure success of a termination.

Real Property Problems Study Committee - William Theodore Conner, Chair: An amendment to Sec. 713.07(4), F.S., (start-stop of construction) was proposed. The report from the Problems Study Committee indicates

See "Real Property Division," next page

PROBATE & TRUST DIVISION

acquiring a lien on real property as parties protected from litigation against the property, where no lis pendens has been recorded, a lis pendens has been dissolved or withdrawn, or a lis pendens has expired. Marty reported that the proposal corrects a previous oversight in the statute.

General Business

The Division Director reported that the Estate and Trust Tax Planning Committee's proposal regarding changes to the Uniform Transfers to Minors Act was removed from the Executive Council agenda item for this meeting because of additional changes made at the Committee meeting. It will be an Action Item at a later Executive Council meeting. The Division Director then introduced Bill Schifino and David Prather, both of whom are exploring the possibility of candidacy for the position of Florida Bar President.

Committee Reports

Elective Share Review Committee – Lauren Detzel and Charlie Nash, Co-Chairs: Lauren Detzel and Charlie Nash gave an update on the progress of their Committee's work. They intend to bring issues before the Probate and Trust Law Division Roundtable to receive guidance before drafting proposed revisions to the elective share statutes.

Don Tescher and Jenna Rubin discussed whether there should be graduated percentages for the elective share amount based on the duration of the marriage. Numerous states have adopted this approach. The concept was included in one of the previous versions of the elective share statute but was removed during the legislative process. The Roundtable attendees voted that the Committee should continue to study the graduated percentages concept.

Christina Papanikos and Rick Gans are studying what standard should be used when the elective share election is made by a third party, such as a guardian. Lauren and Charlie reported that there is a disconnect between the treatment when a spouse makes the election versus when court approval is needed where the election is to be made on behalf of an incapacitated spouse. Charlie Robinson reported that Florida uses a "substituted judgment" standard for an election on behalf of an incapacitated spouse. Roundtable attendees voted in favor of requiring court approval for a third-party to make an elective share election on behalf of an incapacitated spouse, but were split on whether the standard should be one of best interests or an ascertainable standard (taking into account the finances of the incapacitated spouse). Charlie and Lauren requested that any comments or suggestions regarding the revisions to the elective share statute be sent to the Committee.

Wills, Trusts and Estates Certification Review Course - Richard Gans, Chair: Tasha Dickinson reported that twenty-one attorneys sat for the Wills, Trusts and Estates certification exam. Ten attorneys passed the exam, including Brian Malec and Amy Beller.

The meeting was adjourned at 9:55 a.m.

REAL PROPERTY DIVISION

that the old statute has some procedural issues. The Problem Study is looking to rewrite the statute.

Development and Land Use Committee - Vinette Dawn Godelia, Chair: Review of a proposed change to Rule 4-4.2 of the Florida Rules of Professional Conduct (communications with person represented by counsel). The Florida Association of County Attorneys is seeking an amendment to Rule 4-4.2. The Association is of the opinion that the Rule requires that a County Attorney must sign off first, before counsel may speak with county staff. In most land use matters, attorneys interact in the first instance with staff on moving zoning and land use matters forward. The Florida Association of County Attorneys, as it stands now, needs to sign off before counsel may speak with staff, since the county is represented by counsel. The Association is suggesting ways to expand access to staff in limited situations.

Lawyers serving as Fiduciaries, Proposed Amendments to Sections 733.617 and 736.0708, F.S., and Rule 4-1.8(c) of the Rules of Professional Conduct. Bill Hennessey discussed a proposal to amend Secs. 733.617 and 736.0708, F.S., and Rule 4-1.8(c) of the Rules Regulating The Florida Bar. See the highlights of the Probate and Trust Roundtable for further explanation of the proposal.

Creation of Ad Hoc Same Sex Marriage Committee - Jeff Dollinger reported that his committee, at this time, is studying the issues of same sex marriage as they relate to ownership of real property. Many couples move here from states that recognize same sex marriage and are legally married in those states. As such those couples have vested rights on their title to real estate here in Florida but Florida does not recognize same sex marriage. The Committee is looking at estate planning issues, and one major issue is how to provide a form of tenancy that provides the same rights as tenants by entirety. The issues are more in play on the probate side but not yet in the real estate side. The Homestead Issues Study Committee has not yet looked at this issue.

Committee Goals/Administration

Action Plan for 2014-2015. The Division Director stated that each Committee Chair needs to submit goals and an action plan to the Executive Committee.

Appointment of Liaisons. The Division Director reiterated that each Committee Chair needs to appoint a liaison or a subcommittee chair to each of the below areas: Legislature, Website and Publications.

Succession Planning/Annual Reports. The Division Director provided the Annual Report form for use by each committee chair.

Timely reservation/cancellation of meeting room, AV equipment. The Division Director stressed that the cost of renting AV equipment and meeting rooms is very expensive. He requested that if a Committee Chair does not need AV equipment or will not need a meeting room to advise the Section Chair to cancel either the AV equipment or the room, or both.

The meeting adjourned at 9:45 a.m.

Should I Stay or Should I Go: The Clash of Issues for 401(k) Owners Deciding Whether to Rollover into an IRA

Alex Hamrick, Wells Fargo Bank, N.A., Orlando, Florida, and
L. Howard Payne, The Payne Law Group, Sarasota, Florida



The determination of whether 401(k) savings should be rolled over into an Individual Retirement Account ("IRA") or left with the employer plan provider is a decision that can go well beyond costs and convenience. There are significant consequences arising from the decision and a misstep can be irreversible and costly. This article discusses several factors that should be considered by an owner when making a decision that best meets their unique facts and circumstances. Notwithstanding the general issues addressed below, 401(k) owners should adhere to three basic tenets during their rollover analysis: 1) read the plan document and any ancillary information relating to the plan provided by the employer; 2) consult with a retirement account expert with expertise and experience; and 3) supplement the first two steps with independent reading and research.

The Window of Opportunity

The question of whether to retain retirement savings in a company-sponsored 401(k) plan or roll over the assets into an IRA can be triggered by a number of events, including a change of employers, retirement, death, disability, company merger or the specific language within the plan document.

In some situations, a 401(k) owner may not be able to retain assets within the employer's plan, leaving the rollover decision process moot. For instance, some employer plans require that former or retired employees maintain a minimum account value in order to leave the savings in the 401(k). If the account value does not meet this minimum, a distribution may be immediately required. In addition, a distribution may be required upon separation from service. If the employee takes a position with a new employer who sponsors a 401(k) plan, a tax-free rollover to the new employer's 401(k) plan may be an option.

Under some circumstances, such as an employee's death or company merger, the 401(k) account beneficiary or owner's only option may be to take a distribution or rollover the account into an IRA. This article addresses situations where the owner has a choice as to when and whether to rollover assets from a 401(k) to an IRA.

Relevant Factors

The decision to rollover or not rollover a 401(k) involves three areas of consideration: 1) tax consequences; 2) fees and administrative costs; and 3) investment options. As with many important decisions, there is no magic quantitative formula that can be relied upon in arriving at the "correct" answer. The definition of "correct" will vary from owner to owner based on personal circumstances, including, but not limited to, age, employment status, budget and liquidity needs, family dynamics and tax bracket. In every instance, the pillars of personal research and professional advice should be relied upon beyond just this discussion and the otherwise dependable Ouija Board.

Tax Consequences

The Internal Revenue Code ("IRC") provides several options for owners to consider as part of the decision as to whether and when to roll over their 401(k). As with many provisions and rules within the IRC, these options are commonly discussed using their shorthand acronym titles. Consequently, it is important for 401(k) owners to be familiar with and understand the significance of acronyms such as RMDs, SOSEPP and NUA when working through their rollover decision tree.

