ActionLine

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

Condominiums and the Interstate Land Sales Full Disclosure Act – Part I

Electronic Filing and Electronic Service (and Other Changes)

Florida Sustainable Development & Growth Management in a Post-DCA Era

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Strength of the Section - One Explanation

Chair's Column

By W. Fletcher Belcher

Section Chair, 2012- 2013

A wise philosopher once observed that good actions give strength to ourselves and inspire good actions in others. The theme of this report is simple and straightforward: The great strength which the Section enjoys and the successes it has achieved are attributable to the fact that for more than fifty years, its goals and activities have consistently been guided by the dominant purpose for which it exists - to serve the public interest. That purpose is proudly heralded in the Section's bylaws and continues to be well served through its leaders and members simply doing what is right and always striving to promote good public policy in the context of its fields of law.

Historically, the hallmarks of the Section's pursuit of good public policy have centered around protecting private property rights, preserving the certainty of land titles, preventing the erosion of fiduciary responsibilities, promoting the fair and efficient administration of trusts and estates, and protecting the right of due process, including the right to notice and the opportunity to be heard.

The Section is deeply committed to being appropriately supportive of lawyers and enjoys excellent working relationships with industry groups having interests in its fields of law. Although the Section strives to always treat lawyers and industry groups fairly, it does not function as a trade association for the promotion of their economic interests. Bylaw provisions specifically designed to protect the integrity of the Section require full disclosure and prohibit participation by members in Section matters when facts and circumstances exist that may reasonably raise a conflict of interest issue due to the member's personal interests, employment or client relationships.

The financial resources that underwrite the Section's activities essentially come from three sources: annual section dues paid by its voluntary members, revenue from CLE programs produced by the Section (also largely from members), and payments by sponsors and exhibitors who offer products and services that are of interest to Section members and who have an interest in the fields of law in which the Section's members practice. Although the Section's dues are modest, they represent the largest component of revenue because of its well populated and loyal voluntary membership base.

The Section had slightly more than 1,000 members in 1971. By mid-August 2012, its nearly 11,000 members made RPPTL the largest section of The Florida Bar, eclipsing the next largest section by a margin of more than 3,500 members. Section members give by paying dues and supporting its educational programs, and many of them actively participate in Section committee work. Section members also receive by being kept informed of important developments in their practice areas, by having access to the many excellent education programs and materials produced by the Section, and by having pride in knowing that they have materially contributed to its many good works. Clearly, without the support of its large and loyal membership base, the Section could not be the strong force for good that it is or enjoy the successes it has achieved.

What follows is a brief recap of highlights describing how the Section's business model operates to serve the public interest within the context of its fields of law. The principal activities and operations of the Section essentially revolve around communication with its members; development of legislation in real property, probate, trust, and related fields of law; producing education programs and materials; and participation as an amicus curiae in select appellate cases involving significant issues within the Section's fields of law.

COMMUNICATIONS. The Section communicates very effectively with its members concerning their practices and practice areas in several ways, including *ActionLine*, the Section's website (www.rpptl.org), through circuit-based communications from At-Large Members, and through direct e-mail messages from the Section's leadership and dedicated Program Administrator. Both *ActionLine* and the website are undergoing major upgrades to serve the needs of members at an even higher level.

LEGISLATION. This process generally begins at the grass roots with an idea or concept in the mind of a member, followed by the work of a subcommittee within one of the Section's nearly 40 working substantive committees. Most of those committees are actively involved in studying legislative issues and developing proposed legislation within their specific subject-matter areas.

The Section's entire legislative process is coordinated internally by the chairs of the respective committees, the Directors of the Section's two substantive Divisions, and its Legislation Committee, which also acts as liaison for legislative matters with the Section's highly-skilled outside legislative consultants, the Board of Governors of The

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ABOUT THE COVER:

Beach Scene
by Nicole Kibert

IN THIS ISSUE:

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Florida Bar, and other groups having an interest in the Section's legislative proposals. Upon receiving approval by a two-thirds super majority vote of the Executive Council, proposed legislation then goes to the Section's legislative consultants to find legislative sponsors and shepherd it all the way through the legislative process.

In addition to such legislative initiatives as the Florida Probate Code, Trust Code, and Power of Attorney Act, examples of the Section's many legislative accomplishments can be found in legislation protecting LLC assets from outside creditors, prohibiting transfer fee covenants, establishing the statutory right of a surviving spouse to elect a fractional interest in homestead, and amendments to the condominium and homeowners' association acts, the lis pendens statute and the documentary stamp tax statute. The Section has recently formed a new ad hoc committee to review and propose substantial revisions to the Florida guardianship law. In addition, the Section is also frequently called upon to provide technical assistance to legislators and legislative staff.

EDUCATION. During the 2011-12 year, the Section produced at least thirteen different education programs. Most recently, the Section's Electronic Filing and Service Committee, working closely with the CLE Seminar Coordination Committee, launched an ambitious and expedited effort to educate Section members on how to comply with new court rules requiring court documents to be served by e-mail. The leadership of the Electronic Filing and Service Committee produced a free statewide webinar entitled "What RPPTL Lawyers Need To Know About E-Filing and E-Service," which appears to be the most widely attended educational program ever presented by The Florida Bar or any of its sections.

The webinar, together with an informative how-to slide presentation on e-mail service, has also been posted to the Section website (www.rpptl.org) for on-demand viewing. The Section's expertise in this area can be traced back to its visionary creation of an Electronic Filing and Service Committee several years ago, and that expertise has been enhanced by the very active service of one of its Co-Chairs as a member of the Florida Courts Technology Commission.

AMICUS. The Section also participates as an amicus curiae in very select appellate cases involving issues which significantly impact the Section's fields of law, including two cases currently pending before the Florida Supreme Court. One of those cases concerns the extent to which legislation that clarifies previously enacted legislation can be given retrospective application and the other involves the proper construction of an important provision in the Florida Probate Code.

Successful amicus activity requires a high degree of skill and laborious brief-writing. The Section is most fortunate to have an extremely capable Amicus Coordination Committee composed of four distinguished appellate lawyers, one of whom is a former Justice of the Florida Supreme Court and another is a former District Court of Appeal Judge.

The Section's continuing efforts to serve the public interest and facilitate the implementation of good public policy through both its legislative and amicus activities have earned the Section a high degree of respect and a widespread reputation for expertise and credibility within the legislature and judiciary.

OTHER. Numerous dedicated Section members also serve the bar and the public by voluntarily authoring and updating the Uniform Title Standards, as well as several practice manuals published through The Florida Bar and widely used probate and guardianship forms; by participating in the development and ongoing revision of the FAR/BAR residential real estate contract; and through extensive involvement in other law-related organizations and groups, including The Florida Bar, The Florida Bar Foundation, Florida Lawyers Support Services, Inc. (FLSSI), the Florida Legal Education Association (FLEA), American College of Trust and Estate Counsel (ACTEC), American College of Real Estate Lawyers (ACREL), Florida Realtor-Attorney Joint Committee, and the Florida Courts Technology Commission.

A longstanding member of the Section's Executive Council is currently serving as President of The Florida Bar. Two former Section chairs are currently serving on the Board of Governors of The Florida Bar, and one of them is chairing its Legislation Committee. Lastly, the Section benefits greatly from the unique continued involvement and sharing of wisdom and guidance by many former Section Chairs and other section leaders long after the expiration of their terms.

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Evolution of the Lender-Required Arm's Length Affidavit in Short Sales

By Nishad Khan, Esq. Orlando, FL, 2012-2014 RPPTL Section Fellow
Submitted on behalf of the Residential Real Estate & Industry Liaison (RREIL) Committee


N. KAHN

If a significant portion of your practice consists of short sales, the "Arm's Length Affidavit" should be a familiar document. This affidavit is usually incorporated into the short sale package submitted to the lender or required by the lender as part of the closing package. Originally, this one page document, signed by both buyer and seller, was very straightforward and established that neither party was related to each other or part of any outside agreements. Typically, any lender participating in a short sale would require the same form document for every transaction.

Recently however, these affidavits have transitioned into legal contracts between the lender and the participating parties that, among other things, indemnify the lender for misrepresentations or fraudulent information provided by anyone involved in the course of negotiations. Every party, including the closing attorney, must sign the affidavit. By doing so the closing attorney creates legal and financial obligations to the lender despite the minimal role they may have in the transaction. The purpose of this article is to discuss the evolution of the Arm's Length Affidavit into the "Indemnification Agreement" it's become today, as well as the burden it places on real estate practitioners involved in short sale transactions.

The original Arm's Length Affidavit was generally delivered to the closing agent along with the short sale approval letter. The reason behind the affidavit was obvious: sellers and buyers were negotiating side agreements, often times with family or friends that would allow the seller to stay in the house or repurchase the house after the closing of the short sale. By requiring the affidavit, the lenders had some sort of acknowledgement from the parties that the transaction was genuine and there were no outside agreements.

As the number of short sales increased, the parties became more sophisticated and many sellers, usually with the help of third parties, devised ways to circumvent the affidavit and "legally" keep the house or receive proceeds after the sale. These complicated transactions would often involve land trusts, multiple assignments or the sale of "personal" property outside of the contract.

Lenders began to catch on and started to revise their affidavits to require notarized signatures of the agents, brokers, settlement agent, third-party processor, as well as the buyer and seller. These revamped affidavits contained clear representations from the signatories and memorialized the lender's reliance on these representations, both of which survived the closing. Usually, the approval letter was conditioned upon the lender's receipt of a fully-executed affidavit and allowed the lender to invalidate the entire transaction if they later discovered the sale was not "arm's length."

Today, short sales are almost as common as traditional sales and, although the lenders have become more proactive and accustomed to short sales, the affidavits have become more rigid and now place even more obligations on the real estate practitioner.

In addition to the general representations contained in previous versions, the recent affidavits introduced by Fannie Mae and Freddie Mac now include language that indemnifies the lender and imposes responsibility from every party involved in the transaction to the lender, investor, mortgage insurer and/or any guarantor for any loss incurred from misrepresentations or omissions made to the lender, investor, mortgage insurer and/or any guarantor throughout the entire short sale process. The affidavit further states that the occurrence of these acts, whether negligent or intentional, may subject each signatory to both criminal and civil liability.

Moreover, these affidavits place post-closing conditions on the buyer, and by signing the affidavit, the parties implicitly agree to indemnify the lender, investor, mortgage insurer and/or any guarantor if the buyer fails to comply with these conditions.

Several lenders have followed this evolution and have incorporated affidavits similar to the Fannie Mae and Freddie Mac versions into their short sale package. Other lenders, such as Bank of America, have added similar language into their "Third Party Authorizations" or have created addendums akin to the affidavits which all parties must sign.[1]

This, of course, poses a great risk to the attorney who didn't negotiate the short sale, but is acting as the closing agent. By signing this affidavit, that attorney has now agreed to indemnify the lender, investor, mortgage insurer and/or an unnamed guarantor, for statements previously made by the borrower, or documents previously submitted by the realtor or third party. Being the last person in the transaction, that attorney would most likely be the first to be questioned if a misrepresentation did occur.

Despite protests from brokers, attorneys, and title agents, the lenders will usually not approve a short sale unless the affidavit is signed by all parties. Any changes or alterations to the document will generally be rejected and hold up the entire transaction. One solution is to simply avoid closing a short sale negotiated by a third party. Although impractical, the attorney/closing agent may require indemnifications from the other parties involved in the transaction (e.g. the broker, buyer, seller, etc.).

The reality is that most practitioners, fearing the loss of referrals, will sign the affidavit and avoid "killing the deal." Until the lenders, investors, mortgage insurers and/or any guarantors understand the risk being placed on settlement agents, it appears those agents will need to abide by the Golden Rule: "He who holds the gold, makes the rules."

Endnotes:

1 Copies of form affidavits can be found at http://www.rpptl.org , Residential Real Estate and Industry Liaison Committee webpage.

Beware of Clones and Ghosts!

By Margaret A. (Peggy) Williams, Esq., Attorneys' Title Fund Services, LLC


P. WILLIAMS

In addition to the many rules, regulations, procedures, and customs related to the practice of real estate and title insurance, real estate practitioners and title agencies must also keep abreast of the potential frauds and scams used to steal money from unsuspecting lenders, buyers, sellers, and their title agents. Just when you think you have a handle on preventing your practice from falling victim to one scam, another one pops up. There is no end to the creativity of the devious mind!

The new fraud flavor of the month is being called "cloned title agencies" or "ghost title agencies." To perpetrate this fraud, the fraudsters set up a corporation or LLC with a name very similar to the name of an active or recently inactive title agency or law firm. Through a combination of creative word processing, cut and paste, and photocopying, the fraudsters create documents such as Closing Protection Letters and title insurance commitments that, on first glance, appear to be actual underwriter documents. They use these documents to convince lenders, lenders' counsel, and other parties involved in the real estate transaction that they are licensed title agents authorized to handle closings and that they are appointed by an underwriter to issue title insurance commitments and policies. In most cases, the real estate transactions are engineered by the fraudsters using stolen or manufactured identities for the purchasers and sometimes the sellers.

In the course of the transaction, the lender is induced into sending the funds to the clone agency's bank account. The money is then withdrawn by the owner of that account, the fraudster, and no deed is conveyed, no mortgage is recorded, and the lender is left with nothing.

In order to avoid having your clients or yourselves falling victim to this type of fraud, you should be extremely vigilant in dealing with any title agency or law firm, especially when dealing with them for the first time.

Tip #1: Be alert to any discrepancies or inconsistencies in any document provided to you or to your client.

Title Insurance Commitments and Policies:

Is the Commitment a current version (2006), or has an outdated version been used? Does the underwriter and version of the jacket match the underwriter and version reflected on the schedules? Does the Commitment look like the Commitments you have received from the same underwriter on previous occasions?

Closing Protection Letters (CPL):

Are the fonts and typestyles consistent throughout the document? Is the address for the underwriter consistent with your knowledge of the current address of the underwriter?

Tip #2: Check with the Underwriter before relying on any CPL, Commitment, or Policy issued by an agent or agency you are unfamiliar with.

Call the underwriter's agent verification department or go to the underwriter's website to verify the agency status of the agent and the validity of the documents provided to you. Be aware that the contact information for the underwriter printed on the document you received may have been altered by the fraudster. It is better to verify using the phone number or link on the underwriter's official website.

Do not fund (or allow your client to fund) a transaction before checking with the underwriter. (Even if an agency is actively appointed by an underwriter at the time they issued the CPL and commitment, they could be inactive by the time you are ready to fund. Check with the underwriter again, right before funding.) Be sure to verify the address and phone number of the agent in the underwriter's records matches the address and phone number of the entity you are dealing with.

Tip #3: Verify that the attorney or agency is licensed in Florida.

Check the website for the Florida Department of Financial Services (www.myflorida.com) to verify the status and underwriters of a licensed title agency and The Florida Bar's website (www.floridabar.org) to verify that an attorney is licensed to practice law in Florida.

Tip #4: Keep an eye out for a clone of your law firm or title agency.

