ActionLine

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

As The RPPTL World Turns: The Impact Of The Pandemic And Remote/ Zoom Hearings, Depositions And Mediations On Your Trusts And Estates Litigation Practices

Clearing Up The Confusion! Notices Of Commencement Demystified.

Exemptions And Waivers: Kearney Construction – A Whole New Ball Game

Roth IRA Conversions After The SECURE Act

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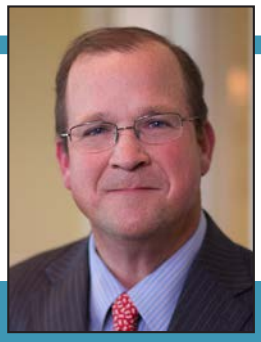

CHAIR'S COLUMN

Man Plans, And God Laughs!

By William T. Hennessey, III, Section Chair, 2020-2021

I think it is safe to say that none of us anticipated the events of 2020. I am sure that most of you, like me, had designs on big things and new adventures – big vacations, graduations, weddings, and, of course, piles of client work to wade through. In what seems like the blink of an eye, much of that changed. The events since March have certainly given us a lot to ponder as we try to return to some semblance of normalcy. It is clear that this pandemic has helped put a lot of things into perspective. For many of us, we had the opportunity to spend some time reengaging with our children and loved ones as they returned home due to shutdowns. At the same time, we struggled through the stir-crazy feelings of being separated from our day-to-day routines, interactions with friends and colleagues, and the difficulties of practicing remotely. Through all of this, one thing has become absolutely clear - we can make plans but we are not in control - bringing to mind the old Yiddish proverb-"Mann Tracht, un Gott Lacht!" or "Man Plans, and God Laughs!"

As we transition into a new Bar year, I want to start by commending our immediate past chair, Rob Freedman, on the manner in which he handled these troubling times. Rob put his heart and soul into this Section for over two decades. He and his wife, Sheri, planned their final meetings of 2020, including a spectacular trip to Amsterdam, for more than 3 years only to see them tabled. As he does with everything, Rob handled the circumstances over the last 4 months with absolute grace and a positive attitude. More importantly, he showed that he was up to the task of leading the Section through a crisis. Rob should be proud of how our Section has responded. I certainly know that I am.

Shortly after the declaration of COVID-19 as a pandemic, Rob mobilized our Section members in a number of ways. Through Rob's leadership, the Section created a special COVID-19 webpage on its website (www.rpptl.org). The first post, on March 26th, was a video presentation which analyzed whether the Florida Supreme Court's order that permitted witnesses in court proceedings during the pandemic to testify remotely applied to executions of wills and other estate planning documents. (It did not!) In the weeks and months that followed, Section members submitted a multitude of articles and videos disseminating information on a wide range of topics relating to practical impacts of COVID-19 on our probate, trust, and real estate practices. At last check, the RPPTL Section has received well over 6,000 views on its COVID-19 webpage from separate users. In addition, the leaders of ActionLine immediately started work on a special edition dedicated to COVID-19 with a myriad of scholarly articles on planning opportunities and pitfalls as well as practical advice. These postings and articles have provided significant guidance for many RPPTL Section members and the public at large during this unprecedented time.

Beyond disseminating useful information, Section members have stepped up to volunteer their time. Johnathan Butler and Rebecca Bell have led a group of twenty-two volunteer RPPTL attorneys in the 13th and 6th Circuits in providing legal services to nurses and hospital workers as part of our Front Line Heroes project. Meanwhile, in the 15th Circuit, Bob Schwartz and Eamonn Gunther have organized a free estate planning seminar as well as material for the Legal Aid Society of Palm Beach County for persons impacted by the COVID-19 epidemic. Other projects to provide free legal services are in the works. All-in-all, our Section has responded and shown that it was up to the challenge. Kudos to Rob and the entire Section for stepping up to help during this crisis.

As with most crises, we often learn much about ourselves and find new ways to adapt. The Section is no different. One of the positives to come out of the crisis is that we have discovered that through technology and platforms, such as Zoom, we can actually make our activities available to more people. The attendance at our Zoom committee meetings during the Convention was some of the best, ever. While there were a few technology glitches, overall, the feedback from attendees was excellent. Many of you praised the meeting platform and suggested that we try to make it available for future meetings.

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Sunset by Michael J. Gelfand

IN THIS ISSUE:

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ARTICLES: Forward any proposed article or news of note to Jeff Baskies at jeff.baskies@katzbaskies.com. Deadlines for all submissions are as follows:

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
2	Winter	October 15
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GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, 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.

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In that regard, the Section has heard you. As we head into the remainder of the 2020-21, our plan is to have meetings in a hybrid form which permit both in person and remote attendance. As of this writing, due to a spike in COVID-19 cases, we have already elected to convert the August Breakers Meeting to a completely virtual format. We have a full slate of committee meetings scheduled during the week of August 17. For those of you who do not normally attend Section meetings, the obvious benefit here is that you get a chance to take a direct look and participate in what we do best as a Section. Our RPPTL Committee Meetings provide an opportunity for you to engage at the highest levels with other practitioners to solve and address practical problems for attorneys in the areas of real estate, estates, trusts, and guardianship. If you are not familiar with our committee structure, I would suggest that you visit our RPPTL website and check out the various committees. You are welcome to reach out to our Committee chairs and get involved. The new virtual format provides a very easy way for you to explore what we have to offer without any cost or expense. I will be sending out the Zoom information for all our meetings to the entire membership in advance of the meetings. I strongly encourage you to take advantage of the opportunity to sit in and see what we do as a Section.

As we head into the Fall, none of us knows for sure what is in store for the rest of 2020. I sure do not. All we can do is make our plans, with contingencies, and hope that God smiles on our Section during the 2020-2021 year. Stay well and stay safe!

Your 2020-2021 RPPTL Section Chair,

William T. Hennessey, III

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The Florida Bar's Real Property, Probate and Trust Law Section (aka RPPTL) 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 their contact information. Again, thank you, sponsors, for supporting RPPTL!*

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J. BASKIES

M. BEDKE

Letter From The Co-Editors-In-Chief

We hope you enjoyed the Summer 2020 special focus edition of *ActionLine*. The Summer issue was 100% dedicated to issues related to the COVID-19 pandemic.

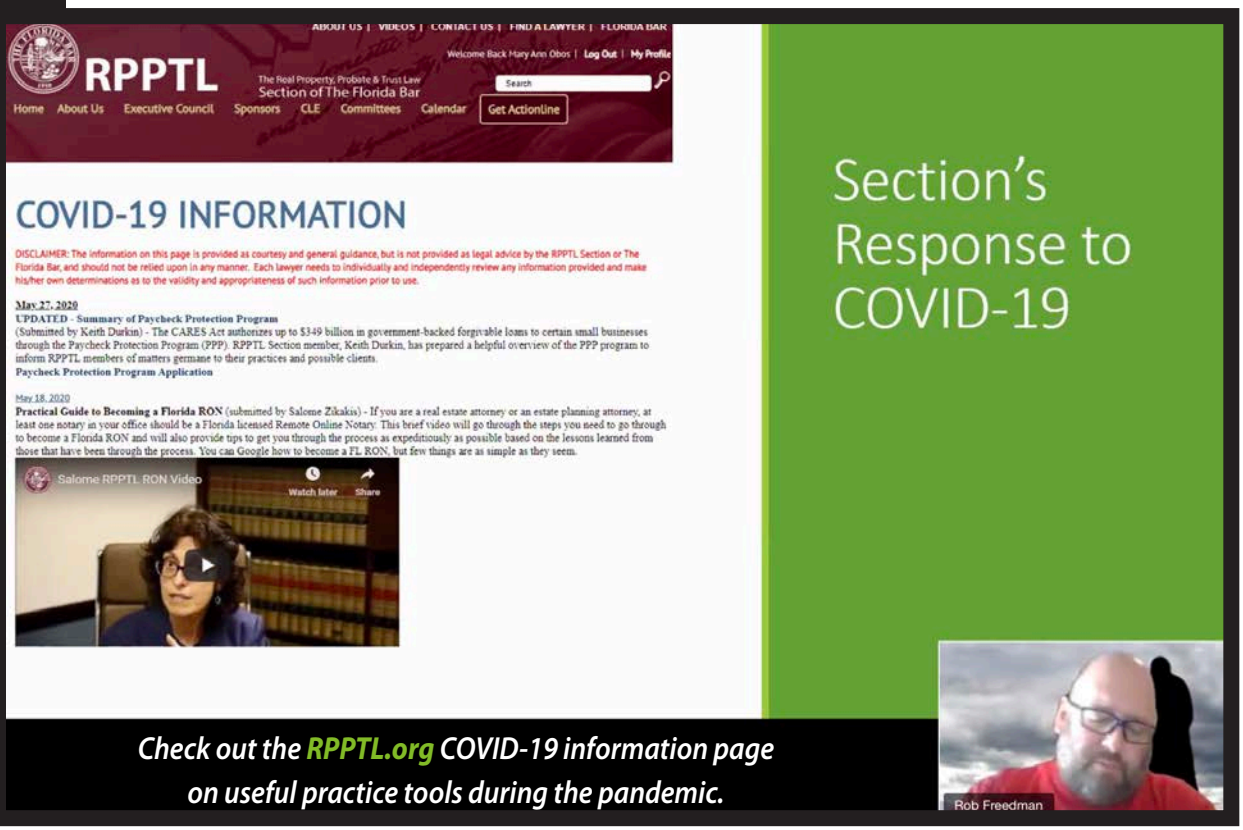
As the pandemic continues, this Fall 2020 edition includes further coverage of practice during the pandemic, with an article by Dan Seigel and Jeff Baskies who interviewed a cross-section of active Section-member trusts and estates litigators regarding the impact of the pandemic on their practices. The article includes interesting discussions and Section-member comments on topics such as remote/zoom hearings, depositions and mediations that will be informative and interesting to all readers.

ActionLine, of course, is not only our Section magazine, but it is also a valuable outlet for members to share their expertise and experiences on a variety of subjects. We cannot thank enough the authors who have contributed to this Fall edition and indeed to all editions of *ActionLine*. If any reader wishes to be published, the writers' guidelines are posted on the Section's website. You may also reach out to either or both of us by email. It is our privilege to publish Section-member authored content, even articles highlighting topics that are not yet settled or may still be evolving or even controversial.

The Fall 2020 *ActionLine* also focuses on developments impacting the Section during the past legislative session. We hope you enjoy the "Political Roundup" feature, where Pete Dunbar (one of our Section's lead lobbyists) summarizes some of the key changes in the 2020 session. Please also enjoy the "Friends of the Section" feature where Martha Edenfield (another one of our Section's lead lobbyists) highlights legislative leaders who provided support for the RPPTL Section and its initiatives.

Regarding general business of the Section, Larry Miller provides you with an overview of the work of the Section's At-Large Members, the ALMs. Also, Jane Cornett wrote a moving tribute to Rob Freedman, the RPPTL Section chair this past year. Further, enjoy our coverage of the most recent in-person Section meeting in Tampa with roundtable summaries, a photo tribute and more.

There are many other excellent articles and features, so please enjoy the *ActionLine* Fall 2020 edition.



AS THE RPPTL WORLD TURNS: THE IMPACT OF THE PANDEMIC AND REMOTE/ZOOM HEARINGS, DEPOSITIONS AND MEDIATIONS ON YOUR TRUSTS AND ESTATES LITIGATION PRACTICES

By Daniel A. Seigel, Esq., Law Offices of Daniel A. Seigel, P.A.
and Jeffrey A. Baskies, Esq., Katz Baskies & Wolf PLLC, Boca Raton, Florida

In recent weeks, the authors performed a series of interviews with a cross-section of RPPTL Section members who practice primarily Trusts and Estates litigation. The interviews were designed to learn how their practices have been impacted by the COVID-19 pandemic.

Some of the topics include:

1. what members enjoyed the most during the past few months;
2. what have been their worst experiences;
3. what have they liked or disliked about remote working and Zoom practicing; and
4. what changes do they think should and will become permanent.

We asked specific questions to these practitioners about the benefits and detriments of holding virtual (primarily Zoom) depositions, hearings, and mediations. We asked for insights on any technology changes or developments to their practices.

In addition, and in general terms, we also discussed how the past few months have affected their lifestyles and thoughts on their practices.

We then grouped the responses into a few main categories and tried to share as much of the practitioners' actual commentary as we could. The comments were analytical and constructive. We wish to thank all who helped us in creating and drafting this article, and we hope you enjoy reading it. Also, we would love to hear from more of you regarding your thoughts on these sea changes to your practices. Please email us any thoughts or useful suggestions which we may use for a follow-up article or we may post to the RPPTL Section website (on its special COVID-19 webpage).

GENERAL THOUGHTS

Below are some comments regarding general aspects of practice during the pandemic.

Richard C. Milstein; Akerman LLP (Miami):

As with most things in life, change can be good, but it needs to be evaluated for its purpose and potential as well as its unintended consequences. The remote practice and the failure to interact with other practitioners and judges, I find to be a negative consequence. It is a loss, whether as a seasoned lawyer or especially a young lawyer, to be unable, during an *ex parte* or motion calendar hearing, to observe the demeanor of the other counsel and the judge, and to learn as an apprentice would, some of the other substantive or procedural areas of the law. I think back at the number of rulings by the judge, or even the questions asked of others, and that gave me insight to the judge and other areas. This is lost.

Also, we all have to admit that when we arrive at a motion calendar and see the number of cases in front of us, we often resolve issues with opposing counsel in a face-to-face conversation that we do not make time for before the hearing or are not willing to address.

On the other hand, for basic matters, especially *ex parte,* the ability to resolve matters easily and efficiently for ourselves and our clients is amazing and helpful. Taking of less complicated depositions or less complicated hearings is also more efficient and helpful, of course with some drawbacks. The reopening of the courthouses will probably find a mix of online hearings and in-person hearings, and this hybrid option should be offered to counsel. The courts should also determine how they are going to open up their hearings, which are public, except for mental health and some other areas, for lay people who want to observe, or especially to lawyers who want to learn about

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a judge or a judge newly assigned to a file, by observing that judge in an open hearing.

Alex Douglas; Shuffield Lowman (Orlando):

I am impressed how much grace judges and other lawyers are showing to one another. I think this is a unifying time for the Bar. Everyone is working together better because we are all in the same boat and frustrated. We all must work together to move on, and I think the Bar and the Bench are doing a fantastic job of making lemonade out of lemons. In the process, I think we are going to eventually improve our quality of life and the level of practice.

I do believe that new technology like Zoom, which we are using on a regular basis, is going to be a gamechanger to the practice of law in a good way: good for the judges, lawyers, and clients. That's a silver lining in the COVID-19 pandemic. It is showing the creativity that will help improve our practice.

Kimberly A. Bald; Harllee & Bald (Bradenton):

The last 3-4 months have been much less stressful…I have loved dressing down. I was used to a full calendar which made scheduling sometimes difficult or caused a delay. I have enjoyed a break from many court appearances and driving to and from depositions.

Grier Pressly; Pressly, Pressly, Randolph & Pressly (Palm Beach):

It is hard for me to find many positives in the practice. It has been more a matter of mitigating the negatives than finding the positives. We see generally increased difficulty moving litigations forward in this environment. We are postponing or avoiding taking meaningful depositions and having evidentiary hearings. Trying to take a deposition with hundreds of documents to share seems daunting and cumbersome.

Eric Virgil; The Virgil Law Firm (Coral Gables):

Some aspects of our practice are harder to do remotely than others. For example, I was a court-appointed *ad litem* for an alleged incapacitated person in a guardianship hearing. I felt it was my duty and obligation to meet with the AIP in person. That posed unique challenges. Examining committee members are struggling with those same issues. A restoration of capacity also poses unique challenges, particularly due to short time deadlines.

Hung Nguyen; The Nguyen Law Firm (Coral Gables):

I am enjoying this time; with all trials and evidentiary hearings pushed off, I feel like my practice is less frenetic than it has been over the past many years, and I like that. We can focus more on the cases and strategies to resolve them and focus less on putting out fires. That is not only enjoyable but likely will save a lot of money for clients. Clearly Zoom hearings and depositions are going to save clients a ton of money. For me, it is great to save all that time on driving back and forth to the office and to the courts.

My primary concern is when tech issues pop up and we frustrate the clients or, worse, the judges. I have been in a deposition that was delayed a half hour by tech issues, for example.

WORKING FROM HOME

Working from home was embraced by many but not by all. Many attorneys have said they are productive and happy working at home, while many others have either continued to work from the office or lamented a bit over lost productivity and other challenges of remote working.

Alex Douglas:

I no longer believe working from home is going to make your productivity less, and I had a bias against anyone who wanted to work from home - it was an excuse for not working the full day. I think a lot of people viewed that the same way. In reality, I find that by not commuting, you are starting to work earlier and working later, and the disruptions can still be there but no more than you have in the office. I am finding the office to have more disruptions because there are more people there.

We also never had our staff work remotely and even our staff (including legal assistants and paralegals) have shown great productivity working remotely which has been surprising. You need the technology/software that allows you to access all documents remotely.

Kimberly Bald:

I have continued to work from office…. found that because we work as teams, we are much more effective working together. During the first two weeks (working from home), we lost collaborative process.

Robert W. Goldman; Goldman Felcoski & Stone P.A. (Naples):

We have had staff in all three of our offices daily, but I have worked mostly from home. If I have something I need to do at the office, then I may go in over the weekend. I have found it fairly easy to stay productive, but I recognize it isn't great for everyone to work remotely. A challenge has been keeping in touch with everyone regularly. I think it is very important that we remember to reach out to one another and to our teams routinely. We've tried some late afternoon Zoom cocktail parties, and it has been a fun way to stay in touch.

Sarah Butters; Ausley McMullen (Tallahassee):

I love working remotely. I cannot envision ever going back to the office full time. Right now, I may go into my "real office" about 2 hours per week to get mail and files, and I think I could practice like this indefinitely if not permanently. However, I realize not everyone will find it as enjoyable as I do.

First, given where I live, I often work with clients remotely already. Second, I am lucky in that my husband also works at home and so we have very defined work time for both of

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us. Plus, we do not have children at home (which I am sure completely changes things). I think when working from home I am much more productive and less distracted than I am in my "real office."

The only negative I perceive is the lack of boundaries. There is no more 9-5 workday; there is no weekend time; and my cell phone is now public, and clients call and text me at all hours.

Eric Virgil:

I think there is still something to be said for the office practice. I miss the personal interactions with Stacy (Rubel) and the staff. I feel there is some diminution in the quality of the practice without such interaction. And while work can get done, I am not finding it as enjoyable. There is less comradery and less collegiality. To be honest, I miss that.

Grier Pressly:

We kept our office open throughout this pandemic for the attorneys. However, the staff has been working more-or-less remotely.

HEARINGS – Non-Evidentiary

The consensus is that remote/Zoom hearings for routine and non-evidentiary matters has not only been acceptable, but it has been a positive change many practitioners hope will continue.

Alex Douglas:

Zoom hearings are very effective. I have done tons of Zoom hearings, and I cannot overstate how impressed I am with that and how you can use PowerPoint with that.

I think Zoom demands an orderly presentation. When you are in court, you can easily interrupt your opponent. That is very difficult to do on Zoom because of the technology. Because of that, there is a little bit more order in terms of how the presentation goes. The court speaks, then the plaintiff and defendant, however it goes. You cannot have a lot of things going on because the technology won't allow multiple people to talk at the same time, and that doesn't happen a lot in the courtroom. I think that the focus on the subject matter is a little better on Zoom.

The other aspect is that clients can easily participate in a hearing and they may very well participate in a hearing that they might not normally go to. I think that Zoom hearings redefine our practice. Wherever you are, there is a physical impediment to take an hour to get to the courthouse from the office and an hour to get back. You spend three hours because you must be there in person. I think Zoom also makes it easier for clients to participate and watch what's going on in their cases. Zoom hearings are thus important, not only for the lawyers, but also for the clients. These Zoom hearings create big savings in time and money for clients.

Amy Beller; Beller Smith (Boca Raton):

Non-evidentiary hearings via Zoom have been extraordinarily time efficient and effective. Now, 15-minute hearings really only take 15 minutes of billing time. That is a great benefit for clients. In the past, we might have incurred and billed hours of time for 15-minute hearings because of the time spent traveling to and from the courthouses, waiting for our matters to be heard, chasing around the clerk's offices and arranging for copies of Orders.

To me, even if contested, non-evidentiary hearings have been uniformly good.

Robert W. Goldman:

The genie is definitely out of the bottle and Zoom hearings are here to stay. I think that is a good thing. I do not believe in or like telephonic hearings, as I feel you lose all the elements of communication. For example, you cannot see if the witnesses are paying attention to the evidence or if the judge is distracted or upset. However, Zoom hearings seem to be a happy medium. Especially for routine motion practice and for lots of discovery issues, a 10-minute Zoom hearing is much more efficient and much less expensive for clients. Given that these video hearings are often a much more efficient way to do much of our practice, I think they are here to stay.

Sarah Butters:

We are doing tons of Zoom hearings and it is working very well. We are getting tons of hearings set quickly via Zoom. I find them to be phenomenally productive. It likely helps that judges have more time now as they are not taking up most of their weeks with bench trials. But we are seeing routine matters and routine hearings scheduled more quickly and efficiently than ever. Further, where I used to find telephonic appearance at hearings was "clunky" or awkward at best, I don't find Zoom hearings like that at all.

Grier Pressly:

Even I can admit that motion calendar hearings and non-evidentiary hearings seem to be okay when held via Zoom.

Eric Virgil:

Zoom hearings in place of in-person hearings for routine

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probate and guardianship matters are fantastic. In the past, it could take 1-2 hours for relatively simple uncontested motions, and now they are being concluded in a 5-minute Zoom hearing. Plus, we are obtaining *ex parte* and routine orders more quickly now. This has been a huge benefit for our practices and our clients and will hopefully continue.

Richard Milstein:

A non-complicated hearing is fine if it is short. It does save time and energy and cost for the client. However, to be honest, I do not like watching myself on Zoom. I do not like staring at myself and only seeing the heads of the judge and the other counsel. There is body language that is now not observed either by counsel or the judge.

The length of a hearing matters as well. Short, an hour or less, is okay, but we, Dale and I, have had half- and full-day hearings, and they are totally draining. Also, we are not able to pass notes to each other during the argument in the same manner and these notes are usually very helpful.

HEARINGS – EVIDENTIARY

For many we interviewed, remote evidentiary hearings seem to pose greater challenges. Many practitioners noted they either had not had any or were not excited to have any via Zoom.

Amy Beller:

As much as I have enjoyed non-evidentiary hearings via Zoom, I do not look forward to dealing with introducing evidence that way. Screen sharing does work but has some drawbacks.

Eric Virgil:

We generally have not had many evidentiary hearings except where evidence has been stipulated and admitted. I participated in a matter where the examining committee reports were stipulated and admitted, so there was no evidentiary dispute.

I find I have to be more organized now. Courts want exhibits as much as one week prior to hearings. That's a lot of lead time. So, there is less last-minute stuff and a greater demand on being prepared in advance.

Richard Milstein:

We have had some (evidentiary proceedings), but there is an awkwardness to these hearings with the inability to be present with your client or interact with a witness and support their anxiety. Plus, you cannot answer a question during the hearing or during a break. The communication is not as personal and is awkward.

I also like to see body language of all participants during a hearing and that aspect is lost. Again, I do not like the focus on my face by the court and the participants, since I do "make faces" at times as to arguments or testimony, now I have to have a poker face all of the time.

In incapacity or guardianship matters, as counsel in any respect, you want to support the client or the witness, but that is just not possible. In representing an alleged incapacitated person, you are not able to give emotional support and comfort which is so critical. Not only that, many of the AIP's do not have the technology or are fearful of the technology and automatically respond in a non-positive manner.

Kimberly Bald:

I had a recent injunction hearing that was scheduled for a full-day hearing via Zoom. The judge wanted everything pre-marked by Friday at noon and delivered to him, all of the witnesses, and to opposing counsel. It required early preparation, in addition to showing some of our strategy early to opposing counsel. I had several witnesses testify via Zoom (who might not have otherwise been able to testify if live appearances were required).

Robert Goldman:

I have not had a Zoom trial yet, but I'm not sure I'm looking forward to it. Remote trials and evidentiary hearings present lots of added issues. Preparing and showing documents has challenges. Sometimes you have documents for cross-examination which you don't want to present in advance. You would seemingly lose a lot if you couldn't present a smoking gun document in the manner you might for an important witness in a case.

DEPOSITIONS

Of course, video depositions are not new. Many depositions pre-pandemic were taken remotely for convenience or economic purposes. However, practitioners shared some interesting comments on the costs and benefits of remote/Zoom depositions.

Stephanie Cook; Shuffield Lowman (Orlando):

One challenge of Zoom depositions relates to witness review of exhibits. For example, I deposed a professional guardian for three days via Zoom. I can tell you that it seemed to take longer, and it got better when I did it a couple of times. This exhibit was one long PDF file, and I had presentations that we used, like tabs for each document. But the court reporter wanted me to tell her the beginning and ending page of the document of the PDF file, for the record. So, I wrote down the page numbers and that kind of helped too. I got more efficient as I went along.

For future depositions, I am thinking about trying the Zoom screen sharing (instead of providing the physical documents to the witness in advance of the depositions). I know another attorney who tried it and he liked it.

We also worry about ethical issues in Zoom depositions. During a deposition, the witness' attorney (who was sitting in a separate room from the witness), forgot to mute his

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microphone. I could hear this attorney texting his client not to answer my questions. He forgot that it was beeping on her end. The court reporter finally informed the attorney that he was not muted.

Coaching could really be a big issue with either texting or in the same room. You are not physically there – you can only see with the camera. And these ethical concerns may be heightened in guardianship proceedings.

Another problem we have experienced was a lack of direct eye contact or a clear view of the witness. One witness set up her camera in such a manner that I could not see her face. I told her I needed to see her face and her reactions. Even with the camera properly set up, it is more difficult to see the body language or facial expressions.

Alex Douglas:

I have not done depositions or mediations via Zoom. My feeling is that important depositions need to be taken in person, and I would be reluctant to try it virtually.

Of course, it is now September and we are finding out if this is truly going to be the new normal. If so, I am sure we will change and start taking key depositions by Zoom. I may find my bias is wrong, and we can just as well take a Zoom deposition as an in-person deposition.

We have several upcoming depositions set for with the hope of doing them in person, but if we are still the hot spot of the nation, the depositions will be by Zoom. I think the clients will all understand at that point.

Kimberly Bald:

The Zoom depositions I have taken required significant organization and thought so as not to lose the surprise elements. For the exhibits, an email would be sent to opposing counsel with a link to download the exhibits. Each exhibit would be password protected. During the deposition, the password would be provided when the exhibit was ready to be used. We do not release the document until right before the question is asked.

Hung Nguyen:

It is hard to cross-examine witnesses and manage documents in Zoom depositions. Additionally, you do not know who else might be there with the deponent. You may have to ask the deponent who is in the room and what materials the deponent may have available. You may need to inquire what she is looking at. Again, you may have to be a bit more aggressive about that in Zoom depositions.

Amy Beller:

I find that depositions that are not document intensive are fine via Zoom. However, if it is a key party with lots of documents, I am reluctant to use Zoom.

Sarah Butters:

Depositions via Zoom work pretty well for me. I think they require more advanced preparation though. We need to put together binders of documents well ahead and share with the other side far earlier/sooner than previously.

Richard Milstein:

Overall, I do not like them. My technology skills are not great, and I have issues with the exhibits to be presented. We are going to have a Zoom training on this aspect. What I do not like is the sharing of exhibits in advance. I may have some exhibits that I may not use that are forwarded to the court reporter or the participants. I would prefer that no one see them until the deposition so that there are no pre-planned responses. However, if you do not share the exhibits in advance, there are difficulties in the review and use of them.

Eric Virgil:

For non-critical matters or witnesses, Zoom can work well. Sometimes you don't want to pay to travel, so for cost-savings reasons, remote depositions are good. However, for critical and important witnesses, I still prefer to do the depositions in person. I like the ability to control the process more.

Daniel McDermott; Adrian Philip Thomas (Fort Lauderdale):

While video conferencing can be an amazing tool, it has also taught us all about the importance of wearing pants with our blazers and sportscoats when practicing law via Zoom (or at least taught us the importance of not standing up while the camera is on). In a recent Zoom deposition, one of approximately half-a-dozen litigators on the other side of the case, and one who had turned off his camera, forgot to turn off his microphone. Consequently, rather than muting a particular conversation with an undisclosed "acquaintance" so that his sexually-charged conversation could proceed privately, all of the other dozen or so lawyers/parties on the Zoom call could hear this individual discussing how he could not wait to see this certain acquaintance… well… in a "state of undress," euphemistically speaking, later on that evening.

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To make matters worse, this non-RPPTL litigator (don't waste your time playing *Guess-that-RPPTL*) had apparently silenced the speakers on his computer, which rendered him oblivious to the warnings, then to the pleas, from his co-counsel and opposing counsel who were begging him to mute what was quickly turning into TV-MA programming right before his colleagues' very eyes.

The lesson in all of this? In addition to wearing pants to Zoom hearings, mediations, and depositions, also do a dry run beforehand to make sure you understand your technology. And do us all a favor, drop the mic and mute yourself before discussing your *adult plans* for the evening.