- *Required Minimum Distributions*

Required Minimum Distributions are sometimes unaffectionately referred to by taxpayers by the fitting *four* letter acronym "RMDs." It is not surprising that many taxpayers view RMDs unfavorably if they do not financially need the present use of the funds mandated to be distributed under IRC Section 401(a)(9).[1] Taxpayers who choose not to roll over their 401(k) may have more flexibility for their RMDs as compared to IRA owners. If the 401(k) owner is

continued, page 35

FLORIDA

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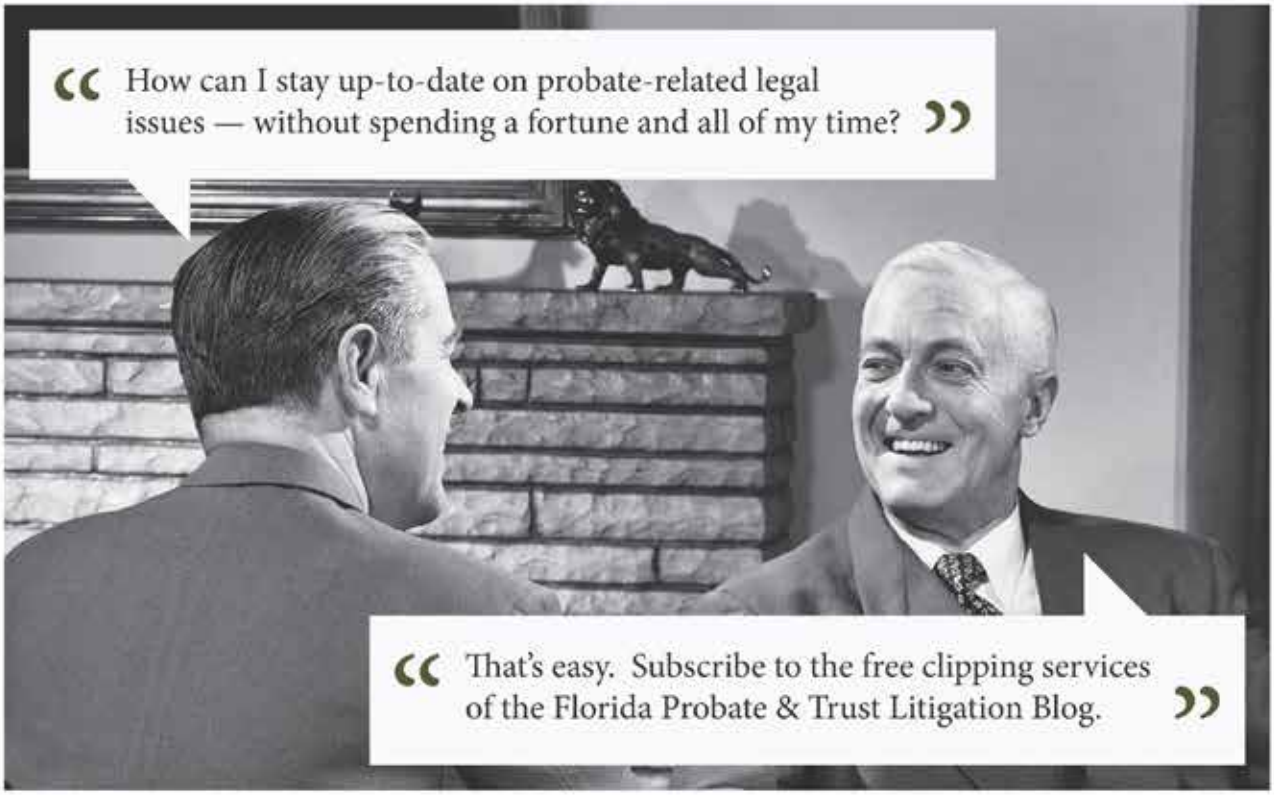

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By
Juan C. Antúnez
ATTORNEY AT LAW

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

STOKES | MCMILLAN | ANTÚNEZ
P.A.
A Trusts & Estates Law Firm
www.smpalaw.com

Contact: Juan C. Antúnez | (305) 379-4008 | jantunez@smpalaw.com | www.flprobatelitigation.com

still employed with the 401(k) plan provider at the normal required beginning date[2] for distributions, the employee is able to defer RMDs even after reaching age 70 ½ provided he is not a 5% or more owner in the employer company. There is another benefit to remaining employed after age 70 ½ and retaining a 401(k) with the employer. Employees (regardless of age) are permitted to continue contributing to their 401(k) so long as they remain employed by the plan provider. Both the deferred RMD and continued contribution benefits can be utilized by 401(k) owners in many professions where there is typically no mandatory retirement age, such as physicians, engineers, architects, accountants and attorneys.

Owners may wish to take distributions from their 401(k) instead of deferring distributions beyond age 70 ½ as permitted under IRC 401(a)(9). When an employee retires or employment is terminated for any other reason, the employee may be able to begin taking distributions from their 401(k) if the employee is at least age 55 at the time of separation from service.[3] This exception can accelerate penalty-free distributions for 401(k) owners by up to 4½ years as compared to their IRA counterparts, who generally must reach age 59½ in order to avoid early withdrawal penalties under IRC Section 72(t).

- *Series of Substantially Equal Periodic Payments*

The RMD discussion above weighs in favor of delaying a 401(k) rollover. In a time of substantial financial need, a 401(k) owner may encounter situations where a rollover into an IRA is the only option. Under guidelines set forth for a Series of Substantially Equal Periodic Payments ("SOSEPP"), employees are permitted to withdraw funds early from a retirement account or qualified plan.[4] However, there are narrow parameters that must be satisfied to receive penalty-free early distributions as part of a SOSEPP. If a taxpayer follows the rules for a SOSEPP, the 10% early withdrawal penalty under IRC Section 72(t) will not apply. In order to utilize the SOSEPP benefits directly from a 401(k) plan, the 401(k) owner must have already separated from service with the employer.[5] However, even if the employee is still employed by the 401(k) plan sponsor, it may be possible to utilize a SOSEPP provided the plan agreement permits the employee to take early distributions of all or part of the assets from the 401(k). Under this scenario, the 401(k) owner distributes all or part of the 401(k) balance to an IRA designed specifically to meet the employee's SOSEPP early distribution needs. Because of the narrow restrictions of the SOSEPP, it is essential that the employee perform research and consult with a professional as part of the decision-making, planning and implementation if an employee is considering the SOSEPP alternative.

- *Net Unrealized Appreciation*

Another factor in determining when and whether to leave assets in a 401(k) plan as opposed to rolling them into an IRA, or even distributing them outright, is the amount of employer stock the employee owns in the 401(k). If an employee has a substantial amount of highly appreciated employer stock in the 401(k), and encounters a triggering event (such as a separation of service, death, disability, or attaining age 59½), the employee should consider the impact and potential benefit of the net unrealized appreciation ("NUA") exception.[6] The NUA exception permits a 401(k) owner to distribute the shares of company stock from the 401(k) into a non-IRA brokerage account. Under the NUA exception, the cost basis in the shares is taxed as ordinary income at the time of the transfer. Thereafter, unrecognized gain at the time of the distribution is taxed as long-term capital gain when the stock is subsequently sold. Appreciation on the stock during the first 365 days following the distribution is taxed as short-term capital gain if the stock is sold during that period. The same gains, and any gains after the 365th day, are characterized as long-term capital gains if the stock is sold after the 365th day following distribution from the 401(k) into the non-qualified account. A 401(k) owner's analysis of whether to utilize the NUA exception will include many factors including the relative margin between the 401(k) owner's ordinary income tax rate and long-term capital gains tax rate and the short-term and long-term financial outlook for the company stock.

Fees and Administrative Costs

In a cost analysis comparing a 401(k) with an IRA, "costs" can include items such as management fees, transactional fees, mutual fund fees and plan administrative expenses. Over a period of 20 or more years, and because of compounding, even a less than 1% annualized difference in aggregate costs between a 401(k) and an IRA can drastically impact the total value of the account that will be available during retirement.

- *Mutual Fund Expenses*

In June 2013, the Investment Company Institute (ICI) published research findings for the fees and expenses associated with employers providing benefits to their employees through 401(k) plans.[7] The report provided that in 2012, the average expense ratio for equity funds outside of a 401(k) was .77%. The average expense ratio for equity funds offered within a 401(k) was almost 20% less at .63%. A similar spread exists between expense ratios for investors outside of 401(k) plans as compared to 401(k) plan investors for hybrid and bond funds. For hybrid funds (funds including a combination of equity and bond elements) the non-401(k) expense ratio in 2012 was .77% compared to the 401(k) expense ratio of .59%. Similarly, the expense ratio for bond funds was .62% and .50%, respectively. The conclusion from the ICI findings is that because of economies of scale and institutional bargaining power large companies can wield, there is typically an economic advantage to holding mutual funds in a 401(k) compared to an IRA. Similarly, there is a positive correlation between the size of the employer's 401(k) plan (by

participants and total assets) and the value the company is able to pass along to employees in the form of lower expense ratios for mutual funds offered within the 401(k). This positive correlation can be negated through direct ownership of stock by an IRA owner; whereas, except for the employer's stock, a 401(k) owner is generally unable to hold individual securities in their account.

