ActionLine

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

Temporary Injunctions In Probate, Guardianship And Trust Proceedings

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Go All In!

GO ALL IN! was the theme of this year's Annual Convention held at the Opal Sands Resort on Clearwater Beach. I hope you joined us. It was a sold-out event. The Section took over the entire hotel. The event was a huge success thanks in no small part to our Convention Coordination Committee of Linda Griffin, Angela Adams, and Tae Bronner, as well as our Section Administrator Mary Ann Obos and Program Coordinator Hilary Stephens. These ladies put in a tremendous amount of time and effort leading up to and during the meeting to make the meeting memorable.

Chair's Column

By Debra Lynn Boje
Section Chair, 2018-2019

As is our custom, Thursday and Friday afternoon were packed full with committee meetings. Over the course of the multi-day event, thirteen real property division committees, twelve probate and trust division committees, and six general standing committees met. If you are not a member of a committee, I encourage you to check out what the various committees are doing on the Section website. Each committee has its own link. If you are not a member of a committee, please consider becoming a member and getting involved. I guarantee you that you will not regret it.

As has become the Section's tradition, the convention was family-friendly. Thursday evening kicked off with a private event at the Clearwater Marine Aquarium ("CMA"). If you have not visited the CMA, I encourage you to do so. Many of you may know CMA as home to Hope and Winter, the stars of the Dolphin Tale movies. But it is so much more. It is a marine animal rescue facility that preserves our environment while inspiring the human spirit through leadership in the rescue, rehabilitation, and release of marine life, environmental education, research, and conservation. During the event, our very own CMA scuba volunteer Linda Griffin entertained guests underwater in Mavis' Hideaway, the home of rescued sea turtles, including Harold, who played Mavis in Dolphin Tale 2. But the fun did not end there…we had our very own dolphin presentation. In addition to being entertained by Nicholas, the rescued bottlenose dolphin, we learned about his story and rescue from 2nd and 3rd degree sunburns, what we can do to preserve our marine environment, and how CMA takes care of rescued marine life. From CMA we travelled by boats and trolleys to the Marina Cantina where we watched the sunset and enjoyed a private reception.

Friday started bright and early with a CLE titled "Tricky Homestead Issues & Other Hot Topics." This CLE had the largest attendance ever for a convention program. We had over 220 people attend in person with almost 100 more attend by webcast. Thank you to our wonderful speakers: Bruce Stone, Rohan Kelley, Jeff Goethe, Karla Staker, Melissa Scaletta, Jennifer Jones Bloodworth, Brian Sparks, Manny Farach, Burt Bruton, and Sarah Butters. If you were not able to attend the CLE you can purchase the program on the Florida Bar website. I assure you that this is one CLE you do not want to miss. Topics included: homesteads in trust; homestead waivers; taking possession of homestead after death; title issues with homestead; documentary stamp tax issues you need to know when transferring homestead; ad valorem issues related to homestead; current state of the law regarding fraud; and current status of remote online notarization and electronic wills, trusts, POAs, etc. As a bonus, sample forms were included.

Following the CLE, we held our annual meeting and luncheon. At the annual meeting, we elected officers, and approved new Executive Committee members, including Wilhelmina Fettrow Kightlinger, who will serve as Secretary. We welcome Willie to the Executive Committee. Following the elections, we recognized the 2018-2019 Section Rising Stars: Brenda Ezell (Real Property Division) and Sancha Brennan (Probate and Trust Law Division), as well as At-Large Member of the Year: Susan Seaford. David Yates, CEO of the Clearwater Marine Aquarium, was our guest speaker. He provided an educational and entertaining presentation of the mission of the CMA. He shared with us several heartwarming stories of how the animals who were rescued in turn have had life-changing impacts on humans. From the young girl who was bullied

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

About the Cover:
"Balloon"
By Mike Gelfand

IN THIS ISSUE:

Get Included In ***ActionLine!***

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

ARTICLES: Forward any proposed article or news of note to 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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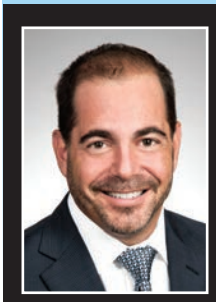
GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.



J. BASKIES

M. BEDKE

Letter From The Co-Editors-In-Chief

As you get ready for summer vacations, sending kids to camp, breaking out your seersucker clothes and grabbing some beach time, we hope you will take along your full color issue of ActionLine.

Our humble publication has grown into what we hope you find to be an informative, entertaining and aesthetically appealing publication. Since its origins, it has transformed from a short newsletter of a few pages to what you are holding in your hands or reading online. It is a far cry from a few mimeographed papers stapled together back in the day. If you are interested, we have archived copies of every issue of ActionLine since May 1978 when the Section published (in ee cummings style) the "real property, probate & trust law section newsletter."

At ActionLine, we do not intend to rest on our laurels. While we do not know exactly what will come next or what the next innovations will entail, you may be certain we will strive to provide you with articles that will keep you abreast of new cases, best practice tips, CLE information, and photos of your Section colleagues. We can assure you that forty years from now the articles in your hand will be part of the ActionLine history.

ActionLine is only as good as the content you provide so, as you are "chillaxing" at the pool, beach or in the mountains, think about what knowledge you may impart to your fellow RPPTL Section members. We need your content. Be an Influencer!

Finally, we want to give a shout-out to Senate President Bill Galvano and Senator Tom Lee, as well as to Speaker-Designate Chris Sprowls, Rep. Travis Cumming, Rep. Spencer Roach and our own Rep. Ben Diamond. These legislators came together in a bi-partisan fashion to appropriate funding to develop and implement a statewide Florida Veterans Legal Helpline (VLH). The VLH was a vision of Section leaders Drew O'Malley, Gwynne Young and Mike Bedke. As a result of the appropriation for the VLH, veterans across Florida will receive free legal assistance, counseling and extended services. Special thanks also to Danny Burgess, the Director of the Florida Department of Veterans Affairs, and to Florida Attorney General Ashley Moody who made the VLH a priority.

— The Editors

LEADERSHIP ACADEMY

In 2013, Eugene Pettis, The Florida Bar's first African-American president, created the Wm. Reece Smith, Jr. Leadership Academy, named after the late chair emeritus of Carlton Fields, with its aim to train future leaders of The Florida Bard and the legal profession. Since 2013, the Leadership Academy has had more the 200 graduates (academy fellows). Incoming classes are 74 percent female and more than 100 academy fellows serve on Florida Bar committees. The fellowship is a one-year term, during which fellows enhance their professional development, hone their leadership skills, and learn about the inner workings of The Florida Bar. The application can be found at http://www.floridabar.org/about/academy.

and contemplated suicide but found the courage to survive through the story of Winter, to the young girl who lost her leg and was able to identify with Winter, which in turn gave her the confidence to embrace her new prosthetic.

Throughout the day on Friday, we held a Jail-N-Bail for the benefit of The Florida Bar Foundation. Fourteen brave Section members and friends of the Section volunteered to be jailed in an effort to raise funds for the Foundation's access to justice programs. The jailbirds included: Michael Bedke, Sandra Diamond, Peter Dunbar, Robert Freedman, Laird Lile, Andrew O'Malley, Bill Perry, Hala Sandridge, Andrew Sasso, William Schifino, Jr., Adele Stone, Michael Tanner, Bill Winters, and Gwynne Young. Thank you, wardens Dresden Brunner and Andrew O'Malley, for helping to organize the event, and thank you Judge Patricia Thomas for hearing their cases and establishing bail. The event raised over $35,000. A special thank you to all of those who contributed to help bail out our jailbirds.

Friday evening kicked off the Annual Awards Banquet and Dinner. The John Arthur Jones Annual Service Award was awarded to E. "Burt" Bruton and Angela Adams. The Robert C. Scott Memorial Award was presented to Tae Kelley Bronner and the William S. Belcher Lifetime Professionalism Award went to Michael Dribin. Be sure to read all about these awards recipients in the next issue of ActionLine. After dinner we continued the evening's fun with a Casino Night. Attendees tried their luck at the tables in the hopes of winning one of over forty baskets contributed by sponsors, law firms, and friends of the Section. Everyone embraced the theme on Friday to Go All In!

Saturday started with our roundtable meetings. For those of you have never attended an Executive Council meeting, this is when each division meets and each division committee discusses the projects they are working on. After the roundtable meetings, the Executive Council meeting was held. At the meeting, we kicked off the Section's 65th anniversary of service to the Bar, public, and the State of Florida. A fitting tribute to the Section's past chairs was made.

On the macro level, over the past 65 years, the RPPTL Section has achieved great and lofty results. First, we have grown into the largest and most active Section in the entire Florida Bar. While other sections struggle sometimes, the RPPTL Section holds standing room only quarterly Section meetings, over-flowing CLEs, and so many committee meetings it is hard to schedule them all. We lead the Bar in sponsoring and supporting so many legislative proposals and positions that it is hard to keep track of them all. And we have the best and most effective lobbyists, staff, and volunteer leadership of any Section in the Florida Bar.

On a micro level, so many RPPTL Section members generously volunteer their time and spirit all in service to the Section's goals. Our Executive Council members provide guidance, leadership, and support to so many causes for our Section. And your officers and Executive Committee members, committee chairs, and vice-chairs and other Section leaders all service the needs of our vibrant Section and the communities we serve. The individual acts of our Section members are far too numerous to list or even mention completely; however, suffice it to say, the RPPTL Section members impact the lives of many throughout Florida in very positive and helpful ways.

Looking back, it is hard to believe that the RPPTL Section started 65 years ago with a few leaders and grew into a dominating force in The Florida Bar. What the Section has become over the years is a testament to the strength, intelligence, and dedication of the RPPTL Section members and leadership.

This year also marks the 5th anniversary of our Section administrator Mary Ann Obos's incredible service to our Section. On behalf of the Section, I was very proud to express our appreciation to Mary Ann at our Saturday Executive Council meeting, along with a few gag gifts to help her continue to persevere in serving the largest section in The Florida Bar, and I was joined by the Council in giving her a standing ovation. Thank you so much Mary Ann, and we genuinely look forward to working with you for many more years!

The convention activities ended with a poolside BBQ. It was hot, but a lot of fun.

Now that the convention has ended, I have had a little bit of time to reflect upon my year as Chair. I am so grateful for my family, friends, and colleagues who have supported me. I could not have done it without your support. Ciao. In Italian this word means both hello and goodbye. Although the time has come for me to say goodbye as your Chair, I am not saying goodbye to the RPPTL Section. On July 1st, I welcome my new home in the Section affectionately known as the "backrow."

I end my last column with a big "THANK YOU!" to all who have been there for me along the way. It has been a wonderful journey as your Chair and I look forward to the road ahead that has been paved by those who have come before and those who are working today on behalf of the Section. The Section's future is bright.

Temporary Injunctions In Probate, Guardianship And Trust Proceedings

By Daniel L. McDermott, Esq., Adrian Philip Thomas, P.A., Fort Lauderdale, Florida

Temporary Injunctions are an incredibly important tool to probate, trust, and guardianship practitioners. This article explores the rules and procedures applicable to litigants seeking, and courts entering, injunctive relief in the context of probate, guardianship, and trust proceedings.

A Primer on Temporary Injunctions in Florida

Florida courts have recognized, "a temporary injunction is an extraordinary remedy and will be granted sparingly only after the moving party has alleged and proven facts entitling it to relief."[1] In order to obtain a temporary injunction, the moving party must establish that "(1) irreparable harm would result if the relief is not granted;[2] (2) an adequate remedy at law is unavailable; (3) a substantial likelihood of success on the merits; and (4) entry of the temporary injunction will serve the public interest."[3]

Fla. R. Civ. P. 1.610(c) requires that the Order imposing the injunction (1) "specify the reasons for entry" and (2) "describe in reasonable detail the act or acts restrained." Furthermore, Florida courts have held that "[s]trict compliance with Florida Rule of Civil Procedure 1.610(c)…is required."[4] As the Florida Fourth District Court of Appeal noted in *4UOrtho, LLC v. Practice Partners, Inc.*, "one against whom [an injunction] is directed should not be left in doubt about what he is to do."[5] "Based on the clear wording of the rule, the specificity requirement applies to both temporary and permanent injunctions."[6]

Courts throughout the state of Florida repeatedly have held that the failure of a trial court to specify in its Order *the reasons for the entry of an injunction* is reversible error.[7] In fact, Florida appellate courts "have often recognized that 'a trial court reversibly errs when an order fails to make *specific findings for each of the elements*.'"[8] The rationale for the foregoing heightened specificity requirement, as articulated by the First District Court of Appeal, is that "[a]ppellate review of temporary injunctions is a matter of right," and that if a temporary injunction "is to be subject to meaningful review, an order granting a temporary injunction must contain more than conclusory legal aphorisms."[9]

Finally, based on the plain language of Fla. R. Civ. P. 1.610(b), "[n]o temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined." However, no bond is required for "a temporary injunction issued solely to prevent physical injury or abuse of a natural person." Based on the foregoing, Florida courts have recognized that "[a]n injunction is defective if it does not require the movant to post a bond" and that a "trial court cannot waive this requirement nor can it comply by setting a nominal amount."[10]

Probate Courts' Authority to Enter Injunctions and Rules of Procedure

Probate, trust, and guardianship proceedings in the state of Florida are conducted before circuit courts pursuant to Article V Section 20(3) of the Florida Constitution. Article V Section 20(3), states that Florida circuit courts have exclusive original jurisdiction in "proceedings relating to the settlement of the estate of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and *other jurisdiction usually pertaining to courts of probate*…[emphasis added]." With regard to the substantive law applicable in probate, trust, and guardianship proceedings, practitioners must look to several different chapters of Florida Statues, depending upon the nature of the proceeding. The Florida Probate Code comprises Chapters 731 through 735 of the Florida Statutes and sets forth the substantive rights of all persons in probate proceedings; Chapter 744 is The Florida Guardianship Law, which governs guardianship proceedings; and Chapter 736 contains the Florida Trust Code which, except as otherwise provided therein, "applies to express trusts, charitable or noncharitable, and trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust."[11]

A Florida circuit court, sitting in its probate capacity, "has inherent jurisdiction to monitor the administration of an estate and to take such appropriate action as it may deem necessary to preserve the assets of the estate for the benefit of the ultimate beneficiaries."[12] Florida courts expanded upon this principle by expressly determining that this inherent jurisdiction authorizes the circuit court, sitting in its probate capacity, "to issue temporary injunctions freezing assets claimed to belong to a decedent's estate."[13] Also, a probate court has the inherent power to enter a temporary injunction *without* notice.[14] Finally, because the function of temporary injunctions is not to determine the ownership of a disputed asset, but merely to preserve the asset pending the outcome of that determination, a probate court has the authority to issue temporary injunctions freezing assets claimed to belong to a decedent's estate, even though ultimate ownership of those assets may be in dispute.[15]

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While it is beyond dispute that circuit courts presiding over probate, trust, and guardianship proceedings have the inherent authority to issue injunctions, neither the Florida Probate Code, nor the Florida Guardianship Law, nor the Florida Trust Code set forth the procedures for obtaining injunctive relief. Rather, a party or practitioner seeking injunctive relief must proceed one step further to determine the applicable procedure for obtaining injunctive relief, notwithstanding the fact that the presiding court has the authority to issue injunctive relief. In probate and guardianship proceedings, the procedures for the enforcement of vested substantive rights are provided in the Florida Probate Rules, which are broken into several parts.[16] Part I applies to probate and guardianship proceedings. Part II applies to probate proceedings only and Part III applies exclusively to guardianship proceedings. The Florida Rules of Civil Procedure, on the other hand, govern all trust proceedings.[17] And while it would seem at first blush as though probate and guardianship proceedings are governed by a different set of rules than those that govern trust proceedings, the Florida Probate Rules also provide in Part I that after service of formal notice in adversarial probate and guardianship proceedings "[t]he Florida Rules of Civil Procedure govern, except for rule 1.525 (which deals with taxing costs and attorneys' fees)," and that the "proceedings, as nearly as practicable, must be conducted similar to suits of a civil nature."[18]

Injunctions in Probate and Guardianship Proceedings

The Third District Court of Appeal explained the following in the seminal case of *Estate of Conger v. Conger,*[19] which has been cited by appellate courts throughout the state of Florida:

> A circuit court, sitting in its probate capacity, has inherent jurisdiction to monitor the administration of an estate and to take such appropriate action as it may deem necessary to preserve the assets of the estate for the benefit of the ultimate beneficiaries."

"Furthermore, a probate court has the authority to issue temporary injunctions freezing assets claimed to belong to a decedent's estate, even though ultimate ownership of those assets may be in dispute."[20] Similarly, "[a] circuit court has the inherent authority to monitor a guardianship and to take action it deems necessary to preserve the assets for the benefit of the beneficiaries."[21] In *Barsanti*, the court noted that "the function of the temporary injunction was not to determine the ownership of the stock but to preserve the asset pending the outcome of that determination, consistent with the duty of the personal representative to marshal and preserve the assets of the estate for distribution."[22] Thus, it is clear that a probate court has the authority to issue temporary injunctions to preserve the assets for the benefit of the beneficiaries in both probate and guardianship proceedings.

Neither the Florida Probate Code nor Florida Guardianship Law, nor the applicable parts of the Florida Probate Rules, set forth the procedure for obtaining the foregoing injunctive relief in probate and guardianship proceedings. However, Fla. Prob. R. 5.025(d)(1) provides "[a]fter service of formal notice, the proceedings, as nearly as practicable, must be conducted similar to suits of a civil nature" and are governed by the "Florida Rules of Civil Procedure," which do contain the procedure for obtaining the foregoing injunctive relief.[23] While Fla. Prob. R. 5.025(a) contains a non-exclusive list of proceedings that "are adversary…otherwise ordered by the court," Fla. Prob. R. 5.025(b) goes on to note that "[o]ther proceedings may be declared adversary by service on interested persons of a separate declaration that the proceeding is adversary." Thus, a proceeding that is already adversarial in nature based upon Fla. Prob. R. 5.025(a), or one that has been declared adversarial in nature pursuant to Fla. Prob. R. 5.025(b), will be governed by the "Florida Rules of Civil Procedure," including Fla. R. Civ. P. 1.610 in the context of temporary injunctions.

Injunctions in Trust Proceedings

While the Florida Trust Code — like the Florida Probate Code and Florida Guardianship Law — does not actually set forth the procedure for obtaining injunctive relief, it expressly authorizes the court presiding over a trust proceeding to "remedy a breach of trust" by, in pertinent part, "[e]njoin[ing] the trustee from committing a breach of trust." However, the issuance of injunctions is not limited to the foregoing specifically enumerated instance. Courts presiding over trust proceedings, like all proceedings, may grant temporary injunctive relief where the moving party establishes that:

"(1) irreparable harm will result if the temporary injunction is not entered;

(2) an adequate remedy at law is unavailable;

(3) there is a substantial likelihood of success on the merits; and

(4) entry of the temporary injunction will serve the public interest."[24]

In the 2017 case of *Landau v. Landau*,[25] the Third District Court of Appeal reviewed an order freezing trust assets, which the appellate court treated and reviewed "as an injunction to preserve assets of the estate and the trust for the protection of the ultimate beneficiaries." While the *Landau* court cited to *Barsanti*[26] and *Conger*[27] and observed that "[t]he probate court's inherent jurisdiction to protect the assets under its supervision is well established," it did not discuss the procedure for obtaining an injunction.[28] However, in April of 2018, the Fourth District Court of Appeal set forth the following requirements for the issuance of injunctive relief in the context of trust litigation:

> For temporary injunctive relief, a movant must demonstrate: (1) irreparable harm would result if the relief is not granted; (2) an adequate remedy at law is

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unavailable; (3) a substantial likelihood of success on the merits; and (4) entry of the temporary injunction will serve the public interest. *Univ. Med. Clinics, Inc. v. Quality Health Plans, Inc.*, 51 So.3d 1191, 1195 (Fla. 4th DCA 2011) (citing *Foreclosure FreeSearch, Inc. v. Sullivan*, 12 So.3d 771, 775 (Fla. 4th DCA 2009)). The movant must also show a clear legal right to the injunction. *McKeegan v. Ernst*, 84 So.3d 1229, 1230 (Fla. 4th DCA 2012).[29]

In *Dubner*, the probate court at the trial level had granted a verified motion for injunctive relief filed by the Personal Representative of an estate, who was also the Successor Co-Trustee of the Decedent's revocable trust,[30] and ordered a financial broker to release any hold or freeze on the trust accounts.[31] There, the Fourth District Court of Appeal ultimately reversed the probate court's temporary injunction order after finding that the injunction was defective

(1) for failure to comply with the procedural and substantive requirements for temporary injunctions;

(2) because the moving party failed to meet the burden for issuance of a temporary injunction; and

(3) for failure to include a bond in accord with the express requirements of Florida Rule of Civil Procedure 1.610(b).

While probate and guardianship proceedings will—or at least should—always be pending before a circuit court sitting in its probate capacity, this will not necessarily be the case in trust litigation.[32] Nevertheless, the same standards and procedures apply for the issuance of temporary injunctions in adversarial probate, adversarial guardianship, and trust proceedings.[33] While the Florida Rules of Civil Procedure only govern adversarial probate and adversarial guardianship proceedings, Fla. Prob. R. 5.025(a) is not an exclusive enumeration of those proceedings that are or may be adversarial. Fla. Prob. R. 5.025(b) enables any proceeding to be "declared adversary by service on interested persons of a separate declaration that the proceeding is adversary," thus giving rise to the applicability of the Florida Rules of Civil Procedure in that particular proceeding.

