ActionLine

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

Asset Protection Planning With A Rensin Offshore Trust

What Are My Rights Again? Rights Of Refusal And Options In Leases And Contracts: Seems Simple Enough Right? Wrong!

Contesting The Beneficiary Designation – Unique Issues And Strategies

Repair Costs Can Be Consequential Damages: Understanding the Keystone Court's Departure From The "Typical" Definition Of Consequential Damages

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The Substantive Committees of the RPPTL Section

PART I

Chair's Column

By Robert S. Freedman
Section Chair, 2019-2020

The RPPTL Section is a diverse organization, and its work is varied on multiple fronts. However, the true lifeblood of the RPPTL Section is the work of its substantive committees. The RPPTL Section consists of over 10,500 members, and its numerous substantive committees are open for participation by the membership, with exceedingly limited exceptions. This column was originally contemplated to reflect the work of the substantive committees in both the Probate and Trust Division and the Real Property Division, but to do so would take up far too much room in this edition (and I did not want to anger our wonderful editors)! So, this column is Part I and will discuss the work of a number of the Probate and Trust Division's substantive committees.

It is important to note that the Probate and Trust Division consists of 21 committees: Ad Hoc Committee on Electronic Wills; Ad Hoc Florida Business Corporation Act Task Force; Ad Hoc Guardianship Law Revision Committee; Ad Hoc Jurisdiction & Service of Process; Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process; Ad Hoc Study Committee on Estate Planning Conflict of Interest; Ad Hoc Study Committee on Professional Fiduciary Licensing; Ad Hoc Study Committee on Spendthrift Trust Issues; Asset Protection Committee; Attorney/Trust Officer Liaison Conference; Charitable Planning and Exempt Organizations; Digital Assets and Information Study Committee; Elective Share Review Committee; Estate & Trust Tax Planning; Guardianship, Power of Attorney & Advance Directives; IRA, Insurance & Employee Benefits; Principal and Income Committee; Probate & Trust Litigation; Probate Law & Procedure; Trust Law; and Wills, Trusts & Estates Certification Review Course. Clearly, if your practice involves probate, trusts and estates, there is a committee here that you need to join!

Sarah Butters, our current Probate and Trust Division Director, has provided the following summaries of the activities of several of these Probate and Trust Division committees, so that you can see the tremendous amount of work being undertaken and concepts and issues being considered:

Charitable Planning and Exempt Organizations Committee. This is a new committee for the 2019-2020 Bar year, and they have hit the ground running! The most significant item that the committee is working on is the Charitable Symposium, which is tentatively set for October 16, 2020, in Miami. The committee already has tentative topics and commitments from speakers. The committee is also working to have its members write articles for ActionLine (and other journals) covering charitable planning or exempt organizations topics. Speaking and writing in general is a goal of the committee, as well, it is primarily focused on educational endeavors rather than legislative. Committee members are also working on legislative matters, including clarification of the role of the Attorney General in overseeing charitable trusts and improvements to the private foundation provisions. At each committee meeting, different charities are invited to speak on trends that are being seen in charitable giving and how it affects them. To date, the American Cancer Society (a new RPPTL Section sponsor), the Community Foundation for Palm Beach and Martin Counties, and the United Way of Miami-Dade County have spoken at committee meetings.

Asset Protection Committee. The committee has been working actively on two pieces of legislation. First, the committee is proposing legislation governing the formation and administration of Tenancy by the Entirety Trusts in Florida - this legislation was withdrawn in the 2019 Session to allow the stakeholders to work out some discrepancies, and it is likely to return in the 2020 legislative session. The committee is also monitoring and offering assistance to defend against proposals from other groups to enact the Uniform Voidable Transactions Act in Florida. The committee has been successful in convincing legislators to decline to adopt this proposed act until some revisions are made. This legislation stalled in 2017 and 2018, and it was not proposed in 2019 and is not expected back in 2020, but the committee is ready to take up the charge if needed. Finally, the committee is monitoring the drafting of the ACTEC Model Asset Protection Trust Statutes.

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Sailboats by John Neukamm

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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
3	Spring	January 15
4	Summer	April 15

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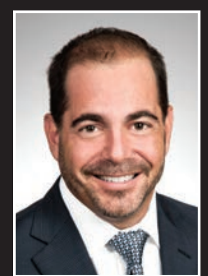
Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.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Letter From The Co-Editors-In-Chief

Dear Readers,

Remember the old saying "You learn something new every day"? Well, hopefully we all learn something new with every issue of *ActionLine*.

This issue of *ActionLine* is especially filled with useful content for all Section members and is worth reading cover-to-cover. Many of the articles have cross-over appeal. On the one hand, our "dirt" editors found several interesting tidbits of useful information in articles that, at first glance, appear to be written for members on the "death" side. For example, would you have correctly predicted the outcome of the *Bitetzakis* case on Page 50? On the other hand, our probate and trust editors discovered practical information within pieces primarily written for the benefit of real estate lawyers. For example, you should review the *Baldwin* case on Page 54 and the *Keystone* case on Page 20 if you are building a new home! Of course, many of our readers have a diversified practice touching on real estate, probate and trust issues.

If nothing else, reading the entire magazine may cause you to take a trip down memory lane. How much time since law school or studying for the bar exam have you spent thinking about things like the rule against perpetuities (see Page 24), the long-arm statute (See Page 52) or the elements of adverse possession (see Page 53)? Not to frighten you, but the contents of this issue of *ActionLine* will show you they remain relevant!

A large number of Section members are interested in construction related matters. Those folks (and the rest of us) should be interested in the *Baldwin v. Henriquez* case highlighted on Pages 48 and 54.

Are you up to speed on: E-Wills; remote notarizations; what does and does not constitute consequential damages; the latest case law pertaining to class actions in the context of condominiums; and, the two questions a business owner may ask when presented with a reasonable modification request for a service animal from a disabled person when the disability and the need for the service animal is not obvious? All these items, encountered by Section members on a daily basis, are addressed in the publication you are reading now!

As is evident by Rob Freedman's Chair's Column, there are a myriad of ways to get involved in the Section. The substantive committees are, as Rob indicates, the true lifeblood of the Section. Read his column and get a sense of the opportunities and return on investment available through participation in the committees. The committees often provide the content you find in *ActionLine*.

That said, we encourage all readers to consider submitting articles to us for publication. As we often say: "If you had to research an issue, it is likely something that will be of interest to the readers of *ActionLine* and it will be a service to your colleagues if you are willing to share your information via an article." Content IS king! And we appreciate all your support. — The Editors

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Trust Law Committee. The committee has been working on the Florida Uniform Directed Trust Act, which was discussed at the RPPTL Section meeting in Miami in early November and approved as a Section position. This has been a multiple year project for the committee. The committee also has subcommittees looking at: (1) proposed legislation intended to address a trustee's ability to condition a distribution upon receipt of a release; (2) analyzing the need for legislation intended to address trustee duties in connection with revocable trusts; (3) studying whether Florida's prudent investor act is in need of change; and (4) examining whether there is a need for legislation that addresses the qualifications of trustees.

IRA, Insurance & Employee Benefits Committee. The committee is currently working on a number of projects: (1) assisting legislative liaisons in addressing inquiries on the RPPTL Section's 2020 statutory proposal regarding IRAs transferred incident to divorce; (2) analyzing Florida's Uniform Transfers to Minors Act statute and the rules thereunder regarding retirement plan assets; (3) analyzing the treatment of retirement accounts under Florida's principal and income act as well as the proposed uniform principal and income act, and advising the Principal & Income Act Committee regarding retirement plan aspects of the proposed uniform act; (4) organizing a joint meeting with the Charitable Benefits & Exempt Organizations Committee to discuss areas of common interest and best practices regarding charitable planning for retirement benefits; (5) studying the proposed SECURE Act currently pending in Congress, considering potential planning implications of the SECURE Act, and educating members of the Bar and the Section regarding the SECURE Act; (6) providing technical assistance to the Family Law Section in its efforts to update the Florida statutes regarding assignment of municipal pension benefits in divorce; and (7) preparing multiple CLEs and articles on retirement and/or insurance planning matters.

Ad Hoc E-Wills Committee. The committee is: (1) reviewing the new remote notary act to identify any glitches and pitfalls; (2) working to educate Florida practitioners through the development of seminars and webcasts, as well as writing opportunities; (3) assisting with development of required training for remote online notaries; and (4) working with the Clerks of Court in their efforts to become a qualified custodian for electronic wills. In addition, committee members Jenna Rubin and Sarah Butters recently submitted an article for The Florida Bar Journal on the Act, and they are preparing a shorter article for ActionLine.

Ad Hoc Study Committee on Professional Fiduciary Licensing. The committee is studying the feasibility of licensing professional fiduciaries and alternatives to licensing (e.g., requiring insurance).

Principal and Income Act Committee. The committee is in the process of analyzing the Uniform Fiduciary Income and Principal Act (UFIPA) to determine what modifications are needed before introducing it as a proposed replacement to Chapter 738, Florida Statutes, the current Principal and Income law of Florida. They anticipate circulating a draft of the new Act in 2020.

Jurisdiction and Due Process Committee. The committee is looking at revisions to Part III of the Florida Trust Code on "representation" of trust beneficiaries by others. In particular, the committee is currently looking at Fla. Stat. §736.0306 on designated representatives and such questions as whether a designated representative can represent beneficiaries in litigation without due process ramifications. Additionally, in connection with the representation issues, the committee is looking at Fla. Stat. §731.303 (part of the Florida Probate Code) to see whether changes are necessary or advisable, and whether representation in probate proceedings should necessarily parallel the Trust Code regime. The focus is on the issues of due process presented by representation of one person by another in litigation.

Guardianship. The committee has been very active legislatively and has also assisted the legislature with analyzing gaps in the current Guardianship Code that might need to be fixed. At the invitation of Senator Kathleen Passidomo, members of the committee recently traveled to Tallahassee to meet with the Senator and various elder law groups to discuss some immediate fixes, as well as the committee's progress on a re-write of the Guardianship Code.

As you can see, there is a lot going on! The above summaries illustrate only a portion of the work being performed by these substantive committees, and the other committees are similarly working on many items. If you are not participating in a Probate and Trust Division committee, I strongly recommend that you get involved – it can only enhance and improve your practice, as you will quite likely learn something that you did not previously know! More information about the Probate and Trust Division committees can be found at www.rpptl.org. If you are interested in getting involved, you can either reach out to the committee chair (again, listed on www.rpptl.org) or contact **Sarah Butters** (sbutters@ausley.com).

In my next column, I will focus on the work of the Real Property Division substantive committees. AL

Asset Protection Planning With A *Rensin* Offshore Trust

By Jerome L. Wolf, Katz Baskies & Wolf PLLC, Boca Raton, Florida

The recent case of *In re: Rensin*,[1] is like a bar exam question created to challenge the best and brightest of Florida's real property and estate planning attorneys.

Briefly, more than 15 years before Mr. Rensin, a Florida resident, filed for bankruptcy, he settled (and was the primary beneficiary of) an irrevocable self-settled spendthrift trust (the "Joren Trust") in the Cook Islands. The situs of the trust was later moved to Belize. At the time the Joren Trust was settled, Mr. Rensin had no claims against him, nor had he formed the business that ultimately led to his bankruptcy.

Among other issues, the case involves rights to annuities that, under certain circumstances, are protected from the claims of the annuitant's creditors under Fla. Stat. § 222.14 (2011); and rights to Mr. Rensin's homestead, that is protected from the claims of his creditors under Article X, Section 4 of the Florida Constitution.

An important issue the Court was required to examine was whether the transfer of assets comprising the principal of the Joren Trust was void and could be accessed by the Court to become part of the bankruptcy estate. In other words, which law applied to the administration of the trust – Belize law, which recognizes self-settled spendthrift trusts, or Florida law, since that was where the Bankruptcy Court was sitting.

Fla. Stat. § 736.0202(2)(a) (2013) provides in pertinent part as follows:

(a) Any trustee… whether or not a citizen or resident of this state, who personally or through an agent does any of the following acts related to a trust, submits to the jurisdiction of the courts of this state involving that trust:

(3) Serves as trustee of a trust create by a settlor who was resident of this state at the time of the creation of the trust ….

Moreover, Fla. Stat. § 736.0107 (2016) confirms that "a designation [of the governing law] in the terms of a trust is not controlling as to any matter for which the designation would be contrary to a strong public policy of this state."

The Bankruptcy Court determined that under Florida law, the choice of law provided in a contract is binding unless it offends Florida public policy.[2] The Court held that "[to] permit Mr. Rensin to rely on the law of Belize, to enforce an asset protection trust designed to offend his creditors, is contrary to Florida public policy. The Court will not apply Belize law but will apply the law of Florida to all aspects of the Joren Trust."

Fla. Stat. § 736.0505(1) (2019) provides "[w]hether or not the terms of a trust contain a spendthrift provision … With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."

In a somewhat similar case, *In re Huber*,[3] Mr. Huber was a lifelong resident of the State of Washington. Washington, similar to Florida, considers self-settled spendthrift trusts to be against public policy. In fact, Section 19.36.020 of the Revised Code of Washington states that transfers of assets into a self-settled trust "are void as against the existing or subsequent creditors" of the settlor.

Nonetheless, Mr. Huber transferred substantial assets to an Alaska limited liability company, and then transferred membership interests in the Alaska LLC into an Alaska DAPT ("Domestic Asset Protection Trust"). Sometime later, Mr. Huber filed for bankruptcy. The bankruptcy judge found that the Alaska trust did not protect its assets from the claims of Mr. Huber's creditors. The Court held that the provisions of Alaska law that recognize the validity of self-settled spendthrift trusts are invalid under the provisions of Washington law that reject self-settled spendthrift trusts. The Court cited the RESTATEMENT (SECOND) OF CONFLICT OF LAWS:

> Effect will be given a provision in the trust instrument that the validity of the trust shall be governed by the local law of a particular state, provided that this state has a substantial relation to the trust and that the application of its local law does not violate a strong public policy of the state with which as to the matter at issue the trust has its most significant relationship.

Accordingly, the Court held that Mr. Huber's transfer of assets into a self-settled spendthrift trust that he created primarily for his benefit was void under Washington law. Since Mr. Huber's transfer of assets was void, the bankruptcy trustee was entitled to summary judgment as a matter of law to the extent the trustee sought to have the transfers invalidated.

Before revealing the plot twist in *Rensin*, we first must discuss the Belize Revised Trust Act, which is the governing legislation for Belize trusts. One provision of particular importance is that a foreign court order is not recognized in Belize because such courts have no jurisdiction to issue orders against entities or structures in Belize. Subsection (6) of Section 7 of the Belize Trust Act provides:

> (6) Where a trust is created under the law of Belize, the Court shall not vary it or set it aside or recognize the validity of any claim against the trust property pursuant to the law of another jurisdiction or the order of a court of another jurisdiction in respect of:
>
> (a) The personal and proprietary consequences of marriage or the termination of marriage.

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(b) Succession rights (whether testate or intestate) including the fixed shares of spouses or relatives; or

(c) The claims of creditors in insolvency.

Since the courts in Belize do not recognize judgments from foreign courts, a creditor has to re-litigate the case in Belize using local counsel. Moreover, as under British procedure, a creditor must post a bond prior to litigating in Belize, since under local law the "loser" pays the fees and costs of the winner.

In addition, subsection (7) of Section 7 of the Belize Trust Act expressly excludes trusts created in Belize from the operation of the Statute of Elizabeth; meaning that a trust created under Belize law is excluded from the provisions of the law of fraudulent conveyances as regards claims arising under any foreign law. Accordingly, Belize does not have a vesting period or waiting period for assets to become protected once they are transferred into a Belize trust. Consequently, a creditor cannot file a cause of action against the settlor for fraudulent transfer. No vesting period means that assets moved into a Belize trust are automatically protected from creditors' claims since there is no statute of limitations within which a creditor can bring a cause of action for fraudulent conveyance.

In *Securities and Exchange Commission v. Banner Fund International* 211 F.3d 602 (D.C. Cir. 2000), the SEC applied for an order to compel the trustee of a Belize trust to disclose information and surrender certain assets of the trust. At the hearing on the application, the Supreme Court of Belize refused the order on the ground that the application contravened the provisions of the Belize Trust Act.

In Count I of the complaint in *Rensin*, the bankruptcy trustee sought a declaratory judgment that the contents of the Belize trust are property of the bankruptcy estate, on the grounds that under Fla. State. § 736.0505(1) (2019), Mr. Rensin's creditors may seek payment from any trust assets that could be paid to him. Count III of the Complaint sought an order directing Mr. Rensin to turn over the funds in the Belize trust.

The Court concluded that although the assets in the Joren Trust are subject to administration in the bankruptcy case, "*because the Joren Trustee is not a party to this action, the plaintiff cannot obtain enforceable relief regarding the assets of the Joren Trust.*" (emphasis added). The Court suggested *"[a]s an alternative, the plaintiff may seek relief against the Joren Trust in Belize."*[4] (emphasis added).

If the Joren Trust was an Alaska DAPT, for example, then based upon *Huber* there could have been enforceable relief against the Trustee. But in *Rensin,* the Court could not get jurisdiction over the Trustee. "Because the… Trustee is an indispensable party that has not been joined, the portion of Count I seeking a declaratory judgment that the assets of the … Trust are the property of the bankruptcy estate will be dismissed, without prejudice."[5]

And, at Item 7, declares "the Court will deny all relief under Count III of the Complaint, without prejudice to "attempt to join the Joren Trust as a defendant."[6]

Consequently, the Court determined that the assets of the irrevocable, self-settled spendthrift trust that Mr. Rensin established for his own benefit were subject to administration by the bankruptcy trustee, since Florida law placed the debtor's creditors in the same position as if the trust had not been created. However, the Bankruptcy Court could not enter a declaratory judgment regarding the attachment of the assets of the trust since the trustee, an indispensable party in the suit affecting the assets of the Trust, was not joined as a party; and, therefore, the Court could not order the "turn over" of the assets of the Trust.

J. WOLF

***Jerome L. "Jerry" Wolf** is a partner in the Boca Raton law firm of Katz Baskies & Wolf PLLC. He is certified as a specialist in Wills, Trusts & Estates law by the Board of Legal Specialization and Education of The Florida Bar, is a Fellow of The American College of Trust and Estate Counsel (ACTE) and is a founder and Co-Dean of The Florida Fellows Institute.*

Jerry has been honored by his selection as an Intermediary of the Bahamian Financial Services Board of the Commonwealth of the Bahamas and has been selected by the Robb Report's WORTH Magazine as one of the Top 100 Attorneys in the United States. Most recently, Jerry has been ranked by Chambers as one of the best Private Wealth lawyers in the country.

Endnotes

1 *Rensin,* 600 B.R. 870 (S.D. Fla., 2019).

2 "A Bankruptcy Court's jurisdiction arises from Federal Bankruptcy law, yet state law governs the validity of most property rights. *In re: Jafari*, 569 F.3d at 648. In this case, the Court follows the so-called diversity jurisdiction approach and looks to Florida law."

- "Under Florida law, the choice of law provided in a contract is binding unless it offends Florida public policy. *See Floating Docks v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 80 (Fla. 2012); *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000). Florida law strongly disfavors asset protection trusts, where the settlor is also the primary beneficiary and there are spendthrift protections. *Menotte v. Brown (In re Brown)*, 303 F. 3d 1261, 1266 (11th Cir. 2002) (citing cases). While Florida law provides a broad set of exemptions designed to protect various assets from the collection activities of creditors, See Fla. Stat. ch. 222, Florida Courts will not enforce a spendthrift trust designed to permit a person to place his or her assets beyond the arms of creditors. *See* Fla. Stat. §736.0107; *In re Brown*, 303 F.3d at 12-66-67; *Barbee v. Goldstein* (*In re: Reliance Fin. & Inv. Group, Inc.*), No. 05-80625, 2006 U.S. Dist. LEXIS 82945, at *19-20 (S.D. Fla. Nov. 14, 2006). Mr. Rensin does not contest that the law of Belize is contrary to Florida public policy on this point."

- "The Joren Trust falls squarely within this category of trusts. To permit, Mr. Rensin to rely on the law of Belize, to enforce an asset protection trust designed to offend his creditors, is contrary to Florida public policy. The Court will not apply Belize law but will apply the law of Florida to all aspects of the Joren Trust. See *Goldberg v. Lawrence* (In re: Lawrence), 227 B.R. 907, 917-18 (Bankr. S.D. Fla. 1998)."

3 *In re Huber*, 201 B.R. 685, 2013 WL 2154218 (Bankr.W.D. Wash, May 17, 2013).

4 *In re Rensin*, 600 B.R. 870, 888.

5 *Id.*

6 *Id.*

Streamlining Your Dissolution Of Marriage (Or Civil) Judgment To Convey Or Transfer Real Property

By Michael M. Shemkus, Esq., Long, Murphy & Zung, P.A., Naples, Florida

The parties execute a marital settlement agreement. The agreement provides that within thirty days, the husband must execute and deliver a deed, quit-claiming his interest in the former marital residence to the wife. The parties file the agreement with the court and the trial court enters a final judgment of dissolution of marriage, incorporating the agreement by reference. Then the husband packs up his belongings and moves to Thailand without ever delivering an executed deed. What is the wife to do?