MEDIATIONS

We asked a variety of trusts and estates litigators to opine on remote mediations via Zoom, as a lawyer for a client and as a mediator.

Rich Caskey; J. Richard Caskey, P.A. (Tampa):

In my experience, toward mid-March, the initial reaction was to cancel all mediations. There was an initial reluctance to get into the remote mediation because people realized that this was not going to end quickly. After the first month, I have seen more attorneys' acceptance of and even embracing Zoom mediations. The speed with which virtual mediations was embraced was impressive.

There was a big initial concern about privacy and security issues. Zoom is an example. Some of the software – unless you changed some of the advanced settings – was automatically storing the mediation on the cloud. As a mediator, I had to come up to speed on software issues. My comments would be to discuss with the mediator what the security measures are, and to confirm which recordings are disabled and which links are password protected. For someone to get ahold of a link is dangerous. I would also comment that a lot of the software companies have adjusted to all the security concerns.

The other thing pretty neat about Zoom mediations is the ability to have as many combinations of meeting spaces as you want. It is similar to having an infinite number of conference rooms where no one else can listen.

Zoom mediations seem to have some drawbacks, though. As humans it is natural to look at someone when speaking in order to see their reaction. That is inherent. When you are looking at someone through a video camera, you cannot look them in the eye directly, and as the mediator you want them to feel like you are listening to them and engaged with them and the only way is for them to see your face. You are looking at the camera. Part of mediating involves a give and take. You learn how to prepare yourself better by looking at the camera. It is much more difficult as a mediator. You want to observe the person and react to them and also have enough empathy

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and understanding that they relate to you. It's harder to do by video. You can't do both at the same time. That is a very touchy aspect, at least for me, learning how to do this better.

Also, it is easier for people to walk away during a Zoom mediation. At home, dogs walk by, kids come and go, and you may go to your refrigerator. I noticed that I had a lot more continuances. They don't want to impasse the mediation, it's 6 o'clock – dinnertime – let's do this another day. If you are at the office, you can stick it out for another hour. I try to have a walk-through with everyone beforehand. I offer to show all the attorneys and parties, whoever wants to participate, how to use the software, log in, and how it works. Comfort level with software, talking to lawyers ahead, and talking to your client about staying in this for the long run are important. We are in this to get a job done. For the most part, in the mediations I have participated in, the lawyers are not physically in the room with the clients, either. So, there is an element lost there. The buy-in comes through expert preparation of doing the walkthrough, getting the lawyers to talk to the clients, and learning how to connect better using the video.

Zoom mediations do work, however. I have done about 12-15 Zoom mediations and settled about half of them. This percentage is lower than my "live" mediations. Historically, I generally settle about 90 percent of my "live" mediations. In Zoom mediations, I have seen more requests to continue or finish at another time.

However, I have gotten better at conducting Zoom mediations. The last four or five have all settled. Also, attorneys are now a little more experienced with it, which helps the process.

Alex Douglas:

I have not done any Zoom mediations to date. However, we have a couple of upcoming mediations set to take place in person, but it is already agreed that they will be virtual if we cannot meet in person, or if any person feels more comfortable doing it virtually. It's kind of the backup; we hope we can do it in-person, but the reality is that they have to be virtual. Like it or not we are going to get it done, and I think there will be more virtual mediations and depositions by the end of the year.

Kimberly Bald:

I have had no problem doing mediations via Zoom. I have *not* found that the parties are less invested…provided that the parties are interested in resolving the case.

I recently served as mediator with three separate rooms. I found that Zoom allows the mediator to easily "pop" into room and advise why they are not in room. It would have been nice to set up an extra room to move attorneys at the end. I noticed however that I was asked to leave the room much more often to allow the parties to confer than when I am mediating in person.

Robert W. Goldman:

I have had one mediation as a lawyer for a client and one mediation as a mediator. I felt both went well. Prior to serving as the mediator, I was concerned a bit about managing the technology. However, I was able to do some self-training ahead, including watching YouTube videos on how to set up separate rooms and add and move participants from room to room. I even learned how to create a doorbell that rings, so the participants knew when I (as mediator) entered the room. My kids live in New York and Boston, so I practiced on them.

A unique challenge with all mediations, but one heightened by Zoom mediations, is keeping all the parties and counsel engaged as we try to get a document prepared and signed. We never want to let a mediation end without a written agreement. However, it is very difficult (in person or on Zoom) to keep clients and counsel working at 11 or 12 at night on highly complex yet very important provisions of their settlement agreements. Indeed, it could be malpractice in some cases to force our clients to stay up late and work on these complex agreements.

As a result, sometimes we will memorialize the settlement in a binding term sheet, and I think that can work very well. I was involved in one case, in fact, where we had an extremely complex and long mediation (over 30 days) which was memorialized in a one to two page term sheet. Subsequently one of the parties tried to argue it was not binding, but after a weeklong trial on that issue, the court ruled it was a valid and binding agreement. So, proper use of binding term sheets may be more important than ever when working on remote mediations.

Amy Beller:

Zoom mediations are great but have their issues. For example, it seems easy for clients to get distracted and not to be invested in the process. It is easier to quit when you are not in person. I think the success of a Zoom mediation falls more squarely on the shoulders of the attorneys; if the attorneys are not pushing their clients, there is not much a mediator can do. The advocates need to engage more in order to have an equal chance of settling compared to an in-person mediation where the mediator can directly engage with the parties.

Grier Pressly:

We have generally avoided Zoom mediations. The larger and more complex the cases, the harder we feel they are to settle and less likely they are to settle via Zoom.

BUSINESS DEVELOPMENT

The good news is most trusts and estates litigators we spoke with remain busy, and it appears drafting attorneys may be busier than ever. Of course, there are some positives and some challenges in generating new business remotely.

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Alex Douglas:

Well, I think that it certainly helped those who have already established referral sources, prior to this time of pandemic, because no one is going to lunch or doing socials. For me, I have not had a big interruption in business. If I were a young lawyer, I could not do the networking that is normally done. I saw an uptick of people finding me on the internet. I think people are using technology more and more to find recommendations for attorneys rather than getting referrals from friends and colleagues.

I have tried to pick up the phone and talk to people, and people are longing for personal interaction. We are too dependent on emails. I think calling people is good advice for everyone - picking up the phone and asking, "How are you doing?" has a tremendous impact because we are not seeing one another and talking in person. It does affect the psyche. Having in-person conversations is very helpful.

Amy Beller:

For existing clients, we are having many Zoom conferences where we might have had phone calls with clients in the past. That may be strengthening bonds with existing clients.

As far as new business, we have been steady and busy, but we worry. While we do not feel new business has slowed, we could see how it may if this continues indefinitely. There are no networking events, no lunches, no bar meetings, and none of the traditional interactions that lead to business generation. I suggest we all need to make an extra effort to catch up with our clients and our referral sources remotely – set up phone or Zoom conferences to stay in touch.

Eric Virgil:

During the outset of the pandemic, I started sending all my bills electronically, and I think that will remain the practice. I also started sharing my ACH and wire information with the bills, and clients responded to that. Again, I think that practice will continue in the future. I had those capabilities previously, of course, but I did not think about it or offer it reflexively. But it seems like a positive to get paid by ACH or wire nearly immediately after sending out bills.

Robert W. Goldman:

If anything, business seems to be coming in as usual and maybe more so. For example, our volume of estate planning matters has certainly increased during the pandemic. There is a steady stream of existing clients wishing to revise their estate plans or add to their plans and new clients referred to implement estate planning during the past several months.

TECHNOLOGY

We are all learning lessons on working remotely, computer technology, video conferencing and much more with respect to remote practice.

William T. Hennessey; Gunster (West Palm Beach):

I have had the opportunity to attend multiple lengthy and complex Zoom hearings. One of the things that strikes me is that we absolutely need to remain current on the technology. It does not matter how great a warrior we are in the courtroom: The Zoom platform is a new battlefield. It brings to mind the iconic scene in the Last Samurai where the samurai are charging through enemy lines only to be mowed down by a new weapon -- the gatling gun. I have participated in several hearings where the lawyers were unprepared for the technology and got lapped by their opponents. It is imperative that during this time, we familiarize ourselves with the technology available and embrace it.

Alex Douglas:

My firm is getting all attorneys laptops that have a camera. We bought a Zoom license, and we are making the attorneys more aware of how they look from the angle of the camera and most importantly what's behind them. If you are doing a hearing in front of the judge, it is probably best not to have a bed behind you. It would be better to have a blank wall or something which would certainly look more formal than a bedroom or your back porch. And regarding the judges, we have had some conferences with judges in Orange County, one with Judge Hudson, and they were saying it's really important that you treat a Zoom hearing just like one in person. So, certainly, we reminded all of our attorneys (not that we have to) that you wear a coat and tie when you are at a Zoom hearing and have a background that is not distracting and looks professional. It is the same if you are doing a Zoom background with a client, you want to carry on with your professional image even though we are in this remote coronavirus situation. With that said, judges and clients – you will occasionally have a dog

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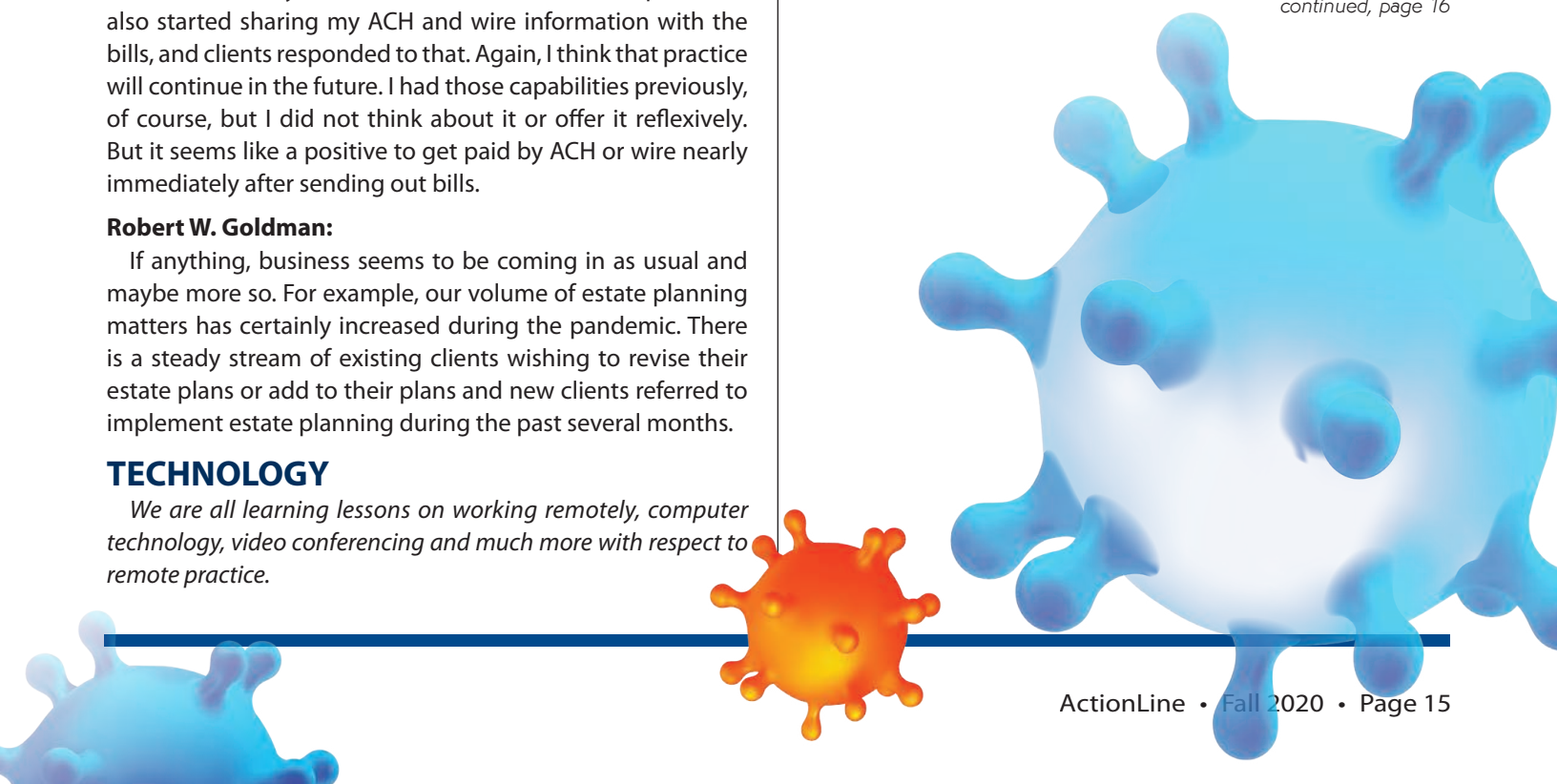

bark and kids down the hall, you will have those interruptions, and they are certainly expected as we are all trying to work remotely with family members in the house.

Sarah Butters:

Anecdotally, I have heard some small firms in particular share concerns that they do not have the technology in place to effectively work remotely, and in many cases they don't have the technology support available to make that work. Perhaps more study on the technology of working remotely and more resources for tech support for smaller firm attorneys would help.

Grier Pressly:

Our office was forced to modernize our technology a bit. For example, we needed to have remote dictation sharing, which we never needed before. In some cases, we had to buy equipment for some employees, but it seems to have paid for itself. We are also setting up a new Zoom room (a "poly studio") in our conference room to have high tech video conferencing capabilities and a large screen TV/monitor. We think it will be better for future Zoom hearings and depositions than everyone trying to take them on their iPads or laptops. Further, we consulted with our IT folks, and we are making better use of our document management software (med-docs) which has been very helpful.

Richard Milstein:

When used effectively, technology is marvelous. When I was chair of the Elder Law Section and was a lot younger, and the courts were starting to request, no require, that attorneys use computers for certain purposes, the older attorneys rebelled and complained about the costs, but mostly they were fearful of learning new and unconventional means of practicing. With technology, we are all going to have to continue to learn the latest programs and upgrades. So, we need to work this into our CLE, and the required hours is not sufficient for the three-year reporting period. We need to set aside more time for the learning process and the practicing process.

POST-PANDEMIC THOUGHTS

We concluded by asking for thoughts on what the practice will be like in the future.

Alex Douglas:

In order to effectively implement video hearings for non-evidentiary hearings, it will be critical for the judges to require that all counsel and parties attend via video conferencing. Most agree that counsel who appear in person has an advantage over those who appear electronically. Making video conferencing mandatory will put all counsel on equal footing.

Kim Bald:

Zoom is going to be here forever; judges in our circuit have indicated how much they like it. My preference will still be largely in-person depositions and in-person court appearances.

Grier Pressly:

I could see setting Zoom hearings where all counsel consent as a useful tool that may continue. It would save lots of money for the clients and would be convenient. It would also be efficient as we have all been to court for a 10-minute hearing but had to sit through 45 minutes of other matters before we get called. With Zoom, you can be working while you wait. Plus, some of us practice in very large counties, like in Palm Beach County where you could have hearings at the far southern and northern tips of the county as well as the central, downtown courthouse. So not driving for uncontested or consented matters could be very efficient for the lawyers and their clients.

Richard Milstein:

There are challenges to remote practice. There are technical problems at times as well. For example, we had to continue a deposition for loss of access to the web. We had delays during a deposition for computer failure, etc. However, the ability to take a deposition via Zoom of an out-of-state (or even out-of-city) witness without the travel is more efficient and cost effective. We need flexibility in all these respects. We know that all these aspects of the practice are going to change when we return to our physical offices, if we want to do so. For example, depositions and hearings will be held from our offices and not our remote offices, so we need to adapt.

Necessity is the mother of invention. We are now seeing inventive ways of practicing outside the courtroom and from the courtroom that would never have been acceptable previously. We need to accept that which is helpful and discard that which is not. What we all need to recognize is the need for flexibility to the circumstances and understand unintended consequences to the actions we take through technology or otherwise. What we learned most is that we can survive this way, and that we can stay healthy if we wear our masks and socially distance.

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Clearing Up The Confusion! Notices Of Commencement Demystified.

By Ashley McRae, Esq., Old Republic National Title Insurance Company, Lee Weintraub., Esq., and Edward Lohrer, Esq., Becker & Poliakoff, Ft. Lauderdale, Florida

> "The Mechanics' Lien Law has long been recognized as an outstanding example of inept legislative endeavor, perplexing alike the bench and bar, contractors, owners, materialmen and workmen." "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."

Judges are not the only people who felt the need to express frustration at understanding the Construction Lien Law (formerly referred to as the Mechanics' Lien Law). Chapter 713 of the Florida Statutes seeks to balance the rights and interests of owners, contractors, subcontractors, and lenders, whose interests are often disparate and contradictory. Lienors want to ensure payment for their work if the contractor does not pay them and owners do not want to have to pay a second time, which happens if they have to pay a lienor something for which the owner already paid the contractor (who, in turn, did not pay the lienor). This has resulted in a complex scheme of notices and procedures designed to normalize payment procedures on construction projects; but for those who do not regularly practice in this area, the concepts are sometimes difficult to understand and reconcile. This article is designed for the real estate practitioner who does not regularly practice construction law, but who must deal with notices of commencement in his or her practice.

History of Mechanics' Lien Law in Florida

Florida's mechanics' lien law, now referred to as the Construction Lien Law, sets forth rights that did not exist at common law and is therefore purely statutory in nature. Since construction liens are purely creatures of statute, Chapter 713 must be strictly construed. While Florida first enacted construction lien laws in 1887, the laws have constantly changed. The Florida Construction Lien Law has strived to balance two main goals: making sure subcontractors and suppliers who have extended credit by furnishing labor and materials in advance of payment obtain full payment, and protecting owners from double payment when they pay their contractor, rather than the subcontractors and suppliers. Mistakes, even minor ones, relative to the Construction Lien Law can be fatal to lienors, owners, lenders and title insurers. For this reason practitioners, lienors and title underwriters must strictly comply with the statutes.

From a title standpoint, the first place to delve into the statutes, and the focus of this article, is Fla. Stat. § 713.13 (2019), governing notices of commencement.

Notices of Commencement

A notice of commencement ("NOC") is a statutory form document recorded in the public records of the county where the construction project is located, signifying the commencement of construction and, with it, the prospect of liens. They are required in Florida on all projects over $2,500. A recorded NOC is a condition to the building department conducting the first or any subsequent inspection of the work on the project.

The NOC identifies the people involved with the project, such as the general contractor, the project owner, the fee simple owner, the construction lender and the surety. It also identifies the project itself, requiring a description of the work to be performed, the location of the work, and a legal description of the property, along with the street address and tax folio number if available.

The NOC must be signed by the project owner, and lienors have the right to rely upon the accuracy of the information contained in it when serving documents required to perfect construction liens. The recording of a NOC does not constitute a lien, cloud, or encumbrance on the property, but gives constructive notice that claims of lien may be recorded and may take priority as provided in Fla. Stat. § 713.07 (2019). This is an important protection for lienors working on the project because it controls the priority of lien rights. If the NOC is properly recorded and has not expired by the time a lienor

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records a claim of lien, the lien will relate back to the date on which the NOC was recorded for priority purposes. If there is no NOC, or if the NOC is expired by the date on which the lien is recorded, the lien will be deemed effective on the date it is recorded. As long as the lienors use the information in the NOC when sending any notices required by Florida's Construction Lien Law, their rights will be protected even if the information contained in the NOC is wrong. In other words, the fact that a notice required pursuant to Fla. Stat. Chapter 713 was sent to the wrong place or contained erroneous information will not give the project owner a defense to a lien, as long as the lienor used the information contained in the NOC. That is because the owner's signature on the NOC acts as an estoppel regarding the accuracy of the information contained therein.

Though the owner is required to sign the NOC and is responsible for ensuring it is properly recorded, it is common for the owner to delegate the responsibility for preparing and recording the NOC to the general contractor. Regardless of who prepares or records it, the owner is still responsible for its content and cannot avoid the negative consequences associated with a missing or incorrect NOC. The one exception to this is when there is a construction lender involved in the project, in which case the lender is responsible for recording the NOC and is liable to the owner for any damages incurred if it fails to do so. Nevertheless, the owner remains responsible for posting a certified copy of the NOC at the construction site.

Aside from failing to completely or accurately fill out all applicable sections of the NOC, a common mistake made when preparing the NOC is the owner's failure to consider the length of the project. Unless a different date is expressly specified in the NOC, the Notice will automatically expire one year from the date of recording. This can be especially problematic on large or phased projects that frequently take multiple years to complete. If the NOC expires, all payments made by the owner after the expiration are considered improper payments, which will be discussed in more detail below. Another common mistake relates to the timing of recording the NOC. If the improvement described in the NOC is not actually commenced within 90 days after the recording, the NOC is void and of no further effect. As such, it is important to carefully consider how long the project will take, list a specific expiration date in the NOC and commence construction within 90 days of recording the NOC.

Mistakes in the preparation or recording of the NOC can have disastrous consequences for the unwary owner, the most serious of which are improper payments. Proper payments, governed by Fla. Stat. § 713.06(3) (2019), are an owner's defense to lien claims, essentially equating to protection against liens only to the extent the owner made proper payments in accordance with the statute throughout the construction project. An owner cannot be compelled to pay a properly paid amount a second time later in the job in the event of an unpaid lienor. On the other hand, an owner will not get credit against future liens for improper payments the owner previously made on the project. Payments made by an owner to its contractor after the NOC has expired are all improper payments for which the owner will not receive credit against subsequent liens. Other requirements of proper payments include obtaining proper lien waivers and releases from all lienors who had served a statutorily required notice on the owner every time a payment was made to the contractor, as the owner has an obligation to ensure payment to each lienor who served such a notice as of the date of each payment. Since all payments made after an NOC has expired are, by definition, improper, this can have devastating financial consequences for the owner who may have to pay a second time to subsequent lienors.

Amending Notices of Commencement

A NOC may be amended during its duration so long as the amendment complies with Fla. Stat. § 713.13(5) (2019). Per the statute, a NOC can only be amended to:

1. extend its effective period;

2. change erroneous information in the original notice; or

3. add information that was inadvertently omitted from the original NOC.

Oftentimes parties believe they can amend the NOC to remove property from the legal description to avoid having to terminate the NOC or to address the NOC in a sale of a portion of the land subject to the NOC. However, the property removed from the notice would still be subject to a claim of lien because the lienors have not waived their right to a lien for their services relative to the property being removed. In the case of a change of the contractor, simply amending the NOC is not sufficient. To change contractors, the existing NOC must be terminated and a new NOC recorded.

The amended NOC must reference the book and page of the original NOC and must be served by the owner upon the contractor and on each lienor who serves a notice to owner before or within 30 days after the date the amended NOC is recorded.

Terminating Notices of Commencement

Owners often forget to terminate the NOC when work is complete. This can create title issues if the owner wants to sell or refinance while the NOC is still effective, as any liens recorded would relate back to the date of recording of the NOC. Even if construction is complete, an open NOC poses a threat of liens to anybody relying upon property title as part of their transaction. It is always good practice to terminate the NOC once work is complete.

A NOC is terminated by recording a notice of termination of NOC in compliance with Fla. Stat. § 713.132 (2019) which requires the notice of termination to:

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- Contain the "same information as the NOC." Yes-this means even if the information is incorrect. If information is incorrect, it can be addressed by first amending the NOC. However, if the NOC is being terminated, there is a pretty good chance that correcting the erroneous information now would be of no import, suggesting that in most cases there would be nothing to gain by correcting the error upon termination. In most cases, the practitioner should just reflect the same information in the notice of termination, as any prejudice due to the error would likely have occurred during construction and not necessarily upon termination of the NOC.
- Reference the book and page or instrument number, and date of recording, of the NOC being terminated.
- Contain a statement of the date on which the NOC is effectively terminated, which cannot be earlier than 30 days after notice of the termination was recorded.
- Contain a statement specifying that the notice of termination applies to all real property subject to the NOC or specify the property to which it applies.
- Contain a statement that all lienors have been paid in full (which actually requires lienors to be paid in full – a task that is often impractical if the NOC is being terminated during construction, such as to accommodate new project financing).
- Contain a statement that the owner has, before recording the notice of termination, served a copy of the notice of termination on each lienor who has a direct contract with the owner or who has served a notice to owner. Note-the owner is not required to serve a copy on any lienor who has executed a final waiver and lien release upon final payment.
- Be signed by the owner under oath.

An owner may not terminate a NOC except after completion of construction or, if construction is ongoing, after construction ceases before completion and all lienors have been paid in full or pro rata in accordance with Fla. Stat. §713.06(4) (2019).

Most practitioners incorrectly believe a final contractor's affidavit in compliance with Fla. Stat. § 713.06(3)(d)(2019) is required to be attached to the notice of termination, based on the last line of Fla. Stat. § 713.132(2)(2019), which states that "the notice of termination must be accompanied by the contractor's affidavit." However, that is only a partial reading of the statute, causing some practitioners to take that statement out of context. Fla. Stat. § 713.132(2)(2019) begins with the proposition that an owner signing the notice of termination has the right to rely on a contractor's affidavit given under Fla. Stat. § 713.06(3)(d)(2019). It is only if the owner is relying on the affidavit to establish payment to lienors that the affidavit is required. At least one court has held that recording a contractor's affidavit with the notice of termination is an *alternative* to the owner "giving a sworn statement [on its own volition without reliance on the affidavit] in its notice of termination that 'all lienors have been paid in full. Nevertheless, where possible or practical, the better practice is to include a contractor's affidavit using the language from Fla. Stat. § 713.06(3)(d). Another good practice is to ask the contractor to include in its affidavit the date on which work was completed, which can serve to establish when lien rights expired under Fla. Stat. § 713.08(5).

Mistakes in preparing the notice of termination are common, often due to the use of old forms. Typical mistakes are failing to include in the notice of termination the same information contained in the NOC and failing to have the notice of termination signed by the owner under oath, instead using only an acknowledgement. Practitioners also fail to realize that the notice of termination is NOT effective until it has been of record for at least 30 days. It is not effective simply upon recording.

Failing to properly terminate a NOC may delay a closing on a sale or refinance or even permit subsequent construction liens to attach to the property as of the date of the NOC, causing title blemishes in the transaction.

Payment Bonds

A payment bond is a type of surety bond, typically paid for by the owner and purchased by the contractor, securing the contractor's payment obligation to all subcontractors, sub-subcontractors and suppliers working directly or indirectly for the contractor. A valid payment bond exempts the property from all construction liens other than the lien of the contractor who provided the bond. In lieu of lien rights, unpaid lienors may pursue recovery against the bond surety.

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Item	Deadline	Statutory Authority
Record Notice of Commencement	Record no more than 90 days before improvements begin	Fla. Stat. §713.13(2)
Notice to Owner	Serve before the owner's final payment to the contractor and no later than 45 days after first providing labor or materials.	Fla. Stat. §713.06(2)(a)
Expiration of a Notice of Commencement	One year unless stated otherwise in the notice or extended	Fla. Stat. §713.132
Lien	Record within 90 days from the lienor's last day of furnishing labor or materials	Fla. Stat. §713.08(5)
Serve Notice of Lien	A lienor must serve a copy of the lien upon the owner within 15 days of recording.	Fla. Stat. §713.08(4)(c)
Contractor's Final Payment Affidavit	Execute and deliver to the owner at least 5 days before filing a foreclosure action	Fla. Stat. §713.06(3)(d)(1)
Action to Foreclose a Lien	File within 1 year from recording the lien, unless the owner shortens the time by filing a notice of contest of lien, which shortens the deadline to 60 days, or an order to show cause, which shortens the deadline to 20 days	Fla. Stat. §713.22(1), §713.21(4) and §713.22(2)

Sureties sell different types of payment bonds, but to exempt the property from liens, the payment bond must comply with Fla. Stat. § 713.23 (2019). The payment bond must be attached to the NOC at the time it is recorded and the NOC must reflect the name and address of the surety and the penal sum of the bond. Thereafter, the rights of unpaid lienors other than the contractor are transferred to the bond in lieu of liens. If the bond is not recorded with the NOC, then lienors will have lien rights and can record liens against the property. If the payment bond existed before the lien was recorded, but simply was not recorded in the public records, the lien can be transferred to the bond by complying with Fla. Stat. § 713.23(2) (2019), pursuant to which the bond can be recorded in the public records as a transfer bond. The lien will encumber the property until it has been transferred to the bond in accordance with that statute. If this transfer procedure is used because the bond was not properly recorded with the NOC, the time frame in which the lienors must serve their statutorily required notices to perfect bond claims may begin to run on the date the lienor was served with a copy of the bond.

Key Dates

Although transcending the issue of notices of commencement, we have created the following chart of key dates to perfect construction liens of which the practitioner should be aware:

Recent Legislative Changes May Create Challenges for the Title and Construction Industries

Recent legislative changes may create unique challenges for the title and construction industries. Effective July 1, 2019, Florida expanded Fla. Stat. §119.071(4)(d) (2019) to prevent the public from accessing public records disclosing where certain protected parties live. Specifically, the statute expands the definition of "home address" to exempt from public view not only a physical address, but also the parcel identification number, legal description, neighborhood name and any other information that could be used to determine a protected person's address. Protected persons now include over 20 different categories, including, for example, active or former law enforcement personnel; current or former investigative personnel of the Department of Financial Services, DBPR and Office of Financial Regulation's Bureau of Financial Investigations; firefighters; current and former EMTs or paramedics; current and former judges and justices; current and former state attorneys, assistant state attorneys, public defenders, magistrates, and child support enforcement hearing officers; current and former human resource type employees; managers or assistant managers of water management districts or local government agencies; current and former code enforcement officers; current and former guardian ad

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litems; current and former probation officers; tax collectors…. The list goes on. These protections also extend to the spouses and children of protected persons.

