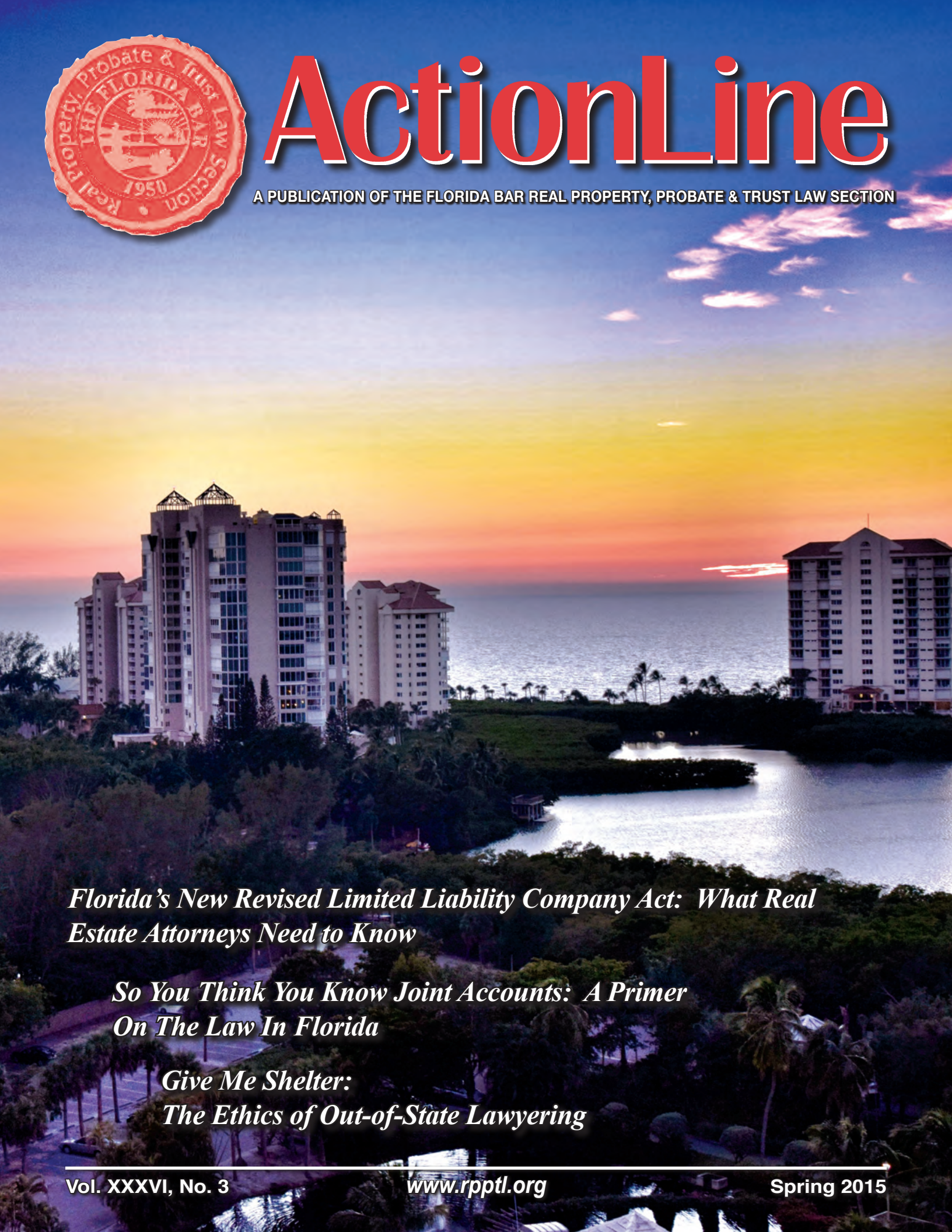


ActionLine

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

Florida's New Revised Limited Liability Company Act: What Real Estate Attorneys Need to Know

So You Think You Know Joint Accounts: A Primer On The Law In Florida

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Alphabet Soup: ABCs of RPPTL CLE



Chair's Column

By Michael A. Dribin

Section Chair, 2014- 2015

As I consider the range of services which the RRPTL Section offers its members, I can think of none that is in greater demand or which more directly impacts our membership than the delivery of timely and relevant Continuing Legal Education courses. For all of us, some CLE is a minimal requirement in order to maintain our licenses to practice. For many of us, and, as importantly, CLE fulfills our desire to keep current about developments in the law and, in doing so, help serve our clients.

Enormous energy and resources go into our CLE planning and implementation. The Section has co-chairs for our CLE Seminar Coordination Committee. Tae Kelley Bronner is Co-Chair on the probate and trust law side and Robert Swaine is Co-Chair on the real property side.[1] They are ultimately responsible for selection of topics, selecting chairs and speakers for each program, monitoring the entire process of submission of course materials, and getting the programs advertised and presented. They, in turn, have the help of dozens of volunteers who commit their time and energy to planning the courses, putting the materials together and speaking.

As anyone who has been practicing for at least ten or fifteen years can attest, the delivery of CLE programming has changed. Those changes seem to be directly correlated to changes in technology. For most of my years of practice, CLE was available first in one way and then in two ways. The traditional CLE program was a live presentation, often in a hotel facility. The course materials were handed to the attendees as they checked in at the registration desk. The programs were either a full-day or a half-day in duration. There was a social and perhaps networking aspect to these live presentations—one was able to interact with the other attendees. Many of those who prefer this approach also suggest that they feel as though they are more focused on the presentations when they are physically away from their offices. (Although the almost universal use of iPhones and similar devices means that one "being physically away" from the office does not equate to not being in communication with the office, unless one is very disciplined.)

Mixed in, in the case of the RPPTL Section, were several weekend conference programs, usually of advanced CLE programming, including the Construction Law Institute and the Attorney-Trust Officer Liaison Conference. Of course, these programs carried with them a much more significant social and networking component. Our annual, all-day Legislative and Case Law Update Conference, offered live at The Breakers and via webinar, provides our members with legislative changes enacted by the Legislature within a few weeks of the end of the legislative session, as well as comprehensive case law developments. The proceeds from the conference are dedicated to supporting the legislative efforts of the Section.

This traditional approach first changed with the ability of lawyers to acquire cassette tape recordings of the presentations as well as the written outlines. This meant that the attorney did not have to attend the lectures in person, but could listen to them at his or her leisure. This approach delivered the same CLE content to the attorney as attendance at the live presentation, but did not require the attorney to spend time out of the office in order to do so. Of course, the social and networking aspects of the program were eliminated. Also, the course materials were typically not available for use for as much as 4-6 weeks after the live presentation.

Advancements in technology that have come along in the last 10 years or so have provided both opportunities to deliver CLE in new and creative ways, and challenges to the traditional live/in-person presentation. Attorneys, especially younger attorneys, are increasingly interested in attending CLE remotely and when it is most convenient to them to do so. Live, in person presentations are still in the majority, but the importance of the networking and social aspect of CLE programming has diminished, relatively speaking.

Our CLE leaders are always trying to address the myriad of ways in which our members wish to have CLE programming delivered. For those who prefer the traditional, live, in-person presentations, they are readily available. Intermediate and Advanced Level Seminars in various practice areas featuring in-depth coverage of the latest and greatest topics presented by experts in their respective fields are offered throughout the year. We have recently begun incorporating question and answer sessions at the end of the programs where possible, giving practitioners attending the programs a chance to submit questions which are answered by the experts. The Section offers three live certification review courses – Wills, Trusts and Estates, Real Estate, and Construction Law Certification Review programs, with two days of advanced CLE, including a comprehensive review of the practice area and new developments designed to

continued, page 5

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ABOUT THE COVER:

View of the Gulf from the Naples Grande Beach Resort by John Neukamm

IN THIS ISSUE:

Alphabet Soup: ABCs of RPPTL CLE 3
Florida's New Revised Limited Liability Company Act
What Real Estate Attorneys Need to Know 6
So You Think You Know Joint Accounts:
A Primer On The Law In Florida 10
Show or Tell? District Courts in Conflict on Key
Requirement for Constructive Service 14
New AAA Alternate Dispute Resolution Procedures In 2014 19
The Transition from Book and Page
to Instrument Number: The Pros and Cons 22
The Value of South Florida Real Estate When A1A
is Under Water: Sea Level Rise and Private Property Rights 23
Undue Influence – Is Failure to Establish a Presumption Fatal? 25
RPPTL Section Executive Council Meeting 27
Photos: RPPTL Section Executive Council Meeting
Naples Grande Beach Resort, Naples, Florida 28
Roundtables 31
Spotlight on the Digital Assets and Information Study Committee 38
Give Me Shelter: The Ethics of Out-of-State Lawyering 39
Beware of FNMA and FHLMC Guidelines'
Impact on ROFR Provisions 43
Probate Case Summaries 44
Real Estate Case Summaries 48

Get Included in *ActionLine!*

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

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

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

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

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

prepare attendees for the certification review exams. These review courses also offer great opportunities for practitioners who are not sitting for the certification exams to refresh and update their knowledge of their practice areas.

There will hopefully soon be a fourth review course, as the Florida Bar Board of Governors approved a new certification for Condominium and Planned Development law. While the rules to implement the new certification still await Florida Supreme Court final action, it is anticipated that a review course will be implemented for the exam. As you may know, the new certification area was a Section Initiative developed by the Condominium Law Committee.

We also, of course, continue our outstanding conference programming, including the Construction Law Institute and the Attorney-Trust Office Liaison Conference. These programs combine advance CLE courses with numerous networking opportunities, as well as family events, throughout the weekend.

But all of the live, one-day presentations described above are also now offered as live webinars for those who either are unable to travel to the live presentation or would prefer to view the presentations live from their offices or homes. Viewing or listening to the presentations in this fashion also results in saving the out-of-pocket expense of traveling to a live presentation. But webinar attendance does eliminate what has become an important aspects of attending the live one-day or weekend courses—the networking and social opportunities.

Speaking of webinars, we offer half-day webinars for more concentrated topics, related to a specific practice area. Recently, the land use planning committee presented a three-hour afternoon webinar focused on platting. This allowed attorneys interested in gaining in-depth knowledge about the special considerations in platting, including vacating plats, the complexity of antiquated subdivisions and intergovernmental coordination, to earn CLE credits without being required to a pay for a full day seminar which included subjects they may not have been interested in.

One of the new opportunities is to timely deliver "hot topic" CLE programming to our members, which can be compiled faster than a live/in-person CLE. We are making more and more use of shorter lunchtime webinars, to address hot topics or new developments in the law that may be of special interest to practitioners. Examples of these include the Dodd-Frank eCLE presented by our own Norwood Gay, where he simplified the complex new rules on Seller financing of real estate transactions and the Insurance and Surety committee's eCLE on cyber security breaches, which will bring together experts from across the country, right to our desks.

A list of the upcoming seminars can always be found on the RPPTL Section website at http://www.rpptl.org/index.php?option=com_content&view=article&id=32&Itemid=153 .

If members cannot attend a live CLE program, either in person or through a webinar, we are offering on-demand CLE of all programs (except conference programs) on line, 24 hours a day. DVD or CD recordings of all programs are also available for three years after the date of the program. To review programs available for purchase, go to http://tfb.inreachce.com/. We also hope to offer on-demand purchase of hourly segments of full-day or half-day programs in the near future, in order to allow practitioners to search our CLE library and purchase segments that may be immediately relevant to a topic they are researching actively on behalf of a client.

I hope these few words about our CLE programming have not only conveyed a sense of the breadth and scope of our CLE programming, but also our ongoing efforts to assess the current manner in which we provide these programs and our consideration of new ways to convey these programs. We want to hear from you about any of these topics. We are all asked to complete course evaluations which are important sources of information not only about the particular program, but any aspect of our providing the course to you.

Finally, I have a request to make. The time that is spent on the planning of topics for a CLE presentation, the preparation of the outlines and the presentation of the course itself represent an enormous commitment of time by the lecturers and those in charge of chairing a program. This is time, of course, taken away from their practices. They commit this time out of a sense of obligation to keep our members well-informed on the subject matter of the course. When you attend a CLE program, whether in person or remotely, please take a moment to personally thank the speakers for their efforts, either at the program or subsequently by email. The goal of this commitment of time is to be of assistance to enhance the knowledge of the law by their colleagues in the RPPTL Section, and the least we can do is thank them for their generosity.

Endnotes

1 I wish to acknowledge and thank Tae Kelley Bronner and Robert Swaine, our CLE Co-Chairs, for their contributions to this article.

Upcoming CLE

The Ins and Outs of Community Association Law 2015

FRIDAY, APRIL 17, 2015

at the Tampa Airport Marriott - Webcast Available

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Florida's New Revised Limited Liability Company Act What Real Estate Attorneys Need to Know

By James A. Marx, Esq., Marx & Frankel PA, Miami, Florida

The creation of Chapter 605 of the Florida Statutes changed significantly, not only the interrelations between managers and members, but also the protections afforded to third parties dealing with Florida LLCs.


J. MARX

This article provides an overview of the Florida Revised Limited Liability Company ("LLC") Act (the "Revised Act") for transactional attorneys and judges. The Revised Act became effective January 1, 2015[1] and is a comprehensive and outstanding rewrite of the Prior Act known as the Florida Limited Liability Company Act (the "Prior Act").[2] The Revised Act was written during a four-year period by a committee formed by The Florida Bar (LLC Drafting Committee), with significant participation and collaboration by members of The Florida Bar Business Law, Real Property, Probate and Trust Law, and Tax sections. The Revised Act incorporates important updated provisions from the Revised Uniform LLC Act (promulgated by the Uniform Law Commission, and as amended in 2011), as well as provisions from Delaware, other states, and Florida corporate and partnership law (because LLCs are a hybrid between corporations and partnerships). This new and improved chapter of the Florida Statutes is likely to facilitate the use of more LLCs.

Florida LLCs have become the entity of choice. There are more active Florida LLCs than corporations, and each year that is becoming more so, with new Florida LLCs now being formed at almost twice the rate of corporations. Florida has more LLCs than any State in the nation, including Delaware, and LLCs are increasingly being used more and more for real estate and other transactions, as it offers a more flexible management structure, "pass through" taxation, exemption from Florida's corporate income tax, the same limited liability protections for owners (members) as received by owners of corporations, and additional asset protection for multi-member LLCs.

The Revised Act is a default statute, and as in the Prior Act, the relationship is governed primarily by the operating agreement (which is strongly encouraged, but not legally required). As compared to the Prior Act, the Revised Act strengthens freedom of contract (addressing items permissible in an operating agreement), expands the number of definitions (from 26 to 69), expands nonwaivable provisions (from 6 to 17), clarifies agency and authority rules, provides for new statements of authority, eliminates the title/concept of "managing member," and retains the distinction for asset protection purposes between single member and multi-member LLCs (Olmstead Patch). It provides the ability to reduce but not eliminate fiduciary duties, permits new members with no participation interest, permits members to dissociate, expands dissolution provisions, clarifies service of process, and liberally permits the entity to be combined with other entities by way of merger or conversion.

Authority: *"Manager-Managed"* or *"Member-Managed"*

Although permitted but not explicitly required by the Revised Act, in order to electronically file articles of organization, the articles of organization must include the name and address of one or more managers for *manager-managed* LLCs, or the name and address of one or more members for *member-managed* LLCs.[3] The articles of organization can also include a statement as to whether the LLC is *manager-managed* or *member-managed*,[4] and this is typically recommended to establish the party or parties who are authorized to act on behalf of the LLC.

When contracting or otherwise dealing with LLCs, third parties (other than members, dissociated members, transferees, and managers), are entitled to rely on Florida Department of State records unless otherwise advised.[5] Florida Department of State records may now include a "statement of authority," which is a concept that is new to the Revised Act (though it has existed for many years in Florida's partnership laws), and this will be more fully described in the section below.

If authority is not clearly stated in the articles of organization, it will be necessary to review the operating agreement to determine authority. It is important to note that the Revised Act provides that, in the event of conflict between the articles of organization and the operating agreement, the operating agreement shall control.

Upon determining whether the company is *member-managed* or *manager-managed*, the Revised Act provides important authority and guidance conducive to real estate transactions:

> Unless a certified statement of authority recorded in the applicable real estate records limits the authority of a member or a manager, a member of a member-managed company or a manager of a manager-managed company may sign and deliver an instrument transferring or affecting the limited liability company's interest in real property. **The instrument is conclusive in favor of a person who gives value without knowledge of the lack of authority of the person signing and delivering the instrument."**[6] [Emphasis added.]

The Revised Act, in contrast to the Revised Uniform LLC Act, provides statutory apparent authority as described above, which is particularly important for real estate transactions.

Manager *or* Member

Often the manager(s) and members(s) are the same person(s), and it is generally best (and it is common practice) to be *manager-managed* so the company will disclose in State records who is authorized to act on behalf of the company, as it is required to do so, but not disclose its ownership. This is also generally preferable because of deemed notice rules and provisions related to the delegation of rights and powers.[7]

The terms *manager-managed* and *member-managed* are not interchangeable. The Revised Act clearly provides that a member does not have any authority to act for a *manager-managed* LLC, and the Revised Act does not empower a manager with any powers to act for a *member-managed* LLC.[8]

Statement of Authority

The Revised Act allows LLCs to file a statement of authority to limit the apparent authority of one or more members or managers or to provide authority for a member, manager or other party to act on behalf of the LLC.[9]

These statements fall into two categories: a statement of authority that pertains to transfers of real property or that does not pertain to such transfers. A properly filed statement of authority (filed with the Florida Department of State)[10] that does not pertain to transfers of real property will be conclusive in favor of any person who gives value in reliance on the grant; provided that the person giving value does not have knowledge to the contrary or that the statement was subsequently canceled or amended to terminate the authority at issue.

By contrast, a statement of authority that pertains to transfers real property requires a second step in addition to filing with the Florida Department of State. The second step is the recording of the statement of authority in the applicable official records of the county where the property is located: *"[A] certified copy of which statement if recorded in the office for recording transfers of real property, is conclusive in favor of a person who gives value in reliance on the grant without knowledge to the contrary…."*[12]

An LLC can also amend or cancel the statement of authority,[13] and persons granted authority are entitled to file a statement of denial of such authority.[14]

Thus, third parties that are dealing with an LLC in the real estate context should review Florida Department of State records and the official records of the county where the property lies to determine if there are any filed or recorded statements of authority, any amendments or cancellations thereto, or any statements of denial, and as stated above, to determine who is authorized to act on behalf of the LLC and whether it is member-managed or manager-managed. Although third parties are entitled to rely on the State and county records unless otherwise advised,[15] it is better practice for practitioners to also review the operating agreement, with the understanding that the Revised Act provides that, in the event of conflict between the articles of organization and the operating agreement, the operating agreement shall control.

Title Insurance: Affidavits

Prior to insuring any conveyance of title for marketability of title purposes, title underwriters are requiring confirmation that persons executing instruments to be insured have the authority to bind the LLC either under a statement of authority filed with the Florida Department of State and recorded in the official records of the county where the property lies, or confirmation with the Florida Department of State that a person identified as a manager is in a *manager-managed* LLC or a person identified as a member is in a *member-managed* LLC, as applicable, and that there is no recorded statement to the contrary. Where there is knowledge that the information filed with the Florida Department of State or recorded with the county is inconsistent with the operating agreement, there will be additional requirements which may include the requirement for all or a majority of the members in interest[16] to provide their consent or for the proper party or parties to execute an affidavit consenting to the transaction and establishing the names of all of the current members and their respective interests. Title underwriters are also requiring a determination (often in the form of an affidavit) that the member or manager that is authorizing the transaction has not become a debtor in bankruptcy since becoming a member or manager, and if the LLC is a single member LLC, a determination that there are no creditors who have acquired or are attempting to acquire control of the LLC by executing upon the member's interest.

Additional Important Considerations

Operating Agreement. An LLC is a creature of contract, and it is recommended that a written operating agreement be prepared setting forth the existence of the entity and members, whether the company is *manager-managed* or *member-managed*, as well as important agreements and protocol concerning rights, duties and indemnification, and many other provisions. The Revised Act strengthens freedom of contract, and although it also adds many new default rules, the vast majority of these rules can be

over-ridden or otherwise modified (except to the extent prohibited by the nonwaivable provisions of the Revised Act).[17]

Integration. It is particularly important to include an integration/merger clause in the operating agreement (i.e., this agreement constitutes the entire agreement between the parties … and no waiver, consent, modification or change shall bind the parties unless in writing and signed), because an operating agreement may be implied; that is, it may be written or oral, or a combination of both.[18]

Effective Date. When filing articles of organization, the Revised Act permits a prior effective date that is within five business days before the date of filing.[19] This is particularly helpful for real estate transactions, enabling a party to sign a contract prior to the formation of the LLC (as permitted for Florida corporations).

Elimination of term – "Managing Member." Although this terminology may not immediately appear to be problematic, it is confusing because it is unclear whether this term is meant to create a *manager-managed* or *a member-managed* LLC, and as such, this term has been eliminated in the Revised Act, and by default those LLCs with this terminology will be deemed to be *member-managed*.[20] Thus, it is recommended for those entities using this terminology (which likely were created prior to the Revised Act) to file articles of amendment to their articles of organization and/or revise the terminology utilized in the annual report (that is, to designate one or more individuals as either MGR (indicating manager) or AMBR (indicating authorized member), but certainly not MGRM, and to revise their operating agreement to clearly designate that the entity is either *manager-managed* or *member-managed*.