A Brave New World: Ex Parte Injunctions Under Fla. Stat. § 825 (2018)

In addition to the foregoing regarding injunctions in the context of probate, guardianship, and trust proceedings, effective as of July 1, 2018, probate, guardianship, and trust litigators *may* have additional tools at their disposal in the fight against exploitation of vulnerable adults, and particularly Florida's elderly population. While the instant article is focused only on injunctions pursuant to Florida Probate Code, Florida Guardianship Law, and the Florida Trust Code, practitioners should be aware of several new statutory provisions.

First, Fla. Stat. § 825.1035 (2018) creates a new cause of action authorizing immediate *ex parte* injunctions freezing contested assets in exploitation cases. Additionally, Fla. Stat. § 825.1036 (2018), which creates a new set of civil and criminal penalties for exploiters who violate an injunction entered pursuant to Fla. Stat. § 825.1035 (2018).

This new statutorily authorized injunction pursuant to Fla. Stat. § 825.1035 (2018) does not require that a party be represented by an attorney, nor is a party prohibited from filing an action simply because another cause of action is currently pending between the parties. Moreover, under the new statutory scheme a petition for an immediate *ex parte* injunction may be filed by any of the following:

- A vulnerable adult in imminent danger of being exploited or his or her guardian;
- A person or organization acting on behalf of the vulnerable adult with the consent of the vulnerable adult or his or her guardian; or
- A person who simultaneously files a petition for determination of incapacity and appointment of an emergency temporary guardian of the vulnerable adult.

The petition must be filed in the circuit court of the county in which the vulnerable adult resides, unless a guardianship proceeding is already pending at the time of filing, in which case the petition must be filed in that proceeding. There is no minimum requirement of residency before an individual or entity may petition the court under this new statute, nor is there a requirement that actual exploitation has to have occurred before an injunction may be issued.

With regard to the new enforcement mechanism, Fla. Stat. § 825.1036 (2018) makes the violation of an injunction for protection against exploitation of a vulnerable adult a first degree misdemeanor (or a third degree felony if the individual has two or more prior convictions for the violation of an injunction). Moreover, the statute expressly allows members of law enforcement to arrest an individual, without a warrant, when there is probable cause to believe the injunction has been violated. Finally, this new statute authorizes the court to enforce a violation of an injunction through a civil or criminal contempt proceeding, and the state attorney to prosecute a violation as a criminal violation. If an individual is arrested by a law enforcement officer for violating an injunction under Fla. Stat. § 901.15(6) (2018) he or she must be held in custody until (expeditiously) brought before the court to enforce the injunction.[34]

D. McDERMOTT

Daniel L. McDermott, Esq. *is an attorney at Adrian Philip Thomas, P.A. in Fort Lauderdale, Florida and practices in the areas of probate, trust, and guardianship litigation and appeals throughout the State of Florida. Mr. McDermott is a second year fellow with the Real Property, Probate and Trust Law*

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Section of the Florida Bar and was recently appointed as a Co-Vice Chair of the Section's ActionLine Committee for 2019-2020. Mr. McDermott is also a graduate of the Florida Fellows Institute for the American College of Trust and Estate Counsel.

Endnotes

1 *See, e.g., Dania Jai Alai Intern., Inc. v. Murua*, 375 So.2d 57, 58 (Fla. 4th DCA 1979).

2 Fla. R. Civ. P. 1.610 "requires a showing to a substantial certainty that immediate and irreparable damage *will* result unless the temporary injunction is issued." *See Minimatic Components, Inc. v. Westinghouse Elec. Corp.*, 494 So.2d 303, 304 (Fla. 4th DCA 1986).

3 *See Dubner v. Ferraro*, 242 So. 3d 444, 447 (Fla. 4th DCA 2018); *see also Univ. Med. Clinics, Inc. v. Quality Health Plans, Inc.*, 51 So.3d 1191, 1195 (Fla. 4th DCA 2011)(citing *Foreclosure FreeSearch, Inc. v. Sullivan*, 12 So.3d 771, 775 (Fla. 4th DCA 2009)).

4 *Eldon v. Perrin*, 78 So. 3d 737, 738 (Fla. 4th DCA 2012).

5 18 So. 3d 41, 43 (Fla. 4th DCA 2009)(quoting *Pizio v. Babcock,* 76 So.2d 654, 655 (Fla.1954)).

6 *Premier Lab Supply, Inc. v. Chemplex Industries, Inc.*, 10 So. 3d 202, 207 (Fla. 4th DCA 2009).

7 *See, e.g., McKeegan v. Ernst*, 84 So. 3d 1229, 1230 (Fla. 4th DCA 2012)("[A] trial court reversibly errs when an order fails to make specific findings for each of the elements."); *see also University Medical Clinics*, 51 So.3d at 1195 ("Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a temporary injunction" and "Although the record supports the trial court's holding, the order is flawed.");
City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So. 2d 750, 754 (Fla. 1st DCA 1994);
Green v. Studen, 622 So. 2d 197 (Fla. 4th DCA 1993)("We agree with appellant that the trial court erred in entering a temporary injunction without making the findings required under Rule 1.610(c) of the Florida Rules of Civil Procedure.");
Hopkins v. Hopkins, 623 So. 2d 586, 587(Fla. 4th DCA 1993)("the temporary injunction is defective because it fails to "specify the reasons for entry," as required by rule 1.610(c), Fla. R. Civ. P.").

8 *See, e.g., Dubner*, 242 So. 3d at 447 (citing *Wade v. Brown*, 928 So. 2d 1260, 1262 (Fla. 4th DCA 2006))[emphasis added].

9 *See Naegele Outdoor Advertising*, 634 So. 2d at 753.

10 *See, e.g.,Rosenberg ex rel. Rosenberg*, 117 So. 3d at 827; *see also Andrist v. Spleen*, 142 So. 3d 950 (Fla. 4th DCA 2014) (" A temporary injunction may not be entered unless a movant posts a bond in an appropriate amount for "costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined.").

11 *See* Fla. Stat. §736.0102(1) (2013).

12 *Conger's Estate v. Conger*, 414 So. 2d 230, 233 (Fla. 3d DCA 1982).

13 *See In Re: Estate of Barsanti*, 773 So. 2d 1206, 1208 (Fla. 3 DCA 2000).

14 *See, e.g., Maldonado v. Buchsbaum*, 259 So. 3d 302, 305 (Fla. 4th DCA 2018)(reversed on other grounds where the "temporary injunction issued below is not endorsed with the date and hour of entry and does not require a bond," as required by Fla. R. Civ. P. 1.610(a)(2) and 1.610(b), which "omissions render the injunction defective. *Bieda*, 42 So. 3d at 861 (requiring strict compliance with Rule 1.610 to uphold a temporary injunction without notice)"); *see also Ripoll v. Comprehensive Personal Care Services, Inc.*, 963 So. 2d 789, 790 (Fla. 3d DCA 2007); *Barsanti*, 773 So. 2d at 1209; *Perez v. Lopez,* 454 So. 2d 777, 778 (Fla. 3d DCA 1984); *Conger*, 414 So. 2d at 233.

15 *See Markowitz v. Merson*, 869 So. 2d 728 (Fla. 4th DCA 2004).

16 *See* Fla. Prob. R. 5.010.

17 *See* Fla. Stat. § 736.0102(1) (2013).

18 *See* Fla. Prob. R. 5.025(d)(2).

19 414 So. 2d 230, 233 (Fla. 3d DCA 1982).

20 *See Barsanti,* 773 So. 2d at 1208.

21 *See Ripoll,* 963 So. 2d at 789 (*citing Barsanti,* 773 So.2d 1206).

22 *See Markowitz v. Merson*, 869 So. 2d 728 (Fla. 4th DCA 2004) (*citing Barsanti v.* 773 So.2d at 1209).

23 *See* Rule 1.610, Fla. R. Civ.

24 *See Burtoff v. Tauber,* 85 So.3d 1182, 1183.

25 230 So.3d 127, 129-130 (Fla. 3d DCA 2017).

26 773 So.2d at 1208.

27 414 So.2d 230.

28 *230 So.3d at 129-130.*

29 *See Dubner*, 242 So.3d at 447.

30 The verified motion for injunctive relief was filed in both his capacity as (1) Personal Representative of the Estate and Successor Co-Trustee of the Decedent's revocable trust.

31 *See Dubner*, 242 So.3d at 447.

32 Rather, Fla. Stat. § 736.0203 (2006) merely provides that "[t]he circuit court has original jurisdiction in this state of all proceedings arising under this code." While Fla. Stat. § 736.0201(5) (2011) provides that a "proceeding for the construction of a testamentary trust *may be filed in the probate proceeding* for the testator's estate," and that any such proceedings shall be governed by the Florida Probate Rules," not all trust proceedings must necessarily be filed in a probate proceeding or before a circuit court sitting in its probate capacity. In fact, Fla. Stat. § 736.0201(1) (2011), mandates that "[e]xcept as provided in subsections (5) and (6) and s. 736.0206, *judicial proceedings concerning trusts shall be commenced by filing a complaint*." [emphasis added].

33 *See* Fla. Prob. R. 5.025(d)(2)("The Florida Rules of Civil Procedure govern, except for rule 1.525."); *see also* Fla. Stat. § 736.0201(1) (2011), ("Except as provided in subsections (5) and (6) and s. 736.0206, judicial proceedings concerning trusts . . . shall be governed by the Florida Rules of Civil Procedure.").

34 Pending a hearing, the court may require respondent to post bail in accordance with Chapter. 903, Florida Statutes, and the applicable rules of criminal procedure.

Proptech: Marching Into The Next Generation Of Real Estate

By Tony Alfonso, Esq., DLA Piper, LLP, Miami, Florida

Proptech is a hot topic that is being talked about more and more in the real estate industry. Although everyone is talking about "Proptech," there does not appear to be a clear understanding of exactly what Proptech means. Many in the industry simply refer to Proptech as real property technology or technology that is focused on the real estate industry. However, this type of definition is too narrow. Proptech is a collective term referring not just to technology but also to innovative processes, standards and uses which are transforming the real estate industry. If real estate companies utilize Proptech correctly, they will be surprised how much they can maximize profits and create a positive impact on the community. The following are just a few examples to provide a better understanding of what constitutes Proptech:

1. tokenization of real estate assets and creation of digital securities using blockchain technology;
2. digital crowdfunding platforms to raise capital;
3. building information management software;
4. digitization of real estate brokerage processes and information;
5. construction project management software and use of IoT (Internet of Things) in real estate development and building analysis;
6. use of Artificial Intelligence (AI) to analyze Big Data related to real property;
7. digitization of the real estate transactions and deed recording process using blockchain technology;
8. software applications and platforms to provide services and improve tenant experience;
9. digitization of the process of selling real estate, including the sale of property to iBuyers;
10. incorporation of green building and wellness standards into real estate development, including technologies and processes to build sustainable and resilient projects; and
11. redefining the use of real estate assets such as co-working and co-living spaces.

Although the real estate industry is very interested and focused on learning more about Proptech, companies have been hesitant to jump in and adopt Proptech for several reasons. It is understandable why real estate companies are cautious about adopting Proptech. They are concerned about the impact of adopting new technologies on their current business and legacy technologies. Additionally, blockchain and other new technologies raise concerns about the potential legal consequences which may result from adopting software that may not be fully compliant with existing legal requirements. Even though these challenges seem daunting, real estate attorneys who understand Proptech issues can help their clients navigate this new landscape to take advantage of Proptech and become a leader in the next generation of the real estate industry. For example, real estate attorneys can help clients better understand:

- How Proptech technologies apply to different stages of the real estate development cycle;
- How to incorporate green building initiatives and processes into projects; and
- How to establish a new legal structure for new real asset classes such as co-working and co-living spaces.

Blockchain and Real Estate

One of the most talked about Proptech technologies that will impact the real estate industry is blockchain. There are numerous articles and books which are devoted to explaining blockchain and how it works. The important aspects of blockchain from a real estate practitioners' perspective is that a blockchain is a database which contains a record of information about a particular transaction. Once a transaction occurs, the transaction is verified by the network of computers on the blockchain. If a transaction is verified by the network, then a new "block" for the transaction is added to the blockchain and everyone on the blockchain can then view the block containing specific information related to the transaction. Blockchain protects and verifies transactions using complex cryptographic technology. One of the common misconceptions about blockchain is that it is the same as Bitcoin and other cryptocurrencies which extends negative perceptions of cryptocurrencies to blockchain. Although blockchain is the technology which makes Bitcoin and other cryptocurrencies work, there are many different potential uses of blockchain technology that extend far beyond cryptocurrencies, including applications in the real estate industry.

Tokenization of Real Estate Assets

As mentioned above, one of the most important aspects of how blockchain will impact the real estate industry is the tokenization of real estate assets. Using blockchain, real estate owners can create fractionalized ownership interests in real estate assets through issuance of "tokens" which can then be sold to third parties. To better visualize this process, the concept of tokens simply refers to a digital representation of a typical share in a company which is recorded on the blockchain. Once the tokens are created, the owner of the real estate asset can

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raise capital through the sale of the tokens on the blockchain. All of the information related to the sale and ownership of the tokens is digitally recorded on the blockchain and preserved so that it is fully transparent and available to third parties. Additionally, creation of secondary markets for the sale of the real estate tokens can provide liquidity for owners of the tokens to be able to easily sell tokens for one project and purchase tokens in another real estate asset. The process of digitizing the real estate assets through the creation and sale of tokens will provide real estate owners and developers with access to new domestic and global markets that were previously unavailable due to the barriers inherent in the traditional process of raising capital.

Digital Deeds and Title Insurance

Another critical impact that blockchain can have on the real estate industry is transforming the way real property is conveyed by creating a digital process for recording deeds. The traditional recording process has historically been subject to abuse and errors, which is addressed by the title insurance industry in order to provide trust and certainty in real estate transactions. Blockchain can be used to verify real estate transactions and then maintain a record of the transfer of real property by recording deeds digitally on a blockchain where the information would be readily available to third parties. The digital recording process would actually not have to be significantly different from the current process to be effective. The deed that is digitally recorded on the blockchain can be on the same form and can be physically recorded in the current local recording office and then digitally uploaded onto the blockchain. Digitizing the recording process through the use of blockchain can be an important way to reduce fraud and abuse and significantly reduce friction in real estate transactions.

Although we may be just taking the first steps in making the digitization of the transfer of real property a reality, there are articles which include broad claims that blockchain and the digitization of real estate transactions will end the title insurance industry and take over the role of other intermediaries in real estate transactions. However, the reality is that technologies such as blockchain will be a tool used to reduce costs and friction in real estate transactions but may not replace entire industries. Capital markets and lenders rely heavily on title insurance in underwriting traditional acquisition and construction loans as well as in securitizations of mortgaged backed loans. These requirements will not disappear overnight, and it will certainly take time for the legal and technological framework to be implemented to perfect transfer of title to real property digitally using blockchain. However, there is little doubt that blockchain and other technologies will significantly alter the way title insurance companies do business. In fact, there are major title insurance companies using blockchain to efficiently share information related to title policies issued for previous transactions in order to provide title commitments and other information in a more efficient manner to create better products for their clients.

Attorneys and Proptech

Obviously, there are a number of laws and regulations that are impacted by the use of blockchain in the real estate industry as described above, which is why attorneys will play a critical role in ensuring that use of these new technologies comply with legal requirements and perform as expected. For example, the real estate tokens are merely the digital evidence of ownership of a portion of the real estate asset. All of the traditional issues involved in a real estate transaction remain applicable to the purchase and sale of real estate tokens. Similar to current transactions, attorneys will need to review documentation and perform standard due diligence to make sure that clients clearly understand the nature of the real estate asset which support the value of the real estate token. Attorneys representing the issuers of the real estate tokens will also need to make sure that the sale of the real estate tokens are fully compliant with applicable securities laws and KYC ("know your client") and AML ("Anti-Money Laundering rules").

The reality is that although Proptech is gaining momentum, technology alone is not sufficient to bring the real estate industry into the future. Real estate attorneys and other stakeholders in the industry will need to be active participants in shaping how the technologies are adopted by traditional companies and integrated into the real estate process. One of the most critical aspects of the real estate industry is that various stakeholders must trust the process and have certainty that the process will result in valid and legal transactions which meet the expectations of the parties. Real estate attorneys have an opportunity and responsibility to help shape the way Proptech influences the real estate industry by working closely with both Proptech companies and traditional real estate companies to ensure that the technology creates an industry which not only is more profitable but is legally compliant with a beneficial impact on our communities.


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Remember The "Attention To Details" When It Comes To Florida Notarization

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Introduction

Standard notarization does not appear to be a complicated process, so long as the details and requirements are diligently followed. In theory, the process is straight forward: the notary confirms the affiant's identity, signs the notarial certificate and affixes his or her stamp or seal. This seems to be a simple process, especially since notarial requirements are set forth in a particular state statute. For instance, D.C. Code §1-1231.04(c) provides:

> "A notarial officer who witnesses or attests to a signature shall determine, from personal knowledge or satisfactory evidence of the identity of the individual, that the individual appearing before the officer and signing the record has the identity claimed."

Some states, such as Florida, have much stricter legal requirements for notarization. A problem arises when the specific statutory requirements are not followed, which can lead to questions concerning the validity of the notarization.

This article explores one of the particular Florida requirements that is often overlooked and discusses its potential impact on documents such as wills and deeds.

Florida Requirements

Like D.C., Florida law requires that the notary confirm the identity of the affiant. Florida, however, expands on the notary's duties with some very specific requirements. The notarial requirements are found in Fla. Stat. § 117.05 (2019). The first sentence of the preamble of Fla. Stat. § 117.05(5) (2019) provides as follows:

> "(5) A notary public may not notarize a signature on a document unless he or she *personally knows*, or has *satisfactory evidence*, that the person whose signature is to be notarized is the individual who is described in and who is executing the instrument." (Emphasis added.)

The statute requires that the notary either have "personal knowledge" or "satisfactory evidence" of the affiant's identification. While those terms appear to be somewhat vague, fortunately, they are defined in the statute. "Personal knowledge" is defined in Fla. Stat. § 117.05(5)(a) (2019) as requiring the notary to "ha[ve] an acquaintance, derived from association with the individual, which establishes the individual's identity with at least a reasonable certainty." "Satisfactory evidence" is defined in Fla. Stat. § 117.05(5)(b) (2019) as "the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person whose signature is to be notarized is not the person he or she claims to be."

The statute expands on this and divides "satisfactory evidence" into two categories. The first category involves obtaining (1) the sworn written statement of one credible witness personally known to the notary, or (2) the sworn written statement of two credible witnesses whose identities are proven to the notary, upon the presentation of satisfactory evidence that each of the following is true:

> **(a)** the person whose signature is to be notarized is the person named in the document;
>
> **(b)** the person whose signature is to be notarized is personally known to the witnesses;
>
> **(c)** it is the reasonable belief of the witnesses that the circumstances of the person whose signature is to be notarized are such that it would be very difficult or impossible for that person to obtain another acceptable form of identification;
>
> **(d)** reasonable belief of the witnesses that the person whose signature is to be notarized does not possess certain identification documents (described below); and
>
> **(e)** the witnesses do not have a financial interest in nor are parties to the underlying transaction.

While the first category would appear to require considerable effort to satisfy, the second category has a much lower threshold. The second category requires only that the person whose signature is to be notarized present a form of identification that is current or which has been issued within the past 5 years, and which bears a serial or other identifying number. The statute contains an exclusive list of 10 forms of approved identification, which includes the obvious forms of official photo identification, such as a valid state (or territory, Canadian or Mexican) driver's license or a U.S. or foreign passport.

Affirmatively Indicate the Identification

While arguably every state requires the notary to have either personal knowledge or have sufficient identification as proof of the affiant's identity, Florida's statute takes this one step further. The second sentence to the preamble to Fla. Stat. § 117.05(5) (2019) provides as follows:

> "A notary public *shall certify in the certificate of acknowledgment or jurat* the type of identification, either based on personal knowledge or other form of identification, upon which the notary public is relying." (Emphasis added.)

Thus, the notary is required not only to have personal

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knowledge of, or possess satisfactory evidence as to, the affiant's identity, but the notary must *certify in the notarial certificate or jurat whether the identification was based on personal knowledge or the presentation of satisfactory evidence* (the "Authentication Requirement"). To many Florida notaries, this is, perhaps, a very misunderstood facet of the statute. The "certification" requirement means that Authentication Requirement is an affirmative "either/or" acknowledgment by the notary – the notary *must affirmatively state* that he/she either personally knows the affiant or set forth the form of identification presented by the affiant.

Often, notarization clauses will state words to the effect of "is personally known or has produced the requisite identification." While this seemingly satisfies the Authentication Requirement, meaning that the notary is attesting that he or she either personally knows the affiant or has asked the affiant to produce the requisite identification, *it is not technically in conformity with the statute* as this is not an "either/or" affirmative statement. This statement is merely stating that "either/or" has been satisfied, but is *not stating which method was satisfied, i.e., personally known or satisfactory external evidence*. It is this requirement that Florida notaries often fail to satisfy.

When reviewing the statute, the conclusions stated above may not be readily apparent. The statute certainly could have been written with more clarity to leave little doubt as to the Authentication Requirement. However, even if a notary is confused by the statutory language, the first sentence of the preamble to Fla. Stat. § 117.05(4) (2019) provides some clarification by stating:

"When notarizing a signature, a notary public shall complete a jurat or notarial certificate *in substantially the same form as those found in subsection (13)*." (Emphasis added.)

Fla. Stat. § 117.05(13) (2019) provides model notarial certificates, and, by way of example, Fla. Stat. § 117.05(13)(a) (2019) provides as follows:

STATE OF FLORIDA

COUNTY OF _____

Sworn to (or affirmed) and subscribed before me this ___ day of _____, (year), by (name of person making statement).

_____

(Signature of Notary Public –State of Florida)

_____

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

_____

Type of Identification Produced

The provisions at the bottom are the key – the identification provision separates out the required elements with the capitalized word "OR", which signifies to the notary that the requirement is an "either/or". Further, the attestation specifically asks for the type of identification produced. This should alert the notary that additional actions on his/her part are required.