While expense ratios represent an important quantitative factor to consider as part of the "Should I Stay or Should I Go"[8] 401(k) analysis, there are other relevant tangibles such as administrative fees which can adversely affect a 401(k) plan's overall return.

- *Plan Administration Expenses*

The administrative fees and costs associated with a 401(k) can vary substantially based on the size of the employer assets under the plan, the number of plan participants, and the number and variety of investment options within the plan. As with mutual fund expense ratios, the concept of economies of scale is prevalent with 401(k) plan administrative costs. Typically, the larger the dollar value of the total assets held within a plan, and the larger the number of total plan participants, the lower the average cost. In some cases, larger employers are able to entirely subsidize the plan administrative costs as an added benefit to the plan's participants. There are substantial resources available to 401(k) owners to assist with independent research specific to their 401(k) plan's expenses. The United States Department of Labor issued a pamphlet titled "A Look at 401(k) Plan Fees."[9] The pamphlet provides plan owners with tips and additional resources to consult as part of a thorough analysis of the type and amount of costs and fees included as part of the owner's participation in the 401(k) plan.

- *Management and Transactional Fees*

Generally, IRA owners have a choice to engage a financial advisor and pay as a fee a percentage based on the value of the investment managed by the advisor or on a transactional basis whereby the owner is charged each time a "trade" is made within the account. With respect to the latter option, IRA owners can self-direct their investment with little or no investment advice from a professional for even lower transactional fees. The flexibility in "choices" afforded IRA owners is not available to 401(k) participants. The asset management fees are often difficult to identify from the plan administration fees on the 401(k) provider's annual Form 5500 filed with the IRS. However, as with the mutual fund expense ratios and plan administration expenses, there is a direct correlation between lower management fees and larger-sized 401(k) plans.

In sum, the "costs" component in a 401(k) owner's decision-making process on whether to roll over into an IRA may depend in large part on the aggregate value of the assets under management in the employer's plan. Ultimately, a true "apples-to-apples" comparison will depend on the 401(k) owner's research into plan costs provided by the employer against cost information gathered from investigating various IRA custodians' fee structures.

Extent of Investment Options

The last factor is certainly not the least important, but requires the least amount of discussion because of the pellucidity of the issue. In America, more is always better. All-you-can-eat buffets, V-8 trucks, 44 oz. fountain drinks, the list goes on. In that vein, an IRA owner has essentially a world of options to invest in while 401(k) owners are usually restricted to anywhere from a handful to a couple dozen options, all of which are selected by the 401(k) plan provider. Clearly this factor should fall on the side of a 401(k) owner trending toward an earlier rollover. Interestingly though, a series of articles in Fiduciary News imply that providing 401(k) owners, and presumably IRA owners who self-direct their investments, with too many options may be counterproductive for the owner.[10] In one study involving choosing among types of chocolate, subjects suffered from what was termed a "tyranny of choice" because of the difficulty arriving at a decision and subsequent buyer's remorse for not choosing one or more of the other pieces.[11] The study concluded that groups with only a handful of choices experienced the most satisfaction from the process.

Clearly, choosing chocolates is substantially different and less important than choosing investment alternatives inside a 401(k). Another article in the Fiduciary News series provided input from financial professionals regarding views on the "right" number of investment choices within a 401(k) plan.[12] The collective sentiment of the financial professionals was that 401(k) owners could construct a well-diversified portfolio with anywhere from 1 to 10 options. However, public perception, and investors' thirst for an overabundance of investment choices, may dictate that an average 401(k) plan provider offer upwards of 20 or more investment alternatives.

Ultimately, an owner must decide whether the limited investment choices under a 401(k) plan are important enough to roll over the 401(k) assets into an IRA. Owners with above average investment experience, expertise and confidence, or with an appetite for non-traditional assets such as real estate or closely held investments, likely will fit into the rollover category. Alternatively, 401(k) owners who are familiar and comfortable with their 401(k) plan's investment options, costs and administration may be more inclined to retain their 401(k) with the employer after retirement, if permitted by the plan.

Conclusion

Fortunately, there are ordinarily only two choices for 401(k) owners: "To Roll Over or Not to Roll Over." Even so, paralysis by analysis can still be a factor for some owners. Each 401(k) owner's decision tree is like a snowflake: the facts and circumstances such as the employer, tax bracket, financial need, basis/value discrepancy on company stock owned inside the plan, the owner's investment acumen, and the owner's age will never overlap exactly for two owners.

Additionally, the issues and options described above are not intended to be exhaustive. Entire books have been written on 401(k)s, IRAs, rollovers and other substantive issues relating to qualified plans.[13]

Independent research that involves reviewing the plan documents, account statements and any other materials an employee can obtain from the employer, is just the beginning. External research well beyond this article and some of the references herein is critical to the education process necessary to arrive at the "correct" decision for the individual employee's situation. Regardless of the level of "self-education," 401(k) owners should seek advice from experienced financial, legal and/or accounting advisors prior to arriving at a decision, especially since the decision, once made, is often irreversible.



Alex Hamrick *is a Senior Fiduciary Advisory Specialist with Wells Fargo Bank, N.A. Prior to joining Wells Fargo in 2006, Alex practiced law as a tax and transactional attorney. Alex received his B.S., with honors, in Finance, J.D., with honors, LL.M (Tax) and Masters in Business Administration, each from the University of Florida.*

Mr. Hamrick would like to thank ***Matthew Hartford****, Financial Advisor, of Wells Faro Advisors, LLC for his assistance in the preparation of this article.*



L. Howard Payne *is a principal in the law firm of The Payne Law Group, P.A., Sarasota, FL. Admitted to bar, 1959, New York, 1961, Florida. Education: Yale University, (B.A. 1956); Cornell University, (LL.B., 1959). Member: Florida Bar and New York Bar; Chair, Insurance Committee of the Real Property, Probate and Trust Law Section, Florida Bar; Fellow, American College of Trust and Estate Counsel (ACTEC); Board Certified Tax Lawyer and Wills, Trusts and Estates Lawyer; Member of Trusts and Estates Certification Committee, Florida Bar.*

Endnotes

1 I.R.C. § 401(a)(9)(A)(ii) provides the requirement for mandatory distributions under a qualified plan. Internal Revenue Code Section 4974 imposes a penalty for failing to satisfy the minimum required distribution during the calendar year.

2 I.R.C. § 401(a)(9)(C) provides that the required beginning date for distributions is the later of April 1st following the year the employee reaches age 70 ½ or the calendar year in the which the employee retires, provided the employee is not a 5% or greater owner of the employer company.

3 I.R.C. § 72(t)(2)(A)(v); Internal Revenue Service Tax Topic 558, *available at* http://www.irs.gov/taxtopics/tc558.html.

4 I.R.C. § 72(t)(2)(A)(iv).

5 I.R.C. § 72(t)(3).

6 I.R.C. § 402(e)(4).

7 ICI Research Perspective, *The Economics of Providing 401(k) Plans: Services, Fees and Expenses* (2012), *available at* http://www.ici.org/pdf/per19-04.pdf.

8 The Clash. "Should I Stay or Should I Go?" Combat Rock. 1982.

9 United States Department of Labor, *A Look at 401(k) Plan Fees*, available at http://www.dol.gov/ebsa/publications/401k_employee.html.

10 Christopher Carosa, *How Many Investment Options Should 401k Plan Sponsors Offer?* Fiduciary News, October 18, 2001, *available at* http://fiduciarynews.com/2011/10/how-many-investment-options-should-401k-plan-sponsors-offer/.

11 Christopher Carosa, *Avoiding Decision Paralysis: How to Create the Ideal 401k Plan Option Menu*, Fiduciary News, November 18, 2001, *available at* http://fiduciarynews.com/2011/10/how-many-investment-options-should-401k-plan-sponsors-offer/.

12 Christopher Carosa, *Professional Advisors Sound Off on Ideal Number of 401k Plan Options*, Fiduciary News, November 11, 2001, *available at* http://fiduciarynews.com/2011/11/professional-advisors-sound-off-on-ideal-number-of-401k-plan-options/?utm_source=FiduciaryNews&utm_medium=HowManyInvestmentOptionsShould401kPlanSponsorsOffer&utm_campaign=101811y.

13 See Natalie B. Choate, *Life and Death Planning for Retirement Benefits* (7th ed. 2011), which is often referred to as one of the preeminent sources for planning with retirement accounts for estate planning and financial professionals.