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Duties. The Revised Act permits duties to be shifted among members.[21]

Non-Members. Non-members may be given a veto power over amendments to the operating agreement. This may be requested by lenders or other third parties dealing with the LLC.[22]

Admission of New Members. Unlike the Prior Act, the Revised Act provides that absent anything to the contrary in the operating agreement, new members may only be admitted by unanimous vote of the members, rather than by a majority.[23] The Revised Act also provides that the operating agreement is binding upon a manager or transferee even when not signed or formally accepted by such person.[24]

Amendment. Unless otherwise provided in the operating agreement, a unanimous vote of the members is required to amend the articles of organization or operating agreement.[25]

Standards of Conduct. The Revised Act provides standards of conduct for members in member-managed LLCs and for managers in *manager-managed* LLCs.[26]

Judicial Dissolution. The topic of judicial dissolution was one of the topics most debated by the LLC Drafting Committee and has been significantly revised. The grounds for a member to seek a judicial dissolution still include a finding that it is not reasonably practicable to carry on the LLC's activities, and this has been expanded in the Revised Act to also include substantial unlawful conduct, misappropriation or waste causing injury, and deadlock that is causing or likely to cause irreparable injury.[27] In addition, taking a cue from the Florida corporate statutes, the Revised Act provides a right to the LLC or its members to elect to purchase the interest of a member who has brought an action for judicial dissolution.[28]

Right to withdraw/dissociate. Unlike the Prior Act, the Revised Act provides a member with the right to withdraw (dissociate) from the LLC at any time, for whatever reason, though a member who wrongfully dissociates is liable for any damages to the LLC caused by the dissociation.[29]

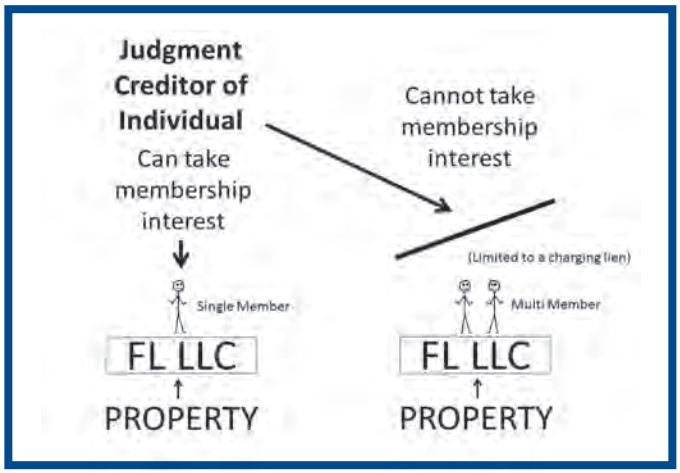
Non-Economic Member. Any person can become a non-economic member with no right to distributions.[30]

Salary. For those that have a *member-managed* LLC, there is a potential trap related to member compensation because the Revised Act states that *"a member is not entitled to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities and affairs of the company, in the absence of agreement to the contrary."* [31]

Charging Orders. Not long before the enactment of the Revised Act, the Florida Supreme Court in the 2010 seminal "Olmstead Case"[32] ruled that a judgment creditor of a single member LLC could execute on the debtor's entire right, title and interest in the LLC to satisfy a judgment. This was a groundbreaking case that inspired extensive consideration

by the LLC Drafting Committee, and other committees of the Florida Bar. With the committees' assistance, the Florida legislature adopted the "Olmstead Patch" in 2011 to clarify that the holding in Olmstead does not apply to multi-member LLCs, and the exclusive remedy for a judgment creditor of a multi-member LLC is a charging order on the member's transferable interest. This is one of the most important distinctions in the Florida LLC laws (and is more fully illustrated below), and which has not been changed in the Revised Act.[33] Practitioners should carefully consider this distinction when structuring LLCs for their clients.

ASSET PROTECTION CONSIDERATIONS DIFFERENCE BETWEEN A SINGLE MEMBER & MULTI-MEMBER LLC IN THE CASE OF A "REVERSE PIERCING"



Conclusion

The creation of Chapter 605 of the Florida Statutes changed significantly, not only the interrelations between managers and members, but also the protections afforded to third parties dealing with Florida LLCs. The Revised Act contains detailed provisions bringing major innovations to the law of LLCs. It is recommended that, prior to giving any advice related to a Florida LLC, the Revised Act be thoroughly reviewed. Also, any attorney who currently represents principals of Florida LLCs should consider advising them of the most significant changes in order to prevent problems or delays in future transactions.

James A. Marx *is a board certified real property attorney, and has practiced for over 25 years, primarily in the areas of real estate and closely held corporate law. James had participated in several drafting sessions of the LLC Drafting Committee, and he serves on the Executive Council of the Business Law Section of the Florida Bar as co-liason to the Real Property Committee. James also currently serves as Vice Chair of the Florida Realtor Attorney Committee, which authors and periodically updates the FR/BAR Contract Documents that are customarily used in residential real estate transactions throughout Florida.*

Endnotes

1 The Revised Act was signed into law on June 14, 2013 and took effect on January 1, 2014 for LLCs organized on and after January 1, 2014 but included a grace period for all LLCs organized prior to that date. The Revised Act took full effect January 1, 2015 for all LLCs, regardless of the dated organized, so that all LLCs are now be governed by the Revised Act rather than the prior act.

2 As of January 1, 2015, Chapter 605, Fla. Stat., (the Revised Act) entirely supersedes Florida Statutes, Chapter 608 (the Prior Act).

3 Sec. 605.0201(3), Fla. Stat., Formation *of limited liability company; articles of organization.*

4 Sec. 605.0201(3), Fla. Stat., *Id*.

5 Sec. 605.0107(4), Fla. Stat., *Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company.* Special care should be taken, however, by anyone who files information with the Department of State, such as an annual report, to make sure that the information is accurate. In the event of inaccurate information, the Revised Act provides that a person who suffers a loss by reliance on the inaccurate information may recover damages not only from the person who knew it was inaccurate but also from the member or manager, as applicable, on whose behalf the record was filed. Sec. 605.0205, Fla. Stat., *Liability for inaccurate information in filed record.*

6 Sec. 605.04074(3), Fla. Stat., *Agency rights of members and managers.*

7 Sections 605.0103, 605.04071, Fla. Stat. *Knowledge; notice; and Delegation of rights and powers to manage.*

8 Sec. 605.04074(2)(a), Fla. Stat. *Agency Rights of members and managers.*

9 Sec. 605.0302, Fla. Stat., *Statement of authority.*

10 To be effective, the statement of authority must include the name of the LLC, the street and mailing address of its principal office, and the status or position of the person or persons. Sec. 605.0302(1), Fla. Stat., *Id.*

11 Sec. 605.0302 (6), Fla. Stat., *Id*.

12 Sec. 605.0302(6), Fla. Stat., *Id*.

13 Sec. 605.0302(2), Fla. Stat., *Id*.

14 Sec. 605.0303, Fla. Stat., *Statement of denial.*

15 Sec. 605. 0107(4), Fla. Stat., *Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company.*

16 Sec. 605.0102(37), Fla. Stat., *Definitions.*

17 Sec. 605.0105, Fla. Stat., *Operating agreement; scope, function, and limitations.*

18 Sec. 605.0102(45), Fla. Stat., *Definitions.*

19 Sec. 605.0207, Fla. Stat., *Effective date and time.*

20 Sec. 605.0407, Fla. Stat., *Management of limited liability company.*

21 Sec. 605.0105(4), Fla. Stat., *Operating agreement; scope, function, and limitations.*

22 Sec. 605.0107(1), Fla. Stat., *Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company.*

23 Sec. 605.0401, Fla. Stat., *Becoming a member.*

24 Sec. 605.0106(4), Fla. Stat., *Operating agreement; effect on limited liability company and person becoming member; preformation agreement; other matters involving operating agreement.*

25 Sec. 605. 04073, Fla. Stat., *Voting rights of members and managers.*

26 Sec. 605.04091, Fla. Stat., *Standards of conduct for members and managers.*

27 Sec. 605.0702, Fla. Stat., *Grounds for judicial dissolution.*

28 Sec. 605.0706, Fla. Stat., *Election to purchase instead of dissolution.*

29 Sec. 605.0601, Fla. Stat., *Power to dissociate as member; wrongful dissociation.*

30 Sec. 605.0401(4), Fla. Stat., *Becoming a member.*

31 Sec. 605.0407(4), Fla. Stat., *Management of limited liability company.*

32 *Olmstead, et al v. The Federal Trade Commission*, Fla. Sup. Ct., No. SC08-1009 (2010).

33 Sec. 605.0503, Fla. Stat., *Charging order.*

So You Think You Know Joint Accounts: A Primer On The Law In Florida

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To lawyers, terminology such as "tenancy by the entirety," "joint tenancy with right of survivorship" and "tenancy in common" may bring back distant memories of property class frustration or Bar exam panic. To laypersons, they may sound undecipherable or indistinguishable. Understanding the differences between these forms of ownership, however, is crucial for lawyers and laypersons alike. The choice between forms of property ownership can have serious ramifications, not only for property owners, but for their spouses, families, heirs, and creditors. For example, the choice between a joint tenancy with right of survivorship and a tenancy by the entireties can control whether a creditor can attach property belonging to a spouse. The choice between a joint tenancy with right of survivorship and a tenancy in common can determine whether jointly owned property will one day pass by operation of law to a co-owner rather than to a decedent's heirs. The choice of ownership determines everything from the funds available to care for an incapacitated account holder to the ease with which wrongfully diverted property can be recovered.

This article is intended to provide clarity to many of these important issues, as well as a general overview of the law regarding ownership of multi-party bank accounts. Though Sec. 655.78, Fla. Stat., provides that accounts in the names of two or more persons can be accessed by any of the account holders or the guardian of an account holder, there are laws and cases which may conflict or further clarify the interests of the co-owners between each other and creditors. The discussion that follows addresses forms of ownership, rights of account holders and creditors, applicable presumptions, and remedies for wrongful diversion.

Forms of Joint Ownership: the Basics

There are three primary forms of joint account ownership:

- tenancy by the entireties ("TBE");
- joint tenancy with right of survivorship ("JTWROS"); and
- tenancy in common ("TIC").

Tenancy by the Entireties:

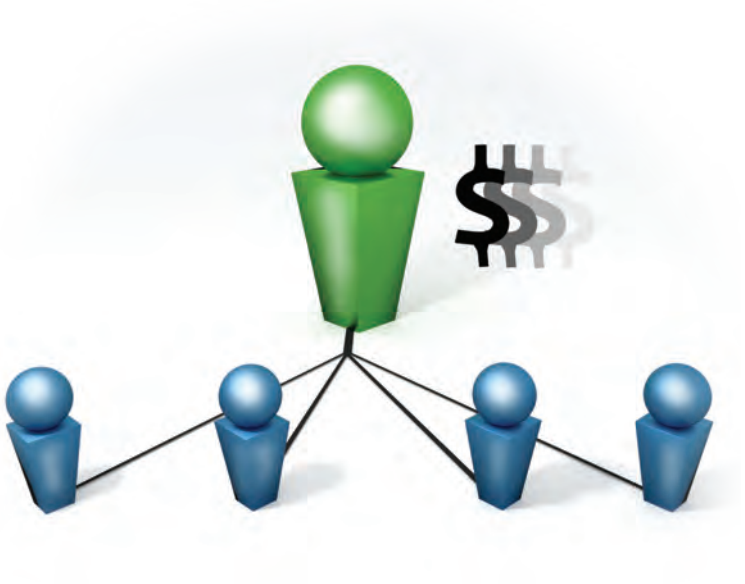
A TBE allows a married couple to hold property as a single legal entity. There are six requirements for creation of a TBE. First, a right of survivorship must exist. Next, five common-law unities must be present: unity of person (the parties must have been married when the property became titled in their joint names); unity of possession (each owner is entitled to the whole property; the property is undivided); unity of interest (each spouse's interest in the account is identical); unity of title (the interests must have originated in the same instrument); and unity of time (the interests were acquired at the same time).

Note that, as will be discussed at greater length, as a result of a 2008 amendment to Sec. 655.79, Fla. Stat., unity of time and title *may* no longer be required for bank accounts to be held as TBE. Sec. 655.79(1), Fla. Stat., now provides, in relevant part:

> … Any deposit or account made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified in writing.

The statute makes no specific reference to the unities of time and title being present or required.[1]

When property is held in a TBE account, both spouses must consent to a transfer of the property. Upon divorce, a TBE account will become a TIC.[2]



Joint Tenancy with Right of Survivorship:

A JTWROS is a form of joint property ownership available to two or more people and characterized by the right of survivorship. Upon one tenant's death, his share of the property passes to his surviving co-tenants, rather than to his heirs or devisees. There are five requirements for creation of a JTWROS: the right of survivorship and the four unities of possession, interest, title, and time. Unlike a TBE, a JTWROS does not require the unity of person and a JTWROS interest can be unilaterally severed. If one of two joint tenants sells or otherwise transfers his share without the consent of the other joint tenant, the JTWROS is severed and converted into a TIC.

Tenancy in Common:

Unlike a TBE or JTWROS, a TIC lacks a right of survivorship. It can be held by two or more people. Only one unity—possession—is required. As with a JTWROS, one tenant can sell or convey his share of the account without the consent of the other tenant(s).

Under Florida law, TIC is the default provision with respect to joint ownership between non-spouses. Sec. 689.15, Fla. Stat., provides that except in the case of a TBE, a devise, transfer, or conveyance made to two or more people creates a TIC, unless the instrument creating the estate expressly provides for a right of survivorship.

What Happens When a Joint Account Holder Dies?

Where the account is held as TBE or JTWROS, upon a co-tenant's death, the deceased co-tenant's share passes to the other co-tenant(s) due to the right of survivorship. Where an account is held as TIC, however, since there is no right of survivorship, the deceased co-tenant's undivided fractional share passes to his or her heirs rather than to the other co-tenants.

Who Owns What Share of an Account?[3]

Tenancy by the Entireties:

Where property is held as TBE, each spouse holds the property "per tout"—that is, each spouse holds the whole or entirety, rather than a share, moiety, or divisible part. The property belongs to neither spouse individually.

Joint Tenancy with Right of Survivorship:

Where property is held as JTWROS, each person has only his or her separate share. For purposes of alienation (such as selling or otherwise transferring) and absent a provision governing the size of the shares,[4] each share is presumed to be equal ("per my"). For purposes of survivorship, each joint tenant owns the whole ("per tout"). Thus, upon death, the remainder of the estate passes to the survivor.

A common issue with JTWROS is the ownership determination when only one account holder contributes funds to the account or one contributes the vast majority of the funds. Florida courts have taken slightly different views on ownership. In the Third District Court of Appeal (the "3d DCA"), some decisions have held that funds contributed to a joint account by one of its owners are presumed to be a lifetime gift to the other owner(s) of the account.[5] Under this view, if M and D open a JTWROS account with M's funds, there will be a presumption that M intended to make a present gift to D of half of the funds in the account. The presumption can only be overcome by clear and convincing evidence to the contrary.[6] Interestingly, Florida's Supreme Court appears to take a different view on the issue. In *In re Estate of Combee*, the Florida Supreme Court explained that the statutorily presumed intent of the creator of a joint account is "not an intent to make an inter vivos gift but rather an intent that the remaining account holders receive the funds remaining in the account when the depositor dies."[7]

Consistent with *Combee*, in the Fourth District Court of Appeal (the "4th DCA"), it is clear that during the lifetime of the joint tenants, each tenant has the right only to his or her individual share of the account, absent evidence of an intent to make a present gift. Funds belong to each joint tenant in proportion to his or her net contributions to the sums on deposit.[8] A gift of funds remaining in the account will be presumed at one tenant's death, even where the account was established with the funds of that tenant.[9] Under Sec. 655.79, Fla. Stat., the presumption can be rebutted "by proof of fraud or undue influence or clear and convincing proof of a contrary intent."

Tenancy in Common:

Where property is held as TIC, each co-tenant owns an undivided fractional share. Each share is presumed to be equal, in the absence of evidence to the contrary.[10]

Creditors' Rights

If property is held as JTWROS, a creditor of one of the joint tenants may attach the joint tenant's portion of the property to recover that joint tenant's individual debt. In its decision in *Beal Bank, SSB v. Almand & Associates* (discussed at length below), the Florida Supreme Court, in its seminal case on TBE and personal property, stated that when property is held as TBE, "only the creditors of both the husband and wife, jointly, may attach the tenancy by entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse."[11]

This difference in creditors' rights highlights how critical it is for account holders to realize what type of account that they have created. The account holders in *Beal Bank* testified that they did not understand the differences between the types of account ownership, but that they wanted to ensure their wives were equal owners of the accounts and had equal access to the funds within them. When banks do not offer proper guidance, married couples may inadvertently create a JTWROS account when their intention was really to create a TBE account.

Effect of Incapacity

If a joint tenant is incapacitated, a JTWROS is not severed, although the incapacitated person's guardian of the property is authorized to make withdrawals from the JTWROS account for the purpose of paying for the ward's necessities. In contrast, if one spouse is incapacitated and a guardian has been appointed, the non-incapacitated spouse must consent to the sale or other transfer of property held as TBE.[12]

In *Romano v. Olshen,*[13] the 4th DCA observed that the requirement that the non-incapacitated spouse consent to transfer of property held as TBE could present a problem where the spouses are estranged or otherwise adverse

to one another. The competent spouse could object to a guardian's withdrawal of funds from a TBE account, even if the funds are necessary to provide care for the incapacitated spouse. The Fourth DCA encouraged the legislature to amend the statute to allow access to a TBE account for necessary expenses of a ward, even where the other spouse does not consent.[14]

Presumptions

Beal Bank:

Prior to the *Beal Bank* decision, the presumption that property acquired by husband and wife was held as TBE applied only to real, not personal, property. This presumption is consistent with that of most states that recognize TBE. *Beal Bank* (somewhat) remedied this disparity by announcing a presumption that, in an action by the creditor of one spouse seeking to garnish a joint bank account titled in the name of both spouses, a presumption arises that the account is held as a TBE.

Thus, in a proceeding between a debtor and third-party creditor, if the signature card of an account does not expressly disclaim the TBE form of ownership, a presumption arises that, as long as the required unities are met and the right of survivorship exists, a bank account titled in the names of both the husband and wife is held as TBE. The presumption shifts the burden of proof to the creditor to prove by a preponderance of the evidence that a TBE was not created.

The *Beal Bank* decision also examined the effect of the wording on signature cards. It determined that an express TBE designation on the signature card will be dispositive proof of a TBE. On the other hand, if the signature card states that the account is held as JTWROS, that alone is not an express disclaimer that the account is not actually held as TBE, *unless* the signature card expressly states that the account is not held as TBE. Furthermore, use of the conjunction "or" rather than "and" between the spouses' names will not be dispositive proof of the type of ownership created.

While *Beal Bank* reduced the disparity in the treatment of real and personal property owned by spouses, the decision was limited. It applied only to accounts at financial institutions, leaving out other forms of personal property. Furthermore, *Beal Bank* did not override the common-law unity requirements. In announcing the presumption in favor of TBE ownership, the Florida Supreme Court simply assumed that the unities of possession, interest, title and time were already present. Finally, the decision was limited to proceedings between third-party creditors and a husband or wife debtor. For example, the 4th DCA in *Romano* held that "[n]o such presumption applies in a guardianship proceeding or in a lawsuit where the husband and wife are opposing parties."[15]

Statutory Presumption under Sec. 655.79, Fla. Stat.:

Pursuant to Sec. 655.79, Fla. Stat., if a deposit account is held in the names of two or more unmarried people, a JTWROS **will be presumed**, unless otherwise expressly provided in contract, signature card, etc. The presumption can be overcome by proof of fraud or undue influence or clear and convincing evidence of a contrary intent.

Several years after the *Beal Bank* decision, the Florida Legislature amended Sec. 655.79, Fla. Stat., to add that if any deposit or account is made in the names of two people who are husband and wife, the account **will be considered** a TBE unless otherwise specified in writing. Thus, when an account is made in the name of a husband and wife, it is not that a presumption of TBE applies; rather, the account is held as TBE unless otherwise specified.

Does the Statutory Presumption under Sec. 655.79, Fla. Stat., Override the Common Law Unity Requirements of Time and Title?