Does it Really Matter Whether the Notary Complies with the Authentication Requirement?

While every notary likely complies with the identification procedure, meaning that if he/she does not know the affiant, he/she will ask for identification, is there really any negative impact if the notary does not comply with the Authentication Requirement? After all, suppose the notary is notarizing the signature of his or her lifelong friend, and suppose that the notary and friend have lived next door to each other for their entire lives. In other words, there is no doubt that the notary "personally knows" the friend. Would anyone object to the notarization if the notary fails to comply with the Authentication Requirement? Perhaps not, but the better question to ask is whether the notarization is actually a proper or legal notarization if the Authentication Requirement is not satisfied.

Consider the effect of notarization on a last will and testament (a "Will"). Under Fla. Stat. § 732.502(b) (2019), a Will is valid in Florida if the testator/testatrix's signature is accompanied by two attesting witnesses. Although the Will is valid, satisfying the "two attesting witnesses requirement" is not, by itself, sufficient to allow the Will to be admitted to probate - Fla. Stat. § 732.201(1) (2019) provides that only a "self-proved" Will may be admitted to probate without further proof. A Will that is not self-proved may still be admitted to probate, but, pursuant to Fla. Stat. § 732.201(2) (2019), only upon the presentation of the oath of any attesting witness taken before any circuit judge, commissioner appointed by the court, or clerk.

This begs the question – "what is a self-proved Will?" The answer to this is found in Fla. Stat. § 732.503(1) (2019), which states, in part, that,

> "A will or codicil executed in conformity with s. 732.502 may be made self-proved at the time of its execution or at any subsequent date by the acknowledgment of it by the testator and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer's certificate attached to or following the will …"

Who is the "officer authorized to administer oaths"? Under Fla. Stat. § 117.03 (2019), this is a notary! What this tells us is that for a Will to be self-proved, the testator or testatrix's signature, and those of the witnesses, must be properly notarized.

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Based on the above, the next question to ask is: "Whether the self-proving affidavit to a Florida Will is valid if there is no compliance with the Authentication Requirement?" According to a recent edict from the Probate Division in the South Palm Beach County Courthouse (serving southern Palm Beach County communities including Boca Raton, Delray Beach and Boynton Beach), the answer is a resounding "NO." The Probate Judges in the South Palm Beach County Courthouse have recently begun enforcing the proper notarization of self-proving affidavits, stating that if the self-proving affidavit does not comply with the Authentication Requirement, the self-proving affidavit is invalid because the document is technically *not notarized* (which is a statutory requirement under the self-proving affidavit statute). While the result is harsh, it is technically correct.

This procedure should be followed in every Florida document requiring notarization.

Effect on Deeds

Consider the results beyond that of the self-proving affidavit. In order to validly convey real property in Florida, Fla. Stat. § 689.01 (2019) requires only that the instrument (i.e., the deed) be signed in the presence of two subscribing witnesses. However, if the deed is to be recorded, the preamble to Fla. Stat. § 695.03 (2019) provides that:

> "To entitle any instrument concerning real property to be recorded, the execution must be acknowledged by the party executing it, proved by a subscribing witness to it, *or legalized or authenticated by a civil-law notary or notary public who affixes her or his official seal …*" (Emphasis added.)

Applying the Authentication Requirement discussed above, if a Florida deed is signed and recorded, but the notary does not comply with the Authentication Requirement, is there a valid recording? Again, by applying the technical provisions of Fla. Stat. § 117.05 (2019), *probably not!*

Best Practices Compliance

How, then, should a notary comply with the Authentication Requirement? The "best practices" method would suggest that the notarial certificate be clarified to leave no doubt as to the satisfaction of the Authentication Requirement. Under our "best practice" approach, the Authentication Requirement should be moved into the body of the notarial certificate and a "check the box" requirement should be added. The suggested certificate should resemble the following:

STATE OF FLORIDA)
) ss:
COUNTY OF _____)

Before me, a Notary Public, the foregoing instrument was acknowledged this _____ day of _____, 2019, by [AFFIANT], who,

❑ is personally known to me, or

❑ has produced _____ as identification

[CHECK APPLICABLE BOX TO SATISFY INDENTIFICATION REQUIREMENT OF FLA. STAT. §117.05]

_____
(Signature of Notary Public –State of Florida)

My Commission Expires:_____

(Printed, typed or stamped commissioned name of Notary Public

If the notary personally knows the affiant, he/she should check the box before "is personally known to me," and if he/she does not personally know the affiant, he/she must, (a) check the box next to the "has produced" line, and (b) must ask for one of the requisite statutory forms of identification from the affiant and print the form of identification presented in the space provided (just the form is sufficient, *i.e.*, "Florida Driver's License" – there is no statutory requirement to provide the I.D. number). Although the "check the box" should be sufficient, it is also highly recommended that the notary cross out the option that does not apply or even add a "belts-and-suspenders" approach and circle the option that was selected (the circle feature is emphasized in correspondence from the South Palm Beach County Courthouse). For example, if the notary personally knows the affiant, the notary should not only check the box next to the "is personally known to me" line, but should also cross out the "has produced _____ as identification" line. The notary may also consider circling the "is personally known to me" line.

This procedure should be followed in *every* Florida document requiring notarization. With a self-proving affidavit, this applies not only to the testator/testatrix, but also to the witnesses. As many firms draft revocable trusts with self-proving affidavits, these forms should also be compliant.

Florida Documents Executed Outside of Florida – What About Them?

In many estate and trust administrations, certain documents to be signed by beneficiaries or other interested persons are required to be notarized. Suppose, for example, that a Florida document requiring notarization is brought by a D.C.

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resident to a D.C. notary. As stated above, the Authentication Requirement is not part of D.C. law, so is the document validly notarized if the notary complies with D.C. law but does not satisfy the Florida Authentication Requirement? Arguably, the answer is "yes," but now let's suppose that the document is required to be filed in a probate matter administered in the South Palm Beach County Courthouse, or perhaps it is to be recorded in the Palm Beach County public records. Can the probate court or recording clerk deem the notarization to be invalid, meaning can a court or recording clerk reject a document on the premise that it was intended to be a Florida document, so it should be subject to the Florida laws regarding notarization? While legal scholars would state that a Conflicts of Law analysis would deem this result to be highly unlikely, the more thoughtful response is "why take a chance?" The "best practices" would be to have the non-Florida notary comply with Florida law with respect to the Authentication Requirement. This way, regardless of whether filing or recording is required, the document will have been notarized in compliance with Florida law.

What if the Notarial Certificate Does Not Contain the Authentication Requirement?

As noticed by many Floridians who sit for the Florida Bar Exam, many non-Floridians will sit for the exam so that they will be licensed in Florida and can continue to represent their clients who may either move permanently to Florida or become "snowbirds" by switching their residency and domicile to Florida while retaining their Northeastern or Midwestern home. While such attorneys are licensed to practice Florida law, they may not be cognizant of all of the nuances that Florida law presents, such as the Authentication Requirement. Often, these attorneys may prepare documents for their clients to sign but use their standard notarial certificate from their home state, which likely will not include a provision for the Authentication Requirement.

If a Florida notary is asked to notarize such a document, what should he/she do? The answer is simple – the notary must add the Authentication Requirement to the notarial certificate. The omission of the Authentication Requirement language in a notarial certificate does not preclude the notary from satisfying the Authentication Requirement – as set forth above, the failure to comply with the Authentication Requirement can jeopardize the validation of the notarization. In such a situation, the notary should insert language underneath the notarial seal (preferably by printing instead of using cursive) to the effect of "the affiant is personally known to me" or "the affiant has produced [a valid Florida's driver's license] as identification" (whichever is applicable).

Conclusion

Many would argue that it is the mundane, picayune details within the law that cause the most angst. Perhaps this is a true statement, especially when it comes to Florida notarization. While there may be anger and frustration if a notarized document is rejected for failure to comply with the Authentication Requirement, the end result is that the statute requires such compliance. Although we are only personally aware of the South Palm Beach County Probate Court calling attention to the Authentication Requirement, that does not mean that any Florida notarization without the Authentication Requirement is a valid notarization. Some of our colleagues have reported similar issues in the Miami-Dade County Courthouse and elsewhere.

The conclusion from this analysis is that notarized documents that do not comply with the Authentication Requirement are technically not notarized in compliance with the law, which means that such documents may not actually be "notarized" and could be a legal dispute waiting to happen. The better approach is to ensure compliance with the Authentication Requirement so that a call never has to be made to the client indicating that an ineffectual notarization has occurred due to a lack of attention to the details.

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Potential Safeharbor For Trustees — CHAPTER 2

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

In the Fall 2018 edition of ActionLine (pps 5-7), our colleagues, Grier Pressly and Randy Randolph, discussed recent legislation adopted in California that permits trustees to give beneficiaries advanced notice of proposed actions. This new legislation provides the trustee with "closure" on a transaction without having to wait for the expiration of the six-month period to object to a trust disclosure document as required under Florida law. It also precludes a beneficiary from using hindsight in a surcharge action to the detriment of the trustee.

Similarly, in 2016 the Parliament of the Commonwealth of The Bahamas amended its trust law.[2] My partner, Jeff Baskies, and I discussed one of the major provisions, the adoption of self-settled spendthrift trust legislation, in the Spring 2018 edition of *ActionLine* (pps 21-24).

The 2016 amendment also inserted a new Section 91C, entitled "Power of Court," that permits an interested party to apply to the court to declare the exercise of a fiduciary power void or voidable. In other words, a court, upon the application of an interested party, may declare the exercise of a fiduciary power void or voidable, if the court is satisfied that:

a. A person with a fiduciary power –

   (i) has failed to take into account relevant considerations; or

   (ii) has taken into account irrelevant considerations; and

b. such person –

   (i) would not have exercised the power; or

   (ii) would have exercised the fiduciary power, but on a different occasion, or in a different manner, to that in which it was exercised.[3]

The purpose of this amendment was to codify what is commonly referred to as the "Rule In Re Hastings – Bass" (the "Rule"). The United Kingdom Court of Appeal, in the case of *In Re-Hastings-Bass,*[4] provided that, where by the terms of a trust, a trustee is given a discretion as to some matter under which he acts in good faith, the trustee could request the court to set aside and declare void an exercise of that power if it resulted in unforeseen or unintended consequences. The Rule provided trustees with a useful means of unwinding perceived harsh consequences flowing from the exercise of a power conferred upon them by the terms of the trust. Once applied, it enables the court to void the relevant transaction with the effect that it was never deemed to have been exercised.

In the actual case, Captain Hastings-Bass settled two trusts, one in 1947 and the other in 1957. Subsequently, in 1958, the trustees of the first trust transferred the principal to the trustees of the second trust, to be held in accordance with its terms. As it turned out, the transfer of the principal by the trustees of the first trust to the second trust failed because of a breach of the rule against perpetuities. When Captain Hastings-Bass died in 1964, the Commissioner of Inland Revenue sought estate duty as a consequence thereof. The trial judge held that the result produced by the 1958 transfer was substantially and essentially different from the intention of the trustees of the first trust when they made the transfer. That being so, it was held that the trustees never effectively exercised the power to transfer, and the principal purportedly transferred to the second trust had at all times remained subject to the terms and conditions of the first trust.

The Court of Appeal held that regard had to be given to what was effectively achieved. If the result could not reasonably be regarded as being beneficial to the person intended to be benefitted, the transfer could not stand because it was beyond the authority of the trustee to make the transfer. So, the *Rule in Hastings-Bass* was stated in the judgment as follows:

> *Where by the terms of a trust …, a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations that he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.*[5]

Since the original *Hastings-Bass* decision, the Rule has been used to set aside, and thus effectively reverse, the exercise of powers in a variety of circumstances, but most particularly where the exercise of the power results in unintended tax consequences, to the detriment of UK's Revenue and Customs.

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One English commentator noted:

> *The unrestrained extension of the Hastings – Bass principal could lead to trustees being treated as a new class of incapacitated persons, like children or feeble-minded adults. No one could ever be sure that they had taken proper advice (even…if they had teams of expert advisers) or that they meant what they said.*[6]

Essentially, the Rule gave trustees a "get out of jail free" card and had become *"a morning after pill [for] trustees suffering post-transaction remorse,"*[7] in order to undo decisions with unintended consequences. *"It cannot be right that whenever trustees do something which they later regret and think they ought not to have done, they can say they never did it in the first place."*[8]

So, against this backdrop, the United Kingdom Court of Appeal heard the joint cases of *Futter v. Commissioner for Her Majesty's Revenue and Customs* ("Futter") and *Pitt v. Commissioner for Her Majesty's Revenue and Customs* ("Pitt").[9]

In Futter, the trustees sought advice from trust counsel, and acted upon it. Unfortunately, the advice was wrong, resulting in substantial capital gains tax liability.

In Pitt, trust counsel had advised on income tax and ad valorem stamp tax issues, but never addressed UK inheritance tax issues. The Trustee fulfilled her duty to take appropriate advice and put it into effect – unfortunately, the advice was wrong and the tax claim of Revenue and Customs remained valid.

One of the Justices of the Court of Appeal noted "*Mrs. Pitt is entitled to feel that she has been badly let down by the advice that she was given, and the failure of her advisers to address the question of the [Inheritance tax] … it seems to me that her remedy for that…lies not in the realms of equity but by way of claim for damages for professional negligence."*[10]

Accordingly, the Court established a new rule to revise and replace the Rule upon which trustees and courts had been relying for the prior thirty years.

1. Where a trustee purports to exercise a discretion that is deemed to be outside the terms of his power, that act is void.
2. Where a trustee exercises a discretionary power, the act is voidable if the trustee *breached a fiduciary duty.*
3. Where a trustee considers a matter outside the scope of his expertise, he must seek proper advice. The trustee must weigh that advice and follow it if the trustee believes it is accurate and appropriate. That is the trustee's duty. If the advice turns out to be incorrect, and results in an unintended tax charge, the fault lies with the adviser. The trustee has carried out his responsibility and has not breached a duty. In such case, the action will be voidable.[11]

Thus, in the case of a transaction with unintended tax consequences, in the absence of a breach of fiduciary duty that would allow for recovery against the trustee, then the only available legal remedy is an action against the adviser if wrong advice is given.

In addition to the United Kingdom, the *Rule of Hastings-Bass* has also been revisited in the Guernsey Court of Appeal the Supreme Court of South Wales (Australia).

Circling back to the amendment to the Bahamian Trust statute, it was enacted in 2016, three years *after* the Futter and Pitt judgments. Section 91C preserves the original Rule as it operated prior to Futter and Pitt. Under the new statute, the court is granted jurisdiction to set aside the exercise of a fiduciary power, not only upon the application of the trustee, but also the protector or any other person to whom the court grants permission. Furthermore, the statute expressly provides that an exercise of a power may be set aside *despite the fact there is no breach of fiduciary duty* by the trustee or some other fault on the part of the person exercising the power or advising on its exercise.[12]

Coincidentally, the Cayman Islands is considering as part of its new trust amendment Bill, the adoption of the Hastings-Bass rule that includes a judicial power to reverse a trustee's mistake. The anticipated trust legislation derives from the "TRUST LAW REFORM DISCUSSION PAPER" dated April 5, 2017, produced by the Cayman Islands Law Reform Commission. In paragraph 12 of Section III of its Report, and citing the Bahamian Act, the Commission reports "... the exercise of the Court's jurisdiction is not dependent on a finding of breach of fiduciary duty on the part of the persons exercising the power or of any person advising them."

So, what is the justification for the court to have jurisdiction to correct the mistake of a trustee in the exercise of his discretionary powers? The Cayman Islands Commission found that the issue usually arises because the trustee has made a disposition, based upon erroneous professional advice, which has adverse consequences for one or more beneficiaries. The decision of the UK court in Futter and Pitt limits the court's jurisdiction only in cases where there is a breach of fiduciary duty. But the new restriction upon a court's ability to correct a mistake in the exercise of a discretionary power applies most frequently when the exercise of a trustee's power is based upon professional advice from reliant service providers. Practically, therefore, a court can only find the trustee at fault if he fails to heed the advice, or relies upon the advice of a service provider that no responsible trustee would seek advice from.

Why is the Bahamian statutory adoption of the *Rule of Hastings-Bass* relevant to the Florida trusts and estates lawyer? You may recall the threat of "*Hubertization*"[13] of self-settled spendthrift trusts by Florida residents who settle trusts in states that have adopted Domestic Asset Protection Trust

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("DAPT") legislation. Under Bahamian law, Bahamian courts have jurisdiction to hear and determine any claim sought against a Bahamian trust.

Unlike state courts in the United States, the courts of the Bahamas have exclusive jurisdiction to hear cases concerning a trust where:

(1) the governing law of the trust is the law of The Bahama;

(2) the trustee of the trust is ordinarily resident, incorporated or registered in The Bahamas;

(3) the administration of the trust is carried on in The Bahamas; and/or

(4) the trust instrument confers jurisdiction on the Bahamian court.[14] In other words, while the courts of another state may be subject to the determination of a Florida court under principals established under the United States Constitution,[15] a Bahamian court is not subject to the "full faith and credit" of a Florida court.

Similarly, Florida's Uniform Fraudulent Transfer Act defines a "creditor" as "[any] person who has a claim."[16] A transfer made by a debtor is fraudulent as to a "creditor" if made with the intent to hinder, delay or defraud any creditor within 4 years after the transfer was made.[17] In contrast, Chapter 78 of the Bahamas Fraudulent Dispositions Act, provides "every disposition of property made with an intent to defraud at an undervalue shall be voidable at the instance of *"a creditor thereby prejudiced"* (i.e. not any "creditor"), if an action is commenced within 2 years of the relevant disposition.[18]

By statutory adoption of the *Rule of Hastings-Bass*, Bahamian courts grant trustees a "morning after" option to render the exercise of a trustee's power void or voidable if it does not seem to have achieved the intended purpose.

Considering the planning options that a Florida lawyer has a duty to provide to his or her clients, it is time to think outside the "box" (or the state, as the case may be) and consider whether the clients' objectives will be better met in Florida, another state or another jurisdiction such as the Commonwealth of the Bahamas.


J. WOLF

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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 Fla. Stat. § 736.1008 (2016).
2 Trustee (Amendment) Act, 2016.
3 *Id*, Section 91C.
4 [1975] Ch. 25.
5 *Id.*
6 "The Rule in Hastings-Bass: Help for Trustees who make Mistakes", Sean McWeeney, QC, STEP (Bahamas) Luncheon, November 29, 2007.
7 *Breadner v. Granville-Grossman*, [2001] Ch 523.
8 *Id.*
9 [2013] UKSC 26 on Appeal from [2011] EWCA Civ 197.
10 *Id.*
11 [2013] UKSC 26 on Appeal from [2011] EWCA Civ 197.
12 Trustee (Amendment) Act, 2016 Section 91C (4).
13 See In Re *Huber*, 493 B.R. 798 (Bankr. W.D. Wash. 2013).
14 Trustees Act, 1998, as amended, Section 79A.
15 U.S. Const.art. IV, Section 1; U.S. Const. amend. V and XIV.
16 Fla. Stat. § 726.102 (5) (2018).
17 Fla. Stat. §726.110 (2018).
18 Fraudulent Dispositions Act, 1991, Section 4. (3).

SUMMARY JURY TRIALS
And Their Use In Resolving Construction Defect Cases

By Anne-Solenne Rolland, Esq., Lee, Hernandez, Landrum & Carlson, APC,
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What if an attorney could try his or her case before a jury, or even multiple juries, before the actual trial with no risk of creating an adverse precedent? Well this mock trial concept is being utilized more and more in certain jurisdictions as the newest in vogue alternative dispute resolution. This non-binding, quasi-trial allows the parties to better understand the merits of the other side's case, as well as to test their legal theories, allowing the attorneys to better prepare for the actual trial. The aim of this article is to analyze the applicability of these "mock trials" to complex construction defect cases and the potential benefits and downfalls as it concerns settlement and the effective use of judicial resources. However, we must first present a brief overview of a summary jury trial, especially given its sparing use. Thereafter, special attention will be paid to a Florida county that has begun utilizing this alternative dispute resolution. Finally, the authors will provide the reader with the unique benefits as well as the downsides of summary jury trials as applied to construction defect litigation.

A summary jury trial, in essence, is a truncated jury trial (usually lasting less than a day) where attorneys present their case to a lay jury without the use of live witnesses.[1] The goal of the summary jury trial, as stated by its creator Judge Thomas Lambros, is for the attorneys and clients to be able to "gaze into a crystal ball" and predict what a jury would do prior to trial through the findings of an actual jury.[2] Summary jury trials first took root in federal court, in no small part due to Judge Lambros' effort. Federal judges, noticing the considerable backlog in their dockets, wanted an effective method whereby the parties would be led to prompt resolution without impeding on the autonomy of the parties.[3] In so doing, these judges created a summary jury trial, which is reminiscent of a mock trial conducted during law school.

Unlike a typical trial, the jury for a summary jury trial is selected by the judge after a brief voir dire.[4] Thereafter, the presentation of evidence is performed in a summary fashion, where the attorneys present key testimony and evidence to the jurors.[5] This often takes the form of videos or written deposition testimony and presentation of exhibits.[6,7] Objections are minimized during the summary trial with the effective use of a pre-trial conference, and counsel are expected to present only evidence admissible at trial.[8] Finally, the jury returns either a consensus or individual verdict on the case.[9] While these are the general rules for a summary jury trial, it must be emphasized that the court makes the ultimate determination as to the proceedings and procedures employed, and they can be tailored to the individual intricacies of the case.

