

ActionLine

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

Florida's Original Real Estate Law Hornbook – The Uniform Title Standards

Improvements Made to Florida's Estate Tax Apportionment Statute

Permitted or Prohibited Communications with Government: The Continuing Debate Over Rule 4-4.2

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A Commentary on the Committees of the RPPTL Section



Chair's Column

By Michael A. Dribin
Section Chair, 2014- 2015

The work of the RPPTL Section, our pulsating heart, where people with similar interests get together to discuss and debate matters of interest to the Section and the public at large, can be found in the work of our committees. It is in our committee meetings that the need for new statutes or changes to existing statutes is debated and formulated. Except in rare circumstances, the debate over a particular proposal extends over a period of several years until satisfactory consensus is reached. Some of our committees, as noted below, do not have as their focus the consideration of our statutes. Instead, they use their time together to listen to educational presentations and otherwise discuss issues of common interest. Another group of our committees deal with administrative issues associated with the Section, including developing and administering CLE programming, working on and monitoring our budget and financial issues and considering bylaws changes.

The one thing all our committees have in common is that they bring together lawyers from all over Florida who care deeply and often passionately about the subject matter of their committee. They devote countless hours doing committee work. This is work which takes them away from their practices, but work that is performed out of a sense of commitment to improve the law and the administration of the law. We are a Section of over 10,000 members, all of whom are impacted by and, I believe, draw great benefit from the work of our committees. Of course, hopefully our clients and the judicial system benefit, as well.

Our committees are supervised by three Section officers and I have asked each of them to provide a brief summary of the work of their committees during the 2014-2015 year ending June 30, 2015. I am confident that, in reading these summaries, you will be as impressed as I am with the breadth and scope of the work and will seek to participate in a committee. Committee leaders and their contact information are listed by Division and then committee name at www.RPPTL.org, and in the Section directory which is also posted at www.RPPTL.org.

The first group of committees is composed of those in our Probate and Trust Law Division. Deborah Goodall is finishing her second year as Division Director. She points out that this Division is comprised of ten substantive committees, five ad hoc committees (which address very specific subjects) and two others dealing with CLE programming. Here are some of her observations about the work of these committees this year:

Asset Protection Committee. The Committee reported on current cases impacting Florida asset protection law and reviewed and commented upon the Uniform Voidable Transactions Act. The Committee also conducted a joint seminar with the Estate and Trust Tax Planning and IRA, Insurance and Employee Benefits committees.

Digital Assets and Information Study Committee. The Committee presented proposed legislation based upon the Uniform Fiduciary Access to Digital Assets Act. Although the bill was not ultimately passed this session, it was not through lack of effort and the bill will likely be reintroduced next year. The Committee worked very hard and provided witness testimony at almost every hearing in Tallahassee.

Elective Share Review Committee. The Committee is in the process of a comprehensive review of Florida's existing elective share law.

Estate & Trust Tax Planning. The Committee sponsored three separate pieces of legislation – two of which were passed by the Florida Legislature in 2015. The first was an update of the estate tax apportionment statute. The second was a change in the law to allow transferors to create custodianships to last until age 25 in certain circumstances. The Family Trust company legislation was one of the bills that was not heard before the House of Representatives adjourned.

Guardianship & Power of Attorney. The Committee was extremely active this year in terms of addressing the numerous guardianship bills that were introduced during this Legislative Session. Ultimately, there was a comprehensive bill sponsored by Representative Passidomo and Chair Hung Nguyen was one of the original members of her task force, together with incredible support from Bill Hennessey, our Legislative Co-Chair and Deb Boje. The Committee also advanced legislation that modified the existing Health Care Surrogate statutes.

IRA, Insurance & Employee Benefits. The Committee provided a platform for practical dialogue on planning with

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The Panther Fountain at the Ritz Carlton-Orlando, Grande Lakes, by John Neukamm.

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Get Included in *ActionLine!*

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

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

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

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

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

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

IRA assets, dealing with insurance issues and drafting clauses when IRAs comprise part of the assets. Chair Howard Payne co-authored an article for ActionLine with Alex Hamrick regarding considerations of whether to rollover a 401(k) into an IRA.

Principal and Income Committee. The Committee continues to monitor issues that arise with regard to the application of Florida's principal and income act. The Committee is considering some possible revisions to that act based upon comments from attorneys and industry professionals.

Probate & Trust Litigation. The Committee successfully presented proposed legislation to amend existing statutes to provide factors for the courts to consider when exercising discretion to assess attorneys' fees and costs against a part of an estate or trust. The Committee is also studying projects including analysis of case law regarding lost or destroyed wills and various standing issues in will and trust contests.

Probate Law & Procedure. The Committee is considering several issues including artificial reproductive technology heirs, holographic wills and harmless error, and the Uniform International Wills Act. The Committee sponsored a very successful full day seminar at the Tampa Airport Marriott.

Trust Law. The Committee addressed many issues, including a proposal of the Florida Bankers Association for the electronic service of trust accountings, compensation for multiple trustees, decanting, reformation, and settlor's intent vs. benefit of the beneficiary. The Committee proposed legislation revising the current statutes dealing with non-judicial modification of trusts during the first ninety years after the death of the grantor. The Committee co-sponsored a full day CLE with the Probate and Trust Litigation Committee in Fort Lauderdale.

Attorney/Trust Officer Liaison Conference. The Committee continues to work on still another terrific multi-day program filled with CLE and networking opportunities on August 27 – 29th at The Breakers

Wills, Trusts & Estates Certification Review Course. The Committee presented another very successful program. This year marked the final presentation of valued speaker Professor David Powell but the Committee is already working on next year's course.

Ad Hoc Guardianship Law Revision Committee. The Committee is in the midst of a multiyear project to conduct a full survey of the current Florida guardianship and incapacity law. Drawing on the experience of committee members and enlisting perspectives of other interested professionals, the Committee continues to examine all aspects of current law and propose comprehensive changes.

Ad Hoc Jurisdiction & Service of Process. The Committee continues to study issues that impact jurisdiction and service of process. For the upcoming year, the Committee structure has been expanded to include review of issues involving due process.

Ad Hoc Study Committee on Estate Planning Conflict of Interest. The Committee presented proposed legislation that would limit compensation when an attorney or someone related to the attorney is appointed as a fiduciary. This legislation was not passed in this Legislative Session, but will be refiled next year.

Ad Hoc Study Committee on Personal Representative Issues. The Committee successfully presented proposed legislation to clarify the law regarding objections to the qualifications of a Personal Representative in order to resolve the conflict between the Florida Supreme Court case of *Hill v. Davis* and the Third DCA case of *Angelus v. Pass*.

Ad Hoc Study Committee on Spendthrift Trust Issues. The Committee has been tasked with reviewing current case law and statutes regarding spendthrift trust issues.

Probate and Trust Division Liaisons. Our liaison committees provide communication conduits, informing us about what is happening with the Elder Law and Tax Law sections of the Florida Bar and the American College of Trust and Estate Counsel, and providing feedback.

The second group of our substantive committees is composed of those within the Real Property Law Division, so capably managed by its Director, Andrew ("Drew") O'Malley. Drew provides this summary of the activities of these committees during 2014-2015:

Commercial Real Estate Committee. Virtually all committee meetings included a CLE component on topics such as closing protection letters, sales tax issues, air rights and commercial brokerage. Committee members participated in the task force addressing the issue of open construction permits and drafted legislation to permit the separate assessment of air rights by property appraisers.

Condominium & Planned Development. The Committee was successful in its effort to obtain Board Certification for Community Association Law, approved by the Florida Bar and pending approval of the Supreme Court of Florida. The drafters of the Condominium Bulk Buyer and Condominium Termination legislation fine tuned the legislation and obtained Section support. The Committee also addressed the issue of UPL by association managers and participated in the debate over condominium/community association estoppels.

Construction Law. Committee meetings included 17 different CLE components on such diverse topics as the BP settlement and claims, the economic loss rule, Chinese drywall and the Florida Arbitration Code. The Committee will be rolling out "Contractors University" later this year which will be small group sessions between lawyers and contractors, sponsored and funded by participating law firms. The Committee addressed numerous legislative initiatives including opposition to a proposal to exempt homesteads from F.S. Chapter 713 and fraudulent recording of claims of lien.

Construction Law Certification Review. The Committee conducted another successful 2½ day presentation, with 18 speakers.

Construction Law Institute. The Committee once again planned and implemented another successful presentation, with several new speakers, and included a new panel discussion on the Florida Building Code.

Development and Land Use Planning Committee. Committee members heard numerous CLE presentations including "Practice Guide on Platting" and "Update on Water Quality", which was co-sponsored with the Florida Chapter of the American Planning Institute. An upcoming meeting will include a presentation on "Real Property Issues and Implications of Climate Change". Committee members worked extensively on comments and suggested revisions to Rule 4-4.2 (communication with government officials).

Insurance and Surety. The Committee sponsored the very well-attended multi-part CLE on "Cyber Risks and Insurance." It meets monthly by telephone, usually including a CLE presentation, regularly publishes a committee newsletter "Insurance Matters" and is considering legislation to permit letters of credit to be used when bonding off construction liens.

Landlord & Tenant. The Committee sponsored a webinar on estoppel letters and addressed the many legislative initiatives impacting tenancies.

Legal Opinions. The Committee's primary focus in the previous year was to consider revisions to the Third Party Legal Opinion report, updating sections pertaining to land trusts and collaborating with the Business Law Section as to the real property aspects of the revisions that the Section successfully proposed relating to limited liability companies.

Liaison with FLTA. Worked and will continue working with Florida Land Title Association and the Ad Hoc Best Practices Committee on CFPB disclosure forms and Best Practices Initiatives.

Real Estate Certification Review Course. The Committee put together another successful presentation in February 2015. The course featured 25 different speakers. The Certification Review Course has become the leading seminar on advanced real estate law in Florida in addition to being a primer for the certification exam.

Real Estate Structures and Taxation. From its origins as the "Land Trusts and Real Estate Investment Trusts Committee", and after successfully having drafted the new Land Trust Code, this committee has shifted its emphasis to real estate related entities and tax implications. It has held CLE presentations on Florida's revised LLC act, FIRPTA, 1031 planning, foreign investment structuring and ad valorem tax issues. It is working on the Support of Marriage legislation with the Tax Section to permit inter-spousal transfers of real estate without documentary stamp tax liability.

Real Property Finance & Lending. The Committee worked with the Residential Real Estate & Industry Liaison Committee on a successful CLE webinar on Dodd-Frank legislation as it pertains to seller financing. It is currently working with the Real Property Problems Study Committee on a revision to F.S. §95.218 clarifying it as a statue of repose rather than a statute of limitations. "Case of the Quarter" CLE presentations are offered at each committee meeting. The Committee scheduled a webinar on the Bank of America Settlement. Committee members engage in informal mentoring and mutual assistance thru a committee list service.

Real Property Litigation. The committee is very active in communicating with members, including circulation of weekly case law updates and a "Case of the Quarter" update posted on the committee webpage. The committee obtained Executive Council approval for support of proposed amendments to F.S. §48.23 (lis pendens to protect lien holders) and participated in the task force reviewing proposed revisions to Rule 4-4.2. It is currently working on legislation for 2016 regarding revisions to F.S. §90.902, pertaining to authentication of electronic records, and revisions to F.S. §95.281, concerning the mortgage statute of repose and to F.S. §§57.011 and 559.715, deleting non-resident cost bonds.

Real Property Problems Study. This Committee worked extensively with the Same Sex Marriage Ad Hoc Committee, through the efforts of committee member Jeff Dollinger (see discussion below). The Committee is working toward legislation for 2016 addressing construction lien stop/start issues under F.S. Chapter 713 to establish priority for a new lender or purchaser during construction while protecting the rights of lien holders; and amendments to modernize F.S. Chapter 82, pertaining to unlawful detainer, that would limit jury trials and prevent squatters from delaying removal.

Residential Real Estate and Industry Liaison (RREIL) Committee. The Committee experienced a very busy year, during which it addressed the CFPB regulations and ALTA Best Practices. The Committee formed an Ad Hoc Committee on Best Practices, led by Melissa Murphy and Adele Stone, which recently featured a presentation by industry and regulatory leaders. The Committee co-sponsored the extremely well-received and well-attended webinar on the Dodd-Frank bill regulations on seller financing, sponsored revisions to the FR/BAR residential contract in 2014 and 2015 and is currently working on template engagement letters for use when representing sellers or buyers.

Title Insurance & Title Insurance Liaison. The Committee worked extensively with the Residential Real Estate & Industry Liaison Committee on Best Practices and CFPB issues. Committee members Brian Hoffman and Ashley McRae worked extensively with the Amicus Coordination Committee on the *Rogers v. U.S.* case. The Committee is also in the process of

reviewing the establishment of a statute of limitation on liability for plat letters.

Title Issues & Standards. The Committee produced additional revisions and updates to the Uniform Title Standards and greatly enhanced the Standards' accessibility through the development of the Electronic Uniform Title Standards, now available online.

The third group of Section committees falls under the umbrella title of the Section's "General Standing Committees". Broadly speaking, these committees either deal with issues of common interest to both our real property and probate and trust substantive areas or deal with Section administrative responsibilities. Michael Gelfand, as Chair-Elect, supervised the General Standing Committees and provides this summary of their activities during 2014-2015:

Ad Hoc Leadership Academy. This Committee considers candidates who are active Section members who wish to participate in The Florida Bar's Leadership Academy and makes recommendations for selection.

Ad Hoc Same-Sex Marriage Implications. Before anyone anticipated the breadth and depth, not to say the speed, with which same-sex marriage issues would advance through the state and federal courts, the Section appointed this committee to consider the potential impact of a repeal of Florida's constitutional and statutory bans on our statutes and practice. (As of this writing, the Supreme Court of the United States has heard argument but has not ruled on appeals addressing these issues). The Committee has made a thorough review of Florida laws, creating not only a list of those laws that are drawn into question by federal decisions, but also proposing an efficient resolution of legal issues. The Committee is presently considering timing and methodology for adoption of curative laws.

Amicus Coordination. This hard-working committee is currently considering a trifecta of appeals. It has been extremely busy, including responding to appellate court requests for section briefing of issues. The Amicus Committee represents the best interests of the Section, combining analysis and drafting into a package that truly can be said to be brief.

Budget. Seeking the equitable allocation of Section resources, the Budget Committee has undertaken not only the Section's budget, but also a continuing level of the evaluation and analysis, providing feedback to the "Big" Bar. Committee leadership has been in the lead in working with the Florida Bar in implementing an overhaul of the Bar's financial reporting systems.

CLE Seminar Coordination. The CLE Committee is leading the Bar in both substance and process. Seminars incorporate new technology, including webinars designed to provide near immediate information on cutting-edge issues.

Convention Coordination. Assisting the Section Chair in planning and implementation, the Convention Coordination Committee helps assure that the Annual Convention successfully meets members' needs and expectations.

Fellows. From a broad group of young attorney applicants who have already displayed an interest in Section involvement and participation, the Fellows Committee selects four who demonstrate extraordinary dedication to work with the Section's Executive Council members, receive valuable practical pointers for their practice, and learn how the Bar operates. To encourage their continued involvement and leadership, the Fellows receive a stipend to assist in their expenses in attending Section meetings.

Florida Electronic Filing & Service. It is through this Committee that the Section is kept aware of developments in the requirements relating to statewide electronic filing and service of pleadings.

Homestead Issues Study. Following an exhaustive and detailed review of the alternatives, this ad hoc committee, composed of real property and probate members, is set to make recommendations on how to address the treatment of Homestead in a trust context.

Legislation Committee. Whether the Florida Legislature is in "meltdown," the "damn the torpedoes" mode, or in between, our Legislation Committee twists and turns to always remain standing at the end. This year was no different, with 15 section positions or matters in which the Section provided substantial technical advice having been approved by both chambers with very few initiatives failing on the floor.

Legislative Update. This committee plans the Section's annual Legislative and Case Law Update Seminar, selecting the topics and speakers and coordinating the entire presentation.

Liaisons. The Section maintains liaison relationships with a variety of groups, all of which enhance communication and cooperation on initiatives that cross organizational boundaries: Business Law Section, Clerks of the Circuit Court, Florida Bar Board of Governors, Judiciary, American Bar Association, Florida Bar Board of Legal Specialization and Education, Florida Bar Council of Sections, Florida Bankers Association, RPPTL Out-of-State Members, Florida Legal Education Association and Florida Legal Support Systems, Inc.

Long-Range Planning. The Committee, comprised of the Section's past chairs, recommends officers and At-Large-Members for election.

Meetings Planning. The Committee provides assistance to the Chair and Section program administrator with planning and arrangements for Section meetings.

Member Communications & Information Technology. The initial update of the Section's website and list serves having been completed, the Committee is moving to a second phase. It assists the Section by assuring that information, both



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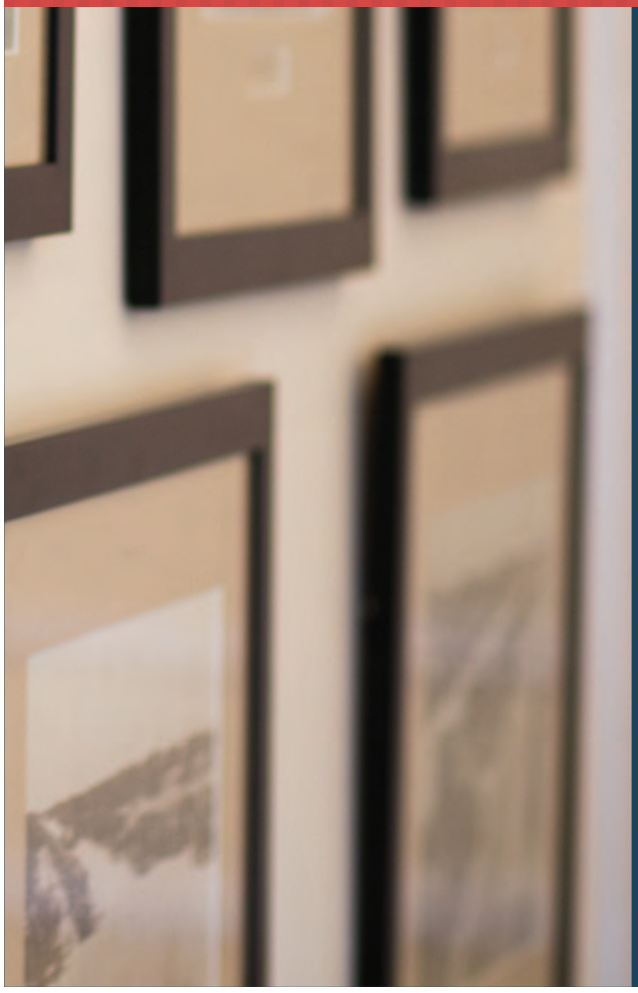

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substantive regarding the law and procedurally regarding the Section, is timely provided to members.

Membership & Inclusion Committee. Stagnating organizations die a slow and withering death. The Membership and Inclusion Committee helps ensure that such a fate never occurs to the Section, introducing a fresh and vital stream of new professionals to the Section, encouraging them to become actively involved in Section committees and other endeavors. An increased focus on law school students is proving to be highly successful.

Model and Uniform Acts. The Committee provides liaison services to the Section on the Uniform Law Commissioners' consideration of model and uniform acts which impact Section members.

Professionalism and Ethics. Professionalism is a key reason most Section members join and stay involved. Defining the line between excellence and zealous advocacy, on the one hand, and less than professional and sanctionable activity, on the other hand, has proven to be a busy as well as exacting task. This year the Committee has focused on efforts to revise Rule 4-4.2 concerning contacts with government staff, a long standing issue.

Publications (ActionLine). Members claim ActionLine alone is worth many times the price of Section membership. Chock full of information, our quarterly journal provides timely practical information to the practitioner in every area covered by the Section. Section news is reported to help keep Section members involved.

Publications (Florida Bar Journal). The Committee solicits and edits articles of scholarly quality for inclusion as Section submissions to the Florida Bar Journal, providing an in-depth treatment of topics of interest.

Sponsor Coordinators. Though the last alphabetically, it is not the least in terms of effort and impact! The Sponsor Coordination Committee has addressed the consolidation of many of our Section supporters, yet has expanded the levels of sponsorship to help ensure the financial vitality of the Section.

Even though, as Chair, I had a pretty good sense of the breadth and scope of our committee work, I admit I was incredibly impressed, as I hope you were, by the summaries which Debbie Goodall, Drew O'Malley and Michael Gelfand provided. What would jurisprudence in the real property, probate, trust and guardianship worlds look like without the thoughtful and dedicated work of our chairs, vice-chairs and committee members? On behalf of all of our Section members, I take this opportunity to thank each person who works in our committees. I invite those of you who are not yet involved in committee work to consider how you might do so and to be in touch with our Section leadership if you are interested and are prepared to work hard and make a meaningful contribution to committee work.

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Two Ways to Improve Your Trust & Estate Practice

The Good, the Bad and the Ugly: Recent Foreclosure Cases Addressing the Business Records Exception to the Hearsay Rule

By John W. Little, III, Esq., West Palm Beach, Florida, and E. Ashley McRae, Esq., Tampa, Florida

Introduction

One of the more frequently used exceptions to the hearsay rule is found in § 90.803(6) of the Florida Evidence Code, entitled "records of regularly conducted business activity."[1] The party seeking to lay the foundation for the "business records" exception must establish *all* of the following: (1) the record was made at or near the time of the event; (2) the record was made by, or from information transmitted by, a person with knowledge; (3) the record was kept in the ordinary course of a regularly conducted business activity; and (4) it was a regular practice of that business to make such a record.[2] These foundational requirements must be established "by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration [that complies with § 90.803(6)(c), F.S., and § 90.902(11), F.S.], unless the sources of information or other circumstances show lack of trustworthiness… ."[3]

Prior to the ongoing foreclosure crisis, the business records exception to the hearsay rule was frequently relied upon in real estate and probate litigation and did not generate a great deal of controversy. Given the lending and secondary mortgage practices of the early and mid-2000s, when the foreclosure tidal wave hit Florida's courts, the note and mortgage holder seeking to enforce its rights was often the third, fourth or fifth holder of those original documents and accompanying records. As a result, over the last several years Florida's trial judges and appellate courts have been called upon to particularly focus on the required elements for the business records exception. These recent appellate decisions provide the practitioner with helpful guidance on how to effectively use this hearsay exception and how to avoid certain pitfalls.