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Florida Realtors/Florida Bar (FR/BAR) Residential Contract Documents Revised Effective September 2014

**By Frederick W. Jones, Esq., Winter Park, FL,
2014 Chair of Florida Realtor-Attorney Joint Committee, and
James A. Marx, Esq., Marx and Frankel PA, Miami, FL,
2015 Chair-elect of Florida Realtor-Attorney Joint Committee**

The residential FR/BAR Contract documents have been in continuous use since 1973 and currently consist of the Residential Contract for Sale and Purchase, the "As Is" Residential Contract for Sale and Purchase, and the Comprehensive Rider, which is comprised of Riders A - BB. These forms, which are widely considered to be the gold standard of statewide residential real estate contracts, are promulgated by the Florida Realtor-Attorney Joint Committee[1], a state-wide committee of Attorneys and Realtors appointed by their respective organizations. Consistent with the Joint Committee's stated purpose, its members' author and periodically update the FR/BAR Contract documents, which are then approved by Florida Realtors and The Florida Bar for use in residential real estate transactions. Additionally, the Joint Committee is charged with working to foster better relations between the two professions.

The FR/BAR Contracts and Riders are typically revised every two to three years, and the last comprehensive change was approved and became effective in July 2013. The 2014 revisions were completed mid-cycle because there were some statutory changes and contract clarifications which the committee felt should be addressed. This article provides an overview of the recent modifications that are included in the current edition of the FR/BAR Contract documents, which have been approved and issued for use effective September 2014.

The revisions include minor changes to the main body

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of the contracts, specifically, Paragraph 9 concerning allocation of payment for municipal lien searches, Paragraph 10 (d) relating to flood insurance disclosure, and revisions to Riders C., Seller Financing; E., FHA/VA Financing; and H., Homeowners'/Flood Insurance. The most comprehensive changes were made to Rider C., Seller Financing, as discussed below.

Municipal Lien Search(es)

In 2013, the contracts were revised in an attempt to deal with which party to the transaction was to pay for municipal lien searches, if any were ordered. Unfortunately, the various counties and locales in Florida have notably different customs and practices in determining whether municipal lien searches are required to be ordered, as well as who pays for this service. It became apparent to the committee that the placement of the words "municipal lien search" in Paragraph 9(c) in 2013 was creating some confusion and potentially mandating that such searches be done even in areas where it was not a customary practice. Therefore, in 2014, the committee in an effort to address these differences, revised the contracts to delete the requirement to include a municipal lien search as part of the title services in 9(c) and moved the words "municipal lien search" to 9(a) and (b), which allocates the expense of the search, if obtained in the transaction, to the seller or buyer, as applicable, based upon who pays for the owner's title insurance policy under 9(c)(i) and (ii) or the specific designation of seller under 9(c)(iii), Miami-Dade/Broward provision.

Flood Insurance

Paragraph 10(d) previously provided that the buyer could terminate the contract if the buyer could not obtain flood insurance through the National Flood Insurance Program. The 2014 revised Contract adds private flood insurance as defined in 42 U.S.C. Section 4012a, so that a buyer would also need to be ineligible for this option to terminate the contract on that basis. Rider H., Homeowner's /Flood Insurance, was modified in the same manner to conform with the revision to the body of the contract.

FHA Financing

Although the substance has not changed, Rider E., Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA), was revised to delete the pre-printed default of "Purchase Price" for the appraised value as set out in paragraph 3, and now requires that the buyer fill in the blank with "purchase price" or other dollar amount of buyer's choice. The other blanks on the form no longer have a dollar amount as a default because this is the requirement of the FHA.

Seller Financing - *The Dodd-Frank Act*

Rider C., Seller Financing (Purchase Money Mortgage; Security Agreement to Seller), was extensively revised to address the Dodd-Frank Act, which went into effect on January 10, 2014, and significantly impacted residential mortgage lending, including seller financing (purchase money financing) of residential properties for the owner-occupant.[2]

Rider C. has changed from one to two pages. The 2014 revision provides, first, a summary of the Dodd-Frank Act (the "Act"), together with a condensed outline or road map detailing certain provisions in the Act to enable parties to navigate through either of the two primary exclusions for seller financing and avoid a seller being treated as a "loan originator." Secondly, the 2014 revision has expanded the various terms, provisions, and alternatives of the seller financing portion of the Rider which the parties can negotiate and complete. What is set forth in the Rider relating to the Act is only a summary of the Act, and the 2014 Rider includes a conspicuous warning for the parties to seek the advice of legal counsel with respect to the effect of the Act and other applicable federal and state regulations prior to entering into the contractual provisions contemplated by the seller financing rider.

Conclusion

RPPTL members can review redlines of the current edition of the contracts versus the prior editions and additional commentary by visiting the Residential Real Estate & Industry Liaison (RREIL) Committee webpage within the RPPTL Website.

Endnotes

1 The Joint Committee consists of 11 Realtors and 11 Attorneys appointed by the Florida Realtors Inc., formerly the Florida Association of Realtors (FR), and by the Board of Governors of The Florida Bar. To distinguish the FR/BAR Contract from the contract issued solely by the FR, the following phrase is printed across the top: "THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR."

2 There is an article in the Fall 2014 Edition of *ActionLine*, written by Arlene C. Udick, which provides a more detailed analysis of the effect of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") on Residential Owner-Occupant Purchase Money Mortgage Financing, "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*."





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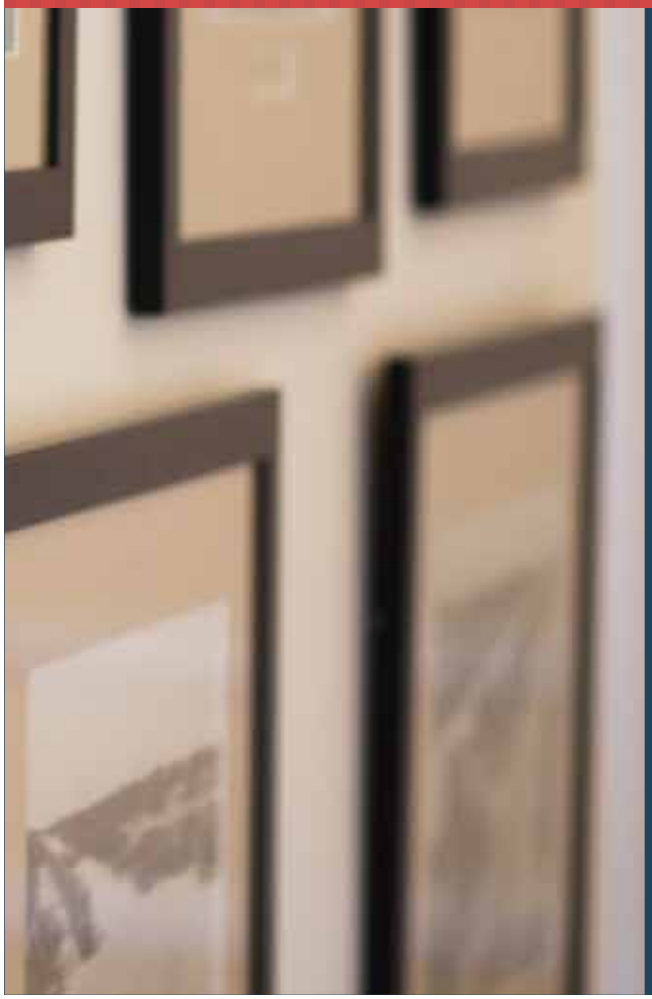

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Spotlight on the Real Property Finance & Lending Committee

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


R. ROBBINS

R. James Robbins, Jr., Chair of the Real Property Finance & Lending Committee, extends an open invitation to anyone interested in this area of Real Estate law to attend meetings of the committee. Jim reports that the Committee covers a fairly broad spectrum of legal issues relative to financing & lending, including commercial development, construction loans both big and small, and residential transactions of all kinds. The Committee is made up of a variety of folks with backgrounds in both commercial and residential lending as well as a number of real property litigators and representatives from the title insurance industry. The Committee is comprised of six (6) sub-committees including a sub-committee that monitors governmental action and regulations, a sub-committee that focuses on case law updates, a sub-committee on commercial transaction matters, another which is responsible for preparing and presenting CLEs including webinars (a recent webinar was on the Dodd-Frank Act, a really "hot topic"), a sub-committee that arranges for in-meeting presentations and discussions on important current topics and finally, a sub-committee that is focused on the issue of receiverships. Jim reports that there is a national trend to increase the powers of court appointed receivers so that a receiver would have the ability to proceed with transactions that would fall within "the normal course of business." For example, if a receiver was appointed for a subdivision that was involved in building and selling homes, the thought is the receiver should be able to continue that business activity. At this time, a receiver cannot close a real estate transaction without court approval. The trend throughout the country is to allow receivers more flexibility in completing these "normal course of business" transactions. This sub-committee is actively monitoring and reporting on this trend and its potential impact in Florida. These extensive and hard-working sub-committees provide very important information to committee members and guidance to all Section members. Jim credits David Brittain, the previous Chair of the Real Property Finance and Lending Committee for setting up this outstanding sub-committee structure.