To take advantage of the exemption from public records, the protected person only needs to submit a written request to the custodial agency. Notarization and proof of entitlement to the exemption are not required by the statute. If a third party, such as a title company, needs to access redacted information, the protected person needs to submit to the custodial agency a notarized request to release the redacted information to the third party. The exemptions will sunset on October 2, 2024 unless reenacted.

In 2020, two bills were filed seeking to expand the class of protected persons to extend the exemption to former county attorneys and assistant county attorneys, former judicial assistants, members of the legislature and cabinet as well as their spouses and children. Neither of the bills passed. However, we expect them to be reintroduced next year.

Isn't it a good thing to prevent the public from learning where our offcers and firefighters live? Generally yes, but it creates issues for the real estate industry. For example, if a protected person has requested the exemption and then applies for a mortgage, the title company will not be able to locate any documents of record on the protected person's property. Upon learning the protected person has obtained the exemption, the title company will need to obtain a notarized consent to access such information, delaying the process. Taking it a step further, what if a title company is asked to insure an appurtenant easement lying on the property of a protected person who has requested the exemption? How will the title company be able to determine if the easement is encumbered with a mortgage?

The exemptions set forth in Chapter 119 also raise questions about what will happen when protected persons want construction performed on their homes. Will those individuals list their property address and legal descriptions in the NOC as required by the Florida Construction Lien Law? If so, do they waive the protections of Chapter 119? If they do not, then how do lienors serve their notices to owner and perfect their lien rights? Will building departments conduct inspections when their required first inspection – the NOC inspection – reveals incomplete information about the property owner? Will building permit applications have the owner's information redacted to protect against disclosure? Time will tell how these issues will play out and the extent to which they may impede the perfection of construction liens in Florida.

At first blush, notices of commencement appear simple, but a review of the relevant statutes and case law reveals their complexity, together with the dangers awaiting the less-than-thorough practitioner. A better understanding of the intricacies of the law touching these documents is required – or traps await the unwary.

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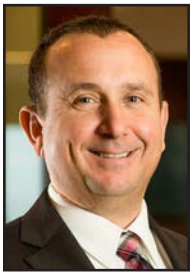

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Mr. Lohrer has served in the United States Army and continues to serve in the United States Army Reserves. He has been deployed to locations around the world, including a 12 month combat tour in Iraq from 2003-2004 as part of Operation Iraqi Freedom.

Endnotes

1 *Miller v. Duke,* 155 So. 2d 627,631 (Fla. 1st DCA 1963).

2 *American Fire & Cas. Co. v. Davis Water & Waste Industries, Inc.,* 358 So. 2d 225 (Fla. 4th DCA 1978).

3 *Palmer v. Edwards,* 51 So. 495 496 (Fla. 1951).

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4 *Stock Building Supply of Florida, Inc. v. Soares Da Costa Construction Services*, LLC, 76 So. 3d 313, 316 (3rd DCA 2011). See also Fla. Stat. § 713.37 (2019) ("This part shall not be subject to a rule of liberal construction in favor of any person to whom it applies.").

5 *See e.g. Mirror and Shower Door Products, Inc. v. Seabridge, Inc.,* 621 So. 2d 486 (Fla. 4th DCA 1993)(holding lienor failed to properly serve a notice to owner, a prerequisite for perfecting a construction lien, and therefore lost all lien rights); *Bridgeport, Inc. v. Tampa Roofing Co*., 903 So. 2d 306 (Fla. 2nd DCA 2005) (lienor was not entitled to payment under a payment bond where the lienor failed to comply with a statutory pre-suit notice requirement and one-year statute of limitations); *Bishop Signs, Inc. v. Magee*, 494 So. 2d 532 (Fla. 4th DCA 1986)(contractor was not excused from complying with the statute requiring service upon the owner of an affidavit prior to filing suit to foreclose).

6 Fla. Stat. § 713.02(5) (2019).

7 Fla. Stat. § 713.135(1)(d) (2019).

8 Fla. Stat. § 713.13(1)(d) (2019).

9 Fla. Stat. §§ 713.13(1)(g) and 713.06(2)(e) (2019).

10 Fla. Stat. § 713.13(3) (2019).

11 Fla. Stat. § 713.07(2) (2019).

12 Fla. Stat. § 713.18(3)(a) (2019).

13 Fla. Stat. § 713.13(7) (2019).

14 Fla. Stat. § 713.13(7) (2019).

15 Fla. Stat. § 713.13(1)(d) (2019).

16 Fla. Stat. § 713.13(1)(c) (2019).

17 Fla. Stat. § 713.13(2) (2019).

18 Fla. Stat. § 713.13(1)(c)(2019).

19 Fla. Stat. § 713.06(3)(c)(1)(2019).

20 Fla. Stat. § 713.13(5)(a) (2019).

21 Fla. Stat. § 713.13(5)(b) (2019).

22 Fla. Stat. § 713.07(2) (2019).

23 Fla. Stat. § 713.132(3) (2019).

24 *LaSalle Bank National Assn v. Blackton, Inc.* 59 So. 3d 329 (Fla. 5th DCA 2011).

25 Fla. Stat. § 713.132(1)(c) (2019).

26 Fla. Stat. § 713.02(6) (2019).

27 Fla. Stat. § 713.23(1)(a) & 713.13(1)(a)5 (2019).

28 Fla. Stat. § 713.23(1)(c) (2019).

29 The term "custodial agency" is not defined in the statutes, but appears to refer to the agency which maintains those particular records.

30 Fla. Stat. § 119.071(4)(a)(3) (2019).

31 Fla. Stats 119.071(4)(a)(4) (2019).

32 Fla. Stat. § 119.071(4)(a)(6) (2019).

33 H.B. 479 (2020) and S.B. 248 (2020).

Exemptions And Waivers: Kearney Construction – A Whole New Ball Game

By Jonathan E. Gopman, Esq., Anna E. Els, Esq., Akerman LLP, Naples, Florida and Michael A. Sneeringer, Esq., Porter Wright Morris & Arthur, LLP, Naples, Florida

Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America is a befuddling opinion that appears to contradict longstanding precedent under Florida law, legislative intent and public policy underlying the state's expansive and generous exemptions which favor the protection and preservation of certain assets from attachment or seizure by creditors. While a disturbing opinion, the holding is nevertheless an anomaly deserving of a fair amount of skepticism and suspicion by practitioners.

In *Kearney*, the debtor ("Debtor") obtained a line of credit ("LOC") from Moose Investments ("Moose") and pledged collateral as security for the LOC pursuant to a security agreement executed on March 1, 2012 (the "Agreement"). The Agreement provided in relevant part:

> As security for any and all Indebtedness (as defined below), the Pledgor hereby irrevocably and unconditionally grants a security interest in the collateral described in the following properties[:] all assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all goods (including inventory, equipment and any accessories thereto), instruments (including promissory notes)[,] documents, accounts, chattel paper, deposit accounts, letters of credit, rights, securities and all other investment property, supporting obligation[s], any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and general intangibles.[2]

The property subject to the collateral under the Agreement was at issue of the case. The Eleventh Circuit considered whether the Debtor's pledge included the assets held in his Individual Retirement Account ("IRA") sufficient to constitute a genuine issue of material fact for purposes of summary judgment.[3]

Observing that the Agreement appeared to constitute an "unambiguous pledge" of *all assets* and rights of the Debtor, the court considered the Debtor's intent to include the IRA on his affidavit in connection with the Agreement.[4] The Debtor argued that the IRA should not have been included based on affidavits previously submitted by both the Debtor and the manager of Moose, respectively. Relying upon the trial court's findings of inconsistencies, contradictions and "self-serving" tendencies regarding the affidavits, the court rejected this argument along with the Debtor's assertion that the IRA had not been perfected as a security interest because it had never been delivered to Moose.[5] Only with an oblique reference to Florida's statutory protection for IRAs, the court held that the trial court had correctly included the IRA as part of the Debtor's security.

Florida law affords generous protections to cash and other property payable to an owner, a participant, or a beneficiary from, and any interest of any such individual in a retirement or profit-sharing plan qualified under §§ 401(a), 403(a), 403(b), 408 (that is, an IRA), 408A (that is, a Roth IRA), or 409 of the Internal Revenue Code (the "Code") by exempting such assets from the claims of creditors of the beneficiary or participant.[6] The exemption applies if the retirement account qualifies as a qualified plan or IRA under the Code. The exemption also applies to governmental and church plans that qualify for tax-exempt status under §§ 414, 457, and 501(a) of the Code.[7] This exemption is in addition to any other exemption from process provided by state or federal law, such as ERISA, which notably does not apply to assets held in an IRA.[8] Beyond a potential fraudulent conversion or fraudulent transfer claim, intent appears to have little relevancy to the application of this exemption.

Exemptions such as the foregoing have historically been liberally construed in favor of protecting the subject interest holder.[9] For example, Florida's homestead protection, a paramount exemption which is engrained in both the state's constitution and statutes, has been consistently interpreted generously by courts in favor of protecting the family home.[10]

This liberal construction standard extends to other Florida exemptions analyzed by courts. To illustrate, in *Chase Bank USA, N.A. v. Alfie*,[11] the defendant ("D") testified that she lived with her elderly parents and provided more than one-half (1/2) of their

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economic support. Thus, D argued she was eligible to claim the head of family exemption under the Florida wage exemption pursuant to former Fla. Stat. § 222.12 (2012).[12] D claimed her parents were "other dependents" under Fla. Stat. § 222.11 (2014). The Court relied on the interpretation of the term "head of family" test[13] where the debtor may show either of the: (1) existence of a legal duty to support arising out of the family relationship at law known as a "family in law"; or (2) continuing communal living by at least two (2) individuals under such circumstances that one is recognized as in charge, known as "family in fact." The court held that D did not qualify under the "*family in law test*" since she had no legal obligation to support her mother and father. Nonetheless, the court found that D did satisfy the "*family in fact test*" as she is the person "in charge" and possessed "a moral obligation to provide support for her elderly, unemployed parents whose sole source of income is a combined $600 per month from social security."[14] Finally, the court also recognized that exemption statutes should be construed liberally in favor of a debtor.[15] Thus, the court held that the term "other dependent"[16] should apply to D's elderly and unemployed parents.

Public policy motivations constitute an important factor for courts weighing the rights of creditors against the potential burden a debtor may place upon the taxpayer. It is also significant that the definition of "asset" contained within Florida's version of the Uniform Fraudulent Transfer Act ("FUFTA") omits from its scope any asset which is generally exempt under nonbankruptcy law.[17] As previously noted, beyond the application of the FUFTA, the intent of the parties in litigation appears to be irrelevant to the application of the exemption, particularly where the application of a waiver is concerned.

Interpreting Florida's statutory protections for wages earned by heads of family, the court in *Killian v. Lawson*[18] emphasized the public policy ramifications of such protections in that they "should be liberally construed in favor of a debtor so that he and his family will not become public charges."[19] Notwithstanding the substantial latitude granted to "honest debtors,"[20] courts are also careful to ensure that such protections do not encourage or enable fraud upon creditors.[21]

Despite substantial precedent which reliably applies Florida's exemption protections in favor of debtors, the *Kearney* court disregarded this authority. Instead, the court construed the statutory IRA exemption narrowly and rigidly against the Debtor. Such an interpretation contradicts the enduring legislative objective in Florida of ensuring that debtors avoid becoming public charges of the state.

Further, the holding in *Kearney* that the Debtor waived the protections of Florida's exemption for IRAs pursuant to the Agreement demonstrates a tremendous disservice to Florida precedent concerning exemption waivers. The language from the Agreement cited in *Kearney* and reproduced above exemplifies the type of "boilerplate" language from which courts have historically attempted to shield the layman debtor.[22] Instead, an effective waiver must be "knowing, voluntary, and intelligent."[23] A "knowing, voluntary, and intelligent" waiver did not seem a reasonable possibility under the record in *Kearney*.

Merely having entered into the Agreement would not appear to satisfy the foregoing stringent standard. Instead, the Debtor would have had to demonstrate a thorough understanding of the rights being surrendered. That does not seem a standard that can be proven under the facts in *Kearney*. This procedural hurdle implemented by courts is intended to discourage routine waivers of important rights provided to Florida residents where public policy concerns are pervasive.

Moreover, it is important to recognize that federal law forbids the use of any portion of an IRA as security for a loan.[24] If such a pledge occurs, the portion (or whole) of the IRA will cease to be treated as an IRA and will instead be deemed a taxable distribution.[25] The court in *Kearney* overlooked the broad consequences of facilitating waivers in this manner notwithstanding existing case law that cautions against general tacit contractual waivers and federal statutes which prohibit such pledges.

Procedurally, the decision in *Kearney* is also faulty because the issues raised were deserving of an *en banc* review.[26] Cases which are of exceptional importance merit the *en banc* standard rather than the three judge panel presiding in the *Kearney* case. Finally, the public policy considerations seem worthy of review by the Florida Supreme Court as a question of great public importance.[27]

Another recent decision, *Castro v. Mercantil Commercebank, N.A.*,[28] issued by the Florida Third District Court of Appeal illustrates the difficulties facing courts attempting to effectively balance the generous exemptions afforded to debtors under Florida law with the rights of creditors. Unlike the "boilerplate" language found in the IRA waiver in *Kearney*, the plain language in the *Castro* waiver presented a greater challenge to the court in its analysis of what constituted a valid and knowing waiver of the Florida wage exemption under the statute in force and effect at the time. Although such language would not pass muster under the current version of Florida's wage exemption statute, the *Castro* case makes for a highly troubling outcome to debtors and practitioners alike if a stale waiver suddenly becomes relevant years later. Ultimately, the court's holding is another reminder of why the current version of Fla. Stat. § 222.11 (2019) more effectively protects debtors from unknowingly waiving their rights under Florida law with respect to garnishment of wages.

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In *Castro*, Halmac Development, Inc. ("Halmac") executed a promissory note in the principal amount of $250,000.00 payable in installments to Mercantil Commercebank, N.A. ("Mercantil"). Hector Castro ("Castro") personally guaranteed payment of the note and pledged certain collateral to secure it. Under the terms of the guaranty, upon a default Mercantil was entitled to "collect any deficiency balance with or without resorting to legal process."[29] Less than a year after executing the note, Halmac defaulted and Mercantil filed suit. In 2015, Mercantil obtained summary judgment against Castro as the guarantor and Halmac as the borrower.

In 2019, Mercantil filed a motion for a continuing writ of garnishment against Castro's wages. The trial court issued the writ that was served on Castro's employer. Castro subsequently filed a motion to dissolve arguing that his wages were exempt from garnishment because he was the "head of family" as defined in Fla. Stat. § 222.11 (2019). The lower court had determined that Castro waived his right to avoid garnishment of his wages. Castro appealed and posited that the contractual language was insufficient to effectuate a waiver of his claim of exemption. The version of Fla. Stat. § 222.11(2)(b) (2009) then in effect provided:

> Disposable earnings of a head of a family, which are greater than $500 a week, may not be attached or garnished unless such person has agreed otherwise in writing. In no event shall the amount attached or garnished exceed the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.[30]

The language of Fla. Stat. § 222.11(2)(b) (2009) has since been amended to include several requirements, including capitalized 14-point type language informing debtors of their rights and the method by which a waiver may be effectuated within a contract or agreement.[31]

Neither party disputed that Castro qualified as the "head of family." Mercantil argued that Castro consented to garnishment of any earnings in excess of $500 per week. Castro, on the other hand, maintained that he only provided his consent to a court issuing a writ of garnishment. Further, he argued that Fla. Stat. § 222.11 (2019) was applicable to the waiver in question.

The guaranty executed by Castro included the following capitalized provision: "GUARANTOR HEREBY CONSENTS TO THE ATTACHMENT OR GARNISHMENT OF HIS/HER/ITS EARNINGS."[32] Additionally, it provided that the "[o]bligations [hereunder] . . . shall not be affected or impaired [by] . . .[a]ny present or future law . . . purporting to reduce, amend or otherwise affect the indebtedness . . . or any other terms of payment."[33]

Affirming the lower court's holding, the court found that the consent to garnishment in the guaranty was clear in its intent and expansive in its reach. In essence, Castro consented to the garnishment of his wages. The court also noted that Fla. Stat. § 77.01 (2019) provided Mercantil with the right to a writ of garnishment regardless of the terms of the guaranty.[34]

In the footnotes, the court dismissed Castro's argument that the 2019 version of the statute applied by invoking Article I, Section 10 of the Florida Constitution ("No bill of attainder, ex post facto law or law impairing obligation of contracts shall be passed.")[35] The court found that the guaranty's clause providing that the "[o]bligations [hereunder] . . . shall not be affected or impaired [by] . . . [a]ny present or future law . . . purporting to reduce, amend or otherwise affect the indebtedness . . . or any other terms of payment" prevented Castro from advancing his argument concerning the applicability of Fla. Stat. § 222.11 (2019).

The *Kearney* decision is flawed due to its indifference to established case law, legislative pronouncements and public policy concerns which together form the basis for creditor protection for IRAs. Contrast *Kearney* with *Castro* where the court's decision rests on a far stronger predicate. While the holding in *Kearney* is the exception rather than the rule among courts interpreting exemption statutes, it appears prudent to cautiously proceed with planning in *this* area until the issue is clarified by the Florida Supreme Court or by amendment to Florida law.

Endnotes

1 *Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America*, 2019 WL 5957361 (Fla. 11th Cir. Nov. 13, 2019).

2 *Id.* at *1.

3 The other issue presented to the court involved the argument that only the Debtor's *pro rata* portion of the IRA was subject to garnishment. However, the court concluded that this issue had not been preserved on appeal.

4 *Id.* at *2.

5 *Id*.

6 Fla. Stat. § 222.21(2)(a) (2019).

7 *Id.*

8 29 U.S.C. § 1051. A qualified plan must contain an anti-alienation provision. 29 U.S.C. § 1056(d)(1).

9 *See e.g. Slatcoff v. Dezen*, 76 So.2d 792 (Fla. 1954) (insurance); *Havoco of Am. Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001) (homestead); *Connor v. Seaside National Bank*, 135 So.3d 508 (Fla. 5th DCA 2014) (annuities).

10 *See e.g., Milton v. Milton*, 58 So. 718, 719 (1912); *Edward Leasing Corp. v. Uhlig*, 652 F. Supp. 1409 (S.D. Fla. 1987)).

11 *Chase Bank USA, N.A. v. Alfie*, 22 Fla. L. Weekly Supp. 1101b (Fla. Broward Cty. Ct. Mar. 16, 2015).

12 Fla. Stat. § 222.12 (2012). Although cited in this 2015 decision, Fla. Stat. § 222.12, "Proceedings for exemption", was repealed effective July 1, 2013.

13 *Mazzella v. Boinis*, 617 So.2d 1156 (Fla. 4th DCA 1993) (citing *Killian v. Lawson*, 387 So.2d 960, 962 (Fla. 1980) and *Holden v. Estate of Gardner*, 420 So.2d 1082, 1083 (Fla. 1982)).

14 *See Nationwide Fin. Corp. v. Thompson*, 400 So.2d 559 (Fla. 1st DCA 1981).

15 *Mazzella v. Boinis*, 617 So.2d 1156 (*citing Patten Package Co. v. Houser*, 102 Fla. 603, 136 So. 353 (1931); *Farland Loan & Savings Co. v. Pittman*, 108 Fla. 442, 146 So. 554 (1933); *Slatcoff v. Dezen*, 76 So.2d 792 (Fla. 1954)).

16 Fla. Stat. § 222.11 (2014).

17 Fla. Stat. § 726.102(2)(b) (2019).

18 *Killian v. Lawson*, 387 So.2d 960 (Fla. 1980).

19 *Id*. at 962 (citing *Patten Package Co. v. Houser*, 102 Fla. 603, 136 So. 353 (1931); *Elvine v. Public Finance Co.*, 196 So.2d 25 (Fla. 3d DCA 1967)).

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20 "[E]xemption laws were 'designed for the honest debtor'[.]" *Slatcoff v. Dezen*, 76 So.2d 792, 793 (Fla. 1954) (citing 22 Am.Jur., Exemptions, Section 140).
21 *Pasco v. Harley*, 75 So. 30 (Fla. 1917).
22 *See e.g. Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007).
23 *Id*. at 861 (citing *State v. Upton*, 658 So.2d 86, 87 (Fla.1995)).
24 I.R.C. § 408(e)(4).
25 *Id*.
26 Rule 9.331, Fla. R. App. P. (2018).
27 Fla. Const. art. 5, § 3(b)(4).
28 *Castro v. Mercantil Commercebank, N.A.,* 2020 WL 2049100 (Fla. 3rd DCA 2020).
29 *Castro v. Mercantil Commercebank, N.A.,* 2020 WL 2049100, at *1.
30 Fla. Stat. § 222.11(2)(b) (2009).
31 Fla Stat. § 222.11(2)(b) (2019).
32 *Castro v. Mercantil Commercebank, N.A.,* 2020 WL 2049100, at *1.
33 *Id*.
34 *Id*. at *2 (citing Fla. Stat. § 77.01 (2019)).
35 *Id*. at n. 2.


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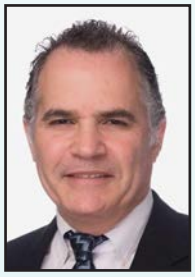
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Are Transfers Of Encumbered Property To Revocable Trusts Subject To Documentary Stamp Tax?

By Robert T. Carroll, Esq., Wilson & Johnson, P.A., Naples, Florida

Fla. Stat. § 201.02 (2019) imposes a tax of seventy cents (or sixty cents in Miami-Dade County) for every one hundred dollars of consideration on any "deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by his or her direction."[1] This tax is commonly known as the documentary stamp tax. It has commonly been thought that this tax is only imposed where there has been a transfer in substance, rather than in form.[2] Thus, many estate planning practitioners have taken the position that a transfer to a revocable trust was exempt from this tax[3] However, a Technical Assistance Advisement issued by the Florida Department of Revenue (the "Department") in December 2018 undermines this position, creating an argument that transfers of encumbered real property into revocable trusts may be taxable.

Common Understanding of Law

As stated above, Fla. Stat. § 201.02(1) (2019) imposes the documentary stamp tax on any documents that shift ownership of real property.[4] The amount of the tax is based on the amount of consideration involved,[5] which includes, among other things, the amount of any encumbrance, whether or not the underlying indebtedness is assumed.[6] Thus, a transfer of real property from one party to another, even as a gift, is typically subject to the documentary stamp tax if that property is encumbered by a mortgage.[7]

However, practitioners believed that transfers of encumbered property to a trust were not subject to this tax when the transferring party was the sole beneficiary of the trust or the trust was a revocable trust.[8] Practitioners pointed to Florida Administrative Code Rule 12B-4.013(28), which states "A deed to or from a trustee conveying real property is taxable to the extent that the deed transfers the beneficial ownership of the real property."[9] This provision goes on to provide "A deed from X to a trustee is exempt from the stamp tax to the extent of X's beneficial ownership interest as a trust beneficiary,"[10] and "A deed to a trustee from a grantor who has the power to revoke the trust instrument, and a deed back to the grantor from the trustee upon revocation of the trust, are not transfers of ownership subject to the stamp tax."[11] These provisions appeared to support the conclusion that a transfer that resulted in no change in beneficial ownership (for example, if the grantor was also the sole beneficiary of the trust), or a transfer to a trust that could be revoked at any time, would not be subject to the documentary stamp tax.

This position was reinforced by previous rulings by the Department in Technical Assistance Advisements ("TAAs") 93(B)4-014R and 09B4-003. TAA 93(B)4-014R considered a situation where a mother and son held title to encumbered property as tenants in common, and they were transferring their respective interests into a separate revocable trust.[12] The Department of Revenue noted that a transfer to a revocable trust is not a true conveyance of property, because:

1. the grantor could reverse the conveyance at any time;
2. the grantor had not relinquished ownership; and
3. a revocable trust was merely an "umbrella" through which the grantor controlled the property through the Trustee.[13] On that basis, the Department held that the transfers were not subject to documentary stamp tax, even though the property was encumbered.[14]

TAA 09B4-003 considered whether the tax applied to a conveyance of seven condominiums, all of which were encumbered, into a joint revocable trust.[15] The first six condominiums were owned solely by the husband, and the Department of Revenue held that 50% of the encumbrance was subject to the tax, due to the encumbrance counting as consideration.[16] However, no tax was due for the conveyance of the seventh condominium, which was owned jointly by the couple.[17] The Department of Revenue stated that there was no transfer of beneficial interest in the seventh condominium, as the condominium was owned jointly by the couple both before and after the deed.[18] Because there was no transfer, the

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Department of Revenue held that the Florida Administrative Code provided that only minimum documentary stamp tax was due on the transfer.[19]

TAA 18B4-003

The Department's holding in TAA 18B4-003 has undermined the positions discussed above.[20] This TAA considered whether the tax would be imposed on a corporation's transfer of encumbered real property into a revocable trust, of which the corporation was the sole beneficiary.[21] The Department held that the transfer would be subject to the documentary stamp tax.[22] The Department stated that Rule 12B-4.013(28) was only applicable to land trusts created under Fla. Stat. § 689.071 (2013), and that the Rule did not apply to any trust created under the Florida Trust Code.[23] The Department based its limitation of the Rule 12B-4.013(28) exemptions on its belief that it was only statutorily authorized to issue exemptions to land trusts created under Fla. Stat. § 689.071 (2013).[24] The Department of Revenue argued that this limitation was appropriate because the only mention of trusts in Fla. Stat. § 201.02 (2019) appeared in Fla. Stat. § 201.02(4) (2019), which referred to land trusts created under Fla. Stat. § 689.071 (2013).[25] Therefore, it believed that a broader application of Rule 12B-4.013(28) beyond land trusts was incorrect as the Department of Revenue had no authority to write such a broad rule.[26] Because the revocable trust was established under the Florida Trust Code, Chapter 736, Florida Statutes, and not Fla. Stat. § 689.071 (2013), the exemptions provided under Rule 12B-4.013(28) did not apply, and the deed transferring the encumbered property from the corporation to the revocable trust was subject to the tax.[27]

Implications Moving Forward

Rule 12B-4.013(28)(h) states that the exceptions to the tax provided under Rule 12B-4.013(28) with respect to transfers to trusts do not depend on whether a trust was created by, or for the benefit of, a corporation or an individual,[28] so the identity of the grantor or beneficiary should be irrelevant. Therefore, if a corporation's transfer of encumbered property to a Ch. 736 revocable trust, of which the corporation was the sole beneficiary, is subject to the tax, an individual engaging in the same transaction should incur the tax as well.

Based on the Department's position, whether a transfer is subject to tax may turn on whether the trust in question qualifies as a land trust, but does a typical revocable trust qualify as a land trust under Fla. Stat. § 689.071 (2013)?

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Unfortunately, a typical revocable trust will likely fail to qualify as a land trust, allowing a transfer of encumbered real property into a revocable trust to be taxed. In order to qualify as a land trust, a variety of requirements and restrictions must be met. The first such requirement is that, unless the trust is a timeshare estate trust or vacation club trust, the duties of the Trustee must be limited to managing real property and performing administrative functions.[29] A typical revocable trust does not meet this requirement and would not be limited to managing real property if, for example, it also holds cash or securities. The trustee of a revocable trust would owe the same level of duty to real property as to any other asset held by the trust. Regardless of the nature of assets held by a revocable trust, [30] Ch. 736 still imposes a variety of duties on a trustee, such as prudent administration,[31] control and protection of trust property,[32] recordkeeping and identification,[33] and collecting trust property.[34] To interpret an individual's revocable trust as establishing a land trust would be to assert that a trustee did not owe such duties to the assets of the trust apart from the real property.[35]

Second, apart from certain provisions that are expressly provided in Fla. Stat. § 689.071 (2013), Ch. 736 does not apply to land trusts.[36] If a trust instrument directs that the trust is governed by Ch. 736, it does not qualify as a land trust.[37] Various provisions of the Florida Trust Code that would ordinarily apply to a revocable trust would have to be deemed inapplicable in order to establish that a revocable trust is a land trust and that a transfer of encumbered real property to the trust is exempt from documentary stamp tax. Such provisions would include:

1. the duty to provide accountings;[38]
2. the execution requirements to create a trust with testamentary provisions;[39]
3. Part VI of the Florida Trust Code, entitled "Revocable Trusts," which contains provisions governing the revocation and amendment of a revocable trust,[40] the persons to whom the trustee owes duties,[41] and the limitations period for challenging the provisions of the trust;[42] and
4. the statutory authority for a grantor's creditors to reach trust assets for purposes of satisfying a debt owed by a grantor during life[43] or after death.[44]

Indeed, Fla. Stat. § 689.071(8)(d) (2013) states that a debt of the land trust does not attach to a beneficiary or a beneficial interest, and a debt of a beneficiary does not attach to the trustee's legal and equitable title to the trust property.[45] It is for these reasons that an individual's revocable trust is unlikely to qualify as a land trust. As a result, under the logic of TAA 18B4-003, a transfer of encumbered property by a grantor into a revocable trust, or into a trust of which the grantor is the sole beneficiary, is likely subject to the documentary stamp tax.