It remains an open question as to whether Sec. 655.79, Fla. Stat., overrides the requirement of the common-law unities of time and title. The statute does not clearly state whether interests have to originate at the same time or in the same instrument. With regard to the statute's provision on TBE accounts, the language "any deposit or account made" appears broad enough to encompass both a deposit made to an existing account and the creation of a new account. As such, it is arguable that an account holder could add his or her spouse's name to an account and all new deposits to that account would be held as TBE property.[16]

Still, it is not clear that the time and title requirements have been abolished by the statute. For example, in *In re Aranda*,[17] the Bankruptcy Court for the Southern District of Florida held that the unity of time was not present and a TBE was not created where a husband added his wife's name to a bank account that had originally been opened in only the husband's name. The court stressed that "[t]he relevant time for establishing the unities of TBE ownership is when the [husband] opened the Accounts."[18]

In answering the certified questions in *Beal Bank*, the Florida Supreme Court assumed that the six unities existed; it did not address the issue of whether time and title should continue as required unities. Given the existence of decisions like *In re Aranda*, it would appear as though the law on this point remains unsettled. As a result, use of a straw person is often employed to create a TBE where one spouse already owns the property at issue. The owner transfers the property to a third party "straw person" who then immediately transfers the property back to the original owner and his or her spouse as TBE.[19] In the absence of further guidance from the courts and legislature, such precautions may well be warranted to ensure TBE ownership of an account when the unities are not present.

Wrongful Diversion from Joint Accounts

The distinctions between the forms of account ownership are also apparent when examining the rules and remedies for wrongful diversion from a joint account. While a JTWROS can be severed by wrongful diversion, a TBE account is "not so fragile."[20] Through application of the nonseverability doctrine, a TBE account holder is entitled to greater protections from wrongful diversion than the holder of a JTWROS or TIC account.

The nonseverability doctrine "preserves the entireties status of funds even after one spouse renames an account or transfers money from it without the consent of the other."[21] When an account is held as TBE, therefore, one spouse may not transfer money from the account without the consent of the other spouse. An aggrieved spouse will be able to trace and claim wrongfully diverted funds, even after the transferring spouse has died.

In contrast, where an account is held as JTWROS, a joint owner's withdrawal of the funds will terminate the joint tenancy and sever the right of survivorship as to the funds withdrawn.[22] Joint tenants are still liable to each other to the extent that they take or withdraw more than their share. Furthermore, in districts where funds contributed by one tenant are *not* presumed to be a lifetime gift to the other tenants, a joint tenant who contributes to the account can recover money wrongfully withdrawn from the account by a non-contributing joint tenant.[23] Remedies for wrongful diversion include actions for conversion, constructive trust, civil theft, and injunctive relief. The non-contributing tenant could escape liability, however, by establishing that the contributing tenant intended to make a present gift of the funds.

As with joint tenants with right of survivorship, tenants in common are also liable to each other to the extent that they take or withdraw more than their share.

Conclusion

Understanding the nuances between these forms of account ownership is critical for lawyers seeking to advise their clients on joint property ownership. Before recommending or discouraging a form of ownership, lawyers should be well aware of the above distinctions, ramifications, and ambiguities.



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Endnotes

1 However, unity of time and title continue to be requirements for other forms of personalty held as TBE.

2 See Sec. 689.15, Fla. Stat.

3 Only the state law effects of joint tenancies are discussed in this article. No attempt is made or inferred to discuss the Federal transfer tax ramifications of the creation, termination or effect of death on a joint tenancy.

4 See *NationsBank, N.A. v. Coastal Utilities, Inc.*, 814 So. 2d 1227, 1229 (Fla. 4th DCA 2002) - "As to [a JTWROS] account, each person has the right, against the other, only to his or her individual interest in the account. Absent other provision, however, the shares in the joint account are presumed to be equal for purposes of alienation."

5 See, *e.g.*, *Varela v. Bernachea*, 917 So. 2d 295, 297 (Fla. 3d DCA 2005).

6 See, *e.g.*, *De Soto v. Guardianship of De Soto*, 664 So. 2d 66, 67 (Fla. 3d DCA 1995).

7 601 So. 2d 1165, 1166 (Fla. 1992). Note that other decisions from the 3rd DCA have espoused the view that the presumed gift is of funds remaining at the contributor's death. See, *e.g., Winterton v. Kaufmann*, 504 So. 2d 439, 442 (Fla. 3d DCA 1987).

8 See *Romano v. Olshen*.153 So. 3d 912, 920 (Fla. 4th DCA 2014).

9 See *Katz v. Katz*. 666 So. 2d 1025, 1027 (Fla. 4th DCA 1996).

10 See *Julia v. Russo*, 984 So. 2d 1283, 1285 (Fla. 4th DCA 2008).

11 780 So. 2d 45, 53 (Fla. 2001).

12 See Sec. 744.457(1)(a), Fla. Stat.

13 153 So. 3d 912 (Fla. 4th DCA 2014).

14 The Estate & Trust Tax Planning Committee of the Florida Bar's Real Property, Probate & Trust Law Section has been studying this issue and is attempting to recommend legislation to statutorily define TBE as to personal property.

15 153 So. 3d 912, 919 (Fla 4th DCA 2014).

16 See Real Property, Probate and Trust Law Section of The Florida Bar, Memorandum Regarding Current State of Florida Law for Creating JTWROS or TBE (July 27, 2014).

17 08–26059–BKC–PGH, 2011 WL 87237 (Bankr. S.D. Fla. Jan. 10, 2011).

18 *Id.* at 3. *Beal Bank* also suggests that a TBE would not be created by merely adding one spouse's name to an existing account—the Florida Supreme Court did not disturb the Fifth District Court of Appeal's ruling that an account later amended to add the wife's name was subject to garnishment by creditors of the husband. *Beal Bank*, 780 So. 2d at 49 n.2 (citing *Beal Bank, SSB v. Almand & Associates*, 710 So. 2d 608, 608 (Fla. 5th DCA 1998)).

19 See Jeffrey A. Baskies, Thomas O. Katz, & Justin M. Savioli, Joint Ownership, BEP FL-CLE 7-1 (2012).

20 See *Sitomer v. Orlan*, 660 So. 2d 1111, 1114 (Fla. 4th DCA 1995).

21 *Id.* at 1115.

22 *Id.* at 1114-15.

23 Even where the presumption of a lifetime gift applies, it can be overcome by clear and convincing evidence to the contrary.

Show or Tell? District Courts in Conflict on Key Requirement for Constructive Service

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In an *in rem* action, a plaintiff is permitted to serve a defendant with process by publishing a notice of action, if the plaintiff cannot locate the defendant after performing a diligent search and the plaintiff has filed a sworn statement that meets the applicable statutory predicates.[1] Unfortunately, the Florida District Courts of Appeal are presently split on the question of what the sworn statement is actually required to contain to comply with the statute.

This has far reaching implications on both the due process rights of litigants, and the title to any real property that may have been conveyed as the result of, for example, a foreclosure action in which one or more of the defendants was served via publication. If service is not perfected, the trial court lacks jurisdiction over the adverse party to the action.[2] Moreover, the statutes setting forth the various procedures for service must be strictly construed by the court.[3] Uniquely to constructive service, if the sworn statement is defective "on its face", then any judgment rendered is void; if the sworn statement is sufficient on its face, but some other aspect of service was deficient, such as the sufficiency of the search performed, then the judgment is merely voidable.[4]

This distinction between void and voidable judgments is substantial: a void judgment unwinds all subsequent transactions no matter how distant in time from the underlying proceeding, but a judgment which is only voidable defeats some subsequent transactions but not the title of a bona fide purchaser for value without notice.[5] If, for example, lenders have been foreclosing on homes in reliance on constructive service premised upon sworn statements that turn out to be facially defective, the foreclosed party has an unlimited amount of time to have the foreclosure judgment reversed as well as the sale, and all subsequent sales, declared void.[6]

The problem is compounded by the fact that each District Court has not necessarily issued an opinion that clarifies where even that particular district stands. Nevertheless, the conflict can be distilled to a central question:

> Must the sworn statement in support of constructive service *show* compliance with the statutory predicate, or is the sworn statement sufficient if it merely *states* that the statutory predicate has been met?

Examining the statute itself suggests that the answer is obvious:

> The sworn statement of the plaintiff, his or her agent or attorney, for service of process by publication against a natural person, **shall show**: (1) That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant; and (2) [whether they are over 18 or their age is unknown]; and (3) [whether their residence is unknown, in a foreign state or country, or in Florida, etc.].[7] [emphasis added]

The case law tells a much more complex story, with opinions holding that the statute may be satisfied by merely reciting the statute in the affidavit, others holding that the statute requires a detailed description of the nature of the search performed and disclosure of the last known address of the defendant, and some self-contradictory variations on those two positions.

Show Means Tell

The apparent keystone of the position that it is sufficient to merely recite the statute in the plaintiff's affidavit is the 1993 opinion of the Fourth District Court of Appeal in *Demars v. Village of Sandalwood Lakes Homeowners Association, Inc*.[8]

To reach this conclusion, the Fourth District Court of Appeal reviewed the history of constructive service in Florida, focusing on the fact that the pre-1941 statutes that provide the requirements for constructive service provide that the affidavit must "state" that a diligent search (and other requirements) had been performed, and the post-1941 statutes which now provide that the affidavit must "show" the elements supporting constructive service have been performed.[9] *Demars* expressly rejected that the change from "state" to "show" had any operative effect on the contents required for a facially sufficient sworn statement in support of constructive service, citing eight prior opinions as its authority.[10]

Demars began its review with the 1926 Florida Supreme Court opinion of *McDaniel v. McElvy*, which was a quiet title action in which constructive service of process was authorized by the then applicable quiet title statute.[11] In *McDaniel*, the Court distinguished the Florida statute at bar from statutes in effect in Oklahoma and South Dakota, each of which required that facts be alleged that show the due diligence performed to support constructive service.[12] The Court explained:

> [the Florida statute] is unlike the statutes referred to. Its requirements are that where the names and residence of persons interested are unknown to the complainant and have not been ascertained

> after diligent inquiry, the bill of complaint shall so *state*; and further, that the complainant shall *allege* certain things in his bill with reference to whether certain defendants are dead or alive.[13]

Demars next discussed *Catlett v. Chestnut*, a 1933 Florida Supreme Court opinion following an appeal from a divorce action, in which the bill of complaint being used as the basis for constructive service deviated from the applicable statute by alleging that the "address" of the defendant was unknown rather than the defendant's "residence."[14] *Catlett* supports the general principle of distinguishing between the total failure to allege a jurisdictional fact, which renders a judgment based thereon void, and the lesser failure of the defective allegation of a jurisdictional fact, which renders the judgment merely voidable.[15] *Catlett* also unequivocally held that if an affidavit in support of constructive service states each required jurisdictional fact, even if the service is later found defective, the judgment thereon is merely voidable and not void.[16]

Next, *Demars* discussed the 1939 Florida Supreme Court case of *Klinger v. Milton Holding Co.* to explain that the determining factor for whether judgment predicated on defective constructive service was void or voidable was whether the sworn statement in support thereof was sufficient on its face.[17] *Klinger* specifically held that the allegations supporting constructive service were facially sufficient because they alleged each element of the relevant statute.[18] *Klinger* quoted the affidavit supporting constructive service which was at issue in the case in full, so there can be no question that the affidavit merely recited in conclusory fashion that defendant was a non-resident, that his residence was unknown, that he was over 21, and that there was no other person upon whom service may be had in Florida.[19]

Upon concluding its review of *Klinger*, *Demars* discussed the constructive service statute's legislative history, explaining that it was amended in 1941 at which time the word "state" was changed to "show."[20] Moreover, the court opined that if its inquiry had been limited to the *McDaniel* opinion, it would have been forced to conclude that the word "show" controlled the content required for facially sufficient affidavit.[21] The court then proceeded to the first post-1941 case that it was relying upon.

That case, *Grammer v. Grammer,* was a 1955 divorce case in which the affidavit under consideration merely alleged that the plaintiff made a diligent search, that the residence of the defendant was unknown, and set forth the defendant's address as particularly as was known.[22] The Florida Supreme Court in *Grammer* held that: "The language of the sworn statement for constructive service is a [*sic*] clear compliance with the statutory requirements of section 48.04, F.S.1951, F.S.A., and this fact is not questioned."[23] The Court made no reference to the 1941 amendment, and the only case cited in the entire opinion with respect to constructive service is *McDaniel*.[24]

None of the next three opinions cited by *Demars* contain any discussion or opinion respecting the statutory requirement that the sworn statement "show" that the requirements have been met. In 1961, the Third District Court of Appeal in *Munro v. Bechard* upheld constructive service, stating only that the affidavit, which is not described, "was not shown to be insufficient under the established rule, as set out in *McDaniel* [and] *Grammer* . . . ."[25] In a 1965 divorce appeal, the court in *Larsen v. Larsen* only briefly referred to the sufficiency of the allegations supporting constructive service in the context of explaining all of the analytical steps required under *McDaniel*.[26] Finally, the 1970 opinion in *Gmaz v. King* exclusively discussed whether the plaintiff's diligent search was sufficient and did not comment on the sufficiency of the sworn statement.[27]

The final case cited by *Demars* is the Fourth District Court of Appeal's opinion from the previous year, *Hobe Sound Industrial Park, Inc. v. First Union National Bank*.[28] In this one page opinion, the court reviewed a sworn statement that described in detail the nature of the diligent search performed and found it to be insufficient on its face because it did not reflect a diligent enough search.[29] Note that *Demars* did not cite this case to support its conclusion, but rather as an illustration of the correctness of its holding as a public policy decision, i.e., holding out *Hobe Sound* as a result that is harmful from a public policy perspective, stating:

> To require the affidavit to "show" the efforts of a diligent search leaves open the judgment to continued challenges that on the face of the affidavit that the affiant did not do enough searching. . . . a title examiner would understandably be reluctant to insure any title in whose chain a foreclosure based on constructive service appears.[30]

Demars concluded by certifying to the Florida Supreme Court the question of whether an affidavit must "state" or "show" that an adequate diligent search was performed, but the question was apparently not taken up by the non-prevailing party.[31]

Show Means Show

The Third District Court of Appeal created a direct conflict with *Demars* in 2008 in *Redfield Investments, A.V.V. v. Village of Pinecrest* when it held that

> …the affidavit filed by Pinecrest in this case is itself legally insufficient. Not only does *section 49.051* set forth explicit requirements to effectuate proper service of process . . . , but the statute also requires that the sworn statement **show** that the requirements have been met. Our case law is clear that averments in conclusory terms fall short of the statutory and constitutional requirements of the statute.[32]

In contrast with *Demars*, *Redfield Investments* undertook no review of legislative history, nor did it address any public policy concerns. *Redfield Investments* cited just three cases, including the Third District Court of Appeal's earlier opinion in *Robinson v. Cornelius.* In *Robinson*, the court briefly mentioned that the "record [did] not disclose any meaningful search or inquiry as to the whereabouts of appellant," but the court did not specifically state whether it was referring to the facial sufficiency of the affidavit or the sufficiency of the search, nor did it articulate what standard it used to review the sworn statement.[33]

Redfield Investments also cited to *Coin Copies, Inc. v. Financial Federal Savings & Loan Association of Dade County*, which held that an affidavit containing a conclusory statement that a diligent search was performed, along with additional evidence that the sheriff made seven attempts at personal service during a one month period, was insufficient for constructive service on a business entity.[34] Citing only to *Robinson*, *Coin Copies* also did not describe the standard it was applying or whether it was addressing the sufficiency of the affidavit or the search.[35]

Redfield Investments' third citation was to *Perpro Systems International, Inc. v. Rickbeil*, a 1996 Fourth District Court of Appeal case.[36] In *Perpro*, however, the affidavit (which is quoted in the opinion) stated that the plaintiff made a diligent search to find the registered agent of the defendant, but failed to allege any diligent search to locate other corporate officers.[37] Although the affidavit did recite all of the statutory elements, *Perpro* held that the affidavit should have alleged that a diligent search was performed for all of the corporate officers, not merely that a diligent search was performed to locate all persons upon whom service of process would bind the defendant corporation.[38] Nevertheless, there is no explicit holding in *Perpro* that the affidavit should have *shown* that a diligent search was performed.[39]

Redfield Investments has more recently been followed by *Castro v. The Charter Club, Inc.*, both of which also contradict *Demars.*[40] The Third District Court of Appeal in *Castro* held that Chapter 49 requires that a sworn statement in support of constructive service must specify, with particularity, what efforts and steps were taken to conduct a diligent search, and failure to do so renders such an affidavit defective on its face and the final judgment thereon void.[41]

What Must You Show, and How Can You Tell?

Demars held that the sworn statement is facially sufficient if one simply copies the words from the statute into the affidavit, without apparent regard for the accuracy or truth of those words.[42] *Castro* held the opposite; the sworn statement must specifically set forth in detail the steps taken by the plaintiff to locate and serve the defendant.[43] Other district court opinions have generated a variety of additional conclusions that are inconsistent with *Demars*, but without adopting the same holding as *Castro*. Examples include:

Gans v. Heathgate-Sunflower Homeowners Association, Inc., in which the Fourth District Court of Appeal held that a sworn statement was facially deficient because it did not set forth the defendant's residence as particularly as was known to plaintiff.[44] Specifically, the affidavit alleged that the defendant's residence was unknown, when in fact the plaintiff had knowledge of at least one possible address for the defendant and should have disclosed it.[45]

Shepheard v. Deutsche Bank Trust Co. Americas, in which the Fifth District Court of Appeal specifically held that the plaintiff's sworn statement was facially sufficient because it recited that a diligent search had been performed, even though the evidence had revealed that the search was defective as to one of the defendants.[46] Pursuant to *Demars*, then, the resultant judgment should have been merely voidable.[47] However, the court in *Shepheard* found that the judgment was void on the basis of a separate line of cases that stand for the proposition that a "judgment is void where service of process is so defective that it amounts to no notice of the proceedings."[48] This holding is incompatible with the principles set forth in *Demars*, though the *Shepheard* court did not acknowledge any inconsistency.

Godsell v. United Guaranty Residential Insurance, in which the Fifth District Court of Appeal mirrored the reasoning of the Fourth in *Gans* under a similar set of facts – the plaintiff in *Godsell* submitted a detailed affidavit setting forth the various attempts to locate the defendant, but omitted information concerning a possible address in Canada at which plaintiff had not made any service attempts.[49] Instead, the plaintiff simply alleged in its sworn statement that the defendants address was unknown, and the court held specifically that the failure to disclose the possible address in Canada was a facial defect and therefore the judgment was void.[50] It is additionally remarkable that the *Godsell* opinion cited to *Demars* for authority even as it conflicted with its holding that merely reciting the statute is sufficient to protect a final judgment from being more than merely voidable.

The author urges the district courts to address this apparent conflict and clarify this important due process issue.

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Endnotes

1 § 49.011, Fla. Stat. (2015). More generally, constructive service of process is governed by Chapter 49, Florida Statutes. The statute delineates fifteen categories of actions for which constructive service is permitted. § 49.011, Fla. Stat. (2015). This article focuses on real property actions.

2 E.g., *Shepheard v. Deutsche Bank Trust Co. Ams.*, 922 So. 2d 340,

345 (Fla. 5th DCA 2006) (citing *Anthony v. Gary J. Rotella & Assocs., P.A.*, 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005)).

3 *Id.* (citing *Floyd v. Fed. Nat'l Mortg. Ass'n*, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998)).

4 *Klinger v. Milton Holding Co.*, 186 So. 526, 532-33 (Fla. 1938).

5 *Lewis v. Fifth Third Mortg. Co.*, 38 So. 3d 157, 160 (Fla. 3d DCA 2010) ("If the trial judge were to find the affidavit to be defective on its face, service would be void as to the bona fide purchaser. If the trial judge finds the affidavit sufficient on its face, but were to determine that a diligent search was not performed, the foreclosure would be voidable, not void, as to the bona fide purchaser.").

6 *Id.*; see also, *Ramagli Realty Co. v. Craver*, 121 So. 2d 648, 654 (Fla. 1960) ("A void judgment is a nullity, a brutum fulmen and is subject to collateral attack and may be stricken at any time. The passage of time cannot make valid that which has always been void but it can and often does render valid that which was merely voidable or erroneously entered." (citation omitted)), quoted in M.*L. Builders, Inc. v. Reserve Developers, LLP*, 769 So. 2d 1079, 1082 (Fla. 4th DCA 2000).

7 § 49.041, Fla. Stat. (2015). The applicable statutes for service on corporations, parties doing business under a corporate name, and unknown parties each contain variations on the information that must be set forth in the sworn statement, but all use the same prefatory language "shall show." §§ 49.051, 49.061, 49.071, Fla. Stats. (2015).

8 625 So. 2d 1219, 1223 (Fla. 4th DCA 1993).

9 *Id.* at 1222.

10 *Id.* at 1223.

11 *Id.* at 1221-22 (*citing McDaniel v. McElvy*, 108 So. 820 (Fla. 1926)).

12 *McDaniel*, 108 So. at 831-32.

13 *Id.* at 832.

14 625 So. 2d at 1222 (*citing Catlett v. Chestnut*, 146 So. 241 (Fla. 1933)).

15 146 So. at 244.

16 *Id.*

17 625 So. 2d at 1222 (*citing Klinger*, 186 So. at 532-33).

18 *Klinger*, 186 So. at 532-33.

19 *Id.* at 532.

20 625 So. 2d at 1222.

21 *Id.*

22 80 So. 2d 457, 458 (Fla. 1955).

23 *Id.* at 459, *quoted in Demars*, 625 So. 2d at 1222.

24 *Id.* at 460.

25 132 So. 2d 429, 430 (Fla. 3d DCA 1961) (other citations omitted), *cited in Demars*, 625 So. 2d at 1222.