One jurisdiction that seems to have taken to the use of summary jury trials is Palm Beach County. The courts of Palm Beach County derive their authority to mandate this procedure pursuant to Florida Rule of Civil Procedure 1.200(a) *Arabian American Oil Co. v. Scarfone*,[10] and *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*.[11] The second and third sources provide the general guidelines and procedures for summary jury trials, as explained in the preceding paragraph. Similar to the federal courts, Florida courts derive their authority to hold summary jury trials under the auspices of a case management conference. The Florida Rules of Civil Procedure provide that a court is permitted to hear a case management conference to "pursue the possibilities of settlement."[12] In light of the freedom built into the rules themselves, judges have taken advantage of the discretion awarded to them by expanding the use of the forum while keeping the original intent of a case management intact. The typical case management conference includes the judge, counsel, and often insurance carrier and client representatives (in person or telephonically), and usually, involves a simple exchange of information between the court and the parties. A summary jury trial, however, now ingeniously also includes the use of jurors. The use of this provision of the Florida Rules of Civil Procedure in this manner to allow for summary jury trials is an elegant solution to a pervasive problem–resolution gridlock.

Surprisingly, construction defect litigation lends itself well to the use of summary jury trials for a number of reasons. First,

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a unique aspect to construction cases is the sheer number of parties and the complexity of the issues. That said, more often than not, defendants stand aligned in their posturing since the cross-claims and third parties claims are generally merely "passthrough" in nature and used as a tool for risk transference should an adverse verdict be rendered. The merits of the claims themselves however generally remain two sided – i.e. whether the building component is defective or not. Therefore, courts will generally afford the Plaintiff equal time to the whole of the multiple defendants. The defendants are forced to designate individuals to represent the whole as to the individual issues and present their best case, usually in the form of easily digestible expert testimony. With this in mind, due to the flexibility of summary jury trials, the parties can creatively posit themselves to the jury to properly address the merits of the individual issues.

Second, a common claim for a construction defect action, such as negligence, is well suited to be heard during a summary jury trial. [13] The biggest uncertainty for claims of negligence is what the jury will dictate in its application of the "reasonableness" standard as applied to a contractor, developer, or design professional. The plaintiff will obviously put forth its preferred standard (strict), and the defense its preferred standard (relaxed), but ultimately the chosen standard will be chosen by a jury. Similarly, the same would also apply to claims that have been brought pursuant to Florida Statute § 718.203 (2018). Warranty claims made pursuant to said statute are conditioned upon routine maintenance being performed. As such, a jury would be required to determine what exactly constitutes "reasonable" maintenance. With the use of a summary jury trial, both sides are able to glimpse what will be considered "reasonable" for a jury. All too often one side or the other becomes so entrenched into its way of thinking such that it considers evaluations by opposing counsel to be anything but "reasonable." The summary jury trial, if conducted properly, then can be well-suited to break this stalemate by injecting the opinion of a lay jury.

Perhaps one of the biggest benefits of the summary jury trial is that counsel may have a discussion with the jurors at the close. Receiving a verdict back is one thing, but it is truly beneficial to speak with the jurors and get their full opinion regarding the merits of the case. Perhaps the jurors focused on an aspect that was glossed over by the attorneys, when it may be something that could have turned the tide of the verdict, or the jury may give honest feedback regarding the lawyers' ability to condense and refine the material into a digestible format. For those large-scale construction defect matters, the subject matter is dense and often foreign to many jurors. With the aid of a summary jury trial, the attorneys are able to better understand if the jurors are grasping the material and perhaps find a way for them to better understand the issues prior to trial. A summary jury trial provides this unique opportunity for all sides to come to a better understanding of the merits of the case.

Another great advantage is the non-binding nature of the summary jury trials which guarantees that no precedent is created by the ultimate ruling of the jury. Depending on the outcome, a traditional trial and following judgment has the potential to create adverse precedent for a litigant, as well as future litigants similarly situated. The summary jury trial, however, creates no adverse precedent that may be later used to the detriment of a certain party. This is paramount in construction defect cases, where allegations of defects, including those merely technical in nature, such as claims of violation of the Florida Building Code, have a great tendency to repeat themselves. This is particularly important for insurance carriers who often hold the purse strings and are risk-averse to creating precedent. Furthermore, summary jury trials provide significant cost savings over a typical construction defect trial, which may last 6 to 8 weeks. For example, if the project was built under the umbrella of an Owner or Contractor Controlled Insurance Program, and still operating under a reservation of rights, the cost to defend the numerous attorneys for the wrap participants for 6 to 8 weeks can be staggering. As such, in comparison, a one-day summary jury trial, where the defendants are forced to cooperate, is significantly less expensive and can still provide a quasi-jury verdict.

All of these benefits however are only as good as the conditions under which the summary jury trial proceeds. One of the biggest hurdles to a successful summary jury trial (even though it is obvious) is that the parties must actually be willing and cooperative with the process. There is no benefit where one or more of the parties simply wishes to move along and try the case. One potential drawback cited for summary jury trials is counsel's fear of giving away its legal strategy.[14] However, courts have repeatedly reiterated that "[a] primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent use of surprise, trickery, bluff and legal gymnastics"[15] and that the "discovery rules are to be accorded a broad and liberal treatment… to effectuate their purpose that civil trials … no longer need be carried on in the dark."[16] If the aim of discovery prior to trial is to afford the parties the opportunity to support their claims and defenses at trial, then a presentation of the same should not be shunned. In fact, it would be a substantial waste of time and money in such a scenario. Therefore, it is imperative that all parties agree to utilize a summary jury trial.

However, even if all parties agree to utilize a summary jury trial, the unique nature of a construction defect action may not result in a fair and impartial result. As mentioned earlier, construction defect suits typically involve a large number of parties, due in part, to the number of subcontractors used in construction. Therefore, the court must allow each party sufficient time to plead their case in front of the jury. Otherwise, the jury will be presented with only the Plaintiff's case, which

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could very well lead to incorrect Plaintiff verdicts. In such a situation, the summary jury trial does more harm than good because the Plaintiff will become even more entrenched in their position, leaving little room for settlement.

Summary jury trials, although sparingly used, present a unique opportunity in the realm of construction defect litigation. The ability to peer into the minds of a jury is an untapped resource that could assist both sides toward a quicker and more cost-effective resolution. Construction defect litigation, by its very nature, includes a number of parties and claims, which creates a host of uncertainty. The use of a summary jury trial, especially shortly before a mediation, can hopefully resolve some of that uncertainty and lead the parties to a productive resolution.

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Special thanks to Jessica Shevlin, a 3L year law student at the University Of Miami School Of Law.

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Endnotes

1 Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 483 (1984) (report prepared for Judicial Conference Committee on the Operation of the Jury System).

2 *Id*. at 463.

3 Charles F. Webber, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56 U. Chi. Law Rev. 1495, 1495 (1989).

4 *Supra* note 1, at 470-71.

5 *Supra* note 1, at 483.

6 *Id.*

7 One federal judge notes that one defense team decided to have an attorney act as a witness, while the other attorney elicited testimony. *See supra* note 1, at 503. This strategy was actually quite useful in keeping the attention of the jury.

8 *Supra* note 1, at 483-84.

9 *Id.* at 484.

10 The full citation to the case is *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1479 n. 7 (11th Cir. 1991).

11 Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984).

12 Fla.R.Civ.P. 1.200(a)(7).

13 The authors have limited the potential causes of action here for the sake of brevity. However, it should be noted that other causes of action are typical for a construction defect case, particularly if the Plaintiff is a condominium association.

14 *Supra* note 3, at 1500.

15 *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970).

16 *Schlagenhauf v. Holder*, 379 US 104, 114-15 (1964) (citations omitted).

POLITICAL ROUNDUP

Florida's New Leaders Take Charge

By Cari L. Roth, Esq., Dean Mead & Dunbar, Tallahassee, Florida

A new Governor and Cabinet, a new President of the Senate, and a new Speaker of the House presiding over a body with over a third of the seats occupied by freshman now have their first legislative session in the rear view mirror. After the last several years, this session seemed less rancorous, despite the fact that there were certainly some of the same contentious partisan issues playing out on the state stage as there are in the national arena.

The 2019 Legislative Session formally concluded on Saturday, May 4th, after a short extension in order to meet the 72 hour waiting period between distribution and vote on the proposed budget. The flurry of activity in the final days of the legislative session ended with passage of a mere 197 bills of the 1861 bills filed this session.

Governor DeSantis echoed the themes of his campaign and inaugural address in his spending and issue priorities, and he was largely successful. The Legislature's 2019-2020 budget met the Governor's requests for major spending increases to address the red tide and blue green algae issues which plagued the state so dramatically last summer. The Florida Forever allocation in the budget of $33 million for the acquisition of environmentally valuable lands was, however, considerably less than the Governor's request. To help spend these monies wisely, the Governor has appointed a state science officer, and recently an academic Task Force, on Blue Green Algae to help advise him and his agency heads on the best use of those earmarked monies. The membership of the Governing Board of the South Florida Water Management District was completely overturned by Governor DeSantis, and all members were confirmed by the Senate except for "Alligator Ron" Bergeron, whose appointment was delayed until an Ethics Commission opinion could be obtained. Bergeron, a contractor, has contracts with the District.

There were three bills which caused lengthy debates and partisan divides. One of those was a priority of the Governor's—a prohibition on sanctuary cities. Specifically, at issue was compelling all state and local government agencies to cooperate with Immigration and Customs Enforcement (ICE). Many of the same themes around the Trump administration's more aggressive pursuit of immigration enforcement efforts being discussed in Washington played out in these debates.

Another hotly debated issue was on implementation of one of the Constitutional amendments which passed last November, Amendment 4. This amendment restores voting rights to those who have completed their criminal sentences with some exceptions for certain crimes. The main issue was what it means to complete the sentence, and whether that includes payment of restitution, fines, and fees. The final bill sets that as a requirement but allows a judge to waive them.

The third difficult subject was an outgrowth of the same subject which riveted the end of last year's legislative session —school shootings and school safety. After the shootings at Marjory Stoneman Douglas High School last year, the Legislature passed some gun sale limits, but a large focus was put on placing additional armed security in all schools. Then, Governor Scott formed the Marjory Stoneman Douglas High School Public Safety Commission to further study the events

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at Parkland and make recommendations. After deconstructing the events of that horrible day, the Commission reported to the Governor with several structural and policy recommendations to improve school safety. While most school districts had not implemented the guardian program adopted last year, the Commission recommended keeping the program and expanding it to teachers. The Legislature eventually approved, allowing classroom teachers to be volunteer school guardians and to carry concealed weapons. The effort to repeal last year's changes, which moved the age to purchase weapons to 21, never gained much traction.

The votes on these three contentious issues were largely split on a partisan divide. The other area of partisan splits was the subject of preemption of local government authority. Local preemption proposals ranged from vacation rentals, environmental issues such as plastic straw and bag bans, front yard vegetable garden bans and tree trimming limits, scooters, and control of public rights of way. Many of these preemptions made it through the legislative process, and as of this writing, are awaiting the Governor's review.

Governor DeSantis wasn't the only Cabinet official to have a good year. Attorney General Ashley Moody, reportedly with the help of Speaker Designate Chris Sprowls, was able to shake loose a bill creating limited access to the State's prescription database to help with the State's opioid litigation. A legislative effort to address the opioid crisis with a task force was trumped when Governor DeSantis appointed a Statewide Task Force on Opioid Drug Abuse with Moody as chair.

Agriculture Commissioner Nikki Fried, who made medical marijuana and industrial hemp a touch point of her campaign, swiftly appointed a Cannabis Czar to lead her Department's involvement in the state medical marijuana and cannabis field. Once the federal government cleared the way for industrial hemp to be licensed in each state in a late 2018 Farm Bill, the Florida Legislature moved to create a state program. Led by Sen. Rob Bradley and Rep. Ralph Massullo, the House and Senate agreed on the terms of a new industrial hemp program on the final day of session. The program will be administered by the Department of Agriculture and Consumer Affairs who will oversee licensure of producers and testing of all products sold in Florida.

Early on, Governor DeSantis called on the Legislature to repeal the current ban on smokable medical marijuana which was mired in litigation. He pledged to drop the State's appeal if another approach wasn't quickly adopted. The Legislature did oblige with new legislation which requires the prescribing doctors to follow new guidelines to be formulated by the Department of Health. Further limits were put on prescriptions for patients under the age of 18.

The Legislature also passed legislation implementing a constitutional amendment approved last November which included vaping in the restrictions on indoor smoking in public places. An effort by Senator Simmons to raise the age to purchase tobacco and nicotine dispensing devices such as vaporizing devices to 21 passed the Senate, but never gained traction in the House.

CFO Jimmy Patronis helped push a bill which provides firefighters certain cancer benefits by deeming 21 types of cancer presumed to be job related. While cancer treatment is covered by insurance, the bill provides benefits for co-pays and deductibles. The Florida League of Cities requested that Governor DeSantis veto the bill in part due to the high cost to local governments, but the legislation was swiftly signed. Another initiative supported by Patronis was reform of assignment of insurance benefits which was also successful.

The new leaders of the House and Senate also had successes on their priorities. Speaker Oliva made health care regulation reform a focus of his first year as Speaker. After decades of discussion, the House and Senate agreed on elimination of the certificate of need requirements for hospitals and other facilities, importation of prescription drugs from Canada, and a framework for "telehealth" delivery of medical services. Oliva pledges additional reform efforts next year, including more authority for registered nurses and physician assistants to work with less supervision from doctors. Another of Oliva's priorities which passed was greater oversight of the State's higher education institutions in the wake of a finding that the University of Central Florida had improperly used millions of operating dollars for capital projects. The state's higher education institutions also saw much of their requests for budget increases ignored this year.

Senate President Bill Galvano's centerpiece legislation was an effort to expand the state roadway network to accommodate population growth and spur rural economic development. Galvano's Senate district briefly included much of Florida's Heartland, the counties in the south-central part of the state which lag considerably behind Florida's coastal areas in economic activity. The initiative was passed after inclusion of multi stakeholder task forces in each of the three corridors to advise the Department of Transportation. The leadership of some environmental groups was not satisfied and is urging a veto by Governor DeSantis. Galvano and Senate President designate Wilton Simpson also worked hard to negotiate a new gaming compact with the Seminole Tribe. Those negotiations were not brought in for a landing during the session, but that issue is likely not over.

The continued support for charter schools was also supported by the Legislature. Expansion of the state's voucher program to continue state funded support of students who wish to pursue their education outside traditional public schools was also passed. An effort to include charter schools in the distribution of voter approved sales tax increases to support schools was limited in the final hours of session to sales taxes approved in the future.

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Frustration over the bundling of proposed constitutional amendments by the Constitution Revision Commission resulted in several proposals to modify the Constitution to abolish the Commission or limit their proposals to single subjects. In the end, no amendments passed, but there's time. The next Commission doesn't meet until 2038. Changes to petition gathering requirements for voter initiatives were adopted in the waning hours of the session.

Of course, the one thing the Legislature must do every year is adopt a budget. The approved budget is the largest ever at $91.1 billion, including federal pass through funding. The continuing needs of Hurricane Michael, impacted communities in the Panhandle were addressed with additional state funding focused on housing and infrastructure, yet the needs still dwarf the funding. At writing, President Trump had just visited the Panhandle and promised additional federal help.

In Florida, the governor has line item veto authority over the budget. Historically, new governors are aggressive with the veto pen, but Governor DeSantis had many of his budget priorities fulfilled, so perhaps he will be kinder on the Legislature's priorities. Budget vetoes are always a major test of the relationship between the governor and Legislative leadership, and the first ones by a new governor are often viewed as policy ground rules for the future.

Meanwhile these new leaders must immediately pivot to preparations for the next session, which begins in early January 2020, with committee meetings beginning probably in September. Looking further into the future, sometime this summer, House Republicans are expected to select their Speaker Designate for a term beginning in 2024 to follow the 2 year speakerships of Rep. Chris Sprowls and Rep. Paul Renner, both of whom are attorneys.

As a final note, congratulations to RPPTL's own, Representative Ben Diamond, who was elected by his peers in the House to assume the leadership of the House Democrats in 2022. He is a calm and powerful voice in the House, respected by all.

C. ROTH

Cari Roth is a shareholder in the Tallahassee Office of Dean, Mead & Dunbar. 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 is a proud member of the Dean, Mead & Dunbar governmental relations team for the Real Property, Probate and Trust Law Section of The Florida Bar.

SECTION SPOTLIGHT

Tallahassee Bar Association Fourth Annual Leon County Public School Legal Diversity Initiative

By Jami Coleman, Section Fellow and TBA Annual Leon County Public School Legal Initiative Event Chair

Circuit Judge Stephen S. Everett welcoming the students.

Lincoln 9th grade student Ariel Coleman giving her closing argument during the Mock Trial session.

Event Chair and Section Fellow Jami Coleman and Circuit Judge Stephen Everett.

Thanks to The Florida Bar Real Property and Probate Section, the 4th Annual Leon County Public School Legal Initiative was a huge success. For the second year in a row, RPPTL has supported this Tallahassee Bar Association and Tallahassee Barristers Association joint event. Eighty high school students and 25 judges, lawyers, RPPTL Section members, law school students, faculty members, and para-professionals enjoyed a day of exploring the legal profession.

Tallahassee Bar Association and the Tallahassee Barristers Association applied for a diversity grant from The Florida Bar that allowed the two voluntary bar associations to partner with Leon County Public Schools, the FSU College of Law, Discover Law Grant Program with the Law School Admission Council, RPPTL Section of The Florida Bar, our Judiciary and others to make the Fourth Annual Leon County Public School Legal Diversity Initiative happen again this year. This program exposes high school students to the diversity of the legal profession. It allows students to learn from diverse attorneys in age, race, gender, and practice area. Tallahassee Bar Association Executive Director Joann Gore said, "This annual event grows and gets better each year thanks to the support of all the event partners. This is one of TBA's and Tallahassee Barristers' premier diversity events so the continued support of RPPTL is not only appreciated but crucial to the success."

The event was held at various courts and the FSU College of Law. This innovative program allowed students from Godby High, Lincoln High, Florida High, and Rickards High to get a behind-the-scenes look at the Leon County Circuit Court, Northern District of Florida U.S. Bankruptcy Court, and the First District Court of Appeal. Students toured courts and conducted their own mock trials at the FSU College of Law. The day concluded with a speed networking lunch with judges, law students, lawyers, and para-professionals from the local legal community. Tallahassee Barristers Association Past President Brandi Thomas said, "I was thoroughly impressed how much the students enjoyed playing the different roles involved in a criminal mock trial."

Circuit Judge Stephen Everett welcomed the mock trial segment and gave advice for the students. Retired Circuit Judge, RPPTL Section Member and FSU College of Law alum Claudia Isom, attended the speed networking lunch and had an opportunity to address the students as well.

Tallahassee Bar Association Event Chair Jami Coleman said, "The Leon County Public Schools Legal Initiative with the Tallahassee Bar Association, Tallahassee Barristers, FSU College of Law, Law School Admission Council, Real Property Probate Trust Law Section of The Florida Bar and The Florida Bar Diversity Initiative has proven to be a successful annual program. The model we have developed for this event could be easily replicated in other parts of the state or country! Joann or I would be happy to share the event model and assist others in starting their own event."

University of Stetson Meet and Greet

MARCH 21, 2019

By Johnathan L. Butler, CTFA, Wells Fargo, Tampa, Florida

Wells Fargo Private Bank sponsored the annual "Meet & Greet with the Stetson Law Students" on Thursday March 21st at 6-8pm in the Hillsborough County Bar Center in Tampa. Stetson Law Students mingled with RPPTL members from the 6th and 13th Circuits while enjoying appetizers and beverages. RPPTL Chair Deb Boje encouraged the students to attend the upcoming RPPTL Convention in Clearwater at the end of May, as this is after law school final exams and where the students can attend committee meetings and learn more about the section. At Large Members (ALMs) from the 6th and 13th Circuits also gathered with the law students to hear about their experience at Stetson, plans for the summer and career aspirations. From Wells Fargo, Debbie Gauthier, Larry Hamrick, Julie Farber and Johnathan Butler thanked the attendees during the reception, wishing the students well at Stetson and in their legal futures.

Atty. Ricky Hearn, 13th Circuit RPPTL Section ALM; Rebecca Bell, 6th Circuit RPPTL Lead ALM; Atty. Debbie Faulkner, 6th Circuit RPPTL ALM; Atty. Eryn Riconda, Baumann Kangas Estate Law, Tampa

Debbie Faulkner, 6th Circuit RPPTL ALM; Deb Boje, RPPTL Chair; Debbie Gauthier, Wells Fargo, Regional Manager of Investment & Fiduciary Services

Lorenzi Lora, 2L, Stetson Law; Atty. Jason Ellison, 6th Circuit RPPTL Section Member; Atty. Tatiana Henao, Former Stetson RPPTL President 2017-2018

Johnathan Butler, 13th Circuit RPPTL Lead ALM, Wells Fargo Senior Fiduciary Advisory Specialist

Julie Farber, Wells Fargo Senior Fiduciary Advisory Specialist, Tampa; Debbie Gauthier, Wells Fargo Regional Manager of Investment & Fiduciary Services; Sarah Boyko, 1L Stetson Law

Tom Henderson, RPPTL 13th Circuit ALM; Johnathan Butler, 13th Circuit RPPTL Lead ALM; Phil Baumann, 13th Circuit RPPTL Section Member

RPPTL Section Executive Council Me
Omni Resorts – Amelia Island Plant
Fernandina Beach, Florida
March 13 – 17, 2019

Terrell and Brenda Ezell

Greenhouse visit for RPPTL family members at the Sprouting Project, Omni Amelia Island Plantation resort

Drew O'Malley and Jonathan Butler

Executive Council meeting.

Silvia Rojas and the donut walls

Donuts

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

eeting ation

Thursday Welcome Reception at Amelia Island

Thursday Welcome Reception at Amelia Island

Gwynne Young and Michael Dribin

Pete Dunbar speaking at probate roundtable

View Photo Albums at www.rpptl.org

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Friday, March 15, 2019 • 3:00-5:00 p.m.