If the parties (or their attorneys) were astute enough when preparing the agreement, the wife could simply record the final judgment (and the agreement) in the same county as the former marital residence, effectuating a muniment of title[1] and achieving the same legal effect as if she had recorded an executed quit-claim deed.

However, if the agreement failed to include the proper language, she would be left either chasing down her globetrotting ex for contempt or incurring additional attorney's fees in commencing an action to quiet title. Neither option seems all that appealing, particularly after she has already gone through the trouble and expense of dissolution proceedings.

For this wife—and for all parties finding themselves in her shoes—attention to Fla. R. Civ.P. 1.570(d) and Fla. Stat. § 61.075(4) (2019) is essential.[2]

Fla. R.Civ.P. 1.570(d) provides:

> **Vesting Title**. If the judgement is for a conveyance, transfer, release, or acquittance of real or personal property, the judgment shall have the effect of a duly executed conveyance, transfer, release, or acquittance that is recorded in the county where the judgment is recorded. A judgment under this subdivision shall be effective notwithstanding any disability of a party.

Fla. Stat. § 61.075(4) (2019) provides:

> The judgment distributing assets shall have the effect of a duly executed instrument of conveyance, transfer, release, or acquisition which is recorded in the county where the property is located when the judgment, or a certified copy of the judgment, is recorded in the official records of the county in which the property is located.

Under both authorities, a mere "judgment" is insufficient. Fla. R. Civ. P. 1.570(d) requires the judgment to be one of "conveyance, transfer, release, or acquittance," while Fla. Stat. § 61.075(4)(2019) requires it to be one "distributing assets." Understanding what elevates a judgment to one or both of these two categories will determine whether the absence of a subsequent quit-claim deed amounts to a problem or not.

First, one should distinguish between a judgment which merely requires a party to perform an act, from one which actually conveys or transfers the subject property. Language is critical here.

In the case of *Sharp v. Hamilton,*[3] a mortgagee sought to foreclose on a mortgage executed solely by the former husband. The former wife, who had been awarded title to the subject property as lump sum alimony, cross-claimed to quiet title. The judgment awarding the former wife title to the property resulted from dissolution of marriage proceedings and specifically ordered that "sole title" to the property be vested in her. The award of "sole title" to the property was deemed sufficient by the Florida Supreme Court to effectuate a legally sufficient defeasance of the former husband's interest in the property so as to protect the property from the former husband's creditors. *Id.* at 10-11 ("[W]e find the judgment of dissolution ordering Mrs. Hamilton be awarded full title to the entireties property as lump sum alimony operates as a defeasance of the husband's interest in the property …").[4]

In contrast, in the case of *Hadden v. Cirelli,*[5] the parties executed a marital settlement agreement which was subsequently incorporated into a final judgment of dissolution of marriage; however, rather than declare sole title to vest in either party, the agreement merely obligated the husband to "convey all right, title, and interest in the following described real properties to the Petitioner-wife within 20 days of the entry of [the] Final Judgment …."[6] This approach, which focused on obligating a party to perform certain acts as opposed to outright vesting title in the wife, was deemed to prevent the judgment from effectuating a transfer.

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As the court explained:

> Mr. Cirelli maintains that application of this rule supports the trial court's conclusion that the 1978 dissolution judgment conveyed the father's interest in Parcel A to the mother. This argument is without merit because the specific language of the dissolution judgment is not 'for a conveyance [or] transfer' of the property. Instead, the judgment merely directed the father to convey all right, title, and interest in Parcel A to the mother within 20 days of the entry of the judgment...
>
> [T]he Hadden's 1978 dissolution judgment was not self-executing. It did not operate to automatically transfer the father's interest, nor did it recognize a special equity in the mother. The judgment merely incorporated the terms of the parties' settlement agreement and then directed the father to transfer his interest in Parcel A to the mother within 20 days. When the father failed to comply, the judgement did not automatically operate to transfer his interest in Parcel A to the mother.[7]

Likewise, in *Pegram v. Pegram,*[8] the court arrived at the same result for essentially the same reasons. In *Pegram*, the parties executed a marital settlement agreement which was subsequently incorporated into a final judgment of dissolution of marriage. Just as in *Hadden*, rather than expressly award sole title of the marital home in either party, the agreement merely required the husband to "execute a quit claim deed to the wife."[9] Because the agreement (and the judgment which incorporated it) failed to state that same was intended to accomplish an actual conveyance or transfer of the subject property, it failed to supplant the need for a deed. The court explained:

> It is true that a judgment of dissolution may convey real property from one spouse to another … Section 61.075(4), Florida Statutes (1995), provides that a 'judgment distributing assets shall have the effect of a duly executed instrument of conveyance.' But the judgment dissolving William and Judy Pegram's marriage did not distribute assets. Instead, the settlement agreement required William to 'execute a quit claim deed' and the judgment ordered him to 'comply with the terms' of the settlement agreement'.
>
> Neither did the agreement provide that Judy Pegram would obtain sole title to the real estate on dissolution. Nor would title vest in Judy Pegram under Florida Rule of Civil Procedure 1.570(d). That rule concerns vesting of title when the judgment 'is for a conveyance.' But this dissolution judgment did not operate as a conveyance.[10]

There are numerous other examples of judgments which failed to serve as a conveyance or transfer of real property in Florida.[11]

In addition to including language clearly vesting sole title in one or the other party upon dissolution, Florida courts have also required that the judgment specifically identify the property—but not always according to the same standard.

Some courts have held inclusion of a property's legal description is required to effectuate a valid conveyance by way of a final judgment.[12] On the other hand, some courts have held a property's street address, or general description to be sufficient.[13]

> An effective conveyance of property needs a sufficient description of the property involved. A proper description is needed so that the parties can ascertain, locate and know what property is involved in specific transactions.
>
> In the case *sub judice*, the subject property was well known to both husband and wife and due to this familiarity no surprise or prejudice resulted from the use of the street address of each parcel of property as opposed to the more detailed legal description. The parties and the court could ascertain and locate the property under consideration without the use of a legal description, and this court is not disposed to eliminate the wife's special equity for a failure to provide a legal description.[14]

Other decisions, outside of the specific context of conveyances pursuant to final judgments of dissolution of marriage, have provided for an even laxer standard. In *Mendelson v. Great Western Bank, F.S.B.,*[15] the court stated:

> The rule is that a 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. Following this rule, Florida courts have upheld conveyances that identified the subject property by their street addresses; or by designations commonly understood in their communities in which the properties were located; and by such seemingly imprecise language as 'my forty near the Garrison lands, in Hernando County.'

With varying degrees of specificity required, depending on the court, a careful practitioner might do well to err on the side of caution by describing the property to be conveyed in a final judgment by its legal description rather than its street address.[16]

No one Florida statute, Supreme Court Rule, or court of review has specified the language required in a judgment to effectuate the automatic conveyance of real property described therein. The following is this author's suggested form based on the research contained herein and consultations with various family law and real estate attorneys around the Naples, Florida area:

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Effective immediately by operation of this Final Judgment of Dissolution of Marriage[17], the wife, JANE A. DOE, whose address is 555 John Adams Boulevard, Naples, Florida 34102, is hereby vested with sole right, title, and interest to the real property legally described as:

[LEGAL DESCRIPTION]

This provision shall constitute a "conveyance" or "transfer" within the meaning and scope of Rule 1.570(d), Florida Rules of Civil Procedure. This Final Judgment of Dissolution of Marriage shall constitute a "judgment distributing assets" within the meaning and scope of Section 61.075(4), Florida Statutes (2019).

M. SHEMKUS

Michael M. Shemkus, Esq. *is an associate attorney at the law firm of LONG, MURPHY & ZUNG, P.A. in Naples, Florida. Michael's practice is entirely devoted to Florida family law, including dissolution of marriage, paternity, post-judgment enforcement and modification, alimony, child support, and settlement agreements.*

Endnotes

1 *Sunshine Vistas Homeowners Ass'n v. Caruana*, 623 So.2d 490, FN[2] (Fla. 1993) ("'Muniments of title' is defined thus: 'Documentary evidence of title. The instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, by which [one] is entitled to defend the title …'" citing to *Black's Law Dictionary* 1019 (6th ed. 1990)).

2 The analysis pertaining to Fla. R. Civ.P. 1.570(d) is applicable to civil judgments, generally, whereas the analysis pertaining to Fla. Stat. § 61.075(4)(2019) is limited to judgments of dissolution of marriage under Chapter 61, Florida Statutes.

3 *Sharp v. Hamilton*, 520 So.2d 9 (Fla. 1988).

4 For other examples of judgments deemed sufficient to serve as a conveyance or transfer, *See In re Sussman*, 2019 WL 2402997 (Bankr. M.D. Fla. Jun. 3, 2019) (final judgment expressly stated that it was a conveyance of the property in accordance with F. R. C. P. 1.570(d)); *Holt v. Boozel*, 394 So.2d 226 (Fla. 5th DCA 1981) (final judgment awarded marital home to wife, declaring same to be wife's sole and exclusive property); *Liberman v. Kelso*, 354 So.2d 137 (Fla. 2d DCA 1978) (final judgment approved and incorporated marital settlement agreement which provided that wife should have sole title to and possession of the marital home); and *Baker v. Baker*, 271 So.2d 796 (Fla. 3d DCA 1973) (final judgment awarded wife the marital home as her sole property).

5 *Hadden v. Cirelli*, 675 So.2d 1003 (Fla. 5th DCA 1996).

6 *Id.*at 1004.

7 *Id.* at 1006.

8 *Pegram v. Pegram*, 821 So.2d 1264 (Fla. 2d DCA 2002).

9 *Id.* at 1264.

10 *Id.* at 1265.

11 *See In re Alonso*, 2018 WL 7017737, 2 (Bankr. S.D. Fla. Jun. 21, 2018) ("[W]here the judgment of dissolution does not allocate the property in its provisions, but rather directs the parties to take action to transfer the property, the result changes."); *Newberry v. Newberry*, 67 So.3d 1123, 1124 (Fla. 1st DCA 2011) ("[A] final judgment will operate as an automatic transfer of interests in property only when the language of the final judgment expressly transfers a property interest from one spouse to the other or declares that one spouse has sole interest … the final judgment does not include specific language of conveyance of title to the former wife."); *In re Clark*, 289 B.R. 474, 482 (Bankr. M.D. Fla. Feb. 11, 2003) (final judgment which "adopted and approved" settlement agreement and "ordered [the parties] to comply with its terms," which included provision that they "agree to deed" marital residence held to be not self-executing); and *In re Wald*, 248 B.R. 642, 648 (Bankr. M.D. Fla. Sep. 14, 1998) ("[T]he judgment did not require the former husband to execute a conveyance of the Tamiami Trail Property, and the judgment itself did not convey title to or distribute the Tamiami Trail Property to the Plaintiff.").

12 *See In re Sussman*, 2019 WL 2402997, 6 (Bankr. M.D. Fla. Jun. 3, 2019) ("The court finds that all requirements necessary under Florida law to effectuate a conveyance … were satisfied by the Final Judgment. The Final Judgment contains the legal description …"); *Schroeder v. Lawhon*, 922 So.2d 285, 291 (Fla. 2d DCA 2006) ("In this case … the order of partition was insufficient to vest title to the two parcels in the parties because it did not include legal descriptions of the parcels."); and *Williams v. Shuler*, 551 So.2d 585, 587 (Fla. 1st DCA 1989) ("In the instant case … the Stipulation and Final Decree were incapable of vesting title because neither document contained, or even made reference to, a legal description of the property and interests involved.").

13 *See In re Flammer*, 150 B.R. 474, 476 (Bankr. M.D. Fla. Jan. 29, 1993) ("[P]roperty described by street address rather than legal description provides sufficient constructive notice by way of the recording statute. In the instant situation, it necessarily follows as a matter of law that equitable title to the three properties described by street address and awarded to the wife passed to her upon the recording of the Amended Final Judgment of Dissolution of Marriage.").

14 *Baker v. Baker, 271 So.2d 796 (Fla. 3d DCA 1973), at 797-798.*

15 *Mendelson v. Great Western Bank, F.S.B.*, 712 So.2d 1194, 1196 (Fla. 2d DCA 1998).

16 *Id.* at 798 (referring to the use of legal descriptions in pleadings and final judgments as the "better practice").

17 Or "Marital Settlement Agreement," as the case may be.

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Florida's Newlywed Documentary Stamp Tax Exemption

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

Florida imposes documentary stamp tax on a wide variety of documents, such as bonds, debentures, promissory notes, and assignments of wages. For Florida taxpayers, the most familiar imposition of documentary stamp tax is likely on deeds and other instruments relating to real property. Anyone who has ever purchased a home in Florida has most likely encountered and paid the tax, even if they never became aware of it in the chaos of a closing. Currently imposed at $0.70 for each $100 of consideration paid for the transfer of real property, the bottom line is a tax of 0.7% of the purchase price of real property. Contrasting the 0.7% documentary stamp tax to Florida's sales tax, which can be more than 10 times the documentary stamp tax rate, it is easy for "doc" stamp taxes to be overlooked in a larger discussion of Florida's state and local tax landscape. However, documentary stamp tax in Florida became increasingly controversial leading up to the statutory amendments in 2018 and 2019.

Documentary Stamp Tax Exemptions

Like other states, Florida uses its state and local tax scheme to encourage certain behaviors by its residents and to discourage others. For example, many states, including Florida, fully exempt grocery items from sales and use tax.[3] However, both soda and candy are excluded from the exemption.[4] By creating a price difference between candy and other snacks, or soda and juice, Florida residents are subtly encouraged to choose healthier options on their weekly shopping trip. Similarly, Florida encourages certain transfers of property through its documentary stamp tax exemption.

Looking after its own interests first, Florida's statute on documentary stamp tax first exempts documents that arise out of the transfer of real property from a nonprofit organization to the Board of Trustees of the Internal Improvement Trust Fund, to any state agency, to any water management district, or to any local government.[5] For purposes of documentary stamp tax, a nonprofit organization is defined narrowly to include 501(c)(3) organizations whose purpose is the preservation of natural resources.

However, Florida also provides exemptions for its residents to encourage business within the state. Florida exempts contracts to sell the residence of an employee relocating at his or her employer's direction, or to documents related to the contract, when the contract exists between the employee and the employer or between the employee and a person in the business of providing employee relocation services.[6] Providing an exemption to such homeowners encourages the free movement of employees across the state and promotes a business-friendly reputation amongst out-of-state or multi-state businesses.

Divorce and Marriage Exemptions

Governmental and business-related exemptions are common across all taxes; however, Florida's documentary stamp tax statute also includes an oddly specific and narrow exemption that grew increasingly controversial leading up to the 2018 amendment. Specifically, Florida's documentary stamp tax on documents relating to transfers of real property exempted a deed, transfer, or conveyance between spouses or former spouses pursuant to an action for dissolution of their marriage wherein the real property is or was their marital home or an interest therein.[7]

The exemption for property transferred pursuant to a divorce goes so far as to refund taxes paid when a deed, transfer, or conveyance occurred one year before the dissolution of marriage. It is not common to see a Florida tax exemption offer a refund that applies retroactively to one year before you even qualify for the exemption. Generally, the transaction or transfer must be exempt at the time of sale or transfer in order to qualify for a refund.

While governmental and business-related exemptions are generally thought to be in the best interest of the state and its residents, offering an exemption for such a personal

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reason does not seem in furtherance of any goals for the state. Furthermore, if exemptions are in place to encourage certain behavior, it is odd that divorces would be what Florida chose to advocate for above all others. The question of whether the state has an interest in promoting a nuclear family at all is a source of political debate that goes far outside the realm of documentary stamp taxes. However, regardless of any opinion regarding the influence of a government entity on personal matters within the home, it is difficult to reconcile an exemption provided to divorcing couples but denied to marrying couples.

It is exactly this discrepancy between marrying and divorcing couples that prompted the controversy resulting in Fla. Stat. § 201.02 (2018). Effective July 1, 2018, Florida has enacted a "newlywed exemption" on transfers of encumbered homestead property between spouses when the only consideration for the transfer is the amount of the mortgage remaining at the time of the transfer and the deed or other instrument is recorded within 1 year after the date of the marriage.[8] The exemption applies to the following transfers: 1) one spouse to another; 2) one spouse to both spouses; 3) both spouses to one spouse.

The new exemption is timely, as millennials are marrying later in life and therefore are more likely to have purchased a home prior to marriage than generations before. Florida residents who are getting married can structure their real property in a variety of ways to best suit their needs. It was important, however, that they acted quickly under the 2018 amendment. The statute provided the exemption only up to one year after the date of the marriage.

Equal Treatment?

Questions remain as to whether the new exemption provides the same relief as the longstanding one for divorcing couples. Divorcing couples can qualify for the exemption pursuant to an action for dissolution of their marriage but also can receive a refund should the transfer occur one year before the actual dissolution. Just as it is common for divorcing couples to separate before a divorce becomes finalized, it is just as common for marrying couples to move in together prior to marriage. Many young couples are forced by circumstance or choice to make decisions regarding their real property assets prior to formalizing their marriage. However, property transferred prior to marriage does not qualify for a refund.

Furthermore, while divorcing couples are bound by their divorce terms, couples getting married were required to act quickly to qualify within the statutory period of one year of marriage. The exemption for divorcing spouses does not put a timeline on the transfer, except for refund purposes. Rather, it simply must be "pursuant to an action for dissolution of their marriage." Therefore, while married couples were required to act quickly within a defined period, divorced couples are not similarly restricted.

Finally, the exemption for divorcing couples covers documents relating to the deed, transfer, or conveyance of a marital home or an interest therein. Meanwhile, the exemption for marrying couples covers documents relating to the deed or other instrument that transfers homestead property. The statute references the definition of homestead property in Fla. Stat. § 192.001 (2018), Florida Statutes. However, "marital home" is not similarly defined. Therefore, the scope of property covered by the exemption for married couples is narrower.

2019 Amendment

One year after the exemption for newlyweds was enacted, another amendment was signed into law by Governor Ron DeSantis. House Bill 7123 has further amended Florida's documentary stamp tax exemption on documents relating to property transferred between married couples to eliminate the requirement that the transfer occur within one year of marriage. Now, all married couples may benefit from the exemption for the duration of their marriage.

Time will tell if further amendments will be made to address some of the other differences between the exemptions, such as the types of qualifying property or the refund period. Regardless, the 2018 and 2019 amendments to Florida's documentary stamp tax statute to include transfers between married couples has resolved a longstanding oddity in Florida's tax scheme. Now, couples across Florida can enter into and leave marriages without the additional burden of documentary stamp taxes on their transfers of qualifying real property.

J. MOFFA

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Endnotes

1 Fla. Stat. Ch. 201 (2019).
2 Fla. Stat. § 201.02 (2019).
3 Fla. Stat. § 212.08(1) (2019).
4 Fla. Stat. § 212.08(1)(c)(7) (2019); Fla. Stat. § 212.08(1)(c)(11) (2019).
5 Fla. Stat. § 201.02(6) (2019).
6 Fla. Stat. § 201.02(8) (2019). Note: In the case of such transactions, taxes apply only to the transfer of the real property comprising the residence by deed that vests legal title in a named grantee.
7 Fla. Stat. § 201.02(7)(a) (2019).
8 Fla. Stat. § 201.02(7)(b) (2019).

Contesting The Beneficiary Designation – Unique Issues And Strategies

By Daniel A. Seigel, Esq., Law Offices of Daniel A. Seigel, Esq., P.A., Boca Raton, Florida

Probate litigation is traditionally associated with disputes relating to the validity of wills and trusts. However, as more individuals seek to transfer their wealth through Pay on Death ("POD") or Transfer on Death ("TOD") accounts, the validity of underlying beneficiary designations will be increasingly litigated.[1]

Beneficiary designation disputes often involve physical evidence and witnesses that are distinct from probate and trust contests. It is these unique issues that this article seeks to examine.

Background: Increasing Prevalence of Beneficiary Designations

The majority of wealth transfers at death are made pursuant to POD or TOD designations, which are distributed outside of a probate or trust administration.[2] Most retirement assets are held in qualified retirement plans or individual retirement accounts ("IRAs"). Assets in qualified retirement plans or IRAs utilize beneficiary designations to distribute assets at the owner's death.[3]

The following statistics demonstrate that the majority of assets are governed by such designations: As of 2017, American life insurance companies had more than $13 trillion of insurance in force and that year made $479 billion in benefit payments.[4] In 2017, the mutual fund industry held assets of $22 trillion.[5] Thirty-nine percent of American workers currently have defined contribution pension accounts, and the assets held in all forms of individual-account retirement plans are currently estimated at about $17 trillion.[6]

As succinctly expressed by Stewart E. Sterk and Melanie B. Leslie in *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*:[7]

> Because 401(K) and IRA accounts have become staples of the legal landscape only recently, a relatively small percentage of current decedents have had the opportunity to accumulate accounts assets over the course of their entire working lives. This situation will change dramatically over the coming decade, however, leaving the families of deceased account holders to bear the consequences of an inadequate beneficiary designation system.