Because these fraudsters are creating entities with names similar to real title agencies and law firms, you should also be alert to the use of a name similar to yours. If you are contacted by someone looking for information or a status on a transaction that you are unfamiliar with, ask questions about how they got your name and number, who they have been dealing with, and the details of their transaction. If you believe that your title agency or law firm has been cloned, contact your underwriter at once.

You should also regularly check the Florida Department of State, Division of Corporations website (www.sunbiz.org), and search your own title agency or law firm name. If you find a newly formed entity with a name very similar to yours, check to see whether the entity is a licensed title agency or law firm (see Tip #3). If not, please notify your underwriter.

While the law enforcement authorities and several title insurance underwriters are actively investigating these clone entities and the fraudsters behind them, real estate practitioners must take action to protect themselves and their clients. As long as there are victims who fall for the scam, the fraudsters will continue. Only when we are all aware of what they are doing, and we no longer fall victim, will they stop and move on to something else.

Condominiums and the Interstate Land Sales Full Disclosure Act

By Jerry E. Aron, Esq., Jerry E. Aron, P.A., West Palm Beach, Florida

Part One: The Way We Were Can It Be That It Was All So Simple Then

This article is part one of a three-part article on the Interstate Land Sales Full Disclosure Act (ILSA).[1] Part one will focus on the status of ILSA as it stood prior to the economic tsunami of 2008 (The Way We Were: Can It Be That It Was All So Simple Then). Part two will deal with the wide range of decisions that followed the economic downturn (Part two's title will be derived from the same lyrics: "Scattered Pictures of the Smiles We Left Behind"….and "What's Too Painful to Remember We Simply Choose to Forget"). Part three will focus on the future and what the future portends as to ILSA (Part three's title also will be from the same lyrics "Has Time Rewritten Every Line"). These articles deal with ILSA and a limited number of issues relating to the sale of preconstruction condominiums.[2] ILSA is substantially broader than the scope of these articles and real estate practitioners should become familiar with the much broader scope and application of ILSA.[3]

ILSA History

ILSA was adopted by the U.S. Congress in 1968. At the time there were unscrupulous developers selling swampland and mountain tops on a national basis where the buyer did not visit the property they were purchasing. Many buyers after closing were quite surprised to discover that their property lacked access, lacked utilities, and/or was underwater or snow most, if not all of the year. Clearly, ILSA was intended as an anti-fraud statute requiring proper disclosure unless the property was exempt from ILSA. ILSA was intended to deal with "lots," which is a word used throughout the Act. Interestingly, the statute itself does NOT define lot. However, the definition of lot in regulations adopted pursuant to ILSA is fairly broad: Any portion, piece, division, unit, or undivided interest in land located in any state or foreign country, if the interest includes the right to the exclusive use of a specific portion of the land.[4] The landscape changed drastically, when, approximately less than three decades ago a few courts found that the term "lot" included a condominium unit.[5] With ILSA applying to condominiums, the developer and its lawyer were forced to either (a) file a statement of record with HUD, and deliver to purchasers a property report, or (b) find one or more applicable exemptions. For many years most practitioners advised their clients to avoid filing like the plague. Long and convincing lists of reasons were developed by practitioners detailing the concerns with filing. Moreover, at the time (not now) it was believed that almost all condominium developments, except the very large developments, easily could fit into one or more of the exemptions. Interestingly, ILSA provides that exemptions are self operative,[6] which means that the developer and the lawyer do not need to request from HUD a written confirmation that no filing was necessary. If the developer and attorney thought the project was exempt they prepared the documents to fit the exemption(s) and never had to contact HUD. This lack of interest in filing was not an indictment of HUD which at the time was responsive and reasonable (although the everyday practitioner might assume otherwise). So, the overwhelming practice was to find one or more exemptions to fit into and avoid the need to file a property report,[7] the disclosure document that must be provided to each purchaser if an exemption does not apply, and a statement of record,[8] which is an extensive document that primarily answers a list of questions and requires the attachment of a lengthy accumulation of backup documents to be filed with HUD, only, but which is a publicly accessible document.

Exemptions

The three most utilized exemptions for preconstruction condominiums were: (1) the twenty-five lot[9] exemption, (2) the improved lot exemption,[10] and (3) the one hundred lot exemption.[11] Although it sounds bizarre to have a 25 lot and a 100 lot exemption, the ILSA exemptions are divided into full statutory exemptions[12] and partial statutory exemptions.[13] If a project fits into one of the full statutory exemptions, such as the 25 lot exemption or the improved lot exemption, for example, ILSA will not apply unless there is a purpose to evade ILSA.[14] Partial statutory exemptions have additional requirements.[15] Prior to the tsunami, it was generally thought that such requirements in a condominium context were to comply with ILSA's anti-fraud provisions which were straight forward requirements. With respect to full and partial exemptions no filing with HUD was required and complying with the 25 (full exemption) and 100 (partial exemption for less than 100 lots) lot exemptions was primarily a numbers game where one had to be careful not to violate ILSA's common proportional plan definition[16] which would have the impact of aggregating two or more developments for counting purposes if certain characteristics were met. As to the improved lot exemption there were two fundamental avenues for compliance: enter into contracts on lots on which there is a completed building,[17] or enter into contracts in which the developer is "obligated" to construct a completed building within two years from the date of the contract.[18] Since most condominium sales from the developer were sold pre-construction, the arm of the improved lot exemption routinely utilized was the latter and it was referred to as the two year completion exemption. Much of the pre-tsunami litigation relative to the improved lot exemption surrounded the meaning of "obligated" in the

above requirement.

In 1990 the Florida Supreme Court decided a landmark case in which the major focus was the importance of adequate remedies required to make a promise to complete a binding obligation.[19] It is quite easy to make a promise to a purchaser that the unit would be completed within two years. However, if the purchaser has no adequate remedy, is the promise truly an obligation? The Court concluded that a purchaser's remedies must not be limited to specific performance or damages in order for the seller to be truly obligated.[20] The court found that the obligation otherwise would be illusory.[21] Further, the court indicated that the obligation had to be "unrestricted."[22] The use of the word "illusory", and the phrases "obligation must be unrestricted" and contracts must not "limit the purchasers remedies" were unfortunate, as a number of other courts have had to further define those rulings and some federal courts have occasionally concluded in not-so-direct terms that the Florida Supreme Court meant "this" although they wrote "that." Much litigation ensued as a result of the words of the Samara decision, much of it was never reported, but settled or dealt with in the lower courts. Although its basic premise that the word obligate needed to be meaningful was both correct and necessary, the onset of additional litigation was created by the loose wording of the decision.

Another issue that arose with the two year completion exemption was whether there was any way that the obligation to complete in two years could be extended or conditioned. In Florida, one party's obligation to perform can be excused in a number of ways, such as force majeure and impossibility. However, is an obligation to complete in two years "absolute" if it can be extended? HUD published guidelines[23] which were in addition to the regulations and statute. Much of the information that practitioners relied upon was contained in those guidelines as the statute and regulations provided limited assistance in day to day practices. The HUD guidelines and rulings were considered "The Bible." After all, HUD was tasked with reviewing the filings, providing interpretive decisions, and dealing with ILSA as the responsible regulatory agencies. The guidelines indicated that "contract provisions which allow for nonperformance or for delays of construction completion beyond the two year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected."[24] No specific contract provisions were provided by HUD. Although excuses to nonperformance are recognized under Florida law without a contract provision,[25] because HUD indicated that a contract provision was acceptable, the common practice was to include an express provision in the contract allowing for specific excuses to nonperformance. The guidelines provided some help by indicating "as a general rule delay or nonperformance must be based on grounds recognizable in contract law such as impossibility or frustration and on events which are beyond the seller's reasonable control."[26] The need to be specific in the contract was the prevailing view and any number of clauses were drafted to specifically deal with which specific types of events, such as hurricanes, work stoppages, permitting delays, strikes, etc. were acceptable to extend the two years but still "obligate" the seller under applicable Florida contract law. After the tsunami many courts found drafted clauses were not based on recognizable Florida contract law, meaning the contract was flawed and the exemption lost, a devastating result. The pre-tsunami answer to the question of which clauses worked and which ones did not, was to utilize an ILSA savings clause. Such a clause basically would provide that if the draft person's clause was interpreted to be too aggressive and violative of ILSA the clause would be reformed to limit it only to what was permissible under ILSA. Interestingly, the simple and good faith notion became attackable in the post-tsunami atmosphere.[27]

So, before the tsunami it was easy to comply with ILSA's exemptions for smaller projects and even larger projects that could be completed in less than two years. However, as the good times rolled, the projects became larger and construction completion dates were extended as contractors and subcontractors became busy. A building that once took 20 months to complete, might now take longer than 2 years to complete. ILSA provided a seemingly straightforward answer to the dilemma. ILSA provides that lots which are wholly exempt from ILSA are not included in the unit count of the one hundred lot exemption.[28] Since the improved lot exemption is a full exemption, if certain units in the project were exempt under the improved lot exemption, and the remainder of the units totaled 99 or less (thus qualifying under the 100 lot exemption), the 2 exemptions could be "piggy-backed." HUD issued various advisory opinions endorsing piggybacking. Thus, as developments grew in size or time to complete became problematic, the developer could execute the first 99 contracts without needing to promise to complete in 2 years. The remainder of the contracts, however, would have to contain the two year completion obligation as required under the improved lot exemption. Most of the larger projects in the state piggybacked and avoided registration.

However, even with the various exemptions and piggybacking, there were some super-large projects that could not squarely fit into one or more exemptions or piggybacking. In such a case a registration was required, which once again meant that a property report had to be given to the purchaser before the contract was signed and a statement of record approved before marketing and contract signing could begin. Unlike state law, contracts under ILSA could not be signed while HUD was reviewing the filing. HUD approval was a condition precedent.[29] As part of the require-

continued, next page

ments when filing, ILSA set forth that the contracts had to provide for the following stated simplistically: (a) a legal description in form capable of recording, (b) a twenty day notice of default for the benefit of purchaser, and (c) upon a purchaser's default, a liquidated damage provision that would limit the seller to retain no more than fifteen percent of the purchase price.[30]

These requirements appeared easy to comply with albeit (b) and (c) were painful for developers. However, no alternatives were available if exemptions were not available.

In the next article we will learn how the standard pre-tsunami practices were a love affair with exemptions that ended in a bitter, highly contested, expensive separation.

Endnotes:

1 15 U.S.C. § 1701-1720 (2011).

2 For example, statutes of limitations, remedies, filing issues, and other applicable exemptions to condominiums not mentioned in this article.

3 See Richard Linquanti, Aspects of the Interstate Land Sales Full Disclosure Act, 44 Real Prop., Trust & Est. L.J., 441-494 (Fall 2009).

4 24 C.F.R. §1710.1(b) (2011).

5 Nargiz v. Henlopen Dev., 380 A. 2d 1361, 1363-64 (Del. 1977); See Winter v. Hollingsworth Props. Inc., 777 F. 2d 1444, 1446-48 (11th Cir. 1985).

6 An advisory opinion may be obtained but is not a guaranteed shield for protection. See 24 C.F.R. §1710.17 (2011).

7 15 U.S.C. §1707 (2011); 24 C.F.R. §§1710-102-1710.118 (2011).

8 15 U.S.C. 1705(2011); 24 C.F.R. §§1710.105-1710.310 (2011).

9 15 U.S.C. §1702(a)(1) (2011).

10 15 U.S.C. §1702(a)(2) (2011).

11 15 U.S.C. §1702(b)(i) (2011).

12 15 U.S.C. §1702(a)(2011).

13 15 U.S.C. §1702(b) (2011).

14 15 U.S.C. §1702(a)(2011).

15 See Meridian Ventures, LLC v. One North Ocean, LLC, 538 F. Supp. 2d 1359 (S.D. Fla. 2007); See also 15 U.S.C. §1703(a)(1), 1704-1707 (2011); Id §1703(a)-(e).

16 15 U.S.C. §1701(4)(2011).

17 See 15 U.S.C. §1702(a)(2)(2011).

18 See id.

19 See Samara Dev. Corp. v. Marlow, 556 So. 2d 1097 (Fla. 1990).

20 Id., at 1098.

21 Id., at 1100.

22 Id..

23 See Guidelines to the Interstate Land Sales Regulation Program 61 Fed. Reg. 13,596 at 13,598 (Mar. 27, 1996).

24 Id. at 13,603

25 See Kamel v. Kenco/The Oaks at Boca Raton, LP, 2008 WL 2245831 (S.D. Fla.).

26 See Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596 at 13,603 (Mar. 27, 1996).

27 See Pilato v. Edge Investors, L.P., 609 F. Supp. 2d 1301 (S.D. Fla. 2009).

28 See Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596 at 13,604 (Mar. 27, 1996).

29 See 24 C.F.R. 1710.22(a) (2011).

30 15 U.S.C. 1703(d) (2011).

RPPTL Law School Liaison Committee Update

By Stacy O. Kalmanson, Esq., Fidelity National Title Group, Maitland, Florida

The RPPTL Law School Liaison Committee is off to a great start. We have many exciting programs scheduled and are busy planning more. Our main purpose is to open lines of communication with students at the 12 law schools in Florida and to encourage their support and membership in RPPTL. Our Fall 2012 plans include:

- **Student Attendees at RPPTL Section Meetings**. We hosted students from Nova, UF and Stetson at the Palm Beach Section meeting in July. Students will also be attending the Key Biscayne Section meeting in September.
- **Events**. Four speakers are scheduled at Nova in the Fall. Three speakers are scheduled at Stetson. A speaker panel is planned for October 4th at FAMU and a reception is being organized for FAMU and Barry law students. At each program, the students will learn about career paths within the real property and probate fields, tips regarding successful career planning in those fields and the benefits the Section offers.
- **Dinner Talks**. We are excited about our new pilot program where we will be hosting small dinners with RPPTL practitioners and students from various law schools.

As you can imagine, many people are necessary to create and maintain a successful outreach program. Thank you to Gwynne Young, Ben Bush, Alex Hamrick, Jason Ellison, Jennifer Jones, Navin Pasem, Toby Muir, Maggie Atkins, Tattiana Brenes-Stahl, Salome Zikakis, Aniella Gonzalez, Edwin Boyer, Robert Bitterli, Michael Bedke and Lynwood Arnold for volunteering their time to mentor students, promote and organize events and/or serve as speakers for upcoming programs. We know there will be many others to thank throughout the year. In addition, our committee really appreciates all of the time that the RPPTL Executive Council members spend making the student attendees feel welcome at our Section meetings. The students always mention that everyone is so friendly and helpful – what a great way to promote our Section!

Electronic Filing and Electronic Service (and Other Changes)

By Rohan Kelley, The Kelley Law Firm P.L., Fort Lauderdale, Florida

R. KELLEY

The author's guarantee

The author guarantees that if you read this article carefully and completely, you will learn at least 5 (and more likely many more) important procedural facts that are now applicable to your practice which you did not know previously and at least that many practical practice tips.