Conclusion

While arguments exist that TAA 18B4-003 was incorrectly decided, practitioners should be aware that the Department of Revenue has taken the position that a transfer of encumbered real property to a revocable trust can generate a documentary stamp tax liability. This stance presents a risk for any taxpayer who seeks to transfer encumbered real property into a revocable trust. This risk must be taken into account by practitioners as they structure a client's estate plan and evaluate whether to utilize a probate skipping strategy for their client's real property, such as a revocable trust, a ladybird deed, or some other means.

R. CARROLL

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Endnotes

1 Fla. Stat. § 201.02(1)(a) (2019).

2 This belief has been supported by the provisions of the Florida Administrative Code that restrict the application of the tax to situations in which there has been a true transfer. *See* Fla. Admin. Code R. 12B-4.013(28) (containing exceptions from documentary stamp tax for transfers in which there is no change in beneficial ownership, a change in Trustee of a trust, a deed transferring a beneficiary's proportional interest from a Trustee to said beneficiary, and a transfer to a revocable trust).

3 *See* Debra L. Boje and Alyse Reiser Comiter, *Chapter 9 Funding the Living Trust*, *in* Basic Estate Planning in Florida (9th ed., 2018), pp. 9-17 (stating "Transfers of real property into typical living trusts are exempt from tax," relying on Fla. Admin. Code R. 12B-4.013(28)(a)), J. Eric Taylor, *Chapter 12 Tax Considerations*, *in* Administration of Trusts in Florida (9th ed., 2017), pp. 12-67 (applying the various exceptions under Fla. Admin. Code R. 12B-4.013(28) to state that various types of transfers are not subject to documentary stamp tax).

4 Fla. Admin. Code R. 12B-4.013(28)(b).

5 Fla. Stat. § 201.02(1)(a) (2019).

6 *Id.*

7 This has held true even with regards to transfers between husbands and wives. Fla. Admin. Code R. 12B-4.013(27). This rule was only recently changed to exempt a deed transferring homestead property between spouses if such deed was executed within one year of the marriage and the sole consideration was the fact that the property was encumbered and then amended again to remove the one year limitation with respect to homestead. Fla. Stat. § 201.02(7)(b) (2019).

8 *See* Boje and Comiter, *supra* Note iii, *and* Taylor, *supra* Note iii.

9 Fla. Admin. Code R. 12B-4.013(28).

10 *Id.*

11 Fla. Admin. Code R. 12B-4.013(28)(i).

12 TAA No. 93(b)4-014R (Revised) at p.1 (Aug. 27, 1993), *available at* https://revenuelaw.floridarevenue.com/LawLibraryDocuments/1993/08/TAA-37920_397ce9e0-0c8d-4580-b402-3db5895a9894.pdf.

13 *Id.* at 1-2.

14 *Id.* at 2.

15 TAA No. 09B4-003 at p. 2 (April 14, 2009), *available at* https://revenuelaw.floridarevenue.com/LawLibraryDocuments/2009/04/TAA-38221_DOC%20TAA%2009B4-003.pdf.

16 *Id.* at pg. 4.

17 *Id.*

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18 *Id.* at pg. 3 ("When Unit #7 held in the name of Husband and Wife, is transferred to the trust for Husband and Wife (whether encumbered or unencumbered by mortgages) only minimum… documentary stamp tax is due…. Husband and Wife are currently in title to the property, and a deed to a revocable trust where Husband and Wife are the only beneficiaries during their lifetimes would not represent a conveyance to another person or entity.").

19 *Id.* at pg. 4.

20 TAA No. 18B4-003 (Dec. 7, 2018), *available at* https://revenuelaw.floridarevenue.com/LawLibraryDocuments/2018/12/TAA-122319_18B4-003%20Redacted-Summary.pdf.

21 *Id.* at pg. 2.

22 TAA No. 18B4-003, *supra* note xxii, at p. 4.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 Fla. Admin. Code R. 12B-4.013(28)(h).

29 Fla. Stat. § 689.071(2)(c) (2013) provides in pertinent part:

> (c) "Land trust" means any express written agreement or arrangement by which a use, confidence, or trust is declared of any land, or of any change upon land, under which the title to real property, including, but not limited to, a leasehold or mortgagee interest, is vested in a trustee by a recorded instrument that confers on the trustee the power and authority prescribed in s. 689.073(1) and under which the trustee has no duties other than the following:
>
> 1. The duty to convey, sell, lease, mortgage, or deal with the trust property, or to exercise such other powers concerning the trust property as may be provided in the recorded instrument, in each case as directed by the beneficiaries or by the holder of the power of direction;
> 2. The duty to sell or dispose of the trust property at the termination of the trust;
> 3. The duty to perform ministerial and administrative functions delegated to the trustee in the trust agreement or by the beneficiaries or the holder of the power of direction; or
> 4. The duties required of a trustee under chapter 721, if the trust is a timeshare estate trust complying with s.721.08(2)(c)4. [sic] or a vacation club trust complying with s. 721.53(1)(e).
>
> Fla. Stat. § 689.071(2)(c) (2013).
>
> Fla. Stat. § 689.071(2)(g) (2013) then defines "Trust property" to mean "any interest in real property, including, but not limited to, a leasehold or mortgagee interest, conveyed by a recorded instrument to a trustee of a land trust or other trust." Fla. Stat. § 689.071(2)(g) (2013).

30 *See* Fla. Stat. § 736.0801 (2006) ("Upon acceptance of a trusteeship, the trustee shall administer the trust… in accordance with this code.") *and* Fla. Stat. § 736.0103(15) (2018) ("'Property' means anything that may be the subject of ownership, real or personal, legal or equitable, or any interest therein.").

31 Fla. Stat. § 736.0804 (2006).

32 Fla. Stat. § 736.0809 (2006).

33 Fla. Stat. § 736.0810 (2006).

34 Fla. Stat. § 736.0812 (2006).

35 This is based on the difference in how Fla. Stat. § 689.071 (2013) defines "Trust property" with respect to land trusts from how Chapter 736, the Florida Trust Code, defines "property" with respect to any trust created under Chapter 736. While Chapter 736 defines property as any item that may be owned, Fla. Stat. § 689.071 (2013) limits its definition of trust property to real property or an interest therein. *Compare* Fla. Stat. § 689.071(2)(g) (2013) *with* Fla. Stat. §736.0103(15) (2006).

36 Fla. Stat. §689.071(12) (2013).

37 This is expressly the case for any land trusts created before June 28, 2013. Fla. Stat. § 689.071(12)(b) (2013). It is also the case for any land trusts created on or after June 28, 2013 where the duties extend beyond those provided under Fla. Stat. § 689.071(2)(c) (2013), which would include the duties owed by a Trustee with respect to any non-real property assets held by the trust. *See* Note xl, *supra*, regarding the difference between how Fla. Stat. § 689.071 (2013) and Chapter 736 define trust property.

38 Fla. Stat. § 736.0813 (2013).

39 Fla. Stat. § 736.0403(2)(b) (2019).

40 Fla. Stat. § 736.0602 (2011).

41 Fla. Stat. § 736.0603(1) (2006).

42 Fla. Stat. § 736.0604 (2006).

43 Fla. Stat. § 736.0505 (2010).

44 Fla. Stat. § 736.05053 (2014).

45 Fla. Stat. § 689.071(8)(d) (2013).

Roth IRA Conversions After The SECURE Act

By Alfred J. Stashis, Jr., Esq., and Denise B. Cazobon, Esq.,
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Among the most significant changes under the SECURE Act is the elimination of stretch IRA distributions for many non-spouse beneficiaries, especially adult children or the grandchildren of the account owner. Under the new rules, for account owners dying on or after January 1, 2020, inherited IRAs payable to those non-spouse beneficiaries must be paid out within ten years after the decedent's death, rather than over the beneficiary's life expectancy. This can lead to significantly higher income tax bills for beneficiaries, particularly beneficiaries in higher income tax brackets and beneficiaries residing in states with a state income tax. Similar income tax problems arise when IRAs are payable to accumulation trusts. Clients concerned about potential income (and/or estate) tax consequences to beneficiaries might consider converting all or part of their traditional IRA(s) to Roth IRA(s) now (or over a series of years) to achieve future income tax savings for their beneficiaries.

How Do Roth Conversions Work?

A plan participant converts a Traditional IRA to a Roth IRA by transferring the assets from the Traditional IRA account to a Roth IRA account. The amount converted is subject to ordinary income tax. Once the funds are converted to a Roth account, the future appreciation of the account, and distributions from the account, are exempt from income tax. In addition, there are no required minimum distributions from a Roth IRA during the account owner's lifetime.

When Do Roth Conversions Make Sense?

Generally, it is not advisable to convert a Traditional IRA to a Roth IRA and pay income tax now if the funds in the Traditional IRA account can be accessed later at a lower income tax rate. Nor is it advisable to withdraw funds from the IRA in order to pay the tax resulting from the conversion. Using the IRA funds to pay the tax changes the mathematics so much that conversions are rarely advisable in that circumstance. Therefore, careful consideration must be given to the facts of each case to assure optimal tax planning.

If the account owner expects to be in the same or higher income tax bracket at retirement, a Roth conversion may be advisable. Also, if the account is intended primarily to benefit individuals (e.g., adult children or grandchildren) whose combined state and federal tax rate is likely to equal or exceed the account owner's current income tax rate, a Roth conversion may likewise be advisable. A few examples may help to illustrate these points.

Married Couple – No Estate Tax

Consider a married Florida couple, Harry and Wanda, each age 72, with a $10 Million combined net worth, of which $4 Million is held in Traditional IRAs. Harry and Wanda plan to leave their IRAs to one another and then to their adult children Charles and Christine. Harry and Wanda expect their 2020 taxable income to be $240,000, meaning that at least some of their income will be taxed at the 24% rate. The next highest marginal income tax bracket, 32% for married taxpayers filing jointly, begins with taxable income of $326,601 or more. Under these facts, Harry and Wanda could convert approximately $86,000 of their Traditional IRAs to Roth IRAs in 2020 at the 24% rate.

From an income tax planning perspective, 2020 may be a particularly good year for Harry and Wanda to begin a series of annual Roth IRA conversions because

1. the CARES Act has eliminated RMDs for 2020, meaning that Harry and Wanda will not have any RMDs to otherwise include in their 2020 taxable income;
2. recent market volatility may have depressed the value of their IRA accounts, meaning that those assets can be converted now at lower values and therefore trigger less income tax; and
3. Harry and Wanda's conversion will be taxed at a marginal rate of 24%, which is relatively low by historical standards. If Harry and Wanda anticipate their future income tax rate will be higher, it may make sense for

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them to begin converting to Roth IRAs now and to pay the tax at lower current income tax rates.

Beneficiaries in High Income Tax Brackets

Consider also Harry and Wanda's children. Charles is single, age 46, lives in New York City, and has taxable income of $150,000 per year. Charles will have 2020 marginal income tax rates of approximately 24% federal, 6.49% state, and 3.876% city, for a combined marginal tax rate of approximately 34.366%. Christine is also single, age 43, lives in Chicago, and has taxable income of $120,000. Christine will have marginal income tax rates of approximately 24% federal and 4.95% state, for a combined marginal tax rate of approximately 28.95%.

If Harry and Wanda were both to die in 2020, then Charles and Christine would each inherit $2 Million of Traditional IRA assets which would need to be paid out over ten years' time. If each were to decide to pay out those accounts in ten equal installments of $200,000 per year (disregarding any potential changes in the value of the assets, their future taxable income, or their future income tax rates), Charles' taxable income would increase to $350,000 per year, and Christine's to $320,000 for the next ten years. Their combined marginal tax rates would similarly increase to 45.726% for Charles [35% federal, 6.85% state and 3.876% city] and 39.95% for Christine [35% federal and 4.95% state].

Of course, marginal income tax rates can change over time, but if Harry and Wanda were to begin converting a portion of their Traditional IRAs to Roth IRAs each year at their current relatively low marginal income tax rate of 24%, they may be able to achieve significant future tax savings for their children.

Estate Tax Considerations

The mathematics in favor of conversion are even more compelling in cases where a federal estate tax is likely to be paid. Change the facts in the prior hypothetical, such that Wanda is now a widow with $20 Million in assets, consisting of $5 Million in a Traditional IRA and $15 Million of cash and other marketable securities. Assuming that Wanda dies in 2020 survived by her children Charles and Christine, there would be a federal estate tax of approximately $3.37 Million

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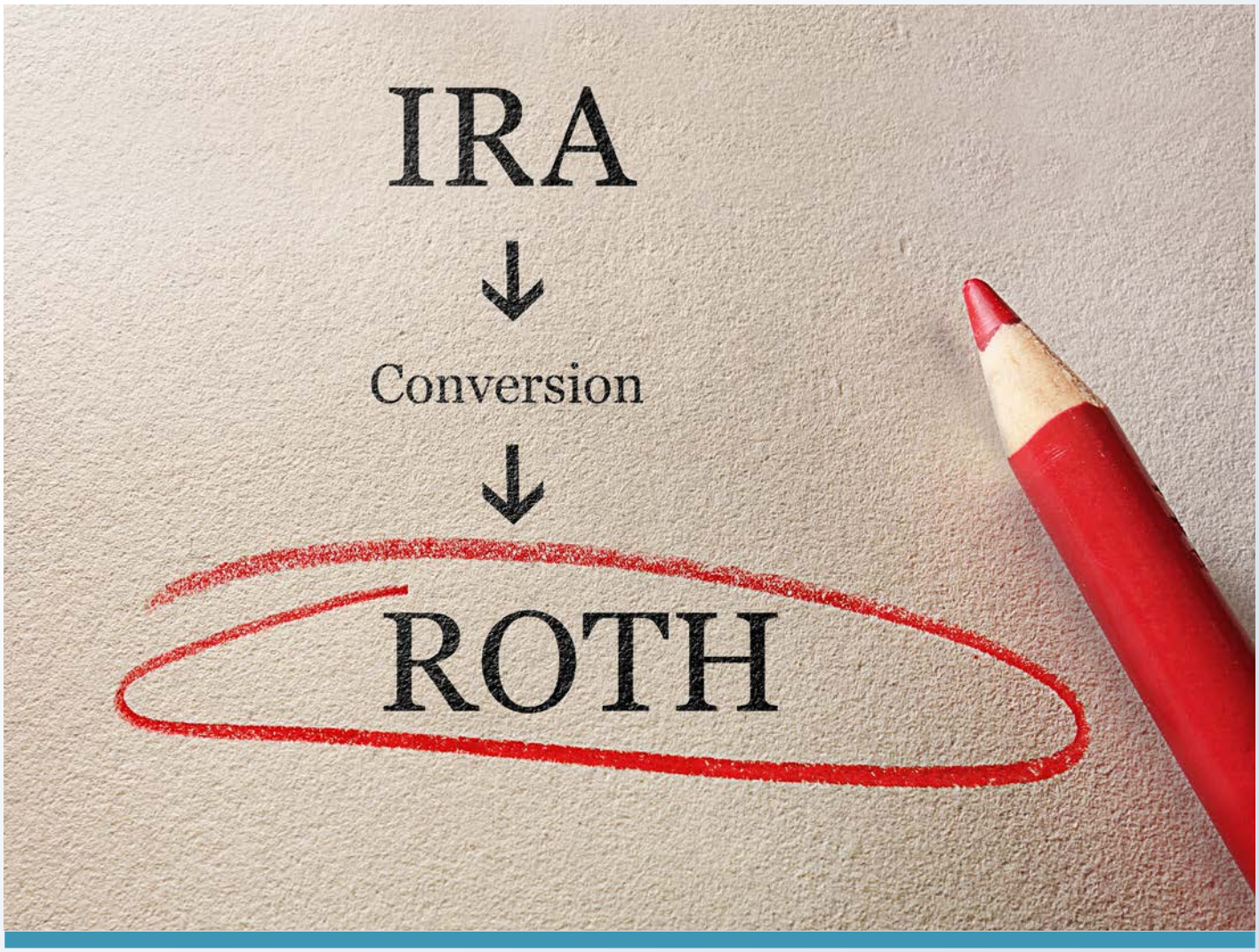

due, and her children would receive a $5 Million Traditional IRA and cash and investment assets of $11.632 Million. Note that the Traditional IRA will be subject to income tax of at least 37% (likely more, if Wanda's children still live in New York City and Chicago), such that the net amount the two children will receive is approximately $14.782 Million ($20 Million gross estate – $3.37 Million estate tax – (0.37 x $5.0 Million income tax on Traditional IRAs) = $14.782 Million); however, as noted, the income tax deduction under Section 691(c) IRC will reduce the total income tax and thus increase the net total to the two children.

In contrast, if Wanda converted her $5 Million Traditional IRA to a Roth IRA prior to her death, for which she would have paid $1.85 Million (at a tax rate of 37%) in federal income tax, at death, Wanda's assets would consist of a $5 Million Roth IRA and $13.15 Million in cash and investment assets. Under these facts, if Wanda died in 2020, there would be a federal estate tax of $2.63 Million due, and the net assets passing to the two children would be $15.522 Million, a tax savings of approximately $740,000.

Like marginal income tax rates, federal estate tax rates and exemptions can change over time. However, if either the federal estate tax rate (currently 40%) were to increase or the federal estate tax exemption (currently $11.58 Million) were to decrease in the future, Roth IRA conversions will become an even more attractive option for our clients.

Note also that although this second hypothetical refers to Wanda making a lump sum Roth IRA conversion, generally clients should instead consider a series of smaller annual conversions, so as to avoid the bunching of taxable income in any single tax year. The goal is to exercise good "bracket management," meaning that the client would convert in each year an incremental portion of their Traditional IRA(s) equal to the amount of additional taxable income needed to fill up their current marginal income tax bracket, avoiding any large jumps in income tax brackets. By spreading conversions over a series of years, clients can reduce the likelihood of forcing too much income into higher tax brackets during any particular tax year.

Retirement Plans Payable to Accumulation Trusts

If the client's estate plan calls for the retirement plan to be paid to an accumulation trust, it is often more tax efficient to fund the accumulation trust with a Roth IRA rather than a Traditional IRA. This is because IRA distributions which are not paid to the beneficiary, but which are instead accumulated in the trust, will be taxed according to the compressed trust income tax rates. Those rates reach the top marginal income tax rate of 37% after $12,950 of accumulated income.

In those cases where clients know they will need to fund an accumulation trust with a retirement account, and where it can be foreseen that the accumulation trust will consistently receive more than $12,950 of accumulated annual taxable income, clients should be alerted to the advisability of a Roth IRA conversion during their lifetime. Doing so will allow them to avail of the much broader tax brackets applicable to them as individuals and will help to minimize future income taxation of the assets at higher trust income tax rates after the client's death.

Conclusion

Diligence is the watchword. Each client case is different, and careful analysis should be undertaken in each case to determine which tax planning approaches make the most sense. The Roth IRA conversion projections for each client, such as those outlined above, should be revisited and refined periodically in order to update for changes in asset values, changes in applicable income and estate tax rates and exemptions, and changes in other life circumstances, in order to confirm the continuing viability of this planning strategy.

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Endnotes

1 Under SECURE, stretch distributions are only permitted for "eligible designated beneficiaries." "Eligible designated beneficiaries" include: the account owner's surviving spouse; the account owner's minor children; disabled or chronically ill individuals; or individuals who are not more than ten years younger than the account owner. An adult child or a grandchild will generally not fall into any of these categories unless disabled or chronically ill.

2 While the original account owner has no required minimum distributions, an "eligible designated beneficiary" inheriting a Roth IRA will have required minimum distributions. And a "designated beneficiary" who is not an "eligible designated beneficiary" inheriting a Roth IRA must pay all of his or her share of the account out within ten years' time.

3 Assumes no prior lifetime taxable gifts and no portability exemption received from Harry.

4 For simplicity this example disregards any potential benefit obtained from a s. 691(c) deduction.

5 In 2020, trusts reach the top marginal income tax rate of 37% after only about $13,000 of accumulated income (compared to single individuals who reach the 37% rate at $518,400 of taxable income and married couples filing jointly who reach the 37% rate at $622,050 of taxable income). The income tax liability is even greater for accumulation trusts that may also be subject to a state income tax.

Cooley Law School February 26, 2020 Event

By Johnathan Butler, Lead ALM, 13th Circuit

Cooley Real Property Probate & Trust Law (RPPTLs) have re-formed under the leadership of President Yveline Dalmacy, Vice President Joseph Garrido and a full board of Cooley law students. The Cooley RPPTL board recruited Cooley Real Property Professor Stevie Swanson to serve as faculty sponsor.

On Wednesday, February 26 from noon-2pm, several Cooley law students gathered in the Tampa (Riverview) Campus near Cooley's Law Library to enjoy some food and drinks together. Dalmacy kicked off the event by thanking all attendees for joining the Cooley RPPTL meeting and then introducing Swanson to briefly share the objectives/goals of today's meeting plus the exciting formation of the Cooley RPPTLs.

Next, Swanson introduced Cooley 3L Jim Johnson, who is also a local real estate investor. Johnson presented his experience working with Hillsborough County government on land zoning and real estate issues.

Swanson then introduced panelists Atty Mack Justin, Atty Kris Fernandez and RPPTL 13th Circuit Lead ALM Johnathan Butler. Justin and Fernandez discussed common issues they see in their practices related to landlord tenant, title insurance and homestead. Justin, a Tampa Bay real estate attorney and realtor, added his commentary on trends he sees in the local real estate market. Fernandez discussed how he began his legal career, common issues that he sees in his practice today, answering several practical questions on real estate. Butler added his perspective on how the Florida Bar's RPPTL Section works with the law school students and how each attendee could get involved.

Afterward, your reporter visited with attendees -- some who also attended the Winter RPPTL Meetings in Tampa in late January 2020. Some of the participants even signed up on the spot to join as RPPTL Student Members. Thank you very much for your support and coming under the "RPPTL Wing" as the future of the Section. The Cooley attendees thanked us for the invitation to participate, sit in on committee meetings, plus attend the ALMs meeting and New Attendee Reception that followed. What a great way to kick off a phoenix of excitement in the rebirth of Cooley's RPPTL Section!

Cooley Law Students pause after the forum for a photo, William Campbell (3L), Tampa Real Estate Atty and RPPTL member Kris Fernandez, Yaritssa Plasencia (2L), Alexis Robbins (1L), Buddy Faulkner (2L), Jim Johnson (3L), Joseph Garrido (Cooley RPPTL Vice President), Yveline Dalmacy (Cooley RPPTL President), Tampa Real Estate Attorney Mack Justin and Johnathan Butler, 13th Circuit RPPTL Lead At Large Member (ALM)

POLITICAL ROUNDUP

CHANGES FROM THE 2020 REGULAR LEGISLATIVE SESSION

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

The 2020 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. The Section is particularly appreciative of the Members of the House and Senate that sponsored initiatives this year, and these Members are acknowledged below with the legislation that passed during this Session.

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

SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Housing—Elimination of Discriminatory Covenants: SB 374 by Senator Rouson modifies the procedures before commencing a civil action in housing discrimination claims. The legislation also adds a provision to the Marketable Record Title Act that was developed with Section technical assistance. The provision now provides a procedure for the extinguishment of discriminatory covenants in community association documents that is now in effect and available for use. **(Chapter 2020-__, *Laws of Florida*.)**

Leases—Elimination of Subscribing Witnesses: CS/HB 469 by Representative Duggan and Senator Simmons amends Fla. Stat. §689.01 to eliminate the need for subscribing witnesses on an instrument pertaining to a leasehold estate in real property. The initiative originates from NAIOP and the Section provided technical assistance on the final version of the language in the initiative. The changes in the legislation took effect on July 1, 2020. **(Chapter 2020-109, *Laws of Florida*.)**

Probate: CS/HB 505 by Representative Driskell and Senator Berman contains seven of the Section Probate Division's initiatives. These include clarification that coins and bullion are tangible personal property; clarification that formal notice under the Probate Code does not confer *in personam* jurisdiction; expansion of the categories of conflicts of interest for personal representatives; codification of client disclosure requirements for fiduciaries; clarification of personal representative/beneficiary standing to recover assets; clarification of the elective share notice regarding the timely election of an extension; and notice of administration changes to provide adequate notice that a party may be waiving the right to contest a trust if they fail to timely contest the will. Most of the changes in this bill become effective on October 1, 2020. **(Chapter 2020-67, *Laws of Florida*.)**

Uniform Partition of Heirs Property Act: CS/CS/SB 580 by Senator Bracy enacts the Uniform Partition of Heirs Property Act. The Section provided technical assistance on the initiative, and the legislation was amended to include the technical revisions recommended by the Section. CS/CS/SB 580 was passed by the Legislature and approved by the Governor, and the provisions in the bill took effect on July 1, 2020. **(Chapter 2020-55, *Laws of Florida*.)**

Business Organizations: CS/SB 838 by Senator Simmons is the Business Law Section initiative "glitch bill" making further revisions to the corporate chapters that were revised during the 2019 Legislative Session. The Section's technical concerns on the impacts that the revisions to Chapter 617 might have had on condominium, cooperative and homeowners' associations were addressed by amendment to the legislation prior to passage, and all of the provisions in the legislation became effective on June 18, 2020, when the bill was signed by the Governor. **(Chapter 2020-32, *Laws of Florida*.)**

Curative Deeds: CS/SB 886 by Senator Powell and Representative Altman contains the RPPTL Section's initiative to provide for a curative process to correct scrivener's errors in deeds that contain typographical errors or omissions. The new provisions in the legislation that have been added to Chapter 689 of the Florida Statutes include the definition for

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a scrivener's error and provide the procedures to be followed when correcting the errors. The legislation was approved by the Governor and became effective on July 1, 2020. **(Chapter 2020-33, *Laws of Florida*.)**

Guardianship: CS/CS/SB 994 by Senator Passidomo and Representative Burton amends the provisions of Chapter 744 of the Florida Statutes to expand the factors for the court to consider when appointing a guardian; it prohibits a guardian from signing a "do-not-resuscitate order" without a prior court order; it prohibits a professional guardian from petitioning for appointment; and it provides for other related revisions. The Section provided technical assistance and language for the initiative at the request of the sponsors and language was included in the final version of the legislation. The bill was approved by the Governor and took effect on July 1, 2020. **(Chapter 2020-35, *Laws of Florida*.)**

Trusts: CS/HB 1089 by Representative Caruso and Senator Gruters creates new Fla. Stat. §736.08145, that authorizes a trustee of certain trusts to reimburse persons being treated as the owner of the trust for taxes attributed to income from the trust; it provides for restrictions on the trustee's authority; and it provides that the provisions in the legislation are applicable to trusts created both before and after the effective date of the Act. The Section provided technical assistance for the final language in the legislation and supported the initiative with the changes. The new section took effect on July 1, 2020. **(Chapter 2020-70, *Laws of Florida*.)**

Rental Agreements upon Foreclosure: SB 1362 by Senator Rodriguez and Representative Sirois is the Section initiative that repeals Fla. Stat. §83.561 relating to tenant protections during a foreclosure proceeding because the section conflicted with a similar provision in federal law. The legislation also includes the provisions of federal law containing the tenant protections and provides that the language will become the law of Florida if the Federal Act is repealed. The legislation was approved by the Governor and took effect on July 1, 2020. ***(*Chapter 2020-99, *Laws of Florida*.)**

Deceased Account Holders: CS/CS/HB 1439 by Representative Yarborough will now permit a financial institution to make payment to a surviving successor from a qualified depository account or certificate of deposit without a pay-on-death or survivor designation, provided the aggregate sum paid does not exceed $1,000 and the payment is not made earlier than six months after the decedent's death. The legislation also created a process by which a beneficiary of an intestate decedent may file an affidavit with the court to request distribution of certain assets of the decedent if the intestate decedent left only personal property that is exempt from probate, personal property constitutionally protected, nonexempt personal property valued at less than $10,000, and certain funeral and medical expenses. For the provisions to be applicable, the decedent must have died more than a year prior and no probate proceedings may be pending. The initiative also expanded exceptions that generally prohibit financial institutions from disclosing information on client accounts. All of the changes became effective on July 1, 2020. **(Chapter 2020-110, *Laws of Florida*.)**

INITIATIVES OF INTEREST

Adoption Benefits: CS/HB 61 by Representative Roth expands the state financial benefits for the adoption of a child to veterans and service members. The legislation also provides an enhanced benefit for the adoption of a child with special needs. CS/HB 61 was approved by the Governor and took effect on July 1, 2020. **(Chapter 2020-22, *Laws of Florida*.)**

Adoption Records: CS/HB 89 by Representative Stark permits release of the name and identity of birth parents to an adoptee who is 18 years of age or older without a court order provided that the birth parents and the adoptive parents have provided written authorization for the release of their names. CS/HB 89 was passed by the Legislature, approved by the Governor, and took effect on July 1, 2020. **(Chapter 2020-42, *Laws of Florida*.)**

Subpoenas—Out-of-State Corporations: CS/HB 103 by Representative Gottlieb amends the provision in Fla. Stat. §92.605 to clarify the procedures for the service of subpoenas on out-of-state corporations that are doing business in Florida, including those doing business via the internet. The legislation also provides procedures for the enforcement of these subpoenas. The legislation was approved by the Governor and took effect on July 1, 2020. **(Chapter 2020-45, *Laws of Florida*.)**

Fireworks—HOA Rules: SB 140 by Senator Hutson permits the consumer purchase of fireworks for use on designated holidays. Section 2 of the bill provides that no provision in the legislation is intended to supersede homeowners' association covenants and further provides that a board of directors may not abrogate a homeowner's right to use fireworks by a rule. CS/SB 140 was approved by the Governor on April 8, 2020, and the provision in the bill became effective immediately. **(Chapter 2020-11, *Laws of Florida*.)**

Florida Commission on Human Relations: CS/HB 255 by Representative Antone revises Chapter 760 of the Florida Statutes relating to the procedures and regulatory scope of the Florida Commission on Human Relations. Among its provisions in Section 4 of the bill, the registration requirement for a community intended and operating for occupancy for persons 55 years of age or older has been eliminated. The legislation was approved by the Governor on June 30, 2020 and became effective on July 1, 2020. (**Chapter 2020-153, *Laws of Florida*.**)

Recreational Vehicle Park Property: CS/CS/HB 343 by Representative Fetterhoff revises the regulation of recreational vehicle park properties in Florida. It authorizes the building

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of improvements damaged in a natural disaster to previously existing density standards; it preempts local regulation of lot size, density and setback separations; and it provides that an operator of a recreational vehicle park may remove a transient guest or occupant who violates park rules or engages in activity that disrupts the quiet enjoyment of others in the park. The legislation also provides that any property left by a guest is to be considered "abandoned property" and may be disposed in accordance with procedures in the Disposition of Personal Property Landlord and Tenant Act. All of the provisions in the legislation took effect on July 1, 2020. **(Chapter 2020-126, *Laws of Florida*.)**

Guardianship: CS/SB 344 by Senator Brandley provides for the waiver of filing fees for public guardians and provides that a physician may delegate the responsibility to prepare a report on a ward to a physician assistant or an advanced nurse practitioner. The legislation was approved by the Governor and took effect on July 1, 2020. **(Chapter 2020-73, *Laws of Florida*.)**

Transfer of Homestead Benefit:HJR 369 by Representative Roth is a proposed constitutional amendment revising the timeframe for the transfer of homestead property tax benefits from property previously owned to new homestead from 2 years to 3 years. The amendment has been filed with the Department of State and will appear on the November general election ballot for voter approval.