The Bad and the Ugly

One of the areas in which lenders have run into trouble with the business records exception is in the use of affidavits in foreclosure actions.[4] In *Clay County Land Trust v. JP Morgan Chase Bank, N.A.,* the trial court entered summary judgment in favor of the bank based in part upon an affidavit of the bank's vice president. In the affidavit, the witness relied on records from the prior owner of the note on which the summary judgment was based. The First DCA agreed that the affidavit contained inadmissible hearsay in the absence of any showing within the four corners of the affidavit that the vice president was familiar with the business practices of the company previously holding the note and the accuracy of that company's records.

Similarly, in *Cach, LLC v. Keyes* the trial court granted a motion to strike an affidavit submitted in connection with summary judgment. The court found that the statement that the affiant was "personally acquainted" with the facts, without more detail as to how the witness accumulated such personal knowledge, was legally insufficient. Further, after noting the Florida Supreme Court's holding in *Yisrael v. State* that exceptions to the hearsay rule must be offered in strict compliance with the requirements of the particular exception, the trial court noted that the affidavit failed to include language that the record was made at or near the time of the matter set forth by or from information transmitted by a person having knowledge of the matters. Further, the affidavit generally addressed a large group of documents rather than detailing the specific records that it was referencing. For all these reasons, the affidavit was stricken.

Similar failures have resulted in the reversal of final judgments following a trial on the merits.[5] In *Hunter v. Aurora Loan Services, LLC,* the borrower argued that the trial court incorrectly admitted two documents into evidence under the business records exception and that those two records were the only documents offered to prove that the foreclosing lender held the promissory note on the date when the lawsuit commenced.[6] In its complaint, the lender alleged that it owned and held the promissory note and mortgage but was not in physical possession of the original documents. Instead, in an effort to establish standing, the lender sought to rely upon a computer generated "account balance report" and a "consolidated notes log" printout from the prior holder of the note. The lender argued that these two documents demonstrated its payment for the assignment of that loan and delivery of the original note and mortgage at that time. [7]

At trial, the lender called one of its employees who had worked in the residential mortgage industry for more than 15 years. The lender sought to use this witness to establish the foundational requirements to support the admission of the account balance report and consolidated notes log under the business records exception. While the witness could testify that these documents were of a type and nature commonly used in the industry, he had no knowledge about who specifically generated the notations in these documents, or how and where that individual obtained the information reported therein. Likewise, the witness could not testify from personal knowledge that either document belonged to or was generated by the prior holder of the note. Rather, he could only testify that it was typical in the industry for the

records custodian of the loan servicer to input these types of notations and it was normal industry practice for a lender's accounts payable department to create an account balance report zeroing out the loan when it was sold to another entity.[8] The First DCA reversed the final judgment and directed that judgment be entered in favor of the borrower. In sum, the appellate court noted that while the witness's testimony might arguably establish that these records were generated and kept in the ordinary course of the mortgage and loan servicing industry, he could not establish the necessary facts to establish that the documents in question were business records of the prior holder.

In *Holt v. Calchas, LLC,* the borrower's hearsay objection to the payment history of a prior holder of the note and mortgage was overruled by the trial court and judgment was entered in favor of the lender. On appeal, the borrower pointed to the fact that the lender's asset manager admitted that he worked for the bank currently holding the note and had never worked for the prior holder which generated the record of payment history. The witness also admitted that he did not know who transmitted the records he was testifying about and he had never seen the prior note holder's policy manual. However, the witness testified that he was generally familiar with the prior holder's business practices and thought they were doing things correctly.

In analyzing the hearsay objection to the payment history, the Fourth DCA reviewed and discussed several earlier decisions addressing the proper foundation under the business records exception.[9] In distinguishing *Holt* from an earlier decision from the Second District in *WAMCO XXVIII, Ltd., v. Integrated Electronic Environments, Inc.*, the Fourth DCA noted that, in *WAMCO*, the witness had testified that the current note holder had procedures in place to check the accuracy of the information that it received from the previous note holder. Conversely, in *Holt*, the lender's witness could not testify that the bank had established any mechanisms for checking the accuracy of the numbers from the prior note holder or that the current lender had conducted its own independent evaluation of the accuracy of the numbers in the payment history. In reversing the trial court's decision and remanding for dismissal of the action, the Fourth DCA stated, "a witness's general testimony that a prior note holder follows a standard record-keeping practice, without discussing details to show compliance with § 90.803(6), is not enough to establish a foundation for the business records exception. When the foundation for the business records exception is sought through a subsequent note holder for documents containing electronic records of loan payments made to a prior note holder, the foundation must demonstrate compliance with § 90.803(6) based on personal knowledge."[10]

The Good

Now that you know the bad and the ugly (i.e., the wrong way to establish the business records exception), it is time to discuss the right way to establish this exception in commercial foreclosure cases. Three recent foreclosure cases illustrate the point.[11]

In *Cayea v. CitiMortgage, Inc.*, the borrower appealed a final judgment of foreclosure arguing that the lender's payment records should not have been admitted into evidence because the lender failed to comply with the requirements of the business records exception. At the trial, the lender called an employee of its default research and litigation department. The witness testified that the borrower had been in default since April 2009. The lender then sought to admit a summary of the borrower's payment history after the witness confirmed that the entries therein were made contemporaneously with payment. Borrower's counsel objected to the admission of the payment history on the grounds of lack of foundation. The witness testified that the payment summary was printed from the lender's own system. The witness then testified that it was the regular practice of the lender to input payments into its system upon receipt, and payments were entered into the lender's system called "citilink." He further testified that the processing department had two groups – one which monitored electronic payments and another that monitored mailed payments, and that each group posted payments. Lastly, he testified that the entries were kept in the ordinary course of business and it was the ordinary business practice of this lender to keep individual records of each loan. After hearing this testimony, the trial court overruled the objection and admitted the documents.

On appeal, the borrower argued the trial court erred when it allowed the lender to introduce the payment history because: (i) the payment history was a summary and did not meet the standards for a business record; (ii) the witness's testimony regarding the payment history therefore constituted hearsay; and (iii) even if the payment record were a business record, the lender failed to lay a proper foundation for its admission.[12]

The appellate court disagreed that the payment history was a summary.[13] The court explained that "[p]rintouts of data prepared for trial may be admitted under the business records exception even if the printouts themselves are not kept in the ordinary course of business so long as a qualified witness testifies as to the manner of preparation, reliability and trustworthiness."[14] The court continued by explaining that loan payment history printouts, if properly authenticated, are routinely admitted as a business record in foreclosure cases.[15] The court also addressed the lack of foundation argument and noted three ways to establish the needed foundation: (i) testimony of a records custodian; (ii) stipulation; or (iii) via certification or declaration that complies with §§ 90.803(6)(c) and 90.902(11), Florida Statutes. The court pointed out that the authenticating witness does not need to be the person that actually prepared the records but can be a witness with

knowledge of the process.[16] The court distinguished this case from others by pointing out that the witness had a familiarity with the lender's record-keeping system and the process for uploading payment information. Ultimately, the court held that the printout of the loan payment history was properly admitted as a business record.[17]

In *Bank of N.Y. v. Calloway*, the loan had been handled by four servicers over its life.[18] The trial court excluded the payment history because the lender's witness lacked personal knowledge of a prior servicer's processes for obtaining and recording loan information. The lender's witness was a litigation foreclosure specialist for the most recent servicer, Resurgent. The witness testified that Resurgent became the servicer years after the default. She also explained that the prior servicer transferred to Resurgent the loan documents along with its business records with a complete payment history. Upon receipt, Resurgent reviewed the documents for accuracy before scanning them and inputting the payment information into its own records system. The lender attempted to introduce into evidence a payment history which featured a tabulation from Resurgent's records laying out the borrower's monthly payments from inception. Borrower's counsel objected to the admission of both documents based upon lack of foundation. During questioning, the witness admitted that because Resurgent became the servicer after the borrower's default, the payment history contained in its records was derived from the documents transferred to it by a prior servicer. The witness conceded she never worked for the other servicer and was not familiar with any of its processes.

Based upon the witness's testimony, borrower's counsel argued the two documents constituted inadmissible hearsay because the witness lacked knowledge regarding the prior servicer's processes. The lender argued, on the other hand, that the witness was knowledgeable as to Resurgent's records and processes and had testified that Resurgent reviewed the accuracy of the information transferred to it upon acquiring loans. The trial court agreed with the borrower and excluded the documents.

Several weeks later, the trial court entered a written order relying on *Glarum v. LaSalle Bank National Ass'n*[19], stating that the lender's witness's testimony constituted inadmissible hearsay because she was not familiar with the prior servicer's business practices or procedures, was unable to testify as to the accuracy of the prior servicer's business records, and did not know who, how or when the data entries were made into the prior servicer's business records. Based on these facts, the lender's witness could not provide the required foundation for any business records of the prior servicers.

In *Glarum*, the court held that an affidavit of a loan servicing specialist was inadmissible under the business records exception because the affiant had no knowledge of his own company's data which was produced and had even less familiarity with the processes of the prior servicer that supplied some of the data.[20] The court in *Glarum*, in a footnote, addressed concerns that its holding could be interpreted as a blanket prohibition on lenders relying on prior servicers' records.[21] Despite this concern, the court in *Glarum* did not set forth under what circumstances a prior servicer's records would be permitted under the business records exception. As a result, attorneys representing borrowers have been consistently relying on this case where a prior servicer or lender's payment records are at issue.

On appeal, the *Calloway* court turned to the Second District's decision in *WAMCO XXVIII, Ltd.*[22] for guidance. In that case, the lender presented loan payment histories. The lender's vice president testified that the loans had been purchased from a prior bank and that the beginning numbers on the outstanding balances had been received from that prior bank. The vice president conceded he did not know the person at the prior bank who inputted the information, and he did not know how the prior bank's loan accounting systems worked. However, he did testify that the prior bank had used "bank-acceptable accounting systems." He also described the process that his company used to verify the accuracy of the information received in connection with the loan purchase. The court in *WAMCO* held that the records were properly admitted under the business records exception.[23]

In *Calloway*, the court explained that reliance on and incorporation of a prior servicer or lender's records is important to establish trustworthiness but is insufficient without more.[24] However, this problem can be addressed by "providing evidence of a business relationship or contractual obligation between the parties that ensures a substantial incentive for accuracy."[25] In the alternative, as in *WAMCO*, the successor lender established trustworthiness by independently confirming the accuracy of the third-party's business records upon receipt. Based on *WAMCO*, the *Calloway* court explained that the lender's witness confirmed the trustworthiness of the prior servicer's records by testifying that the lender had reviewed the prior servicer's records for accuracy before integrating them into its own records.[26] Interestingly, in dicta, the court explained that even if the lender's witness had not testified to these matters, it would have found that the circumstances of the loan transfer itself would have been sufficient to establish trustworthiness given the business relationship and common practices inherent among lending institutions acquiring and selling loans.[27]

Another good example of the proper way to establish the business records exception can be found in *Lindsey v. Cadence Bank, N.A.*[28] In *Lindsey*, the bank included the affidavit of an assistant vice president of the bank in support of summary judgment. Her affidavit stated that she reviewed the records available reflecting the status of the debt. The affidavit also stated that the records were kept in the normal course of

business and reflected timely recordation of payments made, interest and other accountings. The affidavit also included information about how the bank kept records, in that it used a computer system specifically designed for banking to track and reconcile accounts. Attached to the affidavit were computer printouts pertaining to the loan at issue. The borrower, also relying on *Glarum*, objected to the admission of the printouts on the grounds that, based on the assistant vice president's deposition, she lacked sufficient personal knowledge of the bank's computerized loan processing system to establish the necessary foundation to admit the records.

On appeal, the Fourth District explained once again that testimony from the person who prepared the record or the record custodian is not necessary, provided the person through whom the document is being offered is able to show each of the requirements for a proper foundation.[29] The court found that the assistant vice president did indeed have sufficient knowledge to establish a foundation to admit the records. The court pointed out that she was familiar with how the bank's computerized loan processing system worked due to her position as an assistant vice president responsible for handling delinquent loans.[30] She was able to explain how the system automatically maintained account balances and testified that payments are entered into the system as the transaction is happening and the records are updated within 24 hours. The fact that she did not personally oversee the operation of the system or posting of the payments or even the identity of the person that posted the transactions did not mean she was incompetent to lay a foundation for the business records exception.[31]

Conclusion

So here is some practical advice. Prepare your witness. Make sure he or she has sufficient knowledge of your client's processes to meet all the requirements to admit a business record. If your client is relying on a prior lender's records, confirm with the witness that the current holder has verified that the information from the selling lender was accurate prior to integrating such information into the current holder's own records. Alternatively, be prepared to call a witness from the prior lender or to prove that the prior lender had adequate incentive to provide accurate information. The latter point may include introduction of the loan purchase agreement into evidence..



J.. LITTLE

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Endnotes

1 § 90.803(6), Fla. Stat. (2014).

2 *Yisrael v. State*, 993 So. 2d. 952, 956 (Fla. 2008).

3 § 90.803(6)(a) Fla. Stat. (2014).

4 *See e.g. Clay County Land Trust v. JP Morgan Chase Bank, N.A.*, 152 So. 3d. 83 (Fla. 1st DCA 2014); Colon v. JP Morgan Chase Bank, N.A., 2015 WL 477629 (Fla. 1st DCA 2015); and Cach, LLC v. Keyes, 22 Fla.L.W. Supp. 610 (7th Jud. Cir. 2014).

5 *See e.g. Hunter v. Aurora Loan Services, LLC*, 137 So. 3d. 570 (Fla. 1st DCA 2014); Holt v. Calchas, LLC, 155 So 3d. 499 (Fla. 4th DCA 2015).

6 *Hunter*, 137 So. 3d. at 571, 573-74 (discussing cases that hold that establishing standing is a requirement to a successful foreclosure claim).

7 *Id.*

8 *Id.* at 572.

9 *Glarum v. LaSalle Bank National Ass'n*, 83 So. 3d. 780 (Fla. 4th DCA 2011); *Weisenberg v. Deutsche Bank Nat'l Trust Co.*, 89 So. 3d. 1111 (Fla. 4th DCA 2012); and *WAMCO XXVIII, Ltd., v. Integrated Electronic Environments, Inc.*, 903 So. 2d. 230 (Fla. 2d DCA 2005).

10 *Holt,* 155 So. 3d. at 505.

11 *Cayea v. CitiMortgage, Inc.*, 138 So. 3d 1214 (Fla. 4th DCA 2014); *Bank of N.Y. v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015); and *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164 (Fla. 1st DCA 2014).

12 *Cayea*, 138 So. 3d at 1216.

13 *Id.* at 1217.

14 *Id.*

15 *Id.* (citation omitted).

16 *Id.*

17 *Id.* at 1218.

18 *Bank of N.Y.*, 157 So. 3d at 1064.

19 *Glarum*, 83 So. 3d at 780.

20 *Id.* at 782-83.

21 *Id.* at 782, n. 82.

22 *WAMCO XXVIII, Ltd.*, 903 So. 2d at 230

23 *Id.* at 233.

24 *Bank of N.Y.*, 157 So. 3d at 1071-72.

25 *Id.* at 1072.

26 *Id.*

27 *Id.*

28 *Lindsey*, 135 So. 3d at 1164.

29 *Id.* at 1167.

30 *Id.*

31 *Id.*

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A Consummate Lawyer and Leader: Three Awards for Marsha Rydberg



No stranger to leadership and commitment, we congratulate our own Marsha Griffin Rydberg for her exemplary professionalism and for her most recent accomplishments. She has been a member of the Section and an active member of its Executive Council for many years. She is a frequent speaker at Section meetings and sponsored events. Within the past several months, she has received four (4) significant awards recognizing her distinction as a lawyer and the countless hours she has dedicated to volunteer work for her profession and her community.

Stetson Hall of Fame. On November 1, 2014, Marsha was inducted into the Stetson University College of Law Hall of Fame. Hall of Fame inductees are selected for having a profound and positive impact on Stetson Law and the legal profession. Ms. Rydberg graduated first in her class at Stetson Law during a time when a Florida Bar survey revealed that women comprised only about 3% of the legal profession. Rydberg was the first woman president of the Hillsborough County Bar Association (and first Hillsborough woman lawyer to be elected to the Florida Bar Board of Governors); the first woman president of the Tampa Exchange Club; the first woman to chair the Tampa Downtown Partnership; and the first woman member and later president of the University Club of Tampa. She twice chaired the Florida Commission on the Status of Women and the Jacksonville Branch of the Atlanta Federal Reserve Board. She was the second woman to chair the Tampa Chamber's Committee of One Hundred. The Girl Scouts of America presented Rydberg with their Woman of Distinction Award. Rydberg was honored with Stetson Law's Outstanding Alumni Representative Award, the Ben C. Willard Award, and the President's Award. She served as president of the Stetson Lawyers Association, chair of the Board of Overseers, and a member of the Stetson University Board of Trustees. Rydberg played a pivotal role in helping Stetson Law build its Tampa Law Center. As an adjunct professor at Stetson Law, she has inspired numerous young women to pursue a legal career. A link to the video Stetson produced about Marsha's career is at: https://youtu.be/K7mGKppKcBU.

Hillsborough Outstanding Lawyer Award. On January 22, 2015, Marsha was awarded the 2014 Hillsborough County Outstanding Lawyer Award. This major Hillsborough County Bar Association award recognizes an attorney who has made a significant difference in the practice of law and the community because of that individual's personal and professional ethics and conduct. This award is not necessarily presented each year because it is designed to recognize unique lawyers whose professional conduct has made a real difference in the practice of law and in the community.

HAWL Trailblazer Award. On March 26, 2015, Marsha was awarded the 2015 Trailblazer award by the Hillsborough Association for Women Lawyers. The award recognizes an established female attorney in the Tampa Bay area who has exhibited, throughout her life and career, a pioneering spirit, courageous leadership, outstanding contributions to the legal community, and who has refused to let her career and contributions be limited or defined by the expectations of others. These trailblazers demonstrate a spirit of excellence that has lent credibility to the practice of law by women. They use their legal skills and knowledge to benefit those less able to protect themselves.

HCBA "In the Trenches" Award for Civil Trial Practice. On May 28, 2015, the Trial and Litigation Section of the Hillsborough County Bar Association presented its Michael A. Fogarty Memorial "In the Trenches" Award for Civil Trial Practice to Marsha. The award is given to a civil trial lawyer who demonstrates excellence and integrity in civil trial advocacy and ongoing efforts and recent or current accomplishments in the representation of clients in the civil court system.

For these and a myriad of other achievements we congratulate Marsha. And, for her humility, and her untiring and continuing commitment to excellence, leadership and her profession, we thank her.

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

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Community Association Laws 2015: Electronic Voting, Fines and Sundries

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

The primary bill affecting condominiums, homeowners' associations, and cooperatives this year was CS/CS/HB 791, now known as Chapter 2015-97, Laws of Florida. The effective date is June 2, 2015.

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

Applicable Only To Condominiums

Damage Not Caused by Insurable Event

Sec. 718.111(11)(j), F.S., is amended to clarify that if damage is not the result of an insurable event, the association, or unit owner, is responsible for the reconstruction, repair, or replacement as determined by the maintenance provisions of the declaration of condominium or bylaws.

Expenses in Annual Budget

Sec. 718.112(2)(f)1, F.S., was amended to specifically provide that the proposed budget must include, at a minimum, any applicable expenses listed in Sec. 718.504(21), F.S.

Developer Vote on Reserves

Sec. 718.112(2)(f)2.b., F.S., states that before turnover of association control to unit owners, the developer may vote the voting interests allocated to its units to waive the reserves, or reduce the funding of reserves, through the period at the end of the second fiscal year after the fiscal year in which the certificate of surveyor or mapper is recorded or an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit is recorded, whichever occurs first.

Accord and Satisfaction

Sec. 718.116(3), F.S., continues to provide that any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. In an effort to clarify existing law, the statute was amended to address recent court decisions to provide that it is applicable notwithstanding Sec. 673.3111, F.S., to any purported accord in satisfaction, or any restrictive endorsement, designation, or instruction placed on or accompanying the payment.

Lien for Late Fees

Sec. 718.116(5)(b), F.S., was amended to provide that in addition to securing unpaid assessments that are due and may accrue after the claim of lien and through the entry of a final judgment, administrative late fees are now included in addition to interest, reasonable costs and attorney's fees. This is significant if the condominium documents are silent on the imposition of late fees.

Extension of Bulk Assignee or Bulk Buyer Classification

The Distressed Condominium Relief Act, Sec. 718.707, F.S., extends the time limitation for a bulk assignee or bulk buyer from July 1, 2016 to July 1, 2018.

Applicable To Only Condominium And Cooperative Associations

Official Records

The catchall provision in Sec. 718.111(12)(a)15, F.S., is amended to apply only to all other written records of the association . . . which are related to the operation of the association. This provision would seem to, perhaps unintentionally, exclude electronic records of the association not otherwise identified in the statute, but related to the operation of the association from the definition of official records. The same change is made for cooperatives in Sec. 719.104(2)(a)13, F.S.

Applicable To Only Homeowners' Associations

Title

Sec. 720.301(5), F.S., is created to provide a short title for this chapter: Homeowners' Association Act.

Governing Documents

Sec. 720.301(8)(c), F.S., is amended to revise the definition of governing documents to include rules and regulations adopted under the authority of the recorded declaration, articles of incorporation, or bylaws and any duly adopted amendments thereto.

Amendments

Sec. 720.306(1)(b), F.S., previously was amended in each of the last two legislative sessions to provide a procedure for providing copies of amendments to the governing documents. This year's amendment provides that the failure to timely provide notice of the recording of the amendment does not affect the validity or enforceability of the amendment.