26 180 So. 2d 393, 393-95 (Fla. 1st DCA 1965), *cited in Demars*, 625 So. 2d at 1222-23.

27 238 So. 2d 511, 512-13 (Fla. 2d DCA 1970), *cited in Demars*, 625 So. 2d at 1223.

28 625 So. 2d at 1223 (*citing Hobe Sound Indus. Park, Inc. v. First Union Nat'l Bank*, 594 So. 2d 334 (Fla. 4th DCA 1992)).

29 594 So. 2d at 335.

30 625 So. 2d at 1223.

31 See id. at 1224.

32 990 So. 2d at 1139 (citations omitted).

33 *Robinson v. Cornelius*, 377 So. 2d 776, 778 (Fla. 4th DCA 1979), *cited in Redfield Invs. A.V.V. v. Vill. Of Pinecrest*, 990 So. 2d 1135, 1140-41 (Fla. 3d DCA 2008).

34 *Coin Copies, Inc. v. Fin. Fed. Sav. & Loan Ass'n of Dade County*, 439 So. 2d 338 (Fla. 3d DCA 1983) (*citing Robinson*, 377 So. 2d 776), *cited in Redfield Invs.*, 990 So. 2d at 1140-41.

35 See id.

36 668 So. 2d 319, 320 (Fla. 4th DCA 1996) (*citing Coin Copies, Inc.*, 439 So. 2d 338), *cited in Redfield Invs.*, 990 So. 2d at 1140-41.

37 *Id.* at 319.

38 *Id.* at 319-20.

39 *Id.*

40 See *Castro v. Charter Club, Inc.*, 114 So. 3d 1055, 1060-61 (Fla. 3d DCA 2013).

41 *Id.* (citing *Redfield Invs.*, 990 So. 2d at 1140). Notably, *Castro* also cited to G*ans v. Heathgate-Sunflower Homeowners Association, Inc.*, 593 So. 2d 549, 552 (Fla. 4th DCA 1992), decided by the Fourth DCA the year before *Demars*, but *Castro* makes no reference to *Demars* itself. *Castro*, 114 So. 2d at 1060.

42 625 So. 2d at 1223 ("Thus, the sworn statement in support of constructive service does not require the inclusion of specific facts showing that a diligent search has been undertaken.").

43 114 So. 3d at 1060 ("Averments in conclusory terms are insufficient to satisfy the particularity required pursuant to section 49.041") (*citing Redfield Invs.*, 990 So. 2d at 1138).

44 593 So. 2d at 552-53.

45 *Id.* at 552.

46 922 So. 2d at 343 (*citing* Floyd v. Fed. Nat'l Mortg. Ass'n, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998)).

47 625 So. 2d 1223.

48 922 So. 2d at 345 (*citing Reina v. Barnett Bank, N.A.*, 766 So. 2d 290, 292 (Fla. 4th DCA 2000); *Decker v. Kaplus,* 763 So. 2d 1229, 1230 (Fla. 5th DCA 2000)). The *Decker* opinion, in turn, relied on *State ex rel. Gore v. Chillingworth*, 171 So. 649, 652 (Fla. 1936), for this principal that remains undisturbed, however incompatible it may be with *Demars*.

49 923 So. 2d 1209, 1211 (Fla. 5th DCA 2006).

50 *Id.* at 1215; *accord Martins v. Oaks Master Prop. Owners Ass'n, Inc.*, --- So. 3d ---, 2014 WL 5877856, at *9-11 (Fla. 5th DCA 2014). In *Martins*, the author represented the appellant who prevailed under virtually the same factual scenario as in *Gans* and *Godsell*, and in which the Fifth DCA reached the same result, holding that the plaintiff below failed to disclose knowledge of Martins' possible residence in their sworn statement, so the final judgment was void. *Martins*, at *9-11. The opinion did not acknowledge the conflict between *Demars* and the result reached, but unlike *Godsell*, the *Martins* opinion does not cite to *Demars* for authority.



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New AAA Alternate Dispute Resolution Procedures In 2014

By: Larry R. Leiby, Esq, Malka & Kravitz, P.A., Fort Lauderdale, Florida.



L. LEIBY

The American Arbitration Association (AAA) rolled out two new dispute resolution procedures for construction disputes in 2014: The "Supplementary Rules for Fixed Time and Cost Construction Arbitration" and, in association with DecisionQuest, "CaseXplorer Arbitration." The first process for fixed time and cost arbitration is focused on disputes where the parties/lawyers desire to keep dispute resolution costs down and to obtain a prompt arbitration decision. The second process, "CaseXplorer Arbitration" is more focused on larger cases due to its cost.

CaseXplorer Arbitration

DecisionQuest (www.decisionquest.com) has long been a trial consulting firm through which assistance is offered with testing mock juries through questions, online claim and jury research, and other services for trial lawyers. AAA (www.adr.org) has long been an arbitration provider. AAA chose to partner with DecisionQuest in offering CaseXplorer Arbitration.

CaseXplorer Arbitration for construction cases is an online tool enabling users to receive objective evaluation of and feedback on the strengths and weaknesses of their arbitration cases. This comes from experienced arbitrators not associated with their actual cases, who are members of the AAA construction panel, have agreed to serve and have been trained in the CaseXplorer concept. It can be used either before an actual arbitration has begun or while the actual arbitration case is pending.

The CaseXplorer user selects (by keyword, expertise, and locale) a panel of three or five AAA evaluative arbitrators available for CaseXplorer Arbitration service and provides them (in writing) with a set of facts, legal arguments, and questions. CaseXplorer also has a list of potential questions from which the user may choose in addition to the questions the user has compiled. This information is then submitted to the chosen arbitrators online. Within three to four days, the user receives a consolidated written report containing the views of each arbitrator. It is analogous to a mock arbitration but done on-line.

The user of this service may choose to present this information for feedback to either three or five arbitrators. The arbitrators who serve as CaseExplorer arbitrators may not be used as the arbitrators in the real case. Also, the arbitrators selected by the user work alone and have no contact with each other. Thus you get 3 or 5 separate opinions on the case. The cost is less than it likely would cost to do an in-person mock arbitration, yet is not trivial. The cost for a three-person CaseXplorer arbitration is $15,750. For five arbitrators the cost is $21,250. For a significant case it may be worthwhile to use CaseXplorer in order to get feedback and suggestions on what is seen as being moving, troublesome, or otherwise important about the case from experienced arbitrators.

Existing Expedited Construction Arbitration Rules

Arbitration has been described as being a cost effective and more expeditious (than the courts) process to resolve construction disputes. However, many lawyers (often driven by their clients) tend to make arbitration into a private court proceeding with all of the motion practice, discovery, and formalities of presentation of evidence that one would expect to find in court. Where lawyers/parties are serious and professionally cooperative about making arbitration cost effective and prompt, it can be done.

Older Existing Rules for Expedited Construction Dispute Resolution

The AAA has had for many years in its Construction Industry Arbitration Rules (the D-series of rules) procedures for parties who choose to have the case decided on documents only. It is rare that all parties/lawyers to a dispute accept this procedure because one side may perceive its documentation to be inferior to the other side and in serious need of explanation by oral testimony (although affidavits and briefs may be used as established at a preliminary case management hearing). Some clients are simply better record keepers than others. It is clearly a cost effective procedure.

AAA has also had available for many years its "Fast Track" (F-series of rules) for expeditious resolution of disputes. These rules *suggest* that they are intended for cases where any claim or counterclaim does not exceed $75,000.[1] In the Fast Track process there is only one arbitrator and no discovery permitted, other than an exchange of exhibit and witness lists.[2] The hearing is expected to take place in not longer than one day,[3] and is to be closed within 45 days from the preliminary phone conference.[4] The cost under these rules is anticipated to be much lower than the costs of proceeding through court due to the use of only one arbitrator and the expedited and limited process.

The International Institute for Conflict Prevention & Resolution (CPR) also has its Rules for Expedited Resolution of Construction Disputes (http://www.cpradr.org/RulesCaseServices/CPRRules/ConstructionArbitrationRules.aspx). These rules call for three arbitrators;[5] require much of the case information and evidence to be provided to the other side(s) with a demand for arbitration;[6] permit discovery in the discretion of the arbitrator;[7] and expect the arbitration to be concluded within 100 days from the preliminary

conference.[8] While compliance with these rules should result in an expedited decision and full opportunity for exposition of the case, the amount of information required with the arbitration demand, the use of three arbitrators, and the use of discovery will reduce any cost savings from litigation.

2014 AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration

As the title suggests, the AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration are intended to be expeditious and economical. The rules are not intended to be used where there are more than two parties to the arbitration.[9] Where a surety is represented by the same lawyer as its principal, and there are no independent claims asserted by the surety against the principal or others, the two party limitation does not apply.[10] Discovery is permitted as agreed by the parties and their representatives, subject to a discovery plan approval by the arbitrator.[11]

The rules may be adopted in the construction agreement to arbitrate or agreed upon by the parties once a dispute arises.[12]

Each party is to have a "designated employee" to be included on all correspondence and communications served in the arbitration.[13] It appears that the designated employee requirement is intended to avoid proceedings being extended due to counsel's schedule without the client being aware. All communications are by e-mail. There is to be one arbitrator.[14]

Within three business days after the filing of the demand or submission for arbitration, the AAA and the lawyers/parties shall have an administrative phone conference "to expedite the arbitration, explore administrative details, establish an effective means of selecting an arbitrator, ascertain the parties' preferred arbitrator qualifications, and address any other issues regarding the conduct of the arbitration."[15]

Under these rules there is a matrix (depending on the amount in controversy) for many parameters of the arbitration.[16] It is contemplated that these rules may apply to controversies between $75,000 (cap for fast track rules) and five million dollars. Thus, due to the range of the amount in controversy, the matrix limits:

a) maximum time to complete arbitration, (between 120 and 360 days),
b) the maximum number of hearing days (between 3 and 10),
c) arbitrator compensation (between $250 and $350 per hour),[17]
d) maximum arbitrator study time (between 8 and 40 hours), and
e) Maximum total fees, both administrative and arbitrator compensation, not including travel expenses (between $10,500 and $52,000) unless: a) agreement is made to extend the maximum number of days for hearing or b) the parties agree to use post-hearing briefs (as described below).

If a party fails to comply with the supplementary rules, the AAA may choose to move the case to administration under its Regular Track or Large Complex Case Track Construction Arbitration Rules. If that occurs, the party not causing the case administration to be changed may make written application (up to 2 single spaced pages) to the arbitrator to determine that any additional costs caused by moving the case out of the Supplementary Rules for Fixed Time and Cost Arbitration should be borne by the party causing the move. The other party has two business days from receiving such an application to file a two single spaced page response.[18] (This seems to be a delicate decision to request of the arbitrator before final hearing.)

The arbitrator is empowered to impose a schedule for hearing time for the parties and may impose procedures for expediting the case, e.g. chess clock, written direct exam of witnesses with live cross, etc.[19]

Post hearing briefs are in the discretion of the arbitrator, unless the parties agree, and shall not exceed 5 pages. There is additional compensation (between $1,000 to $1,400 depending on case size) afforded the arbitrator if post-hearing briefs are used.[20] The arbitration award must be rendered within 20 days from the close of hearings.[21]

The award is to be a "concise written financial breakdown" and line item disposition of non-monetary claims. If the parties agree to a reasoned award, which contains findings of fact and conclusions of law, the case gets bumped to the Large Complex Case Track for administration, bearing the associated fees.[22]

Failure to pay requested fees or deposits without good cause shown may result in a default upon application of the other party. Any award must still be supported by proof at the scheduled hearing.[23]

In summary, the AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration provide a cost effective and expeditious process for cases in excess of $75,000. However, for true cost and time savings, there must be professional cooperation and compliance with the rules by both sides. The AAA has obtained agreements from many competent arbitrators to serve at the reduced rate. As noted, these rules do not apply for cases involving three or more parties.

The ostensible inability to obtain a reasoned award under these rules also is a limitation. Many parties will want a reasoned award simply to understand why they won or lost. Of course, while not expressly stated and while certainly not required, it would still be within the discretion of the chosen arbitrator to render a reasoned award. Many arbitrators have worked, or still work, as litigation counsel and thus appreciate the desire of the parties to know why they won or lost the case.

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Property Section (1976-1994). He is the author of the Florida Construction Law Manual now published annually by West-Thomson-Reuters. He authored the chapters on construction liens, construction bonds, and contracts in The Contractors Manual, published by Associated Builders and Contractors. Larry is certified by the Florida Supreme Court as a Circuit Civil mediator handling construction and commercial disputes. He is active as a mediator, arbitrator, special master, adjunct professor at Florida International University College of Law, and author. He is a fellow in the College of Commercial Arbitrators.

Endnotes

1 Rule F-1, AAA Construction Industry Arbitration Rules.

2 Rule F-9, AAA Construction Industry Arbitration Rules. The rules allow an exception for "exceptional cases."

3 Rule F-11, AAA Construction Industry Arbitration Rules.

4 Rule F-12, AAA Construction Industry Arbitration Rules.

5 Rules 5 and 6, CPR Expedited Construction Arbitration Rules.

6 Rule 3, CPR Expedited Construction Arbitration Rules.

7 Rule 11, CPR Expedited Construction Arbitration Rules.

8 Rule 1.3, CPR Expedited Construction Arbitration Rules.

9 Rule SR-1, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

10 *Ibid*.

11 Rule SR-11, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

12 Rule SR-1, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

13 Rule SR-2, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

14 Rule SR-10, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

15 Rule SR-9, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

16 Schedule 1, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

17 AAA has a list of arbitrators who have agreed to serve capped at the maximum applicable rates.

18 Rule SR-14, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

19 Rule SR-15, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

20 Rule SR-16, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

21 Rule SR-17, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

22 Rule SR-18, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

23 Rule SR-22, AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration.

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The Transition from Book and Page to Instrument Number: The Pros and Cons

By Bridget M. Friedman, Esq., Friedman & Friedman, P.A., Lake Mary, Florida



B. Friedman

Recently, several Clerks of Court across Florida and across the nation have changed their registration systems for recording the Official Records, transitioning from the traditional Book and Page system to solely using Instrument Numbers. To understand this emerging trend, a historical review is insightful.

Originally, when the recording system began, the records consisted of 200 page leather bound books. Once page 200 was reached, a new higher book was used to record subsequent instruments. The books were limited to 200 pages because otherwise they would be too bulky to pull from the shelf. With the advent of microfilm around the 1950s, some counties discontinued the use of physical books and instruments were then placed onto film. Although microfilm could hold 2,000 pages, the traditional Book and Page numbering system was perpetuated. Once instruments were placed on film, the recording system went from a physical to a virtual recording system.

With each advance in technology, the recording system advanced as well. After microfiche, technology moved to digitizing documents, where Clerks were scanning documents to CDs and DVDs for future retrieval. CDs and DVDs hold thousands of documents, so a new book would seldom be needed. Some counties arbitrarily picked the number of pages for each book, even though CDs and DVDs could accommodate more pages. In spite of these technological advances, the recording industry kept with the historical practice of assigning Book and Page numbers to each recorded instrument.

Now with the advances in technology and with several Clerks converting their recording software to newer technology so that it will function with the latest operating systems, there is a move toward solely using Instrument Numbers as opposed to the historical Book and Page system. Florida Statutes do not mandate the Book and Page system, and therefore, Clerks are able to adopt new numbering systems with advances in technology. The use of an Instrument Number as opposed to a Book and Page number allows easier conversion to newer recording software because there are less data constraints with one number as opposed to two.

Florida Statutes do not mandate the Book and Page system, and therefore, Clerks are able to adopt new numbering systems with advances in technology.

The former physical and space restrictions are absent with the arrival of larger storage capacities prevalent in present day cloud computing. Furthermore, the use of a single Instrument Number eliminates the need for the Clerk to add "A" after the recording information to a page that has been omitted during the recording process or where the wrong page is recorded with a document. Further, the Instrument Number system eliminates the need for designating a "page not used" where, after recording, it is discovered that a page should not have been recorded with a certain instrument. For clarification, under the Book and Page system, when the Clerk discovers that a recorded document is missing a page or includes an incorrect page, the Clerk corrects the recording by designating the missing page as "A" and noting a deleted page as "page not used". By contrast, under the Instrument Number system, each instrument is given a unique number and the pages of the document are identified as "Page 1 of 16, page 2 of 16, etc." If an error is discovered during the Clerk's quality control review, then the Instrument Number stays the same, and the number of pages is modified. In terms of speed of recording, using an Instrument Number allows for faster recording during the quality control process because the recording is based on a package of information versus individual pages where the recorder must verify each page.

However, there are some drawbacks to only using an Instrument Number. For example, if both a Book and Page number and Instrument Number are used, there are redundancies that would allow for cross-checking recording information. However, with only an Instrument Number, if there is a scrivener's error in a related document, one would be relegated to using the name index to locate the document.

In addition, with a lengthy Instrument Number, the numbers could be easily transposed. However, when considering that some Books are five digits long, and the Pages four digits, the nine digit Instrument Number is no longer than what is used under the Book and Page system of recording.

Taken as a whole, it appears that the transition to the Instrument Number system has had a warm reception by both Clerks of Court and by the industry. Lee, Sarasota, and Broward are the known counties that have transitioned to solely using the Instrument Number system.

The Value of South Florida Real Estate When A1A is Under Water: Sea Level Rise and Private Property Rights

By Julia Jennison, Esq., Lewis, Longman and Walker, P.A., W. Palm Beach, Florida, and Kristen King Jaiven, Esq., Boca Raton, Florida

These days it seems there is constant talk about climate change and sea level rise with Florida being particularly vulnerable to the impacts. Sea level rise poses significant challenges to local, state and federal governments, and carries the potential for a myriad of impacts on private property rights. Beyond the political and scientific discussions, what are the real implications of sea level rise on private property rights in Florida? This article seeks to introduce some of the concepts being developed to address sea level rise and how these actions may impact private property rights in Florida.

In south Florida, several counties have adopted the Regional Climate Action Plan that is intended to focus municipalities on regional and local impacts of climate change.[1] This plan recognizes that land development codes and comprehensive plans are two of the most powerful planning tools for municipalities. Each of these has the potential to impact private property rights. Private property rights may be the most significant constraint on government efforts. Local governments need to find a balance between protecting and taking. Increasingly, local governments, including participating members of the Southeast Florida Regional Climate Change Compact, are beginning to analyze how this balance may be realized.

For example, recognizing the vulnerability of Miami-Dade County to the effects of sea level rise, on July 2, 2013, Miami-Dade County Board of County Commissioners (the "*Board*") adopted resolution R-599-13 (the "*Resolution*") creating the Miami-Dade Sea Level Rise Task Force (the "*Task Force*").[2] Sponsored by Commissioner Rebecca Sosa, the Resolution designates individuals to the task of researching and assimilating the effects of sea level rise on real estate and water front property in Miami-Dade County.[3] While the Task Force is advisory in nature, the Task Force's efforts are leading to clear directives aimed at preparing for the effects of sea level rise.[4]

Recent measures adopted by Miami-Dade County are based upon recommendations set forth in the Task Force's July 1, 2014 report.[5] Specifically, the resolution adopted by the Board on January 21, 2015, directs Mayor Carlos A. Giménez to prepare a report for the Board outlining the Mayor's progress in advancing sea level rise preparation in connection with other member counties of the Southeast Florida Regional Climate Change Compact and other local agencies.[6] In the July 1, 2014 report, the Task Force explains the magnitude of sea level rise in Florida by explaining how sea level rise, at various levels, affects property values in Southeast Florida.[7] Property located in Miami-Dade County will be at risk of damage from severe weather patterns, increased flooding events, and, potentially, saltwater intrusion.[8] Finally, the Task Force also explains the realities of risk management projections in Southeast Florida and the consequences high insurance premiums and non-insurability may have on the area.[9]

Many of these regulations…could arguably result in … a "taking" of private property.

Local government regulations such as those that will inevitably result from the Task Force will seemingly have the most obvious impact on private property rights. The recognized principles to combat sea level rise include placing limitations on future development, where and how buildings are located; possible zoning changes aimed at reducing existing densities or allowable uses; and governing how to rebuild after natural disasters. Many of these regulations, although aimed at protecting the public, could arguably result in a negative impacts on private property rights, impacts to property values, or in the worst case, a "taking" of private property. Changes to land development codes, comprehensive plans, zoning ordinances and other regulatory structures will have numerous intended and unintended consequences on private property rights, property values, title insurance, contracting, construction, and property management.

Other, non-regulatory actions of local governments also impact private property rights. Local governments have the responsibility of providing infrastructure, roadways, drainage, and water. As sea level rise impacts old infrastructure, decisions on where to locate new infrastructure or relocate existing infrastructure will have impacts on private property rights. For example, destruction of a public access roadway resulting from a hurricane or sea level rise could impact a private property owner's ability to access their home. In *Jordan et al. v. St. Johns County*,[10] plaintiffs filed suit alleging St. Johns County failed to adequately maintain Old A1A. The road had deteriorated due to damage from natural forces, including storms and erosion, making access to private property impossible. The Plaintiffs' dwellings were properly permitted by the county and lawfully existing on the tract of Old A1A at issue in this case. The Plaintiffs alleged the county's failure to maintain the road resulted in an inverse condemnation. The Fifth

District Court of Appeal found that where the county has not legally abandoned the roadway, they have a duty to reasonably maintain the existing roadway. This case could have long-reaching implications in relation to sea level rise and climate change as other Florida beachfront communities are faced with deteriorating infrastructure that affects their property.