Legal Authorities Governing Beneficiary Designation Disputes

First, Florida case law provides that beneficiary designations can be challenged and invalidated based on undue influence. In *Keul v. Hodges Blvd. Presbyterian Church*,[8] the court invalidated a POD designation of a decedent's credit union account when the decedent's former caregiver used her confidential relationship to obtain the designation. The *Keul* court stated TODs and PODs are will substitutes that "are subject to challenge on grounds such as undue influence, fraud, duress, and overreaching."[9] *Keul* explained that

> a POD account, although not in the strictest sense a testamentary device and not subject to the formalities required of wills, functions as a will substitute and partakes of many of the same equitable considerations that apply to testamentary transfers. Florida law and policy against abuse of fiduciary relationships apply to contracts, inter vivos transfers, and testamentary transfers, and are properly applied to determine whether a POD designation has been obtained through undue influence.[10]

Second, beneficiary designations can also be challenged for lack of capacity.[11]

Unique Issues Present in Designation Disputes

Lack of Formalities and Statutory Regulations for Execution

One of the biggest challenges in contesting a beneficiary designation is the lack of witnesses to the actual execution. Florida law imposes no required formalities for the execution of beneficiary designations (unlike statutes governing wills and trusts).[12] Most financial institutions do not require any witnesses or notaries to execute the beneficiary forms as witnesses.

Moreover, many financial institutions will permit a client to make a POD designation online. This presents substantial opportunity for potential undue influencers with access to the depositor's account login and password, or access to the depositor's computer where the information perhaps auto-fills.[13] As a result, it is difficult to determine whether the depositor or the undue influencer was the individual who effectuated the beneficiary designation.

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Many beneficiary designations are prepared and executed by the account owner without the assistance of legal counsel.[14] As a result, not only is there not a trusted advisor present to monitor the preparation of the form and serve as a potential witness, but the other procedural safeguards of witnesses (and possibly a notary) are also not present. Consequently, there are no witnesses to testify about the decedent's capacity, the circumstances surrounding the execution, or the identity of the individual(s) who assisted and facilitated the execution. This poses significant obstacles to any individual who wishes to contest the designation.

Increased Forgery Issues

Given the lack of witnesses to beneficiary designations, there are greater opportunities for fraud and outright forgeries of these documents. As such, the validity of the account owner's signature is often disputed. Attorneys litigating these cases should contact an experienced handwriting expert. Even if the handwriting expert is not formally retained in the dispute, a handwriting expert can provide essential work product analysis for an attorney to evaluate the subject document. In addition to a handwriting expert, a litigant may utilize a lay witness to testify regarding the authenticity of both the decedent's signature and handwriting. The standard for admissibility of a lay witness is that the lay witness must be "sufficiently familiar" with a subject's signature to form a "reliable opinion."[15]

Given the lack of witnesses to beneficiary designations, there are greater opportunities for fraud and outright forgeries of these documents.

Adjudication is Often Outside of Probate Court

While the probate court has exclusive jurisdiction for will and trust contests, this is not the case for beneficiary disputes. For example, Broward and Palm Beach County both have administrative orders[16] directing specific matters to their Probate Division (including, but not limited to, any matters governed by the Florida Probate Code and Florida Trust Code). Given that beneficiary designation disputes do not fall into either category (or any other category listed in these orders), they are adjudicated in the general circuit division within the appropriate Circuit Court (*i.e.*, not before a probate judge). Moreover, some litigants may seek to litigate in federal court (assuming the diversity and amount-in-controversy requirements are met).[17]

There are significant consequences for having these disputes adjudicated outside of probate court. First, most non-probate judges do not regularly deal with disputes involving capacity and undue influence issues. This presents numerous challenges to litigants and increases unpredictable outcomes. Among other issues, a non-probate division judge is less likely to know the *Carpenter* factors,[18] burden-shifting involved in undue influence cases, or the requisite standard for testamentary capacity.

Second, while some probate attorneys enjoy a degree of rapport and familiarity with probate judges, many of these attorneys do not have the same level of experience with non-probate judges. For those attorneys who have developed a strong level of credibility—through years of hearings before probate judges—appearing before an unknown judge in general circuit or federal court would be undesirable.

Litigants Must Front Legal Fees

In a beneficiary designation dispute, once a financial institution receives notice that there is a dispute as to the "true" beneficiary of the account(s), it will almost invariably exercise its discretion under the operative contract to either demand a court order identifying the correct beneficiary or interplead the funds into the court registry. As a result, the party who is defending the beneficiary designation cannot rely on the proceeds in the subject account to fund their litigation. This is in stark contrast to a personal representative who is required to utilize estate funds to defend a will challenge.[19]

Additional Party: The Financial Institution?

In will/trust disputes, the drafting attorneys are rarely (if ever) made parties to the litigation. However, in a beneficiary dispute, plaintiffs have multiple incentives for naming the financial institution as a nominal defendant. First, it formally places the institution on notice of the dispute, which will likely have the effect of freezing the asset until there is a court order or agreement between the parties. Secondly, it could force the financial institution to interplead the disputed funds into the court registry. Depending on the facts of the case, the financial institution could be subject to liability if it was negligent in permitting the beneficiary change to occur.

Prior to naming the financial institution as a defendant, attorneys should review the underlying account opening documents which may include mandatory arbitration provisions or forum selection provisions. The enforceability of these provisions could create additional litigation issues.

Key Evidence in Beneficiary Designation Cases

Entire File Maintained by Financial Institution for Subject Account

In beneficiary designation disputes, the decedent's entire investment file (at the financial institution that maintained the account(s) in dispute) often contains the most critical evidence.

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First (and most obviously), these files contain the beneficiary form at issue, and possibly the prior and/or original beneficiary form(s) for the account. The manner in which the beneficiary form was prepared (and executed) may reveal the mental or physical condition of the decedent at the time he or she signed the form. Thus, a litigant should specifically inquire whether the institution is in possession of the original form executed by the decedent. If the form is available, it could be examined by a handwriting expert for authenticity. If the form does not exist, it could provide an additional basis for a contest.

Second, a litigant should review the application prepared by, or for, the decedent. The accuracy of the information contained in the application and quality of the handwriting may reveal the mental or physical condition of the decedent. Additionally, it may be probative whether a third party prepared or typed the application for the decedent. If the decedent was able to utilize a computer without assistance, it may support the notion that they were competent. The application (or account profile) may also reveal that the contact information provided for the decedent (*e.g.*, cell phone number and e-mail address) was that of the purported beneficiary of the account, rather than the decedent.

Third, the financial advisor's notes of conversations with the decedent and third parties are significant components of the file. These notes may describe:

1) the decedent's mental capacity and physical condition at various times;

2) the decedent's intentions regarding making a beneficiary designation; and

3) whether the decedent or financial advisor communicated about the account with other individuals or the beneficiary. Often, these notes will demonstrate that third parties contacted the financial advisor regarding the decedent's account, even though they had no formal authorization or legal authority to permit such communications.[20]

Finally, a litigant should request copies of any recorded conversations between the decedent and employees of the financial institution. These tapes could reveal the decedent's level of mental lucidity and the involvement of any third parties.

Entire File Maintained by Financial Institution that Originated Account

It is often important to understand whether the decedent established the subject account with another financial institution or advisor, but subsequently transferred the account to the institution that housed the account at the time of the decedent's death. This discovery may demonstrate that the new financial advisor was recruited by the beneficiary of the decedent's account or assets.

Estate Planning File Maintained by Decedent's Attorney

While the decedent's estate planning documents (*i.e.*, last will and testament and trust) are not at issue in these cases, the decedent's entire estate planning file should be obtained through discovery. These documents can reveal whether the decedent's beneficiary designations (and any subsequent changes) were consistent with the estate plan. If the designations are inconsistent with the terms of the decedent's will or trust, it could support the conclusion that the designations did not reflect the true intentions of the decedent.

Any notes and correspondence with the decedent regarding the decedent's intentions and capacity could be seminal in establishing the validity of the designations.

Finally, the decedent's formal estate planning documents, which require witnesses and are often notarized, are paramount in establishing the true signature of the decedent. These documents can be utilized by a handwriting expert in evaluating the signature(s) contained in the beneficiary designations. Variations in signature due to diminished capacity can be established by evaluating the signatures contained in this file.

Key Depositions

Undoubtedly, the key witnesses to depose in beneficiary disputes are similar to those present in will and trust disputes. These include the beneficiaries of the designations, the decedent's caretakers, medical providers, and family members. The deposition of the beneficiary of the subject designations can be the most significant piece of discovery in these cases. The identical questions that would be asked of a beneficiary of an estate plan (*i.e.*, questions that center on the *Carpenter* elements) should be utilized at this deposition.[21]

Financial Advisor

The deposition of the decedent's financial advisor (or the person otherwise responsible for establishing and managing the subject account) is one of the unique elements of beneficiary designation litigation. Because of his or her ongoing oversight over the subject account, the financial advisor is uniquely positioned to comment on the decedent's level of involvement in managing the account, as well as the decedent's level of financial sophistication. The issues that would routinely be addressed in the deposition of an estate planning attorney - the advisor's relationship history with the decedent, the decedent's intentions in making a beneficiary designation, mental lucidity of the decedent, and involvement of third parties/beneficiaries - should be addressed in this deposition.

Additionally, great effort should be made to determine if there was a change in financial advisors just prior to the beneficiary change. If this occurred, the former financial advisor should be deposed to ascertain the circumstances surrounding their work with the decedent and any perception of the reasons why the decedent elected to utilize a new

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financial advisor. If the former financial advisor believed that the client's departure was sudden, unexpected, or instigated by a third party, this could support a claim of undue influence.

Records Custodian for Financial Institution for Subject Account

Deposing the Record Custodian for the financial institution which maintained the disputed account is critical to ascertaining the following facts:

- whether any original signatures are on file for the subject beneficiary designation;
- when the subject form was sent to the decedent;
- when the subject form was received by the institution from the decedent;
- whether the decedent accessed their account online and attempted to make online changes to the designation; and
- whether any recordings were made and/or maintained.

All this information can be critical to building a timeline of events and developing circumstantial evidence relating to the validity of the subject designation.

Estate Planning Attorney

The decedent's estate planning attorney should be deposed to understand what role (if any) he or she played in creating the subject beneficiary designations. The extent to which the estate planning attorney's testimony is consistent with the testimony of the financial advisor could be a significant development in the case. For example, if the account beneficiary was ever named as a beneficiary in the decedent's estate planning documents, it could support a challenge to the named beneficiary. Additionally, the attorney may have knowledge of a variety of issues about which the financial advisor was unaware (*i.e.*, family dynamics, history of estate plan and amendments to plan, philanthropic objectives, significant life events, *etc*).

Additionally, other attorney(s) who prepared earlier estate plans for the decedent should be identified, questioned, and, if necessary, deposed. The manner and timing of the prior estate planning attorney('s) replacement may provide circumstantial evidence supporting the plaintiff's theory of the case.

Conclusion

Achieving a successful outcome in a beneficiary designation dispute requires a litigator to employ different tactics from the traditional probate or trust dispute. While an estate planning attorney and lay witnesses may not be available, other witnesses (such as financial advisors and handwriting experts) can play a pivotal role. It is essential to obtain as much documentation as possible regarding the decedent's account(s), including the underlying application, contract, and all beneficiary designations. These are not insurmountable challenges and given the anticipated increase in the name of beneficiary designations and the value of these types of retirement assets, this is an area well worth understanding.

D. SEIGEL

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Endnotes

1 TOD designations are often associated with an investment account for stocks, bonds, or other non-qualified, or post-tax investments. POD designations are generally associated with a bank account, life insurance, and annuities.

2 John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1 (Spring 2012).

3 *Id*.

4 American Council of Life Insurers, 2018 Fact Book, at 3.

5 Investment Company Institute, 2018 Fact Book, at 34.

6 John H. Langbein, "Because Property Became Contract: Understanding the American Nonprobate Revolution," (Aug 1, 2019 draft), in *The Changing Role of Property Law; Rights, Values and Concepts* (Ernst Nordtveit, ed.) (forthcoming 2020).

7 89 N.Y.U.L. Rev. 165, 169 (2014).

8 *Keul v. Hodges Blvd. Presbyterian Church*, 180 So. 3d 1074 (Fla. 1st DCA 2015).

9 *Id*. at 1076.

10 *Keul*, at 1077.

11 *See State ex rel. Albritton v. Lee*, 183 So. 782, 795 (Fla. 1938) ("elements of a contract" are "competent parties, lawful subject matter, valid consideration and agreement of minds"); *See also Hogan v. Supreme Camp of American Woodmen*, 1 So. 2d 256, 258 (Fla. 1941) ("[a] valid contract requires both capacity of the parties and consideration").

12 *See* Fla. Stat. §732.502 (governing will formalities) and Fla. Stat. §736.0403 (governing trust formalities).

13 *Id*. at 113.

14 I*d*.

15 *Redmond v. State*, 731 So. 2d 77 (Fla. 2d DCA 1999); *Clark v. State*, 114 So. 2d 197 (Fla. 1st DCA 1959).

16 *See* Broward County Clerk of Courts Administrative Order 2009-86-PRC and Palm Beach County Clerk of Courts Administrative Order 6.102-9/08.

17 *See* 28 U.S.C. § 1332(a) specifying that a federal court may have jurisdiction where the amount in controversy exceeds $75,000 and there is complete diversity of citizenship. A statutory interpleader is governed by 28 U.S.C. § 1335. Although statutory interpleader provides an independent basis for federal court jurisdiction, the statute requires minimal diversity to be present among the claimants.

18 *In re Estate of Carpenter*, 253 So. 2d 697, 702 (Fla. 1971)(identifying the following factors as evidence of "active procurement" of an estate planning document: (a) presence of the beneficiary at the execution of the will; (b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to execution).

19 *In re Blankenship's Estate,* 136 So. 2d 21, 22 (Fla. 2d DCA 1961)(stating that the law is well settled that it is the duty of an executor to defend the will).

20 The account file will reveal whether a Power of Attorney was provided to the decedent's advisor. If an agent under a power of attorney effects a beneficiary designation in favor of herself, that is self-dealing and possibly void under Florida Statutes, Chapter 709.

21 *Fogel v. Swann,* 523 So. 2d 1227, 1229 (Fla. 3d DCA 1988) (holding that *Carpenter* applies to *inter vivos* transfers).

Repair Costs Can Be Consequential Damages: Understanding The Keystone Court's Departure From The "Typical" Definition Of Consequential Damages

By Natalie M. Yello, Esq., GrayRobinson, P.A., Orlando, Florida

> *"The consequential nature of loss . . . is not based on the damages being unforeseeable by the parties. What makes a loss consequential is that it stems from relationships with third parties, while still reasonably foreseeable at the time of contracting."*

Every construction practitioner knows the words – monitor, inspect, and observe – terms that often impose broad responsibilities and implicate extensive liability. The First District Court of Appeal's recent opinion in *Keystone Airpark Authority vs Pipeline Contractors, Inc. et al.*, illuminates just how important those contract terms and liability waivers are.[1] In *Keystone*, the court held the costs to repair and replace defective construction were consequential, rather than direct, damages. A key component of the court's holding was the engineering firm's contract wherein the owner expressly waived recovery of consequential damages against the firm, even though the firm was responsible for determining the suitability of materials to be used for the project, as well as inspecting and monitoring the progression of the work on a part-time basis.

General, Special, and Consequential Damages in Florida

Keystone adds a wrinkle to the damages analysis each practitioner typically employs. One may immediately associate lost profits with consequential damages; however, lost profits are not always consequential.[2] Repair costs are not always direct damages.[3] The *Keystone* case and other recent Florida decisions illuminate just how blurred the lines can be.

A brief overview of general, special, and consequential damages will help with understanding the importance of *Keystone*. First, general damages are those damages "which the law presumes actually and necessarily result from the alleged breach or wrong."[4] Some think of general damages as damages which occur in the regular course of events.[5] Unlike general damages, "special damages are damages that do not follow by implication of law merely upon proof of the breach."[6] Special damages do not occur in the usual course of events.[7] Finally, consequential damages "do not necessarily result from the injury."[8] "[C]onsequential damages do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting."[9]

For example, AIA form A-201 General Conditions (2017) includes a mutual waiver of consequential damages and defines such damages as:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.[10]

The Keystone Airpark Project

Keystone Airpark Authority ("Keystone") retained Passero Associates, LLC ("Passero") and Pipeline Contractors, Inc. ("Pipeline") to design and construct a ten-unit T–hangar and a four-unit corporate hangar at the Keystone Airpark (the "Project").[11] Keystone contracted with Pipeline to perform construction services and separately contracted with Passero to perform engineering services which included part-time construction inspection services, material testing, and material approval.[12] The Keystone-Passero contract included the following significant provisions:

> Observe the work to determine conformance to the contract documents and to ascertain the need for correction or rejection of the work.
>
> Arrange for, conduct, or witness field, laboratory or shop tests of construction materials as required by the plans and specifications.

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> Determine the suitability of materials on the site, and brought to the site, to be used in construction.
>
> Interpret the contract plans and specifications and monitor the construction activities to maintain compliance with the intent.
>
> Prepare and submit inspection reports of construction activity and problems encountered.
>
> [M]onitor[ ] periodic construction activities on the project and document[ ] their observations in a formal project record.[13]

During construction, the concrete slabs underneath the hangar buildings and the pavement began deteriorating and cracking.[14] Pipeline allegedly used an inadequate material to stabilize the base of the hangar buildings, aprons, and taxiways.[15] Keystone alleged Passero failed to evaluate the suitability of the stabilization base product and failed to identify the resulting deficiencies in Pipeline's work.[16] Keystone asserted Passero had breached its contractual duty to inspect and sued both Pipeline and Passero.[17]

The Trial Court

Keystone sued Passero for breach of contract and professional malpractice.[18] Notably, the Keystone-Passero contract contained a limitation of liability provision which provided:

> "Passero shall have no liability for indirect, special, incidental, punitive, or consequential damages of any kind."[19]

At the trial court, Keystone sought to recover costs for removing, replacing, and repairing the hangars, taxiways, and subgrade. They alleged such costs were direct damages; however, Passero argued the repair, removal, and replacement costs were consequential damages and therefore barred by the limitation of liability provision in the contract.[20] The trial court deemed the costs consequential damages, and thus barred by the terms of the contract, and granted Passero's motion for partial final summary judgment on damages.[21]

First District Court of Appeals

On appeal, the court affirmed the grant of partial final summary judgment to Passero and held the costs for removal, repair, and replacement of the hangars and taxiways were indeed consequential damages.[22] The appellate court dismissed Keystone's argument that the damages were general because it was foreseeable to Passero that its failure to perform could result in damages; foreseeability is only part of the analysis.[23]

In distinguishing Keystone's damages from general or special damages, the court embarked on a detailed analysis of general, special, and consequential damages.[24] The court reasoned that the removal, repair, and replacement costs were not general damages because the damages were not a "direct or necessary consequence" of Passero's failure to perform, as Pipeline could have constructed the Project correctly without Passero's work.[25] "[T]he need for repair did not arise within the scope of the immediate transaction between Passero and [Keystone]."[26]

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The court reasoned that the removal, repair, and replacement costs were not special damages because the damages were not "particular" to Keystone.[27] Similar parties in similar circumstances with similar contracts could incur these same types of damages.[28] Other Florida courts have recognized "knowledge is a prerequisite for liability for special damages," meaning the damaged party must give actual notice to the other party regarding the potential for injury, which is usually satisfied through a well-pled request for special damages in a pleading.[29] The appellate court determined that the costs for removal, repair, and replacement constituted consequential damages.[30] Rather than employing a pure foreseeability analysis, the *Keystone* court highlighted that the repairs were necessitated by Keystone's interactions with Pipeline – a third party to the Keystone-Passero transaction.[31] The appellate court noted "[t]he consequential nature of loss . . . is not based on the damages being unforeseeable by the parties. What makes a loss consequential is that it stems from relationships with third parties, while still reasonably foreseeable at the time of contracting."[32] The appellate court analogized the facts in *Keystone* to those cases where consequential damages were assessed as a result of a party's failure to properly inspect – ranging from costs to repair termite damage,[33] costs for reconditioning soil after inaccurate soil testing,[34] and costs for correction of roof leaks following a designer's defective plans.[35]

The appellate court noted the circumstances constituted a matter of first impression, since, unlike other construction inspection cases, *Keystone* involved a contract provision which expressly imposed inspection duties upon Passero.[36] As such, the First District Court of Appeals certified a question of great public importance to the Florida Supreme Court:

> WHERE A CONTRACT EXPRESSLY REQUIRES A PARTY TO INSPECT, MONITOR, AND OBSERVE CONSTRUCTION WORK AND TO DETERMINE THE SUITABILITY OF MATERIALS USED IN THE CONSTRUCTION, BUT THE PARTY FAILS TO DO SO AND INFERIOR MATERIALS ARE USED, ARE THE COSTS TO REPAIR DAMAGE CAUSED BY THE USE OF THE IMPROPER MATERIALS GENERAL, SPECIAL, OR CONSEQUENTIAL DAMAGES?[37]

On March 27, 2019, the Florida Supreme Court declined the First District Court of Appeal's invitation for review as a matter of great public importance.[38] The Florida Supreme Court's decision means *Keystone* is binding upon the courts in the First District Court of Appeal.