Professional competence and the e-world

The Rules of Professional Conduct in the Rules Regulating The Florida Bar require a lawyer to keep abreast of changes in the practice, as well as changes in the law. This is not optional and a lawyer can be disciplined for failing to do so. As of September 1, 2012, the practice has changed and you need to change as well.[1]

Miscellaneous rule changes that impact probate practice

The Florida Supreme Court has embarked on standardization of many practice rules across the separate practice areas. For example, what was rule 1.080 SERVICE OF PLEADINGS AND PAPERS in the civil rules, and rule 5.041 SERVICE OF PLEADINGS AND PAPERS in the probate rules, which were nearly parallel rules, have now been moved to rule 2.516 of the Rules of Judicial Administration ("RJA").

In Florida Supreme Court opinion SC10-2101 [Second Corrected Opinion] dated June 21, 2012, *In re: Amendments to the Florida Rules of Judicial Administration, etc.,* 37 Fla. L. Weekly S436, the court amended probate rule 5.041 SERVICE OF PLEADINGS AND PAPERS to delete nearly all of that rule and provide only ". . . every petition or motion . . . shall be served on interested persons as set forth in Florida Rule of Judicial Administration 2.516 . . . ." The deleted parts of the probate rule, "(b) Service; How Made," "(c) Service; Numerous Interested Persons," "(d) Filing," "(e) Filing With Court Defined," "(f) Certificate of Service," and "(g) Service of Orders," are now a part of rule 2.516 RJA.

Our formal notice rule, 5.040, remains intact. RJA 2.516(a) requires e-mail service except "documents served by formal notice or required to be served in the manner provided for service of formal notice, must be served in accordance with this rule on each party." Amended probate rule 5.041 directs that "For purposes of this rule an interested person shall be deemed a party under rule 2.516."

Another change to our practice involves pleadings and documents which can now be destroyed by the clerk, if submitted in paper format, after they have been scanned into the court record. RJA 2.430(b)(2). It may come as a surprise to many lawyers that the paper they submit to the clerk for filing (for the most part) will be scanned and destroyed. A special exception has been made only for original wills and codicils in new rule 5.043 Deposit of Wills and Codicils. That new rule provides ". . . any original executed will or codicil deposited with the court shall be retained by the clerk in its original form and may not be destroyed or disposed of by the clerk for 20 years after submission regardless of whether the will or codicil has been permanently recorded as defined by Rule 2.430, Florida Rules of Judicial Administration."

E-service and e-mail service distinguished

"E-service" is to be distinguished from "e-mail service," which is the service that is in operation today. E-service is a system intended to be provided by the ePortal Authority (the authority receiving e-filings). As contemplated, when a lawyer files a court document through the ePortal, the ePortal itself would effect e-service on all parties in the same manner as is done presently in the federal courts PACER system. However, recently, the ePortal Authority has indicated that it is uncertain when they will be able to implement e-service.

Alternatively, "e-mail service" is utilization by the filing attorney of the standard e-mail system to serve documents on opposing counsel and, in limited circumstances, on unrepresented interested persons as attachments to emails. This is the system the court has presently mandated in Florida by rule 2.516 RJA.

Mandatory e-mail service rules

On June 21, 2011, in *In re: Amendments to the Florida Rules of Judicial Administration, etc., id.* the Florida Supreme Court, after significant study and consideration, recommendations and comments from many individuals, committees and groups, mandated service of court documents by e-mail.

The beginning mandatory date for that service in the civil divisions (including probate, family and small claims but not criminal, traffic or juvenile) was September 1, 2012.

This service rule, RJA 2.516, bears reading in its entirety. It combines the service provisions previously in probate rule 5.041 and civil procedure rule 1.080, adapted to the procedures in the e-world. This form of service applies to all attorney-to-attorney service ("all documents required or permitted to be served . . . must be served by e-mail, unless this rule otherwise provides"), and to non-attorney

continued, next page

service if the non-attorney has filed a designation of e-mail address. Service on these non-attorneys (referred to as unrepresented persons), such as estate beneficiaries, is by regular mail or hand delivery unless they have opted into the e-mail system by filing a designation of e-mail address. RJA 2.516(b)(1)(C) and (b)(2).

If a non-represented person has not filed a designation, they are to be served by one of the "old fashioned" methods. RJA 2.516(b)(1)(C) and (b)(2). This would typically apply to beneficiaries.

Service by formal notice and in the manner of formal notice is unchanged.

Attorneys are required to file and serve a "Designation of e-mail address" upon appearing in a matter, although there appears to be no penalty for not doing so. RJA 2.516(b)(1)(A). Although an argument can be fashioned that would not require a designation to be filed in existing cases, the better practice is to file and serve a designation.[2] A couple of reasons that support the best practice of the lawyer filing a designation in existing cases are to allow the lawyer to receive e-mail service at an address other than the official Florida Bar designated e-mail address and to facilitate service in the system.

Under the rule, the attorney must designate a primary e-mail address and may designate up to two secondary e-mail addresses. In practice, what is happening is firms are creating a special e-mail account for "*e-mailservice@domain*." Then the attorney's address is designated as primary, *e-mailservice@domain* is designated as first secondary and the lawyer's assistant or paralegal may (or may not) be designated as the second secondary.

On the subject of designating e-mail addresses, the signature block of court documents is now required to include the attorney's current record Florida bar address, telephone number, primary e-mail address and secondary e-mail addresses, if any. Note that different primary and secondary e-mail addresses may be designated from matter to matter, if desired, and the signature blocks would, therefore, differ. Also, the primary e-mail address is not required to be the official e-mail address at The Florida Bar. RJA 2.515(a).

As a practical tip, some firms are creating an e-mail alias in the e-mail system for the assistant or paralegal as, for example, "*assistant2rohan@estatelaw.com*" or "*paralegal-2rohan@estatelaw.com*." In this instance, if the assistant or paralegal leaves the lawyer's employ, the lawyer need only reassign the "alias" in the internal e-mail system to the new employee and not send out a complete new series of amended designations of e-mail address to all counsel in all cases. The greater inconvenience to opposing counsel is to leave the former employee's (now cancelled) e-mail address as designated and with each service by each opposing counsel in each case to that address, the e-mail bounces thereby placing further obligations on counsel sending the e-mail. RJA 2.516(b)(1)(D)(ii) requires if the

sender learns that the e-mail did not reach the address of the person to be served (as indicated by the bounced message), the sender must immediately send another copy by e-mail, or by regular mail, fax service or hand delivery.

"If an attorney does not designate any e-mail address for service, documents may be served on that attorney at the e-mail address on record with The Florida Bar." RJA 2.516(b)(1)(A). "Ah," you say, "the Bar doesn't have my e-mail address." I say "in for a penny, in for a pound." As of July 1, 2012, you were required to provide The Florida Bar with your "business e-mail address" and if you change any of your Bar-registered information, you must promptly notify the executive director. So if you haven't provided the Bar with your e-mail address, you are presently in continuing violation of rule 1-3.3 of the Rules Regulating The Florida Bar.[3]

The "mailbox" rule, allowing an additional five days after service by mail, that was formerly in probate rule 5.042(d) and civil procedure rule 1.090(e), has become RJA 2.514(b), and now applies to service by mail or e-mail. Restated, service by e-mail allows an additional five days to respond. To find this rule, however, you need to go to another opinion, SC10– 2299, July 12, 2012, 37 Fla. L. Weekly S536. This requirement was effective October 1, 2012.

In the past, the mailbox rule didn't apply to service by facsimile or hand delivery. Many lawyers who wanted to avoid the mailbox rule would serve the paper by mail and facsimile

Under new rule, RJA 2.516, service by e-mail is required, thereby triggering the mailbox rule. However, 2.516(b)(2) allows "[i]n addition to, and not in lieu of, service by e-mail, service may also be made upon attorneys by [facsimile and hand delivery]." RJA 2.516(b)(1) then provides "[w]hen, in addition to service by e-mail, the sender also utilizes another means of service provided for in subdivision (b)(2), any differing time limits and other provisions applicable to that other means of service control." If you trace these rules from sub-part to sub-part, it appears that if you serve a document, as required, by e-mail and also serve that same document by fax, the mailbox rule is not applicable. This is the same result previously applicable if you served by regular mail and by facsimile.

Once you have identified all of the primary and secondary e-mail addresses for all other counsel (and any designating non-represented parties), in Microsoft Outlook, you can create a "group" (previously known as a "distribution list"). Addressing the service e-mail to the group actually sends it to each e-mail address in the defined group. See the title "Other material on e-mail service and e-filing" at the end of this article for information on how to obtain instructions to create a service group for each separate matter.

Some discussion is required regarding temporal matters related to facsimile service. Prior to January 1, 2011, fax service after 5:00 p.m. (civil procedure rules) or 4:00 p.m. (probate rules) was considered served the next business day. Rules 1.080(b) and 5.420(b). As of January 1, 2011, the civil procedure rule was (quietly) changed to provide that service by facsimile at or before 11:59 p.m. is service on that day. The probate rule remained unchanged that service after 4:00 p.m. was service on the next business day. Neither triggered the mailbox rule, 1.090(e) or 5.042(d).

Now that you know these service rules (that you may not have known in such detail before), forget them. The rules have changed!

New facsimile and hand delivery service rules

First, probate rule 5.041(b), including the provision that made facsimile delivery after 4:00 p.m. service on the next business day, has been folded into RJA 2.516 and no longer applies. Secondly, civil procedure rule 1.080(b) that made facsimile delivery up until 11:59 p.m. service on that day, and avoided the mailbox rule, has met the same fate.

You ask, "OK what are the rules now?"

If you serve by facsimile or hand delivery after 5:00 p.m. (probate or civil), service is "deemed to have been made by *mailing* on the date [the fax is complete or the date of hand delivery.]" (Emphasis supplied.) RJA 2.516(b)(2)(F). (Both delivery by fax or by hand are considered "delivery" for purposes of subdivision (F) of the rule and are treated the same.) If your fax concludes after 5:00 p.m. (or hand delivery occurs after 5:00 p.m.), you might assume you are considered to have served on the next business day (and the time for response begins to run that next day) but you would be wrong. Service is complete on the day of delivery, regardless of the time delivered (RJA 2.516(b)(2)(F)), but the mailbox rule is triggered and an additional 5 days is added to the response time. RJA 2.514(b). In this instance, nothing has been gained over regular e-mail service by faxing if the fax concludes, or by hand delivery if that delivery occurs, after 5:00 p.m.

An interesting question then arises. If you now realize the fax service went beyond 5:00 p.m. and the mailbox rule has been triggered for that service, may you now re-serve the next day by fax before 5:00 p.m. (assuming it is a business day) and thereby avoid the mailbox rule? There are a number of good arguments on both sides of that question and the answer is unresolved, and certainly beyond the already-lengthy scope of this article.

Service by facsimile still requires the same cover sheet required by the previous rule. RJA 2.516(b)(2)(E).

E-mail format required

Like a fax cover sheet, the rule prescribes a specific format for the host e-mail that serves a court document. RJA 2.516(b)(1)(E)

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First, the e-mail message must contain the subject line, "beginning with the words 'SERVICE OF COURT DOCUMENT' in all capital letters, followed by the case number of the proceeding in which the documents are being served." More than one document may be served in a single e-mail.

There is no specification whether the local case number or the uniform case number (UCN) consisting of 20 characters, is the required format. It is the author's opinion that either should meet the requirements of the rule. The suggested format is the format shown on the court document attached to the e-mail.

Next, the body of the e-mail must also meet specified rule requirements. It must identify:

- the court in which the proceeding is pending,
- the case number (also in the subject line),
- the name of the initial party on each side,
- the title of each document served with that e-mail, and
- the sender's name and telephone number.

The "title of each document" is not the computer name of the file you serve, but rather the title of the document served as shown in the document caption.

See the title "Other material on e-mail service and e-filing" at the end of this article for information on how to obtain the author's staff memorandum outlining the requirements for service e-mail.

The size of the e-mail, together with attachments, may not exceed five megabytes in size. If the size of the e-mail is greater, it must be divided and sent as separate emails, none of which exceed that limit. The size of the attachments is shown next to the name of the attachment in the unsent e-mail. You can determine the total size of the e-mail and attachments by sending it to yourself, if your e-mail listing window is set to display the size of each e-mail.[4]

Signing court documents and service copies

An attorney is personally required to sign each court document. RJA 2.515. If the document is electronically served, the format of that signature on the served copy may be "/s/ [attorney's name]." The fact that the format of the signature may be typed as opposed to handwritten does not eliminate the requirement that the attorney personally sign the document. In that instance, the attorney would have to be the person to type the /s/.

Although the /s/ format is allowable for service, the nearly-universal format for service (and filing) of a court document is a PDF scan of the document actually signed by hand by the attorney. An electronic reproduction (scan) of the signed document may be filed. RJA 2.515(c)(1)(B).

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Of course, this requires the attorney's office to have scanning capability. This is very common in most offices, even smaller ones. The cost of basic hardware and software is equal to a few billable hours. If there is an impediment, it is the technical skill involved in selecting, installing and maintaining the equipment.

RJA 2.516(f) prescribes the new form of service certificate which is

> I certify that a copy hereof has been furnished to (here insert name or names and e-mail or other addresses used for service) by (e-mail) (delivery) (mail) (fax) on _____(date)_____
>
> _____
> Attorney

E-mail service of court orders

The court may serve any order or judgment by e-mail to all attorneys and to all parties not represented by an attorney who have designated an e-mail address for service. RJA 2.516(h)(1). However, as a practical matter for the foreseeable future, since the clerk in most counties is unlikely to maintain a database of e-mail addresses for the court to use, the court will not be utilizing e-mail on a regular basis for this purpose.

Also, the court or court staff should not be copied on regular e-mail service to other attorneys absent a specific request.

Mandatory e-filing

Next is the topic of e-filing.

E-filing has been mandated to begin for the civil, probate, family and small claims trial court divisions as of April 1, 2013 and for the criminal, traffic and juvenile divisions on October 1, 2013. The Florida Supreme Court and other appellate courts were mandated to begin accepting e-filing on October 1, 2012; however, on September 19, 2012, the Court by order in its case number SC10-399 (e-filing), postponed the start of mandatory e-filing to December 1, 2012 for the Supreme Court and April 1, 2013 for the courts of appeal. Optionally, any district court of appeal clerk who wishes to may accept electronic filing before that date. The date by which clerks were required to transmit the record on appeal electronically has been postponed from December 1, 2012 to January 1, 2013.[5]

If you have not registered with the ePortal Authority, you may do so at https:// www.myflcourtaccess.com/. You are encouraged to do so as soon as possible. Only lawyers may register and all registrants will be checked against The Florida Bar membership roster.[6]

The professional ethics committee of The Florida Bar very recently approved a draft staff opinion indicating that a lawyer may grant the use of his or her ePortal credentials (registration) to a supervised assistant and filing by the lawyer, personally, is not required. This authority does not extend to signing a court document or a certificate of service. As this article is written, the Board of Governors has not met to consider this recommendation.

E-filing is not covered here in detail. A further article, seminars and webinars will be produced and presented by the Real Property, Probate and Trust Law Section as

Rider A. "Condominium Association Disclosure," a part of the Comprehensive Riders to the FR/BAR Residential Contract revised, effective 09/12

A copy of the new form, to be used immediately, has been posted on the RPPTL Section Website at http://rpptl.org/DrawNews.aspx?NewsArticleID=110 and also posted on the Residential Real Estate & Industry Liaison (RREIL) Committee homepage. Click on the committees tab at www.rpptl.org after logging in.