Eligibility

Sec. 720.306(9)(b), F.S., clarifies that a person who is delinquent in the payment of any fee, fine or other monetary obligation on the day that he or she could last nominate himself

or herself must not be listed on the ballot. A person serving on the board who becomes more than 90 days delinquent in the payment of any fee, fine or other monetary obligation to the association is deemed to have abandoned his or her seat on the board, creating a vacancy to be filled according to law. The amendment further provides that the term "any fee, fine, or other monetary obligation" means any delinquency to the association with respect to any parcel.

Provisions Common To Condominiums, Cooperatives, And Homeowners' Associations

Electronic Voting

Electronic voting finally arrives for association elections and other unit owner votes through an Internet based online voting system if a unit owner consents in writing and if the association provides:

- Unit owners with a method to authenticate the unit owner's identity.
- In the election of the board, a method to transmit an electronic ballot to the online voting system that ensures the secrecy and integrity of each ballot.
- A method to verify the authenticity of receipts sent from the electronic voting system, and
- A method to confirm, at least 14 days before the voting deadline, that the unit owner's electronic device can successfully communicate with the online voting system.

In addition, the online voting system must be able to:

- Authenticate the unit owner's identity.
- Authenticate the validity of each electronic vote to assure that the vote is not altered in transit.
- Transmit a receipt from the online voting system to each unit owner who casts an electronic vote.
- In the election of the board of directors, separate any authentication or identifying information from the electronic election ballot so it is impossible to tie an electronic ballot to a specific unit owner.
- Store and keep electronic votes accessible to election officials for recount, inspection, and review purposes.

An owner voting electronically is counted in the attendance of the meeting for purposes of determining a quorum. A substantive vote of the unit owners may not be taken on any issue other than the issues specifically identified in the electronic vote, when a quorum is based on the unit owners voting electronically pursuant to this section.

Sec. 718.128, F.S., applies to an association that provides for and authorizes an online voting system pursuant to this statute by board resolution. The board resolution must provide that unit owners receive notice of the opportunity to vote through an online voting system, and must establish reasonable procedures and deadlines for unit owners to consent, in writing, to online voting including procedures and deadlines for unit owners to opt out of online voting after giving consent. Written notice of a meeting at which the resolution will be considered must be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property at least 14 days before the meeting. Evidence of the posting must be made by an affidavit and filed in the official records of the association. An owner's consent to online voting is valid until the unit owner opts out of online voting according to procedures established by the board. The corresponding provision for cooperatives is in Sec. 719.129, F.S., and Sec. 720.317, F.S., for homeowners' associations.

Electronic Transmission of Notices

Pursuant to Sec. 718.112(2)(d)6, F.S., notice of meetings of the board of directors, unit owner meetings, except unit owner meetings called to recall board members under paragraph (j), and committee meetings, may be given by electronic transmission to unit owners who consent to receive notice by electronic transmission. See also, Sec. 718.106(1)(d)3, F.S., as to cooperatives and Sec. 720.303(2)(c)1, F.S., as to homeowner associations, which provide that the association may provide notice by electronic transmission in a manner authorized by law for meetings of the board of directors, committee meetings requiring notice under this section, and annual and special meetings of the members; however, a member must consent in writing to receiving notice by electronic transmission.

Fines

Sec. 718.303(3), F.S., is amended to specifically provide that a fine may be levied by the board on the basis of each day of a continuing violation, with a single notice and opportunity for a hearing before a committee. A fine or suspension may not be imposed unless the board first provides at least 14 days written notice and an opportunity for a hearing to the unit owner and, if applicable, its occupant, licensee, or invitee. The roll of the committee is now limited to confirming or rejecting the fine or suspension levied by the board.

Suspension of Use Rights

An owner who is more than 90 days delinquent in paying a fee, fine or other monetary obligation may be the subject of a suspension of use rights of the common elements, common facilities, or other association property until the fee, fine, or other monetary obligation is paid in full. An association may now suspend the voting rights of a unit or member due to non-payment of any fee, fine, or other monetary obligation due to the association which is more than 90 days delinquent. A voting interest or consent right allocated to a unit or member which has been suspended by the association must be subtracted from the total number of voting interests in the association, which will be reduced by the number of suspended voting interests when calculating the total percentage or number of all voting interests available to take or approve any action, and the suspended voting interests must not be considered for any purpose.

Owners of Multiple Properties

Sec. 718.303(7), F.S., clarifies that the suspensions permitted apply to a member and, when appropriate, the member's tenants, guests, or invitees, even if the delinquency or failure that resulted in the suspension arose from less than all of the multiple units owned by a member. A corresponding provision for cooperatives is at Sec. 719.303(3), F.S., and Sec. 720.305(2), F.S., for homeowners' associations.

Copies

Finally, in an amendment to Sec. 617.0721, (2), F.S., a copy, facsimile transmission, or other reliable reproduction of the original proxy may be used in lieu of the original.



S. MEZER

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Improvements Made to Florida's Estate Tax Apportionment Statute

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During its recent session, the Florida Legislature passed legislation that amends both the Florida Probate and Florida Trust Codes.[1] Included within this legislation was an amendment (the "Amendment") to Section 733.817 of the Florida Statutes (the "Apportionment Statute"), which is the section of the Florida Probate Code that governs the apportionment of estate taxes.[2] The impetus for the Amendment was a study and analysis of the prior Apportionment Statute by the Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of the Florida Bar.

The Amendment updates the Apportionment Statute for changes in the federal estate tax law, clears up ambiguities, addresses tax issues not previously covered, codifies some case law and includes changes reflecting what it is believed most decedents would intend.

Background

The purpose of the Apportionment Statute is to provide default rules for determining the share of the estate tax that is apportioned to the various property interests passing as a result of a decedent's death and to provide for the collection of the estate tax. Prior to the Amendment, the Apportionment Statute had not been substantially revised since 1997. Generally, the Apportionment Statute provides for a modified equitable apportionment regime. Property interests generally bear their share of the taxes, except there are special provisions for property interests passing under a will or trust and for homestead. The default apportionment provisions apply only if the decedent does not direct otherwise. The Apportionment Statute provides rules for determining whether a decedent has overridden the default rules.

Overview of Changes made by the Amendment

The Amendment rearranged the Apportionment Statute, added titles for clarity and made other clarifying changes with a goal of eliminating ambiguities and making it easier for practitioners to work their way through it. Following the definitions[3] are rules for determining the tax attributable to various property interests,[4] rules for determining who is charged (apportioned) with the tax attributable to a property interest,[5] rules for what is required in order to direct against statutory apportionment and rules for resolving conflicts between governing instruments.[6] The remaining provisions of the Apportionment Statute[7] are substantially unchanged and deal with the collection of the estate tax by the personal representative. The purpose of this article is to describe the changes to the Apportionment Statute made by the Amendment.

Definitions

Two new definitions have been added to subsection (1) of the Apportionment Statute: "generation skipping transfer tax" and "Section 2044 property".[8] These definitions have been added for clarity but do not change the law. In addition and more importantly, the definition of "included in the measure of the tax" has been reorganized for clarity and subparagraph (1)(e)3 addresses two items included in the measure of the tax that were not addressed in the prior Apportionment Statute.

A decedent's gross estate for federal estate tax purposes includes gift taxes paid within three years of death.[9] Under the Amendment, gift taxes paid within three years of death are excluded from the definition of "included in the measure of the tax." The effect of this change is that recipients of such gifts are not allocated the estate tax attributable to the gift taxes although the gift taxes are a part of the amount upon which the estate tax is calculated. The result is an increase in the estate tax charged to all other interests.

Section 529 of the Internal Revenue Code permits a donor of a gift to a qualified tuition program (commonly known as a "529 Plan") to treat a gift exceeding the gift tax annual exclusion as being made over five years.[10] If the donor dies prior to the end of the five-year period, the donor's taxable estate includes a portion of the gift. The Amendment excludes those gifts from the definition of "included in the measure of the tax". As with the gift taxes paid, the effect of this change is that the recipients of those gifts are not allocated the estate tax on those gifts, which results in an increase to the estate tax charged to all other interests.

Allocation of Tax

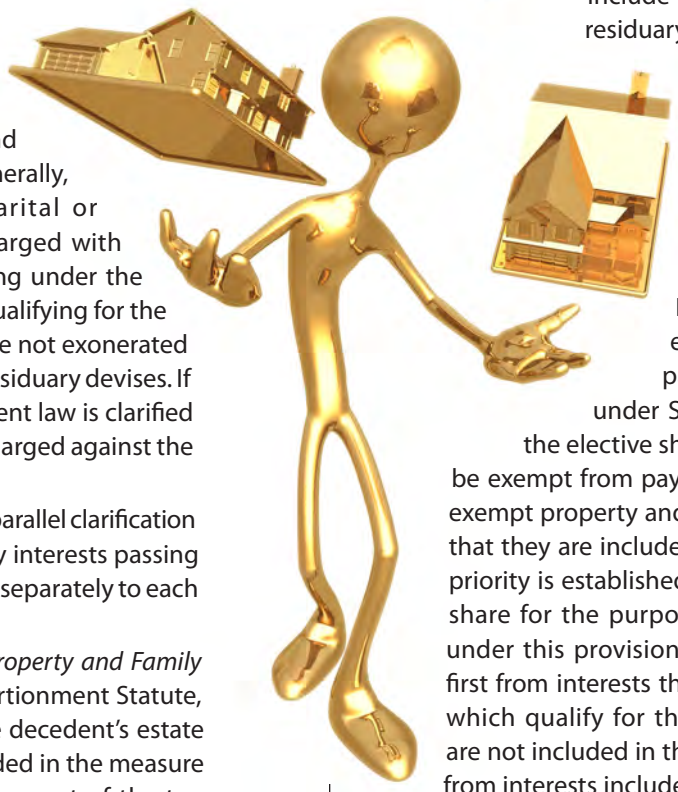
Subsection (2) provides rules for determining how much estate tax is attributable to each property interest included in the measure of the tax. The general rule is to allocate tax among the property interests included in the measure of the tax in proportion to their relative values.

The Amendment deletes references to the state death tax credit and clarifies that the state death tax deduction is allocated to the interests producing the deduction for the purpose of determining the tax attributable to the interest. The federal estate tax credit was eliminated in 2005 and replaced with a deduction for state death taxes.[11]

Apportionment of Tax

Subsection (3) provides rules for determining who is charged with payment of the tax attributable to various property interests included in the measure of the tax.

Section 2044 Interests. Section 2044 interests may pass under a trust or the decedent's will, or pass outside of the will or a trust. The Amendment clarifies current law to insure that (1) the net tax attributable to the Section 2044 interests, which may be at a higher effective rate than the tax attributable to other property interests, is charged to the Section 2044 interests, and (2) the Section 2044 interests are not charged with the tax on other property interests.[12]



Wills. For property passing under the decedent's will, the residue is charged first with the tax on non-residuary devises and then with tax on the residue. Generally, devises qualifying for the marital or charitable deduction are not charged with any of the tax on property passing under the will; however, residuary devises qualifying for the marital or charitable deduction are not exonerated from the payment of tax on non-residuary devises. If the residue is insufficient the current law is clarified so that, the balance of the tax is charged against the non-residuary interests.[13]

Trusts. The Amendment make a parallel clarification to the rules applicable to property interests passing under trusts and generally applies separately to each trust.

Protected Homestead, Exempt Property and Family Allowance. Under the prior Apportionment Statute, the recipients of the assets of the decedent's estate and revocable trust that are included in the measure of the tax bear the burden of payment of the tax on protected homestead. The first group (Class I) bearing the tax on protected homestead are recipients of property not disposed of under the will or revocable trust. As a result, the recipients of exempt property, family allowance, elective share, pretermitted shares and property passing by intestacy were responsible for the payment of the tax on homestead. The second group (Class II) bearing the tax was the residuary beneficiaries. The third group (Class III) was the non-residuary beneficiaries (i.e., recipients who are to receive a specific property or specific type of property, fund or sum).

The Amendment provides that the tax on exempt property and the family allowance is also to be apportioned against other estate and revocable trust property in the same manner as the tax on protected homestead. Further, exempt property and family allowance are no longer charged with payment of estate tax on the homestead (in furtherance of the purposes of exempt property and family allowance). The Amendment continues the limitation that only property within a particular Class that is included in the measure of the tax is charged with payment of the tax. Thus, property interests qualifying for the marital or charitable deduction will not be responsible for paying the tax on homestead, family allowance and exempt property.



For purposes of apportioning the tax on homestead, exempt property and family allowance, the Amendment modified (a) Class I to include only property that passes by intestacy and (b) Class II to include pretermitted shares along with residuary interests. No change was made to Class III.

Under the Amendment, property necessary to satisfy the elective share will not bear any part of the tax on protected homestead, exempt property or the family allowance. If the surviving spouse elects the elective share, and the interests passing to the surviving spouse under Section 732.2075(1), F.S., exceed the elective share, the excess interests will not be exempt from payment of tax on the homestead, exempt property and family allowance to the extent that they are included in Class I, II or III. An order of priority is established for the funding of the elective share for the purpose of determining the "excess" under this provision. Funding is deemed to occur first from interests that pass to the surviving spouse which qualify for the marital deduction (and thus are not included in the measure of the tax), and then from interests included in the measure of the tax and described in Classes I, II, and III.

Finally, the Amendment clarifies that the apportionment of the tax on protected homestead, exempt property and the family allowance occurs after the application of the apportionment provisions for property passing under the will and revocable trust, but prior to the apportionment of tax to assets passing outside the will and revocable trust and prior to the apportionment of the generation-skipping transfer tax. If the assets in Classes I, II and III are exhausted, the remaining tax attributable to homestead, exempt property and family allowance will be apportioned proportionately to those interests.

Assets Passing to the Estate or a Trust. If an estate or trust is the beneficiary of an annuity or insurance policy or under a power of appointment and thus such property is disposed of pursuant to the will or trust, the Amendment clarifies current law that

the tax on such interests will be apportioned in the manner provided for interests passing from the estate or the trust.[14]

Common Instrument Construction. Under the prior Apportionment Statute, a decedent's will and revocable trust were construed together to apportion the tax as if all recipients of the estate and trust (other than the estate and trust themselves) were taking under one common instrument. This simplified the tax apportionment to recipients of residuary and non-residuary interests under the provisions regarding wills, trust and homestead. The prior Apportionment Statute did not apply if one revocable trust poured into another, but applied to a will and revocable trust even if one did not pour into the other.

The Amendment modifies existing law to require that a decedent's will and revocable trust (or two revocable trusts, if applicable) must pour into one another for the common instrument construction to apply.[15] The purpose of this provision is to determine which interests are, in effect, pre-residuary interests and which are residuary interests where a will or trust (or another trust) pours into the other so that the tax attributable to those interests may be apportioned accordingly. Under the Amendment, the common instrument construction will not apply if the will or trusts stand alone from one another.

Assessment of Liability by Court. The prior Apportionment Statute did not expressly provide direction for the apportionment of estate taxes if the Apportionment Statute did not cover a particular situation, e.g., where the recipient of a property interest included in the measure of the tax cannot be determined. The Amendment provides that in such circumstances, the court may assess liability for payment of the tax in the manner it finds equitable.[16]

Direction Against Apportionment.

Subsection (4) provides rules for determining whether a decedent has effectively directed against statutory apportionment and rules for resolving conflicts between governing instruments.

As under the prior Apportionment Statute, a governing instrument may not direct that taxes be paid from property other than property passing under that governing instrument except as permitted in the Apportionment Statute,[17] and the decedent's will may direct the payment of taxes from the decedent's revocable trust if there is no contrary direction contained in the trust.[18]

The Amendment provides that a direction in the governing instrument against statutory apportionment for property interests passing under the governing instrument must be express.[19]

The Amendment removes the provision that required a decedent who wished to direct that property passing under the governing instrument pay tax on property not passing under the governing instrument to expressly refer to "this section."[20] The concern was that the prior Apportionment Statute not only contained default apportionment provisions, but also contained provisions for obtaining an order of apportionment and the collection of the tax, and a waiver of the default apportionment provisions by reference to Section 733.817, F.S., could be construed as also waiving the provisions for obtaining an order of apportionment and collecting the tax.

Sections 2207A and 2207B of the Internal Revenue Code of 1986, as amended (the "Code") provide a decedent's estate with the right to recover the estate taxes described in those sections from the recipients of the property that generated the tax. [21] Those sections provide that the decedent may direct otherwise but require the decedent to specifically indicate an intent to waive these rights of recovery. Section 2603 provides that the generation-skipping transfer tax is imposed on the property constituting the transfer unless otherwise directed by the governing instrument but requires a specific direction to do so. The purpose of the Code provisions requiring specificity in directing against a right of recovery is to guard against the decedent's inadvertent waiver of those rights for the benefit of the estate. The Amendment clarifies that in order to waive recovery, the decedent must meet both the express direction requirements of the Apportionment Statute and the specificity requirements by those Code provisions.

In addition, some property interests are included in the gross estate for estate tax purposes under more than one section of the Code although the interests are taxed only once. Sections 2041 (general powers of appointment) and 2044 (QTIP) may both apply in certain situations. Sections 2038 and 2036 overlap in part so that most revocable trusts are includible in the decedent's gross estate under both Sections. The provisions of Section 2207A apply to property included in the decedent's gross estate under Section 2044 and the provisions of Section 2207B apply to property included in the decedent's gross estate under Section 2036. The overlapping application could affect the apportionment of taxes. The prior Apportionment Statute was silent on these issues. The prior Apportionment Statute applied to revocable trusts long before the enactment of Section 2207B, which the authors believe was never intended to apply to revocable trusts and there is no policy reason why it should.

The Amendment describes what is sufficient to comply with the specificity requirement of Section 2207A and is intended to clarify current law.[22] A reference to "qualified terminable interest" property, "QTIP" or property in which the decedent had a "qualifying income interest for life" is deemed to suffice. The list is not intended to be exclusive.

Further, the Amendment provides that if property is included in the gross estate for estate tax purposes under both Sections 2041 and 2044, the property is deemed to be included under Section 2044 for purposes of the allocation and apportionment of tax under the Apportionment Statute.

To direct otherwise, the decedent must comply with the provisions of Subparagraph (4)(d)1. For both Section 2041 and Section 2044 to apply, the property must have first been a Section 2044 interest. The Amendment reflects the view that most decedents would expect taxation under Section 2044 to continue and to be required to comply with Section 2207A to waive the right of recovery.

The Amendment also describes what is sufficient to comply with the specificity requirement of Section 2207B. It is not intended to be exclusive. Again this is a clarification of existing law.[23]

If property is included in the gross estate under both Sections 2038 and 2036, the Amendment provides that such property will be deemed included under Section 2038 and not Section 2036 for purposes of allocation and apportionment of the tax and there is no right of recovery under Section 2207B. This is a clarification of existing law.

The Amendment clarifies that a general statement in the decedent's will or revocable trust waiving all rights of recovery under the Code is not an express waiver of the rights of recovery provided in Sections 2207A or 2207B.[24]

As a clarification of existing law, the Amendment describes what is sufficient to comply with the specificity requirement of Section 2603.[25] A reference to "the generation-skipping transfer tax or s. 2603 of the Internal Revenue Code" is deemed to suffice. Again, however, this list is not intended to be exclusive.

Under the prior Apportionment Statute, the net tax attributable to property over which the decedent held a general power of appointment (a "general power") is calculated in the same manner as other property included in the measure of the tax (with the exception of the tax on Section 2044 interests). The risk of granting a general power is that the power will be exercised so as to direct the trust property away from the donor's intended beneficiaries. As there are four possible classes of takers under a general power (i.e., the power holder, the power holder's estate, the power holder's creditors or the creditors of the power holder's estate), this risk can be minimized (although not eliminated) by limiting the takers to only one of these classes. For example, a beneficiary will often be granted a testamentary general power to appoint property to the creditors of the beneficiary's estate, which is perhaps the most limited of the four classes. Although the power is still a general power, it would appear more likely than not that the trust property will ultimately pass to the donor's intended beneficiaries.

The Amendment permits the power holder to direct that the property subject to the general power of appointment bear the additional tax incurred by reason of the inclusion of the property subject to the general power of appointment in the power holder's gross estate.[26] This additional tax is calculated in the same manner as the tax attributable to Section 2044 interests.

The Code enables the personal representative of the estate to recover the estate tax attributable to life insurance or property subject to a general power of appointment from the beneficiaries of those interests, but provides that the decedent may direct otherwise by will. Many decedents insert their tax apportionment provisions in their revocable trusts. To avoid any issues with the federal provisions, the Amendment provides that an effective direction of apportionment in the revocable trust is deemed to be a direction in the will as well as the revocable trust.[27]

The decedent's will may direct that estate taxes be paid from the decedent's revocable trust unless the trust contains a contrary provision.[28] The Amendment clarifies that the revocable trust that is to pay the tax must be specifically identified in the decedent's will.

The prior Apportionment Statute covered conflicts between the decedent's will and another governing instrument, but did not cover conflicts between two or more governing instruments which were not wills. Further, the prior Apportionment Statute gave priority to the will even if the conflicting non-will governing instrument was executed at a later date. In view of the prevalence of tax clauses in revocable trusts, the Amendment modifies the Apportionment Statute to apply to conflicts between all governing instruments (whether a conflicting instrument is a will or other instrument) and provides that the last executed governing instrument containing an effective tax apportionment clause controls to the extent of the conflict.[28] If a will or trust is amended, the date of the amendment is the controlling date only if the amendment contains an express tax apportionment provision. Only tax apportionment provisions that would be effective, but for the conflict, create a conflict.

Finally, the general provisions of the Apportionment Statute apply to any tax remaining unpaid after the application of effective directions against statutory apportionment. The Amendment codifies case law that an effective direction for payment of tax on a type of interest in a manner different from that provided in the Apportionment Statute is not effective as an express direction for payment of tax on other types of interests.[30] There are three separate effective date provisions for the amendments to the Apportionment Statute. The reader should review Ch. 2015-27 for the effective date provisions.

Conclusion

As a result of changes made by the Amendment, practitioners should find the Apportionment Statute more user friendly, updated to reflect changes in federal estate tax law and court decisions, and covers issues not previously addressed.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Keith, David and Pam were the members of the Estate Tax Apportionment Subcommittee of the Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of the Florida Bar that drafted the proposal which formed the basis of the Amendment.