Considerations for Practitioners

Keystone challenges what attorneys typically consider consequential damages to be. While practitioners should continue to conduct an in-depth evaluation of the construction contract and scope of work, they should also note two "wrinkles" the decision presents. First, the court emphasized the importance of the contractual provision that imposed inspection and monitoring duties upon the engineer. A major component of the decision, and what made the case one of first impression, was that the contract at issue expressly set out the engineer's inspection duties. A client's contract may not impose the same responsibilities, so attorneys should consider whether *Keystone* is applicable. Second, it is also important to note that Passero was contracted to perform inspection duties for Keystone on a *part-time* basis. If Passero was expected to inspect and monitor the work full time, would the assessment of damages be the same? Perhaps. Construction attorneys – for owners, design professionals, and contractors – should closely examine the proposed scope of work to determine exactly what is expected. Practitioners should consider how sweeping inspection responsibilities in a contract should, or should not, be accompanied by a consequential damages waiver or other limitation of liability provision. Since architects, engineers, and other design professionals can be responsible, to some extent, for the inspection and monitoring of construction, and in light of the decision in *Keystone*, it is especially important to provide advice and counsel regarding the broad range of liability that can flow from such duties, and from the owner's perspective, the effect of a contractual waiver of consequential damages.

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Endnotes

1 266 So.3d 1219 (1st DCA 2019), *review denied*, SC19-314, 2019 WL 1371949 (Fla. Mar. 27, 2019).

2 *HCA Health Services of Florida, Inc. v. CyberKnife Ctr. of Treasure Coast, LLC*, 204 So. 3d 469, 471 n.2 (Fla. 4th DCA 2016) ("lost profits do not *always* constitute consequential damages as a matter of law . . . [l]ost profits are recoverable as general damages where they flow directly and immediately from the breach of a contract) (citations omitted) (emphasis in original).

3 *Keystone*, 266 So. 3d at 1223.

4 *Augustine v. S. Bell Tel. & Tel. Co.*, 91 So. 2d 320, 323 (Fla. 1956); *Hardwick Properties, Inc. v. Newbern*, 711 So. 2d 35, 40 (Fla. 1st DCA 1998). *See Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972); *Hector Martinez & Co. v. S. Pac. Transp. Co.*, 606 F.2d 106, 109 (5th Cir. 1979) (reasoning general damages "are awarded only if injury were foreseeable to a reasonable man . . . Damage is foreseeable by the carrier if it is the proximate and usual consequence of the carrier's action"); *Gonzalez v. Barrenechea*, 170 So. 3d 13, 15 (Fla. 3d DCA 2015) (affirming that, in owner's suit against designer for negligent design of air

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conditioning system, owner is entitled to direct damages consisting of costs for redesigning and repairing the air conditioning system).

5 *HCA Health Services of Florida, Inc.*, 204 So. 3d at 471 n.2 ("when the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract, the damages sought are general damages") (citations omitted).

6 *JP Morgan Chase Bank Nat. Ass'n v. Colletti Investments, LLC*, 199 So. 3d 395, 398 (Fla. 4th DCA 2016). *See Landsman v. City of Vero Beach,* 2015 WL 10960951 (S.D. Fla. Oct. 21, 2015). The *Landsman* court was confronted with determining whether past wages, future lost wages, future earning capacity, past and present lost profits, loss of household services, and further medical care were considered special damages in plaintiff's excessive force case against the City of Vero Beach. *Id.* at *3. The court determined the damages were in fact special damages because they were "peculiar" to each plaintiff and not considered the type of damages which would regularly occur to every plaintiff. *Id.* Plaintiff failed to plead entitlement to special damages in her complaint and therefore was ultimately barred from recovering those damages. *Id. See also Land Title of Cent. Florida, LLC v. Jimenez*, 946 So. 2d 90, 94 (Fla. 5th DCA 2006).

7 *Hardwick Properties, Inc.*, 711 So. 2d at 40.

8 *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819, 827 n.5 (Fla. 4th DCA 2010) (citations omitted).

9 *Keystone*, 266 So. 3d at 1222-23. *See Hardwick Properties, Inc.*, 711 So. 2d at 40; *HCA Health Services of Florida, Inc.*, 204 So. 3d at 471 n.2. *See also Petroleo Brasileiro, S. A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 509 (E.D.N.Y. 1974) ("whatever penalties may have been imposed on plaintiff as a result of defendant's failure to pay the price on the date due under the contract, they stem from plaintiff's dealings with those not a party to the contract and are not properly characterized as incidental damages").

10 Sec. 15.1.7.

11 *Id.* at 1221; Initial Br. of Appellant 1.

12 *Keystone*, 266 So. 3d at 1221.

13 *Id.*

14 Initial Br. of Appellant 1.

15 *Id.* at 2-3.

16 *Keystone*, 266 So. 3d at 1221.

17 *Id.*

18 Initial Br. of Appellant 1.

19 *Keystone*, 266 So. 3d at 1221.

20 *Id.*

21 *Id.*

22 *Id.* at 1223.

23 *Id.* at 1222.

24 *Id.* at 1222-23.

25 *Id.* at 1223.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Florida E. Coast Ry. Co. v. Beaver St. Fisheries, Inc.*, 537 So. 2d 1065, 1068 (Fla. 1st DCA 1989).

30 *Keystone*, 266 So. 3d at 1223.

31 *Id.*

32 *Id.*

33 *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 454 (Fla. 1st DCA 1985) (affirming conclusion that cost of the erroneous termite certificate would constitute general damages while the the costs to repair extensive termite damage would constitute consequential damages).

34 *Mosteller Mansion, LLC v. Mactec Eng'g & Consulting of Georgia, Inc.*, 661 S.E.2d 788 (N.C. Ct. App. 2008) (damages "incurred in repairing and reconditioning the soils which [the engineer] represented [was] suitable for the construction of apartment buildings . . . are indirect and consequential, as the damages "do not flow directly and immediately from" any action of Defendant").

35 *McCloskey & Co., Inc. v. Wright*, 363 F. Supp. 223, 229 (E.D. Va. 1973).

36 *Keystone*, 266 So. 3d at 1223.

37 *Id.* Judge Rowe concurred with the majority's opinion but dissented from the decision to certify the question to the Florida Supreme Court.

38 *Keystone Airpark Auth. v. Pipeline Contractors, Inc.*, SC19-314, 2019 WL 1371949, at *1 (Fla. Mar. 27, 2019).

PART TWO

What Are My Rights Again? Rights Of Refusal And Options In Leases And Contracts: Seems Simple Enough Right? Wrong!

By Brenda B. Ezell, Esq., Ezell Law Firm, P.A., Jacksonville, Florida

III. The Dreaded Rule Against Perpetuities – Does it even Apply Here?

In this part, we consider the application of a doctrine that has been "long cherished by law school professors and dreaded by most law students: the infamous rule against perpetuities"[1] also described as "every first-year law student's worst nightmare."[2] There is a split of authority regarding whether the rule against perpetuities applies to certain options and related rights, including rights of first refusal[3] and until 2008, there was even conflict among Florida jurisdictions.[4] The first Florida Supreme Court to address this issue is the genesis of this early confusion. In *Iglehart v. Phillips*, the Florida Supreme Court, declining to consider the application of the rule against perpetuities and deciding the case on other grounds, stated that the option in that case "might be subject to the rule against perpetuities…"[5] The conflict among jurisdictions is grounded in the question of whether an option is an interest in real property or merely a contractual interest.[6] The *Iglehart* Court reasoned that because the rule against perpetuities is a rule of property law, not of contract law, it is questionable whether an unexercised option, which creates no interest in land, can be subject to the rule.[7] This reasoning did not settle the issue for Florida courts. Following the minority view that an option is not an interest in real property, many Florida courts held that because rights of first refusal do not involve issues of remote vesting (which is the primary concern with applying the rule against perpetuities), but are contractual rights that vested with the agreement itself, the rule against perpetuities does not apply because it was meant to defeat rights vesting in the remote future, not those already existing.[8] Courts adopting the majority view hold that options and rights of first refusal create an interest in real property.[9]

A. Evolution of the Minority View. The *Iglehart* case, which is the earliest Florida Supreme Court case to address this issue, was heard on a request from the United States Court of Appeals for the Fifth Circuit to answer the following certified question[10]:

> Under Florida law, is a repurchase option, expressly set forth in a deed as a covenant running with the land and as part of the consideration for the conveyance, void as being in violation of the rule against unreasonable restraints on alienation or the rule against perpetuities, under circumstances where the option is unlimited as to time, the price is fixed, and no purpose other than consideration is stated in the deed?[11]

Iglehart involved a restrictive covenant contained in a deed that essentially provided that, in the event the grantee desired to sell the property conveyed by the deed, then the property must be offered to the original grantors at a price equal to the amount paid by the grantee to the original grantors, plus the cost of all permanent improvements placed on the property by the grantee.[12] The covenant gave the original grantor sixty (60) days to exercise the option to repurchase and provided that if the original grantor failed or refused to exercise the option to repurchase the property then the grantee would then have the right to sell the property to other parties.[13] The Florida Supreme Court voided the provision, agreeing with the United States District Court of the Southern District of Florida's reasoning that found the restraint unreasonable because

1) there was no purpose for imposing the restraint;

2) the restraint had an unlimited duration; and

3) the method for determining the price was unreasonable in light of then present value of the land, creating a substantial restraint on alienation.[14]

In its analysis, the federal district court described the rule against perpetuities as being a rule of property law.[15] In its analysis of the federal district court's opinion, the Florida Supreme Court noted that scholars questioned whether an option that creates no interest in property can be subject to the rule against perpetuities.[16] The Court went on to note that, in most cases, an option that is not a part of a leasehold or conveyance is subject to the rule against perpetuities.[17] The Court reasoned that that while the rule against perpetuities invalidates interests which vest too remotely, the rule against unreasonable restraints is principally concerned with the duration of a restraint on the property rather than the time of vesting.[18] Ultimately, the Court concluded that, although the option in that case might be subject to the rule against perpetuities, that finding was unnecessary because the Court found that the option should have been classified as an

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unreasonable restraint on the use of the property.[19] Further, the Court noted that, at the time of its holding, the rule against perpetuities in the State of Florida had been codified by statute adopted by the legislature in 1977, subsequent to the commencement of the case, and that the rule excluded similar types of restraints from its operation.[20] After declining to address whether the rule against perpetuities would apply to invalidate the option in that case, the *Iglehart* Court applied the rule against unreasonable restraints to the option in question, holding that, while generally a repurchase option at market or appraised value for unlimited duration is not an unreasonable restraint on alienation, it is an unreasonable restraint where the price is fixed in the option and it is for an unlimited duration.[21]

In 1997, the First District Court of Appeal considered in *Fallschase*, among other things, whether a right of first refusal in a contract violated the common law rule against perpetuities.[22] The court acknowledged the conflicting authority on the issue, but ultimately sided with the majority view, using the rule against perpetuities to void the right of first refusal, holding that, because the agreement at issue purported to create "an unlimited duration for exercise of the right of first refusal," it violated the rule against perpetuities.[23] The court cited *Iglehart*, stating that the rule is intended to invalidate interests which vest too remotely and is a rule of property law, not a rule of construction.[24] In his dissent, Judge Wolf stated that he was "unaware of a vested right to have a court strike down an obligation voluntarily undertaken as part of an enforceable written legal agreement."[25]

In 2008, addressing the conflict among district courts of appeal, the Florida Supreme Court in *Old Port II* reconsidered *Iglehart* and the question of whether a right of first refusal should be subject to the rule against perpetuities.[26] The case was on review from the Fourth District Court of Appeal, which considered an agreement entered into in 1977 that generally stated that if the owner decided to sell the real property, the "ASSOCIATION would have the right of first refusal for the purchase of said real property upon the same terms and conditions as are proposed for its sale and purchase…, said right of first refusal to be exercised by the ASSOCIATION within thirty (30) days following written notice to it of such proposed sale, following which said right of first refusal shall terminate."[27]

In 2002, twenty-five years after the agreement was executed, the property owner sued to quiet title and obtain a declaratory judgment, claiming that the right of first refusal violated the common law rule against perpetuities.[28] At trial, the trial court declared the right of first refusal void ab initio and quieted title in the owners, rejecting the Association's arguments that Fla. Stat. § 689.225 (2005) retroactively abolished the rule against perpetuities.[29] In making its holding, the trial court relied solely on the decision of the First District Court of Appeal in *Fallschase*.[30] On appeal, the Fourth District Court of Appeal reversed.[31] While not directly addressing the issue, the court stated that the agreement in question did not involve remote vesting and expressed doubt that the common law rule against perpetuities ever applied to it but held that, assuming it did, Fla. Stat. § 689.225 (2005) retroactively abrogated it, certifying conflict with *Fallschase*.[32]

In its resolution of the conflict in *Old Port II*, the Florida Supreme Court provided an in-depth overview of both the common law and statutory schemes of the rule against perpetuities as adopted in Florida.[33] The Court addressed the conflict among Florida District Courts of Appeals decisions on the question of applicability of the rule against perpetuities. The Court held that since the rule against perpetuities is solely concerned with remote vesting of title, which is not an issue with rights of first refusal because Florida courts deem these contractual vested rights instead of property rights, the rule against perpetuities does not apply.[34] The Court acknowledged the split among other court jurisdictions and that the majority view is to apply the rule against perpetuities to rights of first refusal.[35] However, the Court held that the minority view was more consistent with Florida law as opposed to the majority view that an option or right of first refusal is a real property interest.[36] The Court provided compelling authority that it is a more modern view,[37] acknowledging that in the First Restatement of Property, options were subject to the rule against perpetuities.[38] However, the Court reasoned that applying the rule against perpetuities to rights of first refusal does not prohibit restraints that remove property from a beneficial use for an extended period of time, and that such rights are best considered under the rule prohibiting unreasonable restraints on alienation.[39]

B. The Majority View. In *Ferrero*, a heavily cited case representing the majority view, which holds that the rule against perpetuities applies to rights of first refusal, the Maryland Supreme Court stated that courts supporting the minority view err by assuming that the sole policy underlying the rule against perpetuities is to eliminate restraints on alienation.[40] The Court in *Ferrero* went on to state that, in making this assumption, these courts confuse the rule against perpetuities with the rule against unreasonable restraints on alienation.[41] The Maryland Supreme Court reasoned that without the rule against perpetuities, it "would be possible at some distant point for a remotely vesting future interest to divest the current owner's estate," and based on this, an owner might be deterred from making the most effective use of the property, and therefore, by voiding certain remotely vesting interests, the rule against perpetuities avoids this result.[42] The Court stated that with respect to the rule against perpetuities, the weight of the burden on the alienability is irrelevant.[43] However, the *Ferrero* court misconstrues the minority view, as the Florida Supreme Court holds that the rule against perpetuities does not apply to rights of first refusal, not because

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it is a rule against restraints on alienation, but because it is a rule against the remote vesting of a property interest and further because it views rights of first refusal as vested contract interests, not real property interests. The Florida Supreme Court stated that, in Florida, an option does not create a legal or equitable interest in property until an option holder exercises the option right.[44]

Other authors writing on this issue have opined that courts adopting this minority view are doing so because they assume that the sole policy behind the rule against perpetuities is to eliminate restraints on alienation and based on this view, minority courts hold that rights of first refusal do not restrain the alienation of property.[45] However, it is clear from the Florida Supreme Court's opinion in *Old Port II* that courts adopting the minority view find that the true policy reason behind the rule against perpetuities is to prevent remote vesting, not restraints on alienation. The rationale of the majority view is that the rule against perpetuities should apply to options and rights of first refusal because they are property rights. The majority view reasons that options contained in a lease are not separable from the leasehold estate, and that reasonableness of time is inferred.[46] Conversely, the minority view reasons that options and rights of first refusal are vested contract rights.

IV. NO RULE AGAINST PERPETUITIES - NOW WHAT?

When Does a Right of First Refusal Unreasonably Restrain Alienation?

Now that we have established that Florida courts no longer use the rule against perpetuities to determine the validity of real property options and rights of first refusal, we now need to determine when these rights will be struck down as unreasonable restraints of alienation. Florida courts review whether option rights are unreasonable restraints on alienability on a case by case basis, but generally, each case will consider whether the restraint "1) negatively impacts the marketability of the property and/or 2) discourages improvements to the property."[47] Generally in Florida, a right of first refusal or other option right will be considered an unreasonable restraint on alienation when the right or option is for a fixed price, as opposed to when the price is allowed to be determined by the third party offer or by the market value.[48] A right of first refusal (as well as other option rights, including options to purchase and repurchase options) that is exercisable at either market value or appraised value is not deemed to violate the rule against unreasonable restraints on alienation, even if for an unlimited duration; however, when the price is fixed, it is generally held to be a violation.[49] The reason is that a fixed price option right may discourage improvements to the land since the value of the improvements may not be recovered if the owner of the option or right exercises the option or right.[50]

The "option right" considered by the Fourth DCA in the *Old Port* case was deemed to be at market value, not unreasonable, and enforceable, because it stated as follows: "the Association shall have the right of first refusal for the purchase of said real property upon the same terms and conditions as are proposed for its sale by [Owner]."[51] Because the right of first refusal was only triggered by the owner's offer to sell, it allowed the owner to specify the price or let a third party make an offer.[52]

Remedies

In the cases cited in this article, actions are brought by both holders of rights of first refusal as well as owners of property burdened by such rights. The owner of land subject to a right of first refusal has a right to petition for declaratory relief to determine the validity of the right of first refusal generally asserting that the right of first refusal violates the rule against unreasonable restraints on alienation or alternatively, that the holder of the right of first refusal failed to properly exercise the right.[53]

Courts will also award damages, cancel deeds given in violation of a right of first refusal, and will quiet title, in addition to ordering specific performance of a right of first refusal against the party in violation of the of the right.[54] However, rescission may not be appropriate in the case of a deed containing a right of first refusal deemed by the court as void for violation of the rule against unreasonable restraints, because to rescind the deed would have the same effect as enforcing the invalidated option by vesting title in the grantor who imposed the invalid restriction.[55] In *Iglehart*, the Florida Supreme Court invalidated a repurchase right as being in violation of the rule against unreasonable restraints but refused to rescind the deed, reasoning that the grantees' desired intention in bringing the action was simply to declare the restriction invalid, and that rescission of the deed would have a chilling effect on grantees seeking to invalidate unreasonable restrictions on their property.[56]

Attorney's Fees

Generally, attorney's fees will not be awarded unless provided for by contract or statute.[57] In cases involving specific performance of a right of first refusal, there is usually no applicable statute awarding attorney's fees, so the court will look to the terms of the contract at issue to determine whether to award attorney's fees.[58] Interestingly, in *Keys Lobster*, the court held that once the intention to sell was made, the right of first refusal ripened into an option, and upon exercise of its option, the lease was no longer of any effect, creating a vendor and vendee relationship for the purchase of the property.[59] The court reasoned that once the right of first refusal was exercised by the tenant after receiving notice that the landlord had entered into a third-party purchase agreement, that third-party purchase agreement, which allowed for attorney's fees to a prevailing party, became binding on the tenant, thus

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obligating the tenant to pay attorney's fees in a suit for specific performance.[60]

V. CONCLUSION

It is clear from the cases discussed in this article that the courts will generally enforce rights of first refusal so long as they do not violate the rule against unreasonable restraints on alienation. Additionally, courts considering rights of first refusal and other related option rights will apply general contract rules of construction and will strictly enforce the written terms of the right of first refusal unless equity dictates another result. When drafting rights of first refusal, practitioners should be careful that the intent of the parties is clear, but not so overly specific that the right or option so overburdens the property to which it is attached that it could be deemed as a violation of the rule against unreasonable restraints. Attempting to expressly state a fixed price in drafting a right of first refusal is a sure way for the right to be void as a violation of the rule against unreasonable restraints on alienation. Further, practitioners should ensure that any attempt to exercise of a right of first refusal is identical in all material respects to the third-party offer, unless otherwise set forth in the express language of the right of first refusal. Drafting these provisions is not the time to don your negotiator's cap, as any attempt to alter price or other terms contained in a third party's offer which triggers the right of first refusal may cause your client's exercise of the right of first refusal to be held improper. This can result in significant financial harm to your client, as these are considered valuable contract (not property) rights and the exercise should be made with due care. Finally, lawyers exercising rights of first refusal on behalf of clients should be aware that the notice and other exercise requirements applicable to the right of first refusal are strictly enforced and complying with such requirements will avoid the risk of a dispute and can avoid the cost of litigation. Additionally, there are other issues that should be considered that have been addressed in other recent articles, such as what happens to the lease and rent requirements after exercise of a right of first refusal in a leasing scenario,[61] and whether rights of first refusal held by homeowner's and condominium associations are triggered by an ordered foreclosure sale.[62]

Editor's Note[63]

B. EZELL

***Brenda Ezell**, a Board Certified Specialist in Real Estate, is the sole shareholder of the Ezell Law Firm, where she practices in the areas of commercial real estate and business transactions, land use and state and local government law. She graduated summa cum laude from Jacksonville University in 1997 and with honors from the University of Florida, Levin College of Law in 2000. Ms. Ezell is currently a member of the Executive Council of the Florida Bar Real Property, Probate and Trust Law Section, for which she serves as chair of the Real Estate Leasing Committee and Co-Chair of the Membership & Inclusion Committee. Locally, Ms. Ezell serves as a member of The Florida Bar 4th Circuit Grievance Committee, is immediate past president of the Jacksonville Area Real Estate Council, is a member of the Board of Directors of ElderSource, Inc. and Clearly Jacksonville, and is a member of the Board of Advisors of the Jacksonville University Public Policy Institute. She is a member of the Jacksonville and American Bar Associations, and is a graduate of the Florida Bar Leadership Academy (Class I) and Leadership Jacksonville (Class of 2012). She was named to the Super Lawyers List for 2019, which is a distinction reserved for only 5% of attorneys in Florida who exhibit excellence in practice.*

Endnotes

1 *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So.2d 1279, 1280 (Fla. 2008) (quoting *Byke Constr. Co. v. Miller*, 680 P.2d 193, 194 (Ariz. Ct. App. 1984) (internal quotations omitted) (hereinafter "*Old Port II*")).