Rider A. was revised so that it complies with a statutory requirement, based on input that the FR/BAR Contract committee received from counsel for the Division of Florida Condominiums, Timeshares and Mobile Homes. The revision does not change any wording within the Rider; however, Paragraph 5 now also appears in **BOLD TYPE** with additional blank space added above the text to comply with FS Chapter 718.

The revised form is identified in the footer as "CR-1a Rev. 9/12." In any residential condominium sale and purchase transaction, this revised Rider A. should be used in lieu of the existing 2010 Rider A, inasmuch as the 2010 form does not have the text in Paragraph 5 in **BOLD** type. The copy of the revised Rider A., CR-1a Rev. 9/12, has been put on the Section website to inform you of the change and assist you until the new forms are available from FLSSI or your software vendor. You may download and use it in the interim should you so require. Please access same by visiting the RPPTL website.

the April 1, 2013 date for mandatory e-filing approaches.

Other material on e-mail service and e-filing

Since you are reading this article, you are most likely a member of the Real Property, Probate and Trust Law Section of The Florida Bar. Recently, Laird A Lile, Esq.– a former chair of our section and current Board of Governors member– and this author jointly prepared and presented a webinar on this topic. It was presented to section members at no charge, as another benefit of membership in this section, and had the highest registration of any seminar ever presented by The Florida Bar or any of its sections with over 1,800 registrants. (A replay of this webinar is available, also at no charge, at the section website, http://www.RPPTL.org in the member's section.)

The author has the following additional material that is relevant to e-mail service:

1. Form for designation of e-mail address.
2. Staff office memorandum for format for e-mail service.
3. Staff office memorandum on how to create an outlook distribution group for one-click e-mail service to multiple designated e-mail addresses.
4. Staff office memorandum on how to create a separate e-mail box so court document service emails are all copied into this e-mail box.

For PDF files of the above, visit: www.estatelaw.com and click the link "Lawyer's Login".

Our brave new e-world

It is a brave new electronic world into which the court and the judicial process are venturing. Practice as we have known it for a very long time is gone and replaced by something new. Whether it is wonderful or terrible is yet to be seen. Regardless of the judgments pronounced now and later, we are there.

In the words of William Shakespeare, spoken in Miranda's speech, modified only slightly to suit the context:

O wonder!
How many goodly creatures are there here!
How beauteous mankind is! O brave new e-world,
That has such electronic wonders in't.

William Shakespeare, The Tempest, Act V,
Scene I, ll. 203—6.

Endnotes:

1 4-1. CLIENT-LAWYER RELATIONSHIP

RULE 4-1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment –

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ...

2 *Pearlstein v. King,* 610 So.2d 445 (Fla. 1992); *Mendez-Perez v. Perez-Perez*, 656 So.2d 458 (Fla.1995); *Natkow v. Natkow*, 696 So.2d 315 (Fla. 1997).

3 While we're on the subject of bar rules violation trivia, did you also know that same rule requires you to use your "official Bar name . . . in the course of [your] practice of law." I would construe that mandate to mean, if the Bar has your middle name included in your registered official Bar name, you must use that (full) name on your business cards, the door to your office and your letterhead and court document signature block. Of course you may modify your official Bar name, but, "[t]he court must approve all official bar name changes." See Rule 1-3.3(b) of the Rules Regulating the Florida Bar.

4 For tips on compressing a large PDF file and search capabilities, go to the author's website, www.estatelaw.com and click on the link "Lawyer's Login."

5 According to the ePortal, some form of electronic filing is available for the following counties, although it may not be implemented for all divisions of the court: Alachua, Baker, Bay, Bradford, Brevard, Calhoun, Charlotte, Clay, (via Local System), Collier, Columbia, Duval, DeSoto, Escambia, Flagler, Franklin, Gadsden, Gilchrist, Glades, Gulf, Hamilton, Hardee, Hendry, Hernando, Highlands, Holmes, Indian River, Jackson, Jefferson, Lafayette, Lake, Lee, Leon, Liberty, Madison, Manatee, Marion, Martin, Monroe, Okaloosa, Okeechobee, Palm Beach, Putnam, Santa Rosa, Sarasota, St. John's, St. Lucie, Suwannee, Union, Volusia, Wakulla, Walton, Washington,

6 As of August 15, 2012 the ePortal reports 12,048 registered users and nearly 20,000 documents per month being filed through the ePortal. That number has been increasing sharply after midyear. Of the total e-filings so far in 2012, 43% were circuit civil, 21% family and 16% probate.

Florida Sustainable Development & Growth Management in a Post-DCA Era

Nicole C. Kibert, Carlton Fields, P.A., Tampa, FL
Submitted on behalf of the Development and Green Building Committee


N. KIBERT

Sustainable Development and specifically, green building is poised for continued growth in Florida. The most often-quoted definition of sustainable development is development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[1] Green buildings are resource efficient and consume far less energy and water than their predecessors. Fla. Stat. § 255.253(6) defines a "sustainable building" as "a building that is healthy and comfortable for its occupants and is economical to operate while conserving resources, including energy, water, and raw materials and land, and minimizing the generation and use of toxic materials and waste in its design, construction, landscaping, and operation."

In spite of the recent recession, the green building trend continues to gain momentum and is projected to achieve robust gains for the foreseeable future. With this opportunity for growth, however, come the hurdles of untested legal obstacles. Navigating these uncharted waters can be challenging as a multitude of governmental entities converge to regulate an area of law still in its infancy. It is critical to understand the underlying legal and technical issues associated with green building and sustainable development as this market segment expands and also how growth management and green building intersect at the local government level.

Commencing with the 1985 Local Government Comprehensive Planning and Land Development Regulation Act, Florida growth management was directly managed by the state executive and legislative branches. That all changed in 2011 when growth management and government reorganization legislation terminated the Department of Community Affairs ("DCA") and transferred the surviving growth management functions to the newly created Division of Community Development within the new Department of Economic Opportunity ("DEO"). As of October 1, 2011, DEO operates the State Land Planning Agency to administer Florida's local government comprehensive planning, DRI and other growth management programs.

While state oversight of local planning is still mandated in select areas, most comprehensive plan amendments only receive comments from and can be challenged by the DEO when proposed plan amendments have adverse impacts to important state resources and facilities. Additionally, the burden of proof has changed in most third-party challenges to plan amendments to the "fairly debatable" test. This means that if the issue is subject to fair debate, the decision of the local government is upheld. The 2011 legislation also repeals state mandates for transportation, education and parks and recreation concurrency making these elements optional. This new flexibility on concurrency and lighter burden of proof has given local governments a greater opportunity to regulate development impacts on their communities. While many local governments have indicated a desire to continue utilizing some form of concurrency, others have indicated a desire to abandon concurrency. Though any analysis at this point is premature, the legacy of the 2011 Florida legislative session may be to provide the local government empowerment necessary to regulate growth management more comprehensively on a local level, including by directly addressing sustainable development.

Since 2009, I have annually compiled an index containing excerpts from Florida municipal codes that address sustainable development through green building, low impact development, and renewable energy, including Property Assessed Clean Energy (PACE) programs. Please visit the complete index posted here: http://www.carltonfields.com/Index-of-Sustainable-Development-Provisions-in-Florida-Municipal-Codes/. In the past four years, Florida local governments have enacted an increasing number of green development initiatives. As of the 2012 update, 94 out of the 324 (29 percent) Florida local governments surveyed had enacted some form of sustainable development legislation. To encourage green development, these municipalities offer varying types of incentives to developers constructing new buildings or retrofitting existing buildings to make them more sustainable. The most commonly utilized programs take the form of tax incentives (credits, deductions, and exemptions), permitting fee waivers, density bonuses, and expedited approval processes. The most innovative programs integrate other low-cost inducements such as marketing and publicity incentives to encourage adoption. Even where such incentives have not yet been codified, increasing emphasis on such values is apparent. Some local governments have incorporated definitions of green building terms in preparation of future legislation. Additionally, numerous local governments have appointed "green task forces" or promised green initiatives in their comprehensive plans. Time will tell how many Florida local governments will adopt sustainable development provisions as a response to community demand rather than state oversight. Please also visit the committee blog at http://floridagreenbuildinglaw.com/.

Endnotes:

1 World Commission on Environment and Development, Our Common Future, 1987

Gathering Support for the Supporting Organization: The Basics

By Lindsay A. Roshkind, Esq. and George D. Karibjanian, Esq
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It is not uncommon for an estate planning attorney to experience the following: wealthy client would like to engage in charitable estate planning techniques but has no preferred charity to include as part of such techniques, or is charitably inclined but desires to utilize a public charity while still maintaining involvement with the decision-making authority as to where donated funds are utilized. Often the failure to satisfy either of these limitations leaves the client in a bind and often charitable planning is rejected. For such clients, § 509(a)(3) of the Code[1] provides a solution – a public charity known as the "Supporting Organization."

A Supporting Organization is, in essence, a charitable organization that chooses one or more specified charitable organizations[2] (referred to in the Code as "supported organizations," but in order to avoid confusion, such organizations shall be referred to herein as "Recipient Charities") to support. Another way to informally view a Supporting Organization is as a form of "'Public' Private Foundation" in that the donor can influence the decisions of the organization as with a private foundation but still achieve public charity status. The support provided by the Supporting Organization can be either payments to or for the use of, or providing services or facilities for, or engaging in charitable activities that further the exempt purpose of the Recipient Charity. This article will provide a brief explanation of Supporting Organizations and the basic rules regulating these entities.

Background

To qualify as a Supporting Organization, three tests must be satisfied, to wit: the "Organizational and Operational Test," the "Relationship Test," and the "Control Test."

The Organizational and Operational Test is satisfied if the Supporting Organization is organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified public charities described in §§ 509(a)(1) or (2).[3]

The Relationship Test is satisfied if the Supporting Organization is, (1) operated, supervised, or controlled by; (2) supervised or controlled in connection with; or (3) operated in connection with one or more public charities described in §§ 509(a)(1) or (2).[4]

Finally, the "Control Test" is satisfied if the Supporting Organization is not controlled directly or indirectly by one or more "disqualified persons"[5] other than foundation managers and other than one or more public charities described in §§ 509(a)(1) or (2).[6]

Explanation of the Organizational and Operational Test

The "Organizational and Operational Test" is composed of two separate tests – an "Organizational Test" and an "Operational Test."

To satisfy the Organizational Test, the Supporting Organization's Articles of Incorporation must, (1) limit the purpose of the Supporting Organization to benefiting, performing the functions of or carrying out the purposes of one or more public charities; (2) not expressly empower the organization to engage in other activities which are not in furtherance of the organization's purpose; (3) state the specified Recipient Charity on whose behalf such organization is to be operated; and (4) not expressly empower the organization to operate to support or benefit any organization other than the specified Recipient Charities.[7]

To satisfy the Operational Test, the Supporting Organization must engage solely in activities which support or benefit the Recipient Charity either by providing monetary contributions, services or facilities to the Recipient Charities or to individual members of the charitable class benefited by the specified Recipient Charity. If, however, any part (this is interpreted literally – there is no *de minimis* exception) of the Supporting Organization's activities is in furtherance of a purpose other than supporting or benefiting one or more specified Recipient Charities, the Supporting Organization will not be regarded as being operated exclusively for the benefit of the Recipient Charity.[8]

Explanation of the Relationship Test

The Relationship Test is satisfied if the Supporting Organization is a Type I, Type II or Type III Supporting Organization. The categorization of the Supporting Organization depends on the closeness of the relationship with the Recipient Charity. In general, the charitable "Types" can be described as follows:[9]

- A Type I Supporting Organization is operated, supervised, or controlled by one or more Recipient Charities and is described as a parent/subsidiary relationship with the Recipient Charity;
- A Type II Supporting Organization is supervised or controlled in connection with one or more Recipient Charities and is described as a brother/sister relationship with the Recipient Charity; and
- A Type III Supporting Organization is operated in connection with one or more Recipient Charities and is either a functionally integrated Type III Supporting Organization or a non-functionally integrated Type III Supporting Organization.

Explanation of the Control Test

Although the Supporting Organization may not be controlled by disqualified persons, the donor is not prohibited from participating as a director, officer or trustee of the

Supporting Organization as long as the donor does not control the decisions made by the Supporting Organization or have control over the organizations assets. This is in contrast to both public charities and private foundations, as in the public charity context, the donor generally does not have any control or influence over how the donated assets are used, and in the private foundation context, the donor generally controls the private foundation and thus may retain control over the donated assets.

A Supporting Organization is consider "controlled" if the disqualified persons, by aggregating their votes or positions of authority, may require such organization to perform any act which significantly affects its operations or may prevent such organization from performing such act.[10] Accordingly, in drafting the Supporting Organization's Articles of Incorporation and Bylaws, it is important to consider who has voting control and who will be making the day to day decisions. If the voting power of the disqualified persons is 50% or more of the total voting power of the organization's governing body or if one or more of such persons has the right to exercise veto power over the actions of the organization, the Supporting Organization will be considered to be controlled by one or more disqualified persons.[11] All of the facts and circumstances will be considered in determining whether a disqualified person does in fact directly or indirectly control an organization.

Return Requirement and Prohibited Transaction Rules

Since the adoption of Title XII of the Pension Protection Act of 2006 (the "PPA"),[12] a Supporting Organization is required to file with the Internal Revenue Service (the "IRS") an annual Form 990, Return of Organization Exempt from Income Tax, on which the organization lists the Recipient Charities, indicates the type of Supporting Organization and certifies that the control requirement is satisfied.[13]

Additionally, unlike private foundations, Supporting Organizations are generally not subject to excise taxes on prohibited transactions. After the enactment of the PPA, however, certain Supporting Organizations may be subject to the tax on excess business holdings under § 4943 and to the tax on excess benefit transactions under § 4958. These rules should be carefully reviewed to avoid the imposition of potentially immense excise taxes.

Summary Chart

The chart that follows as an addendum to this article highlights the differences between public charities, non-operating private foundations and the different types of Supporting Organizations.[14]

Conclusion

As previously discussed, a Supporting Organization allows a donor to continue to be involved with the donated assets either as a director, officer or trustee of such organization and is not subject to the majority of the strict excise tax rules that apply in the private foundation context. In addition, the Supporting Organization is a public charity and is therefore entitled to the maximum income tax deductibility limitations pursuant to § 170(a). Accordingly, the Supporting Organization, although not widely known, may provide a good alternative for donors considering charitable planning.

Endnotes:

1 All references in this Article to the "Code" shall refer to the Internal Revenue Code of 1986, as amended, and, unless otherwise specified, all statutory references shall be to Code sections.

2 Pursuant to § 509(a)(3), the Recipient Charity must be an organization described in §§ 509(a)(1) or 509(a)(2). Organizations described in § 509(a)(1) are the typical organizations that people associate with when they think of charities – a church or a convention or association of churches, certain educational institutions such as colleges and universities, hospitals and medical research organizations, governmental units, including states, possessions of the United States or any political subdivision of either of the foregoing, the United States or the District of Columbia and private foundations. Organizations described in § 509(a)(2) are organizations which normally receive more than one-third of their support in each taxable year from any combination of gifts, grants, contributions or membership fees, and gross receipts from admissions, sales of merchandise, performance of services or furnishing of facilities, in an activity which is not an unrelated trade or business as long as the support is not from prohibited sources.