Transfer of Homestead Benefit: HB 371 by Representative Roth is the implementing legislation for the constitutional amendment revising the timeframe for transfer of homestead property tax benefits to new homestead. HB 371 was approved by the Governor and will take effect upon approval of the constitutional amendment by the voters. **(Chapter 2020-__, *Laws of Florida*.)**

Community Associations: CS/SB 476 by Senator Hooper provides that a condominium, cooperative, or homeowners' association cannot prohibit an owner, tenant or guest from parking his or her law enforcement vehicle in an area where the owner, tenant, or guest otherwise has the right to park in the community. The legislation was approved by the Governor on February 21, 2020 and took effect immediately. **(Chapter 2020-5, *Laws of Florida*.)**

Insurance Guaranty Associations: CS/HB 529 by Representative Webb is an initiative that increases each covered property insurance claim by a condominium, cooperative or homeowners' association from $100,000 to $200,000. The legislation and the increased coverage became effective on July 1, 2020. **(Chapter 2020-155, *Laws of Florida*.)**

Public Nuisances: CS/CS/HB 625 by Representative Newton revises the notice requirements for filing of a temporary injunction to enjoin certain nuisances; it declares that the use of property for criminal gang-related activity is a public nuisance; and it declares a premises that has been used for criminal activities on more than two occasions during a six month period to be a nuisance. The legislation became effective on July 1, 2020. **(Chapter 2020-130, *Laws of Florida*.)**

Jury Service: CS/HB 738 by Senator Harrell provides that, upon request, a full-time high school or college student between 18 and 21 years of age shall be excused from jury service. The legislation became effective on July 1, 2020. **(Chapter 2020-57, *Laws of Florida*.)**

Uniform Commercial Real Estate Receivership Act: CS/HB 783 by Representative Beltran creates new Chapter 714 of the Florida Statutes and provides procedures for the court appointment of a receiver over commercial real property and the powers vested with the receiver once appointed. The legislation provides for the protection of rights of parties claiming interests in the property; provides protections for mortgagees of the property; and protects the property from waste or substantial diminution of value. The Section worked on technical issues in the legislation and provided language that has been included in the final version of the legislation. The legislation took effect on July 1, 2020. **(Chapter 2020-106, *Laws of Florida*.)**

Vulnerable Investors: CS/CS/HB 813 by Representative Donalds revises and expands the definition of "financial exploitation of vulnerable adults" and expands the reporting requirements to include investment advisors and security dealers. The legislation also permits a security dealer or investment advisor to delay disbursement of funds or securities when there is a reasonable belief that the exploitation is present. The legislation took effect on July 1, 2020. **(Chapter 2020-157, *Laws of Florida*.)**

Ad Valorem Tax Discounts: HJR 877 by Representative Killebrew is a proposed constitutional amendment to authorize the surviving spouse of a deceased veteran to carry over certain discounts on ad valorem taxes on homestead property until the surviving spouse remarries or otherwise disposes of the property. The amendment will appear on the November general election ballot for voter approval.

Ad Valorem Tax Discounts: HB 879 by Representative Killebrew is the implementing legislation for the constitutional amendment providing a surviving spouse of a deceased veteran the ability to carry over certain discounts on ad valorem taxes on homestead property until the surviving spouse remarries or otherwise disposes of the property. The implementing legislation was approved by the Governor and it will take effect upon approval of the constitutional amendment. **(Chapter 2020-__, *Laws of Florida*.)**

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Neighborhood Improvement Districts: HB 1009 by Representative Newton amends Fla. Stat. §163.511 to permit the membership on the board of directors of a neighborhood improvement district to consist of 3, 5 or 7 members. It provides that the members of the board will serve four year, staggered terms on the neighborhood improvement district, and the legislation took effect on July 1, 2020. **(Chapter 2020-86, *Laws of Florida*.)**

Impact Fees: CS/CS/CS/SB 1066 by Senator Gruters provides that new or increased impact fees may not apply to current or pending building permits; and it provides that impact fee credits are assignable to another development in the same impact fee zone or impact fee district within the same local government jurisdiction. The legislation was approved by the Governor and became effective on July 1, 2020. **(Chapter 2020-58, *Laws of Florida*.)**

Emotional Support Animals: SB 1084 by Senator Diaz amends Fla. Stat. §413.08 to define and regulate emotional support animals. The legislation provides access to housing accommodations for persons with a disability who have an emotional support animal provided that the animal does not pose a direct threat to persons or property; it provides for written verification of the disability and the need for the animal on a form prescribed by the Department of Health; and it provides for penalties for the falsification of written documentation that knowingly and willfully misrepresents the need for an emotional support animal. The legislation became effective on July 1, 2020. **(Chapter 2020-84, *Laws of Florida*.)**

Ad Valorem Tax Discounts: CS/HB 1249 by Representative Sullivan provides that a disabled veteran or the surviving spouse of a veteran may apply for and receive a prorated refund of property taxes for a new homestead property acquired between January 1 and November 1 of any calendar year. The legislation was approved by the Governor and took effect on July 1, 2020. **(Chapter 2020-140, Laws of Florida.)**

Community Development and Mobile Homes: HB 1339 by Representative Yarborough expands the options for the development of affordable housing within individual municipalities and counties. The legislation also revises provisions in the Florida Mobile Home Act, including provisions to provide disclosure in the prospectus of additions to shared facilities; to require written approval by the park owner before an owner makes modifications to the exterior of the home; to limit amounts a park owner may collect for ad valorem tax charges; to revise notice and election procedures for mobile home owners' associations; and to allow reconstruction of a mobile home park after a natural disaster. All of the provisions became effective on July 1, 2020. **(Chapter 2020-27, *Laws of Florida*.)**

Appellate Jurisdiction: CS/CS/SB 1392 by Senator Simmons provides for a series of administrative changes to the judicial branch of government and provides for travel expenses to appellate judges. Sections 3 and 6 also revise the appellate jurisdiction for matters from the county courts to the district courts of appeal. Revisions to appellate jurisdiction take effect on January 1, 2021 and the administrative changes for the judicial branch took effect on July 1, 2020. **(Chapter 2020-61, *Laws of Florida*.)**

Conservation Easement Areas: CS/SB 7018 by the Senate Appropriations Committee is an initiative relating to essential state infrastructure including for emergency staging areas as part of the state turnpike system. The legislation also amends Fla. Stat. §704.06 (11) to provide that the owner of land traditionally used for agriculture purposes that is subject to a conservation easement may voluntarily negotiate for the use of the land within the conservation easement for public or private linear facilities. All of the provisions in the legislation became effective on July 1, 2020. **(Chapter 2020-21, *Laws of Florida*.)**

Tax Package: CS/HB 7097 by the House Ways and Means Committee is the annual Session tax package. It originally contained the Section's condominium VAB provision, but it was removed from the bill before final passage. Among its provisions, the legislation provides clarification that vacant affordable housing units being offered for rent are considered affordable units for ad valorem tax purposes; and it further provides that even if a renter's income level no longer meets the income level required for affordable housing, the project is not disqualified from the property tax exemption. All of the provisions in the legislation were effective as of July 1, 2020. **(Chapter 2020-10, *Laws of Florida*.)**


P. DUNBAR

***Peter Dunbar** is the Legislative Counsel and Lobbyist for the Real Property, Probate and Trust Law Section of the Florida Bar, and he also serves as the General Counsel for the Florida Conference of Circuit Court Judges. Mr. Dunbar is a Member of the American College of Real Estate Lawyers; he is an adjunct professor at the FSU College of Law where he teaches Condominium and Community Association Law; and he is board certified in Condominium and Planned Development Law. He served 5 terms as a Member of the Florida House of Representatives and later served as general counsel and chief of staff for Governor Bob Martinez. Mr. Dunbar is also the author of 4 books on Florida housing laws.*

RPPTL Section Executive Council Meeting

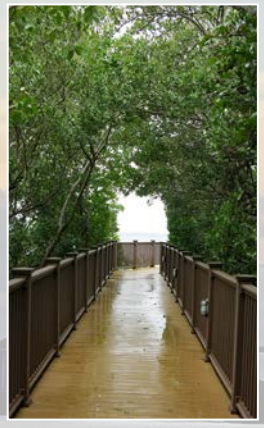
Jami Coleman

Sean Lebowitz, Grier Pressly and Larry Miller

Travis Hayes and Rob Lancaster

Willie Kightlinger, Drew O'Malley and Ed Koren

Carolyn Monroe, President of Old Republic Title; Jim Russick, Vice President; Melissa Murphy, Fund General Counsel; and Old Republic Underwriting counsel Carolyn Broadwater, Amber Ashton, Ashley McRae, and Stephanie Reinicke; joined by current RPPTL Chair Robert Freedman and Past Chair Margaret "Peggy" Rolando.



Bill Hennessey and Rob Freedman — new section chair and immediate past chair

Fentrice Driskell speaking

View Photo Albums at www.rpptl.org

Grand Hyatt Tampa Bay • Tampa, Florida
January 29 – February 2, 2020

Ed Smith, Seth Kaplan and Yoshi Smith

Escape room

Joseph George and Sam Sheets

Rohan Kelley and family

Michele Jayme Ostrow and Jeremy T. Cranford

Long-time Section sponsors – JP Morgan

Photos by John Neukamm, Michael Gelfand and Silvia Rojas. Photo editor, Jeff Baskies.

SECTION SPOTLIGHT

Friends of the Section

2020 LEGISLATIVE SESSION

Martha J. Edenfield, Esq., Dean Mead, Tallahassee, Florida

During every Legislative Session there are many members of the Florida Legislature providing leadership in the support of Section initiatives and positions in their roles as committee chairs, bill sponsors, amendments sponsors and advocates in debate. Some of the legislators who made significant contributions to the Section's success in the 2020 Legislation Session are acknowledged below, along with a brief biographical profile and a list of committee memberships. As we all work hard on behalf of the Section to achieve legislative successes, we are reminded that only members of the Florida Legislature can sponsor and vote on bills. We thank these outstanding legislators for their dedication to and support of the Section.

Senator Bobby Powell

Senator Bobby Powell sponsored the Section's Curative Deeds initiative, Senate Bill 886. Senator Powell is currently the vice chair of the Appropriations Subcommittee on Agriculture, Environment and General Government. He also serves on the full Appropriations Committee, the Ethics & Elections Committee, the Finance & Tax Committee, and as the Alternating Chair of the Joint Committee on Public Counsel Oversight. Senator Powell is an Urban Design planning and project manager. He is a member of the American Institute of Certified Planners and the American Planning Association. Representing part of Palm Beach County, Senator Powell was first elected to the Florida House of Representatives where he served four years prior to being elected to the Florida Senate in 2016. Senator Powell has sponsored one or more bills every year for the Section since becoming a member of the Florida Legislature in 2012.

Representative Thad Altman

Representative Thad Altman sponsored the House version of Senate Bill 886, the Section's Curative Deeds initiative. Representative Altman served as a House member from 2003 through 2008 and as a Florida Senator from 2008 through 2016 until he was termed-out of office. He was elected to the House of Representatives again in 2016 and has been reelected subsequently. He is the vice chair of the Transportation & Infrastructure Subcommittee, and he serves as a member of the Agriculture & Natural Resources Appropriations Subcommittee, the Education & Career Readiness Subcommittee, the Insurance & Banking Committee and the Committee on Public Integrity & Ethics. Representative Altman is the President of The Astronauts Memorial Foundation at the John F. Kennedy Space Center. Throughout his many years of legislative service representing part of Brevard County in both the House and the Senate, Representative Altman has been a tremendous friend to the Section.

Senator Lori Berman

Senator Lori Berman sponsored the Senate version of the Estates and Trusts Bill, House Bill 505, that contained seven separate Section initiatives, and that has now been signed into law. Senator Berman represents part of Palm Beach County since being elected to the Senate in April 2018 in a special election. She previously served four terms in the House of Representatives. Senator Berman is Vice Chair of the Health Policy Committee. She also serves as a member of the Appropriations Subcommittee on Agriculture, Environment & General Government, the Education Committee, and the Environment & Natural Resources Committee. Senator Berman is an attorney and a Section member practicing in the areas of commercial litigation, regulatory real estate law and estate planning. Senator Berman has her LLM in Estate Planning. Since her election to the Florida House of Representatives in 2012, Senator Berman has sponsored and worked on numerous Section initiatives.

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Representative Fentrice Driskell

Representative Fentrice Driskell sponsored the Section's successful Estates and Trusts Bill, House Bill 505, containing seven of the Section's legislative initiatives. Representative Driskell was elected to the Florida House in 2018 representing part of Hillsborough County. She serves as a member of the Judiciary Committee, the Energy & Utilities Subcommittee, the Insurance & Banking Subcommittee, and the Transportation & Infrastructure Subcommittee. Representative Driskell is a Section member with a practice in Tampa specializing in commercial litigation and bankruptcy matters.

Representative Joe Geller

Representative Joe Geller sponsored House Bill 811, the Section's initiative addressing IRA Transfers in Divorce. Representative Geller has been a member of the House of Representatives representing parts of Broward and Miami-Dade counties since 2014. Representative Geller serves as the Democratic Ranking Member on both the Rules Committee and on the Gaming Control Subcommittee. He also serves as a member of the Appropriations Committee, the Judiciary Committee, and the Transportation & Tourism Appropriations Subcommittee. Representative Geller is a Section member with a civil litigation practice in Fort Lauderdale. Representative Geller has worked on Section issues and initiatives every year since his election to the Florida House.

Representative Chris Sprowls

Representative Chris Sprowls has been integral in the passage of numerous Section legislative initiatives since being elected to the House of Representatives in 2014 representing part of Pinellas County. This year as the chair of the powerful House Rules Committee he assured that each of the Section's legislative priorities received consideration by the House of Representatives. Representative Sprowls is also the chair of the Select Committee on the Integrity of Research Institutions and serves as a member of the Appropriations Committee. Representative Sprowls is a litigation attorney with Buchanan, Ingersoll & Rooney, PC. Prior to his election to the Florida House, Representative Sprowls was an Assistant State Attorney for Pasco and Pinellas Counties where he focused on gang and homicide crime. Representative Sprowls has been designated as the incoming Speaker of the House for the 2020-2022 term.

Representative Paul Renner

In his role as House Judiciary Committee Chair, Representative Paul Renner facilitated the scheduling and passage of the Section's legislative initiatives. Representative Renner was elected to the Florida House in 2015 representing Flagler County, part of St. Johns County and part of Volusia County. In addition to serving as the chair of the House Judiciary Committee, Representative Renner serves as a member of the Appropriations Committee, the Justice Appropriations Subcommittee and the Rules Committee. Representative Renner has been a stalwart supporter of the Section throughout his legislative service. He is a part of the House leadership team and has been elected by the body to serve as the Speaker of the House of Representatives in the 2022- 2024 term. He is a retired commander in the U.S. Navy and is a Section member practicing law in Jacksonville.

Representative Ben Diamond

Representative Ben Diamond was elected to the House of Representatives in 2016 and has been reelected subsequently. Throughout his years of legislative service, Representative Diamond has been actively involved in the passage of Section legislative initiatives and advocacy of Section positions. Representative Diamond has worked in support of numerous Section positions and initiatives as the Minority Ranking Member on the House Judiciary Committee. He also serves as a member of the Civil Justice Subcommittee, the Appropriations Committee and the Insurance & Banking Subcommittee. Representative Diamond is a partner in the Diamond Law Firm, P.A., in St. Petersburg, focusing his practice on estate planning, probate administration and litigation involving wills, trusts and guardianships. Representative Diamond serves on the Executive Committee of the Section and in 2017 he received the Section's "Rising Star" Award for his leadership and service. Representative Diamond will serve as the Democratic Leader of the Florida House of Representatives in the 2022-2024 term.

Senator Perry E. Thurston, Jr.

Senator Perry Thurston sponsored the Section initiative on IRA transfers in divorce, Senate Bill 1306, Individual Retirement Accounts. Senator Thurston serves as the vice chair of the Appropriations Subcommittee on Transportation, Tourism & Economic Development. He serves as a committee member on Appropriations,

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Banking & Insurance, Rules, and the Joint Select Committee on Collective Bargaining. Senator Thurston was elected to the Senate in 2016 representing part of Broward County. He was previously in the Florida House of Representatives from 2006 to 2014, serving as the House Democratic leader in his final term. Senator Thurston has been chosen by the Senate Democratic Caucus to be the Minority Leader of the Florida Senate in the 2022 - 2024 Legislative Session. An unfailing supporter of the Section's positions and initiatives throughout his legislative service, Senator Thurston is an attorney with a practice in Fort Lauderdale.

Senator Keith Perry

Senator Keith Perry was the Senate sponsor of Senate Bill 802, the Marketable Record Title Act initiative of the Section. Senator Perry was elected to the Senate in 2016 and served as a member of the House of Representatives from 2010 through 2016. He is the chair of the Criminal Justice Committee and the vice chair of the Infrastructure & Security Committee. He serves as a committee member on the Appropriations Subcommittee on Transportation, Tourism & Economic Development, Banking & Insurance, the Joint Administrative Procedures Committee, the Appropriations Subcommittee on Criminal & Civil justice and Education. Since being elected to the Senate, he has sponsored several Real Property Division initiatives of the Section. Senator Perry is the founder and CEO of Perry Roofing Contractors in Gainesville. His district consists of Alachua County, Putnam County and part of Marion County.

Senator Darryl Ervin Rouson

Senator Darryl Rouson sponsored Senate Bill 374 providing a procedure in the Marketable Record Title Act for the extinguishment of discriminatory community covenants. The Section participated in this legislation by providing technical guidance to the sponsors and staff. Representing parts of Hillsborough County and Pinellas County, Senator Rouson was a member of the Florida House from 2008-2016 and became a Senator in 2016. He is the vice chair of the Banking and Insurance Committee and also serves as a member of the Appropriations Committee, the Appropriation Subcommittee on Health & Human Services, the Appropriations Subcommittee on Criminal & Civil Justice, and the Health Policy Committee. He is an attorney and former Pinellas County Prosecutor.

Representative Loranne Ausley

Representative Loranne Ausley sponsored the House version of Senate Bill 580, the Uniform Partition of Heirs Property Act and the amendment to the Marketable Record Title Act providing

a procedure for the extinguishment of discriminatory community covenants. Representative Ausley served in the House of Representatives representing part of Leon County from 2000 to 2008. She returned to the House of Representatives in 2016 and was reelected subsequently. Representative Ausley is the Democratic ranking member on the Children, Families and Seniors Subcommittee. She is a member of the Commerce Committee, the Healthcare Appropriations Subcommittee, and the Workforce Development & Tourism Subcommittee. An attorney in private practice in Tallahassee, Representative Ausley's twelve years of legislative service have been focused on making an impact on the lives of people with disabilities.

Senator Randolph Bracy

Senator Randolph Bracy sponsored Senate Bill 580, the Uniform Partition of Heirs Property Act. Elected to the Senate In 2016, he became the first African American in the history of the State of Florida to be appointed Chair of the Senate Criminal Justice Committee. Senator Bracy is the vice chair of the Civil & Criminal Justice Appropriations Subcommittee and serves as a member of the Finance & Tax Committee and the Innovation, Industry & Technology Committee. He previously served in the Florida House of Representatives from 2012-2016. Senator Bracy's district includes part of Orange County. In addition to serving the community, Senator Bracy is a small business owner.

Senator Kathleen Passidomo

As Majority Leader of the Florida Senate and throughout her legislative service, Senator Kathleen Passidomo has played a key part in facilitating the passage of numerous Section initiatives and assuring that the Section's proposed legislative initiatives received successful consideration in the Florida Senate. Senator Passidomo previously served in the Florida House of Representatives from 2010-2016 and was elected to the Florida Senate in 2016 representing Collier County, Hendry County and part of Lee County. In addition to being the Majority Leader of the Senate, Senator Passidomo has been named the Senate President-Designate for the 2022-2024 term. Senator Passidomo serves as a member of the Appropriations Committee, the Ethics & Elections Committee, the Rules, the Appropriations Subcommittee on Health & Human Services and the Innovation, Industry & Technology Committee. She is a partner in the law firm of Kelly, Passidomo and Alba, LLP

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in Naples with a practice in real estate law, corporate law and business law. She is a Section member and is a Florida Bar Certified Real Estate Lawyer.

Representative David Smith

Representative David Smith was the House sponsor of House Bill 733, the Section's Marketable Record Title Act initiative. Representative Smith was elected to the Florida House in 2018 representing part of Seminole County. He serves as a member of the Committee on Public Integrity & Ethics, Business & Professions Subcommittee, Children, Families & Seniors Subcommittee, and the Transportation & Tourism Appropriations Subcommittee. Representative Smith is a decorated United States Marine Corps UH - 1N helicopter pilot with 52 combat missions in Iraq and over 4600 mishap-free flight hours. After 30 years of service, Representative Smith retired at the rank of Colonel. He has worked in the private sector in the Central Florida simulation and training industry and now owns a business consulting company.

Senator Joe Gruters

Senator Joe Gruters sponsored the Senate version of the Section's Trust bill, House Bill 1089. Senator Gruters was elected to the Senate in 2018 representing Sarasota County and part of Charlotte County. Prior to becoming a Senator, he served in the House of Representatives from 2016-2018. He is the chair of the Commerce & Tourism Committee, vice chair of the Finance & Tax Committee, and a member of the Appropriations Subcommittee on Criminal & Civil Justice, the Banking & Insurance Committee and the Joint Committee on Public Counsel Oversight. Senator Gruters is a certified public accountant in Sarasota and has 26.2K followers on Twitter – and counting!

Representative Mike Caruso

Representative Mike Caruso sponsored the Section's Trust initiative, House Bill 1089. A House freshman, he was elected to the House of Representatives in 2018 representing part of Palm Beach County. Representative Caruso is on the Ways & Means Committee, Energy & Utilities Subcommittee, Insurance & Banking Subcommittee, Higher Education & Career Readiness Subcommittee, Transportation & Infrastructure Subcommittee and the Joint Legislative Auditing Committee. Representative Caruso is a certified public accountant with his own firm in Delray Beach. He was the 2017 National Men's IV Barefoot Water Skiing Silver Medalist.

Senator José Javier Rodriguez

Senator José Javier Rodriguez sponsored the Section's successful legislative initiative on rental agreements upon foreclosure, Senate Bill 1302. A member of the Florida House of Representatives from 2012-2016, Senator Rodriguez has been a member of the Florida Senate since 2016 representing part of Miami-Dade County. Senator Rodriguez currently serves as the vice chair of the Judiciary Committee and as a member of the Appropriations Subcommittee on Agriculture Environment & General Government, the Ethics & Elections Committee, and the Rules Committee. Senator Rodriguez is an attorney with a diverse litigation practice in Miami and a member of the adjunct faculty for Florida Constitutional Law at St. Thomas University School of Law. Prior to attending law school, Senator Rodríguez served as a Peace Corps Volunteer in Senegal from 2000-2003, first as a business advising volunteer and then as an advisor to Senegal's Ministry of Labor.

Representative Tyler Sirois

Representative Tyler Sirois sponsored the House version of the Section's successful legislative initiative on rental agreements upon foreclosure, Senate Bill 1302. Elected to the House of Representatives in 2018, Representative Sirois represents part of Brevard County. He is a member of the Judiciary Committee, the Civil Justice Subcommittee, the Agriculture & Natural Resources Appropriations Subcommittee, the Gaming Control Subcommittee, the Workforce Development & Tourism Subcommittee and the Agriculture & Natural Resources Subcommittee. Representative Sirois is Executive Director of the Office of the State Attorney for Florida's Eighteenth Judicial Circuit.

M. EDENFIELD

Martha Edenfield *is a founding partner of the Tallahassee office of the Dean Mead law Firm where she focuses her practice on governmental affairs and administrative law. She has extensive experience as legal and governmental counsel for agricultural trade groups, industrial associations, medical professionals, legal & judicial organizations and local governments. Ms. Edenfield has served as legislative counsel for the Real Property, Probate and Trust Law Section since 1999. She was a recipient of the Section's Robert C. Scott Memorial Service Award in 2011.*

Roundtable

Highlights of the Meeting
of the RPPTL Section

REAL PROPERTY DIVISION

Saturday, February 1, 2020

Grand Hyatt Tampa Bay, Tampa, Florida
Prepared by Colleen Sachs, Esq., Santa Rosa Beach, Florida

Thank you to Roundtable Sponsor: Fidelity National Title Insurance

The meeting was called to order at 8:45a.m.

Sponsor Recognition. The Director, Bob Swaine, thanked Fidelity National Title Insurance for sponsoring the Roundtable and recognized Karla Staker to address the group.

Recognition of guests, students, and dignitaries in attendance. The Director welcomed Mia Banks. Mia is in the LLM program at Cooley Law School studying corporate finance. Mia is the sister of our fellow Section member, Jami Coleman.

Summary of Miami Roundtable Meeting (pp. 3-8). There was a motion to approve the summary from the Miami Roundtable meeting. The motion passed and Colleen Sachs was applauded for her hard work compiling the roundtable meeting summaries.

Committee Reports

Attorney-Loan Officer Conference – Robert G. Stern, Chair; Kristopher E. Fernandez, Wilhelmina F. Kightlinger, and Ashley McRae, Co-Vice Chairs. Robert Stern reported. The conference will be Friday February 28th. The committee had a productive interactive conference between attorneys and bankers facilitating collaboration between them. This is the third year for the conference, which is now called the Attorney Banker Conference. Section members are encouraged to register and get the word out. Wilhemina Kightlinger handed out flyers with information. Burt Bruton will present on doc stamps. Other topics include remote online notarization, marijuana and hemp, flood insurance, and cybersecurity.

Commercial Real Estate –Jennifer J. Bloodworth, Chair; E. Burt Bruton, Ashley McRae, R. James Robbins, Jr. and Martin A. Schwartz, Co-Vice Chairs. No report.

Condominium and Planned Development – William P. Sklar and Joseph E. Adams, Co-Chairs; Alexander B. Dobrev, Vice Chair. Bill Sklar reported on a lively meeting. Bill thanked Jane Cornett and Sandra Krumbein for their work on the certification review course. At least 50 have already signed up for the course. Bill also reported on the imminent release of the new first edition on the two volumes on Condominium and HOA law. The committee is also preparing a four-part webinar series on MRTA, association websites compliance, bankruptcy, and another topic to be determined. Legislation was discussed. Bill reported that the 2021 legislative package will be ready to come to the roundtable in May with a goal of introducing it as an action item at The Breakers. There was discussion regarding a task force regarding ADA website accessibility as the current movement is to bring claims by a Plaintiff group against Associations with respect to the websites that currently do not meet the needs of the disabled. It was mentioned that there are programs available, at varying costs and subscriptions, which would cause websites to become compliant. Other activities going on and they are busy. Bob Swaine mentioned that our Firm websites should also be ADA compliant to avoid any issues.