The Committee has anywhere between twenty (20) and thirty (30) members who participate either by attending meetings in person or by phone. The most recent committee meeting included a presentation during the meeting about some unique bankruptcy situations that impact finance and lending as well as a discussion of construction lien issues. What valuable information for us practitioners who are "in the trenches"!

The Committee has been involved, under the direction of David Rodstein, with a special sub-committee in coordination with the Real Property Litigation Committee, to prepare legislation for the 2016 Florida legislative session. This proposal will relate to section 65, the statute of repose and how it interplays with additional advances made by mortgage lenders. The proposal was adopted recently in concept by both the Real Property Litigation Committee and the Real Property Finance & Lending Committee and now the sub-committee members will begin the important task of coming up with the white paper on the legislation, finding a sponsor and looking for a path to move the proposed legislation through the Florida House and Senate.

I recommend that you give serious consideration to accepting Jim's invitation to become involved in the very important work undertaken by this committee. Not only can you be involved in helping chart the course of Florida law in the future, you have the great opportunity to advance your own knowledge in the field of real estate financing and lending at every meeting. If you are interested in any of the Committee efforts, please contact Jim at rjrobbins@hwhlaw.com.

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The Annual Kozyak Minority Mentoring Picnic was a Huge Success!



Michael Dribin, Michael Gelfand, David Shanks and Jorja Williams at the Section booth

The Kozyak Minority Mentoring Picnic took place on Saturday, November 1, 2014 at Amelia Earhart Park in Hialeah, Florida. The RPPTL Section was one of the event's sponsors and had a tent at the Picnic. Section Member Hung Nguyen took care of all the details in setting up the supplies at our booth and enlisting volunteers from the Section. RPPTL Section members, including Section chair, Michael Dribin, and chair-elect, Michael Gelfand, were in attendance at the Section table. For the price of $10 parking, Section members and their families as well as others attending the event enjoyed networking, activities (including rock climbing walls, ring toss, games and face painting for the children; dominoes and volleyball for the adults; even an entertaining and elaborate Dragon Dance) and a diverse selection of food and beverages. The event was a huge success with lawyers and law students engaging Section members in discussions regarding the Section's activities and the Section's commitment to mentoring and diversity. A handful of attorneys and law students also signed up to join the Section. The Section extends a big thank you to everyone who came out to support us and the Picnic!

By Michael Sneeringer



Dragon Dance performers courtesy of Asian Pacific Bar Association

Real Estate Case Summaries

By Kymberlee Curry Smith, Esq.
Pembroke Pines, Florida

Wife lacked standing to: 1) assert homestead rights of her deceased husband and 2) declare a quit-claim deed signed by the wife, but not by the husband, void ab initio. In this case, the wife was sole owner of property when it was transferred to the trust and the children were adults. The constitutional provision preventing the devise of homestead property to protect the surviving spouse and minor children did not apply.

Sanford D. Lyons, Timothy R. Lyons, and John C. Lyons, as Trustees of the Norma W. Lyons 1993 Qualified Personal Residence Trust v. Norma W. Lyons, Valerie A. Lyons, William M. Tuttle, II, and Dorothy A. Lyons Heffner, 39 Fla. L. Weekly D2263b (Fla. 4th DCA 2014)

Husband and wife, Richard and Norma Lyons, owned a home as their primary residence. They had five children. In 1993, both husband and wife executed a quit-claim deed, transferring the property only to the wife. The same day, Mrs. Lyons transferred the property to a qualified personal residence trust. Her three sons were the trustees. In 2002, Mr. Lyons executed a will wherein the trust was acknowledged. He passed away in 2007.

In 2010, Mrs. Lyons attempted to convey the primary residence to herself and one of her daughters. In 2011, the trustees filed a complaint against their mother, two sisters, and the attorney who prepared the 2010 deed to set aside the deed, asserting that their mother was not the property owner and therefore could not convey it. In response, Ms. Lyons, her daughter, and her attorney moved for summary judgment arguing that since Mr. Lyons did not sign the 1993 deed which transferred the property to the trust, it was void ab initio and violated Mr. Lyons' homestead rights. Mrs. Lyons also filed an affidavit stating the intent of both she and her husband was to transfer the marital property to her only. The trustees argued the father's homestead rights were waived and their mother lacked standing to raise the homestead rights argument on their deceased father's behalf. The trial court found in favor of the mother, daughters and attorney and entered a summary judgment.

Homestead rights are protected under the Florida state constitution. The provision limiting the devise of homestead property is Art X, § 4(c), Fla. Const. It provides:

> The 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. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

To assist with interpretation, the court referenced *Lewis v. Leon Cnty.*, 73 So. 3d 151, 153 (Fla. 2011), stating that in "review of the constitutional provisions, a court must 'examine the actual language used in the constitution.'" Also, that if "that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written.'"

The purpose of Art X, § 4(c), Fla. Const., is to protect a surviving spouse and minor children. The Appellate Court determined that Art X, § 4(c), Fla. Const., did not apply to this situation because the children were adults and the surviving spouse, Mrs. Lyons, solely owned the property. The language of Art X, § 4(c), Fla. Const., limits the actions of the homestead property owner. Since Mrs. Lyons was the owner, this provision was not meant to protect her from herself and prevent the transfer of her own property to the trust. She was not a member of the class the article is intended to protect. Summary judgment was reversed and the case was remanded.

City ordinance amending city's comprehensive plan to change zoning map designation is void due to failure to comply with § 286.011, Fla. Stat. (2011) ("Government in the Sunshine Law") and § 166.041, Fla. Stat. (2011).

James Anderson v. City of St. Pete Beach, a municipal government of the State of Florida, and Beverly Garnett, Lorraine Huhn, Marvin Shavlan, James Parent, and Mayor Steve Mcfarlin, all in their official capacities as the members of the St. Pete Beach City Commission, 39 Fla. L. Weekly D2180a (Fla. 2nd DCA 2014)

Mr. Anderson appealed a judgment finding § 163.32466, Fla. Stat. (2011) constitutional. His claim was that the trial court should not have rejected his challenge to the City of St. Pete Beach, Florida, Ordinance 2011-19 (June 28, 2011) (the "Ordinance"), an amendment to the City's comprehensive plan, which he believed was invalid because it was enacted in violation of § 166.041, Fla. Stat. (2011), the state's public notice statute. He also stated that granting the City and its officials summary judgment was incorrect because the City violated § 286.011, Fla. Stat. (2011) ("Government in the Sunshine Law").

First, the Court concluded that the Ordinance was invalid because the City did not comply with the notice requirements of § 166.04 (c)(3), Fla. Stat. (2011). The City did not dispute this violation and offered no explanation in defense.

Second, Mr. Anderson refuted summary judgment entered in favor of the City, stating that Art I, § 24(c), Fla.

Const., and § 286.011, Fla. Stat. (2011) were violated. He argued that the City commissioners conducted several shady meetings to proffer a strategy to amend the City's comprehensive plan, either by repealing or modifying specific sections and the passage of legislation by the legislature.

This Court relied on *Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998) and *Neu v. Miami Herald Publ'g Co*., 462 So. 2d 821, 824 (Fla. 1985) to explain the purpose for the adoption of § 286.011, Fla. Stat. (2011) stating that the "court in *Zorc v. City of Vero Beach*, … explained that the exemption is limited to discussion of settling pending litigation by negotiation and agreement among the parties." Also that the "exemption addressed a long-standing complaint by public bodies that discussing settlement negotiations in public meetings would divulge to the adversary the position or 'bottom line' of the public body and thus give the adversary an unfair advantage that could be used to secure unmerited or excessive judgments or settlements against the public. See *Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 824 (Fla. 1985)."

§ 286.011(8)(b), Fla. Stat. (2011), which pertains most to the facts of this case, states:

> (8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:
>
> (b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.

The Court determined that the City violated the statute because the commission discussions exceeded the boundaries of § 286.011(8), Fla. Stat. (2011), by encompassing a wide range of issues that fell outside the scope of the litigation. In this regard, the trial court erred when it entered summary judgment in favor of the City.