Omni Amelia Island Plantation • Fernandina Beach, Florida

Prepared by Colleen C. Sachs, Santa Rosa Beach, Florida

Thank you to the Roundtable Sponsor: Fidelity National Title Group

The Director of the Real Property Division, Bob Swaine, called the meeting to order at 3:00 pm.

Sponsor Announcement. The Director thanked the sponsor, Fidelity National Title Group.

Introduction of Guests. The Director recognized students, who introduced themselves. Florida Bar Board of Governors member, Steve Davis, was introduced and he spoke.

Summary of the Orlando Roundtable Meeting. The Director directed attention to the summary of the Orlando Roundtable Meeting. There were no comments on the summary.

Action Items

Real Property Finance and Lending Committee — David R. Brittain and Richard McIver, Co-Chairs:

Presentation of the draft Statement of Opinion Practices that has been adopted by various state and national legal groups, pp. 16-22.

Kip Thornton presented on the draft Statement of Opinion Practices that has been adopted by various state and national legal groups. These are third-party legal opinions identifying customary practices through the United States in an effort to codify broad principles. It is geared toward both lawyers who give opinions and lawyers who represent recipients of opinions. This is the start of trying to establish a national opinion practice that people can rely on rather than having separate state opinions. This was presented at the Real Property Finance committee. It was approved by the committee to adopt this as part of the procedure when providing opinions. The committee asked for the Roundtable to approve the statement. This is an aspirational document rather than the approval of particular forms. This is a global national policy statement that the Business Section has already approved. These standards would go along with our current standards as complementary. The statement would not be cited in opinions.

There was a motion to adopt. The motion carried.

Real Property Finance and Lending Committee — David R. Brittain and Richard McIver, Co-Chairs:

Richard McIver reported on Fla. Stat. § 95.11(5)(h) (2018). This is the second reading of a proposal to amend the statute to clarify when the statute of limitations for certain deficiency claims begins. Currently the statute reads that the limitations period is one year from the issuance of the certificate. However, it is not clear which certificate is meant (disbursement, title, or sale), and the certificates are not usually issued at the same time. The proposal is to add "certificate of title" to clarify, and that nothing would affect the date for calculating the maximum deficiency amount.

Proposal to recommend the language to the section carried.

Information Items

At the Executive Council meeting there will be an informal straw poll concerning Lady Bird deeds.

CLE Planning for the 2018-2019 Bar Year — Steve Mezer, CLE Co-Chair:

Steve Mezer presented on the board certification courses. He commented that they are excellent courses even for those not taking the certification exam, including new practitioners. There are 11 courses on the calendar in the next 60 days. Currently summer and fall are open for new courses. There is a good balance of courses via the web. A number of committees that have not produced courses in the past are doing them, and doing them well. Materials for producing courses are on the website. The need for a quality control person for courses was emphasized. There has been discussion about providing CLE credit for service on committees and executive council.

Legislation — S. Katherine Frazier, Legislation Co-Chair: Katherine Frazier thanked everyone who provided feedback and review on the proposed legislation. The legislature is in session now, and things are very time sensitive. Teams need to be prepared to respond quickly when asked. Responses are not only time sensitive but will also likely become public record. Brief, bullet points are best, in form and substance suitable to share with appropriate legislative contacts.

Committee Reports

Attorney-Loan Officer Conference — Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs: Robert Stern reported that the

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second annual conference went well, despite interference from a hurricane. They were able to overcome the issues. The speakers were excellent.

Commercial Real Estate — Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin A. Schwartz, Co-Vice Chairs: Burt Bruton reported on a great joint committee meeting with Real Estate Structures and Taxation, featuring a presentation on transactions involving foreign persons.

Condominium and Planned Development — William P. Sklar, Chair; Alexander B. Dobrev, Vice Chair: William Sklar reported on a webinar series starting March 20th. He said that 31 people sat for the certification exam, and 44 individuals waived in. That was the last group for the waiver. The committee is monitoring many bills in right now. The committee spent a significant amount of time discussing HB 1075, and took an unprecedented 8 votes against certain substantive provisions in the proposed legislation. It is hoped that the next strike-all amendment to the bill will address most if not all the concerns raised. There are ongoing discussions between the lobbyists and the committee leadership to address those positions.

Condominium and Planned Development Law Certification Review Course — Richard D. DeBoest II and Sandra Krumbein, Co-Chairs: Richard DeBoest reported that the course had 50 attendees live and 15 online. He indicated that there were many improvements over the prior year and is looking to next year now.

Construction Law — Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs: No report.

Construction Law Certification Review Course – Melinda S. Gentile and Deborah B. Mastin, Co-Chairs; Elizabeth B. Ferguson and Gregg E. Hutt, Co-Vice Chairs: Sanjay Kurian reported there were 70 people at the certification review course.

Construction Law Institute — Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Brian R. Rendzio, Co-Vice Chairs: Sanjay Kurian reported the institute had 224 registered this year, with 38 exhibitors, and more than $90,000.00 in registrations.

Development & Land Use Planning — Julia L. Jennison, Chair; Colleen C. Sachs, Vice Chair: Colleen Sachs reported that the focus of the committee meeting was on producing continuing education programs on subjects where development and land use crosses over into other areas.

Insurance & Surety — Michael G. Meyer and Scott P. Pence, Co-Chairs; Frederick R. Dudley, Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs: Michael Meyer discussed a presentation on subrogation and insurance. The committee meets every third Monday of each month. They are exploring the possibility of a certification for insurance.

Liaisons with FLTA — Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan Fields and James C. Russick, Co-Vice Chairs: Melissa Murphy reported that the section is working with FLTA on legislation. Lobby days are coming up in April. She encouraged everyone to join FLTA.

Real Estate Certification Review Course — Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs: Lynwood Arnold reported that everything is set for the course.

Real Estate Leasing — Brenda B. Ezell, Chair; Richard D. Eckhard and Christopher A. Sajdera, Co-Vice Chairs: Brenda Ezell reported on pending legislation. She said that there will be a course on May 1st on restaurant leasing. Arlene Udick reported on proposed legislation concerning notices in leases, including disclosure of sinkholes, and mold remediation in the last 12-months. The next leasing committee meeting will include a seminar on emotional support animals.

Real Estate Structures and Taxation — Michael A. Bedke, Chair; Deborah Boyd and Lloyd Granet, Co-Vice Chairs: No report.

Real Property Finance & Lending — David R. Brittain and Richard S. McIver, Co-Chairs; Bridget Friedman, and Robert G. Stern, Co-Vice Chairs: David Brittain gave the report, commenting on an excellent presentation on swaps and derivatives by Mark Heimendinger with the Lowndes firm in Orlando. The meeting was productive as to ongoing projects.

Real Property Litigation — Marty J. Solomon, Chair; Amber E. Ashton, Manuel Farach and Michael V. Hargett, Co-Vice Chairs: Michael Hargett gave the report discussing Palm Beach Imports case dealing with ambiguities in easements and descriptions. The committee also discussed the Uniform Tenant in Common Act, and an initiative to repeal a Florida statute out of finance and lending.

Real Property Problems Study – Lee A. Weintraub, Chair; Mark A. Brown, Jason M. Ellison, Stacy O. Kalmanson, Susan K. Spurgeon Co-Vice Chairs: Lee Weintraub reported on an excellent presentation on demystifying the legislative process. He also discussed strengthening Fla. Stat. § 57.105 and hopes to have one on one meetings with some judges on the impact of the statute. The committee is also looking for a statewide solution to the issue of delays in obtaining case numbers in newly filed lawsuits impacting the ability to record a lis pendens.

Residential Real Estate and Industry Liaison — Salome J. Zikakis, Chair; Raul Ballaga, Louis E. "Trey" Goldman, James Marx and Nicole M. Villarroel, Co-Vice Chairs: No report.

Title Insurance and Title Insurance Liaison – Brian W. Hoffman, Chair; Cynthia A. Riddell, Vice Chair: Brian Hoffman reported on activity with third-party vendor fees.

Title Issues and Standards — Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Melissa Sloan Scaletta and Karla J. Staker, Co-Vice Chairs: Chris

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Roundtable

Highlights Of The Meeting
Of The RPPTL Section

PROBATE AND TRUST DIVISION

Friday, March 15, 2019

Omni Amelia Island Plantation Resort • Fernandina Beach, Florida

Prepared by Elizabeth A. Bowers, Esq., West Palm Beach, Florida

Thank you to Roundtable Sponsors: Stout, Guardian Trust and Cumberland Trust

William ("Bill") Hennessey, Director of the Probate and Trust Division, called the meeting to order at 3:00 p.m.

Action Items.

Probate Law and Procedure — M. Travis Hayes, Chair: Travis Hayes reported on a motion by the Section to, among other things, adopt as a Section legislative position supporting proposed legislation to require that the notice of administration sent to a surviving spouse must include a provision informing the surviving spouse that the elective share deadline may be extended if a request for an extension is made prior to the expiration of the elective share deadline.

Trust Law Committee — Angela Adams, Chair: Angela Adams indicated that the Section decided to withdraw the proposed legislation regarding the Florida Directed Trust Act.

Probate and Trust Litigation Committee — J. Richard Caskey, Chair: Richard Caskey reported on a motion by the Section to, among other things, adopt as a Section legislative position supporting proposed amendments clarifying the personal representative's exclusive authority to pursue causes of action on behalf of the estate, including but not limited to claims for the return of probate assets wrongfully transferred prior to the decedent's death, including changes to Fla. Stat. §§ 731.201(32), 733.607(1), 733.612(20), and 733.802(2).

Ad Hoc Committee on Electronic Wills — Sarah S. Butters, Chair: Sarah Butters reported on a motion by the Section to, among other things, amend the current position of RPPTL Section relating to electronic wills.

Information Items.

Ad Hoc Guardianship Law Revision Committee — Nicklaus Curley and Sancha Brennan Whynot, Vice Chairs: Nicklaus Curley and Sancha Whynot presented on the proposed Motion to adopt as a Section legislative position supporting for adoption of the new Florida Guardianship Code, which improves upon Florida's current Guardianship Code. Mr. Curley requested that any comments to the proposed legislation should be sent to guardianshipcode@gmail.com by May 1, 2019.

Charitable Planning and Exempt Organizations — Seth Kaplan, Chair: Bill Hennessey announced the creation of this new Committee with the Section.

Standing Committee Reports

Ad Hoc Guardianship Law Revision Committee — David Brennan, Chair; Nicklaus Curley, Stacy Rubel, and Sancha Brennan Whynot, Co-Vice Chairs: No report aside from the information item discussed above.

Ad Hoc Committee on Electronic Wills — Sarah S. Butters, Chair; Angela McClendon Adams, Thomas M. Karr, Co-Vice-Chairs: No report aside from the information item discussed above.

Ad Hoc Florida Business Corporation Action Task Force Committee — Brian C. Sparks and M. Travis Hayes, Co-Chairs: Travis Hayes reported that the proposed legislation will be ready for the 2020 legislative session.

Ad Hoc Study Committee on Professional Fiduciary Licensing — Angela McClendon Adams and Darby Jones, Co-Chairs: No report.

Ad Hoc Committee on Estate Planning Conflict of Interest — William T. Hennessey, Chair; Paul Edward Roman, Vice-Chair: Bill Hennessey reported that proposed legislation will require an attorney to make specific disclosures to a client before naming himself or herself as a fiduciary in the client's estate planning documents.

Ad Hoc Committee on Due Process, Jurisdiction & Service of Process — Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs: Barry Spivey reported that the Committee is getting started on a review of part III of the trust code.

Asset Protection Committee — Brian M. Malec, Chair; Richard R. Gans and Michael A. Sneeringer, Co-Vice-Chairs: Brian Malec reported that the Committee is co-sponsoring an upcoming joint CLE.

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Probate And Trust Division Roundtable, from page 34

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: A representative of the Committee reported that the next ATO Conference will be at the Breakers on August 22 – August 24, 2019.

Estate and Trust Tax Planning — Robert L. Lancaster, Chair; Tasha K. Pepper-Dickinson and Jenna G. Rubin, Co-Vice Chairs: Robert Lancaster reported that the Committee is analyzing the possibility of enacting a community property trust statute in Florida. The Committee is looking at similar statutes adopted by other states. The Committee is also looking to enacting grantor trust reimbursement clauses.

Guardianship, Power of Attorney, and Advance Directives – Nicklaus Curley, Chair; Brandon D. Bellew, Darby Jones, and Stacey Beth Rubel Co-Vice Chairs: This Committee did not present.

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 Committee heard a presentation regarding how the tax reform affected insurance planning. In addition, the Committee discussed proposed statutory changes to to make it clear that retirement plan assets transferred to a spouse are exempt under Florida law.

Liaisons with ACTEC — Elaine M. Bucher, Bruce M. Stone, and Diana S.C. Zeydel: This Committee did not present.

Liaisons with Elder Law Section — Charles F. Robinson and Marjorie Ellen Wolasky: Marjorie Wolasky advised that this Committee was hosting a seminar on March 22, 2019.

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: Jolyon D. Acosta reported that this Committee is continuing to evaluate the new uniform act, which was passed last summer. He indicated that they anticipate concluding their review of the new uniform act within the next 3-6 months.

Probate and Trust Litigation — John Richard Caskey, Chair; James R. George and R. Lee McElroy, IV, Co-Vice Chairs: Aside from the Action Item set forth above, this Committee did not present.

Probate Law and Procedure — M. Travis Hayes, Chair; Amy B. Beller, Theodore S. Kypreos and Cristina Papanikos, Co-Vice Chairs: Travis Hayes reported that the Committee is working on a variety of issues, including the following: (1) analyzing legislation that would allow a "surviving successor" to close out a bank account with less than $10,000 without opening a probate; and (2) analyzing proposed statutory changes to Fla. Stat. § 732.507.

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

Trust Law — Angela McClendon Adams, Chair; Tami Foley Conetta, Jack A. Falk, Mary E. Karr, and Matthew H. Triggs, Co-Vice Chairs: Angela Adams reported that this Committee is working on a variety of issues, including the following: (1) analyzing a potential statute that permits a trustee to hold a reasonable reserve prior to the termination of the trust; and (ii) analyzing 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 April 2019 in Orlando.

Adjournment. The next Probate and Trust Division Roundtable meeting will be held at the Opal Sands, Clearwater, Florida.

Real Property Division Roundtable, from page 33

Smart thanked Sanjiv Patel in recruiting law students to help with the title standards.

Joint Florida Association of Realtors/Florida Bar Committee - Fred Jones presented on the realtor/attorney joint committee of eleven realtors and eleven attorneys (appointed by the board of governors). The committee is in the process of revising the 2017 version of the contract. There was substantive discussion on the assignability provision in the contract. Currently, there are three options, but no default if an option is not selected. The suggestion was that if no option is selected the buyer may not assign the contract. During discussion, there was a suggestion to require the buyer to provide notice to the seller if the buyer assigns the contract.

What Partners Should Do Following The New Partnership Tax Audit Procedures

By Alyssa Razook Wan, Esq., Fowler White Burnett, P.A., Miami, Florida

The procedures by which the Internal Revenue Service ("IRS") will audit partnership returns have been thoroughly overhauled, and these changes have important substantive consequences to partners. In order for partners to protect their interests, it is critical to understand these new procedures, consider electing out if eligible, and revise governance documents to provide processes that would apply in the event of an audit.

Discussion

The new rules repeal the prior law and are codified under Sections 6221 through 6241 of the Internal Revenue Code (the "Code") and related Treasury Regulations ("Regulations"). They are effective for tax years beginning after December 31, 2017 and are applicable to partnerships and other entities taxed as partnerships, such as multi-member limited liability companies. A partnership that has a trust or other partnership as a partner is not permitted to elect out of the new procedures. A few key aspects of these changes are discussed below.

Partnership Representative Has Sole Authority.

What was previously known as the "tax matters partner" has become the "partnership representative" ("PR"). The PR may be an individual or an entity, but if it is an entity, a designated individual must be appointed to be the PR.

The PR has the *sole* authority to act on behalf of the partnership during an audit, and all partners and the partnership will be bound by the actions taken by the PR pursuant to Section 6223 of the Code. Further, Section 301.6223-2(d) of the Regulations confirms that partners have no statutory right to participate in the audit without the permission of the IRS. For this reason, it is recommended that the entity's governance documents set forth procedures to permit the partners to vote and approve decisions, such as whether to accept or reject a settlement agreement with the IRS. From the perspective of the PR, the entity should provide indemnification for the PR's actions in carrying out the approved decisions of the partnership and any other actions permitted to be taken by the PR with respect to the audit. Although these provisions are not binding on the IRS because the new Regulation expressly states that the failure of the PR to follow the partnership agreement will not affect the authority of the PR with the IRS, the entity's governing documents should address a means of recourse for the partners against the PR, including grounds for recovery of any damages caused by the PR. For example, in the event the PR does not make the "push-out" election (described below), which was contrary to the partnership agreement and resulted in additional tax liability for a current year partner, that partner may bring a state law claim against the PR seeking to recover damages for the additional liability attributable to him and paid to the IRS.

It is also advisable for the partnership agreement to require the PR to provide notice to the partners of all IRS correspondence received during the course of the audit. Under Section 6231 of the Code, the IRS is required to mail notice to the partnership and PR - but not to the partners - of any administrative proceeding, proposed partnership adjustment and final partnership adjustment resulting from such proceeding. However, Section 6221 of the Code does require a partnership that makes an election out of these procedures to notify the partners of that election.

The PR may be a nonresident alien or even a U.S. person outside of the United States from time to time. Nevertheless, the PR, and the designated individual if applicable, must have "substantial presence" in the United States, which is defined in Section 301.6223-1(b)(2) of the Regulations as (1) making oneself available to the IRS at a reasonable time determined by the IRS and (2) having a U.S. tax identification number ("TIN"), U.S. address[1] and telephone number. The PR must be designated annually on the partnership tax return and remains in effect for that tax year until such time the PR resigns, the designation is revoked or the IRS determines the designation is not in effect as provided in Section 301.6223-1(c) of the Regulations. If the IRS determines that a PR designation is not in effect for a particular tax year, the IRS may designate a PR pursuant to Section 301.6223-1(f) of the Regulations.

Current Partners Bear Liability…and the "Push-Out" Election

Under the new audit procedures, unless the "push-out" election (below) is made, any adjustment to a "partnership-related item," and the resulting tax, interest and penalty, is determined at the partnership level pursuant to Section 6221 of the Code. This means that the partners *at the time the final adjustment is made* bear the economic burden of such

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assessment in proportion to their respective interest in the partnership, even if those partners were not partners in the year to which the audit relates or previously owned a lesser or greater interest in the partnership. Therefore, it is increasingly important for those seeking to purchase an interest in a partnership to carefully consider this issue in addition to conducting a comprehensive due diligence of the partnership's financial and tax records.

Sections 301.6241-1(a)(6)(ii) and (iii) of the Regulations define the term "partnership-related item," which includes any partner's distributive share of any item reflected, or required to be reflected, on the partnership return or required to be maintained in the partnership's books and records. This may exclude items shown, or required to be shown, on a return of one of the partners even if they relate to a transaction or liability of the partnership. Examples of partnership-related items are set forth in Sections 301.6241-1(a)(v) and (vi) of the Regulations and include the character, timing, source and amount of the partnership's income, gain, loss, deductions and credits. An instance of a non-partnership-related item is the treatment of a loan and related interest by a person who makes a loan to a partnership.

The Code and Regulations permit the PR to make what is generally referred to as a "push-out" election pursuant to Section 6226 of the Code. If this election is made, each of the "reviewed year partners," that is, those partners who held an interest in the partnership for the tax year under audit review, will separately take into account its own share of the partnership adjustments. Additionally, if the election is properly made and not determined to be invalid by the IRS, the partnership will not be liable for the imputed underpayment and no assessment of tax, levy or proceeding for collection of such imputed underpayment may be made against the partnership.

A push-out election must be filed with the IRS within 45 days of the date the notice of final partnership adjustment is mailed by the IRS. The election must include all information required by the IRS in forms, instructions and other guidance as set forth in Section 301.6226-1(c)(3)(ii) of the Regulations. Additionally, the partnership must furnish to each reviewed year partner all information set forth in Sections 301.6226-2(e) and (f) of the Regulations, including the reviewed year partner's share of items as originally reported and its share of partnership adjustments. This information provided to the partner and any other required information must be submitted electronically to the IRS within 60 days after the date the partnership adjustments are finally determined.

Election Out. The new audit procedures apply to all partnerships unless a proper election out is made pursuant to Section 6221 of the Code and the related Regulations.

Certain smaller partnerships may elect out of the new procedures. In order to qualify for electing out (i) a partnership must have 100 or fewer partners during the year[2] and (ii) all partners must be "eligible" partners as set forth in Section 301.6221(b)-1(b)(3) of the Regulations. Eligible partners are individuals, C corporations, foreign entities *per se* or taxable as C corporations, S corporations, or estates of a deceased partner. The election is unavailable where there is a partner that is a trust, partnership, disregarded entity, foreign entity that is not taxed as a C corporation or a nominee.

The election is available annually by timely filing (including extensions) IRS Form 1065 and providing all information required by the IRS. The partnership must disclose identifying information[3] to the IRS about each person that was a partner at any time during the taxable year of the partnership to which the election applies. If a partner is an S corporation, the partnership must disclose the foregoing information about each shareholder. A partnership that makes the election must notify the partners of the election within 30 days of the election in the form and manner determined by the partnership.

If the election is made, the IRS will make assessments against all partners in separate partner-level proceedings under the deficiency procedures set forth in Sections 6211 through 6216 of the Code and related Regulations, with the statute of limitations and assessment of tax determined at the partner level. Partners should confirm they will have sufficient access to the partnership's books and records in the event they need to substantiate amounts allocated by the partnership in an IRS audit.