Condominium and Planned Development Law Certification Review Course –Sandra Krumbein, Chair; Jane L. Cornett and Christene M. Ertl, Co-Vice Chairs. Jane Cornett reported. The seminar is set for February 21st and 22nd at Nova Law School. They hope to bring in some of the law students as well. It will be available by webinar, and materials will be available.

C**onstruction Law – Reese J. Henderson, Jr., Chair; Sanjay Kurian, Vice Chair.** Lee Weintraub reported on a joint meeting with Insurance and Surety. A construction engineer came in to teach how to review plans and blueprints. The committee is involved in a great deal of pending legislation right now.

Construction Law Certification Review Course – Melinda S. Gentile and Elizabeth B. Ferguson Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs. Approximately 50 people have registered so far.

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Construction Law Institute – Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs. Jason Quintero reported. The event will be held on March 6th and 7th with a golf tournament on March 5th. Registration is currently open. To date, 108 have signed up. It is going to be a tremendous program featuring many great speakers. Event will be run in conjunction with Construction Law Board Certification CLE.

Development & Land Use Planning – Julia L. Jennison, Chair; Jin Liu and Colleen C. Sachs, Co-Vice Chairs. Colleen Sachs reported. The committee is planning a Development and Land Use 101 series that will have broad interest throughout the real property division. It will be on the committee website.

Insurance & Surety – Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs. No report.

Liaisons with FLTA – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs. Alan McCall reported.

He discussed a RON webinar being developed in conjunction with RPPTL and FLTA. He thanked all parties that assisted with the development of same. He also discussed Lobby Days, which is February 10-12, explaining that FLTA takes about 40 members to attend the legislative session and to sit with the Legislature to get a good flavor of what the Legislature is about. There was also a discussion regarding the Redaction Bill and how it is causing issues with FLTA; however, there are some suggestions as to how to resolve the issues. It appears that the clerks who are redacting the information are running into problem themselves with handling redactions. For example, keeping courthouse records open as the constitution requires. One suggestion would be to redact the internet facing information but keep it as part of the public records at the courthouse They are still working on this with RPPTL to resolve the issues.

Real Estate Certification Review Course – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach, Lloyd Granet and Brian W. Hoffman, Co-Vice Chairs. Lynwood Arnold reported that the Course is moving along. It is scheduled for April.

Real Estate Leasing – Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs. Chris Sadjera reported that there was no meeting, but the committee is working on some legislation regarding Chapter 83 Tenant Law and the Uniform Leasing Issues that are being modified. The committee is currently handling updates to the Supreme Court approved forms for residential leases.

Real Property Finance & Lending – Richard S. McIver, Chair; Jason Ellison and Deborah B. Boyd, Co-Vice Chairs. Richard McIver reported that Jason Ellison gave a presentation on financial fraud. They are considering making it a webinar.

Real Property Litigation – Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs. Michael Hargett thanked Manny Farach regarding his presentation of the Business Records Rule. The presentation is available on the committee page website.

Real Property Problems Study – Lee A. Weintraub, Chair; Adele Ilene Stone, Stacy O. Kalmanson and Susan K. Spurgeon, Co-Vice Chairs. Lee Weintraub presented. The committee had a joint meeting with the Commercial Real Estate committee that included a great CLE on RON given by Melissa Murphy and Burt Bruton. The PowerPoint for the presentation is available on the committee webpage. Susan Spurgeon is chairing a subcommittee. She is working with the Florida Bar Ethics and Professionalism committee regarding Fla. Stat. §57.105 (2019). ALMS is working with Susan to develop war stories. If anyone has any war stories to provide, please email Susan Spurgeon so she can review with the subcommittee and confirm whether to present the story to the Ethics and Professionalism committee. Two new subcommittees have been formed. Silvia Rojas is chairing a subcommittee that will examine difficulties relating to ladybird deeds and enhanced life estates. Rick Taylor is chairing a subcommittee exploring fiduciary duties to third party non-clients.

Residential Real Estate and Industry Liaison – Nicole M. Villarroel and Salome J. Zikakis, Co-Chairs; Raul Ballaga, Louis E. "Trey" Goldman, and James A. Marx, Co-Vice Chairs. Nicole Villarroel presented. The committee discussed the new Business Corporations Statutes and the Pace Loans Addendum. There was significant discussion regarding the form of the addendum during the committee meeting. The addendum will be an action item on the Executive Council meeting agenda.

Title Insurance and Title Insurance Liaison – Brian W. Hoffman, Chair; Mark A. Brown, Alan B. Fields, Leonard Prescott and Cynthia A. Riddell, Co-Vice Chairs. No report.

Title Issues and Standards – Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Karla J. Staker, and Rebecca Wood, Co-Vice Chairs. Brian Hoffman reported that they reviewed different legislation during the committee meeting, including, the redaction of information. They are working on proposed legislation.

Adjournment. Meeting adjourned at 9:13 am.

The drafter thanks Michelle Hinden for her efforts in compiling the meeting summary.

Roundtable

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, February 1, 2020
Grand Hyatt Tampa Bay, Tampa, Florida

Prepared by Sarah Butters, Esq., Ausley McMullen, Tallahassee, Florida and
Elizabeth A. Bowers, Esq., Gunster, Yoakley & Stewart, P.A., West Palm Beach, Florida

Thank you to the Roundtable Sponsors: Stout and Guardian Trust

Sarah Butters ("Sarah"), Director of the Probate and Trust Division, called the meeting to order at 8:00 a.m.

Information Item.

Probate and Trust Litigation Committee — J. Richard Caskey, Chair: Richard Caskey spoke about the proposed changes to Florida Statutes § 736.1008, which would provide that the same statute of limitations for breach of trust against a trustee would apply to directors, officers, and employees acting for the trustee.

Ad Hoc Guardianship Law Revision Committee — Nicklaus J. Curley and Sancha Brennan Whynot, Co-Chairs: Sancha Whynot gave an update on the guardianship code re-write and the committee's intention to pass this as an action item during the Breakers meeting. They are in the process of preparing the white paper, which should be published at the next meeting.

Long-Term Planning Committee. William T. Hennessey, III, Chair Elect, led an extensive discussion regarding the Long-Term Planning Committee's strategic plan for new legislation.

Other Announcements.

Ad Hoc Committee on Electronic Wills — Angela McClendon Adams, Chair: Angela Adams announced that the new remote notary statute went into effect on January 1. She cautioned practitioners to ensure that all notarized documents include the new notary block, which requires the notary to indicate whether the notarization was done in the notary's physical presence or remotely. Angela also announced that her committee has prepared a new self-proof affidavit for testamentary documents, as this was mistakenly left out of the legislation.

Charitable Planning and Exempt Organizations Committee — Seth Kaplan, Chair: Seth Kaplan reminded everyone of his Committee's Fall 2020 charitable organization symposium.

Adjournment. The next Probate and Trust Division Roundtable meeting will be held in Orlando, Florida.

RPPTL Section's At-Large Members

By Lawrence J. Miller, Esq.,
Gutter, Chaves, Josepher, Rubin, Foreman, Fleisher, Miller, P.A., Boca Raton, Florida

The RPPTL Section's At-Large Members ("ALMs"), who represent the Section throughout the state, continue to assist with instituting, supporting and publicizing new and existing programs, and information gathering in their respective communities and within the RPPTL Section and the Executive Council.

ALMs sponsored or supported community projects as well as its support and involvement in "outreach" programs throughout the state has continued to grow. ALMs have continued to provide staffing and organizational support for law student mock interviews statewide in conjunction with the RPPTL Section's Law School/Mentoring Committee. Interview programs have been held or are planned with the participation of ALMs in the 11th, 13th, 9th, 20th and 7th Circuits. In addition, attorney diversity programs in circuits across the state continue to include ALMs at both the organizing and participation level. In each of these programs, ALMs assist RPPTL the Section's Membership and Inclusion Committee in programming or by attending events and providing resourced and contact information, including networking with minority bar members and representatives of the diverse legal communities present in the circuits.

ALMs have also continued to provide strong support for the organization and delivery of legal services through the No Place Like Home ("NPLH") program, a partnership between the RPPTL Section and legal aid services organizations around the state. ALMs' participation in the NPLH program has provided part of the volunteer base for teaching Florida lawyers the need for the method to cure title defects which threaten occupancy, government subsidy and continued ownership of Florida residences. Such participation has also included ALMs taking on pro-bono cases to rectify title issues, also in conjunction with legal aid services organizations around the state. The NPLH program's focus now also includes investigation into possible funding alternatives which may assist Florida's underserved population in remaining in long term generational residences by addressing title defects and issues.

New efforts also undertaken in conjunction with statewide legal aid/services offices and have assisted in the rollout of the new Florida Attorneys Counseling on Evictions ("FACE") program. FACE will provide to the underserved community Section volunteer attorney support for defense of residential evictions. Those evictions are expected to rise exponentially as a result of the COVID-19 pandemic. The FACE program, like the NPLH program, is to be coordinated with Florida's legal aid services organizations.

ALMs have also continued to provide coordination and sponsorship opportunities for CLE and other local bar association programs in the circuits which enhances the relationship between the RPPTL Section and its members and provides support for programs which also enhances lawyer education and involvement on a statewide basis. As to the RPPTL Section/Executive Council, ALMs' focus and information gathering work continues with increased focus on ALMs' coordination with the RPPTL Section's committees through the ALMs Committee Liaisons. Most recently and with the assistance of the ALMs' Guardianship Committee Liaison, guardianship fee information was gathered by ALMs in each of the state's circuits and provided to the Guardianship, Advance Directives and Power of attorney Committee for study in responding to question and issues arising in the efforts to revise statewide guardianship legislation.

Finally, and again, quite recently, enhanced contact by ALMs in their respective circuits, with RPPTL Section members in those circuits, is being facilitated to permit dissemination of more information about the RPPTL Section and its programs to RPPTL Section members, both in person (at meetings, including virtually) and through enhanced newsletter information, including a newly proposed template for information dissemination or RPPTL Section members in each circuit.

The Threshold Question On Threshold Inspections: To Whom Does The Threshold Inspector Owe A Duty?

By Perry M. Adair, Esq., Becker & Poliakoff, P.A., Coral Gables, Florida

The position of threshold inspector[1] has its origin in the March 27, 1981 collapse of the then under construction, Harbour Cay Condominium building in Cocoa Beach, Florida. On that day, the five-story flat-plate reinforced concrete building collapsed as concrete was being placed for the roof slab.[2] Eleven workers were killed and twenty-three were injured.[3] The collapse was caused by a combination of design defects, incorrect steel placement, and possible shoring issues.[4]

A legislative response to that disaster was the threshold inspector statute, Fla. Stat. § 553.79 (2019) titled, Permits; Applications; Issuance; Inspections.[5] According to the then Chairman of the Florida Engineering Society's State Constructed Environment Committee, who devised the statute, the contemplated threshold inspections "were to ensure that the construction complied with the permitted drawings."[6]

The focus of this article is the issue of to whom the threshold inspector owes a duty in negligence. The origin of the threshold inspector, the Harbour Cay collapse, could lead one to conclude a duty is owed to anyone who might be injured if a building is constructed improperly. Recent trial court decisions in construction defect cases, however, conclude that the threshold inspector owes a duty only to the (a) permitting authority and (b) development entity/owner with whom it contracts to perform its threshold inspections.[7] Florida trial courts have ruled that a threshold inspector owes no duty in negligence to other third parties, a condominium association, or to a general contractor who relied on the threshold inspector's inspections.

This article will review the arguments and authorities advanced by both sides of the duty issue based on common law and statutes.[8]

Threshold Building Definition and Threshold Inspection Requirement

A "threshold building" is any building that is greater than three stories or 50 feet in height, or that has an assembly occupancy classification as defined in the Florida Building Code that exceeds 5,000 square feet in area and an occupant content of greater than 500 persons.[9] An enforcing agency must require a threshold inspector to perform structural inspections on a threshold building, pursuant to a structural inspection plan prepared by the engineer or architect of record.[10]

The purpose of the structural inspection plan is to provide specific inspection procedures and schedules so that the building can be adequately inspected for compliance with the permitted documents.[11] The enforcing agency must approve the structural inspection plan before issuing a permit for the construction of the threshold building.[12]

The threshold inspector performs his or her services against the backdrop of

1. the Harbour Cay collapse,
2. a requirement that his or her services be performed pursuant to an enforcing agency-approved structural inspection plan (the purpose of which is to guide the threshold inspections of the building) to confirm the building is constructed in accordance with the permitted documents; and
3. the knowledge that without the threshold inspector's written confirmation, under seal, confirming that the construction complies, a certificate of occupancy will not be issued.

Requirements to be a Threshold Inspector

A threshold inspector must be "a licensed architect or registered engineer who is certified under chapter 471 or chapter 481 to conduct inspections of threshold buildings."[13] The licensed architect or registered engineer may have her or his duly-authorized representative perform "inspections provided all required written reports are prepared by and bear the seal of the special inspector and are submitted to the enforcement agency."[14]

The Florida Administrative Code sets forth required qualification for engineers and architects to serve as threshold inspectors.[15] Those requirements include having experience in performing structural field inspections on threshold buildings. The required experience ranges from three to five years, depending on the threshold inspector's principal practice. For authorized representatives, the Florida Administrative Code requires "four years of Threshold Building inspection training on non-Threshold Buildings performed under the supervision of a Special Inspector who was in responsible charge of the trainee's work…."[16]

Inspections constitute architectural and engineering services. The definition of "Architecture" includes "job site inspections."[17] "Engineering" includes "inspections of construction for the purpose of determining in general if

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the work is proceeding in compliance with the drawings and specifications…."[18]

Employment of Threshold Inspectors

The fee owner of a threshold building is required to select and pay the threshold inspector.[19] The threshold inspector is however, "responsible to the enforcement agency."[20] Some have cited that language to argue that a threshold inspector does not owe a duty to the end user of a threshold building or a contractor involved in the construction. They argue that the statute provides an exclusive list of those to whom the threshold inspector owes a duty. The context of this language as well as the case law on statutory construction, however, support an argument that the "responsible to" language was not intended to exclusively define to whom the threshold inspector owes a duty.

Pro-duty advocates argue that such a strict interpretation of the inspector's duty is inconsistent with the purpose of a statute, which is to prevent a Harbour Cay-like disaster. They further argue this interpretation is contrary to common law that extends liability to third parties for errors and omissions caused by a professional, namely a licensed architect and/or engineer.

Considering its context, the intent of the "responsible to" language may be much more straightforward. The threshold inspector is selected by, is employed by and is being paid by the owner. Given that context, the purpose and intent of this language could be simply to give the enforcement agency authority over the architect or engineer hired by someone else (the owner). Absent the "responsible to" language, what authority would the enforcing agency have over the threshold inspector? What power would the enforcing agency have to require the threshold inspector to follow the threshold inspection plan?

The "responsible to" language does not necessarily preclude or limit other duties owed. Statutory duties will only preempt and supersede common law duties when: (1) the statute expressly states that it eliminates or limits common law rights and duties, or (2) the statutory scheme is so contrary to existing common law duties that it would be repugnant to the statute for the common law to remain in force.[21] Pro-duty advocates argue that the threshold inspector statute neither states that any common law duties or other legal obligations are eliminated or restricted, nor would it be repugnant or even inconsistent for a threshold inspector to have a duty to others alongside his or her duty to the enforcing agency.

The Threshold Inspector's "Deliverables"

The threshold inspector statute expressly contemplates that the threshold inspector will provide certain deliverables to satisfy his or her obligations. The following are most relevant to this discussion:

1. Written reports prepared by and bearing the seal of the threshold inspector.[22]

2. A signed and sealed statement, to be submitted prior to the issuance of a certificate of occupancy stating substantially:

> To the best of my knowledge and belief, the construction of all structural load-bearing components described in the threshold inspection plan complies with the permitted documents, and the specialty shoring design professional engineer has ascertained that the shoring and reshoring conforms with the shoring and reshoring plans submitted to the enforcement agency.[23]

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The requirement that the threshold inspector apply his or her seal is potentially significant to the duty analysis. Regarding design drawings, the Fourth District Court of Appeal observed that a professional's use of his or her seal is significant stating:

> The requirement that a registered engineer stand behind and be responsible for his structural plans and specifications is no idle precaution; most especially when dealing with a building some 12 stories high. The designer of such structures owes a duty of care not only to the owner of the property but to the public as well. The signing and sealing of such plans fixes the responsibility for assistance during construction and ultimate liability for negligent design.[24]

The Florida Supreme Court in Moransais[25] established that construction professionals owe duties to a broad range of parties, including the public at large. The Court rejected the argument that privity or special relationships limited such duties, stating that, "the law imposes a duty to perform… in accordance with the standard of care used by similar professionals in the community under similar circumstances."[26]

Consistent with Moransais, the Fourth District Court of Appeal held that engineers and architects have duties that extend beyond contractual privity.[27] As stated above, a threshold inspector is required to be a licensed architect or engineer. Moransais, at a minimum, suggests Florida jurisprudence supports a determination that a threshold inspector's duty is not limited to the enforcing agency. The no duty advocates argue however, that the threshold inspector statute must be strictly construed, compelling a conclusion that any duty is solely to the enforcing agency.

The Decisions in Two City, Altman, and 2700 Ocean

Duty is a question of law, but the duty analysis involves an examination of the facts of each case. This is particularly so when the duty is a common law duty "arising from the general facts of the case."[28] A review of the facts in Two City, Altman and 2700 Ocean is helpful in considering not only whether those decisions further or diminish the goal of the threshold inspector statute but also, whether A.R. Moyer's[29] "supervision and control" analysis is useful or appropriate in an analysis of a threshold inspector's duties.[30]

Two City involved a negligence claim by a condominium association against a threshold inspector. The negligence alleged was that the inspector did not adequately inspect the work. The threshold inspector argued it had no duty to the association because (a) the threshold inspector statute says the inspector is responsible to the enforcing agency and (b) the threshold inspector did not create, in the words of the trial court, "the risk in question."[31]

The trial court entered summary judgment in favor of the threshold inspector. The order granting summary judgment stated in part: (a) "the [threshold inspector] inspected the construction work in question and did not, therefore, create the risk in question"[32] and (b) "the language of section 553.79 (5) (b), Florida Statutes, … identifies to whom a special inspector owes its duty(ies)."

Altman involved a general contractor's negligence claim against a threshold inspector. The alleged negligence was a failure to properly inspect the placement of rebar in balconies under construction. If the threshold inspector did not approve the placement of the rebar, the balcony could not have been poured. A number of the balconies had defects related to improper placement of the rebar. Some balconies had to be removed and replaced. Others required extensive repairs. The general contractor undertook those repairs and bore the associated cost.

The threshold inspector moved for summary judgment. The inspector contended, in sum, that it did not owe a duty of care to the general contractor. The inspector made an A.R. Moyer based argument that a design professional owes a duty of care to a general contractor only if the design professional has the authority to supervise, control and stop the general contractor's work. The inspector also relied on the Two City order to argue that the threshold inspector owes a duty of care solely to the building official.

The trial court granted summary judgment in favor of the threshold inspector.[33] The Altman order does not provide the trial court's analysis or explain how it reached its conclusion. However, it is reasonable to assume that the court found that the inspector did not have a duty based on (a) AR Moyer factors, (b) the language of the statute, or (c) both.

2700 Ocean also involved a negligence claim by a condominium association against a threshold inspector. The association alleged that the inspector failed to properly inspect the work. The threshold inspector moved for summary judgment. It argued that it had no statutory, contractual or common law duty to the association. The threshold inspector relied on the Two City and Altman orders as support for its motion for summary judgment.

The 2700 Ocean court sided with the threshold inspector and granted its motion. The court's order stated in part, "[s]ee § 553.79(5)(b)." The court's citation indicates that the court concluded the "responsible to" language limits a threshold inspector's duty to only the enforcing agency. That subsection provides in part, "[t]he fee owner of a threshold building shall select and pay all costs of employing a special inspector, but the special inspector shall be responsible to the enforcement agency. (Emphasis added)

Is the AR Moyer Analysis Appropriate for Determining the Duty of a Threshold Inspector?

It has been said that "A.R. Moyer is the leading case governing

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the liability of a supervising architect."[34] Insofar as relevant to this discussion, in A.R. Moyer, the Florida Supreme Court held that a general contractor may maintain a negligence action against a supervising architect notwithstanding the absence of privity. Central to the court's analysis and decision was the control the supervising architect had over the general contractor. One must at least ponder, whether A.R. Moyer — a case involving the duty of an architect to a general contractor — has any application to the analysis of a threshold inspector's duty, whether to a general contractor or the ultimate occupants of a threshold building. The conclusion that it does not, seems to be bolstered by the Spancrete decision.

In Spancrete, Florida's Third District Court of Appeal noting that A.R. Moyer had been limited strictly to its facts[35], ruled "the duty of care there recognized [i.e., the duty of a supervising architect to a general contractor] does not extend to a subcontractor." [36] If the duty examined in A.R. Moyer could not even be extended to a subcontractor, one must question whether the A.R. Moyer analysis is appropriate for analyzing the duty of a threshold inspector.

It is fair to say that A.R. Moyer turned on the architect being a supervising architect and having control over the general contractor in the performance of its duties. Fair to say that the threshold inspector statute does not expressly grant the threshold inspector the power to supervise[37] or control the general contractor. Equally fair to say however, that the threshold inspector statute does empower the threshold inspector to withhold his or her required certification which is required for the threshold building to receive a certificate of occupancy. In other words, the threshold inspector controls whether the threshold building can be occupied.[38]

Control and supervision of the general contractor are not required for the threshold inspector to fulfill his or her duties. It therefore bears consideration whether control and supervision should dictate the parameters of a threshold inspector's duties. Doing so creates a scenario where an owner could simply include in an owner/threshold inspector agreement than the threshold inspector would not have the duty to supervise or control the general contractor. The result could be (although the author submits should not be) to contract away any duties.

This is not to say that where a threshold inspector does supervise or control a general contractor, liability will not result under A.R. Moyer. It is only to say that the A.R. Moyer analysis may not be the best way to examine a threshold inspector's duties.

Does The Threshold Inspector 'Create' Any Risk?

Relying on McCain,[39] the no duty advocates maintain the threshold inspector does not create a foreseeable zone of risk and has no duty. In McCain, the plaintiff was electrocuted when he dug in an area which had been negligently marked by an employee of Florida Power. By analogy to a threshold inspector's report that inaccurately reports a threshold building has been constructed in accordance with the permitted documents, the Florida Power employee inaccurately reported (marked) where it was safe to dig. The Florida Supreme Court upheld a verdict against Florida Power. The court stated in part, "[t]he duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others."[40]

It would seem self-evident, if for no other reason than his or her reports must be under seal, that a threshold inspector has a duty to use reasonable care in inspecting and reporting the condition of the threshold building.

> The issue is whether that duty should run to those who could foreseeably be harmed if the duty is breached, or only to the enforcing agency who will issue a certificate of occupancy in reliance on the inspections and reports.

Of course, the threshold inspector does not construct or create the building he or she is inspecting, unlike Florida Power who constructed/created the power generating equipment and distribution system in McCain. Like the inaccurate marking (reporting) of the underground electrical cables however, when the threshold inspector negligently inspects and then inaccurately reports the condition of the building, it has in effect created a foreseeable zone of risk — a building that will be occupied. Absent the inspector's certification, the building would not be occupied. Stated differently, absent the threshold inspector's report confirming the building was constructed in accordance with the permitted plans, the zone of risk would be much narrower because the building would not be occupied.

Does Trianon[41] Preclude A Common Law Duty?

The argument has been made that Trianon precludes the existence of a common law duty on the part of a threshold inspector. The argument appears to presume that a threshold inspector should be treated the same way as a government entity would be treated for the actions of its building inspector. That position does not appear to be totally consistent with the holding of Trianon or the language of the threshold inspector statute.

In Trianon, the court answered in the negative the certified question: "Whether a governmental entity may be liable in tort to individual property owners for the negligent actions of its building inspectors in enforcing provisions of a building code enacted pursuant to the police powers vested in that governmental entity."[42] The Trianon holding would appear to be limited to governmental entities. The threshold inspector statute provides in part: "[t]he [threshold inspector] may not serve as the surrogate in carrying out the responsibilities of the building official…."[43] It is not clear that either Trianon or the threshold inspector statute support the treatment of a threshold inspector like a government entity.

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The Undertaker Doctrine

Threshold inspectors are not drafted. Rather, for a fee they undertake to perform the inspections and provide the reports contemplated by the threshold inspector statute. While in Trianon, the Florida Supreme Court observed, "…there is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals," the Court has also approved the undertaker doctrine.

In Clay Electric,[44] the court commented on the doctrine:

> [w]henever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service—i.e., the "undertaker"—thereby assumes a duty to act carefully and to not put others at an undue risk of harm (cite omitted). This maxim, termed the "undertaker's doctrine," applies to both governmental (cite omitted) and nongovernmental entities (cite omitted). The doctrine further applies not just to parties in privity with one another—i.e., the parties directly involved in an agreement or undertaking—but also to third parties. Florida courts have applied the doctrine to a variety of third-party, contract-based negligence claims and ruled that the defendants could be held liable, notwithstanding a lack of privity.[45]

Clay contracted to maintain streetlights. A fourteen-year-old was struck by and killed by a vehicle in an area where a streetlight was inoperative.[46] Citing McCain, the court held that a duty arose under the general facts of the case and that Clay owed a duty to Plaintiff. [47]

A threshold inspector undertakes to perform the services required by the threshold inspector statute. It has a duty to exercise reasonable care in doing so. Clay contracted to maintain streetlights. Like the threshold inspector who does not build (create) the building he or she inspects, Clay did not install the streetlight. Clay undertook to maintain the streetlight just as the threshold inspector undertakes his or her duties. The court noted that Clay's negligence increased the risk that the driver would be unable to see child who was killed. Clay would appear to support the pro duty argument that a threshold inspector who fails to use reasonable care and certifies that a building is constructed in accordance with the permitted plans when in fact it is not, has increased the risk of harm resulting from a defect in the building.

Conclusion

The threshold inspector statute creates a new paradigm, the duty aspect of which may require a different analysis than what has been applied to date or at least more flexible reading of cases like A.R. Moyer or McCain to measure the inspector's duty. That the Harbour Cay tragedy was the impetus for the threshold inspector statute, and the requirement that only an engineer or an architect can act as a threshold inspector, would suggest a broader duty than the no duty advocates suggest. That the threshold inspector has the power to withhold his or her report and thereby prevent the issuance of a certificate of occupancy would seem to be more than enough control to warrant the duty the pro duty advocates maintain is appropriate. The courts will need to decide what interpretation and application of the threshold inspector statute furthers the public safety purposes of the statute.

P. ADAIR

Perry Adair *serves as Office Managing Shareholder of Becker's Miami Office. He is Florida Bar Board Certified in Construction Law, focusing his practice on business litigation with an emphasis on construction disputes. Perry can be contacted at padair@beckerlawyers.com.*

Endnotes

1 Perhaps more precisely referred to as a 'Special Inspector who performs inspections on threshold buildings.' For economy of words, the author uses the term threshold inspector.

2 W. Gene Corley, SE, PE, PhD, CASE STUDY: *Collapse of Harbour Cay Condominium, Cocoa Beach, Florida.* Structural Engineering Institute of the American Society of Civil Engineers.

3 *Id.*

4 John Pistorino, SE, SI, *Potential Liabilities Facing Threshold Building Inspectors.* Florida Board of Professional Engineers, July 2020 Newsletter.

5 Referred to herein as the "threshold inspector statute."

6 John Pistorino, SE, SI, *Potential Liabilities Facing Threshold Building Inspectors.* Florida Board of Professional Engineers, July 2020 Newsletter.

7 *Two City Plaza Condo. Ass'n, Inc. v. Kolter City Plaza, II, Inc.,* Case No, 2016-CA-011149 (Fla. 15th Cir. Ct. January 24, 2019) (hereinafter, "Two City"); Altman Glenewinkel Constr., LLC v. Orange and Blue Constr., Inc., et.al., Case. No. 50-2017-CA-001280 (Fla. 15th Cir. Ct. December 26, 2019) (hereinafter, "Altman"); and 2700 North Ocean Condo. Ass'n, Inc., v. Singer Island Condominiums, Ltd., et. al., Case. No. 50-2014 CA-010718 (Fla. 15th Cir. Ct. February 25, 2020) (hereinafter, "2700 Ocean").

8 The author represented the party on the losing side of the trial court duty decision in the 2700 Ocean matter. That decision was appealed, but the Fourth District Court of determined that the appeal was premature, apparently because crossclaims that remained pending against the threshold inspector.

9 Fla. Stat § 553.71(12) (2019); 7 Fla. Jur. 2d 49, *Prerequisite to issuance of permit- Threshold Buildings.*

10 Fla. Stat. § 553.79(5)(a) (2019); 7 Fla. Jur. 2d 49, *Prerequisite to issuance of permit- Threshold Buildings.* "Local enforcement agency" means an agency of local government, a local school board, a community college board of trustees, or a university board of trustees in the State University System with jurisdiction to make inspections of buildings and to enforce the codes which establish standards for design, construction, erection, alteration, repair, modification, or demolition of public or private buildings, structures, or facilities. Fla. Stat. § 553.71(5) (2019).