2 *Id.* (quoting *Shaver v. Clanton*, 31 Cal. Rptr. 2d 595, 596 (Cal. Ct. App. 1994) (internal quotations omitted)).

3 *See id.* at 1295.

4 *Id.*

5 *Iglehart v. Phillips*, 383 So.2d 610, 614 (Fla. 1980).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Old Port II*, 986 So.2d at 1286.

10 *Phillips v. Iglehart*, 558 F.2d 737 (5th Cir. 1977).

11 *Iglehart v. Phillips*, 383 So.2d at 613.

12 *Id.*

13 *Id.* at 612.

14 *Id.*

15 *Id.*

16 *Id.* (citing Note, Options and the Rule Against Perpetuities, 13 U.Fla.L.Rev. 214 (1960)).

17 *Id.* at 614.

18 *Id.*

19 *Id.*

20 *Id.* This statute, Fla. Stat. § 689.22 (1977), was subsequently repealed by Laws 1988, c. 88-40, § 2, eff. Oct. 1, 1988.

21 *Id.* at 615 (citing *Missouri State Highway Comm. v. Stone*, 311 S.W.2d 588 (Mo.App.1958)).

22 *Fallschase Development Corporation v. Blakey*, 696 So.2d 833 (Fla. 1st DCA 1997).

23 *Id.* at 835.

24 *Id.* (citing *Iglehart v. Phillips*, 383 So.2d at 614). The *Fallschase* court stated that while there is conflict, the stronger view is "that the agreement for the right of first refusal must not violate the rule against perpetuities." *Id.* (quoting *Watergate Corp. v. Reagan*, 321 So.2d 133, 136 (Fla. 4th DCA 1975)).

25 *Id.* at 838 (Wolf, J., concurring in part and dissenting in part); *See also Old Port Cove Condo. Ass'n One, Inc. v. Old Port Cove Holdings, Inc.*, 954 So.2d 742, 746 (Fla. 4th DCA 2007) (agreeing with Judge Wolf's dissent in *Fallschase*).

26 986 So.2d at 1279.

27 *Id.* at 1281.

28 *Id.*

29 *Id.* See *Keys Lobster, Inc. v. Ocean Divers, Inc.*, 468 So.2d 360, 362 (Fla. 3d DCA 1985) (citing *Dorner v. Red Top Cab & Baggage Co.*, 37 So.2d 160 (Fla. 1948)).

30 See *Old Port II*, 986 So.2d at 1281 (noting that the trial court relied primarily on *Fallschase*).

31 *Id.*

32 *Id.*

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POLITICAL ROUNDUP

Changes From The 2019 Regular Legislative Session

By Cari Roth, Esq., Lykes Bros. Inc., Tallahassee, Florida

As this article is published, the Legislature is wrapping up committee meeting weeks leading up to a January 14, 2020 start to our 60 day legislative session. In addition to a high-profile U.S. Presidential race, 2020 is another election year in Florida, but it won't compare in size and significance to 2018. None of the Cabinet posts will be on the ballot, but there will be a few competitive House and Senate races.

Senate - The Legislature has now officially designated their leaders for the 2020-2022 period. Sen. Wilton Simpson, from a district focused in Pasco County, is the majority party's pick to lead the Senate. In his acceptance speech, he highlighted efforts to reform the foster care system and continue strong current efforts to address water quality concerns and enhance the business-friendly environment of Florida. Simpson will preside over the Republicans' election efforts in the coming year with the goal of maintaining the Republicans' 23-17 majority in the Florida House. One Miami based seat representing western Miami-Dade and all of Monroe County, currently held by Republican Sen. Anitere Flores is particularly competitive based on voter registration. Sen. Flores ends a long legislative career in both the House and the Senate, and two current freshmen representatives are the leading contenders to vie for her seat. Javier Fernandez is the leading Democrat for the seat. He is an attorney practicing in Miami-Dade. His leading Republican opponent is Ana Maria Rodriguez from Doral, who narrowly won her House seat in a competitive House district. Both are good candidates; expect to see lots of resources poured into this election!

Another Senate seat which should be competitive just by voter registration numbers is the race to replace Sen. David Simmons, who is termed out of his seat. The contest for this Seminole County based seat is being dominated by Republican and former House member Jason Brodeur who has been running an active and disciplined campaign for over 2 years. He has raised over $800,000 between his campaign and his political committee. There are three current contenders for the Democratic nomination, none of whom have raised any significant funds yet, or have prior public service which would give them name recognition.

The race to succeed Simpson as Senate President in 2022 has finally been decided. Sen. Kathleen Passidomo, a long time RPPTL member and friend of the Section was competing against Sen. Travis Hutson from N.E. Florida. Sen. Passidomo will remain Majority Leader through the upcoming legislative session, and Sen. Hutson will continue to chair the subcommittee on Appropriations for Transportation, Tourism and Economic Development. Sen. Passidomo will assume the Senate Presidency in 2024.

House - On the House side, Republican Chris Sprowls is the Republican caucus' pick to lead the House beginning November 2020. As he accepted his party's nomination last September, he outlined his goals and vision for his time in the leadership post. He promised greater conservatism in the state budget, noting his desire to better prepare the state's reserves for recession and storms. He also did not shy away from issues like abortion and climate change. He promised to join forces with Gov. DeSantis who earlier this year appointed Julia Nesheiwat as Florida's first Chief Resilience Officer to address the impacts of climate change and sea level rise.

Speaker Designate Sprowls will also lead his party's effort to elect Republicans to the House. While all House members are up for election every two years, there will be just 18 House members termed out in 2020 leaving open seats. The Republican majority in the House is not likely to change in any significant way.

The succession of the House speakership is decided past Sprowls' term as Speaker. Attorney Paul Renner, who represents a House district based in St. Johns and Volusia Counties, has been picked by his peers to be Speaker for a two-year term beginning in November 2022, and this past summer, Rep. Danny Perez was picked to succeed to the post in 2024. Beginning with Sprowls, there will be a 6 year run of attorney Speakers.

Redistricting - Both Houses will begin the decennial process of redistricting soon. Based on upcoming census numbers set

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Political Roundup, from page 26

to be formally released at the end of next year, districts for state House and Senate as well as the U.S. House must be evaluated to represent nearly equal populations. This process starts in the Legislature, is reviewed by the Florida Supreme Court and inevitably goes through court challenges.

While redistricting may produce more "competitive" districts with lower percentages of voters from one party or the other, also at play is a potential constitutional amendment to allow any registered voter to vote in a primary, regardless of party (or no party) affiliation. Both activities could change the landscape of the Legislature and Florida politics.

Session 2020 - In the more immediate future, there is the 2020 Legislative Session. Last year, both the Senate President and the Speaker of the House were able to accomplish a lot of their goals, and their objectives for this year are less obvious. High profile issues such as parental consent for abortion are on the horizon, and the Governor has made beginning teacher pay increases a big priority. Gaming is a potential issue as well as the Seminole Compact has expired and state revenue from this lucrative business has also dried up. Election security will likely be a budget item of great interest as will continued state efforts to address water quality issues which created the outbreak of blue-green algae in the summer of 2018. Thank goodness Florida was spared from another major outbreak of blue-green algae and red tide in 2019, and this year's storms were minor events compared to Hurricane Michael.

November Campaigns - Once session is over, we'll be back in campaign mode. This year, we'll have no statewide races on the ballot. However, in addition to the open primary constitutional amendment, there are a few other citizen initiatives which may be able to gather enough signatures by the February 1, 2020 deadline to be on the November ballot. One of those is a $15 minimum wage requirement. A new petition drive by Make it Legal Florida which would allow anyone to purchase medical marijuana just began in September 2019. They jumped out quickly with some impressive signature numbers but they must reach 766,200 valid signatures under tougher signature gathering rules adopted last year to be on the November ballot.

With the presidential election taking a highly visible position in the critical State of Florida, Florida is once again the place to be for political junkies! AL

C. ROTH

Cari Roth begins a new role as Vice President for Governmental and Regulatory Affairs with Lykes Bros. Inc. in January, 2020. For the 35 years that she has practiced law, she has had a combined focus in government affairs, land use, environmental, and administrative law. She was formerly a shareholder in the Dean, Mead & Dunbar Tallahassee office and while there, was part of the governmental relations team for the Real Property, Probate and Trust Law Section of The Florida Bar.

What Are My Rights Again?, from page 27

33 *Id.* at 1284-1288.

34 *Id.* at 1284. *Compare Old Port Cove*, 954 So.2d at 743 (rule against perpetuities should not be applied to rights of first refusal) and *Warren v. City of Leesburg*, 203 So. 2d 522, 526 (Fla. 2d DCA 1967) (rule against perpetuities does not apply to rights of first refusal); *with Fallschase*, 696 So. 2d at 835 (rule against perpetuities does apply to rights of first refusal).

35 *Old Port II*, 986 So.2d at 1286.

36 *Id*. (*Citing Ferrero Construction Co. vs. Dennis Rourke Corp.*, 536 A.2d 1137, 1139 (Md. 1988)).

37 *Id.* (*Citing Jesse Dukeminier, A Modern Guide to Perpetuities*, 74 Cal. L.Rev. 1867, 1908 (1986) ("The modern trend . . . has been to free preemptive options from the Rule and to subject them instead to the rule against unreasonable restraints on alienation.")).

38 *Id.* (citing Restatement (First) of Property § 413(1) (1944)).

39 *Id.* at 1289.

40 *See Ferrero*, 536 A.2d at 1144 (*citing* e.g., *Dennis Rourke Corp. v. Ferrero Constr. Co.*, 64 Md. App. at 704, 498 A.2d 689 (1985); *Forderhause v. Cherokee Water Co.*, 623 S.W.2d 435, 438-439 (Tex. Civ. App. 1981); *Robroy Land Co. v. Prather*, 95 Wash.2d 66, 622 P.2d 367, 370 (1980); *Hartnett v. Jones*, 629 P.2d 1357, 1361 (Wyo. 1981); *Weber v. Texas Co.*, 83 F.2d 807, 808 (5th Cir. 1936)).

41 *Id.*

42 *Id.* (*Citing 2 H. Tiffany, The Law of Real Property*, § 392 (3d ed. 1939)).

43 *Id.* (*Citing Smith v. VanVoorhis*, 296 S.E.2d 851, 854 n. 3 (W.Va. 1982); IV Restatement of Property, § 413 (1944)).

44 *Old Port II*, 986 So.2d at 1286-1287 (*Citing Gautier v. Lapof*, 91 So.2d 324, 326 (Fla. 1956)).

45 47 Real Property, Trust And Estate Law Journal 97.

46 47 Real Property Trust And Estate Law Journal 94 n. 113.

47 See *Smurfit-Stone Container Enterprises, Inc. v. Zion Jacksonville Ltd. P'ship*, 52 So. 3d 55, 57–58 (Fla. 1st DCA 2010) (citing *Sandpiper Development & Construction, Inc. v. Rosemary Beach Land Co.*, 907 So. 2d 684 (Fla. 1st DCA 2005) (upholding a fixed price repurchase option that only lasted six years); *Camino Gardens Ass'n, Inc. v. McKim*, 612 So.2d 636, 642 (Fla. 4th DCA 1993) (*Citing Iglehart* and invalidating a repurchase option that allowed the homeowner's association to repurchase foreclosed property for the balance due on the mortgage rather than fair market value); *Brine v. Fertitta*, 537 So.2d 113, 114 (Fla. 2d DCA 1988) (finding that a repurchase option was an unreasonable restraint on the right of alienation because it was for an indefinite period and included a fixed price which was not adjustable based on the market value of the property); *Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So.2d 1166 (Fla. 3d DCA 1984) (invalidating covenant allowing association to disapprove of prospective purchasers)).

48 *See Old Port Cove Condo. Ass'n One, Inc.*, 954 So.2d at 746.

49 *Iglehart v. Phillips*, 383 So.2d at 615.

50 *Old Port Cove Condo. Ass'n One, Inc.*, 954 So.2d at 746.

51 *Id.*

52 *Id.*

53 *See 7-Eleven, Inc., v. Stin, L.L.C.*, 961 So.2d 977 (Fla. 4th DCA 2007).

54 *See Vorpe v. Key Island, Inc.*, 374 So.2d 1035 (Fla. 2d DCA 1979).

55 *See Iglehart v. Phillips*, 383 So.2d at 617.

56 *Id.*

57 *See Keys Lobster*, 468 So.2d at 362 (citing *Dorner*, 37 So.2d at 160).

58 *Id.*

59 *Id.*

60 *Id.* at 364.

61 See ActionLine Vol. XXXVII, No. 4, Summer 2016.

62 See ActionLine Vol. XXXVI, No. 2, Winter 2014-2015.

63 Note: Does the Statute of Frauds Apply? Florida courts will also apply the statute of frauds to rights of first refusal and other options. *See Gulf Theatres v. Guardian Life Ins. Co. of Am.*, 26 So.2d 188, 193 (1946) (holding that if the terms of a contract are clear and unambiguous it must be upheld as written; parol evidence is not allowed absent proof of fraud or deception; and to hold otherwise would be to ignore Fla. Stat. § 725.01 (1941)).

SECTION SPOTLIGHT

Cooley Law School Event On June 7th

By Jonathan Butler, Lead ALM, 13th Circuit

Cooley law students with 13th Circuit ALMs center - Jonathan Butler and Amber Ashton and John Redding

Cooley student lounge giving out RPPTL ActionLine Cups and swag with the Cooley students

Cooley Law School in Tampa is reviving its student RPPTL section and what better way than to hold an ice cream social during "Career Week" in the summer semester on a hot day? Thirteenth Circuit At-Large-Members (ALMs), Amber Ashton, John Redding Jr. and Johnathan Butler, spent a few hours on the afternoon of Friday, June 7th with Cooley law students in the student lounge for an ice cream social. For a few hours, as the students enjoyed yummy ice cream bars, ALMs learned about what the law students were studying for the summer, heard from a few graduates cramming for the Florida Bar Exam next month, and answered questions on how the students can get more involved in the RPPTL section. Thanks to Cooley Career & Professional Development Coordinator, Laura Bare, for arranging the visit with the students.

ALMs handed out *ActionLine* magazines, flyers for the then upcoming Legislative Update and Case Law at the Breakers, and of course, RPPTL swag (cups and pens) to the law students. The RPPTL chapter at Cooley is rechartering after a hiatus to partner-up more closely with the big RPPTL section. The students shared with us on Friday that they have secured a faculty sponsor plus enough student signatures to officially re-form. ALMs hope to hold mock interviews again in the fall semester of 2019, with perhaps a legislative/legal career discussion with Ben Diamond. In February 2020, we hope to have a strong contingency of Cooley students represented at the Tampa meeting at the Grand Hyatt. Stay tuned!

Inaugural 13th Circuit RPPTL "Dirt & Death" CLE Seminar and Reption

By Johnathan Butler, Lead ALM, 13th Circuit

Nearly 50 attendees showed up for the Inaugural 13th Circuit RPPTL "Dirt & Death" CLE Seminar and Reception on Thursday, June 6th in the second-floor training room of the SunTrust building in downtown Tampa. To meet the objective of creating awareness about the section and create a fun atmosphere to share stories, plus make new friendships, the 13th Circuit At-Large-Members (ALMs) developed their own educational and networking sessions for growing RPPTL awareness.

First, a big thanks to co-sponsors, Old Republic Title (Eric Wells) and Sabal Trust (Kathy Belmonte), for helping us hold the event, as we thanked them several times before, during and after Thursday's program. Thanks again, Eric and Kathy! Judge Catherine Catlin of the local 13th Circuit, who hears probate, trust and guardianship matters, also attended the event. Immediate past Section Chair, Deb Boje, and former Section Chair, John Neukamm, greeted those in attendance. Thanks, John, for bringing your trusty iPhone to take pictures.

Fellow ALMs and RPPTL members from neighboring 6th Circuit in Pinellas and Pasco Counties also attended and helped in this inaugural session. Speakers and local 13th Circuit ALMs, Shawn Brown — the "Dirt" speaker — and Ricky Hearn — the "Death" speaker, presented a short legislative review from the most recent Tallahassee session. Plus, the orators shared a case law update with attendees, equipped with a fun Hollywood, blockbuster movie theme within the case law slides. Content centered on remote notarization, electronic wills or "e-wills" and other hot topics with cases spanning from condominium association squabbles to influencing vulnerable adults. The program began promptly at 3pm and concluded right at 5pm, with a short five-minute break in between. Attendees stayed around until 6:30 mixing and mingling, making new friends, enjoying appetizers and beverages, and learning about the Section. Co-Chairs and 13th Circuit ALMs, Mike Kangas and Johnathan Butler, announced the upcoming Asset Protection Seminar in FT. Lauderdale and the big Legislative and Case Law Update at the Breakers. Thirteenth Circuit ALMs hope to make this an annual event locally to provide more education, awareness and demonstrate the great comradery within our Section.

Johnathan Butler (left) Lead ALM 13th Circuit and Deb Boje (right), Immediate Past Chair, RPPTL Section, mingle with fellow RPPTL members.

Fellow 13th & 6th Circuit RPPTLs enjoyed food, beverages and company.

Past RPPTL Chair John Neukamm visits with law students.

Eryn Riconda, Ricky Hearn, Shawn Brown, John Redding, Jr., and Mike Kangas enjoying each other's company after the presentation.

RPPTL Section Executive Council Meeting
The Breakers • Palm Beach, Florida
July 24 – 27, 2019

View Photo Albums at www.rpptl.org

Justin Savioli, Stacy Rubel, Sancha Wynott, Rich Caskey, Mike Kanges, Sharifa Jarrett and Jessica Baskies

Jerry Wells and Bill Hennessey making a point to Fletch Belcher

David Brennan and Sancha Whynot, father daughter duo

Bill Hennessey, Shane Kelley and Deb Boje

Burt Bruton, Carlos Batlle, Michael Gelfand

Section lunch in The Circle dining room

Theo Kypreos ,Cathy Hennessey, and Rich Caskey (former ActionLine Editor-in-Chief)

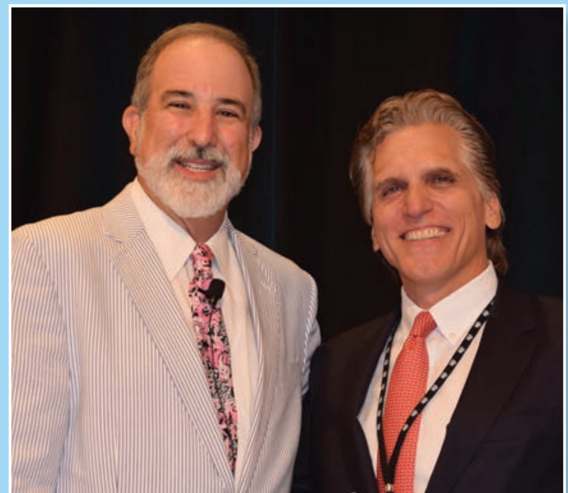
Photos by John Neukamm, Michael Gelfand, Silvia Rojas, Rohan Kelley, Jeff Baskies. Photo editor, Jeff Baskies.

John Harris (Section sponsor) and family

Melissa Murphy and Rob Freedman

Johnathan Butler and Brenda Ezell

Family pool time at the Breakers



Mike Gelfand and Tom Karr

Section leadership meeting

Roundtable

Highlights Of The Meeting
Of The RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, July 27, 2019

The Breakers • Palm Beach, Florida

Elizabeth A. Bowers, Gunster, Yoakley & Stewart, P.A. West Palm Beach, FL

Thank you to Sponsors: Stout Risius Ross, LLC and Guardian Trust

Sarah Butters ("Sarah"), Director of the Probate and Trust Division, called the meeting to order at 8:30 a.m.

Action Items.

IRA, Insurance and Employee Benefits — L. Howard Payne and Alfred J. Stashis, Jr., Co-Chairs: Alfred Stashis reported on the motion by the Section to adopt, as a Section legislative position, support for proposed legislation to change Fla. Stat. § 222.21(2)(c)(2019) to clarify that an ex-spouse's interest in an IRA, which is received in a transfer incident to divorce, is exempt from the claims of the transferee ex-spouse's creditors.

Probate and Trust Litigation Committee — J. Richard Caskey, Chair: Richard Caskey reported on a motion by the Section to adopt as a Section legislative position, support for proposed amendments to Fla. Stat. § 733.212(2019), which governs the contents of a notice of administration, to require additional language to provide adequate notice that a party may be waiving the party's right to contest a trust if they fail to timely contest the will, which incorporates the trust by reference.

Professionalism and Ethics — Gwynne A. Young, Chair: Andrew Sasso reported on the motion by the Section to adopt proposed changes to Rule 4-1.14 of the Rules Regulating The Florida Bar to adopt a modified version of the ABA Model Rules. Currently, all states except Florida, California, and Texas have either adopted the ABA Model Rule in its entirety or with slight modifications. The changes to the Rule would clarify existing law that if a lawyer reasonably believes that a client has diminished capacity, the lawyer may initiate a guardianship proceeding on the client's behalf. However, the lawyer may only take such action after the lawyer has made reasonable efforts to exhaust all other available remedies to protect the client before seeking removal of any of the client's rights.