Other Items

The final Regulations are complex and detailed, and this article does not cover many items described in those Regulations. For example, Regulations pursuant to Section 6222 of the Code confirm and clarify a number of issues relating to a partner's general requirement to treat a partnership item in a manner that is consistent with the treatment on the partnership return (the so-called "consistency rule" or "consistency requirement"). This includes the manner in which a partner should notify the IRS that it is treating an item inconsistently with the partnership return for a tax year. If the notification of inconsistent treatment is not properly made, the IRS may adjust the inconsistent item and determine an underpayment of tax resulting from such adjustment. This consistency requirement applies to all partners, even if the partnership has elected out of the new procedures.

Practice Points

As a result of these changes, it is advisable for partners to review and revise existing governance documents. Below are some issues to consider:

- Designation and removal of the PR, and in the case of an entity as PR, the designated individual of such entity.

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- Mechanism for electing out of the new audit procedures, including how notice is to be given to the partners that the election has been made.
- Requirement that PR provide notice and regular reports of audit proceedings and obtain partner consent before accepting or rejecting a settlement, making the "push-out" election or requesting an adjustment to a partnership-related item.
- Indemnification of the PR in executing partner-approved decisions or otherwise acting in accordance with applicable IRS procedures.

Those considering purchasing an interest in a partnership should perform careful due diligence and seek indemnification for any unpaid tax liabilities, known or unknown, for prior years and seek to require that the partnership elect out of the new procedures if possible, and if not possible, that the PR make the push-out election for years that may come under audit before the purchase occurs.

Legal Disclaimer

The foregoing is for general educational and information purposes only, is not legal advice and does not present a detailed or complete presentation of the Federal tax audit procedures. Each case is unique and requires a careful analysis by one's advisor of the specific facts and circumstances in order to arrive to appropriate advice.

A. RAZOOK WAN

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Alyssa also represents clients in tax controversies before the Internal Revenue Service and U.S. Tax Court and assists clients with voluntary disclosures, FATCA and other compliance issues.

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Endnotes

1 Section §301.6223-1(b)(4)(Ex. 2) of the Regulations provides that the failure of the PR to have a U.S. address does not *per se* cause the designation to be ineffective. The designation remains in effect until it is revoked, the PR resigns or the IRS in its discretion removes the PR pursuant to the procedures in the Regulations.

2 This figure is determined by the number of statements the partnership is required to furnish, with special rules for S corporation partners.

3 Identifying information consists of a partner's name, correct U.S. TIN (or alternative identification permitted by the IRS in published guidance), Federal tax classification, an affirmative statement that the partner is an eligible partner, and any other information required by the IRS in forms, instructions or other guidance pursuant to Section 301.6221(b)-1(c) of the Regulations.

HINDSIGHT IS 2020:

Why Gen X'ers Need To Consider Charitable Tax Planning In 2019

By Seth R. Kaplan, Esq., Gunster, Yoakley & Stewart, P.A., Boca Raton, Florida

Although estate planning is often viewed as a task for those in the "Baby Boomer" generation (generally individuals over fifty-five years of age), there are many estate planning needs and opportunities that Gen X'ers should consider. Issues such as mortality and incapacity are not on the top ten list of concerns of Gen X'ers, other than naming guardians for minor children or purchasing life insurance in the event of an untimely death. Accordingly, Gen X'ers often need to be educated as to the benefits of building wealth outside of the taxable estate, the use of trusts to hold life insurance and other common estate planning techniques. Estate planning is not merely about planning for one's ultimate demise. There are a number of other issues to consider, including income tax planning, asset protection, and business structuring.[1]

When brought to their attention, high taxes, as well as concerns about living in a litigious society, tend to weigh heavily on the minds of Gen X'ers. Gen X'ers (those in their late 30s to early 50s) often have significant wage income relative to their overall net worth and are becoming the dominant group running and selling businesses.[2] *They are also beginning to see the benefits and moral obligation of charitable giving. It is the duty of the estate planning professional to guide these individuals in defining their charitable goals and structuring a charitable giving plan. Some individuals are motivated by helping the community around them while others are focused on educational institutions or illness-based charities personal to them and their families. The optimal planning option would be based on their charitable goals, cash flow needs and desires, and the type of tax exposure they are trying to mitigate, whether from the sale of a business, exercise of a stock option or receipt of a bonus.*[3]

Take for example two different scenarios.

SCENARIO 1. In the first scenario, Zoë, a 41-year-old executive at a startup tech company, having a base salary of $1,000,000 received a particularly high bonus at the end of the first quarter of 2019 of $3,000,000 based on the company's performance and her exceptional negotiating skills that played a key role in the company's success. Zoë is married to a cardiac surgeon and has two minor children. Over the past several years, she has been making annual gifts to the American Cancer Society and United Way. However, because she hasn't historically had any other significant itemized deductions, she has generally not received any tax benefit for the charitable gifts because of the phase-out of itemized deductions.[4] Her CPA has recommended that she make a particularly large gift to charity in 2019; however, she is reluctant to give away a such a large amount of cash or block of marketable securities at this time.

SCENARIO 2. Zac, a 39-year-old entrepreneur and demolition expert, started a new business several years ago that involves intellectual property used in the demolition of smaller structures that minimizes damage to adjacent structures. A public company has shown an interest in Zac's business and recently sent him a letter of intent involving the purchase of his company for part cash and part stock in the acquiring company, valued at $20,000,000. Upon receiving the letter of intent, Zac

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contacted his friend, a former nuclear submarine officer turned corporate lawyer, who brought in his estate planning partner to discuss the tax and estate planning options in connection with the sale of the business. Zac is divorced with one minor child. Zac expects to make a significant gift to charity at some point but sees it as something "down the road."

Zoë and Zac come into your office to discuss their options. To start out, it is essential that each define their goals, in terms of cash flow needs, tax savings and where they want to make an impact.

In Zoë's case, because of her history of annual charitable giving, she should consider creating grantor charitable lead annuity trust ("CLAT"). Grantor CLAT's are a tool to lower a taxpayer's adjusted gross income ("AGI") in a high-income year.

In the case of a grantor CLAT, she would transfer assets to a trust that pays a fixed amount, based on a percentage of the initial value of the trust assets, to one or more charities annually for a number of years. Payments could be made level or increasing. At the end of the term, the assets would pass on to junior family members or to a trust for their benefit. The income tax deduction for the actuarial value of the annuity would be taken by her in the current year, notwithstanding that most of the actual payments will come in successive years.[5] She will be happy to know that the 3% phaseout of itemized deductions was repealed under the new tax act so she would not lose a portion of the deduction. For example, if she was to create a $500,000 CLAT (zeroed out for gift tax purposes) prior to 2019, 3% of her AGI or $120,000 would be subtracted from the amount of the deduction so she would only receive a $380,000 charitable income tax deduction.

Zoë would also need to understand that in future years the income and gains of the CLAT, as a grantor trust, would continue to be taxable to her as if she still held the asset. Additionally, she would need to be advised of some of the investment restrictions of the CLAT, which are primarily related to excess business holdings and the prohibition against self dealing were there to be any transactions between her (or anyone or entity related to her) and the CLAT, such as loans or sales.[6] As her husband is in a relatively high risk profession it is possible that he and Zoë already have a family LLC or limited partnership. In this case, instead of giving cash or securities directly to the CLAT, she could give an interest in the LLC to the CLAT. Zoë and her husband could then continue to control the investments of the LLC. She could take advantage of the benefits of valuation discounts which would allow her to leverage the amount of the gift ultimately passing to the next generation after the CLAT term (as in the case of a GRAT).[7]

However, in Zac's case, he may want to consider creating a charitable remainder trust ("CRT"), as this would allow him to receive a current income tax deduction, defer capital gain related to the sale of his business and reinvest the full proceeds of the sale on a tax-free basis, similar to that of an IRA. It is most important that Zac act swiftly to avoid any assignment of income issues as he has already received a letter of intent ("LOI") from the proposed purchaser. Where the transfer of an asset to a charitable entity is close in time to the sale (or other disposition) of the property in a third party transaction, the IRS may take the position that the gain should be allocable to the transferor, notwithstanding that the transferor did not receive the proceeds from the disposition of the asset, as an "anticipatory assignment of income." This principle was enunciated in *Ferguson v. Commissioner*[8] and again in *Rauenhorst v. Commissioner*.[9]

Pursuant to this doctrine, the income tax is imposed on the person who is deemed to have earned the income, notwithstanding that such person did not receive the proceeds. The argument would be made that the disposition event was "essentially completed" prior to the assignment to the transferee (here, a charitable trust). In such event, all of the gain resulting from the disposition event would be allocable to Zac, notwithstanding the fact that the charitable trust actually received the proceeds and not him. Under *Rauenhorst*, the more recent case, the test is essentially a fact and circumstances test, whether or not the disposition event "ripened to a practical certainty."[10] Generally, a Letter of Intent is not binding. However, there may be cases where the terms of the proposed purchase are rather definitive and no obstacles are in the way of a sale. In such a case, the assignment of income doctrine could be a concern. In any event, there may be other factors beyond control of the parties, including government regulatory issues or zoning restrictions, for instance, that would suggest that the proposed sale is far from a practical certainty.

In some cases the client comes to the office a week before the sale is to close or even after the sale. Before sending him off, he should be advised that he can still do a grantor CLAT and has until December 31st to do so. Such would give him an accelerated income tax deduction to mitigate the tax liability from the sale. To the extent he wants to postpone any gifts to charity to the extent possible, he can still consider a "Shark-Fin" type CLAT that pays a relatively small amount during its term (perhaps in the neighborhood of the AFR or 7520 rate) with a single large payment at the end.[11]

In the case of a CRT, Zac would transfer assets to a trust that pays him fixed or varying amounts annually for life or for a term of years (not to exceed twenty years). At the end of the term, the assets would then pass to one or more charities. This strategy aligns with Zac's goals because it allows him to defer the gain on sale and receive a current income tax deduction for the actuarial value of the remainder interest passing to the charity at the end of the term, while also allowing him to delay the gift to the charities until later "down the road."

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Depending on Zac's personal preference, he may choose to receive the CRT annual payments in the form of fixed or varying amounts. In the case of a charitable remainder annuity trust ("CRAT"), Zac would be paid a fixed annuity each year based on the value of the assets initially contributed to the trust, and such amount would not vary year-to-year. Conversely, in the case of a charitable remainder unitrust ("CRUT"), Zac would be paid an annuity based on a percentage of the value of trust assets, revalued annually; so that he would benefit from positive asset performance but would also be adversely affected by poor asset performance. Zac may also wish to consider a specific type of CRUT—a Net Income Make-up CRUT ("NIMCRUT")—which would limit annual payments to the trust's fiduciary accounting income for that year should that amount be smaller than the pre-determined fixed annuity amount. NIMCRUT's are beneficial because they allow the principal to grow tax free. Regardless of the type of charitable remainder trust Zac determines best fits his goals, he would benefit from forming a CRT as it would allow him to delay recognition of any income or capital gain taxes associated with the sale of his business until the payments are actually made to him each year. Otherwise, if he pays the tax he is already starting out with a smaller base. Theoretically, in certain cases Zac can actually be better off financially creating a CRT even if he has no charitable intent at all depending upon the performance of the trust assets.[12]

These techniques by virtue of their nature, as they involve charitable giving and trusts, also afford a significant amount of creditor protection in addition to the other benefits. Charitable trusts can also be combined with limited partnerships and other estate planning vehicles to further enhance the level of creditor protection as well as facilitate asset management.[13]

This article is not intended to illustrate every scenario that would be available to Zoë or Zac. For instance, there may be reasons for Zac to form an LLC and have the LLC create the CRT or CLAT. In Zoë's case, she may want to consider creating a self-settled trust in Nevada, South Dakota, or Delaware as a remainder beneficiary, so she could access the funds if necessary at the end of the term.[14] Moreover, the phase out of itemized deductions had been previously phased down and then eliminated in 2010 and then came back in 2013. Therefore, the phase out of itemized deductions could return at any time, reducing some of the benefits of charitable planning.

The opportunities are almost limitless. It is our role as advisors, to at least point out a few, and suggest they act now.

The author would like to thank Mallory Williams, attorney at Gunster, for her assistance with the preparation of this article.

S. KAPLAN

***Seth R. Kaplan** is a leader in the field of charitable planning, having authored numerous articles and lectured extensively for over fifteen years, including the NYU Institute on Federal Taxation and for the ABA Tax Section. He is the current Chair of the Charitable Planning and Exempt Organizations Committee of RPPTL (a new committee recently formed), and submits this article on behalf of the Committee. Seth has been involved in coordinating major gifts to national universities and local community organizations. He is also the creator of the S.E.T.H. Hub and Spoke system for charitable planning based on the Delta Airlines model.*

Endnotes

1 *See* Seth R. Kaplan & Joshua N. Goldglantz, *Top Estate Planning Issues Generation X Needs To Consider*, Financial Advisor Magazine (April 21, 2015), https://www.fa-mag.com/news/top-estate-planning-issues-generation-x-needs-to-consider-21441.html; James Salter, *Why Millennials and Generation Xers Need to Worry About Estate Planning*, The Street (November 29, 2015), https://www.thestreet.com/story/13376513/1/why-millennials-and-generation-xers-need-to-worry-about-estate-planning.html.

2 *See* Angela Woo, *The Forgotten Generation: Let's Talk About Generation X*, Forbes (Nov. 14, 2018), https://www.forbes.com/sites/forbesagencycouncil/2018/11/14/the-forgotten-generation-lets-talk-about-generation-x/#7734042576d5.

3 John Anzivino & Seth R. Kaplan, *My View: Charitable Giving in Perspective*, Miami Herald (Dec. 27, 2015), https://www.miamiherald.com/news/business/biz-monday/article51448115.html.

4 Prior to the Tax Cuts and Jobs Act, itemized deductions were reduced by 3% of the taxpayer's overall adjusted gross income (sometimes referred to as the "Pease" limitation), i.e., a taxpayer earning $1,000,000 received no benefit from $30,000 worth of charitable gifts (assuming he or she had no significant other itemized deductions, such as state income taxes, for instance).

5 Internal Revenue Code §170(f)(2)(B); Since the Section 7520 rate (which is used as the discount rate) is generally a below market rate, the deduction calculation will favor the donor and can be further leveraged by backloading payments and/or extending the term of the CLAT. *See* Jerome M. Hesch, Seth R. Kaplan and Brian Sweet, *A Financial Analysis of the Income Tax and Transfer Tax Treatment of Charitable Lead Trusts and Charitable Remainder Trusts*," NYU Institute on Federal Taxation, October 28, 2016.

6 *See generally* Internal Revenue Code §§ 4940 – 4948.

7 John W. Porter, *Family Limited Partnerships and Other Closely-Held Entities: The Continuing Saga*, NYU Institute on Federal Taxation, October 28, 2016. Although valuation discounts for family entities are still viable, there is no guarantee they will be available forever.

8 *Ferguson v. Comm'r*, 108 T.C. 244 (1997), *aff'd*, 174 F.3d 997 (9th Cir. 1999).

9 *Rauenhorst v. Comm'r*, 119 T.C. 157 (2002).

10 *Id*. at 167.

11 Paul S. Lee, Turney P. Berry & Martin Hall, *Reeling, Rolling and Reining in "Shark-Fin" CLATs*, 51 Tax Mgm't. Memo No. 25 (Dec. 6, 2010).

12 *See* Jerome M. Hesch, Seth R. Kaplan and Brian Sweet, *A Financial Analysis of the Income Tax and Transfer Tax Treatment of Charitable Lead Trusts and Charitable Remainder Trusts*," NYU Institute on Federal Taxation, October 28, 2016. Nonetheless, creating a CRT for someone with no charitable intent is not recommended.

13 Seth R. Kaplan, *Charitable Giving and the S.E.T.H. Hub and Spoke Approach*, The Florida Bar 37th Annual Attorney Trust Officer Liaison Conference, August 24, 2018.

14 *See* Steven J. Oshins, *The Hybrid Domestic Asset Protection Trust*, Society of Financial Service Professionals Estate Planning Newsletter (Feb. 2013), available at https://rappslaw.com/wp-content/uploads/2015/03/Hybrid_DAPT_-_Society_of_Financial_Service_Professionals.pdf.

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Affidavits of Diligent Search and Inquiry

Prepared by J. Christopher Barr, Esq.
Bryant, Higby, & Barr, Panama City, Florida

A fundamental purpose of service of process is to provide proper notice to a defendant to make certain that he or she is advised of the pending suit and given an opportunity to defend the same.[1] In most actions, service of process is perfected via personal or substitute service on an individual pursuant to Chapter 48, Florida Statutes. However, in some cases the plaintiff is unable to personally serve the defendant for a multitude of reasons. In those cases, if the claims involve real property, the plaintiff may be able to perfect service of process through publication.

Pursuant to Fla. Stat. § 49.011 (2018), many causes of action involving real property allow service of process by publication, also known as constructive service of process, including, without limitation, the enforcement of liens, actions to quiet title, and partition of real property.[2] In order to perfect service through publication, Fla. Stat. § 49.031(1) (2018), requires that the plaintiff (or the plaintiff's agent or attorney) provide a sworn statement establishing the basis for substitute service.[3] Commonly in practice, the sworn statement is referred to as an "Affidavit of Diligent Search and Inquiry."

Essentially, as a condition precedent to service by publication, Florida law requires that the plaintiff provide a sworn statement that the plaintiff has performed a diligent search and inquiry to discover the proper location to serve the defendant personally with process. The specific requirements of the Affidavit of Diligent Search and Inquiry differ depending on the nature of the defendant to be served and are generally set out in various sections of Chapter 49, Florida Statutes.[4] Strict compliance with all aspects of the constructive service statute is required.[5] A plaintiff's failure to comply with the statute's requirements may render a judgment (and the resulting title) void or, at a minimum, voidable.

It has been held in Florida that "[f]ailure to strictly comply [with the constructive service statute] renders a subsequent judgment voidable."[6] However, "[i]f service of process is so defective that it amounts to no notice of the proceedings, the judgment is void."[7] If an underlying judgment is rendered void or voidable, the marketability of the title to the subject real estate may be substantially compromised without further litigation.

Chapter 49, Florida Statutes, expressly requires only that the Affidavit of Diligent Search and Inquiry contain conclusory allegations regarding the search and inquiry performed. However, plaintiff's counsel should consider including substantially greater detail in the required sworn statement concerning the search and inquiry actually performed. If the adequacy of constructive service is disputed by the defendant at an evidentiary hearing, the trial court must determine: (1) if the Affidavit of Diligent Search and Inquiry is legally sufficient [or compliant with the applicable statute]; and (2) whether the plaintiff conducted an adequate search to locate the party being served.[8] The test employed by the trial court to determine the sufficiency of a "diligent search and inquiry" is basically one of reasonableness under the circumstances. The Florida Supreme Court has determined that "the reasonable diligence a plaintiff must exhibit before effecting substituted service consists of employing knowledge that is at the plaintiff's command, making diligent inquiry, and exerting an honest and conscientious effort that is appropriate to the circumstances to acquire the information necessary to effect service on the defendant."[9]

In most cases the practitioner should include both the required statutory statement(s) together with supporting statements and allegations demonstrating the reasonable efforts employed to locate the defendant to avoid and defeat a potential challenge to the sufficiency of the Affidavit of Diligent Search and Inquiry. A practitioner who opts to employ a "bare bones" Affidavit of Diligent Search and Inquiry containing only the conclusory allegations required by Chapter 49, Florida Statutes, does so with risk. The inclusion of the supporting details in the Affidavit of Diligent Search and Inquiry serves to demonstrate to the trial court that the required reasonable search and inquiry was in fact conducted and possibilities for personal service were not overlooked. At a minimum, if the details concerning the search performed are not included as

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facts under the Affidavit of Diligent Search and Inquiry, the practitioner should keep detailed records of the steps taken in the file.

Further, nearly all title insurance companies require their agents to look beyond conclusory allegations in an Affidavit of Diligent Search and Inquiry to confirm that a legally sufficient diligent search and inquiry was actually performed. The Florida Supreme Court has approved a form Affidavit of Diligent Search and Inquiry.[10] As such, when possible, the practitioner should utilize the Florida Supreme Court approved form (Form 1.924) both when performing the subject search and preparing the Affidavit of Diligent Search and Inquiry.

In addition, based on the recent opinion issued by the Fourth District Court of Appeal in *Benavente v. Ocean Vill. Prop. Owners Ass'n*,[11] the plaintiff may also have an obligation in some circumstances to attempt to reach the defendant via email to confirm his or her physical address prior to engaging in substitute service. As a result, when conducting the required search and inquiry and preparing and filing the Affidavit of Diligent Search and Inquiry, the prudent practitioner should utilize Form 1.924, and exhaust all reasonable efforts to contact and confirm an address appropriate for personal service on the defendant.

Endnotes

1 *Benavente v. Ocean Vill. Prop. Owners Ass'n*, 260 So. 3d 313, 315 (Fla. 4th DCA 2018.

2 Fla. Stat. § 49.011 (2018).

3 Fla. Stat. § 49.031(1) (2018).

4 *See* Fla. Stat. § 49.031(1) (2018) (individuals); Fla. Stat. §49.051 (2018) (corporations); Fla. Stat. § 49.061(2018) (persons doing business under a corporate name); and Fla. Stat. § 49.071 (2018) (unknown parties).

5 *Napoleon B. Broward Drainage Dist. v. Certain Lands Upon Which Taxes Due*, 160 Fla. 120 (1948).

6 *Martins v. Oaks Master Property Owners Ass'n, Inc.,* 159 So.3d 142, 146 (Fla. 5th DCA 2014).

7 *Floyd v. Fannie Mae*, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998).

8 *Peysina v Deutsche Bank Nat'l. Trust Co.*, 118 So. 3d 237 (Fla. 3d DCA 2013).