Endnotes

1 Ch. 2015-27.
2 The Amendment was signed into law by the Governor on May 14, 2015.
3 Fla. Stat. § 733.817(1).
4 Fla. Stat. § 733.817(2).
5 Fla. Stat. § 733.817(3).
6 Fla. Stat. § 733.817(4).
7 Fla. Stat. §§ 733.817(5) through (11).
8 Section 2044 property is property included in the measure of the tax by reason of Section 2044 of the Internal Revenue Code and is commonly described as "QTIP property". Throughout this article, such property may also be referred to as "Section 2044 interests.
9 I.R.C. § 2035(b).
10 I.R.C. §529(c)(2)(B).
11 I.R.C. § 2058.
12 Fla. Stat. § 733.817(3)(b).
13 Fla. Stat. § 733.817(3) (c).
14 Fla. Stat. § 733.817(3)(f).
15 Fla. Stat. § 733.817(3)(g).
16 Fla. Stat. § 733.817(3)(i).
17 Fla. Stat. § 733.817(4)(a).
18 Fla. Stat. § 733.817(4)(g).
19 Fla. Stat. § 733.817(4)(b).
20 Fla. Stat. § 733.817(4)(c).
21 Unless otherwise specifically stated, all section references shall be references to the Code.
22 Fla. Stat. § 733.817(4)(d)1.
23 Fla. Stat. § 733.817(4)(d)2.
24 Fla. Stat. § 733.817(4)(d)3.
25 Fla. Stat. § 733.817(4)(d)4.
26 Fla. Stat. § 733.817(4)(e).
27 Fla. Stat. § 733.817(4)(f).
28 Fla. Stat. § 733.817(4)(g).
29 Fla. Stat. § 733.817(4)(h).
30 Fla. Stat. § 733.817(4)(j).

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Planning for Second Spouses and First Marriage Children and (Surprisingly) Making Everyone Happy!

By Michael A. Sneeringer, Esq., Akerman LLP, Naples, Florida


M. SNEERINGER

It is hard to believe, but married couples with children get divorced. Surprisingly, sometimes a divorced spouse remarries and often, the remarried spouse (for purposes of this article, husband) wants to provide for the second spouse (for purposes of this article, Wife #2). This article will explore some creative techniques for providing for the new spouse while not forgetting the children from the first marriage.

Consider the basic scenario where, say, an uninformed estate planning attorney plans for this situation by providing for husband's assets to pass into a "qualified terminable interest property" marital trust (the "QTIP Trust") for Wife #2's life, with the remainder to the children from the first marriage. The limitation with this plan is that during Wife #2's life, the funds in the QTIP Trust cannot be used to benefit the children from husband's first marriage. This problem is magnified if Wife #2 has sufficient assets of her own (meaning that she has assets outside of the QTIP Trust or is still working) and would not need the QTIP Trust to sustain her standard of living. At that point, the estate planning attorney may look for alternate ways to provide for such children, such as having them borrow assets from the QTIP Trust. Of course, this raises additional issues as to the structure of the loan (fixed payment or balloon) and the interest rate to be charged (AFR or a rate more comparable to that charged by commercial banks).

What if an estate planning attorney could instead energize an otherwise innocuous QTIP Trust plan for Wife #2 while accomplishing the goal of providing liquidity to the children? This was the scenario set forth in Internal Revenue Service ("IRS") Private Letter Ruling ("PLR") 201426016 (June 27, 2014).

PLR 201426016

In PLR 201426016, the decedent's revocable trust created a QTIP Trust for the surviving spouse. The trust provided that after the decedent's death, the net income was to be paid to the surviving spouse during the spouse's lifetime, not less frequently than at least quarter-annually. The trustees had discretion to distribute principal to support the surviving spouse in her accustomed standard of living and to pay for her health, medical, dental, hospital, nursing expenses, and expenses of invalidism. Following the surviving spouse's death, the entire principal of the QTIP Trust was subject to a limited power of appointment in the surviving spouse in favor of the decedent's descendants. According to the trust document, any unappointed principal was to be distributed to the "Family Trust." Upon the surviving spouse's death, the Family Trust provided that "x" percent of the assets would be distributed to the decedent's children, per stirpes (provided that the share of assets to any person under thirty years of age would be held in further trust), and two "other" individuals.

The decedent died survived by the surviving spouse and six children. The surviving spouse, two children and another unnamed individual served as trustees of the QTIP Trust (the "trustees"). The executor qualified the QTIP Trust for the estate tax marital deduction.

The trustees proposed to divide the Marital Trust into three separate trusts: Trust 1, Trust 2, and Trust 3. The terms of Trust 1 would be identical to the terms of the QTIP Trust and continue to be held on its terms for the lifetime benefit of the surviving spouse. The trustees intended to convert Trust 2 to a "total return unitrust" with an annual unitrust payment equal to not less than 3% or more than 5% of the fair market value of the assets of Trust 2. The trustees proposed to obtain a court order permitting the termination of Trust 3 and have its assets distributed to the decedent's children, with the children reimbursing the surviving spouse for any and all gift taxes occasioned by the termination of Trust 3.

The PLR indicated that a "state" statute permitted the division of a trust, after notice to qualified beneficiaries, and the termination or modification of a noncharitable irrevocable trust with the consent of all of the beneficiaries, if the court concluded that continuance of the trust was not necessary to achieve, or that modification would not impair, any material purpose of the trust. State statutes also permitted the conversion of a trust, without the approval of a court, to a total return unitrust.

In the PLR, the IRS made eleven rulings in response to the taxpayer's requests.[1]

Ruling 1

1. Whether, after the division of Marital Trust into three separate trusts, each separate trust would be a QTIP Trust.

The Internal Revenue Code of 1986, as amended (the "IRC")[2] allows a marital deduction for QTIP property treated as passing to a surviving spouse.[3] One of the elements for QTIP property is that the surviving spouse must have a "qualifying interest for life," which is defined as an interest in which the surviving spouse is entitled to all of the income from the property.[4] After the division of the QTIP Trust into three separate trusts, the surviving spouse would continue to be entitled to all of the income from the property held in trust. With the continuance of a qualifying income interest in the trusts, the IRS concluded that each trust would be a QTIP trust under § 2056(b)(7).

Rulings 2 through 6

2. Whether the division of the Marital Trust into three separate trusts would be a gift.
3. Whether, upon termination of Trust 3, Spouse will be deemed to make a gift of her qualifying income interest in Trust 3 under § 2511 and a gift of the entire fair market value of the assets in Trust 3, less the value of the qualifying income interest in the assets in Trust 3 under § 2519.
4. Whether, upon termination of Trust 3, the amount of the gift from Spouse to Decedent's children would be reduced by the amount of gift taxes paid by Decedent's children.
5. Whether the termination of Trust 3 would cause Spouse to be deemed to have made a gift of the property in Trust 1 or Trust 2.
6. Whether the termination of Trust 3 would cause Trust 1 or Trust 2 to fail to qualify as QTIP trusts.

Rulings 2 through 6 were combined into one discussion. Generally any disposition by a surviving spouse of all or part of a qualifying income interest for life in property for which a deduction was allowed under § 2056(b)(7) is treated as a transfer by the surviving spouse of all interest in the property other than the qualifying income interest.[5] Without more, this would subject such a "transfer" to gift tax.[6] Recall that the surviving spouse was dividing the QTIP Trust into three separate trusts while retaining (momentarily) her qualifying income interest in all three trusts. As such, at the moment of the division, it was ruled to not be a deemed gift.

As described above, it was proposed that Trust 3 would be terminated by court order in favor of the decedent's children. The IRS ruled that Trust 3's termination resulted in the surviving spouse making a gift of her income interest and the entire fair market value of the assets,[7] reduced by the amount of gift taxes paid by the decedent's children (conditioned upon the decedent's children paying all gift taxes attributable to the transfer).[8] However, Trust 3's termination did not result in Trust 1 or Trust 2 failing to maintain their status as QTIP Trusts.

Ruling 7

7. Whether the conversion of Trust 2 to a total return unitrust would be deemed to be a gift or other disposition of any interest in Trust 2 under § 2519, cause the surviving spouse to be deemed to have made a gift to the remainder beneficiaries, and cause the remainder beneficiaries to be deemed to have made a gift to the surviving spouse.

An allocation of amounts between income and principal will be respected if pursuant to local law, it provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year.[9] "Total return" includes ordinary income, tax-exempt income, capital gains and appreciation.[10] As previously described, the state statutes permitted a total return unitrust. Thus the IRS ruled that the conversion of Trust 2 to a total return unitrust would not cause the surviving spouse to be deemed to have made a gift to the remainder beneficiaries, or vice versa.

Ruling 8

8. Whether the termination of Trust 3 would cause the value of the surviving spouse's lifetime income and discretionary interests in Trust 1 and Trust 2 to be valued at zero.

Solely for determining whether a transfer of an interest in trust to a member of the transferor's family is a gift, the value of the interest is determined as provided in § 2702(a)(2), which provides that the value of any retained interest which is not a qualified interest shall be treated as zero.[11] The IRS ruled that because the termination of Trust 3 did not result in a transfer under § 2519 with respect to any interest in Trust 1 or 2, there was no deemed gift under § 2519 with respect to Trust 1 or 2.

Ruling 9

9. Following the termination of Trust 3, whether the value of the assets previously held in Trust 3 would be includible in the surviving spouse's gross estate.

The value of the gross estate includes the value of any property in which the decedent had a qualifying income interest for life.[12] Section 2044 applies to any QTIP property if a prior deduction was allowed with respect to the transfer of property to the decedent under § 2056(b)(7) or § 2519.[13] Since the termination of Trust 3 results in the surviving spouse making a gift under § 2519 less the value of the qualifying income interest, the surviving spouse is deemed to have disposed of the assets and therefore such assets will not be includible in the surviving spouse's gross estate.

Rulings 10 - 11

10. Whether the division of Marital Trust into three separate trusts and the funding of such trusts on a pro-rata basis would cause the Marital Trust to recognize gain or loss.
11. Whether the conversion of Trust 2 to a total return unitrust would cause Trust 2 to recognize gain or loss.

Rulings 10 and 11 were combined into one discussion. Gain or loss realized from the exchange of one property for another differing materially either in kind or in extent is treated as either income or as loss sustained.[14] Where co-owners of joint property sever joint interests, there is no sale or other disposition of property as long as the co-owners do not acquire a new or additional interest.[15] The IRS noted that the beneficiaries and their legal entitlements would not be changed by the proposed trust partition and asset distribution as the current income and remainder beneficiaries of the QTIP Trust would be the same under the new trusts. As such, the IRS ruled that there would be no recognition of gain or loss on the division of the QTIP Trust into three new trusts. Recall that following the division of the QTIP Trust, Trust 2 was to be converted to a total return unitrust in line with the provisions under state law. A switch between methods of

determining trust income allowed by state statute will not result in the disposition of property where gain or loss would be recognized.[16] An allocation of amounts between income and principal pursuant to local law "will be respected if local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year."[17] Thus, the IRS ruled that there would be no recognition of gain or loss on the conversion to a total return unitrust in Trust 2.

Application to Florida Law

It should be noted that a PLR is directed only to the taxpayer requesting it and may not be used or cited as precedent.[18] However, the facts of PLR 201426016 should work for Florida trusts. Sections 738.1041, 736.04113 and 736.0417, Fla. Stat., are consistent with the state statutes addressed in the PLR. Sec. 738.1041(2), Fla. Stat., provides that "[a] trustee may, without court approval, convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust…"This statute corresponds with Rulings 7 and 11, above, and enables the trustee of a Florida situs trust to take action to reconvert a total return unitrust to an income trust.

Sec. 736.04113, Fla. Stat. allows judicial modification of an irrevocable trust when modification is not inconsistent with the settlor's purpose.[19] Sec. 736.04113(1)(b), Fla. Stat., discusses that modification may be made "[b]ecause of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust." In modifying the trust under Sec. 736.04113, Fla. Stat., a judge is given the authority to, among other powers, terminate the trust in whole or in part.[20] Sec. 736.0417, Fla. Stat., allows for the division of a trust into two or more separate trusts, after notice to the qualified beneficiaries,[21] if the result "does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trusts or trust, respectively."[22]

Modification and division will be used in conjunction to satisfy the steps described in most of the Rulings when a QTIP marital trust is divided to create three new trusts. However, the overseer during this process is the local circuit court judge who should be given consents and a petition that evidence that Wife #2 and all of the first marriage children agree to the division and modification (along with the trustee).

Plan Execution[23]

In order for PLR 201426016 to help, a few constants must be in place: (1) Wife #2 is independently wealthy, gainfully employed or the QTIP Trust provides assets over and above what Wife #2 otherwise would need to maintain her standard of living; (2) the relationship between Wife #2 and children from first marriage must be civil; and (3) at least one of the children from first marriage must actually need assets from the QTIP Trust to justify the attorney fees, court fees and time involved necessary to implement this plan.

Although the trustee is the "petitioner" who files the court petition to get this process started, if he, she or it is not agreeable to the plan, Wife #2 or first marriage children, depending upon the trust's terms, can probably remove the trustee and find one that is amenable to the plan.

If Wife #2 is independently wealthy, still employed (without a desire to quit working) or the QTIP Trust provides assets over and above what Wife #2 otherwise would need to live off of, she is amenable to the plan because, well . . . why not? The intrinsic value of helping another is one reason, but, more likely, it is the author's opinion that often, Wife #2 (and husband when applicable) is put in this decision making situation because one of the beneficiaries (if not all) does not have the independent means to support his or her lifestyle and sees dad's (or mom's) death as an opportunity to put himself or herself back on track, but then he or she realizes that Wife #2 (or husband) is the ultimate beneficiary until her (or his) death, not the child or his or her siblings. Wife #2 would go through with the plan because either the beneficiary is constantly bombarding the trustee with requests for money (especially by asking for loans from the trust) and Wife #2 is sympathetic to the trustee, or the beneficiary has threatened to cause trouble (most likely a lawsuit alleging some baseless cause of action) that Wife #2 prefers to avoid.

Another consideration would be the future involvement and interaction of Wife #2 and the children. Considering that there is usually tension between an income beneficiary (who would prefer investments produce income) and the remainder beneficiaries (who would prefer investments for growth), such tension is often magnified with a second spouse and children from the first marriage. The unitrust concept illustrated in the PLR eliminates much of the tension because there is no longer any investment tension – the surviving spouse receives the fixed percentage of the value of the trust regardless of how the trust is invested. In a scenario where all tension is to be minimized, perhaps there should only be one continuing trust instead of two trusts, with such trust being a unitrust. This way, Wife #2 is now in a position where her interactions with the first marriage children are minimized. Ultimately, it is solely up to Wife #2 as to whether the plan will succeed or fail.

This dovetails into the next consideration: everybody must get along . . . sort of. Wife #2 and first marriage children do not need to actually get along for the plan to work; they just need to be able to communicate, albeit through an intermediary (the attorney and trustee) to get documents signed in a timely manner. If Wife #2 and children from first marriage cannot even get along through an intermediary, this plan will not work.

Additionally, the execution of the plan is costly because at least one attorney needs to draft a court petition, draft consents among the beneficiaries, and draft the trust language

necessary to provide for the provisions as described in the Rulings and see the matter through for approval from the Court. Such legal involvement can be expensive and the fees must be paid from somewhere. Not only this, but there may be additional trustee fees incurred once two trusts are in force, depending on the compensation arrangement. Therefore, if none of the first marriage children have an immediate need to access the money, this plan will not work.

After everybody agrees to the plan, the attorney will be the person to follow each of the Rulings step by step in order to divide the QTIP Trust into three trusts, terminate the third trust and distribute money outright to beneficiaries, craft the trust language for trust 1 and trust 2, and draft the necessary paperwork with regards to the gift tax (if necessary) to: (a) have Wife #2 file a gift tax return; and (b) have the first marriage children reimburse Wife #2 for the gift tax due.

Conclusion

PLR 201426016 will not work in every situation. The plan requires collaboration from all parties: Wife #2, children from first marriage and of course attorneys for all the parties involved. Sometimes family dynamics may get in the way of an otherwise beneficial estate planning technique and the topic of this article is no exception. However, for the right family and the right situation, estate planning attorneys in Florida could consider whether PLR 201426016 applies and maybe, Wife #2 and children from first marriage get together, one final time… albeit for the last time.

Michael Sneeringer *is an associate in Akerman LLP's Naples office. He practices in the areas of estate planning, probate administration, asset protection planning, and tax law. He received his J.D. from St. Thomas University School of Law and his LL.M. (in Estate Planning) from the University of Miami School of Law.*

Endnotes

1 These may be referred to throughout as the "Rulings."
2 Unless specifically stated otherwise, any section references shall be references to sections under the Internal Revenue Code.
3 IRC § 2056(b)(7).
4 IRC § 2056(b)(7)(B)(ii).
5 IRC § 2519.
6 See IRC §§ 2501 & 2511; Reg. § 25.2519-1(c)(1).
7 IRC §§ 2511 & 2519
8 IRC § 2207A(b); Reg. § 25.2207A-1(a).
9 Reg. § 643(b)-1.
10 See Reg. § 643(b)-1.
11 See IRC §§ 2702(a)(1) & (2).
12 IRC § 2044(a).
13 IRC § 2044(b).
14 Reg. § 1.1001-1(a).
15 See Rev. Rul. 56-437, 1956-2 C.B. 507.
16 IRC §§ 1001(a) & (c).
17 Reg. § 1.643(b)-1.
18 IRC § 6110(k)(3).
19 Fla. Stat. § 736.04113(1)(a)-(c).
20 Fla. Stat. § 736.04113(2)(b).
21 For a definition of qualified beneficiaries, see Fla. Stat. § 736.0103(16).
22 Fla. Stat. § 736.0417(1).
23 In this section, PLR 201426016 as it relates to the technique described is referred to as the "plan."



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RPPTL Section Executive Council Meeting
The Ritz-Carlton Orlando - Grande Lakes

March 19-22, 2015

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

The entrance to The Ritz-Carlton Orlando - Grande Lakes is quite a ways from the main highway and includes a drive up a hill immediately adjacent to a beautiful golf course. An Executive Council Meeting was held at this location several years ago and the appearance of the area as well as the excellent facilities make it clear why a return visit was in order. In addition to excellent facilities and great food, the Grande Lakes offers fishing excursions, casting instructions, eco-tours on Shingle Creek, a bird watching program, special golf programs and an ever-popular spa. No wonder that the Section held its March 2015 meeting at this great locale.

The events started on Wednesday evening when the Executive Committee met for dinner. In case you didn't know, the folks on the Executive Committee put in a lot of extra hours, even more than the time devoted by the many Committee Members.

The registration desk opened at 8:00 a.m. on Thursday, March 19th at the Plaza Ballroom Foyer and meetings kicked off at 8:15 a.m. with the last meeting ending at 6:00 p.m., leaving only thirty (30) minutes to get ready for the bus to the reception. The Welcome Reception was held at the Cypress Grove Estate House which is about a fifteen (15) minute bus ride away from the hotel. The evening was billed as a reception with heavy hors-d'oeuvres but if folks came away hungry, it was their own fault. There was a great variety of food and libations offered and it was a lovely evening for a stroll around the grounds, overlooking a nearby lake. The buses brought everyone back to the hotel a little after 9:00 p.m. and the hospitality suite was open for desserts until 11:30 p.m.

Friday morning started off at 6:30 a.m. with the Reptiles' Run and another day chock-full of meetings from 8:00 a.m. to 6:00 p.m. With thirty nine (39) different committees, both standing and ad hoc, there has to be something to interest everyone who is a member of the Section.

The reception and dinner held Friday evening was at the Plaza Ballroom in the Grande Lakes hotel and was a very pleasant and entertaining event. Once again the hospitality suite was open and this time until midnight.

Saturday morning once again, our Reptiles were out there running at 6:00 a.m. with the Executive Council Meeting commencing at 9:00 a.m. after all Members were fed a hardy breakfast. The meeting concluded shortly before noon. At 12:30 p.m., career coaching sessions were conducted for law students who had come to observe the Executive Council Meeting. The afternoon offered a rousing volleyball game and then dinner was at a gourmet restaurant located in the hotel called Normans. Normans has an outstanding reputation for unique and flavorful food and several people who attended told me they stayed Saturday evening just to have dinner at Normans.

The next Executive Council Meeting will be at the Breakers in Palm Beach in July. Even if you are not a "card carrying" member of the Executive Council, you should catch some of the committee meetings when the Council is in your area of the State.

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RPPTL Section Executive Council Meeting
Ritz Carlton, Orlando Grande Lakes, Florida
March 19-22, 2015



Executive Council members and spouses enjoying the outdoors at the Cypress Grove Estate House



Susan Spurgeon leading the discussion at the Real Property Litigation Committee meeting



Larry Miller reviewing FRPC 4-4.2 and introducing the ethics skit on really bad mentoring



Michael Dribin with Leslie Burkert and John Costello at the Friday reception



Grant Simon from Waterstone Mortgage discussing the CFBP changes coming in August 2015 at the RREIL Committee meeting



Jason Ellison, Rich McIver and law student Carlos Sanchez after a very informative meeting



Chair's Report at the Executive Council meeting



The RPPTL Running Reptiles with their new group T-Shirts

Photos by Michael Gelfand, John Neukamm and Silvia Rojas

RPPTL Section Executive Council Meeting
Ritz Carlton, Orlando Grande Lakes, Florida
March 19-22, 2015



Roland "Chip" Waller indicating his concerns while Angela Adams awaits her turn

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



Second generation Section member, Noel Davies, son of Chris Davies, with Shanna Short, VP at JP Morgan Chase



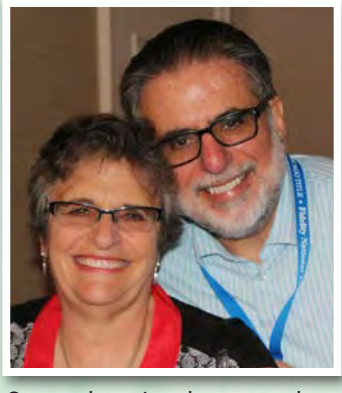
Tara Rao, Annabella Barboza, Karline Lee, Lynwood Arnold, Kathrine Lupo and Kymberlee Smith between meetings



Kristopher Fernandez with Melissa Van Sickle, Alex Overhoff and Seth Marmor at the Cypress Grove Estate House



David Rodstein at Finance & Lending Committee discussing Sec. 95.281, F.S.