One thing is clear, local governments must be proactive. While *Jordan et. al. v. St. Johns County* suggests local governments hold some responsibility for maintaining public infrastructure, it is important to remember that local governments also have an overarching obligation to appropriately manage coastal resources through zoning regulations.[11] Specifically, Florida requires local governments abutting the Gulf of Mexico, Atlantic Ocean, and other select waters of the state[12] to include a coastal zone protection element in their comprehensive plan in order to "…restrict development activities where such activities would damage or destroy coastal resources, and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster."[13] While not required, local governments also have the discretion to prepare low-lying coastal areas from the impacts of sea level rise through the adoption of an adaptation action area.[14]

For the real estate practitioner, it is imperative to know what code amendments are being proposed. A local government may reduce allowable uses and increase restrictions so long as four criteria are met: "economically viable" uses must still be allowed; landowners must not be "inordinately burdened"; there must be a valid reason for the change; and legally vested rights must not be denied.[15] Beyond these, a local government has the right, ability, and responsibility to protect the public.

Julia Jennison *is a shareholder in the West Palm Beach office of Lewis, Longman and Walker, P.A. Ms. Jennison's practice focuses on environmental, land use, water resources, sustainability and real estate law. She represents her clients before local, state, and federal agencies on wetland and water supply permitting, Comprehensive Everglades Restoration Plan implementation, real estate and land use and zoning decisions.*

Kristen King Jaiven, Esq*. has a J.D. from St. Thomas University School of Law and is a candidate for her L.L.M. in Environmental Law from Vermont Law School. Kristen's experience includes commercial real estate for American Tower Corporation and environmental enforcement as a clerk for the South Florida Water Management District.*

Endnotes

1 S.E. Florida Regional Climate Compact, *A Region Responds to a Changing Climate, Regional Climate Action Plan,* Oct. 2012, *available at* http://www.southeastfloridaclimatecompact.org//wp-content/uploads/2014/09/regional-climate-action-plan-final-ada-compliant.pdf.

2 Miami-Dade Res. R-599-13 (2013), *available at* http://www.miamidade.gov/govaction/matter.asp?matter=131459&file=false&yearFolder=Y2013 ("Miami-Dade County is composed of a large section of water front property and is a low-lying coastal community at the frontline to experience the impacts of sea level rise"); amended by Miami-Dade Res. R-774-13 (2013) (adding additional member to task force).

3 *Id.*

4 Kerri L. Barsh, *Miami-Dade County Moves Forward with Comprehensive Climate Change Planning Initiatives,* Nat'l L. Rev. Jan. 22, 2015, *available at* http://www.natlawreview.com/article/miami-dade-county-moves-forward-comprehensive-climate-change-planning-initiatives; *see also* Jenny Staletovich, *New plan calls for Miami-Dade mayor to take reins on sea rise,* Miami Herald, Jan. 18, 2013, *available at* http://www.miamiherald.com/news/local/environment/article7442804.html ("The measures will serve as 'marching orders' to increase the county's response to sea rise").

5 *Id.*

6 Miami-Dade Res. R-48-15 (2015), *available at* http://www.miamidade.gov/govaction/matter.asp?matter=150053&file=true&yearFolder=Y2015.

7 Miami-Dade Sea Level Rise Task Force, *Miami-Dade Sea Level Rise Task Force Report and Recommendations*, 67 Jul. 1, 2014, *available at* http://www.miamidade.gov/planning/library/reports/sea-level-rise-report-recommendations.pdf.

8 *Id.* at 9.

9 *Id.* at 10. (Discussing how adaption policies may be able to prevent abandonment due to increased premiums or unavailability of insurance).

10 63 So. 3d 835 (Fla. 5th DCA 2011).

11 § 163.3178 (1) Fla. Stat.

12 § 380.24 Fla. Stat.

13 See, supra note x.

14 § 163.3177(6)(g) (10), Fla. Stat.

15 From February 5, 2015 presentation entitled Planning for Sea Level Rise - Legal Issues Facing Florida, 1000 Friends of Florida; Richard I. Grosso, speaker; materials from the presentation can be found at http://www.1000friendsofflorida.org/communications/past-webinars/.

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Undue Influence – Is Failure to Establish a Presumption Fatal?

Sean M. Lebowitz, Esq., Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A., Boca Raton, Florida



S. Lebowitz

Undue influence, a species of fraud, has been defined as the dethroning of the testator's free agency, and "rendering his act the product of the will of another instead of his own."[1] Rarely practiced in the open, undue influence can be very difficult to prove by direct evidence.[2] Instead, Florida courts have developed specific procedures to substantiate a rebuttable presumption of undue influence without the necessity of direct proof.[3] A rebuttable presumption is typically an evidentiary tool which acts to shift the burden of proof. Some courts have, however, ruled that without establishing a rebuttable presumption of undue influence, it not only fails to shift the burden of proof, it also means the cause of action must fail as a matter of law.[4]

The preeminent case under Florida law concerning undue influence is the Florida Supreme Court's decision in *In re Carpenter*.[5] Under *Carpenter*, a party can establish a rebuttable presumption of undue influence by demonstrating that the opposition "(1) was a substantial beneficiary (2) who occupied a confidential relationship and (3) was active in procuring the will and trust."[6] In order to substantiate prong number (3), active procurement, courts consider the following factors: (a) presence of the beneficiary at the execution of the will; (b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to execution.[7] While establishing all factors is not required, establishing only one of the factors will typically not support the prong of active procurement.[8] For example, in *Raimi v. Furlong*,[9] although the contestant was able to show that the purported undue influencer was present when the decedent expressed a desire to create a new testamentary document, the court held that satisfying this one prong alone did not establish active procurement.[10]

Once a presumption is established, the proponent of the testamentary instrument has the burden of proving that there was no undue influence by a preponderance of the evidence.[11] If a rebuttable presumption of undue influence cannot be proven, Florida law lacks clarity on whether a contestant can still prevail. However, it is universally agreed that without a presumption of undue influence, it is very difficult for a contestant to prevail.[12]

In *Rand v. Giller*, the Third District Court of Appeal (the "3d DCA") affirmed a trial court's summary judgment finding that an attorney's action of naming himself as a fiduciary did not amount to undue influence.[13] The 3d DCA stated that the attorney's act of naming himself as a fiduciary did not make him a substantial beneficiary under the will, and a presumption of undue influence therefore did not arise. Affirming the dismissal via summary judgment, the 3d DCA viewed having a presumption of undue influence as a requirement for the cause of action rather than a shifting of the burden of proof.

Like *Rand v. Giller,* the Fourth District Court of Appeal (the "4th DCA") in *Davis v. Foulkrod* has stated that without a presumption of undue influence, a court should find against the contestant as a matter of law.[14] The 4th DCA reversed a judgment in favor of a contestant alleging undue influence of joint survivorship accounts.[15] The lower court determined that there was undue influence in the creation of joint survivorship accounts, and therefore required the assets to be part of the probate estate. On appeal, the 4th DCA reversed the lower court, holding that the alleged undue influencer did not actively procure the accounts. In finding that the contestant failed to establish a presumption of undue influence, the 4th DCA determined that the issue "should be decided as a matter of law" against the contestant.[16]

Several years after *Davis v. Foulkrod,* the 4th DCA once again ruled on the issue of undue influence in *Newman v. Brecher.*[17] In this case, the contestants claimed that parties committed undue influence over their aunt when she executed her trust instrument. The trial court granted a motion for directed verdict finding the evidence insufficient to establish a prima facie case for undue influence. The 4th DCA affirmed, stating that the directed verdict was "properly entered" because the contestants failed to establish active procurement. Although the 4th DCA may have affirmed the directed verdict due to the lack of evidence supporting undue influence, the opinion as written supports the *Davis v. Foulkrod* decision that a presumption of undue influence is a necessary finding to prove undue influence.

These three decisions lead to the conclusion that an attorney who is named as a fiduciary in a testamentary instrument cannot be found to have unduly influenced a decedent because the required prong of "substantial beneficiary" is missing.[18] Likewise, an individual who may have been instrumental in procuring a testamentary instrument

may not cause the document to be invalid simply because that individual is not a substantial beneficiary.

These conclusions appear inconsistent with the Restatement (Third) of Property (Wills & Don. Trans) which provides, in part, that an instrument "is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."[19] The Restatement further examines a presumption of undue influence but simply relates it to the burden of proof and not to elements of the cause of action.[20] It may also be argued that the three appellate decisions conflict with the Florida Supreme Court's holding in *In re Ates' Estate*.[21] Although *Ates' Estate* predates the *Carpenter* decision and the rebuttable presumption analysis, it has been advocated that the ruling supports the ability to find undue influence solely through direct evidence.[22] Nonetheless, clarity of this issue would assist probate litigators confronting the most frequent legal basis for revocation of testamentary documents, undue influence.[23]

Endnotes

1 *Peacock v. Du Bois*, 105 So. 2d 321, 322 (Fla. 1925); see also *In re Starr's Estate*, 170 So.2d 620, 623 (Fla. 1936) (The effect of the undue influence must be so that "it cannot be said that the testator was acting voluntarily, of his or her own free will and volition.").

2 See Practice Under Florida Probate Code, Rohan Kelley, PPC FL-CLE 21-1 (2012) ("Undue influence, as a species of fraud, is rarely practiced when independent disinterested witnesses have the opportunity to observe. It is a dark and nefarious activity that occurs in the shadows. The direct proof of undue influence, therefore, becomes extremely difficult and is often impossible.").

3 Florida law provides a contestant the ability to utilize a rebuttable presumption of undue influence rather than attempting to prove direct undue influence. §733.107, Fla. Stat. provides as follows: "In any transaction or event to which the presumption of undue influence applies, the presumption implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304."

4 See infra notes 13, 14, and 17.

5 *In re Estate of Carpenter*, 253 So.2d 697, 701 (Fla.1971).

6 *Id.*

7 *Id.*

8 *Raimi v. Furlong*, 702 So.2d 1273 (Fla. 3d DCA 1997).

9 *Id.*

10 *Id.* at 1288.

11 See, e.g., *Hack v. Janes*, 878 So. 2d 440, 443 (Fla. 5th DCA 2004).

12 See Practice Under Florida Probate Code, Rohan Kelley, PPC FL-CLE 21-1 (2012) ("The direct proof of undue influence, therefore, becomes extremely difficult and is often impossible.).

13 *Rand v. Giller*, 489 So. 2d 796, 798 (Fla. 3d DCA 1986).

14 If a moving party cannot establish "a presumption of undue influence, there is nothing for the [defending] party to rebut and the issue should be decided as a matter of law against the proponent of the undue influence claim." *Davis v. Foulkrod*, 642 So. 2d 1129, 1134 (Fla. 4th DCA 1994). *Buscher v. Kastrenakes* may also support this legal analysis, but because the appellate opinion is very short, it is not entirely clear. 575 So. 2d 227 (Fla. 3d DCA 1991) (affirming an involuntary dismissal because "the presumption of undue influence did not arise because the 'substantial beneficiary' portion of the *Carpenter* test was not satisfied.").

15 *Davis*, 642 So. 2d at 1134.

16 *Id.*

17 887 So. 2d 384 (Fla. 4th DCA 2004).

18 Florida law provides that a named fiduciary is not a substantial beneficiary as to give a rise to a presumption of undue influence. *Zinnser v. Gregory*, 77 So. 2d 611, 614 (Fla. 1955) ("We cannot agree, however, that an attorney who is neither legatee nor devisee, but is named as executor in a will drafted by him for his client, has such a beneficial interest in the estate as to give rise to the presumption of undue influence on his part.")

19 Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 (2003); see also J. Richard Caskey, *Alleging Undue Influence: Maybe You Don't Have To Be So Presumptuous*, Actionline, Spring 2010 ("There is no doubt that tackling an undue influence case without the benefit of the presumption would be an arduous task. However, practitioners should at least be aware of the possibility.").

20 The Restatement specifically provides as follows: The burden of establishing undue influence, duress, or fraud (referred to herein as the "wrong") is on the party contesting the validity of a donative transfer. In some circumstances, the contestant's case may be aided by a presumption of invalidity. Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 (2003).

21 *In re Ates' Estate*, 60 So. 2d 275 (Fla. 1952).

22 See, e.g., J. Richard Caskey, *Alleging Undue Influence: Maybe You Don't Have To Be So Presumptuous*, Actionline, Spring 2010 ("If *Ates* is to serve as a road map, it appears a party might be able to prevail on an undue influence claim based solely upon isolation of and misrepresentations to the decedent, without first establishing any presumption of undue influence. If a party can prove, through other evidence, facts that establish influence to such a degree that the object of the influence did not act of his or her own free agency, then it might be unnecessary to establish, for example, the alleged influencer's active procurement of the instrument in question.")

23 See Practice Under Florida Probate Code, Rohan Kelley, PPC FL-CLE 21-1 (2012).

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RPPTL Section Executive Council Meeting Naples Grande Beach Resort, Naples, Florida

November 13-November 16, 2014

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

The fall meeting of the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar was held November 13 through November 16 at the Naples Grande Beach Resort in Naples, Florida.

The Naples Grande, located adjacent to the Gulf of Mexico, provided 3 miles of powdery white sand beach for the attendees to stroll or to jog on as well as an open air tram ride through a 200-acre protected Mangrove Estuary providing access to that beach.

As is always the case, the committee meetings kicked off by noon on Thursday and continued throughout the afternoon. The social event on Thursday evening was a reception at the Collier Auto Collection located at The Revs Institute. Docents were available to take people on tours and explain each gallery. The reptiles attending were transported to and from the reception by buses. As our Chair Mike Dribin said in his letter, "…this is a fascinating facility tailored not only for the expert, but for the less-informed auto enthusiast." The reception included heavy hors d'oeuvres and tasty libations. The hospitality suite was open for desserts, more libations and good company until after 11:00 p.m.

Friday morning started out bright and early at 6:30 a.m. with a meeting of the Running Reptiles in the lobby led by Mike Bedke. Friday again was full of meetings until 6:00 p.m. The Real Property Division and the Probate and Trust Law Division Roundtables meetings were held later Friday afternoon. The minutes from those meetings are found in this issue of ActionLine.

Due to the fact that the National College of Probate Judges were also conducting their fall meetings at the Grande at the same time as the Executive Council Meeting, the Executive Council members were entitled to sit in on the educational portions of the National College's meetings and some of the judges were able to attend some of the committee meetings. What a great opportunity for everyone to "cross pollinate" with the judiciary.

The Friday evening reception at the hotel was in conjunction with the National College of Probate Judges. This gave the Section members an opportunity to meet in an informal setting with these very distinguished jurists.

Following a reception Friday evening with members of the judicial college, a dinner was held at the hotel with lots of sumptuous food and wine. Of course the hospitality suite was open after dinner was concluded.

For those intrepid Running Reptiles, Saturday morning at 6:00 a.m. was the time for everyone to meet in the hotel lobby for another jog.

The Executive Council meeting took place at 9:00 a.m. Saturday morning after a full breakfast for all Executive Council members. The minutes of the meeting will be posted on the RPPTL website. This meeting was extra special because it included a remembrance of John Arthur Jones.

After the conclusion of the Executive Council meeting, the reptiles were free to enjoy the many beautiful amenities at the Naples Grande Beach Resort.

Saturday evening was a dinner at M Waterfront Grille located a few minutes away from the Grande. Since it was within walking distance everyone met in the lobby and embarked from there.

As you can see, this was an outstanding weekend especially with the opportunity to meet with the probate judges.

Upcoming meetings of the Executive Council are March at the Ritz Carlton Grande Lakes in Orlando, June at the Fontainebleau in Miami Beach and July at The Breakers. Everyone on the ActionLine staff hopes that you can join us for these educational and fun meetings. If a meeting is in your area you are always invited to attend any committee that "piques" your interest.



RPPTL Section Executive Council Meeting
Naples Grande Beach Resort, Naples, Florida

November 13-November 16, 2014



Steven Goodall, Mary Ann Obos, Pam Nelson, and holding the registration sign, Andrea Okkerse, meeting and greeting Section members



Diana Zeydel and Sandy Diamond catching up before dinner



Jennifer Grosso, Sean Lebowitz and Erin Christy at the hospitality suite



Scott Stone, Audrey Singleton with Adele Stone, Laird Lyle and Jesse Diner sharing good times at the pre-dinner reception



Ted Kypreos giving a presentation at the Probate & Trust Litigation Committee meeting



Mike Bedke, Jim Russick, Dana Grutchfield, Anne Pollack and Bob Graham reminiscing on the day's events at the hospitality suite



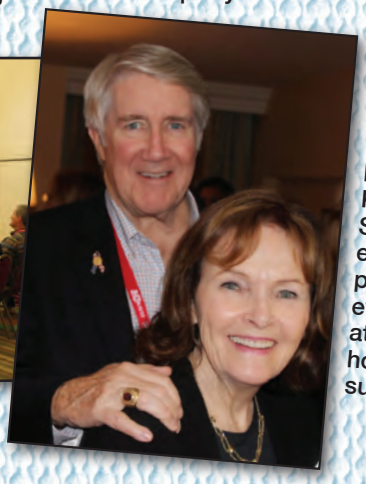
Susan Spurgeon at the podium during the Real Property Division Roundtable



Chip Waller expressing his opinion at the Problems Study Committee meeting



Title Insurance Committee meeting, attentively listening to Jim Russick



Mike and Kathy Stafford enjoying a pleasant evening at the hospitality suite



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

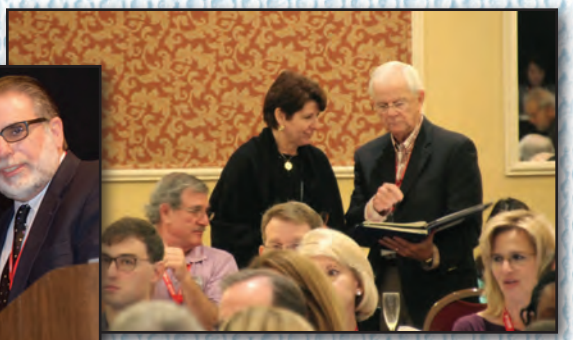
ReptilesRun/Walk Club runners line up ready for the 6:00 o'clock in the morning run



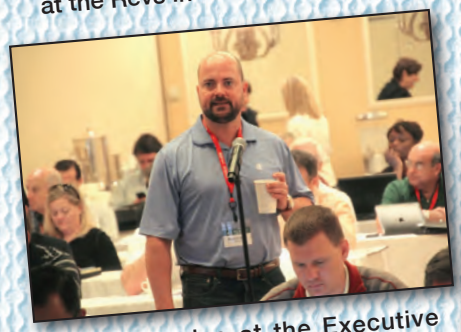
Many choices of heavy hors d'oeuvres at the Revs Institute



Mike Dribin with John Arthur Jones' daughter, Darby and & grandson, Charles, during presentation of the plaque commemorating John Arthur Jones' impressive history



Past Chair, Peggy Rolando, reviewing issues with Pete Dunbar at Executive Council meeting



Robert Swaine at the Executive Council Meeting giving his report



Marina Nice and husband, Craig Carter, savoring the delicious hors d'oeuvres



John and Kathy Neukamm with Salome Zakakis learning all about the Collier Auto Collection at The Revs Institute



Ed Koren, one of several speakers on John Arthur Jones' many contributions to enhancing the practice of Florida attorneys

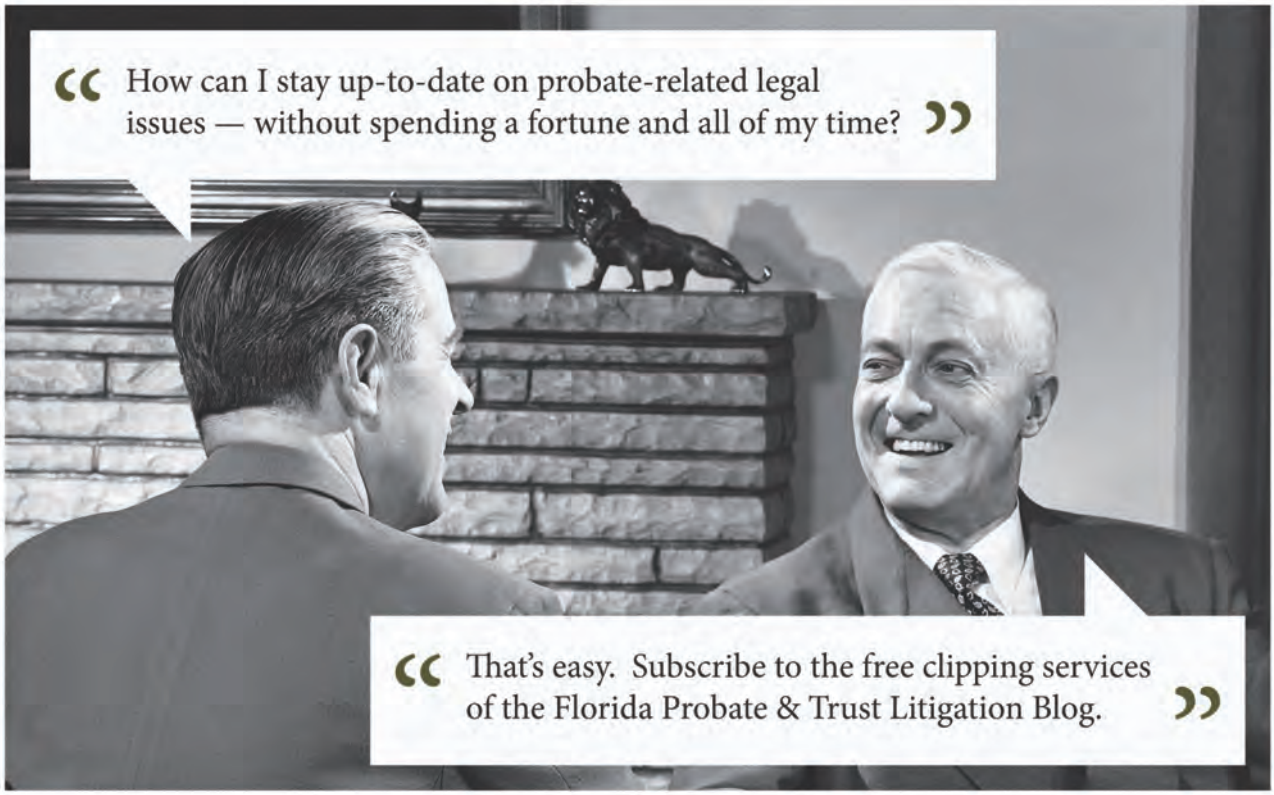


Early riser Club members caught on the run

Photos by Michael Gelfand, John Neukamm and Silvia Rojas

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By
Juan C. Antúnez
ATTORNEY AT LAW

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Roundtables

Friday, November 14, 2014
Naples Grand Resort
Naples, Florida

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

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

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

Thank you to the Roundtable Sponsor, Fidelity National Title Group

The meeting was called to order by Division Director Drew O'Malley at 3:08 pm.