Information Item.

Trust Law Committee — Matthew Triggs, Chair: Matt Triggs discussed the potential Section legislative position to support adoption of the "Florida Directed Trust Act," a modified version of the Uniform Directed Trust Act, which clarifies and changes various aspects of the Florida Statutes relating to directed trusts.

Other Announcements — Move to Standing Committee Reports

Travis Finchum spoke on behalf of the Liaisons with Elder Law Section. He discussed the new policy issued by the Social Security Administration on June 25, 2019, which provides that if an attorney drafts a trust for a person who is trying to be eligible to receive SSI benefits, the attorney's fee must be approved by the Social Security Administration. It is uncertain whether this new rule will apply to third-party trusts.

Patrick Duffey spoke on behalf of the Model and Uniform Acts Committee. This Committee is studying the Uniform Partition of Heirs Property Act, which governs partition actions of property owned by one or more persons who inherited interests in tenants-in-common property.

Standing Committee Reports

Ad Hoc Guardianship Law Revision Committee — Nicklaus Curley and Sancha Brennan Whynot, Chair; David Brennan and Stacy Rubel, Co-Vice Chairs. Sancha Whynot discussed how the Committee is continuing to meet on a weekly basis to finalize a draft of the new Section 745. She also reported that the Committee has reached out to the Elder Law Section for their comments.

Ad Hoc Committee on Electronic Wills — Angela McClendon Adams, Chair. Frederick Hearn and Jenna G. Rubin, Co-Vice Chairs. Angela Adams reported that this Committee is working on several projects, including, reviewing the electronic wills bill for glitches, organizing a CLE to address the new bill, and coordinating with the Clerk of the Court on their qualified custodian program.

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Ad Hoc Study Committee on Professional Fiduciary Licensing — Angela McClendon Adams, Chair. Angela Adams stated that the Committee is continuing to explore whether professional fiduciaries should be required to obtain a license.

Ad Hoc Committee on Estate Planning Conflict of Interest — William T. Hennessey, Chair; Paul Edward Roman, Vice-Chair. This Committee did not present.

Ad Hoc Committee on Due Process, Jurisdiction & Service of Process — Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs. This Committee did not present.

Asset Protection Committee — Brian M. Malec, Chair; Richard R. Gans and Michael A. Sneeringer, Co-Vice-Chairs. Michael Sneeringer reported that Jeff Baskies presented on homestead exemptions and Jerry Wolf discussed asset protection trusts.

Attorney/Trust Officer Liaison Conference — Tattiana Patricia Brenes-Stahl, Chair; Tae Kelley Bronner, Stacey L. Cole (Corporate Fiduciary), Patrick C. Emans, Gail G. Fagan, and Mitchell A. Hipsman, Co-Vice Chairs. Tattiana Brenes-Stahl reported that the next ATO Conference will be at the Breakers on August 22 – August 24, 2019.

Charitable Planning and Exempt Organizations Committee — Seth Kaplan, Chair, and Jason Havens, Vice-Chair. Seth Kaplan discussed how the Committee is in the process of putting on a charitable symposium.

Estate and Trust Tax Planning — Robert L. Lancaster, Chair; Tasha K. Pepper-Dickinson and Jenna G. Rubin, Co-Vice Chairs. Robert Lancaster reported that Travis Hayes presented a section-by-section analysis of a proposed community property trust statute. In addition, Richard Sherrill also discussed the recent unanimous United States Supreme Court opinion in *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*. In this case, the state of North Carolina argued a trust owes income tax to North Carolina whenever the trust's beneficiaries live in the state, even if these beneficiaries did not receive any income from the trust in the relevant tax year and had no right to demand income from the trust. The trustee paid the tax under protest and sued, arguing that the tax violated the Due Process Clause under the Fourteenth Amendment. The Supreme Court held that forcing the trust to pay the tax violated the Due Process Clause because the mere fact that the beneficiary lived in North Carolina was not sufficient to establish minimum contacts with the state.

Guardianship, Power of Attorney, and Advance Directives — Nicklaus Curley, Chair; Brandon D. Bellew, Darby Jones, and Stacey Beth Rubel, Co-Vice Chairs. Nicklaus Curley mentioned that the Committee was working on numerous projects.

IRA, Insurance and Employee Benefits — L. Howard Payne Chair; Charles W. Callahan, III and Alfred J. Stashis, Co-Vice Chairs. Alfred J. Stashis reported that the Section had already heard about his Committee's action item. He also indicated that the Committee was looking into the rules concerning the termination of retirements benefits for minors under the Uniform Transfers to Minors Act.

Liaisons with ACTEC — Elaine M. Bucher, Shane Kelley, Charles I. Nash, Tasha K. Pepper-Dickinson, and Diana S.C. Zeydel. This Committee did not present.

Liaisons with Elder Law Section — Travis Finchum and Marjorie Ellen Wolasky. This Committee did not present.

Liaisons with Tax Section — Lauren Young Detzel, William R. Lane, Jr., and Brian C. Sparks. This Committee did not present.

Principal and Income — Edward F. Koren and Pamela O. Price, Co-Chairs, Jolyon D. Acosta and Keith Braun, Co-Vice Chairs. Ed Koren reported that this Committee is wrapping up its review of the new uniform act, which was passed last summer, and beginning to compile the new revised Florida Principal and Income Act.

Probate and Trust Litigation — J. Richard Caskey, Chair; James R. George, Angela Adams, and R. Lee McElroy, IV, Co-Vice Chairs. Richard Caskey discussed the Action Item and also indicated that the Committee approved a proposal to expand the protection of the 6-month disclosure period to protect trustees.

Probate Law and Procedure — M. Travis Hayes, Chair; Amy B. Beller, Jeffrey S. Goethe, Theodore S. Kypreos and Cristina Papanikos, Co-Vice Chairs. Travis Hayes reported that the Committee is working on a variety of issues, including, (i) proposed revisions to the slayer statute to disinherit individuals who abuse, neglect, or exploit elderly persons, and (ii) proposed revisions to Fla. Stat.§732.507(2019) to address the holding in *Gordon v. Fishman*.

Elective Share Review — Lauren Young Detzel and Charles I. Nash, Co-Chairs; Jenna Rubin, Vice-Chair. This Committee did not present.

Trust Law — Matthew H. Triggs, Chair; Tami Foley Conetta, Jack A. Falk, Jenna G. Rubin, and Mary E. Karr, Co-Vice Chairs. Matthew Triggs reported that this Committee is working on a variety of issues, including: (i) a directed trust statute; and (ii) a study o whether to draft proposed legislation articulating a trustee's duty to account with respect to a revocable trust during the settlor's life.

Wills, Trusts, and Estates Certification — Jeffrey S. Goethe, Chair; J. Allison Archbold, Rachel Lunsford, and Jerome L. Wolf, Co-Vice Chairs. Jeffrey Goethe reported that this Committee will be hosting the certification review course in 2020 in Orlando.

Adjournment. The next Probate and Trust Division Roundtable meeting will be held at the JW Marriott Marquis in Miami, Florida.

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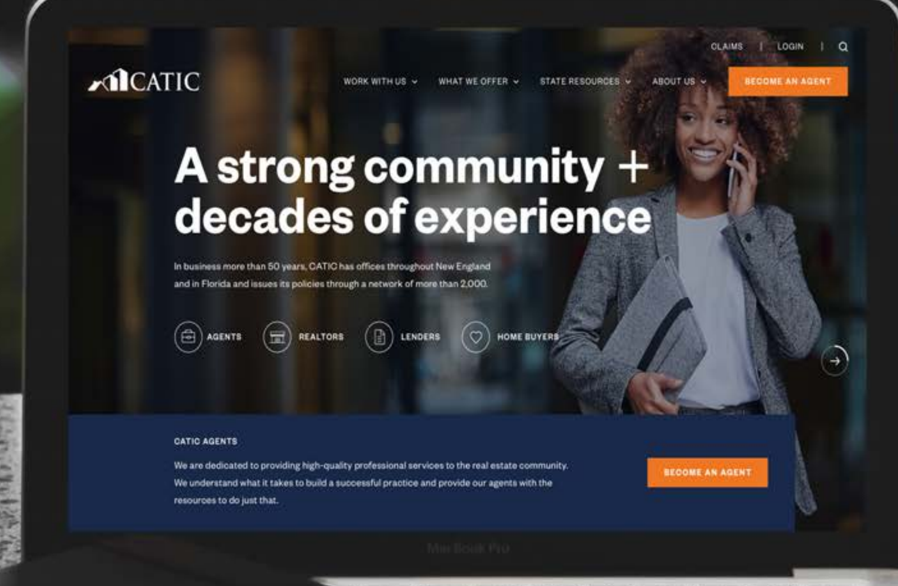

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Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, July 27, 2019

The Breakers • Palm Beach, Florida

Prepared by Colleen C. Sachs, Esq., Pensacola, Florida

Thank you to the Roundtable Sponsor: Fidelity National Title Group

The meeting was called to order at 8:30 a.m. by Director Bob Swaine.

Sponsor Recognition. The Director thanked sponsor Fidelity National Title Group.

Recognition of guests, students, and dignitaries in attendance. Section members introduced the visiting law students. Fellows in attendance were Gabrielle Jackson (2nd year Fellow), Chris Barr (2nd year Fellow), Kristen King Jaiven (1st year Fellow), and Michelle Hindon (1st year Fellow). Mike Tanner, our liaison to the Board of Governors, was introduced.

Summary of Clearwater Beach Convention Roundtable Meeting. The summary was approved as presented.

Action Item

Condominium and Planned Development Committee – William P. Sklar and Joseph E. Adams, Co-Chairs: Bill Sklar presented on supporting proposed legislation to amend Fla. Stat. § 194.011 (2016) to clarify that a condominium association has the right to represent its unit owner members in a group pursuant to Fla. R. Civ. Pro. 1.221 and Fla. Stat. § 718.111(3) (2018). This was converted from an action item to an informational item for this meeting. The background is that the property appraiser in Miami-Dade was increasing taxes on condominium units and the association contested on behalf of the unit owners and prevailed. The court in *Central Carillon Beach Condominium Association, Inc. v. Garcia*, 245 So.3d 869 (Fla. 3d DCA 2018), found that the unit owners were the taxpayers, so the association could not represent the taxpayers as a class. This overturned 42 years of practice where associations have been able to bring class actions for matters of common interest on behalf of its unit owner members as a result of *Avila v. Kappa*, 347 So. 2d 599 (Fla. 1977), including ad valorem taxes. The court in *Central Carillon* held that class action standing for associations is limited to defense of actions in eminent domain and is not applicable to property appraiser appeals of Value Adjustment Board decisions concerning ad valorem taxes. Miami-Dade has fought the class action representation when it has been part of proposed legislation for the past two years. This rule of procedure has been used mainly by the plaintiff bar for actions against contractors in construction defect actions. There is a concern that this decision will erode a rule of procedure. It was discussed that this treatment is fundamentally unfair and gives a procedural advantage to the property appraiser. The owners, who may have a reduction of a few hundred dollars are unlikely to pursue it individually, as is also the case with many absentee owners. It was also pointed out that issues with the impact of the case extend to closing transactions.

Information Item

Construction Law Committee – Reese J. Henderson, Jr., Chair: Reese Henderson presented on the issue of notices of commencement and leasehold interests. The Construction Law Committee's goal is to more clearly identify the interest of the tenant and the extent of the contractor's lien on the notice of commencement. The committee also wants to change the bond requirements to require notice of the contract amount. He discussed supporting legislation for construction related issues, including liens, payment bonds and bond claims. The committee members believe they need to be proactive instead of waiting for the next time the legislature wants to do something to the lien law. There is a proposed change to Fla. Stat. § 255.05 (2019) concerning changes to government property where the government leases to a private entity. Bob Swaine said they will get this out to the litigation committee, commercial real estate, and other committees that may have an interest.

CLE Planning for the 2018-2019 Bar Year – Wilhelmina F. Kightlinger, CLE Co-Chair: Wilhelmina F. Kightlinger presented. She asked committee chairs to let her know who the CLE liaison for each committee is. There is a great schedule of CLE coming up. Committees are encouraged to look into whether CLEs presented in the committee meetings can be turned into webinars. There is room for additional CLEs in the fall, but time is running short on the deadlines.

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Legislative Update – S. Katherine Frazier, Legislation Co-Chair:

Katherine Frazier reported that the session starts January 14, 2020, and the legislation committee is in full preparation mode. Each committee needs a legislative liaison, and the committee leadership and legislative liaisons will be contacted to help in the legislative process. Section members have asked about prior white papers. Fellows will be assisting with this by updating the legislative archive.

Bob Swaine pointed out that each committee also needs to have liaisons for publications.

Committee Reports

Attorney-Loan Officer Conference – Robert G. Stern, Chair; Kristopher E. Fernandez, Wilhelmina F. Kightlinger, and Ashley McRae, Co-Vice Chairs. Wilhelmina F. Kightlinger announced the third annual Attorney Loan Officer Conference will be held at Stetson, in Tampa. The program will continue to include the popular plenary roundtable sessions. The committee is currently looking for an economist to give the keynote. Burt Bruton will help with documentary stamp tax issues. Other topics will include lending issues concerning hemp and cannabis, Remote Online Notarization, fraud, title issues, 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. Jennifer Bloodworth discussed the proposal to remove witnesses from leases. There was also a presentation on the top 10 reasons to review your contract.

Condominium and Planned Development – William P. Sklar and Joseph E. Adams, Co-Chairs; Alexander B. Dobrev, Vice Chair. Bill Sklar recognized the committee co-chair and vice chair, as well as the task force and subcommittee leaders. Jane Cornett and Steve Mezer are heading up the new volume on HOAs.

Condominium and Planned Development Law Certification Review Course – Sandra Krumbein, Chair; Jane L. Cornett and Christene M. Ertl, Co-Vice Chairs. Sandra Krumbein discussed the third annual review course and recognized the vice chairs. To take the course to the next level the committee hopes to attract not only those taking the exam, but those looking for broad overview of the topic. The course will be held February 21-22, 2020 at the Nova Law School in Fort Lauderdale. A component involving the students is a possibility.

Construction Law – Reese J. Henderson, Jr., Chair; Sanjay Kurian, Vice Chair. No report.

Construction Law Certification Review Course – Melinda S. Gentile and Elizabeth B. Ferguson Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs. No report.

Construction Law Institute – Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs. After thanking the committee vice chairs, Jason Quintero reported that planning for the Construction Law Institute to be held March 5-7, 2020 has started. He asked those interested in speaking and those with suggested topics contact him or the vice chairs.

Development & Land Use Planning – Julia L. Jennison, Chair; Jin Liu and Colleen C. Sachs, Co-Vice Chairs. Julia Jennison reported on an excellent CLE program presented at the meeting on Effective Use of Public Outreach and Social media in land Use Approvals.

Insurance & Surety – Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs. Katherine Heckert reported that the committee has a new newsletter produced by Mariela Malfeld. She invited section members to join in the telephonic CLE held each month. The committee is also building its legislative subcommittee.

Liaisons with FLTA – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs. Alan McCall presented. The FLTA Government Affairs committee is discussing the proposed changes to curative statues for defective legals. FLTA wants to postpone discussion until the FLTA convention in November so that more time and attention can be given to analyzing the proposal. Melissa Murphy shared that FLTA is going to be hosting some "town hall" meetings to discuss unlawful inducement. It was discussed that ALMs could help spread the word about the town hall meetings.

Real Estate Certification Review Course – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach, Lloyd Granet and Brian W. Hoffman, Co-Vice Chairs. Manuel Farach presented. The review course will be held March 27-28, 2020. The exam will be May 10, 2020. There is a concern about the length of time between the course and the test, so the committee is considering an additional program that would provide interim support and assistance.

Real Estate Leasing – Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs. Brenda Ezell presented. The committee discussed the current legislative proposal to eliminate witness requirements on leases in Fla. Stat. § 689.01(2008). Art Menor and Burt Bruton did tremendous amounts of research dealing with long term lease interests as opposed to short term leases. The committee is leaning to requiring two witnesses on leases in excess of 5 years.

Real Property Finance & Lending – Richard S. McIver, Chair; Jason Ellison and Deborah B. Boyd, Co-Vice Chairs. No Report.

Real Property Litigation – Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart,

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Co-Vice Chairs. Mike Hargett presented. The committee had two representatives from the Business Law Section present on the Receivership Act. The committee discussed the Business Law Section's initiative to revise the state receivership laws to allow a receiver in a state court case the authority to sell property upon the owner's consent or failure to contest. They are looking at how to make the Act better, and how to keep it from creating title insurance issues.

Real Property Problems Study – Lee A. Weintraub, Chair; Adele Ilene Stone, Stacy O. Kalmanson and Susan K. Spurgeon, Co- Chairs. Lee Weintraub thanked Marty Solomon, who gave a presentation on the closing protection letter. The committee discussed the current legislative proposal to eliminate witness requirements on a deed. The committee also discussed the recent *Hayslip v. U.S. Home Corporation*, 276 So.3d 109 (Fla. 2d DCA 2019), case and whether RPPTL should get involved. It was decided at the committee level to wait and see what happens at the rehearings pending in the Second District Court of Appeal and determine whether an amicus brief would be appropriate. A section-wide task force is being created to study the impact of the *Hayslip* decision.

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 reported that Linda Monaco from The Fund gave a great presentation on PACE Liens. The committee is working with the Florida Association of Realtors/Florida Bar joint committee on a PACE addendum.

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. Brian Hoffman reported on a good meeting that included a presentation on title claims by George Perez of The Fund.

Title Issues and Standards – Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Karla J. Staker, and Rebecca Wood, Co-Vice Chairs. No report.

Gwynne Young presented on a rule change dealing with clients with diminished capacity. It was an action item that was supposed to be on the agenda. It went out by email on Thursday. It changes R. Regulating Fla. Bar 4-1.14. It is a slightly modified version on the ABA model rule. Andy Sasso explained it. At the Clearwater meeting the committee felt it provides a lot more guidance to attorneys dealing with a person with diminished capacity. Twenty-Seven states have adopted the model rule without changes. All other states have adopted it with some changes except for Texas, Florida, and California.

Adjournment: The meeting adjourned at 9:30.

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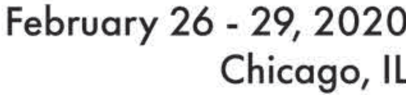

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- Preferred opportunity to reserve exhibition space at the Legislative Update meeting and the annual Section Convention Meeting, at a twenty-five percent (25%) discount off of standard rate.
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** This benefit is available for General Sponsors of the Thursday night reception; Friday night reception; Friday night dinner; Roundtable meetings; and Saturday night function. General Sponsors of breakfasts, luncheons and the Executive Council meeting sponsors will be introduced and thanked at the Executive Council meeting. RPPTL reserves the right to not hold one or more designated events at one or more meetings during the Term. If an event is not held at a meeting, the RPPTL will provide substitute recognition and an opportunity to address the Executive Council.*

For more information contact the Chair of the Sponsorship Committee

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Q+A

INTERVIEW WITH LEE WEINTRAUB:

CHAIR PUBLIC-PRIVATE PARTNERSHIP GROUP, BECKER & POLIAKOFF, FORT LAUDERDALE

By Jeffrey A. Baskies, Katz Baskies & Wolf PLLC, Boca Raton, Florida

Q: *Lee, how long have you been the chair of the Public-Private Partnership (P3) group at Becker?*

A: I have practiced in the Fort Lauderdale office of Becker since 1999, where I am the Vice-Chair of the Construction Law and Litigation Practice Group and Chair of the Public/Private Partnerships Practice Group. Since 2013, the year in which I drafted Florida's P3 statute, I've chaired the P3 practice group.

Q: *What does the P3 group do?*

A: The attorneys in the P3 group assist governmental entities and businesses seeking to partner on public facilities. We seek to help governmental units that are always squeezed for funds, yet they face ongoing and sometimes increasing demands for improved infrastructure, schools, civic buildings and other public assets.

Q: *How have you been involved in P3 work in Florida?*

A: In 2011–2013, I helped draft, negotiate and advocate for the P3 legislation that became law in Florida in 2013. I was involved in all the statute's subsequent amendments. Subsequently, I created a statewide P3 trade association called the Florida Council for Public/Private Partnerships that brought public and private sector members together to learn and network. Around that time, I founded the P3 Practice Group at Becker, and the rest is history. We have been lead counsel on many projects, some of them very high profile, and it has been a lot of fun.

Q: *What is the Florida Council for Public/Private Partnerships?*

A: It is a non-profit consortium of public and private sector organizations working together to further P3 opportunities.

Q: *I understand you recently were invited to share your P3 expertise with leaders from eight Asian governments in meetings held overseas. Can you please elaborate on your experience?*

A: Yes, I was invited by the U.S. Department of Commerce's Commercial Law Development Program (CLDP) to speak at a series of P3 training workshops on behalf of the U.S. federal government. The workshops were held for representatives of governments of eight Asian countries.

Q: *Where were these workshops held?*

A: The workshops were held in Nepal and Singapore between September 9 and September 18, 2019.

Q: *Who set up the workshops for you?*

A: The training workshops were organized through the U.S. Embassies in the eight nations invited to attend.