3 § 509(a)(3)(A).

4 § 509(a)(3)(B).

5 For this purpose, "disqualified persons" is defined in § 4946.

6 § 509(a)(3)(C).

7 *See generally* Treas. Reg. § 1.509(a)-4(c) and (d).

8 *See* Treas. Reg. § 1.509(a)-4(e)(1).

9 A more detailed explanation of the charitable "Types" is beyond the scope of this Article; a detailed description of the "Types" is found generally in *See* Treas. Reg. §§ 1.509(a)-4(f) and (g). Each "Type" has specific requirements that must be satisfied for the organization to qualify as a Supporting Organization. These rules should be reviewed carefully before proceeding with this type of charitable planning.

10 Treas. Reg. § 1.509(a)-4(j)(1).

11 *Id.* If the board of the Supporting Organization is composed of five directors, none of whom has a veto power over the actions of the organization and no more than two directors are at any time disqualified persons, such organization will not be considered to be controlled directly or indirectly by one or more disqualified persons by reason of this fact alone. *Id.*

12 Pub. L. 109-280, 120 Stat. 780 (2006).

13 *See* § 6033(l); Instructions to Form 990, Return of Organization Exempt from Income Tax, *available at*: http://www.irs.gov/pub/irs-pdf/i990.pdf. *See also* Report to Congress on Supporting Organizations and Donor Advised Funds, December 2011, *available at* http://www.treasury.gov/resource-center/tax-policy/documents/supporting-organizations-and-donor-advised-funds-12-5-11.pdf. The Supporting Organizations exempted from filing a Form 990 are the following: (1) an integrated auxiliary of a church described in Treas. Reg. § 1.6033-2(h); (2) the exclusively religious activities of a religious order; or (3) an organization, the gross receipts of which are normally not more than $5,000, that supports an § 501(c)(3) religious organization.

14 This chart was obtained from the Report to Congress on Supporting Organizations and Donor Advised Funds, *see supra note 13*.

15 Corporations may also receive a charitable contribution deduction which is limited to 10% of taxable income. *See* § 170(b)(2) and the Report to Congress on Supporting Organizations and Donor Advised Funds, *see supra note 13*.

16 *See* Payout Requirements for Type III Supporting Organizations That Are Not Functionally Integrated, 74 Fed. Reg. 48672 (Sept. 24, 2009). The proposed regulations are to be effective on the date of publication of final regulations. *Id*. See *also* Report to Congress on Supporting Organizations and Donor Advised Funds, *see supra note 13*.

continued, next page

Type of Charity	General Charitable Contribution Deduction Limitation for Individuals	Donor Control	Annual Distribution Requirements	Excise Taxes on Organization and/or Manager
Public Charity - §§ 509(a)(1) and 509(a)(2)	Cash: 50% of Adjusted Gross Income ("AGI") Capital Gain Property: 30% of AGI	Donors may, but generally do not, control the organization. Donors may offer non-binding advice on investment and distribution of assets.	Medical research organizations must expend at least 3.5% of fair market value ("FMV") of assets for or devote more than 50% of assets to the active conduct of medical research.	On excess benefit transactions, excessive lobbying and political expenditures
Type of Charity	**General Charitable Contribution Deduction Limitation for Individuals**	**Donor Control**	**Annual Distribution Requirements**	**Excise Taxes on Organization and/or Manager**
Non-Operating Private Foundations	Cash: 30% of AGI Capital Gain Property: 20% of AGI	Donor may control the organization.	Must expend 5% of FMV of assets not devoted to charitable use. Grants made to non-functionally integrated Type III Supporting Organizations and certain other Supporting Organizations are not qualifying distributions.	On acts of self-dealing with disqualified persons, investment income, failure to meet the mandatory distribution requirement, excess business holdings, jeopardizing investments, taxable expenditures, and political expenditures.
Type I Supporting Organization	Cash: 50% of AGI Capital Gain Property: 30% of AGI	Donor may NOT control the Supporting Organization Supporting Organization is controlled by its Recipient Charity.	None	On excess benefit transactions, excessive lobbying and political expenditures.
Type II Supporting Organization	Cash: 50% of AGI Capital Gain Property: 30% of AGI	Donor may NOT control the Supporting Organization Supporting Organization is controlled by persons who control its Recipient Charity.	None	On excess benefit transactions, excessive lobbying, political expenditures and excess business holdings if the Supporting Organization accepts a contribution from a donor who controls a Recipient Charity.
Type of Charity	**General Charitable Contribution Deduction Limitation for Individuals**	**Donor Control**	**Annual Distribution Requirements**	**Excise Taxes on Organization and/or Manager**
Functionally Integrated Type III Supporting Organization	Cash: 50% of AGI Capital Gain Property: 30% of AGI	Donor may NOT control Supporting Organization. Supporting Organization is NOT controlled by its Recipient Charity.	None	On excess benefit transactions, excessive lobbying and political expenditures.
Non-Functionally Integrated Type III Supporting Organization	Cash: 50% of AGI Capital Gain Property: 30% of AGI	Donor may NOT control the Supporting Organization. Supporting Organization is NOT controlled by its Recipient Charity.	Must distribute 85% of net income to Recipient Charities and meet an attentiveness test. Proposed regulations would revise the payout requirement to 5% of the FMV of non-exempt use assets.	On excess benefit transactions, excessive lobbying, political expenditures and excess business holdings

Construction Contracts Are Greener Thanks to the AIA SP Series

Scott P. Pence and Nicole C. Kibert, Carlton Fields, P.A., Tampa FL
Submitted on behalf of the Development and Green Building Committee

Green buildings are the application of sustainable development in the construction industry. Buildings have a tremendous impact on the environment, and reducing the energy consumption of U.S. buildings is a major factor in reducing climate impact and reaching energy security. Accordingly, green building standards continue to be innovated particularly with regard to energy efficiency. The Energy Independence and Security Act of 2007 that went into effect on December 9, 2010, included green building requirements and provisions for residential, commercial, and federal buildings as well as schools. For example, the bill required that federal agencies lease space in buildings that have earned the Energy Star label in the most recent year with only a few, narrow exceptions. It also created an Office of Commercial High Performance Green Buildings in the Department of Energy to encourage energy-efficient building, as well as providing various grants for energy-efficient improvements to school buildings. In February 2011, President Obama launched the Better Buildings Initiative, which aims "to improve energy efficiency in commercial buildings across the country."[1] The Initiative has three central objectives: (1) achieve a twenty percent improvement in energy efficiency by 2020, (2) reduce companies' and business owners' energy bills by about $40 billion per year, and (3) save energy by reforming outdated incentives and challenging the private sector to act.[2]

The American Institute of Architects ("AIA") is the producer of the oft-used construction contract forms. In May 2012, AIA released a new series of documents for use with a sustainable construction project (the "SP Series").[3] The SP Series is comprised of the following five forms that are each alternate versions of their "conventional family" counterparts: (1) A101–2007 SP, Standard Form of Agreement Between Owner and Contractor, for use on a Sustainable Project where the basis of payment is a Stipulated Sum ("Form A101 SP"); (2) A201–2007 SP, General Conditions of the Contract for Construction, for use on a Sustainable Project ("Form A201 SP"); (3) A401–2007 SP, Standard Form of Agreement Between Contractor and Subcontractor, for use on a Sustainable Project ("Form A401 SP"); (4) B101–2007 SP, Standard Form of Agreement Between Owner and Architect, for use on a Sustainable Project ("Form B101 SP"); and (5) C401–2007 SP, Standard Form of Agreement Between Architect and Consultant, for use on a Sustainable Project ("Form C401 SP"). The SP Series of forms represent relationships between the owner and contractor (i.e., Forms A101 SP and A201 SP), contractor and subcontractor (i.e., Form A401 SP), owner and architect (i.e., Form B101 SP), and architect and consultant (i.e., Form C401 SP).

The new SP Series creates a concept of developing a "Sustainability Plan,"[4] which is incorporated into the various contracts, as appropriate. That plan is intended to identify the following: (1) the "Sustainable Objective" which is "[t]he [o]wner's goal of incorporating Sustainable Measures into the design, construction and operations of the [p]roject to achieve a Sustainable Certification or other benefit to the environment, to enhance the health and well-being of building occupants, or to improve energy efficiency"[5]; (2) the targeted Sustainable Measures, which are defined as "specific design or construction element[s], or post occupancy use, operation, maintenance or monitoring requirement[s] that must be completed in order to achieve the Sustainable Objective"[6]; (3) strategies that will be implemented to achieve the Sustainable Measures; (4) the parties' respective obligations with respect to achieving the Sustainable Measures; (5) the manner in which achievement of each Sustainable Measure will be verified (e.g., through design reviews, testing, or other metrics); and (6) the required Sustainable Documentation, which "includes all documentation related to the Sustainable Objective or to a specific Sustainable Measure that [the parties are] required to prepare in accordance with [their respective contracts] … which may also include "documentation required by the Certifying Authority."[7] The "Certifying Authority"[8] is the entity that establishes the criteria for achieving the Sustainability Certification, which is defined as "the initial third-party certification of sustainable design, construction, or environmental or energy performance … that may be designated as the Sustainable Objective."[9]

In addition, each party now has various responsibilities and obligations with respect to these concepts under the SP Series forms. The owner is required to comply with the Sustainability Plan and the requirements of the Certifying Authority. The contractor, and any of its subcontractors (to the extent applicable to their work), are also required to comply with, and perform their work in accordance with, the Sustainability Plan. This includes notifying and meeting with the owner and the architect to discuss alternatives in the event conditions are identified or discovered that will

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adversely affect achievement of a Sustainable Measure. Additionally, the contractor and its subcontractors are required to prepare a waste management and disposal plan and to recycle, reuse, remove, or dispose of materials in accordance with that plan. The architect now has a "scope of sustainability services" that identifies the architect's specific responsibilities throughout the various phases of the project as they relate to the sustainability concepts. These new responsibilities include (1) providing the owner all forms required by the Certifying Authority to properly register the project; (2) conducting a sustainability workshop with the owner, architect, and their respective consultants to determine the criteria and elements to be included in the Sustainability Plan; (3) preparing the Sustainability Plan; (4) at various stages of the design process, incorporating into the design the Sustainable Measures identified in the Sustainability Plan; (5) during the construction phase, advising and consulting with the owner regarding the progress of the project toward achievement of the Sustainable Measures, and notifying the owner of known deviations from the Sustainability Plan based on the architect's visits to the project site; and (6) if the Sustainability Objectives include a Sustainability Certification, acting on behalf of the owner to ensure the project is properly registered, organizing and managing the Sustainability Documentation, and submitting the Sustainability Documentation to the Certifying Authority as required for the Sustainability Certification process.

Notwithstanding the fact that the SP Series identifies all of these various obligations and creates a scheme to further achieve the Sustainable Objectives, the SP Series forms each contains language effectively limiting the liability of the contractor, the architect, and their respective subcontractors and consultants, if those objectives are not achieved for some reason. For example, Forms A201 SP and A401 SP each make it clear that the contractor or subcontractor, as applicable, does not guarantee or warrant that the project will achieve the Sustainable Objective. Similarly, Forms B101 SP and C401 SP contain disclaimers indicating that, because achieving the Sustainable Objective is dependent upon many factors beyond the control of the architect or consultant, as applicable, those entities do not warrant or guarantee that the project will achieve the Sustainable Objective. Further, Form A201 SP expressly states that achievement of the Sustainable Objective is not a condition precedent to the achievement of substantial or final completion of the contractor's work. Finally, Forms A201

continued, next page

SP and B101 SP also include damages resulting from the failure of the project to achieve a Sustainable Objective, such as unachieved savings or lost financial or tax incentives, to the list of consequential damages waived by the parties. In other words, if the project fails to achieve the Sustainable Objectives or the Sustainability Certification, the contractor and architect, and their respective subcontractors and consultants, will not be liable to the owner for such failure or for any damages incurred by the owner as a result of such failure.

Lawyers drafting design and construction contracts should inquire specifically about the nature of the sustainable design elements of a project so that risk is allocated properly for experimental elements and certification promises are clearly documented with responsibility for necessary data collection and reporting allocated up front. In addition, if a building will require special expertise – for example, a structural engineer to design the building to support a green roof – the contract should provide for that type of specialist to be required. You may even want to negotiate the penalties for delays in the certification process, or for achieving lower certification levels than desired by the owner up front, so there is no protracted dispute later about the value of a silver LEED certification versus a platinum certification.

Endnotes:

1 http://www.whitehouse.gov/the-press-office/2011/02/03/president-obama-s-plan-win-future-making-american-businesses-more-energy

2 *Ibid*.

3 *See* http://www.aia.org/press/AIAB094809

4 *See* § 1.1.9.3, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.

5 § 1.1.9.1, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.

6 § 1.1.9.2, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.

7 § 1.1.9.5, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.

8 *See* § 1.1.9.6, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.

9 § 1.1.9.4, AIA Document A201-2007 SP, General Conditions of the Contract for Construction.

RPPTL Section Executive Council Meeting

~and~

32nd Annual Legislative and Case Law Update

The Breakers, Palm Beach • July 25-28th, 2012

By Jane L. Cornett, Esq. • Cornett, Googe & Associates, P.A. • Stuart, Florida

The Executive Council Meeting of the Real Property, Probate and Trust Law Section of The Florida Bar took place from July 25th through July 28th at The Breakers oceanfront hotel and resort in Palm Beach, Florida. As always, the block of rooms booked at The Breakers for attendees was completely filled. This location is always very, very popular with our members.

The meeting had a jumpstart on Wednesday afternoon with a seminar on Drafting Powers of Attorney.

Thursday started with meetings at 8:00 a.m. which didn't stop until 7:00 p.m. There were thirty (30) different meetings that occurred throughout the day, almost all of which were open to any member of the section. Section members are always encouraged to attend.

Friday was the legislative and case law update which was very well attended. Thursday evening saw a welcome reception from 6:30 p.m. to 8:00 p.m. on site at The Breakers, a second reception on Friday evening, and the Saturday evening dinner also took place at The Breakers. When you are in such a fabulous waterfront local, you want to take every opportunity to enjoy the view.

Saturday morning started bright and early at 8:00 a.m. with a substantial buffet breakfast for both the Real Estate and Probate Roundtables and then the Roundtable meetings concluded around 10:00 a.m. The Executive Council Meeting started promptly at 10:00 a.m. and was over shortly after noon allowing everyone a free afternoon before the excellent dinner that evening. Sunday morning offered a complimentary breakfast before the attendees headed home after an enjoyable and relaxing weekend.

Thank you to all sponsors!