11 Fla. Stat. § 553.79(5)(a) (2019).

12 *Id.*

13 Fla. Stat. § 553.71(9) (2019).

14 Fla. Stat. § 553.79(5)(d) (2019).

15 Fla. Admin. Code 61G15-35.003 and 61G1-25.003.

16 Fla. Admin. Code 61G15-35.004 (2)(e). The Rule also provides as alternatives certifications from the American Concrete Institute, the International Code Council, the Post-Tensioning Institute and the American Institute of Steel Construction as applicable to the type of inspections being conducted.

17 Fla. Stat. § 481.203(6) (2019).

18 Fla. Stat. § 471.005(5) (2019).

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19 Fla. Stat. § 553.79(5)(b) (2019).

20 *Id.*

21 *Major League Baseball v. Morsani,* 790 So. 2d 1071, 1078 (Fla. 2001); *Jax Utilities Mgmt., Inc. v. Hancock Bank, LLC,* 164 So. 3d 1266, 1271 (Fla. 1st DCA 2015).

22 Fla. Stat. § 553.79(5)(d) (2019).

23 Fla. Stat. § 553.79(7)(a) (2019).

24 *O.P. Corp. v. Lewis,* 373 So. 2d 929, 931 (Fla. 4th DCA 1979) (emphasis added).

25 *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

26 *Id.* at 975-976.

27 *See e.g. Trikon Sunrise Associates, LLC v. Brice Building Co., Inc.,* 41 So. 3d 315, 318 (Fla. 4th DCA 2010) (professional rendering professional services has duty of care which extends to third-party landowner with whom professional had no direct relationship); *Hewitt-Kier Constr., Inc. v. Lemeul Ramos and Associates, Inc.*, 775 So.2d 373, 375 (Fla. 4th DCA 2000) (contractor not in privity with architect could maintain negligence claim against architect who drew plans for contractor's client).

28 McCain *v. Florida Power Corp.*, 593 So. 2d 500, 505 Fn. 2 (Fla. 1992) (hereinafter, "McCain") (describing the four different sources of duties and citing the Restatement (Second) of Torts. McCain is a favorite of the no duty advocates. They argue that it *precludes* a duty because the threshold inspector does not *create* "a foreseeable zone of risk" because the inspector did not 'create' the defective work. Pro-duty advocates argue that it is beyond legitimate dispute that the threshold inspector creates the risk of a building with defects being occupied when the inspector issues its report under seal stating that building has been constructed in accordance with the permitted plan, when in fact, that is not the case. The author submits that McCain's "creates," like *A.R. Moyer's* "supervision" and "control" *(infra*, Note 29), at least as those terms are used in those cases, may not be terribly helpful in analyzing the duty of a threshold inspector.

29 *A.R. Moyer v. Graham,* 285 So. 2d 397 (Fla. 1973) (hereinafter, "A.R. Moyer").

30 Significantly, the Florida Supreme Court has limited the holding in *A.R. Moyer* to the facts of that case. *Casa Clara Condo. v. Charles Topino & Sons, Inc.*, 620 So. 2d 1244, 1248 (Fla. 1993) (hereinafter, "Casa Clara"). *A.R. Moyer* did not involve a threshold inspector, much less the question of to whom a threshold inspector owes a duty.

31 *See*, Two City, *supra* Note 7, "*Order on Ardaman and Associates, Inc's Motion for Partial Summary Judgment*," at para. 5., presumably referring to the risk of injury resulting from defective work performed by others.

32 Emphasis added.

33 The ruling is under appeal.

34 *Spancrete, Inc., v. Ronald E. Frazier & Associates, P.A.,* 630 So. 2d 1197 (Fla. 3rd DCA 1994) (hereinafter, "Spancrete").

35 See, *Casa Clara, supra* Note 30, at. fn.9. where the Florida Supreme Court limited *A.R. Moyer* "strictly to its facts."

36 *Spancrete, supra* Note 34, at 1198.

37 "Supervise" is defined as "to be in charge of." https://www.merriam-webster.com/dictionary/supervise

38 Of course, it is the permitting authority that makes the ultimate decision of whether to issue a certificate of occupancy. However, that may not dispositive of the duty issue. *See*, *Garce and Naeem Uddin, Inc., v. Singer Architects, Inc.,* 278 So. 3d 89, 93 (Fla. 4th DCA 2019) (observing that even though an architect did not have absolute authority to stop the work, it had the authority to recommend work stoppage, was relevant to the issue of supervisory control).

39 McCain, *supra,* Note 28.

40 *Id.,* at 503: (internal quotes in original).

41 *Trianon Park Condominium Assoc., Inc. v. City of Hialeah,* 468 So. 2d 912 (Fla. 1985).

42 *Id*. at 914.

43 Fla. Stat. § 553.79(5)(a) (2019). "Surrogate" has been defined as "one appointed to act in the place of another: Deputy." https://www.merriam-webster.com/dictionary/surrogate

44 *Clay Electric Cooperative, Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003), (rehearing denied 2004).

45 *Id.* at 1186. The court also cited to Section 324 A of the Restatement (Second) of Torts § 342 A (1965) which is in accord on liability to third persons.

46 *Id*. at 1184.

47 *Id.* at 1185.

Enhanced Life Estates Are Now Standard Practice

By Benjamin T. Jepson, Esq., Attorneys' Title Fund Services, LLC, Orlando, Florida

Enhanced life estate deeds, also known as "Lady Bird Deeds," are deeds wherein the life tenant is either granted or reserves certain powers and control over the remainder interest vested in another person or people. Generally, it is considered sufficient to create an enhanced life estate when the life tenant has the power to "sell, convey, mortgage or otherwise manage and dispose of" the real property without the consent of the remindermen. The issue, as noted in the comments to all of the uniform title standards to be discussed in this article, is, "although Lady Bird Deeds are used prevalently in Florida for various purposes, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice." Recognizing the lack of authority available, last year the Uniform Title Standards Committee of the Real Property, Probate and Trust Law Section of The Florida Bar approved three new title standards regarding enhanced life estates to "represent the consensus view of the Real Property, Probate, and Trust Law Section of The Florida Bar." Each uniform title standard contains the title standard, examples of hypothetical fact patterns illustrating the application of the title standard, and commentary about the title standard.

The first new uniform title standard is Uniform Title Standard 6.10 titled: Enhanced Life Estate: Deed for Non-Homestead Property, which provides:

> The holder of a life estate in non-homestead property, coupled with the power to sell, convey, mortgage and otherwise manage the fee simple estate, can convey or encumber the fee simple estate during the lifetime of the holder without the remaindermen.

This first uniform title standard confirms title to non-homestead property can be validly held in an enhanced life estate.

The first problem illustrating the application of the standard is:

> A remainder in Blackacre was conveyed by John Doe to Jane Smith with John Doe reserving for himself, without any liability for waste, full power and authority in himself to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without joinder of the remaindermen, and full power and authority to retain any and all proceeds generated by such action. John Doe died. Is the conveyance to Jane Smith valid?

The answer is "yes." This first problem shows, as long as the property is not conveyed during the lifetime of the life tenant, title to non-homestead property held in an enhanced life estate will pass to the remainderman upon the death of the life tenant without anything further.

The second problem illustrating the application of the standard is:

> Same facts as in Problem 1, except John Doe, during his lifetime and for his benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. Did Jeffery Williams acquire title to Blackacre free of the claims of Jane Smith?

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The answer, again, is "yes." This problem confirms the life tenant with enhanced powers can convey fee simple title to non-homestead property held in an enhanced life estate to a third-party without the joinder of the remainderman. This is because the remainderman holds a vested interest subject to divestment by the life tenant. It is Important to note title insurance underwriters will typically want to confirm the conveyance to Jeffrey Williams was clearly authorized by the powers held by the life tenant with enhanced powers and often make a distinction between the power to "sell" or "dispose of" and the power to "gift."

The third problem illustrating the application of the standard is:

> Same facts as in Problem 1, except John Doe, during his lifetime and for his benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. At the time of the conveyance, Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith and Creditor?

The answer is "yes." This third problem addresses the issue of judgment liens against the remainderman and confirms the life tenant with enhanced powers has the same power to divest judgment liens against the remainderman as the life tenant with enhanced powers does to divest the actual remainderman. The creditor's lien can only attach to the interest held by the remainderman and, in this case, the life tenant with enhanced powers always had the power to divest the remainderman of her interest, so, the same is true for the Creditor's judgment lien.

The fourth, and final, problem illustrating the application of this standard is:

> Same facts as in Problem 1, except Creditor has a judgment lien against John Doe. However, Creditor does not levy and execute his judgment. John Doe dies without conveying the property. Did Jane Smith acquire title to Blackacre free of the judgment lien of Creditor?

Once again, the answer is "yes." The final problem addresses the issue of judgment liens against the life tenant with enhanced powers. As stated above, creditors' liens can only attach to whatever interest the debtor has in the real property. In this case, the life estate held by the life tenant with enhanced powers terminates upon their death, so the life tenant with enhanced powers no longer has an interest in the property. Further, as discussed in the Comments to this uniform title standard, pursuant to Fla. Stat. § 733.706 (2018), judgment creditors cannot enforce their liens against property owned by the debtor at their death without the approval of the court. Instead, the creditor becomes a creditor of the estate of the deceased life tenant and will have to file a claim against the estate in the same manner as other claims.

Finally, for this uniform title standard, the Comment section makes two important points about how to avoid title issues when there are attempts to divest the remaindermen of their interest by the life tenant with enhanced powers. The first point is to ensure the power to divest the remaindermen is specifically included in the powers retained by/granted to the life tenant in the deed creating the enhanced life estate. The second point is the deed from the life tenant with enhanced powers attempting to divest the remaindermen of their interest should clearly state the life tenant's intent, whether by reconveying the remainder interest or by conveying the entire fee simple title to a third party.

The second new uniform title standard on enhanced life estates is Uniform Title Standard 6.11: Enhanced Life Estate: Life Tenant and Homestead Property, which states:

> A life tenant with an interest in homestead property, coupled with the power to sell, convey, mortgage, and otherwise manage the fee simple estate, can convey or encumber the fee simple estate during the lifetime of the holder without the remainderman.

This uniform title standard holds the title to homestead property, just like the title to non-homestead property, can be validly held in an enhanced life estate.

The first problem illustrating the application of this uniform title standard states:

> A remainder in Blackacre was conveyed by John Doe to Jane Smith by John Doe reserving for himself, without any liability for waste, full power and authority in himself to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration without joinder of the remainderman and full power and authority to retain any and all proceeds generated by such action. During his lifetime and for his own benefit, John Doe by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. John Doe was a single man at the time of the conveyance to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

The answer is "yes." This problem confirms a single life tenant with enhanced powers can convey fee simple title to homestead property held in an enhanced life estate to a third-party without the joinder of the remainderman. Again, the remainderman has a vested interest subject to divestment by the life tenant with enhanced powers.

The second problem illustrating the application of this uniform title standard states:

> Same facts as in Problem 1, except John Doe was married at the time of the conveyance to Jeffrey Williams and his

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spouse joined in the conveyance. Did Jeffrey Williams acquire title to Blackacre fee of the claims of Jane Smith?

The answer is "yes." The second example demonstrates the restrictions on conveying and encumbering homestead property set forth in Art. X, Sec. 4(c), of the Florida Constitution, still apply to homestead property held in an enhanced life estate and spousal joinder is still be required in those situations.

The third problem illustrating the application of this uniform title standards states:

> Same facts as in Problem 1, except at the time of the conveyance Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre fee of the claims of Jane Smith and Creditor?

Again, the answer is "yes." This final problem again supports the position the life tenant with enhanced powers can convey fee simple title to the real property held in an enhanced life estate free and clear of the judgment liens against the remainderman.

Finally, for this uniform title standard, the major point made by the Comment section is the restriction on the devise of homestead property may need to be considered after the death of the life tenant with enhanced powers where the homestead property is held in an enhanced life estate. This is because, unlike a standard life estate, the life tenant with enhanced powers retains power and control over the real property, without the joinder of the remainderman, until the moment of the life tenant's death. If the real property held in the enhanced life estate is homestead property, it is possible for that "power and control" to be interpreted by the courts in the same manner as homestead property held in a revocable trust. Since the transfer to the remainderman in an enhanced life estate is subject to being divested until the death of the life tenant with enhanced powers, the "transfer" may be considered a "devise" of the homestead property subject to the restrictions contained in Art. X, Sec. 4(c), of the Florida Constitution. If the life tenant is survived by a spouse or minor child, deeds from all of the heirs of the deceased life tenant may be required to convey marketable title.

The third uniform title standard on enhanced life estates is Uniform Title Standard 6.12: Enhanced Life Estate: Remainderman and Homestead Property, which states:

> The remainderman in homestead property, wherein the life tenant reserved the power to sell, convey, mortgage, and otherwise manage the fee simple estate, acquires the fee simple title upon the death of the life tenant only when not in violation of Constitutional restrictions on devise of homestead.

Pursuant to Article X, Section 4(c), "The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." This uniform title standard holds as long as those restrictions are not violated, fee simple title to the homestead property of life tenant held in an enhanced life estate will pass to the remainderman upon the death of the life tenant with enhanced powers.

The first problem illustrating the application of this uniform title standard states:

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> A remainder in Blackacre was conveyed by John Doe, a single man, to Jane Smith with John Doe reserving for himself, without any liability for waste, full power and authority in himself to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration, without joinder of the remainderman, and full power and authority to retain any and all proceeds generated by such action. John Doe died without a spouse or a minor child. Upon the death of John Doe, is fee simple title vested in Jane Smith?

The answer is "yes." In this problem, since the life tenant with enhanced powers was not survived by a spouse or minor child, there are no restrictions on the devise of homestead property, and fee simple title passes to the remainderman under the terms of the deed creating the enhanced life estate.

The second problem illustrating the application of this uniform title standard states:

> Same facts as in Problem 1, except John Doe died while married to Sally Brown. Upon the death of John Doe, is fee simple title vested in Jane Smith?

The answer is "no." Under these facts, the life tenant with enhanced powers was survived by a spouse but not by a minor child. Pursuant to Art. X, Sec. 4(c), of the Florida Constitution, the only permissible devise of the homestead property is to the surviving spouse. Since the remainderman under the terms of the deed creating the enhanced life estate is not the surviving spouse, the restrictions on devise were violated and marketable title does not pass to the remainderman.

The third problem illustrating the application of this uniform title standard states:

> Same facts as in Problem 2, except the deed is executed on or after July 1, 2018, and John Doe's spouse, Sally Brown, joined in John Doe's deed to Jane Smith and the deed contained the following statement: "By executing or joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me." John Doe had no minor child at the time of his death. Upon the death of John Doe, is fee simple title vested in Jane Smith?

The answer is "yes." This problem illustrates Fla. Stat. § 732.7025 (2018), which provides for the statutory waiver by deed procedure, can be used in conjunction with deeds creating enhanced life estates to help resolve homestead issues after the death of the life tenant with enhanced powers in an enhanced life estate. By including the statutory waiver language in the deed creating the enhanced life estate and having the waiving spouse join on the deed, as long as the life tenant with enhanced powers is not survived by a minor child, they are free to devise their homestead property to whomever they wish. As such, marketable title does pass to the remainderman under the terms of the deed creating the enhanced life estate.

The final problem illustrating the application of this title standard states:

> Same facts as in Problem 1, except at the time of the conveyance, and when John Doe died, Jane Smith was his spouse and Jane Smith joined in the deed. John Doe had no minor children at the time of his death. Is the conveyance to Jane Smith valid?

The answer, again, is "yes." This last problem highlights homestead issues must be considered both when the enhanced life estate is created and when the life tenant with enhanced powers dies. Remember, Art. X, Sec. 4(c), of the Florida Constitution, places restrictions on both conveying or encumbering and devising homestead property. If a married grantor conveys homestead property, reserving an enhanced life estate to themselves, their spouse must also join on the deed. And, as previously discussed, when the life tenant with enhanced powers is survived by a spouse, it must be confirmed the restrictions on the devise of homestead property have not been violated. It should be noted, if the life tenant with enhanced powers is survived by a minor child, there is no permissible devise under Art. X, Sec. 4(c), of the Florida Constitution, and the enhanced life estate deed cannot pass marketable title to the remainderman, even if the remainderman is the surviving spouse of the life tenant.

The purpose of the Florida Uniform Title Standards, as written in the preface thereto, is to "facilitate conveyancing by eliminating needless objections to marketability of title." Hopefully, these new title standards, their illustrative problems, this commentary to the title standards, and the discussions in this article will help do exactly that.


B. JEPSON

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A Tribute To Rob Freedman

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

Robert Freedman, or Rob, is the immediate past Chair of the Real Property, Probate and Trust Law Section. Rob is a shareholder at the firm of Carlton Fields in the Tampa office.

Rob is a 1990 graduate of Stetson University College of Law and became a member of The Florida Bar shortly after graduation. Rob attended Duke University as an undergraduate and is a devoted Blue Devil. I have even heard rumors that Rob has a room in his home that is totally devoted to Blue Devil memorabilia.

Rob first became involved with the Real Property, Probate and Trust Law Section of The Florida Bar when he was only a 2-year attorney. His mentor at Carlton Fields, Larry Kinsolving, got Rob involved in the Condominium and Planned Development Committee, which he later ended up chairing. Rob reports that, in the good old days, the Condominium and Planned Development Committee met at the Tampa Airport, so it was an easy trip from his office to attend on a regular basis, and once he got involved with the committee, he was hooked. Rob's practice very heavily relates to condominium and planned development law, as he has represented developers, lenders and purchasers of development properties for over 28 years.

In his many years in the Section, Rob was also involved with committees on development and land use, but his real love was the Condominium and Planned Development Committee, which he chaired for a period of 6 years. After his stint as Chair of the Condominium and Planned Development Committee, Rob started his 9-year track on the Executive Committee. Rob values the 9 years he spent rising through the ranks of the Executive Committee, and that time was needed so that he was ready to take over as Chair when it was his turn in 2019-2020.

One of the questions this author always asks the outgoing Chair is: what was the most difficult part of serving as Chair? Rob's positive response was that he wasn't sure there was a "hardest part." He did indicate that the time involved in organizing Section meetings could be up to 100 hours a month, and that getting committee meetings scheduled and coordinated takes an extraordinary amount of time.

When asked about the best part of serving as Chair, Rob cited the great fun in serving as host for all of the many events that did take place. Rob was especially pleased by the Dave Matthews Band concert in West Palm Beach last July, which Rob cited as an event people really, really loved.

Of course, the COVID-19 pandemic has overshadowed Rob's year as Chair, but Rob offered the opinion that it was fate that he was put in place to deal with such an unknown and challenging problem as COVID-19. The incredible and special challenges Rob faced this year as the first Chair ever to cancel more than one meeting (the prior cancellation was due to a hurricane) included the disappointment in not being able to undertake the fabulous Out-of-State trip planned for Amsterdam, but the success in getting full refunds for everyone was a rewarding outcome. He reports that the difficulties of the pandemic have really caused the members of the Executive Committee and the Section to be even closer than before, with a true feeling of "family." Rob repeatedly expressed his appreciation and admiration for the other members of the Executive Committee and acknowledged the amazing support provided by Mary Ann Obos and Hilary Stephens.

When questioned about advice to future Chairs, Rob offered the following: first, stay organized and don't hesitate to delegate to other members of the Executive Committee so they too can learn and be ready to take over when they move up the ladder and, second, have fun! Serving as the Chair of

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the Section, while it takes a great deal of time and a lot of hard work, is also fun, and future Chairs should enjoy their special year.

Rob's goals for this year were to improve communications within the Section's committees and the members of those committees. He viewed with some frustration the fact that committees do not always have the opportunity to communicate with each other even though they are working on the same or similar projects. Rob's goal was to foster and improve that communication among and/or between the committees, as well as with other Sections that might be involved with similar issues. He thinks that the communication issue still needs more work, but it has been improved and facilitated under his watch.

Rob's lesson he learned from this year is that patience is not just a virtue but a necessity. Serving on the Executive Committee, and especially as the Chair, has caused him to learn to sit back and evaluate with more time and consideration than he might have in the past. Rob says, "I just want folks to know I'm humbled by the position, and I encourage everyone to keep working for the Section." And most importantly, Rob reports that the only reason he was able to succeed this year as Chair of the Section is due to the support and help from his wonderful wife, Sheri.

And just so you don't think that Rob will be resting on his laurels, he is continuing his Bar activity but on the national front through the ABA, where he will begin serving on September 1st as the Real Property Division Vice Chair of the Real Property, Trusts and Estates Section.

All of us Members of the Section owe a huge debt of gratitude to Rob for his leadership in the calendar year 2019-2020. Thanks Rob, for all your efforts and the fun you fostered. Welcome to your hard-earned seat on the back row!

Residential Real Estate Transactions?

By Kristen King Jaiven, Esq., In-House Counsel to
The Signature Real Estate Companies, Boca Raton, Florida

The use of Listing Agreements in residential real estate transactions is widely accepted. Real estate brokers use Listing Agreements to outline the contractual terms upon which a seller wishes to hire a broker to market and sell his or her home. The Listing Agreement terms are set by statute,[1] the National Association of Realtors® (NAR) Code of Ethics,[2] and local Multiple Listing Service (MLS) rules. In a residential Listing Agreement, a property owner will typically provide a real estate broker with the exclusive authority to market and sell the owner's property for a certain period of time. Such agreement will state the terms upon which the seller wants to sell the property along with the terms upon which the broker will both earn and share compensation with cooperating brokers (i.e., buyer's agents). While Listing Agreements are accepted as a normal part of buying and selling residential real estate in Florida, Buyer Broker Agreements are often not as widely accepted or used. Buyer Broker Agreements offer protections to real estate brokers who invest time and energy to prospective buyers.

Background on Buyer Broker Agreements

Buyer Broker Agreements may come in the form of a proprietary document produced by the broker, a standard form such as the form produced by Florida Realtors,[3] or a form produced by a local Board of Realtors. The forms vary widely, from a form that just outlines any amount of commission due directly from a prospective buyer to the broker, to more elaborate agreements that indicate the services to be provided by the broker and provide for the up-front payment of a non-refundable retainer fee for the broker's services.[4] Buyer Broker Agreements may provide for exclusivity in a certain geographic range or be strictly limited to one prospective property. As with a Listing Agreement, the specific terms can be negotiated between the prospective buyer and the broker.

Three Reasons Why Brokers Use Buyer Broker Agreements

1) *Protects the Broker's Investment:* Upon the commencement of a relationship between a broker and a prospective buyer, a broker will often immediately begin searching for property, organizing and attending showings, and drafting offers. A broker may draft offers and negotiate counteroffers on many transactions that fail before execution or during a contract contingency. All of this work is undertaken without confirmation that a transaction will close and a commission will be paid to the broker. Absent a written contract, a prospective buyer has the right to change brokers at any time, including after a broker has undertaken substantial work on behalf of the prospective buyer. The Buyer Broker Agreement protects the broker's investment in the customer and the transaction.

2) *Guarantees Compensation for Off Market or Flat Fee Listing Brokers:* While many homes are listed and sold through the MLS, some homeowners still choose to sell their homes without a listing broker (the traditional For Sale By Owner or FSBO model) or through a hybrid process offered by a flat-fee listing broker, whereby a homeowner lists the property directly on the MLS through a limited service virtual broker for a flat fee.[5] When homeowners choose to sell through a FSBO or flat-fee model, limited commission may be offered to the buyer's agents.

3) Protects Brokers in Procuring Cause Claims: NAR's Arbitration Guidelines dictate the process by which a local Board of Realtors will resolve procuring cause disputes between member brokers.[6] "[P]rocuring cause in broker to broker disputes can be readily understood as the uninterrupted series of causal events which results in the successful transaction."[7] In determining whether a broker was the procuring cause of a transaction, an arbitration panel set by a local board of realtors will look at the existence of a written buyer broker agreement (among other factors) as evidence in support of the broker's claim for procuring cause.[8]

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Conclusion

While many real estate brokers choose not to use Buyer Broker Agreements, other brokers embrace the agreements as a way to encourage excellent customer service to prospective buyers who have contractually committed to use the broker's services. As explained by real estate broker Ben Schachter of The Signature Real Estate Companies:

> The use of a Buyer Broker Agreement in Florida is relatively uncommon; however, is extremely important and something that cannot be stressed enough. In the State of Florida, buyers of real estate are given tremendous latitude to use multiple real estate professionals simultaneously and with only minor differences in the relationships, the entire commission paid by the seller or listing broker on a transaction to any one of a number of buyer's agents can be impacted significantly. Real estate professionals need protection, the same way the general public needs protections. If a real estate professional is working with a customer to help them identify, negotiate, and close upon real property in Florida then there should be a firm, written commitment between that real estate brokerage company and the prospective customer outlining their business relationship and the expectation of exclusivity and compensation.

Buyer Broker Agreements outline the brokerage relationship between a real estate licensee and a prospective buyer that is analogous to the relationship that is created upon the execution of a Listing Agreement between and a property owner and a listing broker. The establishment of written terms at the onset of the brokerage relationship benefits both brokers and consumers if expectations are agreed to prior to the provision of services.

Endnotes

1 Fla. Stat. § 475.25 (1)(r) (2012) (Outlining the actions upon which a real estate licensee may be subject to discipline, including when an agent "[h]as failed in any written listing agreement to include a definite expiration date, description of the property, price and terms, fee or commission, and a proper signature of the principal(s); and has failed to give the principal(s) a legible, signed, true and correct copy of the listing agreement within 24 hours of obtaining the written listing agreement. The written listing agreement shall contain no provision requiring the person signing the listing to notify the broker of the intention to cancel the listing after such definite expiration date.").

2 National Association of Realtors, *2020 Code of Ethics & Standards of Practice, available at:* https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2020-code-of-ethics-standards-of-practice.

3 Form EBBA-6tb ©Florida Realtors.

4 *See paragraph* 6 of EBBA-6tb ©Florida Realtors.

5 Keith Larsen, *Flat-fee brokerage launches DIY home listings platform in Florida*, The Real Deal, *available at* https://therealdeal.com/miami/2019/06/17/flat-fee-brokerage-launches-diy-home-listings-platform-in-florida/.

National Association of Realtors, *Arbitration Guidelines, available at: https://www.nar.realtor/code-of-ethics-and-arbitration-manual/appendix-ii-to-part-ten-arbitration-guidelines*.

6 *Id.*

7 *Id.*

8 *Id. See Factor #6. Consideration of the entire course of events: Nature, status, and terms of buyer representation agreements.*

Special Considerations In An Ever Increasing LGBTQ+ World

By Antonio P. Romano, Esq., Comiter, Singer, Baseman & Braun, LLP

Let me preface this by saying that I am in no way as well versed on this subject as many of my mentors and those I look up to. But I do feel compelled to impart some of my limited knowledge to my fellow practitioners who are lucky enough to land a meeting with, interact with, or ultimately be retained by a LGBTQ+ individual or individuals. Ultimately, keep in mind that the majority, if not all, within the LGBTQ+ community have experienced some sort of discrimination. We are told that we are abominations and disgusting, disappointments and unnatural, and there are too many instances when those hearing such commentary refuse to correct it. So, it should come as no surprise when a LGBTQ+ individual is reluctant to share information.

I cannot stress the following enough. In many instances, it is human nature to want to find some form of common ground in an attempt to comfort a potential client or clients during intake, deponents or clients during breaks in depositions, and/or an opposing counsel. However, steer away from stereotypes, such as comments like, "Just so you know, my wife loves RuPaul's Drag Race," or "I am dying for a fabulous best friend." Creating an open and comfortable environment is critical, and at the end of the day, the LGBTQ+ client is a human who likes many of the same things you do. Use travel, food, or culture to appeal to the individual, not stereotypes. Ask questions, choose your words wisely, and try to genuinely understand what the individual's issues really are, while also trying to understand those issues that plague the LGBTQ+ community. For example, notating familial relationships and dynamics is crucial in LGBTQ+ estate plans, both to understand risks of future contests and to ensure that no current or future beneficiary is inadvertently excluded. Keep this in mind, especially when creating a memo to the file and drafting documents. However, also embrace the idea that clients may be reluctant to share information on family structures based on the psychological impact of the individual's experience. We are all lawyers, and we spend years learning our respective practices. So, take a few minutes to brush up on LGBTQ+ terminology before your meeting. It will make a world of difference, and it will assist in creating an environment that makes the individual more comfortable with sharing. By that same token, a great starting point is revising your intake form to make it more LGBTQ+ friendly. Our firm changed things like "husband" and "wife" to "spouse 1" and "spouse 2," and we ask the client for an identification of gender with it.

When it comes to planning, boilerplate language is the enemy of a comprehensive estate plan for any present or future LGBTQ+ individual. Gender references, for example, should include all possible genders (masculine, feminine, and neutral), especially for trusts and documents that are meant to span generations. Further, allowing for name and gender changes will assist in avoiding future disputes about whether a name or gender change caused a beneficiary to be written out of a document. Even further, one should consider the language used to draft specific bequests. For example, if the client wants a wedding ring left to a daughter, instead of saying that a wedding ring goes to the first born daughter, you may wish to consider an alternative, such as the wedding ring is to be given to my oldest living female child. These considerations also spill over into gifting powers pursuant to powers of attorney. Lastly, everyone is aware of the HEMS standard. However, for a LGBTQ+ beneficiary, HEMS may not sufficiently address needs like adoption or surrogacy. Accordingly, special consideration should be given to how "health" is defined in the document, and you should consider expanding the definition to include the preceding.