Q: *Did you travel alone?*

A: Yes, I did. First time traveling alone on such a big trip — my flights from the start to the end completely circumnavigated the globe! Very cool concept, but boy were those flights long!

Q: *What did you seek to accomplish in the workshops?*

A: The primary purpose of the workshops was to train Asian countries on how to develop policies and legal frameworks to increase foreign investors' interest in the South Asian and Southeast Asian P3 infrastructure markets. Most of these emerging countries have or are considering empowering P3 legislation and are now wrestling with how to implement P3s, beginning with promulgating national standards and processes. That is where we came in with the training.

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Q+A Interview With Lee Weintraub, from page 42

Q: ***Can you explain in a bit more detail what sort of infrastructure investments you are talking about?***

A: Sure, like much of the world, there are constant and mounting needs for improvements to roads, sewers, schools and other public assets. As governments are constantly squeezed for funds, this creates business opportunities for private companies to partner with public entities to fill that void with P3s. In South and Southeast Asia, the primary needs are transportation, water treatment, and social infrastructure (buildings, schools, etc.), but also some unique needs such as energy generation and mining.

Q: ***What sorts of issues were you presenting in the workshops?***

A: We discussed key considerations regarding regulatory requirements, procurement strategies, deal structures and contract negotiations of P3s. In Nepal, we trained their government agency in charge of P3s on how to create regulatory guidelines for procuring P3s. We then spent a day with their Parliament training them on what P3s are, and finished by spending a day with their media to train them on messaging. In Singapore, eight countries joined us for two days of training on how to deal with unsolicited proposals.

Q: ***Can you summarize how you feel about this unique opportunity?***

A: It was extremely humbling to be recruited by the federal government for this opportunity and especially rewarding to meet with foreign governments and teach them how to best meet their needs with P3s through a combination of private financing and ingenuity. P3s will allow these countries to transfer some of the project risks from the public sector to the private sector and leverage the expertise of their private sector partners. These emerging governments are under constant strain from their more developed neighbors, and P3s can provide some much needed autonomy to help these countries progress with less international interference and influence.

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Real Property Division

The Commercial Real Estate Lawyer's Practical Guide To The American With Disabilities Act And Its Applicability To Service Animals

By Michelle Gomez Hinden, Esq., Nishad Khan, P.L., Orlando, Florida

The Americans with Disabilities Act, also known as the ADA, was established, among other reasons, to prohibit discrimination and to address major areas of discrimination faced by disabled persons.[1] Title III of the ADA provides that no disabled person shall be discriminated against in the full and equal enjoyment of any commercial establishment, which provides goods, services, facilities, privileges and/or accommodations to the public.[2] This edition of Practice Corner will offer general information and practical pointers to assist commercial real estate attorneys advising business owners on the ADA and its applicability to the presence of service animals on their clients' commercial property.

What types of businesses are obligated to comply with Title III of the ADA?

The following businesses are considered public accommodations that fall under the scope of the ADA:

a. an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that is owner occupied with five rooms or less for rent or hire;
b. a restaurant, bar, or other establishment serving food or drink;
c. a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
d. an auditorium, convention center, lecture hall, or other place of public gathering;
e. a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
f. a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, lawyer or accountant office, pharmacy, insurance office, health care professional office, hospital or other service establishment;
g. a terminal, depot, or other public transportation station;
h. a museum, library, gallery, or other place of public display or collection;
i. a park, zoo, amusement park, or other place of recreation;
j. a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
k. a day care, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
l. a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[3]

Practical Pointer: Generally, the obligations under the ADA are very broad and they apply to any business which offers some type of good, accommodation or service to the public.

What considerations must a business owner contemplate when creating a "pets" policy?

When advising your commercial client, it makes sense, from a business and premises liability standpoint, to advise your client on creating a "pets" policy for its commercial establishment. When creating a "pets" policy, it is important for your client to understand that while there may be reason to worry about the potential liability exposure of permitting animals onto its commercial property, sometimes, an outright prohibition on permitting animals may not be the best option, specifically when approached with a disabled person's request for a reasonable modification of your client's "no pets" policy.

Practical Pointer: When representing an owner of a public accommodation, it is important to work with your client in establishing a clear policy concerning the entry of service animals onto the business owner's commercial property when "reasonable modification" requests are made by a disabled person.

What is a "Service Animal"?

The following list contains examples of assistance animals and how each type of animal is treated under the ADA:

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1. Dog - The ADA defines a "service animal" as "any 'dog' that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."[4]
2. Miniature Horse - The ADA has codified a separate provision for public entities, which includes a 'miniature horse' as a "service animal," provided that certain factors are met.[5]
3. Emotional Support Animal – The ADA is of the position that the provision of emotional support, well-being, comfort or companionship by an animal does not constitute work or a task. Therefore, the ADA does not recognize an emotional support animal as a service animal.[6]

Practical Pointer: While in some cases, a miniature horse may qualify as a service animal, generally, if the business is a commercial establishment, the service animal will be a dog. Emotional support animals have no training to perform any work or tasks, and therefore, are not protected under the ADA.[7]

What information or documentation may a business owner request from a disabled person who is seeking for a service animal to accompany him or her onto the business owner's commercial property?

After receiving a reasonable modification request for a service animal from a disabled person, if the disability and the need for the service animal is not obvious, a business owner may only ask two questions:

a. Is the service animal required because of a disability?[8]

b. If the answer is yes, what work or task has the animal been trained to perform?[9]

Practical Pointer: It is important to note that if a person's disability and the need for the service animal is obvious or readily apparent, such as a person who is blind and who needs a seeing eye dog, your client must accommodate the disabled person's request for the service animal accommodation onto your client's commercial property without making any additional inquiries.[10]

Is there anything a business owner is prohibited from requesting from a disabled person who is seeking for a service animal to accompany him or her onto the business owner's commercial property?

Yes, when presented with a reasonable modification request for a service animal, a business owner may not:

a. inquire as to the nature of the person's disability;

b. request any documentation for the service animal;

c. request proof that the service animal has been certified, trained or licensed as a service animal;

d. implement any breed restrictions;

e. require the animal to wear a vest, a special identification tag or a specific harness; or

f. require the animal to demonstrate its capability to perform the task or work prior to granting admission to the commercial property.[11]

Practical Pointer: Aside from the two permissible questions that a business owner may ask, generally, a business owner should not make any additional inquiries as to the person's disability or the service animal's capabilities.

May a business owner place a restriction on the number of service animals that may accompany a disabled person onto the business owner's commercial property?

No, a disabled person may sometimes use more than one service animal to perform different tasks. Therefore, if the commercial property has the capability to accommodate multiple service animals, then the request is considered reasonable, and your client must accommodate the request for the modification.[12]

Practical Pointer: It is important to understand that, sometimes, in an overcrowded situation, too many service animals within a commercial establishment could potentially create a public safety hazard.

7. May a business owner request the removal of a service animal from its commercial property?

Yes, under certain circumstances, a business owner may ask for the removal of a service animal from its commercial property when the service animal:

a. is out of control and the disabled person is not taking any effective action to control it;[13]

b. is not housebroken;[14] or

c. poses a direct threat against the health or safety of others that cannot be eliminated by a modification of the business owner's policies, practices, or procedures.[15]

When your commercial client seeks advice concerning service animals, having a general understanding of the relevant points to consider and working with your commercial client to develop and implement a policy concerning how to properly address reasonable modification requests for service animals will help your commercial client avoid a lot of time, hassle and money in dealing with any discrimination claims that could arise under the ADA.

Endnotes

1 42 U.S.C. § 12101 (2009).

2 *Dilorenzo v. Costco Wholesale Corp.*, 515 F. Supp. 2d 1187, 1191 (W.D. Wash. 2007); 42 U.S.C. § 12182(a).

3 42 U.S.C. § 12181 (1990).

4 28 C.F.R. § 36.104 (2016).

5 28 C.F.R. § 35.136 (2011).

6 U.S. Department of Housing and Urban Development, FHEO Notice-2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, at p.4 (April 25, 2013) (hereinafter, "HUD FHEO Notice 2013-01") available at: https://www.animallaw.info/sites/default/files/FHEO_notice_assistance_animals2013.pdf

PRACTICE CORNER

Probate and Trust Division

Is Notice To AHCA Required Or Just A Good Idea In A Summary Administration?

By Joesph M. Percopo, Esq., Mateer Harbert, P.A., Orlando, Florida

In a formal probate administration it is clear that, if a decedent is over the age of 55, notice to creditors and a death certificate must be provided to the Agency of Health Care Administration ("AHCA").[1] In reviewing Chapter 735 of Florida Statutes, there appears on its face no equivalent mandatory provision in a summary administration. However, Fla. Stat. § 735.206 (2019) does require a petitioner to make a "diligent search and reasonable inquiry" for creditors prior to entry of the order of summary administration. The section further states that creditors must be served with a copy of the petition for summary administration. Florida Probate Rule 5.530(a)(9) specifies the petition must state either (1) all creditor claims are barred or (2) "that a diligent search and reasonable inquiry for any known or reasonably ascertainable creditors has been made" and the estate is not indebted or a listing of the known creditors. Therefore, prior to filing the petition for summary administration, a diligent creditor search must be conducted so a true and correct statement as to creditors may be included in the petition; only then may a court enter an order of summary administration.

In conducting a "diligent search," the petitioner should contact AHCA if the decedent is over age 55 to inquire whether it is a creditor of the estate. This author has had success in emailing AHCA's designated agent, Conduent Payment Integrity Solutions (flsubro@conduent.com), advising of the pending probate, providing a copy of the death certificate, and inquiring if AHCA has any claim against the estate. To expedite the response time, the email should include a request that AHCA respond via email and, if there is no claim, to attach a letter stating the same. Upon receiving a response from AHCA, you can complete the creditor statement within your petition prior to filing, provided no other creditors were located and AHCA has stated there is no claim. The petitioner can file a verified[2] petition for summary administration asserting that a diligent search was performed for creditors and that the estate is not indebted. While the verified statement contained in the petition should be sufficient for the judge to enter the requested order, this author has encountered some courts that still require some form of "proof of service" to AHCA. Rather than risk a delay in having the summary order entered because there is no proof of service to AHCA filed, it is good practice that the petition, include a statement that the estate is not indebted and specific language indicating that AHCA was contacted, that they do not have any claim, and that a letter from AHCA stating the same is attached. This approach is especially useful when there is a time crunch, such as a pending sale, where any delay would result in additional damages or problems. AL

Endnotes

1 Fla. Stat. § 733.2121(3)(d) and Fla. Prob. R. 5.241.

2 Petitioner is swearing under penalty of perjury.

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7 Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63833, 63836 (Oct. 27, 2008) (codified at 24 C.F.R. § 5.303 (2017)).

8 U.S. Department of Justice, Civil Rights Division, Disability Rights Section, ADA Requirements: Service Animals, at p. 2 (July 2011), available at: https://www.ada.gov/service_animals_2010.htm.

9 *Id*.

10 *See* HUD FHEO Notice 2013-01, *supra* note 6, at p.4.

11 U.S. Department of Justice, Civil Rights Division, Disability Rights Section, Frequently Asked Questions about Service Animals and the ADA, at p. 2, 5 (July 20, 2015) (hereinafter, "DOJ FAQ") available at: https://www.ada.gov/regs2010/service_animal_qa.pdf.

12 DOJ FAQ, *supra* note 11, at p. 3.

13 *Alboniga v. Sch. Bd. of Broward Cty. Fla.*, 87 F. Supp. 3d 1319, 1332 (S.D. Fla. 2015).

14 *Id*.

15 *Roe v. Providence Health Sys.-Oregon*, 655 F. Supp. 2d 1164, 1168 (D. Or. 2009).

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State Tax Case Summaries

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

Couple could not claim homestead on property under construction regardless of their intent to use the property.

Baldwin v. Henriquez, Case No. 2D18-2658, (FL 2nd DCA 2019)

In July 2013, Taxpayers sold their homestead property and purchased another home. Taxpayers did not move into the new home, but instead moved into a leased condo and demolished the house in November 2013. Due to delays in construction, Taxpayers could not move into their new house until June 9, 2015. When Taxpayers applied for the Save Our Homes homestead portability benefit for tax year 2015, the Property Appraiser denied the application because the property was not the Taxpayers' permanent residence as of January 1, 2015. Taxpayers argued that their inability to physically occupy the premises was not determinative of their ability to claim the homestead because they had manifested an intent to use the property as a permanent residence.

Article VII, Section 4(d)(8)a of the Florida constitution provides in pertinent part:

> "A person who establishes a new homestead as of January 1, 2009, or January 1 of any subsequent year and who has received a homestead exemption pursuant to Section 6 of this Article as of January 1 of either of the two years immediately preceding the establishment of the new homestead is entitled to have the new homestead assessed at less than just value."

Looking towards the plain and ordinary language of the constitution, the Second District Court of Appeals found that Taxpayers could not "maintain" or "continue in possession of" a "residence" when the residence did not yet exist. Because the Save Our Homes constitutional amendment requires Taxpayer to transfer the benefit to a new homestead established within less than two years of abandonment of the prior homestead (i.e. the new property must be the new homestead by January 1 of the second year – it is not based on 2 calendar years), and the construction delays resulted in an abandoned homestead for more than the period, the Taxpayer could not claim the exemption.

Homestead exemption disallowed for Taxpayer receiving tax exemption in Ohio based upon permanent residency even when Taxpayer was not aware of Ohio tax benefit.

Fitts v. Furst, Case No. 2D18-538, (FL 2nd DCA 2019)

Taxpayers brought suit challenging Proper Appraiser's disallowance of homestead exemption going back approximately five years. Taxpayers were not aware of the $560 credit they received over a 5-year period from Ohio for a property for which they did not intend to obtain a credit. It was undisputed that the Taxpayers did not intend for their home in Ohio to receive an exemption and that the exemption was received because of a third-party's error.

The Second District Court of Appeal found that the plain language of Fla. Stat. 196.151(1)(b), was clear in its requirement that Taxpayers could only benefit from the homestead tax exemption if they received no other benefit based on permanent residency in another state. While acknowledging the result was harsh, the Second District Court of Appeal affirmed the trial court's imposition of back taxes, penalties, and interest on Taxpayers.

Loan modification unenforceable when lender failed to pay the requisite taxes.

Schroeder v. MTGLQ Investors, L.P., Case No. 4D18-3177 (FL 4th DCA 2019)

As part of a mortgage foreclosure action, lender sought to increase the principal balance owed by alleging the parties had entered into a loan modification agreement. Upon investigation, it was determined that neither the documentary stamp taxes nor the intangible tax on the increased principal balance had been paid prior to or while the case was pending in trial court.

Fla. Stat. § 201.08(1)(b)(2002), F.S. states that a mortgage shall not be enforceable in any court of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid. The Fourth District Court of Appeal found that the failure to pay documentary stamp and intangible taxes made the mortgage modification void. Therefore, the court reversed the trial court's final judgment and remanded the case for another final judgment to be entered regarding the submission of proof that the taxes had been paid.

Lewis Kanner

IN MEMORIAM

The Real Property, Probate and Trust Law Section sadly announces the death on August 17, 2018 of a great leader of The Florida Bar and a former Chair of our Section (1977-1978), Lewis Kanner. Mr. Kanner was honored with the reading and passage of the Resolution (copied, here) at the Executive Council meeting on November 9, 2019 in Miami, where the Resolution was unanimously adopted. Mr. Kanner's daughter, Ellen Kanner, who attended the Miami Executive Council meeting, accepted the recognition on behalf of her father (and mother). May Lewis' memory be celebrated in the Section, while we mourn his passing.

Resolution, the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar Recognizing the Service and Contributions of Lewis Mitchell Kanner.

Whereas, Lewis Mitchell Kanner was born July 13, 1934, a fourth generation Florida native, who graduated from Miami High School, The University of Florida in 1955 and the University of Florida College of Law in 1958; and

Whereas, Lewis Kanner was husband to his wife of 59 years, Marcia Kanner, and father to Ellen Kanner; and

Whereas, Lewis Kanner was admitted to The Florida Bar on November 6, 1958; and Whereas, Lewis Kanner was a partner of the law firm of Salomon, Kanner, Damian and Rodriguez, practicing both real estate and probate law and was known as a fierce advocate for his clients; and

Whereas, Lewis Kanner was an author of publications on Title Standards, Real Estate and Surveying; and

Whereas, Lewis Kanner served as Chairman of The Florida Board of Bar Examiners and served as Chair of the Real Property, Probate and Trust Law Section of The Florida Bar in 1977-1978, and he established many enduring friendships through his service to the Bar; and

Whereas, Lewis Kanner was a proud Floridian who loved birds and traveling throughout Florida and was fond of Florida history, but hated traffic; and

Whereas, Lewis Kanner passed away on August 17, 2018, at the age of 84 years; and

Whereas, the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Lewis Kanner provided during his lifetime to his community, his family and friends, and The Florida Bar, particularly the Real Property, Probate and Trust Law Section, and acknowledges that he will be missed and fondly remembered.

Now Therefore, be it resolved by the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar that the rich life of Lewis Kanner is celebrated, that his passing is mourned, and that his distinguished service and many contributions to the practice of law, particularly to the practice of Real Estate, Probate and Trust Law, are respected, appreciated, acknowledged and will be remembered forever.

Unanimously Adopted by the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar in Miami, Florida, this 9th day of November, 2019.

Probate And Trust Case Summaries

Prepared by Antonio P. Romano, Esq., Comiter, Singer Baseman & Braun, LLP
Palm Beach Gardens, Florida

Testator's will was not executed in strict compliance with statutory requirement, as testator only signed his first name to his will, which was contrary to his usual custom of using both his first and last name to sign documents.

Bitetzakis v. Bitetzakis, 264 So. 3d 297 (Fla. 2d DCA 2019)

The decedent, George Bitetzakis, undertook to execute his will at his home on the morning of September 26, 2013. The decedent, his wife, Ana, and two witnesses—Thomas Rivera and the parties' pastor, Santiago Alequin—gathered in the Bitetzakis' kitchen, where the parties met for weekly breakfasts. Rivera was the first person to sign as a witness and did so at the decedent's request. Alequin was the second person to sign as a witness. After Alequin signed, the decedent began to sign the will but stopped at his wife's instruction because she believed that he needed to sign in the presence of a notary public. As a result, only the decedent's first name appeared on the signature line of the will. The next day, September 27, 2013, Ana took the decedent to a notary. The decedent did not bring the will, but instead brought a self-proving affidavit titled "Affidavit of Subscribing Witnesses." The self-proving affidavit bore the decedent's signature and the notary's stamp, but incongruously averred that the decedent served as a witness to himself executing his own will. Rivera's and Alequin's signatures did not appear on the self-proving affidavit.

The probate court found, in pertinent part, that the will was properly executed within the provisions of Fla. Stat. § 732.502 (2013), reasoning that (a) although the testator only signed a portion of his name, he nevertheless intended the Will to be his last will and testament, and he stopped his signature on the mistaken belief that he needed a notary present; and (b) the testator intended the Will to be his last will and testament because he proceeded to visit a notary on the very next day and signed the document entitled "Affidavit of Subscribing Witnesses" in front of the notary.

The decedent's daughter, Alice Bitetzakis, appealed. The Second District Court of Appeal (the "2d DCA") reversed and remanded, indicating that the probate court erred because the evidence did not establish that the decedent signed at the end of the will or directed another to subscribe his name in his stead. Although the testator signed a document in a notary's presence on following day, that document was a self-proving affidavit and not the testator's actual will. Even though the self-proving affidavit intended to ratify the testator's will, it was not the actual will itself, which the testator never signed with his full name. The 2nd DCA further found that, because the decedent recorded something less than his full customary signature, this did not constitute a proper signature on the will within the meaning of Fla. Stat. § 732.502 (2013). The decedent intentionally ceasing to sign the will and later signing the self-proving affidavit in an apparent attempt to ratify the document actually dispelled any notion that the decedent believed or intended that his first name serve as his signature and assent to the will. Because the will was not signed by the testator in strict compliance with Fla. Stat. § 732.502 (2013), the will was invalid, and therefore improperly admitted to probate.

Beneficiary of deceased ward's estate was not entitled to notice of further proceedings regarding the payment of ward's creditors with the ward's artwork, as the beneficiary never filed a request for notice form.

Lovest v. Mangiero, 279 So, 3d 205 (Fla. 3d DCA 2019)

In 2007, David Mangiero was appointed as the guardian of the property for Pervis Young. After Young passed away in 2010, Mangiero became the successor personal representative of Young's estate. Taketha Lovest was a beneficiary under Young's will. Mangiero filed a petition to pay the estate's outstanding debts using Young's artwork. The next day, the guardianship court granted the petition, but in order to offset appraisal and brokerage fees, the court required that creditors receive total artwork with a value equal to 200% of their claims. Three months later, Eddie Mae Lovest, who lives at the same address as Taketha Lovest, sent a letter acknowledging receipt of the order but objecting to paying 200% of claims on the grounds that Taketha was not present for the initial hearing. The court held a rehearing that February. On May 16, 2017, Mangiero filed another petition to pay the debts with Young's artwork, stating that his efforts to pay the creditors cash had failed because there was no marketplace for the art. Mangiero sent notice of the petition and hearing by certified mail to Taketha on May 22, 2017, which was evidenced by an "undeliverable" stamp on the envelope sent to her. On July 19, 2017, the guardianship court approved the petition. On July 4, 2018, Lovest filed three objections to the guardianship court's order, specifically that (1) the guardianship court's July 2017 and November 2011 orders violated her due process rights, (2) the guardianship

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court lacked subject matter jurisdiction, and (3) Mangiero should have provided proper accountings. Acknowledging that he had not filed annual reports since 2011, on October 22, 2018, Mangiero filed annual reports for the past seven years. The guardianship court overruled all three objections, and this appeal followed.