9 *Grammer v. Grammer*, 80 So. 2d 457 (Fla. 1955).

10 Form 1.924, Forms For Use With the Rules of Civil Procedure.

11 *Benavente*, 260 So. 3rd 317.

EFFECTIVE JUNE 2019

The FR/BAR Contract documents now include a new FR/BAR Rider as a part of the Comprehensive Riders: CC. Miami-Dade County Special Taxing District Disclosure.

Rider "CC." should be used with FR/BAR Contracts for the sale of certain residential properties in Miami-Dade County, Florida, as a result of Miami-Dade County amending Sec. 18-20.2 of its Code requiring sellers to disclose to buyers the existence of special taxing district(s), if applicable, by Ordinance adopted by the Board of County Commissioners on 3/5/2019.

The new FR/BAR Rider "CC. Miami-Dade County Special Taxing District Disclosure," prepared by the Florida Realtor-Attorney Joint Committee and the FR/BAR Contract subcommittee, has been approved by Florida Realtors© and the RPPTL Section of The Florida Bar, on behalf of TFB, and is being released as of June 14, 2019. The new Rider and all Comprehensive Riders will now be version "CR-5x" and "Rev. 6/19." The new Rider has been added as a check box in Paragraph 19. "ADDENDA": on the standard and the AS/IS FR/BAR Contracts, both of which have been updated to version "5x" and "Rev. 6/19." Previous versions of the FR/BAR Contracts and Comprehensive Riders will be replaced by these new "5x" forms.

Planning Considerations For Making Charitable Gifts Of S Corporation Stock

By Denise B. Cazobon, Esq., Dunwody White & Landon, P.A., Naples, Florida

For clients that are charitably inclined, a common gifting strategy is to donate appreciated assets instead of cash. Generally, the fair market value of the appreciated asset at the time of the charitable contribution is used to value the donor's charitable deduction for income tax purposes. In addition, the charity – not the donor – realizes any capital gain upon a subsequent sale of the asset, which is generally tax-exempt income to the charity. However, S corporation stock is treated differently from other types of assets, requiring additional planning to address the various issues that can arise in situations where a donor wishes to make a charitable gift of S corporation stock.

Unlike donations of other types of appreciated assets, charities must recognize any gain or loss, and pay any capital gains tax, resulting from the disposition of any S corporation stock as unrelated business taxable income.[1] In addition, the items of income, deductions and losses that flow through the S corporation to its shareholders are also taken into account in computing the charity's unrelated business taxable income, meaning that the charity can have income tax liability resulting from each day that the charity holds the S corporation stock.[2]

From the donor's perspective, the S corporation stock will have to be appraised to determine the fair market value at the time of the contribution. The appraised value would take into account any discounts for lack of marketability and lack of control that may apply. Further, the value of the donor's contribution for income tax purposes can be less than the appraised value of the stock. This is because the value of the contribution is reduced by the donor's share of any ordinary income that the donor would have recognized upon a liquidation of the S corporation, such as ordinary income resulting from any inventory or depreciated assets held by the corporation.[3] Thus, if the donor wishes to make a donation solely to obtain a charitable deduction for income tax purposes, the donor may want to consider funding such donation with assets other than S corporation stock.

In cases where a client is considering a charitable gift of S corporation stock, the following additional planning considerations should be taken into account:

- What is the donor's basis in the S corporation stock? If the donor has a low or no basis in the stock so that the donor would have a significant capital gains tax liability upon a sale of such stock, then from an income tax planning perspective, it may be more favorable to the donor to contribute the stock to a public charity, regardless of the income tax consequences to the charity.
- What are the underlying assets of the S corporation? As mentioned above, the appraised value of the donor's shares will be reduced by the donor's share of any ordinary income items, such as inventory and depreciated assets, reducing the amount of the donor's charitable deduction for income tax purposes.
- Is the charity organized as a corporation or a trust under state law? How the charity is organized under state law determines the rate at which the charity pays tax on ordinary income and capital gains. A charity organized as a trust under state law may pay a higher rate of tax on items of ordinary income but a more favorable rate on capital gains. The reverse is true for a charity organized as a corporation under state law.
- How long is the charity expected to hold on to the S corporation stock and how much income is expected to be earned by the corporation during such time? If the charity is expected to hold on to the stock for a number of years, then consideration should be given to the rate at which the charity pays tax on ordinary income.
- Does the S corporation have a history of making distributions to the shareholders, and if so, will there will be sufficient distributions from the corporation to provide liquidity for the charity to pay its resulting tax obligations?

Despite the consequences to the charity and the donor, the donor may nonetheless wish to make a charitable contribution of S corporation stock. For example, if the donor anticipates a sale of the business and wishes to minimize the donor's capital

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gains tax, or the donor wishes to make a substantial charitable gift for income tax purposes and does not have sufficient other assets from which to fund the gift.

An instance that might lead to unintended results is where the donor wishes to donate S corporation stock to a public charity in satisfaction of a pledge. Assuming the charity is willing to accept the stock, the negotiations between the donor and the charity should include a discussion of any adjustments to the value of the donor's contribution to account for the income tax liability to the charity resulting from the S corporation stock. If the donor's contribution will be reduced dollar for dollar by any resulting income tax liability, the donor would have to make up the difference with an additional contribution. If the charity will be paying income tax at a higher rate than the donor, the donor may be better off selling the stock and making a cash contribution after the sale or finding another way to structure the gift.

One way to avoid the consequences to the donor and the charity is to terminate the S corporation status prior to making the charitable gift, which, depending on the facts and circumstances, may not be the recommended course of action. Another alternative for the donor to consider is establishing a donor advised fund with an institution willing to administer S corporation stock. A donor advised fund does not eliminate the unrelated business income tax issues to the charity or the limitations on valuing the donor's shares to determine the charitable deduction for income tax purposes that are identified above. However, the donor would receive a charitable deduction for income tax purposes in the year the S corporation stock is contributed to the donor advised fund, and the income tax liability to the fund resulting from holding the S corporation stock can be paid from distributions from the corporation to its shareholders and/or the proceeds from a sale of the stock. The donor can then make recommendations for donations to charities that may not have been willing or able to accept the S corporation stock, allowing the donor to fulfill their donative intent while still achieving the donor's income tax planning objectives.

Endnotes

1 I.R.C. § 512(e)(1)(B)(ii) (2019).
2 I.R.C. § 512(e)(1)(B)(i) (2019).
3 I.R.C. §§ 170(e)(1) and 751 (2019).

Q+A

INTERVIEW WITH YOSHI SMITH:

By Jeffrey A. Baskies, Katz Baskies & Wolf PLLC, Boca Raton, Florida
and Yoshimi O. Smith, Beller Smith, P.L., Boca Raton, Florida

Yoshi Smith's webcast on "Modifying, Changing or Terminating Irrevocable Trusts" was part of the new Probate Practice Series created by the RPPTL. It aired on February 19, 2019, and is available for download at www.rpptl.org.

Q: ***Yoshi, congratulations on a great webcast! Can you give a brief summary of what you discussed?***

A: I first covered both judicial and non-judicial ways under the Florida Trust Code to fix, change, or terminate existing irrevocable trusts. I then covered transactional techniques like loans between trusts, distributions from trust, and purchase of trust assets as other alternatives. Finally, I addressed the tax issues to look out for with all of this.

Q: ***How did you get involved with the program in the first place?***

A: As an active member in RPPTL and having done other presentations in the past, John Moran asked me to do a speech on a topic that was practical, but at an intermediate level. I gave a similar speech for the NYU Tax Institute a couple years ago and enjoyed the topic on a national level, so I thought it would be fun to make it state specific.

Q: ***How much time did it take you to prepare?***

A: Since all I had to do was modify a portion of the presentation to cover the Florida Statutes, create a chart comparing the statutory sections, and do a PowerPoint, it didn't take more than another 8 hours to prepare.

Q: ***How exactly do you present a webcast for the Probate Practice Series?***

A: After you prepare the outline for CLE credit, you then broadcast the seminar live on the agreed-upon date by calling in from the comfort of your office. The presentation is simultaneously broadcasted and recorded and is then made available for future downloads.

Q: ***So, your total time commitment was approximately 9 hours in this case?***

A: Yes, and Mary Ann Obos made it very easy for me. The great part was preparing and presenting the entire CLE without having to leave the office. It is a huge time-saver and very easy to do.

Q: ***You make it sound like everyone should do a webcast. How would one get involved?***

A: I recommend Section members contact John Moran if they have a topic they would like to address.

Q: ***Who should download the webcast, and who would benefit from it most?***

A: As the title suggests, the Practice Series is designed to be user-friendly and practical. The seminars and webcasts are all on mid-level subjects of practical use and importance to a broad audience. Any attorney who is involved with irrevocable trusts in Florida will find something valuable in the webcast, for sure.

Q: ***Would you do it again if asked?***

A: Absolutely! And thanks for publicizing the webcasts.

Probate And Trust Case Summaries

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The failure to contain a legal description of real estate in a disclaimer of interest in estate does not invalidate the disclaimer. Even if the Statute of Frauds applies, a disclaimer meets the statute's requirements if in writing and signed by declarant.

Lee v. Lee, 44 Fla. L. Weekly D283a (Fla. 3d DCA Jan. 23, 2019)

The Third District Court of Appeal ("Third District") reverses a trial court order declaring a disclaimer of interest in an estate as deficient, finding the probate court's decision to be improper. The decedent died intestate, and subsequently Nicole Lee, appellee, disclaimed her interest in the estate assets, which she later claimed was deficient.

Decedent, Andre Lee, died intestate in Miami, Florida survived by his three children, Camille Lee, Bruce Lee, and Nicole Lee. The estate contained real property located in Miami and the proceeds of a wrongful death action. On July 14, 2014, the Miami Probate Court appointed appellant, Camille Lee, as personal representative of the estate. On July 8, 2014, Nicole Lee, appellee, executed a "Disclaimer of Interest in Property of Estate," which was signed in front of two witnesses and notarized. Within the disclaimer, appellee irrevocably disclaimed all rights, title, interest, current or prospective in "All Estate assets." On December 11, 2014, appellant filed a petition for discharge. On April 9, 2015, appellant filed the disclaimer with the court and the court issued an order granting the distribution of assets. On May 24, 2016, appellee filed an objection, in which she argued that the disclaimer was deficient. The probate court found that the disclaimer was insufficient under Fla. Stat. § 739.104(3) (2014) and it violated the statute of frauds since the disclaimer did not specifically identify the real property being disclaimed.

The Third District determined that the probate court erred in its invalidity determination. Under Fla. Stat. § 739.104(3) (2014), "[t]o be effective, a disclaimer must be in writing, declare the writing as a disclaimer, describe the interest or power disclaimed, and be signed by the person making the disclaimer and witnessed and acknowledged in the manner provided for deeds of real estate to be recorded in this state. In addition, for a disclaimer to be effective, an original of the disclaimer must be delivered or filed in the manner provided in Fla. Stat. § 739.301 (2014)."[1] Additionally, Fla. Stat. § 739.601(1)-(2) (2014) states that "(1) A disclaimer of an interest in or relating to real estate does not provide constructive notice to all persons unless the disclaimer contains a legal description of the real estate to which the disclaimer relates and unless the disclaimer is filed for recording in the office of the clerk of the court in the county or counties where the real estate is located. (2) An effective disclaimer meeting the requirements of subsection (1) constitutes constructive notice to all persons from the time of filing. Failure to record the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer."[2] The Third District stated that even if a disclaimer is not recorded, it still is valid between the disclaimant and the person to which property passes due to the disclaimer regardless of whether the disclaimer includes the real property description. Therefore, the appellee's disclaimer met the statutory requirements. While it is not recordable under Florida Statutes, the language used does not affect its validity. Even if the statute of frauds were to apply, the disclaimer is in writing and signed by appellee. The Third District reversed the order and remanded for proceedings consistent with the opinion.

A will fails statutory requirements under Fla. Stat. § 732.502 (2013) and may not be admitted to probate where the decedent only signed his first name and not his full customary signature. A later self-proving affidavit is insufficient to validate the will where the decedent served as a witness to himself and did not include any other witness signatures.

Bitetzakis v. Bitetzakis, 44 Fla. L. Weekly D343f (Fla. 2d DCA February 1, 2019)

The Second District Court of Appeals (the "Second District") reverses a circuit court order admitting a will because it was not in compliance with the signature requirements under Fla. Stat. § 732.502 (2013). The decedent signed only his first name on his will due to a mistaken belief that a notary was required. He then had a self-proving affidavit notarized, in which he was the sole listed witness to himself signing the affidavit.

Decedent, George Bitetzakis, passed away in January 2017 and his grandson, who was appointed personal representative of the estate, petitioned the court to admit a will dated September 2013 to probate. Decedent's daughter, Alison Bitetzakis, responded that the will had not been executed properly under the statute. The probate court held an evidentiary hearing where it was determined that

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two witnesses first signed the will and while decedent was signing but then his wife stopped him. She directed him to stop because she believed that he was required to sign the will in front of a notary. A notary was, in fact, not required to notarize the will. The decedent only signed his first name on the will and not his full customary signature. The next day, the decedent went to a notary, without the will but instead with a self-proving affidavit which was signed in front of the notary and listed the decedent as his own witness.

The trial court found that the document followed Florida Statutes. Even though the decedent stopped signing his name due to a mistaken belief that a notary was required, he nevertheless showed his intent to sign the document and for the document to constitute his last will and testament. The fact that he also went to a notary the next day with a self-proving affidavit also showed his intent.

The Second District, however, reversed the lower court's opinion and ruled that the lower court erred in their decision because the decedent did not sign his name at the end of the will using his full customary signature. Under Fla. Stat. § 732.501(1) (2013), to properly execute a will, the testator "must sign the will at the end" or the testator's name "must be subscribed at the end of the will by some other person in the testator's presence and by the testator's direction."[3] Strict compliance is required. Under *Allen v. Dalk*, a will cannot be admitted to probate if the testator failed to sign his or her name to the will.[4] Here, the decedent signed something that was "less than his full customary signature." Under Black's Law Dictionary, a signature is defined as "a person's name or mark written by that person . . . esp., one's handwritten name as one ordinarily writes it."[5] There is no evidence that the decedent intended the signing of his first name to constitute his signature and assent to the document. Evidence shows that he intentionally stopped signing his name. The self-proving affidavit signed the next day shows that the decedent did not believe his prior signature constituted assent to the will. Therefore, the Second District reversed the probate court order and remanded for further proceedings.

Florida Statutes require a surviving spouse to make an election to take an interest in a decedent's homestead property within six months of decedent's death. The court may not grant an extension of time to make the election claiming excusable neglect.

Samad v. Pla, 44 Fla. L. Weekly D726a (Fla. 2d DCA March 15, 2019)

The Second District reversed a circuit court order granting an extension of time to file an election to take an undivided one-half interest in the decedent's homestead property as a tenant in common because the trial court erred as a matter of law in granting the extension and deeming the extension timely.

The decedent's surviving spouse, Pla, failed to make an election to take an undivided one-half interest as a tenant in common of homestead property or file a petition for approval to make the election within the six months of the decedent's death. Upon realizing this failure, which occurred approximately seven-and-a-half months after her husband's death, Pla moved for an extension of time to make the election under Florida Probate Rule 5.042(b)(2), claiming excusable neglect. The Probate Court agreed with Pla that excusable neglect warranted an extension of time and that the requirements of excusable neglect had been shown in this case.

Under Fla. Stat. § 732.401(2) (2017), a surviving spouse takes a life estate in decedent's homestead property unless he or she elects to take an undivided one-half interest as a tenant in common.[6] The surviving spouse is required to make the election within six months of the decedent's death and the time "may not be extended except . . . [upon a] petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election." The petition must be timely within the six-month time limit. Florida Probate Rule 5.042(b)(2) provides that "[w]hen an act is required or allowed to be done at or within a specified time *by these rules, by order of court, or by notice given thereunder*," the court may grant an extension of time if the request is made before the expiration of the specified time or after the expiration if "the failure to act was the result of excusable neglect."[7] (Emphasis added.) Because the election was *statutory* and not under the Probate Rules, Florida Probate Rule 5.042(b)(2) does not apply to acts which are required to be done within a specified time period *by statute*. The Second District held that because Pla failed to comply with requirements of Fla. Stat. § 732.401(2) (2017), the trial court erred in granting the time extension. The probate court order was reversed.

A trust directive requiring the trustee to distribute estate assets to the remainder beneficiary is triggered when a charitable foundation is not in existence at the time of decedent's death. The relation back doctrine is not applicable if it would frustrate the expressed intentions of decedent in the trust.

Sibley v. Estate of Sibley, 2019 Fla. App. LEXIS 5031 (Fla. 3d DCA 2019)

The Third District affirmed the circuit court holding that a charitable foundation, which had been designated as a decedent's trust beneficiary, was not in existence at the time of decedent's death.

Charles Sibley, the brother of the decedent and trustee of the Curtiss F. Sibley Revocable Living Trust, was required by the court to distribute all trust assets to the residual beneficiary.

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Prior to his death in 2011, the decedent executed a will and revocable living trust which stated that all remaining trust assets were to be distributed to the CURTISS F. SIBLEY CHARITABLE FOUNDATION (the "Foundation"), and if the Foundation was no longer in existence, the remaining assets should go to FELLOWSHIP HOUSE FOUNDATION ("Fellowship House").

In 2017, Fellowship House filed a Petition to Reopen for Subsequent Administration claiming that the Foundation was not in existence at the time of decedent's death, so therefore the estate assets should have been distributed to Fellowship House. Following an evidentiary hearing which occurred in September 2018, it was established that The Foundation had been dissolved in September 2011, three months prior to decedent's death, and had not been reinstated until July 9, 2012, seven months after decedent's death. At the hearing, Charles Sibley testified that he had never funded the foundation, opened a bank account for the foundation, or filed any paperwork with the IRS. The trial court concluded that the Foundation had not been in existence and the time of decedent's death and ordered Charles Sibley to forward all assets and monies in the estate to Fellowship House.

On appeal, Charles Sibley claimed that the trial court had erred by not relating back the reinstatement of the foundation to the date of dissolution, citing to Fla. Stat. § 607.1422(3) (2011) which stated that when a reinstatement of a corporation was effective, it "relates back," having the effective date of the dissolution. The Third District, however, found that the Foundation was "no longer in existence" at the time of decedent's death, and its only authorized function at that time was "to wind up and liquidate its business and affairs." The Third District rejected Sibley's argument and stated that the statute was not relevant to the issue here, and that if they were to apply the relation-back provision, the administration of the estate might never finalize because a dissolved beneficiary could at any point in the future reinstate themselves, which would also frustrate the settlor's intent.

The Third District framed the question in this case not as to whether the dissolved foundation could continue carrying on business if reinstated, but whether the Foundation was in existence at the time of decedent's death. Therefore, the Third District ruled that the Foundation had not been in existence on that date and that Charles Sibley, as trustee, must distribute all assets to Fellowship House.

Local policy that presumes the need for a restricted depository in all probate cases is improper. Whether there is a cause for a restricted depository should be decided on a case by case basis.

Goodstein v. Goodstein, 263 So. 3d 78 (Fla. 4th DCA 2019)

The Fourth District Court of Appeal ("Fourth District") affirmed the designation of a restricted depository in this case but stated that the trial court should not have a "blanket policy" requiring restricted depositories in all probate cases. The probate court required a restricted depository for the decedent's estate assets and that restricted depositories were required in all probate cases in the court's jurisdiction due to local policy.

The decedent was survived by one adult son and two minor children, all of whom were the beneficiaries. The beneficiaries petitioned for the use of a restricted depository for estate assets due to a recently enacted local policy requiring restricted depositories in all probate cases. However, the decedent's father, who was the personal representative, avoided the requirement because it had been opened prior to the effective date of the policy. The probate court agreed that all probate cases were required to designate a restricted depository and that the policy "reduced expenses and increased productivity by encouraging attorneys to resolve cases more quickly." The probate court granted the petition and ordered a restricted depository be designated.

According to Fla. Stat. § 69.031(1) (2018), "[w]hen it is expedient in the judgment of any court having jurisdiction of any estate in process of administration by any guardian, curator, executor, administrator, trustee, receiver, or other officer, *because the size of the bond required of the officer is burdensome or for other cause, the court may order part or all of the personal assets of the estate placed with a bank, trust company, or savings and loan association* . . . designated by the court . . . ."[8] (Emphasis added.) The Fourth District stated that the emphasized language makes it clear that a policy requiring a depository in all probate cases would be inconsistent with state law. The restricted depository may only be used when the size of the bond required of the administrator is burdensome, or "for other cause." Therefore, trial courts should look at each case individually to see if it fits under either stated reason for the designation of a depository. The Fourth District affirmed but warned against the use of such local policy regarding designation of restricted depository.

Endnotes

1 Fla. Stat. § 739.104(3) (2014).
2 Fla. Stat. § 739.601(1)-(2) (2014).
3 Fla. Stat. § 732.501(1)(a) (2013).
4 *Allen v. Dalk*, 826 So. 2d 245, 247 (Fla. 2002).
5 *See Signature, Black's Law Dictionary* (10th ed. 2014).
6 Fla. Stat. § 732.401(2) (2017).
7 Fla. Prob. R. 5.042(b)(2).
8 Fla. Stat. § 69.031(1) (2018).