The Court sided with Mr. Anderson and voided the adoption of the comprehensive plan amendment as both statutes were violated. The case was reversed and remanded.

A wild deed was used to convey property and it became the root of marketable title under the Marketable Record Title Act ("MRTA"). An exception to the MRTA was triggered when deeds representing interests in the property were recorded subsequent to date of root of title, but within thirty-year period.

Joseph Lehmann and Therese Lehmann v. Cocoanut Bayou Association, 39 Fla. L. Weekly D2259a (Fla. 2nd DCA 2014)

Mr. and Mrs. Lehmann owned a beachfront property in Sarasota County. Cocoanut Bayou Association ("CBA") owned the adjacent beachfront property to the north. A dispute over the property line was at issue.

In 1912, the revised plat of Siesta Subdivision was recorded in the public records showing the property separated into blocks by platted streets. All of the property, except Lots 10 and 11 of Block 60, was originally owned by E.S. Boyd and his wife, Helen. Lots 10 and 11 were owned by Kathleen Ingalls. Ms. Ingalls deeded her property to James and Alice Thomas in 1945. Then in 1946 the Boyds executed a deed in favor of the Thomases, transferring title to Lots 9, 12, 13, 14, and the north half of Lot 15 in Block 60. Lots 9 and 10 are adjacent to the south side of Bee Street. In addition, the Boyd to Thomas deed included land described by a very specific set of directions. In 1950, Mr. Thomas deeded his property to Mrs. Thomas. The Thomas to Thomas deed contained the same property description as the 1946 Boyd to Thomas deed. However, the Thomas to Thomas deed was not recorded until 1953. Prior to this, in 1952, Mr. and Mrs. Boyd conveyed to CBA property north of Bee Street.

Numerous other transfers were made between the Boyds, Thomases and CBA, a few of which were not recorded in order of transfer. In 1979, Mr. Lehmann purchased the property and was made aware of the disputed boundary line along the northern boundary line of his property. His chain of title stemmed from a deed by Mrs. Thomas to her daughter in 1964. Mr. Lehmann later executed a deed to his then-wife Judy C. Lehmann claiming to convey title to the parcel to her alone. This deed was recorded on July 8, 1982. The Lehmanns believed that the Boyd to CBA deed was a "wild" deed because Boyd had attempted to convey that which he did not own.

In 2012, CBA filed a quiet title action against the Lehmanns hoping to be named owner of marketable title to the contested parcel. The action was brought on both the theory of adverse possession and the application of the MRTA. See Ch. 712, Fla. Stat. (2012). The MRTA provides in part that:

> [a]ny person having the legal capacity to own land in this state, who, alone or together with her or his predecessors in title, has been vested with any estate in land of record for [thirty] years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in § 712.03.

CBA's complaint alleged that the 1952 Boyd to CBA deed was recorded in excess of thirty years ago, which meant it complied with the MRTA. CBA also alleged that under the MRTA, the 1952 Boyd to CBA deed was evidence that marketable record title was vested in CBA and the Lehmanns' claim was not valid. CBA also claimed its use of the property, which began in 1952, equated to adverse

possession. Though the trial court's final judgment does not mention the MRTA, it does include a finding that the 1952 Boyd to CBA deed "is the root of title." This implies that the MRTA was the basis of the trial court's finding that CBA's claim to the disputed parcel superseded any other.

The issue on review is the applicability of the MRTA to the facts of this case. To determine CBA's "root of title," the last recorded transaction must be analyzed. The intention was to transfer title to CBA and the deed was recorded prior to August 15, 1982, the thirty years required from the root of title under the MRTA. The trial court resolved that the 1952 Boyd to CBA deed is CBA's "root of title". Further, at the time of the 1952 conveyance, the Boyds did not own the contested parcel and conveyed title to CBA via a "wild" deed. The Court cites the following in support, "MRTA . . . describ[es] certain titles in land of record for a stated time, declares them to be of marketable quality and, with certain exceptions, undertakes to completely extinguish all other estates, interest[s], claims or charges as against such titles." *Holland v. Hattaway*, 438 So. 2d 456, 463 (Fla. 5th DCA 1983). The Court also cites *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 446-47 (Fla. 1978) ("[MRTA] is not concerned with the quality of the title conveyed by the root of title so long as the root purports to convey the estate claimed. This can be so even though a deed is not part of the chain of title emanating from the sovereign and is therefore often called an 'interloping' or 'wild' deed. It can, under the marketable title acts, form a root of title which may eventually cut off the interest of a person who might otherwise have a claim." (quoting *Wilson v. Kelley*, 226 So. 2d 123, 127 (Fla. 2d DCA 1969)).

To further eliminate any other claims, exceptions to the MRTA must also be determined. The Court found that since the 1950 Thomas to Thomas deed was recorded in 1953, after the 1952 recording of CBA's "root of title," the recording of the Thomas to Thomas deed triggered the exception found in Ch. 712, Fla. Stat. (2012). Accordingly, the Court found that the trial court erred in not considering the 1953 recordation of the Thomas to Thomas deed and therefore concluding that the 1952 Boyd/CBA deed was the root of title. The Court reversed that portion of the final judgment. The Court did affirm the lower court's rejection of the Lehmanns' counterclaim for title based on their adverse possession of the contested property. Because ownership remained at issue, the Court remanded the case to the trial court for further proceedings.

Wild quitclaim deed from an interloper to himself and his mother did not constitute color of title under law of adverse possession. The trial court quieted title in owner of property.

Luke Aaron Frazier and Connie C. Frazier v. Richard Goszczynski, et al., 39 Fla. L. Weekly D2133a (Fla. 5th DCA 2014)

Mr. Richard Goszczynski owned real property in Hernando County with Eugene Zielinski as joint tenants with right of survivorship. After Zielinski passed away, Goszczynski became the sole owner of the property. Mr. Goszczynski became delinquent in paying the ad valorem taxes. Luke Frazier and his mother, Connie Frazier, attempted to take the property owned by Mr. Goszczynski without his consent by recording a "wild" quit-claim deed. The Fraziers subsequently took possession of the property, paid the delinquent taxes, rented the property to others, and kept the rental payments for themselves. Mr. Goszczynski discovered the scam and filed suit. The Fraziers filed a counterclaim for quiet title, claiming adverse possession and that the property belonged to them pursuant to § 95.16, Fla. Stat. (2003). Mr. Goszczynski was granted summary judgment by the trial court. The issue under review is whether the Fraziers' quit-claim deed equated to color of title under the law of adverse possession.

The text of section § 95.16(1), Fla. Stat. (2003), offers that color of title references "a claim of title exclusive of any other right" founded on a written instrument of conveyance. The Court relied on *Simpson v. Lindgren*, 133 So. 2d 439 (Fla. 3d DCA 1961) which determined that:

> [T]he instrument must be accepted in a good faith and honest belief by the grantee that it vests title to the property in the grantee. Adverse possession under color of title may not be had where title is accepted with knowledge that it is invalid or that the grantor had no title in the property.

While the Fraziers claimed they had a good faith belief there was a valid conveyance, Mr. Frazier previously admitted the deed was "wild" and that he executed it for the purpose of setting up a claim of adverse possession under color of title. The Court further relied on the following in affirming the trial court: "[t]he scheme did not succeed then and it will not succeed now. The courts have declared on many occasions that taking property by adverse possession is not a favored concept. See *Candler Holdings Ltd. I v. Watch Omega Holdings*, L.P., 947 So. 2d 1231 (Fla. 1st DCA 2007)).

The homeowners appealed the trial court's order granting final summary judgment of foreclosure in favor of the bank after previously dismissing the case for non-activity. The homeowners argue that dismissing the case resulted in the trial court's lack of jurisdiction. The Court of Appeal agreed.

Morin Magloire and Germain Jean Claude v. The Bank of New York as Trustee for the Certificate Holders Cwabs, Inc. Asset-Backed Certificates, Series 2006-23, 39 Fla. L. Weekly D1927 (Fla. 4th DCA 2014)

On October 10, 2008, Bank of New York filed a mortgage foreclosure complaint. On October 15, 2008, the homeowners filed an answer to the complaint, explaining that

they had "experienced serious hardships [sic] that have prevented [them] from making the mortgage payments on [their] primary residence." They also stated that they were trying to work with the lender.