The Third District Court of Appeal (the "3d DCA") affirmed the lower court's decision. The 3d DCA reasoned that nothing in the record indicated that Lovest filed a request for notice form pursuant to Fla. Prob. R. 5.060, so the guardianship court could not determine if she was an "interested party." Thus, she was not entitled to notice.

Further, Fla. Stat. § 744.527(2) (2011) states that when a guardian applies for discharge, they "may retain from the funds in his or her possession a sufficient amount to pay the final costs of administration, including guardian and attorney's fees regardless of the death of the ward." This statute includes assets like Young's artwork as well as funds, and thus the guardianship court retained jurisdiction after Young's death while Mangiero paid the outstanding guardian and attorney fees.

Finally, if a guardian fails to provide a timely annual report, "the judge may impose sanctions which may include contempt, removal of the guardian, or other sanctions provided by law in [section] 744.3685." Fla. Stat. § 744.3685 (2011) provides that the court shall order the guardian to file the report within fifteen days or be held in contempt or personally fined. In the present case, the guardianship court should have required Mangiero to provide proper accountings each year. However, because the court never ordered him to provide the accountings, it never gave him a fifteen-day deadline. Therefore, the issue was deemed moot.

Trial court abused its discretion by granting life partner's petition for emergency temporary guardianship of ward ex-parte, as the court was required to hold a hearing prior to ruling on the appointment of emergency temporary guardian.

Covey v. Shaffer, 277 So. 3d 694 (Fla. 2d DCA 2019)

On June 27, 2018, Linda Shaffer filed petitions to determine Beulah Covey's incapacity and for the appointment of an emergency temporary guardian for Covey, whom Shaffer asserted was suffering from Alzheimer's disease and diminished capacity. Shaffer was Covey's life partner for thirty-six years. She alleged that, two months earlier, Covey's niece took Covey with her to Michigan and was not allowing Shaffer to speak with her, which Shaffer argued prevented her from determining whether Covey was taking her medications and receiving the proper care. Shaffer also alleged that Covey had since revoked a power of attorney that she had previously given to Shaffer and had been writing checks to the benefit of others.

On July 2, the circuit court issued an ex-parte order appointing Shaffer as Covey's emergency temporary guardian. The court also appointed counsel to represent Covey and to serve as elisor. Covey's attorney was able to make contact with Covey by phone, and he then filed an emergency motion to vacate the letters of guardianship and the order appointing Shaffer as emergency temporary guardian. A hearing on the motion was scheduled for July 31. Several days before the hearing, Covey and her niece traveled to Florida. Covey's attorney was then able to meet with Covey for the first time and serve her with Shaffer's petitions.

At the hearing on the motion to vacate, Covey's counsel argued, among other things, that the court could not appoint a temporary guardian without holding an evidentiary hearing. Shaffer responded that the court could still hold an evidentiary hearing on the petition even after the petition had been granted. Covey's niece, who had filed a counterpetition and sought to serve as guardian, suggested that the court take testimony then and there, as all of the parties were present, but the court rejected that proposal, citing a lack of notice. The court then denied Covey's motion to vacate, and her counsel filed the appeal to the Second District Court of Appeal (the "2d DCA") under Fla. R. App. P. 9.170(b)(8).

During the pendency of the appeal, the circuit court, as authorized under Fla Stat. § 744.3031(4) (2018), extended the temporary guardianship for a further ninety days. At oral argument in January 2019, the parties' attorneys informed the 2d DCA that the circuit court had since determined that Covey was incapacitated and that it had appointed Shaffer to act as the as permanent guardian of Covey's person and a professional guardian to act as the permanent guardian of Covey's property. Because an emergency temporary guardianship can last for a maximum of only 180 days, Fla. Stat. § 744.3031(4) (2018) (providing that an emergency temporary guardianship expires after ninety days or when a guardian is appointed, whichever occurs first, and may be extended for "an additional 90 days"), the 2d DCA determined that the issues presented before it were capable of repetition while evading appellate review, and therefore declined to dismiss the appeal as moot.

The 2d DCA ultimately held that Fla. Stat. § 744.3031 requires a circuit court to hold a hearing prior to ruling on a petition for the appointment of an emergency temporary guardian, and thus the court erred by granting Shaffer's petition ex-parte. Specifically, the 2d DCA reasoned that, pursuant to the statute, the petitioner is required to serve the alleged incapacitated person and his or her attorney with a notice of filing the petition "and a hearing on the petition," and the requirement that the petitioner serve a notice of hearing plainly contemplates that a hearing is to be held. Accordingly, the order appointing Shaffer as Beulah Covey's emergency temporary guardian was reversed.

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Long-arm statute's section regarding commission of torts within the state did not apply, and thus the trial court did not have personal jurisdiction over a nonresident trustee in the beneficiaries' action for breach of fiduciary duties; neither the trustee nor the settlor had ever resided in Florida, no trust assets were located in Florida, the trust had always been administered from either New York or New Jersey, and there were no allegations of acts or misconduct by the trustee in Florida.

Kaminsky v. Hecht, 272 So. 3d 786 (Fla. 4th DCA 2019)

A testamentary trust created under the will of Sylvia Donenfeld was created in New York in 2003. The trust provided for separate accounts were to be created for the benefit of multiple beneficiaries. Marion Kaminsky began to serve as trustee in 2008, and, in 2012, moved the principal place of administration to New Jersey.

The Plaintiffs, Jeffrey Hecht and Monica Hecht, as husband and wife and as legal guardian of Tara Hecht, a minor, and Shana Hecht, are the beneficiaries of the trust and brought the action in Florida alleging that Kaminsky breached her fiduciary duties as trustee by failing to provide an accounting of the trust, mismanaging the investment of trust funds, and commingling trust funds meant for their respective benefit with the funds of other beneficiary accounts (although the opinion did not state as such, it is understood that the Hecht's were Florida residents and that is why the action was brought in Florida). There were no allegations of acts or misconduct by Kaminsky in Florida. Kaminsky submitted an affidavit in support of a motion to dismiss declaring that she had never resided in Florida, the settlor of the Trust never resided in Florida, the Trust had always been administered from either New York or New Jersey, and no trust assets were located in Florida. Thus, any failure to provide an accounting and any mismanagement of trust assets would have occurred in New York or New Jersey and not Florida. The beneficiaries did not contest the preceding assertions by a counter-affidavit. The trial court denied Kaminsky's motion to dismiss, and he thereafter appealed to the Fourth District Court of Appeal (the "4th DCA").

The 4th DCA looked to the Florida Supreme Court's two-step inquiry for determining whether long-arm jurisdiction over a nonresident defendant in a given case is proper, as delineated in *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). Specifically, in determining whether long-arm jurisdiction is appropriate in a given case, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements.

The beneficiaries first mentioned the long-arm statute in their response to Kaminsky's motion to dismiss by arguing that Fla. Stat. § 48.193(1)(a)(2) was satisfied because the alleged acts caused injury in Florida. The 4th DCA reasoned, however, that the beneficiaries' complaint did not track the language of the long-arm statute or allege specific facts to demonstrate that Kaminsky's alleged breaches of fiduciary duty fit within a subsection of the long-arm statute. The 4th DCA stated that, as previous decisions have generally held, though physical presence in Florida is not required to commit a tortious act for purposes of the long-arm statute, a majority of the district courts have held that mere injury in Florida resulting from a tort committed elsewhere is insufficient to support personal jurisdiction over a nonresident defendant. Therefore, the 4th DCA reversed the dismissal of the motion to dismiss.

Alleged creditor who filed a claim against an estate after the expiration of claim period, alleging entitlement to proceeds from sale of estate house, did not establish that the personal representative was on actual notice of claim.

Cantero v. Estate of Caswell, 3D18-1425, 2019 WL 4849335 (Fla. 3d DCA Oct. 2, 2019)

The decedent, Jane Althea Caswell, died on April 16, 2017, owning property located in Golden Beach, Florida (Miami-Dade County). The decedent was not married at the time of her death and did not have children. On June 7, 2017, the personal representative published the Notice to Creditors. The creditors' period expired on September 7, 2017. No creditor claims were filed in the estate, and the personal representative filed a Verified Statement as to creditors on September 25, 2017, reporting that there were no creditors of the estate. By order dated August 28, 2017, the probate court ordered the Golden Beach property to be sold.

Nearly four months after the expiration of the creditors period, Jorge Cantero filed a Statement of Claim/Correspondence in the probate matter asserting that he was entitled to all of the proceeds from the sale of the property. Cantero was in a romantic relationship with the decedent when the property was purchased in 1992. He resided with the decedent in the property for nearly five years until their relationship ended. Cantero claimed that he paid all the monies to purchase the property, continued to pay the mortgage premiums while he resided in the property, paid the down payment for the home, and had a verbal agreement with the decedent that upon her death, the property would be transferred to him. However, he failed to provide any documentation to verify his assertions, and no documentation was found among the decedent's papers to support his claim to the property. Cantero acknowledged in a hearing that he moved out in 1997 and took no steps in the following 20 years to document his alleged interest in the property.

Cantero asserted that he was a reasonably ascertainable creditor entitled to personal service of Notice to Creditors so

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Real Property Case Summaries

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

In partition action, boyfriend who carried expenses of property purchased jointly with girlfriend not entitled to obtain credit for expenses paid towards the purchase and maintenance of the property because such expenses were deemed to be gratuitous in nature.

Fernandez v. Marrero, Case No. 3D16-2931 (Fla. 3rd DCA 2019) (Opinion Filed September 25, 2019). [1]

Jorge Alfonso Fernandez ("Fernandez") and his girlfriend Romena Marrero ("Marrero"), purchased a home together on March 25, 2014, taking title to the property as joint tenants with right of survivorship. Fernandez assumed most of the financial burden of purchasing the property, including paying the down payment, closing costs, mortgage payments, and repairs, without contribution from Marrero. The parties ended their relationship in March 2015, and Marrero filed an action for partition. While Fernandez agreed that Marrero was entitled to the partition, Fernandez sought credit for the financial contributions he made towards the purchase of the property, arguing that his purchase of the property with Marrero was a business transaction.[2] Marrero argued that the property was purchased as a result of their relationship and their plans to start a family.[3]

The court reviewed the expenses paid by Fernandez in connection with the acquisition and maintenance of the property, discussing the following three categories of expenses separately: down payment and closing costs, pre-closing expenses, and post-closing expenses.[4] In considering whether Fernandez was entitled to a credit for the down payment and closing costs, the court stated: "a cotenant paying [the] obligations of the property is entitled to a credit from the proceeds of the sale for the other cotenant's proportionate share of expenses."[5] The court further stated that when property is purchased by one party but paid for by another, a trust relationship can be implied; however, the presumption of trust does not arise when it is clear the person who paid the expenses did so in connection with the grant of a gift to the other party.[6] Relying on the ruling in *O'Donnell v. Marks*,[7] the court determined that the facts presented by Fernandez and Marrero reflected that the home was purchased as a gift and not in connection with a business transaction because the property was purchased in furtherance of their relationship and there was no documentation (such as a promissory note) that would imply a business relationship was in place.[8]

The court affirmed the trial court's decision that Fernandez was not entitled to pre-closing costs[9] but was entitled to 50% of the post-closing expenses[10] and remanded the case to the trial court for further proceedings.

Adjacent landowners who for over 60 years shared a common driveway centered on the common boundary of their properties are are not entitled to prescriptive easements, as the element of adverse possession cannot be established.

Dana v. Eilers, Case No. 2D18-2352 (Fla. 2nd DCA 2019) (Opinion Filed September 20, 2019).[11]

In *Dana v. Eilers*, Gregory Dana and Jessica S. Dana, as trustees of their revocable trust ("Dana") appealed a judgment that granted a prescriptive easement to appellees, Lorrie N. Eilers and Mark Eilers ("Eilers").[12]

Dana and Eilers own adjacent Hillsborough County properties that were once a single tract of land and share a twenty-foot-wide private driveway centered along the parcels' common boundary.[13] This driveway, while not the only way to access the property, was the primary method of ingress/egress used by both parties and their predecessors. After purchasing the property in 2014, Dana filed an action seeking to prevent the Eilers from using the portion of the driveway that was on Dana's property. Following a bench trial, the trial court denied Dana's complaint for declaratory judgment and granted reciprocal prescriptive easements to both Eilers and Dana, each for the ten-foot-wide strip of driveway running along the others' property line.[14]

The court began its analysis by reviewing the law on prescriptive easements, exploring the various elements that have to be shown to establish such interest.[15] Thereafter, the court explained that in reviewing claims for prescriptive easements: 1) claims will be reviewed with a presumption that the true owner of the property authorized the other party's use (negating the element of adverse interest), and 2) claimants must meet a high burden of proof when establishing the necessary elements.[16] The court found that the driveway was shared by the parcel owners for over sixty years, and such shared use was not exclusive to either owner nor inconsistent with or injurious to Dana's use. Specifically, the court rejected the trial court's finding that the need for one car to move to the side of the driveway to allow another car to pass at narrow

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portions of the driveway was sufficient to establish an adverse effect on the other party's use.[18] The inability of Eilers to establish proof of adversity prevented their ability to establish a prescriptive easement.[19]

The court concluded that Eilers could not establish the elements required to create a prescriptive easement and, as a result, reversed the trial court's decision and remanded the case to the trial court for further consideration.[20]

Property owners who purchased property but demolished the home to construct a new home were not entitled a homestead exemption for the 2015 tax year, or preservation of the portability under Save Our Homes, because they did not physically occupy the new home by January 1, 2015.

Baldwin v. Bob Henriquez, as Property Appraiser for Hillsborough County, et al., Case No. 2D18-2658 (Fla. 2nd DCA 2019) (Opinion Filed September 13, 2019). [21]

In *Baldwin v. Bob Henriquez, as Property Appraiser for Hillsborough County, et al.*, court considered an appeal filed by L. Lowry Baldwin and Jennifer L. Baldwin ("Baldwin Family") in response to a summary judgment finding in favor of the Hillsborough County property appraiser, et al., which denied the Baldwin Family a homestead exemption for the 2015 tax year.[22] The failure of the Baldwin family to secure the homestead exemption on their residential property in tax year 2015 resulted in the Baldwin Family losing the ability to transfer their portability benefit under Save Our Homes.[23] The Baldwin Family appealed the trial court's decision.

*Timeline***:**

- July 2013: Baldwin Family sell prior homestead.
- July 10, 2013: Baldwin Family purchases new property.
- November 2013: Baldwin Family demolishes the existing structure on the new property and commences construction of a new home (during the construction, the Baldwin Family rents a condo).
- December 26, 2014: Baldwin Family pitches a tent on the new property and spends the night. Jennifer Baldwin stays one additional night later that same week.
- Prior to January 1, 2015: The Baldwin Family updates their driver's licenses and voter registrations to list their address as the new property.
- June 9, 2015: a Temporary Certificate of Occupancy is issued for the new home.
- June 11, 2015: The Baldwin Family moves into the new home.
- January 8, 2016: Final Certificate of Occupancy is issued on the new home.[24]

The Baldwin Family, on appeal, argued their manifestation of "…an intent of establish a permanent residence…" along with the affirmative acts of updating their license and voter registration cards and abandoning their prior homestead was sufficient to qualify for the 2015 homestead exemption despite the fact they could not take occupancy of the new property by January 1, 2015.[25] The Baldwin family also argued that public policy supports a ruling that preserves the homestead exemption.[26] The court began its analysis by reviewing the terms "maintain" and "permanent residence" in order to determine whether the Baldwin Family could show they qualified for the homestead exemption, which required establishing that the Baldwin Family "maintains thereon the permanent residence of the owner."[27] The court focused on Article VII, Section 6(a) of the Florida Constitution, which provides a homestead exemption to "[e]very person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner." The court determined that…to 'maintain' 'permanent residence' on a piece of property, a taxpayer must preserve and continue in possession of a dwelling that the taxpayer ***physically occupies as a home*** and intends to return to whenever absent…"[28] (emphasis added). The court held the Baldwin Family did not meet this requirement until the date they moved into the new property, which was June 11, 2015.

The court's determination that the Baldwin Family did not meet the standard to establish homestead until June 11, 2015 resulted in the conclusion that the Baldwin Family did not maintain the new property as their homestead on or before January 1, 2015, meaning the Baldwin Family lost both their 2015 homestead exemption and their ability to transfer their portability benefit under Save Our Homes.[29] Judge Casanueva wrote a concurring opinion highlighting the importance of ensuring that building contractors and property owners consider the impact construction delays could have on homestead benefits and address such concerns in the construction contract, as loss of a tax-payer benefit is a risk to be evaluated by all parties during the negotiation of the construction contract.[30]

Endnotes

1 This opinion was marked not final until disposition of timely filed motion for rehearing.

2 *Id.*

3 *Id.*

4 *Id.* at 4.

5 *Id.* at 5-6 (*citing Goolsby v. Wiley*, 547 So. 2d 227 (Fla. 4th DCA 1989) and *Gerver v. Stein*, 490 So. 2d 1331 (Fla. 3d DCA 1986)).

6 *Id.* at 6-7.

7 *O'Donnell v. Marks*, 823 So. 2d 197 (Fla. 4th DCA 2002).

8 *Fernandez* at 7-8.

9 *Id.* at 9 (finding that because the parties did not yet own the property they were not responsible for maintenance pre-closing).

10 *Id.* at 10 (finding Fernandez was entitled to a credit of 50% of his post-closing expenses based upon his ownership interest in the property).

continued, page 55

Real Property Case Summaries, from page 54

11 This opinion was marked as not final until time expires to file motion for rehearing.

12 *Dana* at 1.

13 *Id.*

14 *Id.*

15 *Id.* at 3-4 ["(1) actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of twenty years; (2) that during the whole prescribed period the use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use is imputed to the owner; (3) that the use related to a certain limited and defined area of land or, if for a right-of-way, the use was of a definite route with a reasonably certain line, width, and termini; and (4) that during the whole prescribed period the use has been adverse to the lawful owner; that is, (a) the use has been made without the permission of the owner and under some claim of right other than permission from the owner, (b) the use has been either exclusive of the owner or inconsistent with the rights of the owner of the land to its use and enjoyment, and (c) the use has been such that, during the whole prescribed period, the owner had a cause of action against the user for the use being made," citing *Dan v. BSJ Realty*, LLC, 953 So. 2d 640, 642 (Fla. 3d DCA 2007); *Downing v. Bird*, 100 So. 2d 57, 64 (Fla. 1958); *Phelps v. Griffith*, 629 So. 2d 304, 305 (Fla. 2d DCA 1993); and *Stackman v. Pope*, 28 So. 3d 131, 133 (Fla. 5th DCA 2010)].

16 *Id.* at 4-5 ("The claimant must establish adversity, as well as the other elements of a prescriptive easement, by clear and positive proof, and the elements 'cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture.'").

17 *Id.* at 7-8.

18 *Id.* at 9-10.

19 *Id.* at 10.

20 *Id.* at 10-11.

21 This opinion was marked as not final until time expires to file a motion for rehearing.

22 *Baldwin* at 1-2.

23 *Id.* at 3-4.

24 *Id.* at 2-3.

25 *Id.* at 6-7.

26 *Id.* at 7.

27 *Id.* at 8-9.

28 *Id.* at 13.

29 *Id.* at 16-17.

30 *Id.* at 17-18.

Probate and Trust Case Summaries, from page 52

therefore his claim was timely filed. The basis of his assertion related to two conversations with the personal representative. The first time they spoke, Cantero called to give condolences, and, after a few minutes, mentioned that he may have left some car parts in the garage. The personal representative told him the house was up for sale and that he was welcome to go by the house and check the garage. In the second call, Cantero advised that he went to the house to go in the garage, but it was locked. The personal representative told him to contact the personal representative's attorney, David Hauser. Mr. Hauser testified that Cantero called him once and that the call lasted less than a minute. The conversation consisted of Cantero mentioning that he left some car parts in the garage over 20 years ago. Mr. Hauser advised him that the family cleaned out the garage in order to sell the home and did not find any car parts. Cantero never raised any kind of ownership interest in the property when he spoke to Mr. Hauser, nor did he indicate that he wished to file a claim regarding the car parts.

The trial court ultimately struck Cantero's claim under Fla. Stat. § 733.702(1) (2018) because, as a mere conjectural creditor, he was not entitled to personal service of Notice to Creditors. On appeal to the 3d DCA, the decision was affirmed as Cantero presented no evidence that either the personal representative or his attorney knew that Cantero was claiming he ever paid for the home or had a verbal agreement with decedent about the home. AL

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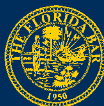

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Additionally, the Section is working on human resource pages where searches can be done for out-of-state licensed Section members, law students available for clerkships or special project assistance, and other classifications. Further, each Section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

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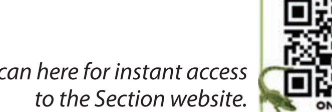

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