Sponsor Announcement. The Division Director thanked the sponsor Fidelity National Title Group. Snacks and candy were offered compliments of the sponsor.

Recognition - The Division Director welcomed all new members of the Executive Council to the "warm and cuddly RPPTL division." The Division Director recognized Annabella Barboza from the law firm of Phelan Hallinan PLC in Ft. Lauderdale, Jonathan G. Sieg, a law student at the University of Florida Levin College of Law, and Mishele Schutz, an underwriting counsel at Attorneys' Title Fund Services.

Action Items

Condominium & Planned Development Committee - Steve Mezer, Chair: Amendments to F.S. § 718.117 (condominium termination) were discussed. Steve explained the background and history of the condominium termination statute including changes in 2006. Some recent litigation has raised the issue of retroactive application of the statute. The Committee has now prepared amendments including several consumer protection provisions to deal with the problems raised in the litigation. These include provisions such as: homestead property may be rented for one year after termination if the owner is current in assessments; rental property may receive 120% of assessed value; and the Division of Condominiums may review proposed terminations to confirm proper implementation. Marty Schwartz also reported on proposed revisions intended as safeguards for consumers including: methodology to amend the termination plan and to stop the termination; allowances for correction of scrivener's errors; allowances for deduction of owner arrearage owed to the Association to be deducted from proceeds; and modifications to documentary stamp requirements to avoid double taxation. Support for the proposed amendments had been approved

See "Real Property Division," next page

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 3:05 p.m. on Friday, November 14, 2014.

Sponsor Announcement. The Division Director thanked the sponsors Stout Risius Ross, Inc. and BMO Harris Bank.

Recognition - The Division Director welcomed all in attendance and introduced Representative Elaine Schwartz who was present.

Actions Items

Estate & Trust Tax Planning Committee - Elaine M. Bucher, Chair: Rick Gans discussed proposed amendments to F.S. §§710.105, 710.111 and 710.123 that would grant the transferor of assets to a Uniform Transfer to Minors Act ("UTMA") account the option, in certain circumstances, to use custodianships that do not terminate until the beneficiary attains the age of 25, rather than the current age of 21. Transferors would thus benefit from the statutory protections of UTMA for college-aged beneficiaries without the expense and complexity of formal trust arrangements. Rick reported that numerous other states have already made this change. Rick also stated that the amendments contain notice procedures that are intended to qualify gifts to an UTMA account that terminates at age 25 for the federal gift tax annual exclusion. The proposed amendments would be effective for custodianships created on or after the effective date of the statute. This action item was passed at the Executive Council which followed the Roundtable meeting.

Committee Reports

Ad Hoc Study Committee on Estate Planning Conflict of Interest - Bill Hennessey, Chair: Bill Hennessey reported that the Committee's proposal regarding necessary disclosures when an attorney is serving as a fiduciary was

See "Probate & Trust Division," next page

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REAL PROPERTY DIVISION

unanimously by the Condominium & Planned Development Committee and the Roundtable also approved support for the proposed amendments.

Real Property Problems Study Committee - William Theodore Conner, Chair / Title Insurance & Title Insurance Liaison Committee - Raul Perez Ballaga, Chair: The Division Director discussed an urgent issue that had been raised less than two weeks ago. He commended those who had been working diligently on this issue in this short time period including Brian Hoffman and Ashley McRae. The Section was requested to provide an amicus brief on a question the U.S. Court of Appeals for the Federal Circuit (Case No. 2013-5098-5102) certified to the Florida Supreme Court (Case No. SC14-1465). Brian reported that the case relates to a "Rails to Trails" taking issue, a scenario where the individual property owner deeded the land to the railroad after certain railroad tracks were laid. The issue is whether the deed conveyed an easement or a fee simple title. Brian stated that the Section was not addressing the eminent domain issue but addressing two other issues to help ensure that the Court does not set bad precedent by supporting the Appellant's position regarding parole evidence and consideration. The Appellant has argued that words in the legal description like "across, over, through" create an easement and that parole evidence can be used to confirm this. The Section will focus on parole evidence only being admissible when the deed is ambiguous. Appellant also argues that because the consideration referenced in the deed was $10, parole evidence is not admissible to prove otherwise and obviously the grantor meant to convey an easement because no one would sell land for such little consideration. The Section is opposing this position as well. A Motion was approved unanimously by the Roundtable members present to proceed with the amicus brief on these two issues and to give the Executive Council authority to approve further issues that may be disclosed in discussions by the amicus committee.

Information Items

Real Property Litigation Committee - Susan K. Spurgeon, Chair: Susan reported on possible revisions to the Florida Evidence Code concerning requirements for filing certified copies of documents as those relate to the authentication of electronic and scanned copies. A process is needed to authenticate electronic records from government and court websites. Jason Ellison and Ashley McRae are addressing this issue. Susan requested assistance with this proposal which the Committee would like to present to the legislature for 2016. Susan also reported on a joint committee comprised of members of the Real Property Litigation Committee and Real Property Finance & Lending Committee. They are working on legislation to make

See "Real Property Division," next page

PROBATE & TRUST DIVISION

passed at the last Executive Council meeting. It is now in the "legislative hopper" for the upcoming session.

Asset Protection – Brian Sparks, Chair: Brian Sparks reported that the Committee held its joint CLE program with the Estate and Trust Tax Planning Committee and had over 90 attendees. Brian thanked Keith Kromash and Rob Lancaster for co-chairing the CLE program. Brian also reported that the Committee had an in-depth discussion about the Uniform Voidable Transactions Act and has significant concerns with the comments to the Act, which the Committee feels reflect the interests of parties who are anti-asset protection. Brian reported that the Committee's response to the Uniform Act will be coordinated with the Florida Bar Business Law Section, and the Committee would like to have a say in the proposed Uniform Act before it is adopted.

Digital Assets and Information Study – Eric Virgil, Chair: Dresden Brunner reported that the proposed Florida Fiduciary Access to Digital Assets Act now has a sponsor in the Florida Senate, Sen. Dorothy Hukill. Dresden stated that the Committee approved changes to the Florida Act to conform it to the final version of the Uniform Act.

Elective Share Review - Lauren Detzel and Charlie Nash, Co-Chairs: Shane Kelley reported that the Committee is considering a proposal that would include the value of the surviving spouse's homestead interest in the elective share calculation, which would reduce the elective share amount. Shane said that he would like input regarding whether a life estate, as well as a 50% tenant-in-common interest resulting from an election under F.S. § 732.401, should count towards the elective share amount. Charlie Nash suggested codifying a procedure for determining the value of a life estate. The Roundtable attendees voted overwhelmingly for the Committee to continue looking at the possibility of including the value of homestead property (regardless of how it is devised) in the elective share calculation.

Estate & Trust Tax Planning – Elaine Bucher, Chair: Elaine Bucher reported that the Tenancy by the Entireties Subcommittee (Tae Kelley Bronner, Debra Boje, Angela Adams and Rick Gans) is close to finalizing its proposal to eliminate the need for the unity of time and the use of a "strawman" to create a tenancy by the entirety in personal property. Elaine expects that the proposal will be voted on by the Committee at the March meeting in Orlando, and will be an Action Item at the June meeting in Miami Beach. The Subcommittee intends to reach out to contacts in ACTEC and the ABA for comments. Elaine concluded her report by stating that the Family Trust Company "glitch bill" is part of the Section's 2015 legislative package.

Guardianship & Powers of Attorney – Hung Nguyen, Chair: Hung Nguyen reported that the Committee should

See "Probate & Trust Division," next page

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LITIGATION



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REAL PROPERTY DIVISION

two changes to F.S. § 95.281: (1) to change the name from "limitations" to "statute of repose" and (2) to remove subsection (1)(c) which limits the time a mortgagee can recover past due payments to five years.

Residential Real Estate & Industry Liaison (RREIL) Committee - Salome J. Zikakis, Chair: Salome reported on the formation of a task force in combination with the Commercial Real Estate Committee and the Title Insurance & Industry Liaison Committee to review the impact of the ALTA Best Practices Program on attorney settlement agents, both residential and commercial. The goal is to keep Section members informed and address potential problems. Salome also reported that the Committee has created a task force to educate Section members on ALTA best practices.

Upcoming Issues

Development and Land Use Planning Committee - Vinette Dawn Godelia, Co-Chair: Vinette reported on an effort to deal with issues raised in the Tobin case (Fla. Bar Case No. 70,451B) concerning contact by attorneys with government staff. There is a proposed change to Florida Bar Rule 4-4.2 to deal with those issues. As proposed, the Rule creates two classes of people. The first class is composed of those who utilize the services of a lawyer and the second class is composed of those who advocate for themselves or hire a lobbyist, engineer or someone who is not a lawyer. The proposed requirements for a lawyer under the Rule are much more cumbersome than those proposed for a non-lawyer. This Committee and the Professionalism and Ethics Committee drafted a White Paper and prepared a letter from the Section which was sent to the Bar opposing the proposed changes.

Committee Reports

Construction Law - Hardy Roberts, Chair: The Committee now has 615 members with many subcommittees including 4 new subcommittees. Construction law CLEs are now offered on iTunes and the Committee's website.

Insurance and Surety - William Cary Wright, Chair: The Committee is focusing on cyber security and data breaches. They plan to provide a monthly seminar on insurability (risks to law firms) for Committee members and eventually hope to offer this information to the Section.

Legal Opinions - Kenneth E. Thornton, Chair: David Brittain reported that the Committee is focusing on issuing a first supplement to the 2011 Legal Opinions Report. This supplement is being reviewed with the Business Law Section and is expected to be completed in the next 3-6 months. Of the 15,000 copies of the 2011 Legal Opinions Report that were printed only about 2,000 remain.

See "Real Property Division," next page

PROBATE & TRUST DIVISION

have a White Paper to present at the next meeting regarding *Shen v. Parkes*, 100 So. 3d 1189 (Fla. 4th DCA 2012), and the issue of hearsay exceptions in guardianship proceedings. Hung stated that subcommittees have been formed to study the following issues: (1) how to address the issue of a ward who wishes to divorce his or her spouse (currently the non-incapacitated spouse must consent); (2) whether to increase the $6,000 limit for funeral expenses that a guardian may pay from the ward's estate pursuant to F.S. § 744.441(16); and (3) whether Baker Act records are confidential. Hung also reported that the Committee continues to work on changes to the Health Care Advance Directives statutes (Chapter 765). Finally, Hung reported that Representative Kathleen Passidomo has put together a Task Force to work on fixes to the Guardianship Code in order to address concerns expressed by her constituency. Debbie Goodall, Debra Boje, Bill Hennessey, Pete Dunbar, Martha Edenfield, Ellen Morris and Sharon Miller, as well as representatives from the Clerk of Courts and the Elder Law Section, are working with the Task Force.

IRA, Insurance and Employee Benefits – Howard Payne and Lester Law, Co-Chairs: Howard Payne reported that Carlos Rodriguez gave a presentation at the Committee meeting on recent IRA and Employee Benefits rulings and cases, including two cases pending in the Eighth Circuit and Tenth Circuit regarding the misuse of self-directed IRA funds. Carlos also discussed the Tax Court decision in *Bohner v. Commissioner*, 143 TC No. 11 (2014), where the court ruled that a federal employee's attempt to rollover funds from an IRA to his federal retirement plan was invalid because the federal retirement plan did not permit rollovers from IRAs. Finally, Howard reported that Randy Ellington led a discussion of the various types of life insurance policies and his recommendations regarding when certain policies should be used.

Probate & Trust Litigation – Tom Karr, Chair: Tom Karr reported that the Committee is very close to finalizing the proposed amendments to F.S. § 736.0802(10) regarding the award of attorneys' fees in trust litigation cases. The Committee hopes to vote on the final proposal at the next meeting in Orlando, and then present it as an Action Item at the June meeting in Miami Beach. Tom also reported that the Committee continues to work on the "lost or destroyed wills" project and that the Committee voted in favor of including an unsigned copy of a Will in the definition of a "correct copy" under F.S. § 733.207(2). A subcommittee will now study what restrictions, if any, should be included in the "correct copy" definition. The Committee is also studying the issue of expanding the standing provision under Chapter 415 (which provides a civil cause of action for exploitation of a vulnerable adult) to mirror the standing provision in the Florida Power of Attorney Act (Chapter 709).

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

Real Estate Structures And Taxation - Wilhelmina Fettrow Kightlinger, Chair: This is a new committee and it meets the second Tuesday of every month. The Committee has approved a documentary stamp proposal to make transfers between married couples the same as divorcing couples and not be subject to documentary stamps.

Residential Real Estate & Industry Liaison (RREIL) - Salome J. Zikakis, Chair: Salome reported that the FR/BAR 2014 contracts are on the Committee's webpage. The Committee is also looking into providing guidance on engagement letters for residential real estate transactions.

Committee Goals/Administration

Publications - ActionLine / Florida Bar Journal: The Division Director, Drew O'Malley, and Silvia Rojas, Editor-in-Chief of ActionLine, both requested greater participation by committees in promoting the writing of articles for publication in ActionLIne. Articles in all areas of interest to Section members are welcomed. The deadline for the summer edition is April 30, 2015. David Brittain also reported on the request for articles for the Florida Bar Journal. David has received some articles from the Probate and Trust Division but seeks more participation from the Real Property Division. David cited to several interesting topics that have been raised during the Executive Council meeting that would make good articles.

Succession Planning / Annual Reports: The Division Director reminded everyone that the report is due from each committee by December 15th. He reminded all that the report is quite important and can be used as an opportunity for succession planning and as an evaluation of the past year.

Committee Websites: The Division Director asked all committees to update their web pages and to appoint a web liaison.

Legislation: Rob Freedman reported on the legislative process. All proposed legislation must be reviewed in three separate meetings. First, approval for support of the legislation is at the committee meeting of the committee or committees charged with review of the particular bill. The second approval is at the Roundtable for the appropriate Division. The final approval for support of the legislation is at the Executive Council meeting. Rob reminded everyone that all proposed legislation must be approved by the Breakers meeting which means any 2016 legislative proposals must have completed the process by July.

Rob thanked all committees who have designated a legislative liaison for the upcoming session. Rob advised that Pete Dunbar may send emails to the appropriate committee or committees in charge of a particular bill and request a quick turnaround response. Comments from the legislative liaison of the committee on proposed legislation

See "Real Property Division," next page

PROBATE & TRUST DIVISION

Probate Law & Procedure – John Moran, Chair: John Moran reported that the proposal from the *Saunders v. Saunders* Subcommittee, led by Patrick Mize, was approved by the Committee. The proposal confirms that Florida law governs the validity and effect of the disposition of Florida real property, whether owned by a domiciliary or a nondomiciliary and regardless of any directive in a will. John anticipates that this proposal will be an Action Item at the Orlando meeting in March. On the Holographic Wills and Harmless Error project, John reported that the Committee voted not to allow holographic wills in Florida, but to consider a change to allow valid holographic wills from other states to be afforded full faith and credit in Florida. Finally, John reported that subcommittees will be formed to study the issues of how to handle "orphan wills" (i.e., old wills deposited with the Clerks of Court), as well as whether coins and bullion constitute tangible personal property (subject to devise by a tangible personal property clause or a separate writing) or intangible property (subject to devise by a residuary clause).

Trust Law – Angela Adams, Chair: Angela Adams reported that the Committee discussed the electronic delivery of trust accountings and whether a separate limitations notice should be sent if an electronic accounting is provided or if the limitations notice should only be required on the first page of the accounting. Once this issue is resolved, the Committee should be able to work on a legislative proposal. Angela also reported that the Committee agreed that the Attorney General for the State of Florida is the only person that needs to receive formal notice for actions regarding charitable trusts. The Committee is now looking at whether the Attorney General must be joined in such an action or just receive notice. Finally, Angela reported that Mary Karr made a presentation to the Committee on the issue of compensation for multiple trustees. The Committee consensus was that Florida law should follow the Restatement (Third) of Trusts so that each co-trustee is entitled to reasonable compensation and so that aggregate compensation can exceed what would be reasonable compensation for a single trustee. Angela reported that the Committee will consider a proposed amendment to F.S. §736.0708 in order to incorporate the approach decided on by the Committee.

Wills, Trusts & Estates Certification Review Course – Rick Gans, Chair: The Wills, Trusts & Estates Certification Review Course will be held on April 10 and 11, 2015 at the Orlando Airport Hyatt. This will be Prof. David Powell's 30th and last time speaking at the program. Tasha Dickinson reported that there were 23 applicants this year for Certification.

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

should be succinct, explain the reason for the comments, provide suggestions for making the legislation better, and use bullet points if possible.

PROBATE & TRUST DIVISION

General Business

The Division Director reminded the chairs of subcommittees and ad hoc committees to keep proposed legislation progressing by having teleconferences to discuss the legislation in-between Section meetings. The Section Administrator, Mary Ann Obos, can arrange call-in information for any subcommittees or ad hoc committees that wish to have teleconferences. The Division Director encouraged the chairs to not wait until the Section meeting at the Breakers to have proposed legislation presented and voted upon.

The Division Director reported that Sandy Diamond and Jerry Aron will be discussing a new conflict of interest policy for the Section at the Executive Council meeting. This will be an Information Item presented on behalf of the Integrity Awareness and Coordination Committee

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Spotlight on the Digital Assets and Information Study Committee

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



E. Virgil

The Digital Assets and Information Study Committee was created by the Probate Division of the RPPTL in 2012. The mission of the Committee is to study and identify issues and problems encountered by Florida fiduciaries associated with access to, and the disposition of, digital assets and information. The Committee also analyzes existing Florida law relating to digital assets in its efforts to identify problems and provide solutions.

The Committee began when Travis Hayes, current Co-Vice Chair, provided a presentation to the Section membership concerning the lack of any legal guidance for fiduciary access to digital assets. Eric Virgil agreed to lead the Committee. The Committee found that the number of digital assets held by the average person was rapidly increasing and that questions about the disposition of these assets upon an individual's death or incapacity would become more and more common. Thus, the Committee assembled under the guidance of Eric and Travis to address this void.

The Committee drafted a bill entitled the Florida Fiduciary Access to Digital Assets Act (FFADAA). The Committee was aided in its drafting process by the ongoing efforts of the National Conference of Commissioners on Uniform State Laws to develop a Uniform Fiduciary Access to Digital Assets Act. The Committee reviewed the drafting efforts relating to the proposed uniform act that ultimately resulted in the July 2014 Uniform Fiduciary Access to Digital Assets Act. The Uniform Act, and the Committee's detailed review of relevant Florida law, led to the drafting of digital assets legislation appropriate to the state of Florida, which was presented to the Florida Legislature for its 2015 session.

The proposed legislation creates Chapter 740 and draws from other Chapters of the Florida Statutes, such as 709, 731 and 744 for definitions. This approach to drafting assures that the new law will work well with existing laws.