Our welcoming hosts at the hospitality suite: Lori and Michael Dribin



Two generations of Executive Council members: George and Pat Meyer with son, Michael Meyer



John Harrison, Katherine Frazier and Michael Bedke meeting & greeting



Real Property Roundtable - Alan Fields discussing show cause rule changes

Roundtables

Friday, March 20, 2015
The Ritz Carlton Grande Lakes
Orlando, Florida

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

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

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

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

The Director of the Probate and Trust Law Division, Debbie Goodall, called the meeting to order at 3:10 pm.

Sponsor Announcement. The Division Director thanked the sponsors, SRR and BMO Harris Bank. Garry Marshall was present on behalf of SRR. The Division Director acknowledged Past Chair Joan Kayser from BMO who was unable to attend but sent her regards and appreciation for being a sponsor.

Recognition and Introductions. The Division Director recognized the involvement of numerous past chairs and thanked them for their continued willingness to help on projects and participate at meetings. She encouraged the newer members of the Council to make it a point to introduce themselves to the past chairs with the gold nametags. The Division Director introduced the law students who were in attendance. She welcomed Professor Lee-Ford Tritt from the University of Florida Levin College of Law who had graciously agreed to come and speak at various committee meetings and at the roundtable. The Division Director then introduced the four current Probate and Trust Law Division Fellows: Sean Lebowitz, Josh Rosenberg, John Costello and Michael Sneeringer. She congratulated the four newest ACTEC Fellows - all of whom are active members of the Executive Council: Angela Adams, Amy Beller, Tasha Dickinson, and Jon Scuderi. The Division Director thanked Travis Hayes and Brian Malec for preparing the summaries of the roundtable that appear in ActionLine.

Action Item

Trust Law Committee – Angela M. Adams, Chair: Angela Adams discussed the Committee's proposed legislation to revise F.S. §§ 736.0412 and 736.0105(2)(k) to provide that nonjudicial modification is not permitted during the first 90 years of the trust term unless the terms of the trust provide otherwise. Under the current version of the nonjudicial modification statute, a trust with a rule against perpetuities

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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 shortly after 3:00 p.m. on March 20, 2015.

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

Recognition - The Division Director welcomed a number of law students who were attending as guests from Stetson and Barry University. The Division Director announced that due to being pressed for time, information items found later in the agenda would be addressed first so they don't get missed.

Committee Goals/ Administration

Legislation Committee - Robert Freedman and Robert Swaine, Co-Chairs: Rob Freedman offered his thanks to those who helped during this legislative session. Rob emphasized how difficult it was sometimes with response times as short as two hours. Rob reminded everyone to start thinking about the 2016 legislature and proposals that committees want to put forward in that session. The 2016 session will start the first Tuesday in January so everything will be accelerated. Rob requested each committee to establish the person to be the liaison for legislation and predicts a busy summer. Rob also emphasized that comments should be marked on the bill itself. The committee needs marked up legislation sent back and comments without the markup doesn't help.

Executive Council voting procedure. The Division Director announced that, at the Executive Council Meeting tomorrow, a new voting procedure will be followed. Upon entering, each Executive Council Member will receive a package with voting cards. The cards will be used for important votes. The red cards signifies "no" and the green card "yes" and the yellow card an abstention. The cards will be collected at the end of the meeting.

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PROBATE & TRUST DIVISION

period of 360 years may be nonjudicially modified immediately after the settlor's death. However, a trust with a rule against perpetuities period of 90 years or more to which the common law rule against perpetuities period applies may only be nonjudicially modified if the trust agreement specifically allows for nonjudicial modification of the trust. If enacted, all irrevocable trusts would be treated the same as to whether nonjudicial modification is available during the first 90 years after the trust is created. This action item was passed at the Executive Council meeting on Saturday, March 21, and will be part of the 2016 legislative package.

Legislative Update

Bill Hennessey provided an update on the various guardianship-related bills in the Florida Legislature. Bill thanked Hung Nguyen, Debra Boje and Debbie Goodall for their hard work on dealing with these bills.

Bill described House Bill 5, which addresses (1) the payment of fees for examining committee members when no guardian is appointed (i.e., the petition to determine incapacity is dismissed), (2) the confidentiality of settlement agreements for minors, and (3) allowing a court to authorize the payment of fees to experts and professionals acting on behalf of the guardianship without the need for expert testimony. Pete Dunbar is working with Rep. Kathleen Passidomo on proposals under HB 5. Bill stated that the Section is not supporting HB 5, but is trying to reach compromises on some of the issues contained therein.

Bill stated that the Section is also opposing a guardianship bill sponsored by Sen. Miguel Diaz de la Portilla and certain parts of other bills, such as a provision requiring referrals to mediators in disputed guardianships.

Upcoming Committee Meetings and Proposed Legislation

The Division Director reminded the Committee Chairs that proposals need to be Information Items at the Miami Beach meeting in June and Action Items at the Breakers meeting in July if they are to be included in next year's legislative package. Bills go to the Legislative Drafting Committee on August 1. The Division Director stated that there is an accelerated schedule for the upcoming year since the Florida Legislature will be in session early. Bill Hennessey reported that the Florida Legislature committee meetings will begin in September. Committee Chairs should email the Division Director or Bill if they need help putting together proposed bills or planning for the next legislative session's accelerated schedule.

Committee Reports

Ad Hoc Guardianship Law Revision Committee – David

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REAL PROPERTY DIVISION

Publication: ActionLine/Florida Bar Journal/Appointment of CLE Liaisons. The Section is always looking for new articles and Drew O'Malley, Division Chair, commented, "I know there are good articles lurking out there." David Brittain is the contact for articles for the Florida Bar Journal and Silvia Rojas is the contact for articles for ActionLine. Each committee must have a liaison for CLE and publications.

Committee Action Plans for 2015-2016. The Division Director reminded everyone that all committees should have action plans ready and they need to be presented to him as soon as possible.

Committee Webpage. Nicole Kibert suggested everybody take a look as the website as it is full of really useful information. Melissa Murphy also reported that the ALTA Best Practices are posted on the website.

Information Items

Real Property Litigation Committee - Susan K. Spurgeon, Chair: Susan was attending a hearing so the report was provided by Alan Fields. The Committee recently provided comments to the Civil Procedure Rules Committee of the Florida Bar. The Civil Procedures Rules Committee was under the impression that the order to show cause was only applicable for commercial issues. The Real Property Litigation Committee pointed out that it can be used for all kinds of property related questions. (See pages 81-113 of the RPPTL Section March, 2015 meeting agenda).

Upcoming Issues

Commercial Real Estate Committee - Art Menor, Chair: Art reported on a joint task force with two other committees on the issue of open or expired permits. Open or expired permits can significantly delay a closing. The Committee interviewed officials of municipalities and noted that a vast variety of approaches are taken within different jurisdictions. There are problems presented when the original contractor is not willing to cooperate and there may be problems if the code has changed since the permit was pulled. The terms of the current FR/BAR Residential Contract does not require a seller to clean up an open or expired permit. The contract only requires the seller to cooperate. The Committee considered two different approaches. One would be a statute of limitations of three to five years after which a municipality could not take action but concluded that approach could be problematic if a life safety issue was involved. The Committee has come up with an approach to permit the owner to hire an inspector and certify compliance with the code. The municipality would be required to accept the certification. The Committee is working in that direction and looking for input from other relevant

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PROBATE & TRUST DIVISION

Brennan, Chair: David Brennan reported that the Committee is planning on having a lengthy workshop at the Section meeting at the Breakers in July. David does not believe the Committee will have its revised Code ready for next year's legislative session.

Ad Hoc Study Committee on Estate Planning Conflict of Interest – Bill Hennessey, Chair: Bill Hennessey reported that the revisions to F.S. § 732.806 regarding fiduciary fee disclosures is the Section's omnibus bill in the Senate version but it is not in the House version; therefore, it may be removed from the bill and may not pass during this legislative session.

Ad Hoc Study Jurisdiction & Service of Process Committee – Barry Spivey, Chair: Barry Spivey stated that the Committee will be discussing due process issues involved with same-sex marriages and specifically issues which may be raised if same-sex marriages are deemed to be valid retroactively.

Ad Hoc Committee on Spendthrift Trust Issues – Lauren Detzel and Jon Scuderi, Co-Chairs: Jon Scuderi discussed *Berlinger v. Casselberry*, 133 So. 3d 961 (2013), a case in which an ex-wife was able to garnish a beneficiary's interest in a discretionary trust. Jon reported that the Committee will have three proposals in response to the court decision ready at the Miami Beach meeting in June, which will be presented at the Trust Law, Probate and Trust Litigation, and Asset Protection Committee meetings.

Asset Protection Committee – Brian Sparks, Chair: Brian Sparks reported that the Committee will hold another joint CLE program with the Estate and Trust Tax Planning Committee and IRA, Insurance and Employee Benefits Committee in October in Tampa. Michael Singer will co-chair the CLE program. Brian stated that the Committee has prepared comments to the proposed Uniform Voidable Transactions Act and will coordinate its response with the Business Law Section of The Florida Bar. The Division Director stated that the Asset Protection Committee will work with the Guardianship Law Committee to review *Romano v. Olshen*, a recent Fourth District Court of Appeals decision that allowed the guardian and the guardian's attorneys to pay fees and expenses from a jointly-owned investment account.

Digital Assets and Information Study Committee – Eric Virgil, Chair: Eric Virgil reported that the Committee's bill before the Florida Legislature is being strongly opposed by internet service providers and the ACLU. The reasons stated for the opposition are privacy concerns and federal law preemption. Eric requested that any members with real life anecdotal experience in dealing with access to digital assets contact the Committee.

Elective Share Review Committee – Lauren Detzel and Charlie Nash, Co-Chairs: Lauren Detzel reported that the

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REAL PROPERTY DIVISION

committees. The related problem of what to do if a permit was never issued has not yet been addressed.

Condominium & Planned Development - Steve Mezer, Chair: Pending legislation to change the statute of repose from ten years to seven years seems to be stalled which is a good thing because such a change would potentially present a large problem for condominiums since the developer may retain control of an association for a period of seven years, thus, denying the association the ability to ever bring a legal claim. Steve also reported on the proposed estoppel bill which would significantly limit estoppel fees which can be charged in connection with a transfer of property located within a condominium or homeowner association community. Steve reported that, while a great deal of time and discussion have been spent on this issue, the Committee has not taken a position primarily because there were so many divergent opinions including the opinions of the title industry. Condominium terminations was also a topic of proposed legislation and much discussion because so much bad press had been received in a case where a termination resulted in the loss of a homestead by one or two homeowners. Representatives from the Condominium & Planned Development Committee met with sponsors of the bill and worked on compromises. Their objective was to require that a mortgage be paid in full and an objecting owner receiving 110% of the purchase price. The Committee is still working with the sponsors in hopes to finally draft a bill that is a fair protection for consumers but also accomplishes the need for redevelopment.

Construction Law - Hardy Roberts, Chair: Scott Pence reported on House Bill 87 which includes amendments to Sec. 558, F.S., regarding the prerequisites to filing construction defect claims and construction defect lawsuits. The Committee addressed a few minor issues in the bill. For example, where the bill required the claimant to identify the location of the defects, the Committee asked for the addition of "to the extent known." The Committee was hopeful that these changes would be accepted.

Real Property Finance & Lending - Jim Robbins, Chair: Jim reported that the rights of tenants in foreclosure found in federal law has already sunset. Florida is now considering its own bill and the Committee has been working with the drafters of the bill but Jim was unable to predict its future.

Real Property Litigation - Susan Spurgeon, Chair: Susan reported that the Committee will have two proposals for the next session on problems that have arisen due to efiling. There is an issue relating to the need for certified copies for judicial notice as this is not currently covered under the efiling rules. The proposal of the Committee would allow an attorney to efile a certified copy and allow the judge to take judicial notice

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PROBATE & TRUST DIVISION

Committee is working with Jack Falk regarding attorneys' fee issues in the elective share context. Lauren anticipates that the Committee's proposal will be ready for the 2017 legislative package.

Estate and Trust Tax Planning – Elaine Bucher, Chair: Elaine reported that Rick Gans continues to work on the Tenants by the Entireties project with Angela Adams, Tae Kelley Bronner and Debra Boje. Elaine also reported that George Karibjanian made a presentation on same-sex marriage issues to the Committee.

Guardianship & Power of Attorney – Hung Nguyen, Chair: Hung Nguyen reported that there are numerous bills before the Florida Legislature which may affect guardianship/elder law practitioners, including bills that would make changes to the advance health care directive statute and create a public records exception for minors. Hung also reported that a subcommittee has been formed to look at the recent decision in *Romano v. Olshen*. The subcommittee will be chaired by Larry Miller. Hung reported that the Fourth District Court of Appeal has asked the Section to file an amicus brief in *Saadeh v. Connors*.

IRA, Insurance & Employee Benefits – Howard Payne and Lester Law, Co-Chairs: Howard Payne reported that Carlos Rodriguez gave a presentation on recent insurance, IRA and employee benefits rulings and cases, and Bob Baker from Asset Strategies presented on using financed split-dollar arrangements to provide deferred compensation.

Liaison to Elder Law Section – Charlie Robinson and Marjorie Wolasky, Co-Chairs: Charlie Robinson reported that the Elder Law Section would like to participate in the new subcommittee chaired by Rick Gans to look into elder abuse issues.

Ad Hoc Decanting Committee – Don Tescher, Chair: Don Tescher reported this Committee is working at an accelerated pace on proposed revisions to Florida decanting statute because the Uniform Law Commission is close to finalizing the Uniform Trust Decanting Act. The Committee intends to have a proposal for the 2017 legislature.

Liaisons with ACTEC. Michael Simon, Bruce Stone and Diana Zeydel: Elaine Bucher, the Florida Chair for ACTEC, reported on the creation of the Florida ACTEC Institute, which will be the first of its kind in the nation. Elaine anticipates that there will be between 25-40 participants in the first Institute class. The Institute will be an educational program comprised of six sessions taught by Florida ACTEC Fellows over a two-year period.

Principal and Income Committee – Ed Koren, Chair: Ed Koren reported that the Committee has been receiving comments from national banks regarding the changes made to

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REAL PROPERTY DIVISION

from a website, such as from another proceeding. Additionally, proposed revisions to Sec. 57.011, F.S., was supported by the Committee in order to delete the requirement that out of state entities file a one hundred dollar bond. The Committee also proposed a change to Sec. 559.715, F.S., which required that a debtor receive thirty days' notice of intent to assign the debt. The chief judge of Pinellas County has requested that section be revised to say that the thirty day notice is not a prerequisite to the filing of a foreclosure.

Real Property Problems Study - W. Theodore "Ted" Conner, Chair: Ted reported on the unlawful detainer statute, Sec. 82.071, F.S. The proposal of the Committee is to make the statute more accessible. The Committee is requesting comments. Ted also commented on proposed amendments to Sec. 713.07, F.S., concerning construction lien starts and stops. The problem has been the loss of priority of a mortgage executed and recorded in the midst of construction as against any construction liens filed pursuant to a pre-existing notice of commencement. The general wisdom was that work had to stop for at least twenty-four hours which caused unnecessary delays and required that the contractor be paid in full. The proposed change is intended to simplify that process, require payments subject to retainage, if any, and the recording a new notice of commencement to allow the project to keep going. The Committee is working with the Construction Law Committee on this and also plans to draft changes to the notice of commencement statute.

Discussion of Deutsche Bank v. Beauvais: Kristopher Fernandez reported on a case in which a mortgage foreclosure had been dismissed with prejudice. The condominium association obtained title and defended its title against a foreclosure of a pre-existing bank mortgage based on the statute of limitations, Sec. 95.11(2)(c), F.S. The trial court agreed and the Third DCA affirmed the trial court's order which determined that the current action was barred by the statute of limitations but reversed the trial court's order which declared the mortgage null and void. The Third DCA based its opinion on the statute of repose, Sec. 95.281(1)(a), F.S., with the result that the mortgage in question remained a valid lien until March 1, 2041.

Real Estate Structures and Taxation - Cristin Keane, Chair: The Committee is proposing that any transfer between spouses be exempt from transfer taxes. At this time transfers in a divorce are exempt but transfers between married spouses and not associated with a divorce are not.

Discussion of Same Sex Marriage Implications, Ad-Hoc Committee - Jeffrey Ross Dollinger, Co-Chair (Real Property): While the Committee had prepared an 11 page proposal on changes to Florida Statutes that may be needed when same sex

See "Real Property Division," next page

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the Principal and Income Act a few years ago. As a result, additional changes may be proposed to the Act. Ed requested that members contact the Committee if they have run into any issues with the Act as a result of the recent changes.

Probate & Trust Litigation – Tom Karr, Chair: Tom Karr reported that the Committee approved a proposal for revisions to F.S. § 736.0802(10) regarding the award of attorneys' fees in trust litigation cases, which were necessary due to changes made during the legislative process when the statute was first enacted. Tom stated that the proposal will be an Information Item at the Miami Beach meeting in June and is expected to be an Action Item at the Breakers meeting in July.

Probate Law & Procedure – John Moran, Chair: John Moran reported that the Committee approved a proposal from the Saunders v. Saunders Subcommittee, led by Patrick Mize, confirming that Florida law governs Florida real property in probate matters. John also reported that the Committee debated whether Florida should recognize holographic wills from other states. The Committee ultimately voted not to allow holographic wills to be admitted in Florida under any circumstances.

Trust Law – Angela Adams, Chair: Angela Adams reported that the Committee continues to analyze a proposal to follow the Restatement (Third) of Trusts approach for multiple trustees, which would allow each co-trustee to be entitled to reasonable compensation, and the aggregate compensation of all trustees to exceed what would be reasonable compensation for a single trustee. Angela also reported that new subcommittees have been formed to analyze (1) statute of limitation issues when a trustee does not account to qualified beneficiaries of a trust (in response to *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015)) and (2) conflicts between settlor's intent versus the best interests of the beneficiaries standard under the Florida Trust Code (in response to a presentation on the issue by Professor Lee-Ford Tritt).

Panel Discussion on Same-Sex Marriage Issues Affecting Trust and Estate Practitioners

George Karibjanian, Sarah Butters, Ben Diamond and Professor Lee-Ford Tritt discussed various estate, trust and real property issues that could arise as the result of the recognition of same-sex marriages in Florida, and the implications of retroactive versus prospective recognition of such marriages. In response to scenarios that were raised, Professor Tritt stated that similar issues came up in the 1960s when the United States Supreme Court issued three decisions recognizing illegitimate children as heirs. Prior to those decisions, they were not treated as heirs. He suggested that these cases could be reviewed for guidance on what may happen in Florida with regard to same-sex marriage issues.

REAL PROPERTY DIVISION

marriages are recognized in Florida, the Committee determined no proposed legislation should be offered since it appears the Florida Supreme Court and/or the legislature are addressing the issue.

Committee Reports

Construction Law Institute - Reese Henderson, Chair: Reese reported the Institute was last week and had been an outstanding success.

Insurance and Surety - Fred Dudley, Cary Wright, Co-Chairs: Fred reported the Committee is looking into alternatives for cash bonds with regards to Sec. 713, F.S.

Real Estate Certification Review Course - Jennifer Tobin, Chair; Manuel Farach, Co-Vice Chairs: Manny reported that about 100 attorneys attended the class with 25 attending by video conference/email.

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Spotlight on the Construction Law Institute Committee

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


R. HENDERSON

The Construction Law Institute Committee, chaired by Reese Henderson, is a very specialized committee of the Real Property Law Division of the Real Property Probate and Trust Law Section of the Florida Bar. The Construction Law Institute Committee started its life as a sub-committee of the Construction Law Committee, but it quickly became apparent that the work involved was so demanding and specialized that a separate committee devoted just to the Construction Law Institute was vital to its proper function.

In 2005, construction law was approved by the Florida Supreme Court as an area of legal certification. Approval of this area of certification gave rise to a certification review course. It soon became apparent that something special was needed for those attorneys who had already obtained their certification and, thus, the Construction Law Institute sub-committee was born with the goal of providing to attorneys who were already certified in construction law an opportunity to obtain the CLE credits necessary to maintain the construction law certification as well as an opportunity to network with other folks from the construction industry.

The first Construction Law Institute was held in the spring of 2008 and was attended by over 60 attorneys. The simultaneous construction certification review course, held in the same location, and exhibiting sponsors, provided additional attendees. At the 8th annual Institute held this year, there were over 200 attendees, all receiving CLE credit in this very specialized field. The Institute now provides an educational and social opportunity not only for attorneys who are board certified but also other folks involved in other phases of construction issues, such as attorneys who deal with liens and bonds, who draft construction contracts and even some transactional attorneys who just want to know more about the construction field. The goal of the Institute is the same as when it started; to promote scholarship and learning concerning construction law in the state of Florida.

The Institute also provides an opportunity to meet consultants and vendors who provide construction and litigation support in this field. As a result of this networking opportunity, the sponsorship income for the Institute has reached over $150,000.00. The Institute is held at the same time as the review course for attorneys who plan to take the test for board certification in construction law which gives those new folks an opportunity to have a glimpse into the Institute. In addition to the CLE program that allows board certified attorneys to stay up to date, the Institute offers a golf tournament, receptions on Thursday and Friday evening and a Friday luncheon with eminent speakers such as the Chief Justice of the Supreme Court of Florida. The Institute program includes plenary sessions and break-out sessions to provide multiple options, all of which are approved for CLE credit in construction law.

Under the guidance of the current Co-Vice Chairs of the Institute, Sanjay Kurian, Diane Perera and Jason Quintero, along with the co-chairs of the Construction Law Certification Review Course Committee, Deborah Mastin and Bryan Rendzio, with able assistance and guidance from Mary Ann Obos, the Florida Bar Liaison to the two committees, care of the organization, coordination and accommodations for this year's Institute were accomplished to rave reviews.