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RPPTL Section Executive Council Meeting and 32nd Annual Legislative and Case Law Update

Chair-elect, Peggy Rolando with At-Large Member, Jennifer Jones

The Kelley twins, Sean with daughter Quinn and son Finn, and Shane with daughter Kaelin, looking forward to a wonderful weekend at The Breakers

Martin Auerbach, Lynn Crippen and Jim Russick between meetings

Travis Hayes, Carlos Batlle and Jack Falk at the hospitality suite

Legislative Update Co-Vice Chair, Stuart Altman and Program Chair, Robert Swaine, getting ready for the seminar presentations

John Dowd with Mike Bedke, William Parady and Salomi Zikakis, Kathy Neukamm and Alex Parady before the Friday evening dinner

Cathy and Mark Brown with Judge Patricia Thomas at the reception

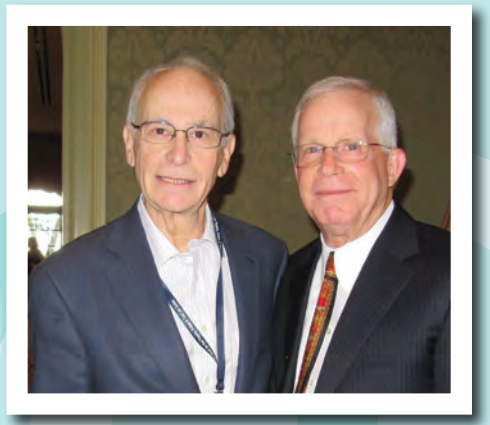
(L) Florida Lawyers Support Services' Sheila Brennan and Erin Brennan Chambers helping with the Legislative Update Seminar registration

(R) Commercial Real Estate Committee meeting – members attending in person and over speaker phone

More photos available on the Section website.

Attendees at the Legislative Update Seminar - the premier educational event of the year for Section members

Kris Fernandez, Mike Bedke and Charles (Chuck) Carver during a break from the seminar



Judge Mel Grossman and RPPTL Section Chair, Fletcher Belcher taking a break between seminars

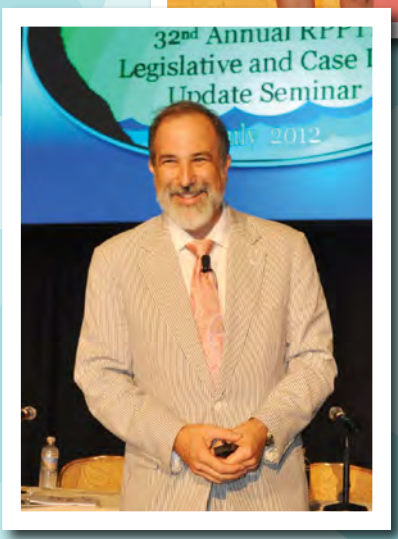
For more photos, log in to www.rpptl.org, Section Information tab

Past Chair, Sandy Diamond, giving a presentation on Judicial Merit Retention at the seminar

Interview with our Section lobbyist, Peter Dunbar, one of several informational interviews of Section members for future publication in the Section website

Rich and Wendy Caskey enjoying the event with son, Parker, and daughter, Emmie.

John Arthur Jones flanked by his two grandsons, Charles and Robert, enjoying the hospitality suite.



The always entertaining and informative review of real property cases by Michael Gelfand

Barry Spivey, Tami Conetta, and Debra Boje relaxing after a busy day.

Photos by Michael Gelfand and John Neukamm

Roundtables

Saturday, July 28th, 2012
Palm Beach, Florida

Prepared by Amber Jade F. Johnson, Esq., Maitland, Florida, and Jane L. Cornett, Esq., Stuart, Florida

The following briefly identifies for future reference some notable presentations at the Division Roundtables. For more information on Roundtables, see the Summer 2012 issue of ActionLine, Page 23.

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

Thank you to the Roundtable Sponsors: SunTrust and Stout Risius Ross, Inc. (SRR)

The meeting was called to order by the **Division Chair, Michael Dribin**.

The following action items, information item and committee reports were discussed at the Roundtable. The meeting began with **Debra Boje, Chair of the At Large Members Committee,** stating that the At Large Members Committee is willing to help with special needs/projects of any of the committees.

Action Items

Ad Hoc Committee on Jurisdiction and Service of Process - Barry F. Spivey, Chair: The committee proposed to adopt a legislative position to amend Sec.736.0202, Fla. Stat. The statute was not clear because attorneys were arguing that simply because a trustee had accepted duties that the statute gave the court jurisdiction and this was not necessarily the case. The proposal also would create a new Sec. 736.02023, Fla. Stat., and Sec. 736.02025, Fla. Stat., and repeal Sec. 736.0205, Fla. Stat., and Sec. 736.0807(4), Fla. Stat., effective July 1, 2013, if passed into law. The proposal is to revise provisions of the Florida Trust Code governing jurisdiction over nonresident trustees and beneficiaries in trust cases, adds a long arm statute specifying acts subjecting nonresidents to personal jurisdiction in cases involving trusts and provides for service of process in both *in rem* and *quasi in rem* cases involving trusts.

Guardianship and Power of Attorney Committee, Sean Kelley, Chair. There are several glitch items in the Florida Power of Attorney Act, Ch. 709, Fla. Stat., that the committee is working on correcting in a proposed legislative

See "Probate & Trust Division," next page

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

Thank you to the Roundtable sponsor: Fidelity National Title Group

The meeting was called to order by the **Division Chair, Michael Gelfand**.

The following action item and information items were discussed at the Real Property Roundtable in addition to various committee activity reports from the committee chairs:

Action Item

Real Property Problems Study Committee - S. Katherine Frazier, Chair - presented curative amendments to Sec. 95.231, Fla. Stat. The proposal from the committee was approved unanimously by all present.

Information Items

Florida Land Trust Act Amendments – Real Estate Entities and Land Trusts Committee - Wilhelmina ("Willie") Kightlinger, Chair. Willie thanked all her committee members and indicated the draft is not yet completed but expects to have it ready for voting at the Key Biscayne meeting in September. Willie stated that the proposal is a significant rewrite and hopefully a clarification. The rewrite is in response to concerns expressed by practitioners as well as some court decisions. Willie stated that the rewrite includes protection for existing land trusts and that language has been added to deal with time shares under Sec. 721, Fla. Stat. Willie also indicated that other committees with a stake in this matter have indicated their approval.[1]

Insurance and Surety Committee - Wm. Cary Wright, Chair. Re the National Flood Insurance Program (NFIP): Cary indicating that the intent of the committee is to provide a regular newsletter by email to committee members and any others with an interest in receiving it. The committee

See "Real Property Division," next page

PROBATE & TRUST DIVISION

bill. Note: this action item was sent back to the committee for further work.

Information Item

Guardianship and Power of Attorney Committee, Sean Kelley, Chair. Also, the committee made a report regarding the RPPTL Section's application to the Florida Supreme Court regarding the 9th Judicial Circuit's Administrative Order 2011-12 dealing with professional guardians. The Administrative Order set a standard fee, set time limits, and directly contradicted the guardianship statutes in several places. The RPPTL Section applied to the Florida Supreme Court to have the Court determine whether this was actually a local rule as opposed to an administrative order. If it is a local rule, then the Florida Supreme Court would have had to propose the rule, there would be input from the bar and a dialogue regarding it. The Court referred the matter to their Local Rules Advisory Committee, who gave its recommendation: it is a local rule. It is expected the Florida Supreme Court will rule that it is a local rule. This would make Administrative Order 2011-12 invalid. This is only the second petition like this in Florida history (the first one lost). The Court may also make a request for some legislative changes in this area.

Committee reports:

Ad hoc Committee on Creditor's Rights – Angela Adams, Chair - is working on a procedure to use decedent's non-probate non-exempt assets to pay creditors. The most recent copy is on the committee's RPPTL webpage. This will be an information item at the Key Biscayne Executive Council meeting and will be an Executive Council action item in Tallahassee.

Ad hoc Guardianship Law Revision Committee – David Brennan, Chair – is taking an overall look at revising the guardianship law.

Ad hoc Study Committee on Estate Planning Attorney Conflict of Interest – William Hennessey, Chair – is working on the issue of lawyers naming themselves as fiduciaries in documents. The comments to the rules state that if the lawyer's professional judgment will be impacted by their fee, then it is treated as a conflict, but does not mandate the lawyer to treat it as a conflict so this leaves a lot of room for interpretation. *If you have views/thoughts communicate them to Mr. Hennessey*.

Ad hoc Committee on Personal Representative Issues – Jack Falk, Chair – discussed the Florida Supreme Court's *Hill v Davis*, 70 So. 3d 572 (Fla. 2011) decision

See "Probate & Trust Division," next page

REAL PROPERTY DIVISION

also plans to present CLEs and will address all kinds of insurance issues, except for title insurance. Cary invited folks to join the committee if interested. Cary also provided a legislative alert on the National Flood Insurance Program extension and reforms. A copy of that alert was attached to the minutes. Trey Goldman discussed the alert explaining that flood insurance has been extended by Congress for another five (5) years. That is good news since it was scheduled to expire September 30, 2013. Trey did emphasize, however, that rates are going up because ever since Hurricane Katrina, flood insurance has been running at an approximate $18 billion deficit and most current rate subsidies will be eliminated by the end of this year. A number of members present had questions and Trey pointed out that there are links on the alert to help find more information.[2]

Condominium and Planned Development Specialization – Certification Condominium & Planned Development Committee - Steve Mezer, Chair. Steve reported on the proposal for Board Certification in the area of Condominium & Planned Development Law. That proposal is moving forward and the Condominium & Planned Development Committee hopes to have a final proposal for approval in the near future.[3]

Endnotes:

1 Update: The proposal as presented at the Key Biscayne meeting on Sept. 14, 2012, was approved by the Executive Council of the RPPTL Section.

2 A link to the Insurance and Surety Committee's newsletters and this legislative alert can be found on the committee's webpage on the RPPTL Section's website at www.rpptl.org

3 Update: The proposal for support of the Sub-Specialty Certification in the area of Condominium & Planned Development Law as presented at the Key Biscayne meeting on September 14, 2012, was approved by the Executive Council of the RPPTL Section.

PROBATE & TRUST DIVISION

regarding Sec. 733.212, Fla. Stat., in which there is a 3 month period to object. There is a huge exception, if fraud, concealment, or wrongdoing. There is a concern that a lot of people who contest a Will, will claim fraud and then have a big loophole in which to not comply with the 3 month period. The committee is working on amending the statute with some kind of repose, but with an ultimate cut off.

Asset Protection Committee - Brian Sparks, Chair – is working on an upcoming seminar. They discussed Barry Nelson's "Bacardi on the Rocks" Florida Bar Journal article.

Attorney/Trust Officer Conference Committee – Jack Falk, Chair - is planning the next conference and *asking for all to help design the logo and the winner will get a free conference entry next year.*

Digital Assets and Information Study Committee – Travis Hayes, Co-Chair. This is a new committee. It reviewed all other state statutes regarding digital assets and liked the thorough and comprehensive Oregon statute. The committee is reviewing all statutes that may be affected by this. *They are looking for new members especially from guardianship and banking backgrounds.* They are monitoring the Uniform Law Commission (a/k/a National Conference of Commissioners on Uniform State Laws), but it will not have anything until late next summer.

Estate and Trust Tax Planning – Elaine Bucher, Chair. The committee discussed a) tenants by the entireties legislation – still working on the details - it will be a 2014 item; b) family trust company legislation- will be a 2014 item and its next step is sending it to the Office of Financial Regulation (OFR) for their comments; c) working on UTMA (Uniform Transfers to Minors Act) legislation to change age to 25 if opt in, default is 21; and d) joint seminar with Asset Protection Committee coming up with very good speakers this November 30 in Tampa;

Guardianship and Power of Attorney Committee – Sean Kelley, Chair.

There are 3 potential action items for next meeting:

a) The committee is working on an issue with regards to the *Rothman v. Rothman,* 93 So. 3d 1052 (Fla. 4th DCA 2012) case out of Broward where 2 out of 3 members of the committee appointed to evaluate the petitioner twice found that the petitioner suffered no incapacity. Sec. 744.331(4), Fla. Stat., provides that a court shall dismiss the petition to determine incapacity under these circumstances but the lower court found the statute to be unconstitutional. The finding was appealed and the 4th DCA found that the statute was constitutional. This Section committee felt it was not the right result and that instead the statute should require the 3 examining committee members to agree or have to have a hearing.

b) Currently there is no confidentiality of minor's settlements in Florida, so there are concerns about kidnappings. The committee will be proposing a statute;

c) The committee discussed *Faulkner v. Faulkner*, 65 So.3d 1167 (Fla. 1st DCA 2011). The concern is if an incapacity petition gets dismissed prior to a hearing, there is no method to pay the examining committee members. The Section committee examined the procedures around the state and found some jurisdictions paying the examining committee members as expert witnesses under Sec. 29.004(6), Fla. Stat., so adopted this as a proposal to create Sec. 744.108(9), Fla. Stat., for payment of expert witness fees for providing expert witness testimony in a guardianship: The court can decide fees for guardians without expert testimony, but if the court allows the expert witness testimony, then the court shall allow for expert witness fees to pay them.

IRA, Insurance and Employee benefits Committee – Linda Griffin, Co-Chair. IRA: the committee looked at recently passed Sec 732.703, Fla. Stat., regarding a divorced spouse being eliminated as an IRA or life insurance beneficiary and will present in Key Biscayne a legislative proposal to cure one glitch – an improper reference to the trust code.

Insurance: the Healthcare Act was summarized and that there are 12 different new taxes in this Act.

Life insurance: the committee discussed employers who have employer owned life insurance. Sec. 101(j) of the Internal Revenue Code requires employers that have life insurance covering their employees to inform them they have the life insurance and to inquire whether they want to continue to maintain even if employee leaves the company.

Liaison with Elder Law Section – Sam Boone, Liaison. This committee is a) monitoring AHCA (Agency for Health Care Administration) for more guidance on the Affordable Care Act and how it affects our clients on issues such as aging at home versus relying heavily on assisted living facilities; b) reviewing first party special needs trust to try to bring them more in line with the most recent edition of the Social Security Administration's POMS (Program Operations Manual System) published in March providing for strict rules in processing claims such as the sole benefit rule which deals with issues such as compensating a relative and traveling with the beneficiary; c) monitoring rule-making at the Department of Children and Families to see that it complies with administrative procedures laws and participates in a Joint Task Force between the Elder Law Section and the Academy of Elder Law Attorneys;

PROBATE & TRUST DIVISION

Probate and Trust Litigation Committee – Tom Karr, Chair - is working on 2 items: a) finished the work on burden of proof in trust contests but looking to move the provisions to Chapter 731, Fla. Stat., which may raise some issues; b) regarding attorney fees and costs in Sec. 733.1064, Fla. Stat., and Sec. 733.1052, Fla. Stat., the committee wants to establish a standard when those fees/costs should be awarded and when it should be assessed from a beneficiary's share;

Probate Law and Procedure Committee – Tae Kelley Bonner, Chair – is working on: a) changes to creditor claims statute; and b) working on ART (artificial reproduction technology) children and their status for inheritance. *The Palm Beach subcommittee is working on this and would like more volunteers.*

Probate Rules Committee (a Standing Committee of the Florida Bar) –John Moran, Chair - discussed that all documents that are served must now be served by email, effective as of September 1, 2012. We should expect some glitches. Also, last September, 2011, there were changes to the probate rules regarding adversary proceedings. Prior to this change a motion for fees/costs had to be filed within 30 days. The change took it out, so that the 30 day timeframe did not apply. This caused confusion. It was intended that it apply to prospective actions but people thought it applied to fully litigated matters. On July 12, 2012, the Florida Supreme Court clarified that the probate rule, as changed in 2011, only applied to prospective proceedings on or after 9/28/11. As to those pending, it applied only to judgments/orders filed after that date.