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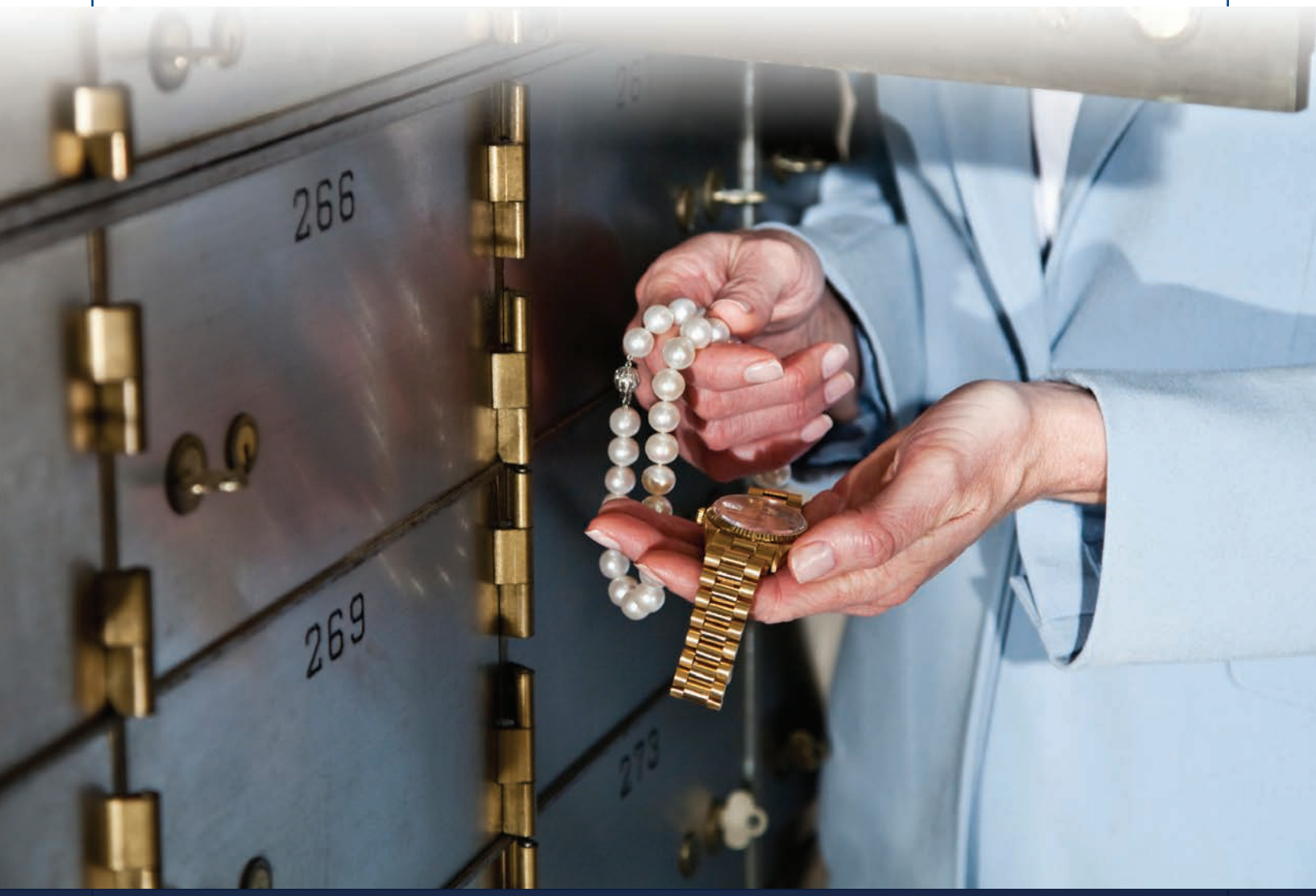

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State Tax Case Summaries

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

Taxpayer's property had not escaped taxation when it was erroneously undervalued. Therefore, the assessment for back taxes was invalid.

DeFrances v. Furst, No. 2D17-3973, (Fla. 2nd DCA 2019)

Taxpayer challenged the trial court's determination that back taxes were properly assessed on property even when tax was paid on the property for the year at issue. Due to a clerical error resulting in a miscalculation of tax due, the Sarasota County Property Appraiser issued a Notice of Proposed Increase in Assessed Value and Taxes, retroactively increasing Taxpayer's 2014 assessment. The trial court ruled against the Taxpayer's three-count declaratory judgment challenging the back taxes, revised assessed value, and assessed value. On appeal, the Second District Court of Appeal found that the property was not "missed, overlooked, or forgotten." Prior case law[1] held that only property which has "escaped taxation" may be retroactively taxed. Here, the Court found that the property at issue had not escaped taxation but was rather mistakenly undervalued. Because mistakenly undervalued property did not escape taxation, the Sarasota Property Appraiser was not entitled to retroactively assess Taxpayer for the difference created by the clerical error when the Property Appraiser's office transferred data from one mass appraisal system to another. Furthermore, the court found that the Property Appraiser's argument that the error was the type that the appraiser may correct under rule 12D-8.021 did not authorize the assessment for retroactive taxes.

Property Appraiser failed to meet its burden of providing competent, substantial evidence in the record to support its valuation of Taxpayer's tangible personal property

Darden Restaurants, Inc. and GMRI, Inc. v. Singh, No. 5D16-4049 (Fla. 5th DCA 2019)

Taxpayer's tax returns estimated the current fair market value of its tangible personal property to be less than the Property Appraiser valued it to be. The Value Adjustment Board agreed with Taxpayer, resulting in the reduction of the assessment. The Property Appraiser challenged the Value Adjustment Board's determinations and the trial court agreed, entering a final judgment reinstating the original assessment. At trial, Taxpayer argued that the Property Appraiser was required under Florida law[2] to show its appraisal methodology was in compliance with professionally accepted appraisal practices. Instead, the trial court relied on case law,[3] which held that "[t]he property appraiser's determination of assessment value is an exercise of administrative discretion within the officer's field of expertise." On appeal, the Fifth District Court of Appeal noted that the case law cited by the Property Appraiser preceded the statutory amendment put forth by the Taxpayer. Specifically, in 2009, the Legislature amended the statute[4] to require the value of property be determined by an appraisal methodology that met professionally accepted appraisal practices.

The court found the Property Appraiser did present sufficient evidence in support of its determination of (1) the replacement cost of the Taxpayer's tangible personal property; and (2) the reduction of its value due to deterioration. Because the court found the Department of Revenue Guidelines relied upon in this determination to be qualifying professionally accepted appraisal practices, these calculations were supported by the statute. Meanwhile, the Property Appraiser's calculation of the reduction of value resulting from obsolescence did not meet the statutory burden. The evidence provided by the Property Appraiser included generalized "look[ing] to the market" approaches along with the reliance upon a guide and table which were constantly adjusted. The court agreed with Taxpayer's argument that "looking to the market" failed to satisfy the statutory burden when there was a failure to sufficiently examine comparable sales. Consequently, the court reversed and remanded the case to the Property Appraiser with instructions to calculate obsolescence with professionally accepted appraisal practices.

Delinquent taxes may not be included in the final judgment amount and then added again to calculate the total deficiency judgment amount.

Martinec v. Early Bird Int'l Inc., 262 So. 3d 205 (Fla. 4th DCA 2018)

Taxpayer appealed a deficiency judgment on the basis that the court erroneously added delinquent taxes to the deficiency judgment amount when those taxes were already included in the underlying foreclosure judgment. Despite the court stating it would "deduct the amount of delinquent taxes in determining the fair market value," the court instead included the entire amount of the delinquent taxes in the foreclosure judgement and also added the taxes again in its calculation of the deficiency judgement. Prior case law[5] had required that the amount of delinquent taxes be considered when determining fair market value. However, the court found this prior case law to be for the purpose of ensuring the mortgagee is fully compensated. Moreover, the prior case law addressed whether delinquent taxes were required to be included in a foreclosure

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Real Property Case Summaries

Prepared by Gabrielle Jackson-Gelfand & Arpe, P.A., West Palm Beach, Florida

The determination of abandonment of homestead property is a fact intensive inquiry; homestead property is generally not deemed abandoned when the property owner claiming homestead was involuntarily forced to leave the property.

Yost-Rudge v. A to Z Properties, Inc., 263 So. 3d 95, (Fla. 4th DCA 2019)

The appellate court reversed a partial order of summary judgment finding that a wife abandoned her homestead. A husband and wife claimed homestead to property. The couple was forced to move out of the property due to municipal violations in 2010. In 2015, the husband sold the property and issued a warranty deed. The wife was not a party to the warranty deed. The buyer filed a claim to quiet title claiming that the husband and wife abandoned the property, and thus the property was not their homestead. The wife answered the complaint *pro se* asserting that: the transfer of property was legally insufficient without her signature; the property was her homestead; she claimed no other property as her homestead; and she was working to make the property habitable so that she could return to the property. The buyer filed a motion for Partial Summary Judgment arguing that the property was not the wife's homestead because she abandoned the property. The wife responded by denying abandonment but she failed to file an affidavit. The lower court granted the buyer's motion, holding that at the time of the sale, the property was not the homestead property of the wife or the husband.

The appellate court determined that the trial court erred, as there were material issues of fact regarding whether the property was the wife's homestead. The court recognized that homestead property is afforded special protections under Florida law and "[o]nce homestead status is acquired, it continues until the homestead is abandoned or alienated in the manner provided by law. To show abandonment, both the owner and his family must have abandoned the property."[1] Abandonment of homestead property is a fact intensive inquiry, and Florida courts have consistently held that a homestead is not abandoned when the party involuntarily leaves the property.[2] Thus, the court found that there were material issues of fact as to whether the wife abandoned the property because the wife alleged that she was forced to leave the property, asserted that she intended to return to the property, and attached documents to her answer indicating that she was taking steps to remediate the property so that she could return.

Therefore, the appellate court determined that although the wife did not submit an affidavit in opposition of the Motion for Summary Judgment, the trial court erred in granting summary judgment because material issues of fact existed as to whether the wife intended to abandon the property or retain the property as her homestead.

There must be a "fair nexus" between the property subject to a lis pendens and the litigation dispute to support a lis pendens not based on a recorded instrument or lien.

Delta Aggregate, LLC v. Hermes Hialeah Warehouse, LLC, 266 So. 3d 248 (Fla. 4th DCA 2019)

The interest in Delta Aggregate, LLC ("Delta"), an entity conducting a mining operation on real property, was initially owned by DeSimone and Raelaur Realty LLC ("Raelaur") equally. DeSimone executed a promissory note to purchase Raelaur's fifty percent interest. Raelaur did not receive full payment and declared DeSimone in default. The parties entered a loan modification and added Delta, who was to pay DeSimone specified amounts of revenue from the sale of sand and stone excavated from real property. Raelaur alleged that it was never paid under the modification agreement. Raelaur assigned its interest in the modification agreement to Hermes Hialeah Warehouse, LLC ("Hermes") who sued Delta and DeSimone for nonpayment and included a count to impose an equitable or constructive lien on real property and filed a lis pendens. Delta and DeSimone filed a motion to discharge the lis pendens, which the trial court denied. Delta and DeSimone sought certiorari review of the order denying the motion to discharge the lis pendens.

The appellate court granted the petition for certiorari review. To maintain a lis pendens not based upon a recorded instrument or lien, there must be a fair nexus between the real property and the dispute. The court held that the dispute was solely based on Delta's failure to pay an amount due from the sale of excavated material as provided in the modification agreement. Thus, because the dispute was based on the modification agreement, there was no fair nexus between the dispute and the real property. Therefore, the appellate court quashed the order denying the motion to discharge the lis pendens.

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Under the possession exception to the Marketable Record Title Act ("MRTA"), Fla. Stat. § 712.03(3) (2016), the right to occupy the property may not be sufficient, and a person may be required to actually occupy and control the property for the exception to apply.

Dorsey v. Robinson, 44 Fla. L. Weekly D895 (Fla. 1st DCA April 5, 2019)

This is an appeal of the trial court's final judgment quieting title to real property. In 1911, Lizzie McClary and Ella McCollough (the "Sisters") obtained 40 acres of property in a recorded deed. In 1985, the Sisters, through a recorded deed, transferred 20 acres of the 40 acre property to Lillie Dorsey, Mary Thompson, and Josephine Robinson (the "Grandchildren"), the grandchildren of one of the Sisters. In 2005, the Grandchildren signed two deeds; one deed transferred two acres of the twenty-acre parcel to Lillie, and the other deed transferred the remaining 18 acres of the twenty-acre parcel to Mary and Josephine. In 2007, Mary and Josephine deeded the 18 acres to themselves and Franklin Robinson. James Dorsey, a family member of the Sisters, had a mobile home on a portion of the 18 acres of property but moved off the property in 1982; however, he allowed his ex-wife to live in the mobile home on the property until 2014. In 2016, Mary, Josephine, and Franklin (the "Appellees") filed an action to quiet title among other claims disputing the interests of at least eight family members including James and Lillie Dorsey (the "Appellants"), all of whom were relatives of the Sisters. After a non-jury trial, the court found that Appellants had no legal interest in the property, that the six family members had a possessory interest under Fla. Stat. § 712.03(3) (2016), as stipulated by the Appellees, and that the other two family members did not qualify for the possession exception under Fla. Stat. § 712.03(3) (2016).

The appellate court found that the trial court did not err. The appellate court recognized that subject to Fla. Stat. § 712.303 (2016), "a marketable record title is free and clear of all estates, interest, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title. . . ."[3] Thus, the court held that the 1985 deed to the Grandchildren was a valid root of title. The court further held that because the 1985 deed was a valid root of title, the Appellees had an unbroken chain of title for thirty years since the 1985 deed. Therefore, the only question for the court to address was whether an exception to marketability applied.

The only exception to marketability at issue was whether the exception in Fla. Stat. § 712.03(3) (2016), which provides that the marketable record title does not extinguish: "rights of any person in possession of lands, so long as such person is in such possession." The court recognized that MRTA does not define possession, and thus the court turned to Black's Law Dictionary, which defined possession as "occupancy or control." The appellate court determined that although James had a mobile home on the 18 acre property and could lease the mobile home at any time, there was insufficient evidence to establish that he had control of the property especially because he had not lived on the property since 2014. With regard to Lillie, the court also found that she relinquished her interest in the property in the 2005 deed, and although Lillie claimed that her home was built on the 18 acres in question, there was insufficient evidence to support that assertion. Thus, the court found that the exception in Fla. Stat. § 712.03(3) (2016) did not apply to James or Lillie.

Accordingly, the appellate court affirmed the trial court's final judgment finding that six family members qualified for the possession exception under Fla. Stat. § 712.03(3) (2016), that Lillie and James Dorsey did not qualify for the possession exception under Fla. Stat. 712.03(3) (2016), and the Appellants did not have a legal interest of record or ownership interest in the property.

There is a rebuttable presumption that the record owner of a property at the time a lis pendens is filed is entitled to the surplus funds from the sale of a property, unless there is proof of a transfer or assignment of the right to collect the surplus.

2017 Bell Ranch Residential Land Trust v. Burrill, 264 So. 3d 295, (Fla. 2nd DCA 2019)

2017 Bell Ranch Residential Trust (the "Trust") acquired property from Carol Burrill through a quit claim deed subject to a Wells Fargo mortgage in 2012. In 2014, Wells Fargo recorded a lis pendens against the property and filed a complaint to foreclose the mortgage. Burrill did not respond and was defaulted. The trial court entered a consent final judgment of foreclosure and ordered a public sale of the property. The sale resulted in a surplus of funds. Burrill and the Trust filed motions for disbursements, both claiming to be the owner of the property at the time the lis pendens was recorded. The trial court held that the Trust was the title owner but awarded Burrill the funds because: the Trust promised Burrill it would pay the taxes, insurance and mortgage in exchange for title to the property; the Trust failed to make any payments on the taxes, insurance, or mortgage payments on the property; the Trust had a duty to make payments on the taxes, insurance and mortgage payments of the property; and the Trust was renting the property for a profit.

The appellate court held that the trial court's order awarding Burrill the surplus was contrary to the law. Fla. Stat. § 45.032(2) (2017) states: "[t]here is established a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as

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an assignee of the rights of the owner of record must prove to the court that such person is entitled to the funds. At any hearing regarding such entitlement, the court shall consider the factors set forth in s. 45.033 in determining whether an assignment is sufficient to overcome the presumption." The court specifically noted that pursuant to Fla. Stat. § 45.033 (2017), the presumption that the owner of the property on the date the lis pendens is recorded is entitled to the surplus can only be rebutted by proof that the record owner transferred or assigned the right to collect the surplus funds. Thus, because the Trust was the record owner at the time the lis pendens was recorded and there was no evidence of a transfer or assignment of the right to the surplus, the appellate court found that the trial court's reasonings were insufficient to overcome the Trust's entitlement to the surplus.[4]

Endnotes

1 *Coy v. Mango Bay Prop. and Invs., Inc.*, 963 So. 2d 873, 878 (Fla. 4th DCA 2007).

2 *See Stokes v. Whidden*, 122 So. 566 (Fla. 1929); *Crain v. Putnam*, 687 So. 2d 1325 (Fla. 4th DCA 1997).

3 Fla. Stat. § 712.04 (2016).

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judgment, not the issue at hand of whether the delinquent taxes could be included in both the foreclosure judgment and then added again in the calculation of a deficiency judgment. Ultimately, the court found that nothing in the case presented supported the assertion that a mortgagee could recover unpaid taxes twice. The case was reversed and remanded for the delinquent taxes to be removed from the amended deficiency judgment.

Endnotes

1 *Okeelanta Sugar Refiner, Inc. v. Maxwell*, 183 So. 2d 567, 568 (Fla. 4th DCA 1966).

2 Section 294.301(2)(b), Fla. Stat.

3 *Mazourek v. Wal-Mart Stores, Inc.*, 832 So. 2d 85,89 (Fla. 2002).

4 Fla. Stat. § 294.301(2)(b).

5 *Edwards v. Federal Deposit Insurance Corp.*, 746 So. 2d 1157 (Fla. 4th DCA 1999).

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

_____ **Set(s) of 10 FR/BAR CONTRACTS (Revised April 2017)** **$50.00 per set**

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Condominium Rider
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Seller Financing (Purchase Money Mortgage; Security Agreement to Seller)
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Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA)
Appraisal Contingency
Short Sale Approval Contingency
Homeowner's/Flood Insurance
Interest-Bearing Account
"As Is"
Right to Inspection and Right to Cancel
Defective Drywall
Coastal Construction Control Line
Insulation Disclosure for New Residence

Lead-Based Paint Disclosure (Pre-1978 Housing)
Housing for Older Persons
Rezoning Contingency
Lease Purchas/Lease Option
Pre-Closing Occupancy by Buyer
Post-Closing Occupancy by Seller
Sale Of Buyer's Property
Back-Up Contract
Kick Out Clause
Sellers's Attorney Approval
Buyer's Attorney Approval
Licensee Disclosure of Personal Interest in Property
Binding Arbitration

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

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

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PLEASE CIRCLE ONE: COMMERCIAL or RESIDENTIAL Address

Phone: (_____)_____ E-mail address: _____

Mail this form with check to the address listed above or include credit card information and fax. VISA or MasterCard ONLY.

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Charge Card Number Exp. Date CODE Signature of Cardholder

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

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

SHIP DATE _____/_____/2018 LB____ $_____ # ___ ___ ___ ___ ___ ___ ___ ___ *January 2018 OFFICE*

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PROBATE & GUARDIANSHIP FORMS

The 2019 FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2019 FLSSI forms.**

Firm: _____

Attorney Name: _____ **Bar #:** _____

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2019 PROBATE FORMS

OPTION #1 **2019 FORMS AND INDEX - .PDF ON FLASH DRIVE $373.10**
OPTION #2 **2019 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH $393.20**

2019 GUARDIANSHIP FORMS

OPTION #1 **2019 FORMS AND INDEX - .PDF ON FLASH DRIVE $392.10**
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The flash drive provides forms in locked .pdf format, which will only allow the user to open and print forms. These forms are not interactive and are not able to be saved or modified in any way.

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METHOD OF PAYMENT

Mail this form with a check to the address listed above or include credit card information and email (info@FLSSI.org) or fax (407.515.1504). Above prices **include** taxes and shipping**. VISA or MasterCard ONLY.**

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What's Happening Within The Section...

As one of the largest sections of The Florida Bar, the RPPTL Section provides numerous opportunities to meet and network with other attorneys who practice in real property and probate & trust areas of the law, whether through getting involved in one of the various RPPTL Section committees or attending a RPPTL Section sponsored CLE course. Members have access to a wealth of information on the RPPTL Section website, including up-to-date news and articles regarding case law and legislative changes, publications such as ActionLine, upcoming RPPTL Section sponsored CLE courses (see page 46), and a whole host of relevant links to other Real Property, Probate & Trust Law websites.

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

EXECUTIVE COUNCIL MEETING & LEGISLATIVE UPDATE

JULY 24-28, 2019

The Breakers • Palm Beach, Florida

Room Rate: Room Rate (Deluxe Room – King): $225

Premium Room Rate: $280

EXECUTIVE COUNCIL & COMMITTEE MEETINGS

NOVEMBER 6-10, 2019

JW Marriott Marquis Miami - Florida

Standard Guest Room Rate: $269 (single/double)

EXECUTIVE COUNCIL & COMMITTEE MEETINGS

JANUARY 29 – FEBRUARY 2, 2020

Grand Hyatt Tampa Bay • Tampa, Florida

Standard Guest Room Rate: $225 (single/double)

** To be added to the waitlist for this event, please email Hilary Stephens at hstephens@floridabar.org*
Be sure to include in the email the nights for which reservations are needed and your full contact information.

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

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Available Now.
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www.RPPTL.org

Legislative and Case Law Update Seminar

JULY 26, 2019
THE BREAKERS
Palm Beach, FL

SAVE the DATE! Attorney Trust Officer Conference

AUGUST 22-24, 2019
THE BREAKERS
PALM BEACH, FL

PRACTICE CORNER:

Don't miss these short tips to assist in your practice.

SEE PAGE 44-47.

LOOKING for simple ways to earn CLE from your desk, visit www.RPPTL.org to find new available webcasts.

FR/BAR Rider "CC. Miami-Dade County Special Taxing District Disclosure" approved!
Release date: 6-14-19!
For more details, see page 45.

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