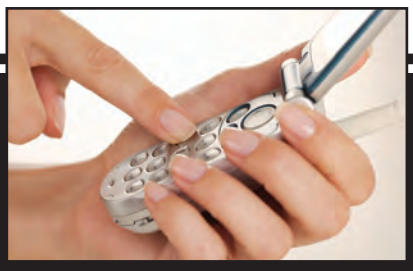
The Committee also prepared a 17 page white paper to explain and support the proposed legislation. The proposed legislation was approved by the Probate & Trust Division and by the Executive Council. A legislative sponsor was secured and the proposal became Senate Bill 102 for the 2015 legislature.

The concept of the Committee was to have a small group that could work quickly and respond to the ongoing Uniform Act drafting process. The group included lawyers from private practice, attorneys employed by corporate fiduciaries, and a representative of the Uniform Act committee. The group also included attorneys who represent all four relevant fiduciaries (personal representatives, trustees, guardians, and agents under durable powers of attorney) affected by the legislation. The Committee specifically targeted some younger lawyers for inclusion, understanding that technology is more the language of the younger generation.

The next project of the Committee is to develop CLE programs on how to understand and apply the FFADAA. Even if the FFADAA is not enacted, however, the Committee will prepare a CLE to educate lawyers on how to help their clients plan and manage their digital lives.

The Committee, in its very thoughtful white paper drafted by Co-Vice Chair, Dresden Brunner, emphasized that the goal of the FFADAA is to remove barriers to a fiduciary's access to electronic records and that the federal and state substantive rules of fiduciary, probate, trust, banking, securities, and agency law remain unaffected by FFADAA.

The Committee holds meetings in conjunction with each Executive Council Meeting. You are invited to attend the Digital Asset and Information Study Committee and become involved in the discussion about access to digital assets.



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Give Me Shelter: The Ethics of Out-of-State Lawyering

By Gary M. Kaleita, Alexander Dobrev, and Adam R. Lewis, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, Florida

Many Florida real estate lawyers have no doubt dealt with out-of-state clients and attorneys that are involved in buying and selling real property located in Florida. Moreover, in the contemporary legal milieu, using out-of-state real property as collateral for a loan is an increasingly common practice. As such, real property located in Florida may be used as collateral for loans that otherwise may have little connection to the state of Florida. Given that Florida is a haven for real estate investment (e.g. condominiums, timeshare and seasonal homes), out-of-state investors routinely buy and sell Florida real property, and their out-of-state attorneys often represent them in these transactions. Of course, whether via investing or estate planning, Florida attorneys also represent clients in transactions that involve out-of-state property.

In these scenarios, many (if not most) out-of-state attorneys choose to engage local counsel. However, there have been and continue to be times when local counsel is not engaged. This can leave the client exposed to liabilities stemming from the potential differences in law of which the attorney might have been unaware. In such cases, several considerations arise. First – is this practice ethical, and might the attorney be subject to disciplinary action; and second – is this a practice that places the client at risk and might the attorney be subject to a malpractice claim?

With regard to the ethics issue, one must first consider the Florida Rules of Professional Conduct. Rule 4-5.5 stipulates that, "a lawyer shall not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so."[1] Similarly, one who is not admitted to practice in Florida may not establish an office for the practice of law or hold out to the public that they are admitted to practice in Florida. What constitutes the practice of law has undergone some discussion, but in *The Florida Bar v. Sperry*,[2] the Florida Supreme Court stated that, "[if engaged in] the giving of advice and performance of services [that] affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law."

In the scenarios posed above, there is little dispute as to whether the behavior constitutes the practice of law, but rather whether the practice may be considered *unauthorized* or having taken place *in the state*. A foreign attorney dealing with Florida property has likely not stepped foot on Florida soil, but nonetheless is drafting documents that concern Florida property and Florida law. The same is true of the Florida attorney who deals with out-of-state property. Even so, unauthorized practice of law (UPL) statutes are often reserved for non-lawyers actually located within the state that threaten the integrity of the profession. However, this is not definitive. When applying the UPL standards, the Florida Supreme Court has stated that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation."[3] Accordingly, if any particular representation threatens the public in this manner, the Florida Bar may see fit to intervene.

Lawyers licensed to practice in other states may, however, provide legal services in Florida if those services are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice, or if those services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is authorized to practice. For the reasons indicated below, preparing loan documents in another state and using Florida property as collateral would likely fall into this category (assuming that preparing such documents that touch and concern Florida property would not violate the unauthorized practice of law rule in the first place, which is unclear). After all, the attorney in this scenario has only practiced law in his or her own state, and has prepared documents that are likely governed by the laws of that state. It may be considered a mere ancillary concern that Florida law might apply to the creation, perfection and enforcement of a security interest in collateral here. Note, however, that there are specific documents that non-lawyers (which term would include lawyers licensed in other jurisdictions[4]) are forbidden from preparing, as such preparation would constitute the unauthorized practice of law. These include deeds, land trusts, leases, mortgages and other liens.[5] If the out-of-state attorney is prudent, he or she should consult with a Florida attorney regarding such documents.

There are still some questions as to whether preparation by an out-of-state attorney of a contract that affects Florida property constitutes the unauthorized practice of Florida law. It might be useful to consider what state's law would govern such a contract in order to shed light on the jurisdiction in which the attorney should be licensed. However, rather than merely applying the law of the state where the contract was formed, the Restatement (Second)

of Conflicts of Laws asserts that the court should ascertain which state has the "most significant relationship" to the parties and transaction. The Florida Supreme Court has held that a non-lawyer was engaged in the unauthorized practice of law by "having direct contact in the nature of consultation, explanation, recommendations, advice and assistance in the provision, selection and completion of forms"[6] pertaining to Florida law.

Another potential means of determining whether an out-of-state lawyer is engaged in the unauthorized practice of law in Florida is to determine whether Florida jurisdiction would extend to the out-of-state client. For example, in *A.B.L. Realty Corp. v. Cohl*, the court found that the Florida long-arm statute applied because the defendant-corporation was engaged in a business venture in Florida by buying and selling a Florida condominium.[7] The same determination was made regarding the purchase and sale of a Florida citrus grove.[8] Of course, Fla. Stat. § 48.193 enumerates acts that can subject a person to Florida's jurisdiction, and provides that "owning, using, possessing, or holding a mortgage or other lien on any real property within the state" is sufficient.[9] It follows that if a client will be subject to Florida jurisdiction because of the transaction at hand, an out-of-state attorney's involvement in the transaction might be considered the practice of law in Florida. This is, of course, speculative, and there have been cases that have concluded that mere ownership of property in the state is not sufficient to invoke the Florida long-arm statute.[10]

If potential UPL issues can be ruled out, then one must inquire about the ethics of the behavior, which in turn touches upon competency and reasonable billing. Rule 4-1.1 stipulates: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Of course, a lawyer is not expected to know all there is to know about every legal subject, and may provide competent representation by way of adequate preparation, necessary study, or by consulting with another lawyer more knowledgeable in a particular area. Given the flexibility of the competency requirements, it is entirely possible for an attorney to provide competent representation to a lender who loans against out-of-state collateral, or even an investor who purchases out-of-state property (granted that a local attorney may be required for closing). However, the lawyer must attain a certain level of competence in order to satisfy the Rules of Professional Conduct, and it would be unethical to bill a client for all of the time that it takes to learn about an entirely unfamiliar subject.

There may also be finer points of general ethics and morality to consider. When any lawyer is presented with the opportunity to represent a client involved in an interstate transaction, he or she should ask him or herself, "do I feel comfortable with this?" Each attorney must decide whether he or she honestly believes that adequate and competent representation can be provided, and whether consulting out-of-state counsel is necessary and appropriate.

Part of this decision should include consideration of whether the client will be exposed to an unacceptable level of risk. Laws vary subtly from state to state, and a simple unawareness of the nuances of a particular state's law could have catastrophic consequences. For example, in the area of real property law, some states, such as New York, Nevada, and California, are "one action" states; several states have anti-deficiency statutes in place; and in California anti-deficiency statutes only extend to purchase money loans. These are just a few examples of the many differences between the laws of each state. It would surely take significant research in order to become competent in the laws of a state in which an attorney is not licensed to practice, and even then, not seeking counsel in the relevant state could be viewed as negligent.

This leads to the ultimate concern whether an attorney engaging in such interstate practices could be subject to discipline or claims of malpractice. Simply put, maybe. There is no precedent to presuppose that the Florida Bar would drag an out-of-state attorney into Florida for an unauthorized practice of law claim (though certainly anything is possible). However, a Florida attorney who is found to have engaged in the unauthorized practice of law in another jurisdiction would be subject to discipline in Florida given the language of Rule 4-5.5, and it is likely that other states have similar rules. Furthermore, any person who practices law in Florida or who holds himself or herself out as a lawyer but is not licensed to practice in Florida is guilty of a third degree felony under Florida law.[11] Claims of malpractice are also very likely. Succeeding in a malpractice claim is no easy task if spawned by the lawyer's representation during litigation, but if a client loses property or a significant amount of money because his or her attorney failed to understand how the laws of the foreign jurisdiction affected a transaction, that client will no doubt seek retribution and it would likely be easier to demonstrate malpractice. Additionally, "In 2010, the Florida Supreme Court interpreted Rule 10-7.1(d)(3) of the Rules Regulating the Florida Bar as permitting a party to bring a private civil action against an unlicensed practitioner to recover fees and damages," and further, it is not required that the defendant has been subject to a Florida Bar proceeding.[12] This interpretation could impose liability on out-of-state lawyers for damages resulting from an inadequate knowledge of local law.

In sum, there is no definitive basis to assert that any lawyer representing a client in a transaction involving out-of-state property is engaging in the unauthorized practice of law. Further, it would be inaccurate to claim that any lawyer engaged in such practices is acting unethically. However, the facts of each situation must be examined carefully to make such determination. If an attorney chooses to represent a client in an out-of-state transaction, he or she may

be violating the UPL rules in his or her own jurisdiction, and perhaps in the jurisdiction in which the property is situated. Furthermore, the attorney may put the client's interests at risk unnecessarily by subjecting them to potential loss and to Florida's jurisdiction.[13] The attorney may also expose himself or herself to Bar discipline or claims of malpractice. A simple opinion letter from a licensed attorney in the other relevant jurisdiction may be enough to protect the attorney, and lay to rest any moral dilemma that may have arisen by taking on the particular matter. As always, attorneys everywhere would be wise to listen to that internal voice that should be asking in each circumstance, "does this feel right?"



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Endnotes

1 Florida Rules of Professional Conduct, Rule 4-5.5.

2 The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962), judg. vacated on other grounds, 373 U.S. 379 (1963).

3 The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980).

4 Florida Rules of Professional Conduct, Rule 10-2.1.

5 The Florida Bar v. Irizarry, 268 So. 2d 377 (Fla. 1972); The Florida Bar v. Hughes, 697 So. 2d 501 (Fla. 1997); The Florida Bar v. Lister, 662 So. 2d 1241 (Fla. 1995); The Florida Bar v. Valdes, 464 So. 2d 1183 (Fla. 1985); The Fla. Bar re: Advisory Opinion – Activities of Community Association Managers, 681 So. 2d 1119 (Fla. 1996).

6 The Florida Bar v. King, 468 So. 2d 982, 983 (Fla. 1985).

7 A. B. L. Realty Corp. v. Cohl, 384 So. 2d 1351 (Fla. Dist. Ct. App. 4th Dist.1980) (citing Fla. Stat. § 48.181. Service on nonresident engaging in business in state).

8 State ex rel. Weber v. Register, 67 So.2d 619, 620 (Fla. 1953).

9 Fla. Stat. § 48.193(1)(a)(3).

10 James v. Kush, 157 So.2d 203 (Fla. 2d DCA 1963).

11 Fla. Stat. § 454.23.

12 Goldberg v. Merrill Lynch Credit Corp., 35 So. 3d 905, 907 (Fla. 2010).

13 Depending on the nature of the transaction, there is a possibility that a Florida court could determine that a client was "carrying on a business" in Florida. While Florida would certainly have *in rem* jurisdiction over any property located in the state, a client that has sufficient dealings within the state could be determined to be carrying on a business in Florida and therefore subject to personal jurisdiction. *See* A.B.L. Realty, *supra* note 7.

Follow the status of RPPTL 2015 legislative bills at the Florida Bar website under

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Beware of FNMA and FHLMC Guidelines' Impact on ROFR Provisions

This piece is to supplement the article *"Check Your Dec—Is Your Right of First Refusal at Risk of Being Refused?"* by Kathryn Yankowski, published in the Winter 2014-15 edition of ActionLine. That article discussed the lack of Florida statutory and case law governing situations where a condominium association wishes to exercise its right of first refusal ("ROFR") upon a lender's resale of a foreclosed unit to third-party bidders. While there remains a tension between an association's expectation of preserving its ROFR in a recorded declaration and the necessity for lenders to freely transfer property obtained through foreclosure, practitioners should be alerted to the Fannie Mae and Freddie Mac Guidelines on this issue. The Freddie Mac *Single-Family Seller/Servicer Guide*[1] and Fannie Mae *Single-Family Selling Guide*[2] both contain provisions regarding restrictions on a lender's ability to resell a foreclosed condominium where a ROFR exists. Specifically, the guidelines provide the following direction:

Any right of first refusal in the condo project documents will not adversely impact the rights of a mortgagee or its assignee to:

- Foreclose or take title to a condo unit pursuant to the remedies in the mortgage;
- Accept a deed or assignment in lieu of foreclosure in the event of default by a mortgagor; or
- Sell or lease a unit acquired by the mortgagee or its assignee.

Allowing associations to exercise their ROFR without limitation would undoubtedly have an adverse impact on mortgagees' resale market. These Guidelines not only promote sound lending practices, but also foster economic growth and free markets, however, in this light, condominium associations must recognize that the enforceability of their ROFR is much more limited than they may have intended when drafting their condo docs. The Guidelines further highlight the need for associations to establish alternate approval process rights whereby mortgagees are not deterred by undesirable selling restrictions while still preserving the integrity of their community. When considering any restrictions for condominiums, cooperatives or planned unit developments (PUD) projects, a preliminary review of the FNMA and FHLMC Guidelines should be a first step.

Kathryn D. Yankowski

Endnotes

1 Freddie Mac Single-Family Seller/Servicer Guide, Section 42.6, Special Requirements for Condominiums, page 5 (Oct. 2014).

2 Fannie Mae Single-Family Selling Guide, Section B4-2.2-13, Condo Project Review and Legal Document Requirements, page 663 (Apr. 9, 2013).

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Probate Case Summaries

Prepared by Michael A. Sneeringer – the Law Offices of Nelson & Nelson, P.A., North Miami Beach, Florida

The probate court did not err in finding that, (1) the mother of a 22-year-old autistic man was not an interested person for purpose of inspecting guardianship reports and other financial information where the father was appointed plenary guardian of his son's person and property, and (2) the parenting plan did not give the mother any right to, or interest in, financial decisions made for her son.

Rudolph v. Rosecan, 39 Fla. L. Weekly D2460b (Fla. 4th DCA 2014)

The mother of a twenty-two year old autistic man appealed an order determining that she was not an "interested person" for the purpose of inspecting guardianship reports and other financial information. The father was appointed plenary guardian of his son's person and property. The order expressly incorporated a parenting and timesharing plan, which was attached to the order. The plan provided for the parents to have shared parental responsibility with decision making authority, and it required them to confer and attempt to agree on major decisions affecting their son. In the event that they could not agree, the father was charged with the ultimate authority to make major decisions related to education, residential placement, and all non-emergency medical, dental, and psychiatric care. As to information sharing, both parents had access to medical and school records and were to "cooperate with each other in sharing information related to the health, education, and welfare of the child(ren)." The plan did not address decision making authority regarding the financial decisions for the son. After having voluntarily provided the mother with the annual guardianship accounting and financial information for a few years, the guardian moved for an order declaring that the mother was not an "interested person" for purposes of the annual accounting and other guardianship financial matters. The guardian argued that Florida's guardianship statutes did not make the mother an "interested person" because she had no financial rights or obligations with regard to the son, so she therefore would not be affected by the outcome of the guardianship proceedings.

The mother responded that she was an "interested person" because the parenting plan for their son entitled her to make major decisions in his life. She also argued that because she is next of kin, she is an "interested person" with standing to object to the annual guardianship reports.

The probate court entered an order stating that the mother had no status as an interested person for purposes of annual accounting or other guardianship financial matters, and she was not an interested person or entitled by law or in any order of the court to be included in the guardianship of the property that had been established for which the mother was not the guardian. The mother appealed.

The Fourth District Court of Appeal (the "4th DCA") affirmed. It noted that under Florida law, a guardian has a statutory duty to file an annual guardianship report, but Florida law limits who can inspect a report and requires a person be an "interested person" to object to the report. Florida law defines "interested person" as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." However, under Florida case law, a person's status as an "interested person" with standing in a guardianship proceeding is dependent upon whether the person would be affected by the outcome of the proceedings. According to the 4th DCA, being "next of kin" does not confer "interested person" status. Ultimately, because the parenting plan did not give the mother any right to, or interest in, the financial decisions made for her son, it was held that she was not an "interested person" with standing to object to the annual accounting or other financial matters of her son.

Proceeding seeking an order or judgment, (1) imposing a refund or surcharge against a fiduciary or a fiduciary's agent, individually, and (2) the return of money to a trust, probate, or guardianship estate as a result of a breach of fiduciary duty, is tantamount to a judgment for damages requiring personal service on the fiduciary as an individual.

Kozinski v. Stabenow, 39 Fla. L. Weekly D2302a (Fla. 4th DCA 2014)

Appellant served as the trustee of a revocable trust created by her mother. After the mother died, Appellant filed a notice of trust, which noted that the trust would be liable to the mother's creditors to the extent that her estate was insufficient to pay them. Thereafter, a petition for administration of the mother's estate was filed as a separate case. Appellant was appointed as personal representative of the estate. Subsequently, the two cases were consolidated. Like Appellant, the mother's two other daughters were beneficiaries under the will and the trust (the "Appellees"). Appellees filed a petition to review the compensation of Appellant as personal representative and as trustee, as well as fees paid to the Appellant's law firm and another law firm. In the petition, Appellees also objected to accountings based on the payment of the fees,

claiming that Appellant had paid excessive fees from the estate and trust assets. Appellees asked the trial court to determine the reasonableness of the compensation and also to enter such surcharge or disgorgement orders as warranted, along with fees and other relief.

However, Appellees' petition for review was not formally served upon Appellant, but was sent via e-mail service to her counsel. In response, Appellant filed a motion to dismiss the petition for lack of personal jurisdiction, arguing, among other things, that Appellees failed to invoke the court's personal jurisdiction over her where they sought surcharge and disgorgement against her in her individual capacity. At the hearing on the motion, Appellant argued that a surcharge action, which is based on a breach of fiduciary duty, was an adversary proceeding which required formal notice or a complaint served under the Florida Rules of Civil Procedure in order to obtain personal jurisdiction over Appellant individually. See Fla. Prob. R. 5.025(a), (d). The trial court denied the motion to dismiss, but granted a stay pending appeal.

The 4th DCA reversed the trial court order without prejudice. It held that a proceeding seeking an order or judgment imposing a refund or surcharge against a fiduciary or a fiduciary's agent, individually, and the immediate return of money to a trust, probate, or guardianship estate as a result of a breach of fiduciary duty (charging excessive fees) is tantamount to a judgment for damages, requiring personal service on the fiduciary as an individual, and not in any representative capacity. With regard to notice and procedure in such adversary proceedings, the 4th DCA noted that Fla. Prob. R. 5.025(d) (1) explicitly states that a petitioner must serve formal notice. Since Appellant was not served individually with formal notice of the petition for review of fees, and she did not waive in writing her right to receive such notice, personal jurisdiction over her in her individual capacity was not properly obtained.

Amendments made to a trust by a trust protector were within the trust protector's powers where the trust agreement was ambiguous and amendments were made to effectuate the settlor's intent.

Minassian v. Rachins, 39 Fla. L. Weekly D2502a (Fla. 4th DCA 2014)

Husband executed a revocable trust (the "Trust") which became irrevocable upon his death. He named himself and his wife as the sole trustees. Husband established the Trust for the primary purpose of taking care of himself and his wife. Both he and his wife remained trustees of the Trust during the husband's lifetime. The Trust provided that, if the wife survived the husband, the trustee should divide the trust property into two separate trusts: the Marital Trust and the Family Trust. However, if the federal estate tax was not in effect at the time of the husband's death, the trust directed creation of only the Family Trust.

Upon the husband's death in 2010, the latter circumstance occurred, and only the Family Trust was created. The provisions of the Family Trust empowered the trustee to distribute net income and principal of the Family Trust to the wife for her health, education, and maintenance. The Family Trust stated that the trustee was directed to "be mindful that my primary concern and objective is to provide for the health, education, and maintenance of my spouse, and that the preservation of principal is not as important as the accomplishment of these objectives." Upon the wife's death, the remainder of the Family Trust was to be divided into a separate trust share for each of the husband's children.