Trust Law Committee - Shane Kelley, Chair – this committee has an information item at the Executive Council meeting today (will be action item at the next meeting) regarding land trusts, amending Sec 736.0102, Fla. Stat., and has another action item for the next Executive Council meeting, a fix to definitions for qualified beneficiary because no definition of distribute. The committee also discussed the *Bacardi v. White*, 463 So.2d 218 (Fla. 1985) case and will be forming a joint subcommittee with the Asset Protection Committee to determine if we need a statute.

Ad hoc Homestead Committee – Shane Kelley, Chair – discussed a new 2nd DCA case with significant homestead issues: *Geraci v. Sunstar EMS, 93 So. 3d 384 (*Fla. 2nd DCA 2012), decided June 27, 2012, by Judge Laughlin in Pinellas County. The case deals with a condominium unit under a 100 year long- term lease and whether it can be considered homestead for protection from forced sale. There are conflicting cases with regards to descent and devise. When the opinion becomes final, the committee may address it. The Real Property Division of the RPPTL Section has a big interest in this, as well as the Asset Protection Committee of the Probate and Trust Division.

Wills, Trusts & Estates Certification Review Course Committee – Rick Gans, Chair - next course April 5-6 in 2013 at Orlando Airport Hyatt

IRA, Insurance and Employee Benefits Committee - Howard Payne, Co- Chair. Insurance: This committee discussed that rates for flood insurance are increasing substantially over the next few years and old homes will be hit hard. The Property and Liability Insurance Committee of the Real Property Division is working on issues concerning an estate or trust owned house to consider whether a new type of insurance should be available for unoccupied homes. This is an information item from the Real Property Division of the RPPTL Section.

Be Careful What You Wish For– Gifts to Drafting Attorneys

By William T. Hennessey, Esq., Gunster, Yoakley & Stewart, P.A, West Palm Beach, FL


W. HENNESSEY

You spent your entire career striving to make the "right" choices and decisions – doing your best to practice with professionalism and integrity. Your mind races back to that fateful day several years ago when your long time client (who is not related to you) with a net worth in excess of $5 million stated that, in addition to other significant changes to be made to her will, she wished to leave you a $10,000 cash bequest. You are aware that the Florida Rules of Professional Conduct Rule 4-1.8(c) provides, in pertinent part, that, "a lawyer shall not prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to client" ("Rule 4-1.8(c)"), but, in this instance, with this particular client, you thought, "what's the harm?"

Now that the client has died and her will probated, the bequest to you has come into question. The other beneficiaries under the will are claiming that you procured the gift through undue influence or by breaching your fiduciary duties. Your integrity is being questioned and with your ticket to practice law on the line, all you have left is a litany of excuses.

"She insisted! I knew her for over 30 years! She had no children of her own. Her spouse passed away almost 20 years ago. She was like family! She spent holidays at my home. She loved my wife and kids! It's just a small gift really– a token in such a large estate! I told her to get separate counsel to prepare the document; but she wouldn't listen!"

You disclaim the gift thinking that the disclaimer will stop the undeserved attacks on your character. Unfortunately, the family still questions the validity of the document you prepared and your motives. You now find yourself defending a bar grievance filed against you. Your thoughts of "what's the harm?" seem like a distant memory. Your mind is now filled with "How did I let this happen? It wasn't worth it! I should have just said no. If only I had thought about the consequences!"

The reality is that once you prepare a testamentary instrument for a client under which you, the drafting attorney, are a beneficiary, it may be impossible to pretend that it never happened. Like Pandora's Box, it may be impossible to reseal the box and, more importantly, to keep the potential trouble lurking inside from wreaking havoc.

I believe that most lawyers reading this article are aware of the ethical implications of soliciting a substantial gift from an unrelated client or preparing an instrument making a substantial gift to the lawyer or the lawyer's family and would chose not to solicit such gift or draft said instrument. However, over the past two years, I have had the pleasure of serving as Chair of the Ad Hoc Estate Planning Conflicts Committee for the Real Property Probate and Trust Law Section of the Florida Bar. During this time, our Committee met with counsel for The Florida Bar to discuss the issue of lawyers drafting testamentary documents in which they are named as beneficiaries. We were surprised to learn that this is indeed a problem and that a growing number of lawyers every year are subject to disciplinary proceedings for violating Rule 4-1.8(c).

In most instances, the lawyers argue that they have done nothing wrong. They raise the above-referenced defenses and excuses. In many instances, the gift to the lawyer is not unnatural given the length and depth of the relationship between the lawyer and the client. The key problem for the lawyer is that the transaction is potentially tainted by a conflict of interest.

The issue of whether an attorney may draft a will in which he or she is named as a beneficiary is not a new or novel question. As explained by the Honorable Judge Lauren C. Laughlin in *Estate of Virginia Murphy,* Case 06-6744ES-4 (Fla. Cir. Ct. for Pinellas County, August 1, 2008), the prohibition on the scrivener of a will inheriting under it dates back to Roman law.[1] Rule 4-1.8(c) follows this historic proscription. Given the nature of the confidential relationship between a lawyer and a client, Rule 4-1.8(c) serves the important purpose of protecting the client from potential overreaching and impropriety by the lawyer by prohibiting the lawyer from preparing the instrument making the gift.[2]

Florida courts have determined that the violation of this Rule, however, does not render the gift to the lawyer void as a matter of law. As a consequence, a lawyer may violate this Rule, be disciplined accordingly and, under certain circumstances, is still entitled to retain the gift or bequest. In *Agee v. Brown*, 73 So.3d 882 (Fla. 4th Dist. Ct. App. 2011), the 4th District Court of Appeals reversed the trial court which had found that a gift to a drafting lawyer under a will was void as a matter of law because it violated Rule 4-1.8(c) and public policy. The *Agee* court held that the trial court had improperly "incorporated Rule 4–1.8(c) … into the statutory framework of the probate code," and that such an interpretation was erroneous as "[i]t is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature."[3] The court further noted that the "best way to protect the public from unethical attorneys in the drafting of wills . . . is entirely within the province of the Florida Legislature."[4]

The end result is that the allure of a potential gift for a client places the lawyer in an ethical dilemma, referred to in the *Murphy* decision as the "South Indian Monkey Trap."[5] As explained in *Murphy*:

The "South Indian Monkey Trap" was developed by

villagers to catch the ever-present and numerous small monkeys in that part of the world. It involves a hollowed-out coconut chained to a stake. The coconut has some rice inside which can be seen through the small hole. The hole is just big enough so that the monkey can put his hand in, but too small for his fist to come out after he has grabbed the rice. Tempted by the rice, the monkey reached in and is suddenly trapped. He is not able to see that it his own fist that traps him, his own desire for the rice. He rigidly holds on to the rice, because he values it."[6]

Tempted by the value of the bequest, the lawyer is placed in the position of potentially violating the ethical rule or ultimately letting go of the bequest.[7] The lawyer's dilemma is further complicated by the fact that Rule 4-1.8(c) only prohibits the lawyer from preparing a document which makes a "substantial" gift. What is not apparent is the meaning of the word "substantial;" does "substantial" depend on the net worth of the individual making the gift, the size of the gift to the lawyer in relation to other gifts in the plan, whether it is substantial to the lawyer, or some other standard? Is a $100,000 gift in the context of a $10,000,000 estate substantial? How about a $10,000 gift? By negative inference, Rule 4-1.8(c) would seemingly authorize non-substantial gifts to the drafting attorney, so in understanding said Rule, a meaning of "substantial" must be ascertained. The comments to said Rule do not provide significant guidance on the intended meaning of "substantial" beyond providing that "simple gifts" given at holidays or as tokens of appreciation are not prohibited.[8] The seemingly generic use of the word "substantial" can potentially create defenses in instances where attorneys have arguably engaged in overreaching. More importantly, it can entice a lawyer into thinking that, without fully considering all of the consequences, perhaps, for this client, in this instance, there is nothing wrong with a bequest to himself or herself.

In most situations, it is the beneficiaries who will challenge the gift to the lawyer based upon standard allegations of fraud, undue influence, and duress. This is precisely what happened in *Murphy*. In that case, the decedent's heir-at-law challenged gifts to the lawyer who drafted the decedent's will and the lawyer's legal assistant. The lawyer and the legal assistant were the sole residuary beneficiaries of the client's estate.

Like *Agee*, the *Murphy* court refused to find the gift void as a matter of law. Instead, the decedent's heir-at-law was forced to rely upon a claim for undue influence. The court noted the difficulties of proof which a contestant can face in such cases:

> The nature of the attorney-client relationship in matters testamentary is a particularly circumspect matter for the courts. The decisions that go into the drafting of a testamentary instrument are inherently private. Because the testator will not be available to correct any errors that the attorney may have made when the will is offered for probate, a client is especially dependent upon an attorney's advice and professional skill when they consult an attorney to have a will drawn. A client's dependence upon, and trust in, an attorney's skills, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorney's advice, guidance and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are among the most private to take place between an attorney and his client. 'The client is dealing with his innermost thoughts and feelings, which he may not wish to share with his spouse, children and other next of kin'.[9]

These difficulties of proof and the nature of the confidential relationship between a lawyer and client have caused courts and commentators to conclude that the lawyer must prove that the gift was free of undue influence by clear and convincing evidence.[10]

The trial court in *Murphy* ultimately set aside a series of wills benefitting the lawyer and paralegal notwithstanding the fact that Mrs. Murphy met with independent counsel each time that a new will was prepared increasing the share to her longtime counsel; in doing so, the court was not convinced that Mrs. Murphy understood the size of the gift that she was making to her lawyer, and, further, the court was troubled by the fact that the lawyer and paralegal seemed to have recognized that they were engaging in questionable behavior.[11] They had entered into an agreement which contained a "self-serving" statement that they had not breached their fiduciary duties and which provided that they would not sue each other for conflicts of interest in connection with Mrs. Murphy's estate planning, which the court called a document which "reeks of a consciousness of fraud" and compelling evidence that the perpetrators knew all of the elements of undue influence were present.[12]

One of the most interesting, as well as troubling, aspects of *Murphy* from the drafting lawyer's perspective is that the lawyer in *Murphy* likely believed that he was fulfilling his ethical obligations. Although the lawyer's office prepared and retained each of the client's wills, an independent lawyer met with Mrs. Murphy on each occasion when a new will was signed. This procedure seemingly satisfies a provision in the "Gift To Lawyers" comment to Rule 4-1.8, which provides, in general, that a lawyer may accept a substantial gift from a client under a testamentary instrument if the client is represented by independent counsel.

However, the facts and circumstances in the *Murphy* case were such that the court determined that the lawyer had still acted with a conflict of interest and breached his fiduciary duties to his elderly client. The court voided the bequest to the drafting attorney (who, as a result, was ultimately disbarred).[13] Beyond losing the gift, the lawyer's name and career were forever tagged with an asterisk.

continued, next page

Indeed, Judge Laughlin was placed in the unenviable position of meting out justice against an attorney who had, up to that point, served our profession honorably. The Order setting aside the Last Will placed a solemn epitaph on the lawyer's career:

> "[T]he attorney whose bequests are at issue in this case was himself sixty-eight years old and retired at the time of the [disputed] will. This court must acknowledge that [the attorney] has had an exemplary career in the legal profession. He enjoys a reputation as an honest professional and a civic-minded citizen of great integrity. For this reason, deciding the facts and issues in this case has been especially painful and troubling. The court cannot help but speculate on whether the lawyer made a cost/benefit analysis, weighing the risks of being charged with a disciplinary infraction (having no intention of continuing to practice law) against the economic benefits to be derived from the conduct."[14]

It is important to note that under Rules Regulating the Florida Bar, Rule 4-1.8(k), the prohibition on bequests to drafting lawyers extends to other lawyers in the same firm. Thus, a lawyer cannot avoid the conflict simply by requesting that his or her partner to prepare the document. In addition, as previously stated, Rule 4-1.8(c) applies to gifts by a client to persons "related to the lawyer," which it defines as, "…a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship."

There are countless situations where a gift to the drafting lawyer or the lawyer's family may appear natural given the nature or extent of the relationship. For example, beyond the situation of a longtime client of the lawyer, the lawyer or lawyer's spouse may have a life-long friend who wishes to provide them with a substantial testamentary gift. There is no ethical rule or statute in Florida prohibiting a lawyer from accepting an unsolicited inter-vivos or testamentary gift or which prohibits the client from making such a gift. However, regardless of the situation, it is important to be mindful of the ethical rule and the potential consequences of violating it. If an instrument must be prepared to effectuate a "substantial" gift to the client's attorney, Rule 4-1.8(c) requires the client to have independent counsel. Yet, even with independent counsel, the *Murphy* decision teaches us that the drafting lawyer may still be placed in the uncomfortable position of having to defend claims of undue influence and breach of fiduciary duty, to which the drafting lawyer must ask himself or herself whether any gift (regardless of whether inter-vivos or testamentary) is worth risking your livelihood and having your integrity questioned.

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Check out the new *ActionLine* **WORD SEARCH FEATURE** on our Section Website at **http://www.rpptl.org/.** After logging in, go to "Publications" and choose "ActionLine." You can now search for articles and authors by word(s) through the "ActionLine Search" window powered by Google. The search engine button will direct you to the issues that contain the word(s) you insert in the search window. The search can be expanded by following the directions online. You can locate the word(s) within the chosen ActionLine issue by utilizing its pdf search engine.

ActionLine is a treasure trove for real property, probate and/or trust law practitioners looking for a secondary source of historical and current information with analysis by knowledgeable and experienced authors on a myriad of topics affecting their practice. With the enhancement of the word search engine, you now have an efficient tool for using *ActionLine* as a resource for research or just to expand your personal knowledge.

Endnotes:

1 *Murphy*, at 7 (citing Dig. 48.15 supplement to the lex cornelia ordered in edict by Emperor Claudius).

2 There have been a number of reported decisions wherein lawyers have been sanctioned for violating Rule 4-1.8(c). See, e.g., *The Florida Bar v. Poe,* 786 So.2d 1164 (Fla. 2001) (wherein a lawyer was disbarred for preparing a will that included a $15,000 bequest to the lawyer and named the lawyer as personal representative of the estate); *The Florida Bar v. Anderson,* 638 So. 2d 29 (Fla. 1994) (wherein an attorney with a perfect disciplinary record received a 91 day suspension for drafting numerous wills for the same client over a period of years which contained bequests for the attorney or his wife).

3 *Agee* at 886.

4 *Id*. The Agee decision is particularly interesting because the lawyer in that case was the one contesting the last will of the decedent in the hopes of reinstating a bequest to the lawyer and his wife under a prior will of his former client (and friend). The beneficiaries successfully convinced the trial court to dismiss the will contest on the basis that the lawyer lacked standing to contest the validity of the last will because the gift to the lawyer and his wife violated the ethical rule. The 4th District Court of Appeals dismissed the trial court decision and, on remand, the personal representative and beneficiaries will be forced to defend the validity of the decedent's last will against a challenge by said lawyer.