On November 19, 2009, the trial court filed a notice of intent to dismiss the bank's complaint for lack of activity. The bank filed a statement asserting the delay was attributed to its evaluation of whether the homeowners would qualify for a settlement offer and asked the court to allow the case to remain open. On December 16, 2009, the trial court entered a final order of dismissal of the bank's complaint, again, due to lack of activity in excess of 1 year and no good cause.

On June 28, 2010, the bank filed a motion for summary judgment. Then, on November 9, 2011, the trial court entered summary final judgment in favor of the bank. It is unknown whether the homeowners raised the issue of the December 16, 2009 dismissal, but on appeal, they did dispute lack of jurisdiction. Support for this strategy is given in *Rudel v. Rudel*, 111 So. 3d 285, 291 (Fla. 4th DCA 2013), "the issue of subject-matter jurisdiction . . . may be raised for the first time on appeal."

This Court also referenced, *Gardner v. Nioso*, 108 So. 3d 1122, 1123 (Fla. 1st DCA 2013), which states, "A trial court lacks jurisdiction to hear a case once it has been dismissed." The Court determined that since the complaint was never refiled, there was no rehearing, or a motion to vacate filed or ruled upon regarding the order of dismissal, the trial court did not have jurisdiction to enter an order granting the motion for summary judgment. Though the bank refuted this, it was denied. Attempts were made to regain jurisdiction through the claim of "equitable jurisdiction." The Court found that the argument that equitable jurisdiction can replace subject-matter jurisdiction unconvincing. In support of the reversal and remand, the Court used the following quote from Black's Law Dictionary 18(c) (9th ed. 2009) (quoting William Q. de Funiak, Handbook of Modern Equity 38 (2d ed. 1956)):

> [T]he term equity jurisdiction does not refer to jurisdiction in the sense of the power conferred by the sovereign on the *court over specified subject-matters* or to jurisdiction over the res or the persons… but refers rather to the merits. The want of equity jurisdiction does not mean that the court has no power to act but that it should not act, as on the ground, for example, that there is an adequate remedy at law. (emphasis added) (internal quotation marks omitted)

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Probate Case Summaries

Prepared by Sean M. Lebowitz, Esq.
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A creditor who is not served with a notice to creditors is required to file a claim against an estate or may seek an extension of time from the probate court to file a claim within two (2) years of a Decedent's death.

Souder v. Malone, 143 So. 3d 486 (Fla. 5th DCA 2014)

After the Decedent's demise, the personal representative filed a petition for administration and published a notice to creditors. A purported creditor, Souder, was not served with a copy of the notice to creditors. § 733.702, Fla. Stat., requires a creditor to file a claim in an estate the latter of the date that is three (3) months after the time of the first publication of the notice to creditors or thirty (30) days after service on the creditor with the notice to creditors. Further, a personal representative is required to serve a known or reasonably ascertainable creditor with the notice to creditors.

After the time deadlines provided in § 733.702, Fla. Stat. expired, Souder filed claims in the estate. In response, the personal representative filed a motion to strike Souder's claims as untimely. Souder never petitioned the court for an extension of time to file his claims, and the trial court granted the personal representative's motion to strike.

On appeal, Souder maintained that, as a known or reasonably ascertainable creditor, because he was never served with a notice to creditors as required by § 733.702, Fla. Stat., he had two (2) years from the Decedent's date of death to file claims pursuant to § 733.710, Fla. Stat. The Fifth District Court of Appeal reviewed the appellate decisions of its sister courts on this particular issue; specifically, the Fourth District Court of Appeal in *Golden v. Jones*, the Second District Court of Appeal in *Lubee v. Adams* and the First District Court of Appeal in *Morgenthau v. Estate of Andzel*.

The appellate court affirmed the trial court's order granting the motion to strike. It focused on § 733.702(3), Fla. Stat., which provides that a claim not timely filed by a creditor is barred unless the court extends the time to file a claim, and an "extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period." Based upon the statute, the appellate court determined that when a reasonably known or ascertainable creditor fails to receive service of the notice to creditors and does not file a timely claim, the creditor's remedy is to file a petition for extension of time pursuant to § 733.702(3), Fla. Stat.

Disinherited son's collateral attack on his deceased father's Nevada divorce decree was barred by the Full Faith and Credit Clause.

Kelley, III v. Kelley, et al., 147 So. 3d 597 (Fla. 4th DCA 2014)

In *Kelley*, the Decedent's disinherited son contested his father's estate by claiming that the father's marriage was invalid because his father was concurrently still married to his former spouse. The son maintained that if his father's marriage was void due to bigamy, the spouse would be excluded as a beneficiary of a multigenerational family trust, making the son the beneficiary.

The terms of the Decedent's trust permitted the Decedent to exercise a limited power of appointment in favor of his spouse, descendants and certain charities. If the Decedent failed to exercise his power of appointment, the assets defaulted to his son. The Decedent exercised the power of appointment in favor of his current spouse and certain charities, and did not leave anything to his son.

The son sought a declaration finding his father's exercise of his power of appointment invalid since his spouse was not his legal spouse, and would therefore be considered an impermissible appointee under the terms of the trust. Due to the invalid exercise of the power of appointment, the son contended that he was the sole beneficiary as the default taker under the terms of the trust.

To support the position that the Decedent's marriage to his spouse was invalid, the son maintained that his father's first marriage was never properly annulled in Nevada, and therefore the father's next marriage was invalid because the father was still married to his first wife. Specifically, the son alleged that his father and his first wife erroneously claimed they satisfied the state's residency requirements when they got divorced in Nevada. The trial court dismissed the son's petition and complaint.

The Fourth District Court of Appeal affirmed the dismissal. The appellate court held that the son's collateral attack on the Nevada divorce decree was barred by the Full Faith and Credit Clause of the Federal Constitution. The Full Faith and Credit Clause was designed to ensure that a judgment entered in one state is respected in another state. A judgment entered in a foreign state is impeachable in Florida only if the judgment is susceptible to collateral attack under that foreign state's law, and in Nevada, no attack is permissible involving parties who already had their day in court in such jurisdiction.

The appellate court found that the son was precluded from collaterally attacking the Nevada divorce decree pursuant to Nevada statutes and jurisprudence which prohibits "all third-party attacks on Nevada divorce decrees that are binding on the parties to the divorce action." Due to the father's

participation in and agreement that his spouse maintained proper Nevada residency in the divorce proceeding, the appellate court affirmed the trial court's dismissal of the lawsuit.

It is improper to apply the presumption enjoyed by joint deposit accounts that such accounts vest in the surviving owner under § 655.79, Fla. Stat., to pay-on-death accounts.

Brown v. Brown, Jr., 149 So. 3d 108 (Fla. 1st DCA 2014)

In *Brown*, the Decedent had six (6) children who were named as equal residuary beneficiaries under her will. The Decedent died with probate and non-probate assets. In pertinent part, the Decedent's non-probate assets consisted of two (2) joint bank accounts and three (3) pay-on-death accounts.

The curator of the estate filed an action seeking a declaratory judgment that the pay-on-death and joint bank accounts were assets of the estate, as opposed to non-probate assets. The trial court appointed a magistrate who conducted an evidentiary hearing on the curator's lawsuit.

The magistrate found that the Decedent intended that all of her children share in the funds of the pay-on-death and joint bank accounts, notwithstanding the fact that they were designated otherwise by the Decedent. Specifically, the magistrate's report provided that the curator met his burden of clear and convincing evidence to overcome the statutory presumption that title to a joint deposit account vests in the surviving owner(s) as outlined in § 655.79, Fla. Stat. The trial court adopted the magistrate's report, and an appeal ensued by the accounts' designated beneficiary.

The First District Court of Appeal affirmed the trial court's determination concerning the joint bank accounts because it found there was competent substantial evidence in the record supporting the finding that the curator overcame the statutory presumption. However, the appellate court reversed the trial court's findings pertaining to the pay-on-death accounts. The appellate court's reversal was due to the trial court's reliance on § 655.79, Fla. Stat. By the statute's express terms, the concept of overcoming the presumption that a decedent intends to leave a joint account to a designated beneficiary only applies to joint bank accounts, as opposed to pay-on-death accounts. Instead, § 655.82, Fla. Stat. is applicable to pay-on-death accounts, but it does not provide a rebuttable presumption concerning ownership. Due to the trial court's application of an inapplicable statute, the appellate court reversed the order relating to the pay-on-death accounts.

A court will not enforce a settlement agreement on an attorney's claim for fees unless the agreement is sufficiently specific on every essential element and, absent a settlement, the amount of fees must be established by sworn testimony.