During the course of the administration of the Family Trust, husband's children filed a complaint against the wife alleging that she was improperly administering the Family Trust. They claimed she had breached her fiduciary duties, sought a surcharge against her, and demanded an accounting of the Family Trust. The wife moved to dismiss the children's complaint against her, arguing they lacked standing because they were not beneficiaries of the Family Trust. She pointed to the Trust provisions which indicated that the Family Trust would terminate upon her death, and thus argued the children could not be beneficiaries of the Family Trust. Instead, she argued, new trusts were to be created upon her death, of which the children would be the beneficiaries. The children claimed that they had standing because the Family Trust provisions did not create a new trust, but instead created separate shares in the existing Family Trust for each child upon the wife's death. After reviewing the provisions of the Family Trust, the trial court denied the motion to dismiss.

Subsequently, the wife appointed a "trust protector," pursuant to the provisions of the Trust, who had the authority to modify or amend the Trust provisions (which included the provisions of the Family Trust) to correct ambiguities that might otherwise require court construction or correct a drafting error that defeated the husband's intent, as determined by the trust protector in his or her sole and absolute discretion, following the guidelines provided in the Trust agreement. The wife filed an affidavit from her appointed trust protector stating he had "amend[ed], clarif[ied], and correct[ed] ambiguities to the Trust" to effectuate the husband's intent. He purported to amend the Trust to clarify that it was intended that the Family Trust create a new trust after the wife's death, and grant the children shares in the new trust.

The children filed a supplemental complaint challenging the validity of the provisions amended by the trust protector. Both parties then moved for summary judgment as to the validity of the trust protector amendments. The trial court entered an order granting the children's motion for partial summary judgment and denying the wife's motion.

The 4th DCA reversed, holding that the Trust provisions were ambiguous and the trust protector's amendments

were made to effectuate the settlor's intent and within his powers. Since the Trust was ambiguous and it was the settlor's intent that where his Trust was ambiguous or imperfectly drafted, the use of a trust protector would be his preferred method of resolving those issues, removing that authority from the trust protector and assigning it to a court violated the settlor's intent.

The trial court noted that although the amendments may have disadvantaged the children, the trust protector was authorized to correct ambiguities with the limitation that he act either to benefit a group of beneficiaries or to further the husband's probable wishes and were within the trust protector's power. In the trial court's opinion, the trust protector had acted to correct ambiguities in a way to further the husband's probable wishes.

As the drafting agent, the trust protector was privy to what the husband intended. The trial court pointed to the trust protector's deposition for this authority. The trial court noted that the trust protector stated in deposition that he had met with the husband twice, first in person to discuss his estate planning desires, and second over the phone to discuss and execute the documents he drafted. According to the deposition, the husband wanted to provide for the wife in the way they had lived in the past. The trust protector also stated, that the challenge by the children was exactly what the husband expected and that the husband had referred to his daughter, in the presence of the trust protector, in derogatory terms, and that the daughter had not seen her father in years.

The trial court improperly denied the petition of the brother of a missing sister to have the sister declared deceased on the grounds that the evidence was insufficient to prove the sister was dead where, due to the length of time the sister had been missing, there existed a presumption that she was deceased.

Andrews v. Estate of Andrews, 149 So. 3d 760 (Fla. 5th DCA 2014)

Appellant petitioned the trial court to declare his sister deceased pursuant to **§** 731.103(3), Fla. Stat. (2013). According to the petition, Appellant's sister went missing in 1974, when she was 14 years old, and has never been found. The trial court denied the petition, finding that the evidence was insufficient to prove that she was dead. Appellant appealed.

The Fifth District Court of Appeal (the "5th DCA") reversed and remanded the matter for an evidentiary hearing. The court noted that **§** 731.103(3) Fla. Stat. (2013) provides that a person who is absent from the place of his or her last known domicile for a continuous period of 5 years, and whose absence is not satisfactorily explained after diligent search and inquiry, is presumed to be dead. The 5th DCA concluded that where, (i) Appellant filed a petition explaining that his sister has been missing since December 24, 1974; (ii) advised the trial court that his sister left their home in Orlando to go to the neighborhood park and never returned; (iii) their parents filed a missing person's report with the Orlando Police Department; (iv) there was no indication that the sister would have run away from home; and (v) there was no record of her whereabouts, due to the length of time that she had been missing, there existed a presumption that his sister was deceased under **§** 731.103(3), Fla. Stat. (2013). The 5th DCA noted that at a minimum, Appellant was entitled to an evidentiary hearing before the petition was denied.

Trial court properly found that co-trustees were liable for breach of trust and breach of oral contract for failure to comply with settlor's directive to make arrangements so that a beneficiary's college costs would be paid. Court properly prohibited payment of co-trustees' attorney's fee and costs from trust assets.

Kritchman v. Wolk, 39 Fla. L. Weekly D2082a (Fla. 3d DCA 2014)

Decedent (the "Decedent") created a revocable trust naming herself and another as co-trustees. The trust stated that during the Decedent's lifetime, the trustee was to pay such sums from principal as settlor may direct at any time. In addition, the Decedent instructed her co-trustee that, during the Decedent's lifetime, trust funds should be used to pay tuition for her first cousin's grandson ("Grandson"). Grandson entered college and the Decedent instructed the co-trustee to pay for his college education, indicating in a letter that co-trustee was to pay same for the next two years as well. After the Decedent's death, the co-trustee did not pay for Grandson's final three semesters. Following the Decedent's death, her son and the Grandson disagreed regarding the Decedent's last will and testament and the Decedent's son countermanded his mother's written instructions to the co-trustee. Grandson sued co-trustee and Decedent's son; the second amended complaint alleged breaches of written and oral contracts, promissory estoppel and breach of trust. The trial court granted judgment for Grandson on the breach of oral contract and breach of trust claims. It required the co-trustee to disgorge any amounts removed from the trust to pay legal expenses. The trial court denied Grandson's breach of written contract and promissory estoppel claims. All parties appealed.

The Third District Court of Appeal (the "3d DCA") affirmed the judgments against the co-trustee and Decedent's son for breach of oral contract and breach of trust (although damages were reduced), affirmed the final judgment relating to the written contract and promissory estoppel claims, affirmed the prohibition of payment of attorney's fees and costs from the trust assets and reversed the final judgment only as it contemplated future liability of co-trustee, the trust or Decedent's estate for future graduate school expenses. The 3d DCA noted that the co-trustee, (i) failed to comply with the express terms of Decedent's written directive, and (ii) offered neither evidence nor a supportable explanation

for parsing Decedent's written directive in such a way as to justify inaction. According to the 3d DCA, the co-trustee violated the duty to administer the trust in good faith, duty to act impartially as among beneficiaries, and duty to prudently administer the trust by considering the purposes, terms, distribution requirements and other circumstances of the trust. For its authority, the court cited to §§ 736.0801, 736.0803 and 736.0804, Fla. Stat., respectively. Upon the finding of breach of trust, the co-trustee failed to give notice as required by § 736.0802(10), Fla. Stat., justifying the trial court's prohibition of further attorney's fees and costs from assets of the trust and its order for a refund of previous attorney's fees and costs paid to co-trustee from the trust.

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Real Estate Case Summaries

Prepared by Melissa N. VanSickle, Esq., Clark, Partington, Hart, Larry, Bond & Stackhouse, Tallahassee, Florida

Color of title requires more than just an instrument of conveyance. Specifically, "color of title" requires the deed of conveyance be accepted by the grantee in good faith and with the belief that it constitutes a legitimate conveyance of title. Although good faith is not required in adverse possession, it is required to establish color of title. Therefore a quitclaim deed from an interloper to himself and his mother did not constitute color of title under law of adverse possession.

Frazier v. Goszczynski, 39 Fla. L. Weekly D2133 (Fla. 5th DCA Oct. 10, 2014)

Frazier, who had no interest in the subject property owned by Goszczynski, attempted to convey title to himself and his mother via a quitclaim deed thereby becoming interlopers in the chain of title upon recording of the wild deed. Thereafter, the Fraziers took possession of the property, paid taxes, and rented the property to others. When Goszcynski, the titleholder of record prior to the recording of the quitclaim deed, filed suit to quiet title, the Fraziers counterclaimed based on adverse possession under color of title. In the quiet title suit, the trial court quieted title in favor of Goszczynski on the basis that the Frazier quitclaim deed did not constitute color of title under the law of adverse possession.

In determining what constitutes "color of title", the Fifth District Court of Appeal determined that more is required than just an instrument of conveyance. Specifically, the court found that "color of title" requires the deed of conveyance to be accepted by the grantee in good faith and with the belief that it constitutes a legitimate conveyance of title. Although good faith is not required in adverse possession, it is required to establish color of title.

Given the Fraziers' admission that the wild deed was created solely for purposes of asserting an adverse possession claim, the Fifth District Court of Appeal determined that the Fraziers did not act in good faith, and therefore failed to meet the element of color of title to establish an adverse possession claim, upholding the trial court's ruling in favor of Goszczynski.

In a complaint alleging fraudulent misrepresentation and breach of warranty, it was error for the trial court to enter summary judgment when factual dispute existed as to the nature of the structure being purchased and the property's compliance with local development ordinances; trial court improperly found that statements made after signing contract but prior to closing were irrelevant; and trial court erred in concluding contractual warranty merged with deed.

Southern National Track Services, Inc. v. Gilley, 152 So. 3d 13 (Fla. 1st DCA 2014)

The parties contracted for the purchase and sale of property including a structure advertised as a two bedroom residence with fountain and swimming pool. Included in the contract was the right to obtain an inspection and an express warranty that there existed no violations of "land use plans, zoning, restrictions, prohibitions and other requirements imposed by governmental authority...." Prior to closing, the seller's representatives discussed their prior use of the structure as a residence. The purchaser did not obtain an inspection. Following closing and as a result of repairs needed for water damage, the purchaser determined that the structure was in fact a large storage shed that had been converted into a residence without conforming to applicable codes and regulations. As a result, purchaser sued the seller for breach of warranty for failure to disclose, fraudulent misrepresentation, and rescission. The trial court found the property in question was commercial and that the *Johnson v. Davis* obligation was inapplicable and dismissed the breach of warranty claim.

On appeal from the trial court's entry of summary judgment in favor of seller, the First District Court of Appeal determined that genuine issues of material fact existed as to the nature of the structure and whether the structure complied with applicable laws and regulations.

The First District Court of Appeal reviewed the trial court's reliance on *Wasser v. Sasoni,* 652 So. 2d 411 (Fla. 3d DCA 1995) (holding that "an intentional nondisclosure of known facts materially affecting the value of commercial property is not actionable under Florida law"), identified exceptions also contained within the *Wasser* decision (for instance when specific misrepresentations are made regarding a latent defect), and determined that a factual dispute existed in the present case regarding the representations made by the seller and whether those statements were "obviously false" as required by *Wasser*. The First District Court of Appeal also determined that it could reasonably be inferred that the purchaser believed it was not necessary to perform a home inspection based on the seller's comments and actions that occurred after the signing of the contract but prior to closing.

The court further addressed the issue of merger and whether the parties intended for the warranty at issue to merge with the deed. The First District Court of Appeal determined that there was no such evidence of the intent of the parties. Further, the court noted that zoning violation(s) existed at the time of closing, thus negating a claim for

merger given that the warranty against the existence of violations had not been performed prior to execution and delivery of the deed.

As a result, the Frist District Court of Appeal reversed the trial court's ruling granting summary judgment to seller.

Lender's acceleration of debt triggered commencement of statute of limitations; involuntary dismissal without prejudice of foreclosure did not invalidate or otherwise decelerate mortgagee's acceleration of payments; and filing of subsequent action, after expiration of statute of limitations, was barred.

Deutsche Bank Trust Co. Americas v. Beauvais, 40 Fla. L. Weekly D1 (Fla. 3d DCA Dec. 17, 2014).

First mortgage holder initiated foreclosure action against a property owner, referencing acceleration of the loan balance in the body of its complaint. The action was dismissed without prejudice. Thereafter, the condominium association (the "Association") successfully foreclosed and acquired title to the subject property based on condominium assessments owed. Deutsche Bank (successor to the first mortgage holder) subsequently filed foreclosure naming the Association as the property owner. The trial court granted summary judgment in favor of the Association based on statute of limitations. At issue was the notice of acceleration contained in the complaint in the initial foreclosure action that was dismissed. Deutsche Bank argued that the dismissal of the foreclosure "decelerated" the loan and the installment nature of the loan was reinstated, such that Deutsche Bank could accelerate the loan at a later date at which time the statute of limitations would be triggered anew. The Association argued that the bank's exercise of the acceleration triggered commencement of the statute of limitations, and that neither the bank nor the borrower took actions to reinstate the installment payments.

On appeal, the Third District Court of Appeal determined that involuntary dismissal (of the original action) without prejudice did not have any legal effect on the acceleration of the debt because there was no adjudication on the merits of the case nor a determination that the acceleration was invalid. Because the acceleration by Deutsche Bank survived the dismissal, and because the parties never subsequently reinstated the loan, the statute of limitations ran and the subsequent foreclosure action was time barred.

Although a wild deed purporting to convey title by parties who did not own property may become the root of marketable title under the Marketable Record Title Act ("MRTA"), deeds representing interests in property arising from title transactions which were recorded subsequent to date of root of title, but within thirty year period, met requirement of exception to the MRTA.

Lehmann v. Cocoanut Bayou Association, 39 Fla. L. Weekly D2259 (Fla. 2d DCA Oct. 29, 2014)

Lawsuit involved a dispute over the location of the property line dividing beachfront property owned by the Lehmanns and adjacent property owned by the homeowner's association ("Association"). At issue was a 1950 deed from Mr. Thomas to Mrs. Thomas (the "Thomas/Thomas deed") which contained a legal description consistent with those in the chain of title, but which deed was not recorded until 1953. Prior to the recording of the Thomas/Thomas deed, the Boyds (the "Boyd deed") had conveyed title to the Association inclusive of a 12.5 foot wide stretch of land which had previously been conveyed to the Thomas'. The Thomas property, as contained in the Thomas/Thomas deed, was subsequently re-conveyed many times until it was acquired by the Lehmanns, at which time Mr. Lehmann became aware of the disputed property line but discounted the claim on the basis that the Boyd deed was "wild" because Boyd had attempted to convey that which he did not own. Mr. Lehmann transferred the property to his wife on July 8, 1982.

Several years later, the Association filed a quiet title action seeking ownership of the contested parcel. The Association relied on the theory of adverse possession based on its use of the property for 60 years and application of the MRTA on the grounds that the Boyd deed was a sufficient root of title and more than 30 years had passed.

The Lehmanns defended on the grounds of certain MRTA exceptions and the payment of taxes and open possession of the property. The trial court ruled in favor of the Association based on the MRTA.

On appeal, the Second District Court of Appeal addressed the trial court's application of the MRTA and determined that the Boyd deed was the root of title as defined by the MRTA. Although the Boyd deed was a wild deed, the Second District Court of Appeal relied on prior cases to determine that a wild deed may become the root of marketable title under the MRTA. However, the Second District Court of Appeal determined that an exception to the MRTA existed. Specifically, because the Thomas/Thomas deed was not recorded until 1953, after the Boyd deed (the Association's root of title) was recorded, the Association was on notice of the Thomas' claim to the property.

Applying this MRTA exception, the Second District Court of Appeal reversed the trial court's judgment in favor of the Association and stated that ownership remains at issue and remanded the case for further proceedings.

Amendment to covenants and restrictions in a commercial plaza to prohibit residential use of units was not unreasonable; and adoption of amendment did not impose impermissible retroactive regulation on unit owner desiring to convert unit for residential use when unit owner was on notice of prohibition against residential use based on long-established character of commercial plaza and based on recording of amendment in public records.

Luani Plaza, Inc. v. Burton, 149 So. 3d 712 (Fla. 3d DCA 2014)

Burton acquired 2 units in Luani Plaza, a commercial plaza or "strip mall" of businesses and professional offices, each owned in fee simple and each subject to a 1982 Declaration of Covenants, Conditions and Restrictions (the "Declaration").

Thereafter, Burton applied to the City to convert the second floor of each unit to residential use. When the property owner's association learned of the application, it demanded Burton cease the conversion. Burton refused. The association then amended the declaration to specifically prohibit residential use of the units, but Burton moved forward with the project and obtained certificates of occupancy for the residential units. The association filed suit seeking an injunction, but the trial court ruled in favor of Burton.

On appeal, the Third District Court of Appeal interpreted the Declaration and denied both of Burton's defenses: (1) that the prohibition against residential uses was unreasonable and arbitrary and (2) that the amendment was applied retroactively.

Specifically, the Third District Court of Appeal determined that the amendment to prohibit residential use was a reasonable exercise given that the project was originally conceived as a commercial business project and that it was used for more than 2 decades for commercial purposes. Although "residential use" was not one of the original excluded uses stated in the Declaration, the court determined that the other excluded uses evidence the intended commercial use of the property.

The Third District Court of Appeal also determined that the amendment did not impose an impermissible retroactive regulation given that Burton knew of the long standing character of the Luani Plaza which did not include residential use, and further given that Burton did not obtain certificates of occupancy until well after the amendment was recorded, having moved forward with his improvements with full knowledge about the amendment.

Accordingly, the Third District Court of Appeal overturned the trial court's judgment in finding the Declaration unenforceable against Burton.

In dispute over ownership of waterfront strip, trial court erred in finding that plaintiff's claim was time barred under the statute of limitations pursuant to §95.11 Fla. Stat., as the present cause of action was filed within the four year period required by §95.11 Fla. Stat. Also, the twenty year limitation in § 95.231, Fla. Stat., did not bar the plaintiff's claim where it was not demonstrated that the deed which indisputably conveyed the waterfront strip at issue had been recorded more than twenty years prior.

Hardey v. Shell, 144 So. 3d 668 (Fla. 2d DCA 2014)

The Hardeys and Shells owned neighboring properties which have been the subject of many suits over the years based on faulty legal descriptions, improperly located improvements, and an erroneous tax map. The present suit resulted from the Shells, in 2010, erecting a fence on the Hardeys' pool deck and asserting their right to certain waterfront property, leading to the Hardeys filing suit for declaratory relief, among other counts. Ultimately, the trial court granted the Shell's motion for summary judgment on the grounds that the Hardeys were time barred on their count for declaratory relief under the statute of limitations, specifically § 95.231, Fla. Stat., and §95.11, Fla. Stat.

On appeal, and regarding § 95.11, Fla. Stat., the Second District Court of Appeal determined that a prior lawsuit involving the property did not trigger the statute of limitations. Specifically, that prior suit was resolved such that there was no longer a "present controversy" required for an action for declaratory judgment. The Second District Court of Appeal determined that the present cause of action did not commence until the Shells laid claim to the Hardeys' property in 2010, at that time triggering the cause of action for declaratory judgment, which was filed well within the four year period required by § 95.11, Fla. Stat.

The Second District Court of Appeal also determined that § 95.231, Fla. Stat., did not bar the Hardeys' action for declaratory relief because a dispute existed as to whether the legal description of a prior deed included the waterfront strip at issue. If the waterfront strip being disputed had in fact been contained in the prior deed which had been recorded more than twenty years prior, the statute of limitations would apply. However, since the Shells could not indisputably show that the subject deed included the waterfront strip at issue, they cannot rely on § 95.231, Fla. Stat. as a time bar.

The Second District Court of Appeal overturned the trial court's ruling on the grounds stated above.




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

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Appraisal Contingency
Short Sale Approval Contingency
Homeowner's/Flood Insurance
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence
Lead-Based Paint Disclosure (Pre-1978 Housing)
Housing for Older Persons
Rezoning Contingency
Lease Purchase/Lease Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
Sale Of Buyer's Property
Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
Buyer's Attorney Approval
Licensee Disclosure of Personal Interest in Property
Binding Arbitration

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

Firm:_____

Attn:_____ Attorney Bar #: _____

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

City/State/Zip:_____

PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

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

E-mail address:_____

METHOD OF PAYMENT

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

OR

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

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Card Number Exp. Date Signature of Cardholder (REQUIRED)

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Action Line August 2013

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PROBATE & GUARDIANSHIP FORMS

The FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2014 FLSSI forms.**

Firm: _____

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OPTION #1	**2014 FORMS AND INDEX - .PDF ON DISK**	**$379.10**
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Either mail this form with check to the address listed above or include credit card information and fax to 407.515.1504. Prices include shipping, handling and sales tax. **VISA or MasterCard Only.**

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AL 2014

What's Happening Within the Section...

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

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

SCHEDULE

2015 EXECUTIVE COUNCIL MEETINGS

JUNE 4 - 7, 2015
Executive Council Meeting / RPPTL Convention
Fontainebleau Florida Hotel • Miami Beach, Florida
Reservation Phone # 800-548-8886
Room Rate: $239
Cut-off Date: May 13, 2015

JULY 30, 2015 - AUGUST 1, 2015
Executive Council Meeting & Legislative Update
The Breakers • Palm Beach, Florida
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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HEADS UP:
Under the new LLC Act, any manager named in the annual report shown on Sunbiz could bind the Company without further confirmation of authority.
See page 6

BE AWARE:
Most residential closings based on loan applications on and after August 1, 2015, require the new Loan Estimate and Closing Disclosure.

CAUTION: Unless a later final day of work is stated on an amended claim of lien, it expires 1 year from the recording of the original lien. See Sec. 713.22(1), F.S.

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

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