The next Institute will be held in early 2016 so be sure to watch for information about this very special program.

Judicial performance feedback sought from Bar members



The Judicial Administration & Evaluation Committee is encouraging all Bar members to participate in the Confidential Judicial Feedback Program developed by the committee and approved by the Florida Bar Board of Governors.

The purpose of the Confidential Judicial Feedback Program is to promote judicial self-improvement and enhance the quality of our judiciary as a whole. Attorneys are asked to evaluate the judge's demeanor, knowledge, fairness, and other factors, but not to discuss issues of their specific cases. The commenting attorney's identity is kept confidential and the comments are provided only to the judge who is the subject of the review. All feedback is and remains confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4).

There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways" by competing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.

Is a "Lien Transfer" under Florida Statute §713.24 Still Available to Residential Homeowners?

Addressing the Problems Facing Residential Homeowners in Attempting to Transfer a Construction Lien

By Michael G. Meyer, Esq., Tampa, Florida


M. MEYER

Florida's "Construction Lien Law"[1] is the statutory manifestation of the Florida Legislature's attempt to set forth a balanced, albeit highly complex,[2] set of rules, procedures, and safeguards for the facilitation, encouragement, propagation, and regulation of the construction industry. The Florida Supreme Court has noted that the Florida "lien law serves at least two purposes. First, mechanic's liens protect suppliers who furnish labor or materials to the property by assuring them of full payment…[Second, the] lien law also protects owners by requiring subcontractors to provide notice of possible liens, thereby allowing owners to prevent double payment to both a contractor and subcontractor, material supplier, or laborer, for provision of the same services or materials…."[3]

Adding a third competing principle to the mix is Florida's compelling interest in preserving the free use and alienation of real property. "The right of alienation is said to be an inherent and inseparable quality of the estate."[4] Moreover, Florida courts have consistently acknowledged that "the assertion of a mechanic's lien may have a drastic effect upon the use and alienation of real property,"[5] and recognized "the important public policy in favor of promptly clearing construction liens from real estate."[6] To give the force and effect of law to that "important public policy," the Florida Legislature has enacted a few methods by which an interested party may either directly challenge the lien or remove the restriction on alienability of the real property caused by the lien, which legislative methods include (without limitation) the Notice of Contest of Lien,[7] the Show Cause Complaint,[8] and transferring the lien to other security.[9]

Generally, this article focuses on the statutory mechanism by which a person with an interest in the liened property may transfer the lien(s) to another form of security, as provided for in Florida Statute §713.24.[10] Specifically, this article will highlight and discuss the challenges that face *residential homeowners* in exercising their statutory right to transfer a construction lien off of their homes (either new or remodeled) and onto an alternative form of security, pursuant to Florida Statute §713.24. Additionally, this article attempts to provide the reader with some helpful, or at least practical, solutions to those challenges.

Brief Overview of the Operation of Florida Statute §713.24

Florida Statute **§** 713.24, authorizes "any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed"[11] to transfer the lien (or liens as the case may be)[12] from such real property to other security…." The statute provides only two types of acceptable security to which a lien may be transferred: a deposited sum of money in the clerk's office (a "Cash Bond"), or the "[f]iling in the clerk's office [of] a bond executed as surety by a surety insurer licensed to do business in this state…" (a "Surety Bond").[13]

Florida Statute **§** 713.24 requires that either form of security must "be in an amount equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate for 3 years, plus $1,000 or 25 percent of the amount demanded in the claim of lien, whichever is greater, to apply on any attorney's fees and court costs that may be taxed in any proceeding to enforce said lien."[14] By way of example, let's suppose the lien to be transferred is claiming an amount due and owing of $50,000.00. In such a case, the penal sum, or *total* amount, of the bond, whether it be a Cash Bond or a Surety Bond, must be for the full amount of approximately $69,625.00[15], not including the clerk's statutory recording fees and certificate of transfer fees.[16]

As an operation of law, and upon the making of such deposit (Cash Bond) or filing such a bond (Surety Bond)[17], the clerk is *required* to "make and record a certificate showing the transfer of the lien from the real property to the security and shall mail a copy thereof by registered or certified mail to the lienor named in the claim of lien so transferred, at the address stated therein."[18] The statute further provides that "[u]pon filing the certificate of transfer, the real property shall thereupon be released from the lien claimed, and such lien shall be transferred to said security."[19]

Challenges Facing a Residential Homeowner Attempting to Transfer a Lien Pursuant to Florida Statute § 713.24

Not all of the challenges facing a residential homeowner ("Owner") may be readily apparent to Owner's counsel. After all, once the deposit is made or the bond filed, the clerk is required by law to transfer the lien from the underlying real property to the new security.[20] However, the practical application of the statute in the context of the residential markets is an example

of where the statutorily intended operation is thwarted by the real world application of the free market.

Perhaps the first and most obvious challenge facing an Owner is the Owner's inability to obtain the necessary cash to post the Cash Bond. In the above example, where the Claim of Lien was for $50,000.00, the total penal sum needed to transfer the lien was approximately $69,625.00. An average residential homeowner, more often than not, will not have access to a spare seventy thousand dollars cash that they can individually part with for months, if not years, as is often the time required to resolve construction disputes. From a practical point of view, most residential Owners, effectively, will not have the alternative security option of the Cash Bond available under the statute.

"But all is not lost!" Owner's counsel might think. There is still the Surety Bond option available to the residential homeowner. The hope is that, while the Owner might have to pay up front a percentage premium of the penal sum of the bond, at least they do not have to come up with the full penal sum amount in cash to deposit with the clerk. "After all," the Owner's counsel may believe, "is it not the case that bail bonds usually only charge a ten percent premium of the full bail amount [penal sum]? This is merely a civil construction case, with a well-meaning Owner client, and one hears all the time about the lienors' tales of woe of transfer bonds gone wrong."

The problem, however, is that the party seeking the transfer bond here is an actual individual, a person and not a corporate contractor. What is not widely known is that the surety markets treat requests to purchase a lien transfer bond made by an individual homeowner differently than requests to purchase lien transfer bonds made by corporate contractors. When the request for the bond comes from an individual homeowner, the surety markets call the liens "personal," which places such request for lien transfer bonds into the most "risky" of categories by the sureties' national rating agencies.[21]

The rationale provided by the surety markets in rating lien transfer bonds requested by residential Owners as the riskiest category of bonds is that, from the surety's perspective, there is already a claim in play, with very little chance that the surety will not have to pay out at least something on the bond once issued and final judgment in the underlying dispute is rendered. Moreover, argues the surety, when the transfer bonds are requested by the residential Owner, the disputes are "personal" in nature and amount to little more than an "owner-said/contractor-said dispute." As a result of the placement of such transfer bonds (that are requested by residential Owners[22]) in the riskiest category, many sureties simply ***refuse*** to issue such bonds to residential Owners at all.

The more "liberal" surety markets will in certain cases agree to issue to the residential Owner a lien transfer bond, but ***only if*** the requesting Owner provides one hundred to one hundred-ten percent (100-110%) "cash"[23] collateral of the ***penal sum***, or face-value, of the bond. However, the self-defeating aspect of this surety requirement is immediately self-evident. If the Owner had one hundred to one hundred-ten percent (100-110%) of the penal sum of the bond to post as a "cash" collateral, then the Owner would simply deposit the cash with the clerk, pursuant to Florida Statute § 713.24(1)(a). Effectively, the surety market has priced-out Florida residential homeowners from making use of the lien transfer rights pursuant to Florida Statute § 713.24.

Effectively, the surety market has priced-out Florida residential homeowners from making use of the lien transfer rights…

One last issue for residential Owners to be made aware of has to do with the ramifications that an outstanding Claim of Lien can have on an Owners' ability to switch to permanent financing from the construction loan at the end of the project. Simply put, lenders will not authorize a closing on the new, permanent financing loan until after the lien has been removed from the property, so as to preserve (and have insured) their first priority lien claim as the mortgagee. Accordingly, with many construction loans having short-term, full-payment acceleration clauses, Owners can be under enormous pressure to quickly have the lien removed from the property or face the possibility of the construction lender calling the balance of the construction loan due.[24]

Possible, and Practical (Somewhat!), Solutions to those Challenges for Owners

Addressing first the challenge discussed above with obtaining a Surety Bond, not all surety markets *refuse* to issue a lien transfer bond to residential Owners, but, as mentioned above, the ones that do not simply refuse *do* require the posting of one hundred to one hundred-ten percent (100-110%) "cash" collateral of the penal sum of the bond. The sureties' reason, in part, for requiring such a great (complete) amount of "cash" collateral is because they "underwrite to a zero-net loss" and are not willing to look to other sources of collateral that the requesting Owner may have, such as other unencumbered property, cars/boats, stocks, etc.

However, the "cash" collateral referred to by these more *liberal* markets is actually required to be provided in the form of an irrevocable letter of credit executed by an F.D.I.C. insured lender. The good news here is that lenders, i.e. banks, *are* able to look to those other potential sources of collateral in determining what the Owner's available credit. However, while lenders do look to additional sources of collateral, the issue of liquidity is still a significant factor in a lender's credit

analysis of an applicant for a letter of credit to be given as collateral to a surety.

There are some drawbacks with this route. First, not all Owners may qualify for a large enough line of credit to satisfy the sureties' 100-110% "cash" collateral requirement. Second, fees can be high and numerous. An Owner that opts to go this route to obtain the lien transfer Surety Bond can expect to pay application and processing fees (and probably a premium) to their lender to obtain the necessary irrevocable letter of credit. Then there will be processing fees and a premium (on top of the required 100% collateral) to be paid to the surety that issues the lien transfer bond. Owners opting to go this route should be counseled to understand that they will likely have to pay double the fees to obtain a Surety Bond.[25]

Regarding the option of depositing a Cash Bond with the Clerk, one possible answer to the challenge of having enough cash to make such a deposit is to take out a loan or to have a cash-out during the closing of the permanent financing loan. However, such a "solution" comes with its own healthy list of drawbacks and challenges. First, the Owner must either have sufficient, and likely unencumbered, collateral against which to take out a separate loan, or the final equity value of the constructed (or remodeled) home must be sufficient to support the increased loan amount, which in the example above is almost seventy thousand dollars.

Even if there is sufficient collateral or equity against which to obtain a loan (or otherwise increase it), the Owner will likely be forced to pay a higher (or additional, if it is a wholly separate loan) interest rate on a higher principal amount over the life of the loan. Not all residential Owners will be able to afford such an increased monthly mortgage (or loan) payment,[26] and there is always the risk of a negative impact on the Owner's credit to debt ratio.

Another challenge that may face a residential Owner attempting to proceed down this route is the impact on title. The permanent financing lender, or the soon-to-be mortgagee, will require title insurance insuring it in first priority as against the subject property. Accordingly, title companies and their underwriters may need to have the process of lien transfer pursuant to Florida Statute § 713.24, explained in significant detail in order to feel comfortable that the lien will be removed from record title prior to issuance of the title insurance policy. Specifically, it should be explained that the cash-out funds from the loan will be deposited with the clerk, *as part of the loan closing*, and will operate to transfer the lien as *a matter of law* off of the subject property and onto the Cash Bond.

Owner's counsel should be forewarned of another related title challenge that can arise when transferring a lien pursuant to Florida Statute § 713.24 (whether it be by Cash or Surety Bond). That issue involves a *lis pendens*. Specifically, if a *lis pendens* has been properly recorded against the property,[27] then some title underwriters may require an exception for the litigation and *lis pendens* to be put onto the title insurance commitment. For some title underwriters, the transfer of the lien (at or before the loan closing, but during the pendency of litigation over the lien) can cause a bit of a quandary. While they may be convinced that the lien transfer statute specifically operates as a matter of law to require the clerk to immediately transfer the lien off the property and onto the bond, Florida Statute § 713.24, does not specifically state that the *lis pendens* is of no further legal effect. "However, dicta in the *State-Wide* case, together with the language of Florida Statute § 713.24, tend to indicate that once it has been established that there is a valid lien transfer bond, then a notice *lis pendens* would no longer be needed."[28] Additionally, the controlling statute for *lis pendens* states that "when the action no longer affects the subject property, the court shall control and discharge the recorded notice of lis pendens as the court would grant and dissolve injunctions."[29]

Moreover, in *C.V. II, Inc. v. Cury Corp.*, the court ruled that it was proper to dismiss the claim against a subsequent purchaser of real property that had previously been liened by a contractor, because prior to when the subsequent purchaser took title to the real property, the original owner bonded off the lien pursuant to Florida Statute § 713.24.[30] As that court explained, "[t]he historical purpose of the bond is to make property, which is subject to a claim of lien, alienable. To allow C.V. II to go beyond the amount of the posted bond, or to allow it to proceed against the subsequent buyers of the properties, would frustrate this purpose."[31] Therefore, dialogue with the title insurer to determine whether, for title insurance purposes, a title exception for the lien and *lis pendens* is warranted when law provides that a transfer bond releases the lien from title, which in turn either invalidates or requires dissolution of the *lis pendens,* is recommended.

Conclusion

While the intent of Florida Statute § 713.24 was to provide a means of preserving Florida's strong public policy in favor of alienability of real property, while preserving the lienors' security interests, the statute fails to provide residential homeowners with any satisfactory means for transferring the lien off the real property. This article provides an overview of the practical challenges that await the unwary Owner, or Owner's counsel, when attempting to use the statute, as well as provide some possible pointers for navigating the path to transferring a lien pursuant to Florida Statute §713.24. Ultimately, however, it is the opinion of the author that significant changes to the statute will need to be made in order to make the benefit of this transfer statute available to all parties, including residential homeowners. Similarly, and in light of previous articles written on the difficulties of collecting a judgment against the transferred lien, a wholesale reconsideration of the statute may be necessary to ensure the efficacy of this statute's, and the Legislature's, intent.

Michael Meyer *is an associate attorney at Redding & Associates, P.A., in Tampa, Florida, where his practice focuses on construction and real property litigation and transactions throughout central Florida. He is currently the RPPTL Co-Vice Chair of the Insurance & Surety Committee and an active member of the RPPTL Executive Council. He has spoken and written on a variety of construction, real property, and insurance related issues.*

Endnotes

1 *See* Fla. Stat §713.001 *et seq.* (2014), Fla. Stat. Unless otherwise noted, all statutory references are to the 2014 version of §713.001 et seq., Fla. Stat.

2 *See American Fire & Cas. Co. v. Davis Water & Waste Industries, Inc.*, 358 So. 2d 225 (Fla. 4th DCA 1978) ("There can be no more confusing statute in Florida than the one on liens under Chapter 713. The frequent impracticality of its application in the field, coupled with ill conceived, confusing, patchwork amendments, all topped off by conflicting appellate decisions, have all combined to make life miserable for judges, lawyers, legislators and the vitally affected construction and lending industries.").

3 *See Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623, 626 (Fla. 1995); *see also*, Leiby, Larry R., Florida Construction Law Manual, 2014-2015 ed., §8:2, p.535 (Vol. 8, West's Florida Practice Series) ("The purpose of a construction lien is to give the craftsworker or material supplier security for a debt incurred in making a product where the product itself cannot be retained to secure payment of the debt.").

4 *See Vinson v. Johnson*, 931 So. 2d 245, 248 (Fla. 1st DCA 2006) (citing 61 AM.JUR.2D *Perpetuities, Etc.* § 102 (2002); and 3 THOMPSON REAL PROPERTY § 29.03(b), at 707 (2001)).

5 *See Matrix Const. Corp. v. Mecca Const., Inc.*, 578 So. 2d 388, 389-90 (Fla. 3d DCA 1991) ("The pendency of a mechanic's lien could stultify the owner's use and enjoyment of the property…."); see also *Dracon Const., Inc. v. Facility Const. Management, Inc*., 828 So. 2d 1069, 1071 (Fla. 4th DCA 2002).

6 *See Zager Plumbing, Inc. v. JPI National Construction, Inc.*, 785 So. 2d 660, 662 (Fla. 3d DCA 2001) (citing *Matrix*, 578 So. 2d at 389).

7 *See* Fla. Stat. § 713.22(2).

8 *See* Fla. Stat. § 713.21(4).

9 *See* Fla. Stat. § 713.24.

10 "The historical purpose of the bond is to make property, which is subject to a claim of lien, alienable." *C.V. II, Inc. v. Cury Corp.*, 559 So. 2d 231, 232 (Fla. 4th DCA 1990).

11 It should be noted that this statute does not delineate the differences between different "persons having an interest in the real property…or the contract…." Accordingly, this statute should operate in the same manner, regardless of whether the person or entity transferring the lien is an owner of property (whether commercial or residential) or a general contractor or subcontractor.

12 *See* Fla. Stat. § 713.24(1) ("Any number of liens may be transferred to one such security.").

13 *See* Fla. Stat. § 713.24(1)(a) and (b).

14 *See* Fla. Stat. § 713.24(1).

15 (Full amount of Claim of Lien = $50,000.00) + (Court Costs/Attorneys' Fees calculation, 50,000.00 x 25% = $12,500.00) + (3 years statutory interest, approximately $7,125.00) = $69,625.00.

16 As a practical tip, it is extremely helpful to contact, well in advance, the county clerk's office where the property is located to discuss the upcoming deposit or filing of the Cash or Surety Bond. The clerk is a good resource for calculating the exact amount of statutory interest based on the lien amount as well as for providing the total amount of their registry, certificate, and recordation fees.

17 Both security instruments must "be conditioned to pay any judgment or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded." See Fla. Stat. §713.24(1).

18 *See* Fla. Stat. § 713.24(1).

19 *Id.*

20 There has been much in the way of published, scholarly commentary on the difficulties facing lienors in perfecting their rights against a bond once the lien has been transferred as well the difficulties in increasing the amount of said bond. *See* Vega, Daniel R. and Ellish, Matthew S., *Practical Solutions to the Problems Resulting from the Real Life Application of Florida's Construction Lien Transfer Bond Statute*, The Florida Bar Journal, Volume 82, No.3, p.26 (March 2008). However, there are equally significant challenges facing residential homeowners in merely obtaining a transfer bond (Cash or Surety) that have not been discussed or analyzed in publications or commentary.

21 In dealings with multiple surety brokers, this author has heard such "riskiest categories" called "Category 5" bonds.

22 Perplexing, however, is the fact that many of the same surety markets that flat out refuse to issue lien transfer bonds to residential homeowners ***would*** issue the same bonds to a contractor or other corporate entity (with interest in the real property) on the exact same residential home project. The surety's point being that since it is not an individual in that case requesting the lien transfer bond, the request is no longer for a "personal" bond.

23 These sureties will only accept "cash" collateral, because they "underwrite to a zero-net loss," meaning that they are not willing to look to other sources of collateral that the requesting Owner may have, such as other unencumbered property, cars/boats, stocks, etc.

24 Such pressure is not lost on less than scrupulous contractors and, at least in the opinion of this author, can sometimes lead contractors to put disputed amounts on their Claim of Lien on the gamble that they can unfairly pressure Owners into settling at a higher amount before either the construction loan is called due or a final judgment finding the lien to be fraudulent can be entered by the Court. While such tactics are certainly not representative of the whole of contractors (nor is that the opinion of this author), it is worth noting that, from time-to-time, such "horror-stories" are often the cause of great fervor in the rank and file of the state legislature to make wholesale, if not extreme, changes to Chapter 713.

25 Owners should also note that there could be a negative impact on their credit rating for not only obtaining and drawing on a significant line of credit, but also in the unfortunate event they are denied a line of credit in the amount requested. Attorneys should counsel their Owner clients to think honestly about whether they have sufficient credit before applying.

26 Although, if the residential Owner wins a favorable judgment or settlement and the bulk of the deposited funds are released back to him/her, counsel for the Owner should, before the new or increased permanent loan is finalized, review the loan documents to make sure there is no pre-payment penalty if the Owner pays a significant portion of the loan early (i.e., when the returned funds from the clerk arrive). At the very least, counsel should advise their Owner clients of any such pre-payment penalties prior to the execution of said loan documents.

27 *See* Fla. Stat. § 48.23.

28 Leiby, at § 8:60, p.696 (citing *State-Wide Const. Inc. v. Dowda*, 424 So. 2d 198 (Fla. 5th DCA 1983)).

29 *See* Fla. Stat. § 48.23(3).

30 *C.V. II, Inc. v Cury Corp.* 559 So. 2d 231 (Fla. 4th DCA 1990).

31 *Id.* at 232.

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By Brian W. Hoffman, Esq., Pensacola, Florida,
and Christopher W. Smart, Esq., Tampa, Florida

For many young attorneys beginning their careers in Florida in transactional real estate or other real estate related areas of the law, a world without title insurance is difficult to imagine. A title insurance commitment is a cornerstone of most real estate transactions, since its requirements are the conditions to issuance of a title insurance policy that ensures a buyer has good and marketable title to the real property purchased. Attorneys have long played a vital role in reviewing and opining on title issues and other real estate related matters. It was with this in mind that, in March of 1959, the Florida Bar published the first Uniform Title Standards in Florida (the "Standards") prepared by the Florida Bar Committee on Uniform Title Standards.[1] The original Standards were the culmination of significant contributions by several lawyers that specialized in real estate and the real estate related topics covered in the Standards.[2]

The original Standards organized real estate law into several topics as a guide to the practitioner in determining marketability. Within each topic there were confirmed "standards" of well settled law to guide the practitioner. Useful examples of problems illustrated the application of those Standards, and key statutory and case law references and commentary were also provided. The original Standards contained fourteen chapters ranging from conveyances to mortgages and judgments.