Jaffe v. Jaffe, 147 So. 3d 578 (Fla. 3d DCA 2014)

In *Jaffe*, a father of a mentally ill son consulted with an attorney on bringing a claim against an estate on behalf of his son. The attorney suggested that the father seek a limited guardianship over his son due to his illness. No retainer agreement between the lawyer and father for legal services concerning the guardianship was executed, and the father successfully obtained a limited guardianship over his son.

After court approval from the guardianship court, the father as limited guardian filed a claim against an estate seeking remuneration for underpaid services allegedly due to his son. The attorney and the father executed a forty-percent contingency fee agreement. The fee agreement only addressed the claim in the estate, and did not reference services rendered in the initial guardianship action.

The father reached a settlement agreement with the estate to settle the claim in favor of his son. After the payment of the attorney's fees, $120,000.00 was placed in a restricted guardianship account for the benefit of the son. The father then discharged his attorney.

The attorney billed the father $27,393.23 in attorney's fees and costs for the work expended in the guardianship matter. The father refused to pay the attorney's bill, alleging that he was never informed of the attorney's hourly rate of $300.00, and he did not know he would be responsible for the $2,403.23 in costs.

After the father filed a complaint with The Florida Bar against the attorney, the parties attempted to negotiate a settlement. However, when the father refused to withdraw The Florida Bar complaint as a condition of the settlement, the negotiations ended.

The trial court conducted a series of evidentiary hearings, including evidence by an expert witness who testified that the full fee was a reasonable amount of attorney's fees for the legal services rendered. The father alleged that a settlement was reached and moved to have it enforced. The trial court denied the father's request, reduced the fee by about $7,000.00 due to the monetary size of the guardianship, and awarded the remainder of the fee and all costs to the lawyer out of the guardianship account.

The father appealed the trial court's order. The Third District Court of Appeal affirmed the trial court's ruling. It agreed with the trial court that a settlement was not reached between the attorney and father because a settlement agreement "must be sufficiently specific and mutually agreeable as to every essential element" in order to be judicially enforceable. The appellate court further found that withdrawal of The Florida Bar complaint was an essential term and, although an improper and unenforceable condition, it was not severable to make the remainder of the agreement effective.

The appellate court noted that an award of attorney's fees requires competent substantial evidence, which includes sworn testimony through witnesses or an agreed to stipulation. Finding that the lawyer presented an expert witness and her own sworn testimony, the appellate court affirmed the fee award and awarded costs from the guardianship pursuant to § 744.108(8), Fla. Stat.

A Decedent's interest in homestead property retained its protected homestead status at death and, because the Decedent died intestate, the Decedent's interest in the homestead property descended to his second spouse as a life estate with a vested remainder to the Decedent's children.

Friscia v. Friscia, et. al., 2014 WL 4212689 (Fla. 2d DCA 2014)

In *Friscia*, the Decedent died leaving a former spouse, current spouse and children from his first marriage. The assets of the Decedent's estate were insufficient to satisfy its debts and other expenses. One of the children filed a petition to determine homestead with the probate court, seeking an order that the marital home was protected homestead, and therefore could not be used to satisfy the estate's debts. The personal representative of the estate objected, and argued that the property was not protected homestead due to a marital settlement agreement entered into between the Decedent and his former spouse.

The probate court determined that the property was protected homestead. As a result, the property could not be used to satisfy the estate's debts. The probate court rejected the personal representative's arguments that the marital settlement agreement between the Decedent and former spouse trumped the homestead protection. In particular, the personal representative maintained that the mutual release in the marital settlement agreement as well as the requirement that the former wife sell the property when the youngest son graduated from high school waived the Decedent's homestead rights. The probate court disagreed, and determined that the Decedent owned the property as a tenant in common with his former spouse, and his one-half interest in the property was entitled to homestead protection. As a result of the probate court's ruling, the former spouse and current spouse owned the property as tenants in common, the current wife having a life estate with a vested remainder in the Decedent's lineal descendants.

Due to the probate court's ruling, the personal representative filed an amended motion for rehearing and an alternative motion to enforce the court's order. The personal representative asserted that the probate court's ruling fails to effectuate the marital settlement agreement's requirement that the home be sold when the Decedent's youngest child graduates from high school. The probate court indicated that the "untenable consequences . . . are well taken," but it upheld its order.

The personal representative appealed the probate court's order to the Second District Court of Appeal, arguing that the probate court erred in determining that the Decedent's interest in the former marital home is entitled to the homestead exemption. The appellate court upheld the probate court's order, determining that the Decedent's one-half interest in the property retained its protected homestead status because the Decedent owned the home as a tenant in common.

The appellate court also rejected the personal representative's assertion that the mutual release contained in the marital settlement agreement between the Decedent and former spouse removed the protected homestead status from the Decedent's one-half ownership of the property. The appellate court noted that the marital settlement agreement's mutual release only released rights through the date of the agreement and only the rights "in the property of the other." Relying on the agreement's plain language, the appellate court held that the release is inapplicable because the rights at issue in the lawsuit are the Decedent's homestead rights in his property, not in the property of the former spouse and the right accrued after the date of the marital settlement agreement.

The appellate court affirmed the probate court's order and determined that the Decedent's protected homestead interest descended to the current spouse as a life estate with a vested remainder to the Decedent's children. Further, the appellate court noted that the terms of the marital settlement agreement still apply to protect the former wife's exclusive use and possession of the property as well as the requirement that the former wife sell the property upon the youngest child graduating from high school.



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Reservation Link: https://resweb.passkey.com/go/FLBAR15
Room Rate: $218
Note: The group rate is no longer available for the nights of 7/30, 7/31 and 8/01. Email meeting.reservations@thebreakers.com to be added to a waitlist for this event.

September 30, 2015 – October 4, 2015
Executive Council Meeting/Out of State
The Ritz Carlton • Berlin, Germany
Reservation Phone # +49 (0)30-33 777-5555
Reservation Link: http://www.ritzcarlton.com/en/Properties/Berlin/Reservations/ Default.htm?nr-1%26ng=1%26gc=tfbtfba
Room Rate: €210
Conference Code: tfbtfba
Please note: This room block is full. To be added to the waitlist, please email mobos@flabar.org.

November 11 – 15, 2015
Executive Council Meeting
Boca Raton Resort and Club • Boca Raton, Florida
Room Rates[1]: Cloister Estate Room: $220.00
Cloister Suite: $475.00
Yacht Club Waterway Room: $275.00
Tower Room: $220.00
Tower Junior Suite: $260.00
Cut-off Date: October 21, 2015
Reservations link will be published 11 months prior to event.
Conference Code: [To Be Announced]

February 25 – 28, 2016
Executive Council Meeting
Marriott Tampa Waterside • Tampa, Florida
Room Rate: $224
Cut-off Date: January 13, 2016
Reservations link will be published 11 months prior to event.
Conference Code: [To Be Announced]

June 1 – 5, 2016
Executive Council Meeting I RPPTL Convention
Loews Portofino Bay Hotel • Orlando, Florida
Room Rate $219
Cut-off Date: May 2, 2016
Reservations link will be published 11 months prior to event.
Conference Code: [To Be Announced]

1 Boca Raton Hotel & Resort Requested Information and Further Notes: $20.00 daily resort fee separate and distinct from the sleeping room rate and applicable taxes. Resort fee includes: Round trip Bellman Gratuities; Wireless Internet in Guest Rooms and Public Space (Not Meeting Rooms); Local 800 & Domestic Long Distance Phone Calls; Beach Umbrellas at the Boca Beach Club; Specialty Fitness Center classes including yoga and Pilates; and Unlimited Driving Range Usage and Golf Club Storage. Guests wishing to avoid an early checkout fee should advise the Hotel at or before check-in of any change in planned length of stay. Guests should check with the Hotel to make certain all incidental charges are paid prior to departure.

2015 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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FR/BAR CONTRACT HAS BEEN REVISED:
See page 38 for details

REMINDER: Affidavits must be subscribed in front of a notary, deeds do not but the signatory must be physically present in front of the notary to acknowledge the execution

BEWARE: The plaintiff filing a foreclosure cannot gain standing by assignment after the complaint is filed. See F.S.§§ 559.715 AND 702.015

RPPTL FELLOWSHIP PROGRAM accepting applications. See page 21

CAUTION: Review Fla. R.P.C 4-4.2 when contacting a govt. official directly

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

TAKE NOTE: Circuit and County Court judgment liens cannot be extended past 20 years AND lose priority if extended after the initial 10 year recording period

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.)