In summary, the information discussed within is merely a glimpse of considerations that are often overlooked when dealing with LGBTQ+ clients. By merely taking the time to read this article, you have already taken a critical step toward a better understanding of an entire community.

State Tax Case Summaries

By Jeanette Moffa, Esq., Moffa, Sutton, & Donnini, P.A., Ft. Lauderdale, Florida

Property appraiser improperly inflated value of Disney luxury hotel.

Singh v. Walt Disney Parks and Resorts US, Inc., etc., Case No. 5D18-2927 (Fla. 5th DCA 2020)

When Rick Singh was elected as the Orange County Property Appraiser in 2012, he determined that resort-style hotels, among other properties, were undervalued for property tax purposes. As a result, the property appraiser adopted the "Rushmore" method, or an income approach, to recalculate those values. Under the Rushmore method, Disney's Yacht & Beach Club increased in value by 118%.

Specifically, the Orange County Property Appraiser used the Average Daily Rate to determine the gross potential room income. This amount was then multiplied by a 75% occupancy rate. Next, the appraiser calculated "ancillary income," which is revenue primarily from restaurant sales and convention center contracts. The total ancillary income was calculated to be $73,727,719. After adding the effective room income to the ancillary income, the appraiser deducted an 80% expense to account for hotel operation expenses, management fee expense, and franchise fee expense. After dividing the net operating income by a 9.732 percent capitalization rate, reducing the result by $15,973,391 for tangible personal property, and reducing the result further for a laundry allocation and cell tower allocation, the resulting value was $336,922,772.

Disney challenged the increase in property value primarily upon the basis that the intangible Disney brand was improperly being included in the value of the hotel property. Disney argued that the Rushmore method underestimated business value, thereby overestimating the real estate value. Goodwill, loyal customers, and an assembled workforce, Disney argued, were ignored in the calculation. As a result, the Disney brand, characters, ability to use theme parks, character breakfasts, transportation, and high-quality service were all disregarded in the Rushmore calculation.

The trial court found that the property appraiser failed to properly consider income from the business activities conducted on the hotel property in its calculation. In short, the appraiser's calculation of ancillary income was erroneous. On appeal, the property appraiser argued that the trial court failed to rely on professionally accepted appraisal practices in calculating the reduced assessment. Furthermore, the property appraiser argued that the rejection of its use of the Rushmore method was in error.

The Fifth District Court of Appeals agreed with the trail court's determination that the Rushmore method impermissibly included the value of Disney's intangible business assets in its calculation of the assessment. Because the Rushmore method fails to remove all business value from an assessment, the court found that it violated Florida law. The consequence of this holding is that all Walt Disney World properties, and potentially thousands of other properties in Florida, can challenge their assessed values if such values were calculated using the Rushmore method. The property appraiser is currently seeking a rehearing.

A Sarasota County resident's rental of two bedrooms in a homesteaded property did not disqualify him from the full homestead property tax exemption.

Furst v. Rebholz, Case No. 2D18-3323 (Fla. 2nd DCA 2020)

The Sarasota County Property Appraiser determined that only 85% of a taxpayer's residence was entitled to a homestead exemption. In other words, the "Save Our Homes" cap only applied to 85% of the residence. The taxpayer at issue rented out two bedrooms of his homestead property to tenants. As a result of the loss of the exemption, the property appraiser sought to recover roughly $7,000 of taxes that it claimed should have been paid over the years on the portion of the property that failed to qualify for the homestead exemption.

When the assessment and partial revocation were challenged in circuit court, the court ruled that the entire property qualified for the homestead exemption. On appeal, the Second District Court of Appeal agreed. Specifically, the appellate court concluded that property appraisers were not authorized under Florida law to "carve up" a homeowner's permanent residence for the purpose of removing the homestead property tax exemption provided for under the Florida Constitution just because a portion of that property was rented out. The appellate court also expressed concern that a property owner could potentially lose the homestead exemption as a result of working from home in home offices or renting out rooms to make ends meet.

Probate And Trust Case Summaries

Joseph M. Percopo, Esq., LLM. Mateer & Harbert, P.A.

A later executed foreign Will with only one witness fails to comply with the Florida requirements for a Will to be valid and therefore does not revoke the earlier executed valid Florida Will.

Zidman v. Zidman, 45 Fla. L. Weekly D820a (Fla. 3d DCA 2020)

In 2012, the Decedent executed a will in Florida (the "Florida Will") in compliance with statutory formalities. In 2015 the Decedent executed a new will in Belgium revoking the earlier Florida Will (the "Belgium Will"); however, the Belgium Will only had one witness. The Decedent's Surviving Spouse attempted to probate the Florida Will, which left the entire estate to her. Children of the Decedent submitted the 2015 Belgium Will, which left the entire estate to the children. The Trial Court had to review the two competing wills and determine whether the Belgium Will could properly revoke the Florida Will. The Trial Court granted Surviving Spouse's motion to strike the children's counter-petition attempting to probate the 2015 Belgium Will.

On appeal, the Children argued that the Belgium Will was a validly executed handwritten will under Belgium law. Surviving Spouse argued that, even if it were validly executed in Belgium, because the Belgium Will only had one witness it was not valid in Florida and therefore could not properly revoke the 2012 Florida Will. Fla. Stat. §732.502(2) (2015) provides that a handwritten will must comply with the statutory formalities of Fla. Stat. §732.502(1) (2015), which requires the execution to be in the presence of two witnesses. The Third District Court of Appeal held that the Belgium Will was not executed in compliance with Florida statutory formalities and therefore the Decedent's revocation of the 2012 Florida Will was ineffective.

Despite 3 out of 4 bedrooms of homestead property being rented out, the entirety of the property was subject to Florida's Constitutional homestead protection because the property was a single-family residence that was not severable.

Anderson v. Letosky and Precious Pets, 45 Fla. L. Weekly D1266a (Fla. 2d DCA 2020)

Following the death of the Decedent, his son filed a petition seeking an exempt homestead determination for property his father owned and occupied at the time of his death. A statement of creditor claim was filed in the probate action. The trial court held a hearing on the homestead petition and determined that the Decedent occupied one bedroom while the other three bedrooms were rented out via valid leases. The trial court, in relying on *In Re Bornstein, 335 B.R. 462* (Bankr. M.D. 2005), held that the portion of the home that was rented lost its homestead protection and therefore 75% of the homestead was subject to creditor claims.

The Second District Court of Appeal first reviewed Article X, Section 4, of the Florida Constitution pertaining to the Florida homestead protection and reiterated the Florida Supreme Court's position to liberally construe homestead protection. The court reviewed a series of cases. The first two cases involved a triplex and a duplex where the court found that homestead was lost on the portions not used by the homeowner and rented out. This resulted from the application of a two-part test: (1) "whether the debtor's residence is a fraction of the entire property" and (2) "whether the property can be severed –that is, by using an imaginary line the residence can be severed

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from the remainder of the property." The next two cases dealt with single-family residences where the court found that despite portions being rented out, the entire property was still protected homestead since it could not be severed. The appellate court determined that the homestead at issue was also a single-family residence and therefore the entirety of the property was entitled to homestead protection.

While the trust document may contain other and supplemental methods to remove a trustee, it cannot eliminate or curtail the probate court's power and responsibility under the Trust Code to remove a trustee when necessary in the interests of justice to protect the interests of the beneficiaries.

Wallace v. Comprehensive Personal Care Services, Inc., 15 Fla. L. Weekly D1318a (Fla. 3d DCA 2020)

Grantor and his wife entered into a marital agreement and created an irrevocable trust. After the death of Grantor's spouse, and while the Grantor continued to serve as the trustee, a lawsuit was initiated to have the Grantor comply with the terms of the trust agreement and to remove the Grantor as trustee due to alleged lack of mental capacity. The irrevocable trust had provisions for the removal of a trustee, however, the action sought removal instead under Fla. Stat. §§736.105(2)(e), 736.0706, and 736.1001(2). Grantor moved to dismiss that count citing to provisions of the trust as the proper method for removal unless Grantor was otherwise determined by a court of law to be incapacitated. The trial court agreed with Grantor stating that relief could not be sought that was contrary to the terms of the trust and guardianship procedural safeguards under Fla. Stat. §744.331.

On appeal, the Grantor argued that the Florida Trust Code removal provisions should not apply to his unique situation (since he was the grantor and majority lifetime beneficiary) and that removing him as trustee was "tantamount to declaring him a ward and depriving him of control over his own property," which should only occur if the standards of Fla. Stat. §744.331 are met. The Third District Court of Appeal disagreed with the Grantor, explaining that a trial court, in the interest of justice, may remove a trustee as provided in the Florida Trust Code and the standard established to do so in Fla. Stat. §736.0706 is "less exacting than the standard for imposing a guardianship under section 744.331 of the Guardianship Code." In further support of its position, the Court stated an individual may lack "accounting, business, legal, or mental acumen" preventing him from serving as trustee but not arising to guardianship over the individual.

Court appointed counsel for an alleged incapacitated person is required to represent the expressed wishes of the alleged incapacitated person and where the alleged incapacitated person objects to the guardianship, the appointed counsel is obligated to defend against the guardianship petition.

Erlandsson v. Erlandsson, 45 Fla. L. Weekly D1102a (Fla. 4th DCA 2020)

Appellant's parents filed a petition for a limited guardianship seeking to remove their daughter's rights except for her right to vote and marry. The basis of the petition was that the daughter was not able to attend to her basic medical and psychiatric needs and was unable to manage her own finances. The trial court appointed an examining committee who reported unanimously that the daughter lacked capacity to exercise her basic rights and recommended a plenary guardian be appointed.

The trial court appointed counsel to represent the daughter in the guardianship hearings. Throughout the entirety of his representation, the daughter objected to the appointed counsel and the guardianship. The trial court denied her request to discharge her lawyer. The appointed counsel did not believe the daughter had the capacity to make a decision to fire her and agreed with the parents that the daughter needed a guardianship. The trial court ordered a plenary guardianship and appointed the parents.

On appeal, the daughter argued that she had a constitutional right to discharge her counsel and represent herself or require a new appointed lawyer, in the same manner as permitted under the 6th Amendment in criminal proceedings. The daughter also argued she had a constitutional right to challenge the effective assistance of her appointed counsel. The Fourth District Court of Appeal disagreed with daughter on both points, stating that the 6th Amendment only applies to criminal matters and that she did not have a constitutional right to challenge the effective assistance of her counsel. However, the appellate court did find it necessary to determine whether the trial court should have recognized that a conflict of interest existed between the daughter and her appointed counsel and whether the trial court had a statutory duty to appoint new counsel. Upon review of Fla. Stat. §744.102 (2019), the Florida Bar Rules, and other similarly situated jurisdictions, the appellate court determined that the appointed attorney was required to "represent the expressed wishes of the alleged incapacitated person" and was obligated to defend against the guardianship petition.

Provided the consent of all settlors and beneficiaries is obtained, an irrevocable trust may be modified or terminated at common law and such rule is neither abrogated nor controlled by the Florida Trust Code. Additionally, generally only the trustee, settlor, and beneficiaries are indispensable parties to a trust action, and where the terms of the trust provide for indemnification a Trial

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Court does not have discretion under the Florida Trust Code to deny such fees.

Demircan v. Mikhaylov, 45 Fla. L. Weekly D1201a (Fla. 3d DCA 2020)

The settlor created an irrevocable trust, with an initial corpus of $25,000,000, to invest in a complex business venture for a shopping mall. The trust was for the benefit of settlor's children (only one being an adult) and it designated an initial trustee and special power holder (who could remove or appoint trustees). The settlor disagreed with the initial trustee and special power holder on the projects development plan and halted all funding by the trust. The settlor, with the beneficiaries, brought suit seeking to modify the trust to remove the initial trustee and special power holder. After filing and dismissing initial complaints, the settlor brought the action in probate court without including the special power holder as a party. The trustee argued at the court hearing that the special power holder was an indispensable party, "that the beneficiaries' consent was not sufficiently shown, and that common law modification required consideration of factors other than consent, as reflected in chapter 736, Florida Statutes." The trial court allowed the common law modification noting that the settlor and all beneficiaries' consented.[1]

There were four issues on appeal: (1) whether the trustee had standing to appeal the trust's modification, (2) whether the special power holder was an indispensable party, (3) whether the trial court erred as a matter of law in modifying the trust, and (4) whether the trial court erred in denying attorney fees for the trustee. The Third District Court of Appeal found that a trustee was an interested person and had standing in a trust reformation action, and that the special power holder was not an indispensable party. Further, the appellate court found that the trial court did not err in allowing the trust modification because at common law, the settlor and beneficiaries may revoke or amend an irrevocable trust and Fla. Stat. §736.04113 (2016) "neither abrogated, nor controlled" the common law rule. It was argued that the settlor waived his right to revoke or amend the trust and therefore the common law rule could not apply. However, the appellate court rejected this argument, stating that because such waiver would only be valid if it was conditioned on the trustee's assent, and that such condition was not contained in the trust. Lastly, the appellate court concluded that the trial court did have discretion to deny attorney fees under the Florida Trust Code but it could not do so when the trust provided that the trustees be held harmless and indemnified for "attorney's fees, expenses, and costs incurred as a result of its service as Trustee." However, such indemnification was limited to the trust assets or beneficiary distributions, and not from the personal assets of settlor.

Endnotes

1 *Preston v. City National Bank of Miami*, 294 So. 2d 11 (Fla. 3d DCA 1974).

Real Property Case Summaries

Prepared by J. Christopher Barr, Esq.,
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A lease with a Term terminating on the occurrence of an event such as the demolition of a structure that does not occur is not considered a lease for years and is instead terminable at will.

Waveblast Watersports II Inc. v. UH-Pompano, LLC, 291 So. 3d 657 (Fla 4th DCA 2020)

Waveblast Watersports II Inc. ("Waveblast") entered into a lease with a hotel to operate a concession to rent wave runners, parasails, and scuba diving equipment on a beach adjacent to that hotel. Subsequently, the hotel was purchased by UH-Pompano, LLC ("Pompano"). Following its acquisition of the property, Pompano terminated the lease. Waveblast filed a complaint as a result of the termination of the lease and the trial court entered summary judgment in favor of Pompano, finding that the lease did not have a stated duration and therefore was terminable at will.

The subject lease provided:

1. Term: this lease shall be enforced commencing on September 18, 2007 and terminating on the demolition of the property. During the term of this lease should hotel under go [sic] major renovations or rebuilding, the landlord at his discretion may suspend the lease until the construction is complete. At which point lease term will resume to the full term of lease. At completion of the term, Tenant is given the option to extend this lease agreement provided no defaults occur.[1]

The Fourth District Court of Appeal advised that the case essentially turned on "whether the lease had a definite term of duration."[2] If it did, then Waveblast's allegations of breach, conspiracy, and tortious interference would be possible and the summary judgment granted by the trial court would be improper. If, on the other hand, the lease did not have a definite term of duration, then the lease becomes terminable at will, and it would not be possible as a matter of law to breach, conspire, or tortiously interfere with the lease.

Florida law holds that "[t]he term of a lease for years must be certain and if not, an estate at will is created."[3] Further, "[l]eases in perpetuity are universally disfavored . . . ."[4] Thus, if the duration of the lease term is not certain or, in fact, appears to be running in perpetuity, that lease will be interpreted as being at will. A tenancy at will may be terminated by either party by giving the requisite amount of notice.[5]

The Fourth District Court of Appeal considered whether the phrase in the lease of "demolition of the property" has sufficient certainty in defining the duration of the lease. The Fourth District Court of Appeal found that the term "demolition of the property" is uncertain, necessitating the review of parol evidence to ascertain the intent of the parties in using this term of duration. The Court further found that the undisputed parol evidence of the parties' intent provided that "the lease did not include a specific end term date . . . because the original owner/landlord was contemplating demolishing/tearing down the entire hotel property sometime in the future and building condominiums (at which time the property would cease to operate as a resort/hotel) (hence the use of the word demolition)."[6] Based on the undisputed evidence that the lease was contemplated to end or terminate when the hotel was torn down or demolished and that event never happened, the lease was indefinite and therefore, terminable at will. As a result, the Fourth District Court of Appeal held that Pompano was within its right to terminate the lease at will.

A homestead property does not lose its protection from creditors if a portion of the property not subjetct to severability and lawful conveyance is rented to third parties.

Anderson v. Letosky, 2020 Fla. App. LEXIS 7307 (Fla. 2nd DCA 2020)

Following the death of his father, Mr. Anderson filed a petition with the probate court seeking a determination that the residence his father owned and occupied at the time of his death constituted homestead property within the meaning and protection of Article X, Section 4 of the Florida Constitution. Ms. Letosky was a judgment creditor of the decedent and filed a caveat by creditor and statement of claim in the probate case. The subject property was a single-family residence. The decedent personally occupied the residence and rented three bedrooms in the residence to three individuals who were also permitted to use other common area portions of the home.

The probate court held a hearing on Mr. Anderson's petition to determine homestead and found that the rented portion of the residence lost its constitutional homestead protection and ruled that seventy-five percent (75%) of the

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subject property was not the decedent's homestead at the time of the decedent's death and therefore subject to the judgment liens of creditors. The Second District Court of Appeal reversed the probate court's determination finding that because the subject property was a single family residence not subject to severability (unlike a duplex, triplex or other multifamily dwelling), that the entire residence is entitled to homestead exemption that protected the property from judgment creditors. Although the decedent rented three of the bedrooms, both the decedent and the tenants had access to the common areas of the home, and the Second District Court of Appeal found that neither the common areas nor the bedrooms could be severed from the residence by an imaginary line and were not lawfully conveyable as independent parcels. As a result, the decedent's rental of three bedrooms in the single-family residence did not eliminate the claim of homestead exemption to the entire property.

Junior interest holders who prevail in construction lien enforcement and foreclosure actions may not recover attorney's fees under Florida Statute § 713.29 (2018).

Decks N Such Marine, Inc. v. Daake, 2020 WL 2507500 (Fla. 1st DCA 2020)

Decks N Such Marine, Inc. ("DNS") made substantial improvements to the home of Mr. and Mrs. Daake. DNS did not receive full compensation for the construction services rendered and filed an action for enforcement and foreclosure of its construction lien on the Daakes' property. At the time it filed the foreclosure action, DNS did not file a Notice of Lis Pendens. Subsequent to DNS's foreclosure, Mr. and Mrs. Daake granted a mortgage to Bank of America ("BOA"). Thereafter, DNS amended its pending lien foreclosure action to include BOA as a defendant and recorded a Notice of Lis Pendens.

The trial court awarded summary judgment in favor of BOA pursuant to Fla. Stat. § 713.22 (2018), as a result of DNS's failure to timely record the notice of lis pendens prior to the recording of the subject mortgage. BOA subsequently moved for an award of attorney's fees under Fla. Stat. § 713.29 (2018), which the trial court granted. DNS appealed the trial court's attorney fee award in favor of BOA arguing that the trial court improperly broadened the scope of Fla. Stat. **§** 713.29 (2018) to include not only the contractor and property owner but also junior interest holders.

DNS argued that including junior interest holders as parties entitled to attorney's fees in an action to enforce a lien would upset the equitable balance mandated by the Florida Supreme Court in naming the "prevailing party" under Fla. Stat. **§** 713.29 (2018). The First District Court of Appeal agreed finding that "[a]n expansion of §713.29 [Florida Statutes (2018)] to include fee awards to junior interest holders would establish a statutory scheme and a balance of interests largely out of step with the process governing mortgage and other interest foreclosures, a process the Legislature referenced in §713.26" Florida Statutes (2018).[7] In reaching its decision, the First District Court of Appeal was concerned that "if a prevailing construction lienor could recoup its attorney's fees against a junior interest holder, the lienholder would likely be required to pay attorney's fees in order to exercise its redemption rights under [**§**]713.26" Florida Statutes (2018) and the "potential for additional attorney's fee exposure to junior interest holders would dissuade construction lienors, like DNS, from joining the junior interest holder to the foreclosure action in contravention of the purposes of §713.26" Florida Statutes (2018).[8]

The Court found that because BOA was joined in the action as a junior interest holder and that DNS was not "enforcing the construction lien against BOA but joining it to the underlying action to ensure determination of superiority of lien or security interests upon a foreclosure sale," BOA was not the "prevailing party" in the action to enforce the lien against Daake and was not entitled to attorney's fees.[9]

A property owner who takes no action when he realizes his property was fraudulently conveyed is without remedy if the property is sold again, this time to a bona fide purchaser without notice.

Rivas v. Tsang, 2020 WL 1969240 (Fla. 5th DCA 2020)

In 2011, Rivas allowed his cousin, Ceasar Suarez-Rivera, to manage his rental home. Suarez-Rivera created a fraudulent and forged power of attorney, which he used to sell Rivas' property to innocent purchasers, the Paganis, in December 2012. Rivas discovered the unauthorized sale in February 2013 when his lender stopped automatically debiting his account for the monthly mortgage payments. The lender advised Rivas that the mortgage had been satisfied upon the sale of the property. At that time, Rivas confirmed both the fact of the sale to the Paganis and Suarez-Rivera's use of the allegedly forged power of attorney to accomplish the sale. When confronted, Suarez-Rivera allegedly admitted what he had done and provided Rivas with access to the closing documents.

Initially, Rivas did nothing beyond confronting and speaking with Suarez-Rivera. Rivas did not contact the police, did not take legal action to set aside the sale to the Paganis, and did not notify the Paganis of the circumstances of the sale. Unaware of Rivas' concerns, in April 2014, the Paganis conveyed the property to the Tsangs, who were bona fide purchasers for value without knowledge of the prior misdeed of Suarez-Rivera. Following the sale, Rivas filed an action against the Tsangs seeking a declaration of their respective rights to the property. Based on Rivas' prior knowledge and inaction, the trial court found that as between the Tsangs and Rivas, Rivas was the least innocent party and his conduct or failure to act contributed to the losses.

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The Fifth District Court of Appeal affirmed the trial court's ruling. In reaching its decision, the Fifth District Court of Appeal relied upon "the equitable principle that where one of two seemingly innocent parties must suffer a loss caused by the misdeed of a third party, the 'least innocent should suffer, and the least innocent is the one who could have prevented the misdeed.'"[10] The Court further reasoned that "[i]f one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person."[11] Put another way, "if one remains silent when it is his duty to speak, he will not be permitted to speak when in justice he should remain silent."[12]

As a result of Rivas' failure to take action to protect his claim to the property, the Tsangs lacked notice, either constructive or actual, of any alleged irregularities in the chain of title. As a bona fide purchaser without notice of any alleged irregularities in the public record chain of title, the Court found that Tsang was protected from claims outside that chain of title.

A legal description contained in a mortgage is not so ambiguous so as to render the mortgage unenforceable if it describes the subject property by street address and unique parcel ID number.

Deutsche Bank Nat'l Trust Co. v. Cope, 2020 WL 2781345 (Fla. 2nd DCA 2020)

Ms. Mercedes conveyed the subject parcel of real property to Mr. and Mrs. Toribio in 2005. The subject deed referred to the property by its unique parcel ID number and its address rather than by lot and block. Mr. and Mrs. Toribio executed a mortgage describing the collateral property by the parcel ID number and address rather than lot and block. Mr. and Mrs. Toribio subsequently conveyed the subject property to Mr. and Mrs. Copes. At that time, MERS recorded a junior mortgage on the property.

The plaintiff lender instituted an action against Mr. and Mrs. Toribio, Mr. and Mrs. Cope, and MERS to foreclose the subject property. Mr. and Mrs. Cope and MERS claimed the subject mortgage was patently ambiguous as to the property that it encumbered. The trial court agreed with Mr. and Mrs. Cope and MERS and held that the mortgage did not give them notice that it encumbered the subject property. The plaintiff lender appealed and challenged the trial court's determination that the property address and parcel ID number were insufficient to give notice that the subject property was encumbered.

The act of recording a mortgage is generally sufficient to provide subsequent purchases constructive notice of the mortgage.[13] However, a recorded mortgage can only provide constructive notice of an encumbered property that is sufficiently described in the mortgage.[14] The rule is that the description is sufficient if, by relying on the description read in light of all facts and circumstances referred to in the instrument, a surveyor could locate the land.[15]

"Courts generally understand a street address to sufficiently describe a parcel of land."[16] "Florida courts have upheld conveyances that identified the subject properties by their street addresses . . . ."[17] In this case, the Second District Court of Appeal found that it was undisputed that the lender's surveyor was able to locate the subject property based on its description in the mortgage. Thus, both precedent and the undisputed facts presented to the trial court required the conclusion that the subject property's street address and parcel ID number were sufficient to provide constructive notice of the encumbrance by the mortgage.

Endnotes

1 *Waveblast*, 291 So. 3d at 659.

2 *Id.* at 660.

3 *Id.* (quoting *Ehrlich v. Barbatsis Holding Co.*, 63 So. 2d 911, 913 (Fla. 1953)) (internal quotation marks omitted).

4 *Id.* (quoting *Chessmasters, Inc. v. Chamoun*, 948 So. 2d 985, 986 (Fla. 4th DCA 2007)) (internal quotation marks omitted).

5 § 83.03, Fla. Stat. (2010).

6 *Waveblast*, 291 So. 3d at 660.

7 *Decks N Such Marine*, 2020 WL 2507500 at *4.

8 *Id.*

9 *Id.*

10 *Rivas*, 2020 WL 1969240 at *1 (quoting *Countrywide Funding Corp. v. Palmer*, 589 So.2d 994, 996 (Fla. 2d DCA 1991)).

11 *Id.* (quoting *Coram v. Palmer*, 58 So. 721, 722 (Fla. 1912)).

12 *Id.* (quoting *United Serv. Corp. v. Vi-An Constr. Corp.*, 77 So. 2d 800, 803-04 (Fla. 1955)).

13 See *Whitburn, LLC v. Wells Fargo Bank, N.A.*, 190 So. 3d 1087, 1091 (Fla. 2d DCA 2015).

14 *Fla. Bank & Tr. Co. of W. Palm Beach v. Ocean & Lake Realty Co.*, 160 So. 1, 2 (Fla. 1935).

15 *U.S. Bank, N.A. v. Holbrook*, 226 So. 3d 363, 364 n. 2 (Fla. 2d DCA 2017).

16 *Cope*, 2020 WL 2781345 at *3 (quoting *Mendelson v. Great W. Bank, F.S.B.*, 712 So. 2d 1194, 1196 (Fla. 2d DCA 1998)) (internal quotation marks omitted).

17 *Id.* (quoting *Mendelson*, 712 So. 2d at 1196 (first citing *Bajrangi v. Magnethel Enters., Inc.*, 589 So. 2d 416, 419-20 (Fla. 5th DCA 1991); and then citing *Baker v. Baker*, 271 So. 2d 796, 797-98 (Fla. 3d DCA 1973))) (internal quotation marks omitted); see also *Holbrook*, 226 So. 3d at 364 n.2 (recognizing that a mortgage may not need to be reformed to be valid because it "appears to contain a valid street address and parcel identification number"); *Regions Bank v. Deluca*, 97 So. 3d 879, 885 (Fla. 2d DCA 2012) (concluding that a mortgage gave constructive notice that it encumbered a property where the legal description consisted of a street address).

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City/State/Zip: _____

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$ _____ _____ _____/_____ ___ ___ ___ _____
Charge Card Number Exp. Date CODE Signature of Cardholder

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

Check # _____ $ _____ Authorization Date _____/_____/2018 # ____ ____ ____ ____ ____

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What's Happening Within The Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses (see page 55), and a whole host of relevant links to other Real Property, Probate & Trust Law websites.

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

OUT OF STATE EXECUTIVE COUNCIL MEETING

SEPTEMBER 30 – OCTOBER 4, 2020
Four Seasons Resort • Jackson Hole, Wyoming
Standard Guest Room Rate: $395 (single/double)

EXECUTIVE COUNCIL & COMMITTEE MEETINGS

DECEMBER 3 – DECEMBER 6, 2020
Disney's Yacht Club • Orlando, Florida
Standard Guest Room Rate: $289 ($25 pp for each person over 18 years old)

EXECUTIVE COUNCIL & COMMITTEE MEETINGS

February 4 – 7, 2021
Hammock Beach Resortm • Palm Coast, FL
Standard Guest Room Rate: $289 (single/double)

EXECUTIVE COUNCIL & CONVENTION

June 3 – 6, 2021
JW Marriott • Marco Island, FL
Standard Guest Room Rate: $245 (single/double)

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

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ACTIONLINE BULLETIN BOARD

December 3 – 6, 2020
Executive Council and Committee Meetings (Scheduled Live at Disney's Yacht Club)

WANT TO BE AN ACTIONLINE AUTHOR?
See RPPTL website for guidelines and deadlines on submitting articles.

Need CLE?
Check our website at RPPTL.org for a list of OnDemand products available at a discount to Section members.

COVID-19
Check out the RPPTL.org COVID-19 information page on useful practice tools during the pandemic.

OCTOBER 16TH
First Annual RPPTL Charitable Planning and Exempt Organizations Symposium (virtual)

Nov. 13th
Probate Law Seminar (Virtual)

Like our **Facebook** page **@FLRPPTL** to get the most up to date Section information

Follow us on **Twitter** **@RPPTL_FL**

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