The objective of the original Standards was simple – to compress divergent views on marketability in order to help make land transfers expeditious and secure.[3] The goal of the Standards was to give practitioners the tools to construe facts in favor of marketability and avoid needless flyspecking.[4] The Standards have always been consensual among the community of real property practitioners in Florida. They have also consistently been cited by the Florida Supreme Court and Florida Appellate Courts to confirm Florida law when confronting title issues covered by the Standards.[5]

The original Standards were not designed to remain static, and have been consistently revised to keep up with changes in the law. Initially, the Standards were published by a committee of the Florida Bar; however, after the formation of the Real Property Probate and Trust Law Section ("RPPTL"), the Standards were entrusted to the RPPTL for continued update.[6] Following the 1959 original publication, the Standards were revised and republished in 1975,[7] and a third revision followed in 1981.[8] In 2012, the most recent revision of the Standards was finalized, which was the culmination of efforts that began



Watercolor sketch from the original 1959 Uniform Title Standards

in the late 1990's spearheaded by Patricia P. Jones, Chair of the Title Issues and Standards Committee of the RPPTL (the "Committee"). The 2012 version of the Standards represents the first time the Standards have been published in a purely electronic form. Copies are available on the RPPTL's website at www.RPPTL.org.

The Standards continue to serve as an invaluable resource for attorneys representing buyers and sellers in real estate transactions and attorneys addressing real estate title issues in transactions and real property litigation. The Standards remain a testament to the strength, collegiality and integrity of real property practitioners in Florida. The popular and widely used FR/BAR Contract for Sale and Purchase[9] has, for example, long incorporated the Standards, specifically providing that "(m)arketable title shall be determined according to applicable standards adopted by authority of The Florida Bar and in accordance with law."[10]

Following the 2012 revision of the Standards, the Committee explored options to encourage and foster attorneys use and reference to the Standards. One significant issue identified by the Committee was the format of the Standards, which was electronic PDF; however, it lacked the indexing and search features that would allow easy and efficient navigation through the Standards. In 2012, the Committee updated the format of the Standards to allow easy maneuvering with indexing and searching, which is available to the general public through the RPPTL website. The Committee also created another version for RPPTL members that allows for instant access to most of the extensive citations in the Standards to Florida Statutes, case law, and secondary sources. Finally, the Committee is in the process of finalizing an agreement with The Fund to allow for inclusion of specific title notes from The Fund Title Notes (the title insurance underwriting guidelines for The Fund) that are cited throughout the Standards. This version will soon be available to members of the RPPTL Section for download on the Section's website. A detailed description of the specific features of the newly revised electronic version of the Standards is itemized and explained in the Introduction to the Standards.

Today real estate attorneys have access to a wealth of information from legal research providers such as Lexis and Westlaw, as well as extensive underwriting guidelines prepared by a number of title insurance companies. The Standards are not intended to compete with those resources, which tend to focus on insurability rather than marketability. Instead, the Standards provide an independent summary of well-settled real estate law in Florida from a practitioner's perspective. The recent revisions to the electronic format of the Standards make it an invaluable starting point for practitioners needing to recall or confirm well-settled Florida law or commence research on novel real estate issues. Put simply, the Standards are a must for all Florida real estate practitioners. The RPPTL has continuously revised and developed the Standards for the last fifty years, and the RPPTL will continue to revise and develop the Standards with the same intent envisioned in 1959 – to compress divergent views on marketability and to help make land transfers expeditious and secure.

Mr. Hoffman *is a partner with the law firm of Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC, and practices in the firm's Pensacola office. His practice focuses on commercial litigation, real estate litigation, real estate transactions, debt enforcement actions, and general business and corporate law. He is Board Certified by the Florida Bar in Real Estate Law, and is on the Executive Council of the RPPTL, serving as a Co-Vice-Chair of the Title Issues and Standards Committee, as well as the Title Insurance Liaison Committee.*

Mr. Smart *is shareholder with Carlton, Fields, Jorden, Burt, P.A., and practices in the firm's Tampa office. He is a real property litigator whose practice focuses on title insurance and real estate related disputes. He represents national title insurance companies, lenders, creditors, and a broad array of real estate owners, developers, and investors. He is on the Executive Council of the RPPTL, and serves as the Chair of Title Issues and Standards Committee and is a member of the Real Property Litigation and Problem Studies Committees.*

Endnotes

1 See Catsman, David, *Forward*, Fla. Bar J. 221 (March 1959 Supp.).

2 See McEwan, O. B., *President's Page, Title Standards for Florida*, Fla. Bar J. 218 (March 1959 Supp.).

3 See Catsman, David, *Forward*, Fla. Bar J. 221 (March 1959 Supp.).

4 Id.

5 See *Marshall v. Hollywood, Inc.*, 236 So.2d 114 (Fla. 1970); *City of Miami v. St. Joe Paper Co.*, 364 So.2d 439 (Fla. 1970); *H & F Land, Inc. v. Panama City-Bay County Airport Industrial Dist.*, 736 So. 2d 1167 (Fla. 1999); *Reid v. Bradshaw*, 302 So. 2d 180 (Fla. 1st DCA 1974); *Cirelli v. ENT*, 885 So. 2d 423 (Fla. 5th DCA 2004) *DGG Development Corp. v. Estate of Capponi*, 983 So. 2d (Fla. 5th DCA 2008).

6 The Uniform Title Standards was the first committee created by the RPPTL when formed in 1954, and at that time the Board of Governors of the Florida Bar ("BOG") ceded responsibility for developing uniform standards to the RPPTL. However, in 2008-2009 the BOG unanimously re-endorsed the Uniform Title Standards to confirm as Standards of the Florida Bar. *Preface*, Uniform Title Standards (2012 rev.).

7 The 1975 revision was spearheaded by Sherwood Spencer, along with the assistance of a task force led by Mandell Glicksberg, Professor of Law at the University of Florida School of Law. *Preface*, Uniform Title Standards (2012 rev.).

8 The 1981 revision was led by Mandell Glicksberg, and included significant contributions by the University of Florida Law Review.

9 The FR/BAR Contract for Sale and Purchase is a contract approved by a joint committee of the Florida Realtors and the Florida Bar initially published in the 1970s, and continually updated thereafter.

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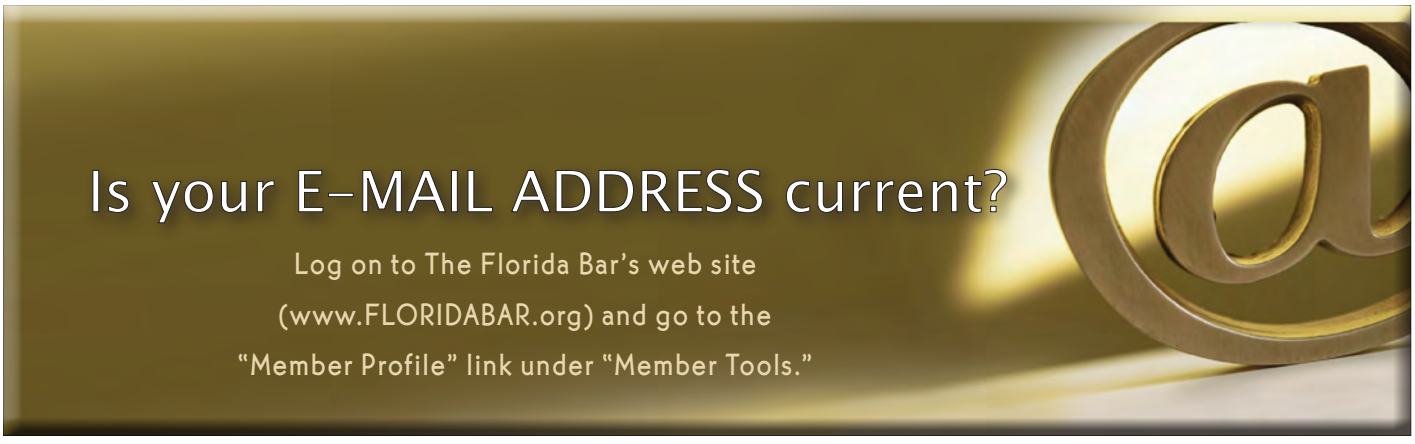

Permitted Or Prohibited Communications With Government: The Continuing Debate Over Rule 4-4.2

By Lawrence J. Miller, Esq., Boca Raton, Florida

One of the fundamental ethical restrictions with which each of us is charged is that as lawyers, we should not be communicating about the subject of specific representation with a person who we know to be represented by counsel. But, while expansive in its reach and application, this ethical precept can conflict with the right of a Florida citizen to petition government or redress grievances through government. Such a clash is presently in focus as the Florida Bar's Board of Governors considers changes to the commentary for Florida Bar Rule 4-4.2 ("Communication with Person Represented by Counsel") suggested by the City, County and Local Government Law Section of the Florida Bar ("CCG") and the Florida Association of County Attorneys ("FACA"), among other groups. These efforts to amend have thus far been opposed by the RPPTL Section, the Business Law Section and the Eminent Domain Sections of the Florida Bar, along with others. The current debate arises from the CCG and FACA's perceived need to change the Rule's commentary due to the result reached in *Florida Bar v. Tobin*, Florida Bar Case No. 70-451B (October 21, 2013) ("Tobin").

The Tobin Decision Spawns CCG and FACA Concerns

In Tobin, the referee in an ethics proceeding brought against Mr. Tobin, found that an attorney seeking redress from a county government for a client and at the same time representing the client in a separate circuit court action against the same county, did not violate Rule 4-4.2 by meeting with members of the applicable county commission without their counsel being present. The referee found that "the issues raised by Tobin's communications with members of the commission were squarely part of his efforts to convince county officials to grant his client administrative relief, or to reconsider previous action that was adverse to his client, and were, therefore, permitted communications." In essence, the referee found that such communications fit within the "independent justification" language of the Rule's commentary. As such, those communications which did not directly and solely arise in the litigation context, were appropriate. In other words, the existence of simultaneous proceedings or matters, dictated that Tobin be permitted to engage in direct communication with government representatives about regulatory matters, despite the existence of litigation among the same parties. Distinguishing prior Florida Bar Ethics opinions as not applicable in the Tobin context, the referee's decision appeared to CCG and FACA to practically take away the protection of Rule 4-4.2 from governmental agencies and their staff. By the referee's view of the Rule, they argue that their government clients were and are deprived of effective counsel. Pending litigation matters are said to be detrimentally impacted by allowing communications to proceed between unrepresented government officials, employees and opposing parties who are represented by counsel. Government counsel's arguments continued by stating that, in essence, all communications should in such instances be made directly with or through government counsel, unless consent is otherwise given. If not, then outside parties and their counsel are free to communicate with government officials and employees about litigation that is pending between them. To ameliorate their concerns, CCG and FACA argue that the Rule's Commentary should be changed. The proposed change, in its second iteration, has been submitted to the Florida Bar's Board of Governors for review and comment by other Bar sections has been requested. This latest amended commentary is a response to the objections and concerns of the RPPTL Section and other sections discussed at a February 2015 meeting among the interested Bar Sections.

The RPPTL Section's Initial Response

While the proposed second version of the amended commentary is now being reviewed by the RPPTL Section and other sections, a reply is not due until July, 2015. Prior discussions among the sections have emphasized many of RPPTL Section's previous objections. Such observations and objections were included in a formal White Paper submitted by the Section and summarized here. In the first instance, the original proposed amendments made no distinctions between the attorney representing a client before an elected body (county commission), appointed body (zoning board) or agency in matters such as a comprehensive plan amendment, rezoning request, site plan or other permit application, as opposed to an attorney representing a client in a clearly declared dispute. Similarly, the earlier proposed amendments to the commentary have not acknowledged that in dealing with governmental agencies, it is common to seek administrative, judicial and legislative remedies all at the same time. Perhaps most importantly, the first set of proposed commentary changes failed to balance or take seriously into account the need to protect the rights of citizens, through their lawyers, to engage their elected and appointed officials as guaranteed under the Federal and Florida Constitutions. The suggested commentary amendments are also sufficiently overbroad as to provide interference in daily non-judicial dialogue and resolution of administrative, regulatory and related governmental matters. Furthermore, in changing the commentary as proposed, governmental interaction with citizens will be heavily chilled by inhibiting free and normal

discussion between citizens participating in the process of governing and the agency or body charged with oversight responsibility.

A Potentially Wider Net

In the end, it appears that the previously proposed commentary amendments attempt to use an overbroad and potentially harmful resolution to a problem that either does not exist or appears limited to a specific case. Those situations (other than real property regulation) which may ultimately be found to also fall within the net of negative impact should the Rule's commentary be changed in line with previous proposals, include the possibly expanding areas of Circuit Court Clerk authority and involvement in guardianship proceedings (both with the legislature's contemplated modified statutory regime and without), audits in the guardianship and probate contexts and other matters now generally pursued by county representatives, clerks and staffers without legal counsel.

In the meantime, the RPPTL Section's response to the latest suggested amendments to the Rule's commentary is to be formulated, with review now underway. Additional information about this matter will be made available on the Professionalism and Ethics Webpage of the Section website and in updates in *ActionLine*.

Lawrence J. Miller *is a shareholder in the Boca Raton firm of Gutter Chaves Josepher Rubin Forman Fleisher Miller, P.A. His practice focuses on estate, trust and guardianship litigation and administration, including multi-state and multi-jurisdictional disputes and contests. He is currently a Fellow, Litigation Counsel of America, Chair of the Professionalism and Ethics Committee of the Real Property, Probate and Trust Law Section of The Florida Bar and remains active in its Probate and Trust Litigation, Probate Law and Procedure, Trust Law and Guardianship and Power of Attorney Committees.*

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Promoting Diversity

By Stacey A. Prince-Troutman, Esq., Orlando, Florida

Over the past several months, the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL) has sponsored several events to encourage and promote diversity in its membership.



Stewart Marshall and Charles (Chuck Wilder) with law student, Phil Morales.

On November 1, 2014, the Kozyak Minority Mentoring Picnic was held at Amelia Earhart Park located in Miami. The picnic was well-attended by over 1,000 law students from across the state. Hung Nguyen, a former RPPTL fellow, coordinated RPPTL's booth, and Section Chair Michael Dribin as well as other members of the Section leadership were in attendance. Students interested in the benefits of RPPTL membership were given student affiliate membership applications.

Also, on January 31, 2015, the FAMU College of Law hosted the Third Annual Greater Orlando Diversity Mentoring Picnic on its campus. RPPTL was represented by ALMS (At-Large Members) Stacey A. Prince-Troutman, Charles (Chuck) Wilder, Marina Nice, Stewart Marshall, and David Akins. The ALMS explained the objectives of RPPTL and their experience as Section members. The information captured the interest of many students who asked to be added to the Central Florida email-list to be kept informed of Section events.

Finally, on February 21, 2015, RPPTL was a sponsor of the Hillsborough County Bar Association Diversity Networking Social in Tampa. The event was promoted by Navin Pasem, a former RPPTL fellow and the committee's Vice Chair for Diversity. Students had the opportunity to network with local attorneys and obtain information about the upcoming Executive Council meetings and mock interview opportunities.



Navin Pasem, David Brittain, Brandon Bellew and Robert Walton at the Chester H. Ferguson Law Center in Tampa

The Membership and Inclusion Committee would like to thank all of the attorneys who volunteered to make the events a success. Please contact Jason Ellison or Lynwood Arnold, Co-Chairs of the Membership and Inclusion Committee, for more information about RPPTL representation at your local bar networking events.

RPPTL Section's Law School Outreach

By Kathrine Lupo, Esq., Sarasota, Florida

The Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL) proudly sponsors Florida law school events as part of its initiative to increase student affiliate membership and promote student involvement with RPPTL. Over the past semester, the Membership & Inclusion Committee has realized unprecedented success in both the quantity and quality of events in which it has participated.

The Ave Maria School of Law hosted a well-received Eat-and-Educate event on January 27, 2015 coordinated by Tara Rao and Noelle Melanson. Moderated by Greg Holz, panelists Patrick Mize, Robert Lancaster, Jon Scuderi, Noelle Melanson and Eleanor Taft discussed their practice areas, RPPTL activities, and membership benefits. A similar Eat-and-Educate luncheon was held on February 5, 2015, at the University of Florida Levin College of Law. Panelists Richard White, Tae Kelley Bronner, Theo Kypreos and Jeff Dollinger explained how RPPTL can be a resource to law students now and as they transition into becoming attorneys.





Richard White, Theo Kypreos, and Tae Kelley Bronner leading the discussion

In South Florida, Kymberlee Smith and Annabella Barboza teamed up to organize two law school events. The first was at the Nova Southeastern University Shepard Broad Law Center on February 24, 2015 where RPPTL partnered with the student Real Property Probate and Trust Law Society for an Eat-and-Educate event. The students were addressed by panelists Bill Parady, Salome J. Zikakis, Shane Kelly and Michelle J. Gomez, who discussed career paths, internship opportunities, mock interviews, and joining the RPPTL. The second Eat-and-Educate luncheon was held on March 17, 2015, at the St. Thomas University School of Law. Three student organizations (the Student RPPTL Association, the Black Law Student Association, and the Hispanic American Law Student Association) joined together to host the event. Panelists included the Honorable Judge Norma Lindsey, Raul Perez-Ballaga, and Eamonn Gunther, who addressed over 40 students. RPPTL also presented a website demonstration to highlight the resources available to members, and six students registered for affiliate membership at the event.



Kymberlee Smith and Annabella Barboza with the RPPTL Society of NSU Officers: Hayley Newman, Johnathan Hicks and Janelle Pimienta



Paige Baker, Michael Bedke, Jason Ellison, and Cari Allen at the Meet & Greet

On March 5, 2015, the Stetson University College of Law and Thomas M. Cooley Law School Annual Meet & Greet event was held at the Tampa Club Ballroom. Jason Ellison assisted the Stetson Law student RPPTL organization coordinate the event, which was attended by approximately 30 attorneys and 40 law students. Also on March 5, 2015, the Florida State University College of Law hosted a reception at Harry's Bar & Grill, which had about 40 students in attendance. The event was organized by Lynwood Arnold and Melissa Van Sickle, who received enthusiastic feedback from the students with plans to make the event an annual occurrence. Both events promoted a conversational atmosphere for students to network with local practicing RPPTL attorneys.

Stacey Prince-Troutman, with the assistance of ALMS members Alex Hamrick and Charles (Chuck) Wilder, organized an ice cream social event at the Barry University School of Law



Melissa VanSickle and Vinette Godelia with law students at the study break.

on March 16, 2015. Additionally, they addressed a Probate class of 15 students and a Real Property class of 40 students to encourage students to learn more about RPPTL and its benefits. Back at Florida State University College of Law on April 17, 2015, Melissa Van Sickle coordinated with Kandace Hillebrandt and Caleb Hinton to provide a much-needed study break to law students. RPPTL provided coffee and doughnuts for the event, and Vinette Godelia and Sarah Butters volunteered to discuss RPPTL benefits with more than 35 participating students.

The Membership and Inclusion Committee looks forward to representing RPPTL at upcoming law school events. The Committee would like to extend its gratitude to those ALMS who volunteered their time to make these events successful. Please contact Lynwood Arnold or Jason Ellison, Co-Chairs of the Membership and Inclusion Committee, for more information about RPPTL representation at law school events.

RPPTL General Sponsors

The RPPTL Section is grateful to all of its sponsors who faithfully support the good work of the Section. In addition to recognizing them in each issue of *ActionLine* as we do, we want to offer information to you in the event you wish to speak with a sponsor about the services it provides. Below are the names of the sponsors and contact information. Again, thank you, sponsors, for supporting RPPTL!

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Probate Case Summaries

Prepared by T. John Costello, Jr., Esq., Wollman, Gehrke & Solomon, P.A., Naples, Florida

A Guardian may exercise a Ward's power to amend the Ward's revocable trust to appoint the Guardian as Trustee of the revocable trust if the amendment is in the Ward's best interest.

Rene v. Sykes-Kennedy, 156 So. 3d 518 (Fla. 5th DCA 2015)

The Ward's revocable trust provided that upon the Ward becoming incapacitated, the Ward's granddaughter became trustee. Two months after the guardianship court found the Ward to be incapacitated, the Guardian petitioned the court to allow the Guardian to amend the Ward's trust to appoint the Guardian as trustee. The Guardian alleged that it was necessary for the Guardian to access the trust assets to care for the Ward and that the Ward "expressed continued worry" that the granddaughter was controlling the assets. Finding that the amendment would serve the Ward's best interests, the trial court granted the petition and allowed the Guardian to amend the trust. Notably, the trial court also found there was no evidence of wrongdoing by the granddaughter.

The granddaughter argued to the appellate court that the guardianship court lacked authority to approve the trust amendment because § 736.0201(1), Fla. Stat., states that "judicial proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure." The appellate court rejected that argument because § 736.0602(6), Fla. Stat., states that a guardian of the property of the settlor may exercise a settlor's power to amend a trust. The appellate court supported its opinion by citing to § 744.441, Fla. Stat., which provides that with court approval, a guardian may exercise any power as trustee that the ward might have lawfully exercised if not incapacitated, if the best interest of the ward required such action.

If a guardianship petition is not successful, the court-appointed attorneys and examining committee members are not entitled to payment of fees and costs under § 744.108, Fla. Stat. (2013), from the alleged incapacitated person.

Steiner v. Steiner, 159 So. 3d 253 (Fla. 2d DCA 2015)

Margaret Steiner and Robert Steiner filed involuntary guardianship and incapacity proceedings for both their mother and father, John Steiner and Joan Steiner. The trial court then appointed counsel and an examining committee for both of the alleged incapacitated persons. Based on the examining committee's findings, the trial court found that both John and Joan Steiner were not incapacitated and dismissed the proceedings. After the court-appointed attorneys petitioned the trial court for attorney's fees under §§ 744.108 and 744.331, Fla. Stat., the trial court entered orders authorizing and directing the payment of the fees by John Steiner and Joan Steiner, the alleged incapacitated persons.

The appellate court reversed the trial court "[b]ecause sections 744.108 and 744.331 do not contemplate the payment of fees and costs from an alleged incapacitated person where a guardianship is not established." The Second DCA cited to its recent opinion of In re Guardianship of Klatthaar, 129 So. 3d 482 (Fla. 2d DCA 2014) in which it "determined that chapter 744 does not require the alleged incapacitated person to pay fees and costs where the petition to determine guardianship and incapacity is brought in good faith but incapacity is not found and guardianship is not established."

The Second DCA took the opportunity to "emphasize the importance of correcting the statutory gap" between the requirement that the trial court appoint an attorney for the alleged incapacitated person and the possibility that the attorney not be entitled to fees from any party if the petition was brought in good faith. "The examining committee and any attorney appointed under subsection (2) are entitled to reasonable fees to be determined by the court." See § 744.331(7)(a), Fla. Stat. "However, if the petition for incapacity is dismissed, 'costs and attorney's fees . . . may be assessed against the petitioner if the court finds the petition to have been filed in bad faith." If a good faith petition is dismissed, § 744.331(7), Fla. Stat., does not provide who is responsible for paying the court-appointed attorney's fees and examining committee's fees.

The Second DCA noted that an amended version of § 744.331, Fla. Stat., has been introduced in the Florida Legislature but until that or similar legislation is implemented, court appointed attorneys and examining committee members must face the possibility of having no one to obtain fees from.

A designation of preneed guardian must be honored by the trial court unless (1) the preneed guardian is unqualified or unwilling to serve as guardian, or (2) the trial court makes specific findings supported by substantial and competent evidence that the appointment of the preneed guardian would be contrary to the ward's best interest.

Martinez v. Smith, 159 So. 3d 394 (Fla. 4th DCA 2015)

Martinez involved a dispute between a professional guardian and the Ward's wife over whether the Ward's preneed guardian

designation, which named the Ward's wife, should be honored by the court. Prior to losing capacity, the Ward executed a designation of health care surrogate that named his wife, Martinez, as both his health care surrogate and preneed guardian. The Ward also named Martinez as his attorney-in-fact in his durable power of attorney.

After the Ward was in an accident in 2010, a professional guardian, John Cramer, was appointed as the Ward's limited guardian. In 2012, however, Cramer petitioned the court for the appointment of plenary guardian and alleged that Martinez's designation of health care surrogate was no longer an alternative to guardianship of the person because Martinez was not acting in the Ward's best interest.

Martinez opposed Cramer's petition for plenary guardian for four reasons: (1) the trial court was required, under §§ 744.312(3)(a) and (c), Fla. Stat., to consider the wishes of the Ward in determining who to appoint as guardian and the Ward had made his wishes known throughout his estate planning documents; (2) the Ward's designation of Martinez as his preneed guardian gave rise to a rebuttable presumption that Martinez was entitled to the appointment under §§ 744.102(16), 744.312(4), and 744.3045(4), Fla. Stat. (2012); (3) the court should give preference to Martinez because she was the Ward's wife; and (4) naming a guardian was not the least restrictive alternative because the health care surrogacy, living will, and durable power of attorney adequately protected the Ward. The appellate court refused to discuss the marriage argument because the validity of the marriage is being dealt with in a separate appeal.

The testimony at the hearing on the petition showed that during the previous three years, the Ward's residence was changed nine times and that he developed pneumonia twice, once requiring a nine-day hospital stay. Martinez and Cramer disagreed over whether the Ward's residence should change once again and Cramer accused Martinez of not communicating properly with the Ward's caregivers and other interested persons. Cramer argued to the trial court that Martinez was not a suitable surrogate because she had abused her power by interfering with the Ward's care.

The trial court ultimately appointed Cramer as the plenary guardian of the Ward and in its order, revoked Martinez's designation of health care surrogate under § 765.105(5), Fla. Stat., because Martinez had "moved the Ward multiple times and does not communicate properly with the Ward's caregivers and other interested persons."

The Fourth DCA reversed because the trial court's order was not supported by substantial, competent evidence that the appointment of the designated preneed guardian would be contrary to the Ward's best interest and Martinez was otherwise qualified to serve. "Production of the declaration in a proceeding for incapacity shall constitute a rebuttable presumption that the preneed guardian is entitled to serve." See § 744.3045(4), Fla. Stat. "If the person designated is qualified to serve, the court shall appoint [the] preneed guardian, unless the court determines that appointing such person is contrary to the best interests of the ward." See § 744.312(4), Fla. Stat.

The Fourth DCA held that Martinez's conflict with the nursing facility staff did not show that her appointment was contrary to the best interests of the Ward. The evidence simply showed that she and the staff had poor interaction, not that she had done anything to harm the Ward. The Fourth DCA supported its decision by citing to *Koshenina v. Buvens*, 130 So.3d 276 (Fla. 1st DCA 2014), which found that the "statutory standard requires more than a finding that a designated preneed guardian is lacking in interpersonal and social skills." It may be that the Ward wanted the "bull-in-the-china-closet approach to caring for" the Ward. In addition, the 4th DCA held that the poor communication with the nursing facility's staff was not an abuse of power that would justify revocation of a health care surrogate designation under § 765.105(5), Fla. Stat.

When a witness submits an affidavit to the probate court alleging that the witness did not sign in the presence of the testator or other witnesses, an issue of material fact exists that requires denial of summary judgment as to the validity of the will's execution.

Helfenbein v. Baval, 157 So. 3d 531 (Fla. 4th DCA 2015)

In *Helfenbein,* two Wills were at issue: a Will dated in 1982 and a later Will dated in 2007. The 1982 Will contained a waiver of the elective share by the decedent's wife, Estelle Baval (the "Wife"). The later 2007 Will, contained no waiver by the Wife and the Wife's only interest in the decedent's estate was a discretionary power to the decedent's daughter, Arlyne Helfenbein (the "Daughter"), to give the Wife $150,000.00. As a result, if the 2007 Will was deemed valid, the Wife would be entitled to take her elective share.

The validity of the 2007 Will hinged on whether it was properly executed under § 732.502(1)(c), Fla. Stat., which requires "[t]he attesting witnesses . . . sign the will in the presence of the testator and in the presence of each other." The Daughter argued that the 2007 Will was invalid because it was not signed with the proper formalities. She supported her argument by filing an affidavit with the trial court in which Murray Adler, a witness to the 2007 Will, "alleged that he did not sign the will in the presence of the other witness and that he did not see Testator sign the will."

The Fourth DCA reversed the trial court's summary judgment that found the 2007 Will was executed in conformity with § 732.502, Fla. Stat., because Adler's affidavit created an issue of material fact that required a denial of summary judgment for the Wife. The Court also held the self-proving affidavit created an issue of material fact because only two of the three witnesses listed in the notarized paragraph signed that

section. "This discrepancy concerning who was present raises an issue as to the entire execution of the self-proof clause" and "raises an issue as to the veracity of Testator and the two signing witnesses because they 'were sworn and declared to [the notary] that each of the Witnesses, in the presence of the Testator and each other, signed the will as a witness."

The Fourth DCA supported its decision by citing to *Simpson v. Williamson*, 611 So. 2d 544, 547 (Fla. 5th DCA 1992), which held there was a genuine issue of material fact as to the execution of a will when a witness submitted an affidavit stating he was not present when three others signed the will.

The Fourth DCA also held the elective share waiver attached to the 1982 Will applied only to the 1982 Will and not the 2007 Will. However, the court also noted in a footnote that if the 2007 Will was deemed invalid, the doctrine of dependent relative revocation would potentially revive the 1982 Will, and thus the elective share waiver may then also apply.

A trial court's judgment invalidating a decedent's will on the basis of undue influence by the decedent's spouse was upheld because it was supported by substantial competent evidence.

Blinn v. Carlman, 159 So. 3d 390 (Fla. 4th DCA 2015)

In *Blinn v. Carlman*, the Fourth DCA upheld a trial court's invalidation of the decedent's April 2, 2008, will based on undue influence by the decedent's wife. When the husband and wife married in 2007, it was the husband's fourth marriage. The evidence admitted at trial showed that the husband's health began deteriorating as early as 2005 and he was "susceptible to undue influence due to his declining physical state, anxiety disorders, depression, and progressive dementia." From 2006 on, the husband suffered from worsening dementia and "frequently engaged in inappropriate behavior and expressed paranoid beliefs." In June 2011, the husband was deemed totally incapacitated and his daughter was appointed as his plenary guardian.

Two separate lawyers were involved with the procurement of the invalidated will. The referring lawyer was a social friend of the husband who testified he gave the husband and wife "no legal advice whatsoever." The drafting lawyer, however, stated he had no interaction with the husband and wife prior to their meeting at his office to sign their new wills, and he drafted the wills in accordance with instructions given to him by the referring lawyer. The new will devised the husband's entire estate to the wife, with a charity named as the alternate beneficiary. This was a drastic change from the husband's prior will, which devised his entire estate to his daughter, with his granddaughter as the alternate beneficiary. Notably, the prior will was executed eight months after husband and wife had met.

The drafting lawyer stated he "was uncomfortable with the circumstances surrounding his preparation of the [will]," and that although he only vaguely remembered the signing appointment with the husband and wife, he remembered that the majority of the conversation during the appointment was with the wife. Further, a month after the signing appointment, the wife sent the drafting lawyer two "doctor letters" that stated both she and her husband were of sound mind. The wife wanted the letters to be attached to the new wills, which were dated nine months before the signing of the new wills.

Evidence at trial showed that the wife "preyed on [the husband's] paranoia and mental infirmity to alienate the [husband] from his two children and their families." The husband and his daughter had worked together at the husband's company, Sovereign Yachts. But once the wife took control of husband, communication with the daughter dropped off. None of the husband's family was invited to the wedding; and when the son would call, the wife would hang up the phone immediately.

The trial court also received a rare glimpse into what the appellate court called an "abusive marital relationship." The wife inadvertently left a voicemail on a phone belonging to a former employee of Sovereign Yachts. In the voicemail, the wife was heard screaming at the husband telling him that his daughter is lying to him, "She's no GD good," is "stealing from you," and "just taking your money doing stuff behind your back." Finally, in 2008, 2010, and 2011, the wife sent letters to the husband's life insurance company in her own handwriting requesting that the beneficiary be changed from the daughter to the wife.

The appellate court deferred to the trial judge's "detailed final judgment" and affirmed the invalidation of the 2008 will because a "probate court's findings in a will contest shall not be overturned where there is substantial competent evidence to support those findings, unless the probate judge has misapprehended the evidence as a whole." *See Henderson v. Estate of Hendershaw*, 763 So. 2d 482, 483 (Fla. 4th DCA 2000).



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Real Estate Case Summaries

Prepared by Julia L. Jennison, Esq., Partner – Lewis, Longman & Walker, P.A.
West Palm Beach, Florida

Florida's Supreme Court holds estate held in fee by the Florida Department of Transportation ("DOT") that was used in part for highway right-of-way cannot be extinguished by the Marketable Record Title Act ("MRTA"), specifically finding that use of any part of the estate as a highway right-of-way preserved the DOT's interest and excluded the remainder from the effect of the MRTA. This case resolves a conflict with *Florida Department of Transportation v. Dardashti Properties*, 605 So. 2d 120 (Fla. 4th DCA 1992) on whether exceptions to the MRTA may apply to an estate held in fee by the DOT.

Florida Department of Transportation v. Clipper Bay Investments, LLC, 40 Fla. L. Weekly S164, 2015 WL 1379975 (Fla. 2015) (Fla. S. Ct. Mar. 26, 2015)

In this case, at its inception, Clipper Bay Investments, LLC ("Clipper Bay") sought to quiet title to a portion of land adjacent to I-10 under the MRTA. DOT contended it held fee title, and the property was exempt from the MRTA under the exception found in § 712.03(5), Florida Statutes, for easements or rights-of-way. The trial court ruled partially in favor of Clipper Bay and partially in favor of DOT. Clipper Bay appealed and DOT cross-appealed. On the relevant question of whether the MRTA exception applied to DOT, the Second District Court reversed in favor of Clipper Bay, holding that MRTA would apply to property held for easement or right-of-way purposes, but that DOT had not shown the land was ever used for right-of-way purposes. (*See Clipper Bay Investments, LLC v. Department of Transportation,* 117 So. 3d 7 (Fla. 2d DCA 2013).

DOT sought review by the Florida Supreme Court on the grounds that the 2013 Clipper Bay decision expressly and directly conflicts with *Dardashti* on whether exceptions to the MRTA apply to an estate held in fee by the DOT.

DOT obtained fee simple title to the subject property in 1965. Clipper Bay alleges to have obtained fee simple title to the same property in 1970. For purposes of the case, the Clipper Bay 1970 Deed constitutes the "root title." Clipper Bay filed the instant action to quiet title to the contested 7 acres. DOT contends that it has used part of the underlying fee simple for I-10 right-of-way and leased part of the property to Santa Rosa County for a county road for over 30 years and therefore the MRTA exception applies and the MRTA cannot extinguish its interest.

The MRTA exception at § 712.03(5), Florida Statutes, specifically provides for exception from the MRTA for recorded or unrecorded easements or rights-of-way, "so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof." A definition of "right-of-way" is not found in the MRTA. However, in *Clipper Bay*, the District Court analyzed the MRTA's intent and purpose and applied the definition of "right-of-way" found in the transportation code at § 334.03(22), Florida Statutes. This definition includes "land in which the state, the department, a county, or a municipality owns the fee or has an easement devoted to or required for use as a transportation facility." The Florida Supreme Court found the First District's analysis to be correct that the focus of the MRTA exception is on the purpose or reason the state holds the land, rather than the manner in which the title is actually held. For this reason, the Florida Supreme Court rejected the holding in *Dardashti*.

Therefore, citing to the MRTA exception, the Florida Supreme Court found that it was undisputed that DOT maintains a right-of-way with respect to access to I-10, and furthermore that a portion of DOT's estate has been conveyed to Santa Rosa County to maintain a county road, and that DOT's use of part of its estate is sufficient to apply the exception.

The Bert J. Harris, Jr., Private Property Rights Act, which provides property owner protection from a governmental law, regulation or ordinance which inordinately burdens private property, does not apply where plaintiff's property is not itself subject to any governmental regulatory action.

City of Jacksonville v. Smith, 159 So. 3d 888, (Fla. 1st DCA 2015)

The property owners, the Smiths, purchased a parcel of undeveloped property along the riverfront in the City of Jacksonville. At the time of their purchase, the City owned an adjacent parcel which contained a deed restriction, limiting use of the City's lot to the leisure and recreation of Duval County employees. Both parcels were zoned "residential low density". The City obtained a release of its deed restriction, rezoned their parcel, and constructed a fire station which, when completed, included a two-story, 13,000 square foot building, a 265-foot dock with berths for two large fireboats, and a Florida Marine Patrol boat.

The Smiths filed a challenge under the Bert J. Harris, Jr. Private Property Rights Protection Act ("Harris Act"), alleging the City's construction and operation of a fire station next to their property "inordinately burdened" their property, by impacting their ability to market and sell the property as a luxury home site, and in fact diminished its value by $470,000. The trial court found that the Smiths were entitled to relief under the Harris Act. The First District Court of Appeal reversed on the basis that the Harris Act is not intended to protect an

individual property owner from all acts of the government which may negatively impact their property, the Harris Act is intended only to protect against those regulations which are directly applied to the individual private property.

The Harris Act provides protections when a governmental action is directly applied to private property. The Act was intended to "fill a void in then-existing Florida law, because, prior to its enactment, there was no means by which an owner could receive compensation for the adverse financial effects of governmental regulation of his land without satisfying the constitutional standards for a taking, namely, physical invasion or the loss of all economically viable use."

The First District Court of Appeal analyzed the underlying intent and purpose of the Harris Act, and determined that the Act, "simply contains no language to indicate that the Legislature intended to create a whole new class of takings claimants who do not have to demonstrate that a governmental law, rule, or regulation had been applied to their property, nor is there language which would clearly allow for claims-based non-regulatory actions of government," finding that the "specific language of the Act indicates that in order to have a cause of action under the Act, governmental action must be directly "applied" to the claimant's property."

> "because the trial court's opinion broadens the scope of the Harris Act far beyond its intended purpose and has the potential to open the floodgates for claims under the Act against state, regional, and local governmental entities whenever they approve development on one property (or conduct activities on their own property) that adversely impacts the value of another property, we reverse. We would leave it to the Legislature to expand the scope of the Act to encompass claims such as the claim filed by the Smiths in this case, if it is the will of that body to do so."

The First District Court of Appeal also certified the following question to the Florida Supreme Court in accordance with the Florida Rules of Appellate Procedure, as one of great public importance: "[m]ay a property owner maintain an action pursuant to the Harris Act if that owner has not had a law, regulation, or ordinance directly applied to the owner's property which restricts or limits the use of the property?"

Subsequent to this case in its 2015 regular session, the Florida Legislature amended the Harris Act to clarify the term "property owner." The revised definition of "property owner" includes the language "that is the subject of and directly impacted by the action of a governmental entity." This new definition appears to codify the decision reached in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015). See House Bill 383 which is as of this writing currently enrolled and if passed, would take effect on October 1, 2015.

The Marketable Record Title Act does not extinguish restrictive covenants included in a muniment of title that names the homeowners' association.

Barney v. Silver Lakes Acres Property, 159 So. 3d 181 (Fla. 5th DCA 2015)

Several property owners within the Silver Lakes Acres subdivision sought declaratory relief asserting that certain restrictive covenants of Silver Lakes Acres were extinguished by the MRTA. The trial court entered judgement in favor of the homeowners' association, determining that the MRTA did not extinguish the restrictive covenants. At issue was whether the statutory exception found in § 712.03(1), Florida Statutes, was applicable to the restrictive covenants and the homeowners' association. The property owners argued that the language set forth in their respective deeds was a mere "general reference" and therefore insufficient to keep any restrictive covenants of Silver Lakes Acres from being extinguished by the MRTA.

§ 712.03(1), Florida Statutes, exempts from extinguishment under the MRTA use restrictions "disclosed by . . . muniments of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests . . . shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction . . . "

The following language was included in the various deeds, "subject to restrictive covenants, reservations and easements of record applicable to Silver Lakes Acres"; "subject also to the obligations of the owners of each lot at Silver Lakes Acres to the Silver Lakes Acres Property Owners Association, their successors and assigns, which obligations Grantee assumes and agrees to pay"; and "subject to restrictive covenants and amendments thereto of record affecting the property; and subject also to easements of record affecting said property; and subject also to the obligations of the owners of each lot of Silver Lakes Acres s/d to the Silver Lakes Acres Property Owners Association, their successors and assigns, which said obligations Grantee assumes and agrees to pay."

The District Court of Appeal upheld the trial court's finding that citation to an official record book and page is not the only evidence necessary to overcome "general reference." Specific ratification and assumption of the obligations of the Association constitutes sufficient notice to meet the core concern of the MRTA which is that no hidden interest in property be asserted without limitation against a record property owner.

In an action for fraud, constructive fraud, breach of fiduciary duty, and legal malpractice against a title insurance company, the attorney that represented the party and the attorney's law firm as the title insurance

company's title agent, and the attorney's law firm that was the closing agent, claims were all barred under statute of limitations.

West Brook Isles Partner's 1, LLC v. Commonwealth Land Title Insurance Company, 40 Fla. Law Weekly D976a, 2015 WL 1874453 (Fla. 2d DCA Apr. 24, 2015)

West Brook Isles Partner's 1, LLC ("WBI") sued Commonwealth Land Title Insurance Company et al., ("Commonwealth") for a real estate transaction that allegedly went bad. WBI alleged breach of fiduciary duty and constructive fraud against Commonwealth as closing agent and breach of contract for the title commitment; legal malpractice, fraud, and constructive fraud against Mr. Navaretta in his capacity as WBI's attorney; and constructive fraud and breach of fiduciary duty against Mr. Navaretta's law firm in its role as closing agent. All three parties pleaded an affirmative defense that the statutes of limitations bared WBI's claims. WBI alleges it was not aware that property it purchased was not "raw land", but was rather "condominium units." However, according to the District Court of Appeal, all evidence showed that WBI was provided with numerous documents indicating it was purchasing "condominium units" as opposed to raw land.

The District Court of Appeal held that WBI was confusing fraud and fraudulent concealment. The statute of limitations for fraud begins to run when the plaintiff should have discovered, exercising any diligence that the allegedly fraudulent transaction was suspect. See *Breitz v. Lykes-Pasco Packing Co*., 561 So. 2d 1204, 1205 (Fla. 2d DCA 1990). Fraudulent concealment focuses on subsequent actions to keep the improper conduct from sight. See Nardone v. Reynolds, 333 So. 2d 25, 37 (Fla. 1976). Where there is no active concealment and a party with the exercise of due diligence could have discovered the facts, the statute of limitations is not tolled.

Taxation - In a case of first impression, the First District Court of Appeal held that the retroactive repeal of a tax exemption for a nonprofit limited partnership affordable housing project property was unconstitutional because it impaired a vested right and imposed a new tax obligation on the nonprofit limited partnership.

Stranburg v. Panama Commons L.P., 160 So. 3d 160 (Fla. 1st DCA 2015)

This case was brought by a Panama Commons, L.P., a nonprofit limited partnership that constructed a 92-unit affordable housing project in Panama City, Bay County, Florida. Panama Commons challenged the Bay County Property Appraiser's decision to deny its renewal application for tax exemption for its affordable housing property. Bay County's decision was based on legislation that was passed after Panama Commons filed a timely application. The trial court entered final summary judgment concluding that Panama Commons was entitled to a property tax exemption, finding that the Legislature's attempt to retroactively repeal the property tax exemption was unconstitutional.

Panama Commons qualified for a full tax exemption for the 2012 tax year, and timely filed application for the same tax exemption under § 196.1978, Florida Statutes. Subsequent to its timely filing, the state legislature passed legislation eliminating this tax exemption for affordable housing property owned by limited partnerships, retroactively to the 2013 tax roll. The District Court of Appeal held the retroactive repeal of the law to be unconstitutional, finding it impaired a vested right and imposed a new tax obligation in direct violation/ conflict with Art I, §2, Fla. Const. and Art I, § 9, Fla. Const. Article I, §2, guarantees to all persons the right to acquire, possess, and protect property. Section 9 provides that no person shall be deprived of life, liberty or property without due process of law. Together, these two constitutional provisions protect individuals from the retroactive application of a law that adversely affects or destroys a vested right, imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties. Since tax exempt status of real property is determined on January 1 of each year, a subsequent law would impact a "vested right." Therefore, the statute is unconstitutional and the trial court's holding was affirmed.



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