5 *Murphy*, at 22.

6 *Id*., fn 2 (*citing* Robert M. Pirsig, Zen and the Art of Motorcycle Maintenance: An Inquiry Into Values Ch. 26 (William Morrow & Co., ed. 1974).

7 *See Id.*

8 The comment to Rule 4-1.8(c) provides that "a simple gift such as a present given at a holiday or as token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence." R. Regulating Fla. Bar 4-1.8, comment "Gifts to Lawyers."

9 Murphy, at 8 (quoting *Kirschbaum v. Dillon*, 567 N.E. 2d 1291, 1296 (Ohio 1991)).

10 *See* Rohan Kelley, Probate Litigation, PRACTICE UNDER FLORIDA PROBATE CODE §21.17 (Fla. Bar CLE 2010) *citing Ritter v. Shamas,* 452 So. 2d 1057 (Fla. 3rd DCA 1984); *Zinnser v. Gregory,* 77 So. 2d 611 (Fla. 1955); *Nelson v. Walden,* 186 So. 2d 517 (Fla. 2nd DCA 1966); *In re Estate of Reid,* 138 So. 2d 342 (Fla. 3rd DCA 1962).

11 *Murphy*, at 19.

12 *Id.* at 22.

13 *The Florida Bar v. Carey,* 46 So.3d 48 (Fla. 2010).

14 *Murphy*, at 26.

The 9th Annual Minority Mentoring Picnic

By Sharaine Sibblies, Esq., Carlton Fields, P.A., Miami, Florida

The 9th Annual Minority Mentoring picnic, skillfully put together by the Kozyak Minority Mentoring Foundation, is fast approaching! Once again, the Real Property, Probate & Trust Law Section of the Florida Bar ("RPPTL") will be a very proud sponsor. For those of you who have not had the pleasure of attending this annual event, you are missing out! This year's picnic will be held on Saturday, November 10, 2012, from 12:00 noon–4:00 p.m. at the Amelia Earhart Park in Hialeah, Florida.

Recent Mentoring Picnic in Central Florida. (Photo courtesy The Florida Bar *News.)*

Year after year, this picnic proves to be an event not to be missed, with the number of attendees increasing each year. I have been fortunate enough to attend this event every year since I was a first-year law student and mentee in 2004.

John Kozyak, Esq. of Kozyak Tropin & Throckmorton, P.A., the founder of the Kozyak Minority Mentoring Foundation (the "Foundation"), held the first minority mentoring picnic in 2003 with approximately 200 guests. Having grown exponentially over the years, the Foundation was proud to host close to 3,500 attendees who came from all parts of Florida last year to attend this fantastic event. In addition to local South Florida attendees, law schools from Central and North Florida arrange buses to transport students to South Florida for the day to attend the picnic. Also in attendance are lawyers, judges, law school faculty, and other legal professionals, who are all welcome to bring along their families and friends.

The purpose of the picnic is to promote the mentoring of minority law students and hundreds of successful mentor-mentee pairings have been made over the last nine years. Not only is it a great minority mentoring event, but it is also a wonderful networking event for law students and legal professionals alike. Attendees spend hours visiting sponsors' tables, meeting new faces, catching up with old contacts and attending a panel discussion comprised of distinguished speakers offering invaluable advice and guidance for law students and lawyers alike—all while eating, drinking and enjoying the many other activities that the picnic has to offer. The best part is that this is an event for the entire family. Not only are there quality mentoring and networking opportunities, but also music, dancing, face painting and games for the kids, a volleyball tournament, a dunk tank and a petting zoo!

The RPPTL Section is soliciting volunteers to sit at our sponsorship table this year to share with the attendees all the great benefits of our Section. Should you wish to volunteer to sit at the RPPTL table, please contact me via e-mail at ssibblies@carltonfields.com or by phone at 305-539-7378.

More information about the 9th Annual Minority Mentoring Picnic can be found at http://www.kmmfoundation.org/picnic/ where you should also RSVP if you plan to attend.

Do you need a mentor?

There are many great reasons to be a member of the Real Property, Probate and Trust Law Section. However, in case you need one more, think about asking for a mentor.

Some years ago the RPPTL Section developed a program to provide mentors to young attorneys in the Section. The idea behind the program is to provide sustained, effective mentoring by helping the attorney with their development in the areas of professionalism, ethics and knowledge of the Section's membership for purposes of networking and further guidance. While open to every Section member, our aim is to mentor young lawyers and lawyers of diverse backgrounds. The Section can provide the attorney with counsel and guidance as he or she starts the formative years of a practice.

Fortunately, the Section has a number of experienced, successful attorneys who have volunteered their time to assist young attorneys in creating a successful, ethical and professional practice that is not only a great benefit to the attorney but a credit to The Florida Bar and the Section.

A mentee is assigned a mentor with the understanding that the relationship will last for one year but with the hope that it will develop into a long-term professional friendship. A serious attempt is made to pair the mentor and mentee according to geographical factors, practice areas, as well as other factors.

If you are interested in having a mentor, please contact Guy Emerich at gemerich@farr.com. Guy is the co-chair of the Fellows and Mentoring Committee of the Section, and will make every effort to find the right mentor for you.

Legislator Supporters of the RPPTL Section during the 2012 Legislature

By Joshua D. Aubuchon, Esq.
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Tallahassee, Florida

The 2012 Legislative Session saw many of the Real Property, Probate, and Trust Law Section's (the "Section") initiatives and items of interest pass favorably in the halls of the Senate and the House of Representatives. Although many Section members are acutely aware of the resulting changes to specific statutes, at times many of the "movers and shakers" in the Legislature who spearhead such changes are unknown to the Section's populace. At this time, we are proud to highlight and recognize **Senator Arthenia Joyner**, **Senator David Simmons**, **Representative Jose Felix Diaz**, **Representative James Grant**, **Representative Dorothy Hukill**, **Representative George Moraitis**, **Representative Kathleen Passidomo**, **Representative Elaine Schwartz**, and **Representative John Wood**, as active Section members who served in the Florida Legislature during the 2012 Session.


SEN. JOYNER

Senator Arthenia Joyner was the sponsor of Senate Bill 990, Relating to Natural Guardians, which contained the Section's initiative to amend Chapter 744 relating to natural guardians. The bill included natural guardians of a minor child within the meaning of "parents" and, throughout Chapter 744 changed "custody" to "parental responsibility." The bill was passed unanimously in both chambers and was approved as Chapter 2012-48, Laws of Florida.

Senator Joyner is the Vice Chair of the Judiciary Committee, the Vice Chair of the Budget Subcommittee on Criminal & Civil Justice Appropriations, and the Vice Chair of the Select Committee on Protecting Florida's Children. She also serves on the Budget Committee, the Budget Subcommittee on Higher Education Appropriations, the Communications, Energy & Public Utilities Committee, the Joint Legislative Auditing Committee, the Reapportionment Committee, the Rules Subcommittee on Ethics & Elections, and the Transportation Committee.

Senator Joyner is a practicing probate attorney from Tampa with the law firm of Stiles & Grace, P.A. She has represented the Tampa Bay area in the Florida Senate since 2006 and previously served in the Florida House of Representatives from 2000-2006.


SEN. SIMMONS

Senator David Simmons was the sponsor of Senate Bill 1146, Relating to the Effect of Dissolution or Annulment of Marriage on Certain Designations (which later became CS/CS/SB 1146). The bill, which was a Section initiative, provided that the designations of a beneficiary and other designations occurring prior to a divorce (such as a retirement account designation) would be inapplicable in the event of a divorce and subsequent death of the designating party. The bill was later substituted by House Bill 401, the House companion, which passed both chambers and was approved by the Governor as Chapter 2012-148, Laws of Florida.

Senator Simmons is the Chair of the Budget Subcommittee on Education Pre-K-12 Appropriations. He also serves on the Judiciary Committee, the Agriculture Committee, the Budget Committee, the Reapportionment Committee, the Budget Subcommittee on Higher Education, and the Rules Subcommittee on Ethics & Elections.

Senator Simmons is a practicing civil trial attorney from Orlando, Florida, with the law firm of deBeaubien, Knight, Simmons, Mantzaris & Neal, LLP. He has been a member of the Florida Senate since 2010 and previously served in the Florida House of Representatives from 2000-2008.


REP. DIAZ

Representative Jose Felix Diaz was the sponsor of House Bill 979 (which later became CS/CS/HB 979), Relating to Developments of Regional Impact, which was an initiative of interest for the Section. The bill allowed for an alternate review process for developments of regional impact which remain subject to state review, provided that increases in peak hour traffic would not constitute a substantial deviation of DRI, and included a provision allowing for the rezoning of certain agricultural enclaves to the zoning designation of surrounding property without local government approval. The bill was approved as Chapter 2012-75, Laws of Florida.

Representative Diaz is the Vice Chair of the Community & Military Affairs Subcommittee. He also serves on the Finance & Tax Committee, the Criminal Justice Subcommittee, the Health & Human Services Access Subcommittee, the Health Care Appropriations Subcommittee, and the House Redistricting Subcommittee.

Representative Diaz is a real estate attorney, specializing in land use and entitlements from Miami, practicing with the law firm of Akerman Senterfitt. He has been a member of the Florida House of Representatives since 2010.


REP. GRANT

Representative James Grant was

the sponsor of House Bill 517, which was a bill concerning the Department of Business and Professional Regulation (which later became CS/HB 517). The Section's initiative to extend the "Bulk Buyer" provisions in Part VII of the Condominium Act was added as an amendment to the bill. The bill was later approved as Chapter 2012-61, Laws of Florida.

Representative Grant serves on the Finance & Tax Committee, the Criminal Justice Subcommittee, the Justice Appropriations Subcommittee, the K-20 Competitiveness Subcommittee, and the Transportation & Highway Safety Subcommittee.

Representative Grant is a practicing real estate and probate attorney from Tampa at the Grant Law Group. He has been a member of the Florida House of Representatives since 2010.


REP. HUKILL

Representative Dorothy Hukill has been a longtime sponsor of Section initiatives and is an enthusiastic supporter of the Section. During the 2010 Session, Representative Hukill was the sponsor of House Bill 1237, Relating to Probate Procedures (which later became CS/CS/HB 1237), which was approved as Chapter 2010-132, Laws of Florida. The bill was a Section initiative which provided technical corrections to the probate laws, including allowing a court to modify the dispositive provisions of a will probated in 2010 (during a time when there was no Federal estate tax) where the will erroneously included estate tax-related formulas; permitted a probate court to set aside a marriage based on fraud, duress, or undue influence after the death of one spouse; and provided for transfers of homestead property into trusts or other forms of ownership that will not run afoul of the constitutional prohibition on alienation of the homestead.

Representative Hukill is Chair of the Economic Affairs Committee and the Co-Chair of the Senate Redistricting Subcommittee. She also serves on the Appropriations Committee and the Redistricting Committee.

Representative Hukill is a practicing probate attorney from Port Orange, at the law firm of Dorothy L. Hukill, P.A. She has been a member of the Florida House of Representatives since 2004 and is currently running for the Florida Senate.


REP. MORAITIS

Representative George Moraitis was involved in a number of successful Section initiatives and bills of interest during the 2012 Session. Representative Moraitis sponsored House Bill 401, the companion bill to the aforementioned Senate Bill 1146, sponsored by Senator Simmons (which later became CS/HB 401). He was the sponsor of House Bill 643, Relating to Title Insurance (which later became CS/CS/HB 643), which revised the regulation of title insurance agents and agencies, and which was approved as Chapter 2012-206, Laws of Florida. Representative Moraitis also sponsored House Bill 897, Relating to Construction Contracting (which later became CS/HB 897), which made clarifying changes to s. 255.05, F.S., regarding payment bonds, and amended sections concerning construction liens relating to notice for parties having direct contact with an owner and the method by which notice may be provided. The bill was approved by the Governor as Chapter 2012-211, Laws of Florida.

Representative Moraitis is a member of the Finance & Tax Committee and the Joint Committee on Public Counsel Oversight. He also serves on the Energy & Utilities Subcommittee, the Government Operations Subcommittee, the Higher Education Appropriations Subcommittee, and the K-20 Innovation Subcommittee.

Representative Moraitis is a practicing real estate attorney from Ft. Lauderdale, with the law firm of Moraitis, Cofar, Karney & Moraitis. He has been a member of the Florida House of Representatives since 2010.


REP. PASSIDOMO

Representative Kathleen Passidomo was the sponsor of House Bill 483, Relating to the Uniform Commercial Code, which updated the Florida version of Article 9 of the UCC to the changes previously adopted to the uniform act (which later became CS/HB 483). The bill was approved as Chapter 2012-59, Laws of Florida.

Representative Passidomo is a member of the Judiciary Committee and the Joint Committee on Public Counsel Oversight. She also serves on the Civil Justice Subcommittee, the Congressional Redistricting Subcommittee, the Energy & Utilities Subcommittee, the Higher Education Appropriations Subcommittee, and the K-20 Innovation Subcommittee.

Representative Passidomo is an attorney in Naples with the law firm of Kelly, Passidomo, & Alba, LLP. She has been a member of the Florida House of Representatives since 2010.


REP. SCHWARTZ

Representative Elaine Schwartz was the sponsor of House Bill 851, which contained the Section's initiative in the House to amend Chapter 744. The bill amends the chapter to include natural guardians of a minor child within the meaning of "parents" and changes "custody" to "parental responsibility" where applicable in the chapter. The companion bill, Senate Bill 990, was ultimately passed unanimously in both chambers and was

continued, next page

approved as Chapter 2012-48, Laws of Florida.

Representative Schwartz is the Ranking Democratic Member of the Health & Human Services Quality Subcommittee. She also serves on the Judiciary Committee, the Health & Human Services Committee, the Federal Affairs Subcommittee, and the Health Care Appropriations Subcommittee.


REP. WOOD

Representative Schwartz is an attorney practicing in Hollywood at the Law Offices of Elaine J. Schwartz. She has been a member of the Florida House of Representatives since 2006.

Representative John Wood was the sponsor of House Bill 103, Relating to the Transfer of Tax Liability, which was a joint initiative between the Section and the Business Law Section. The bill clarified that the transfer of business assets is considered to be the sale of the business and established the tax liability in conjunction with the transaction. It was approved as Chapter 2012-55, Laws of Florida.

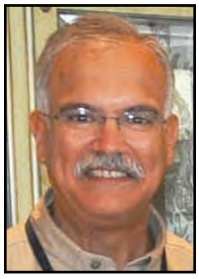
Representative Wood is the Chair of the Health & Human Services Quality Subcommittee and serves on the Health & Human Services Committee, the Health Care Appropriations Subcommittee, and the Insurance & Banking Subcommittee.

Representative Wood is a real estate attorney in Winter Haven. He has been a member of the Florida House of Representatives since 2008.

Spotlight on the Title Insurance Committee

By Jane L. Cornett, Esq.,
Law Offices of Cornett, Googe & Associates, P.A., Stuart, Florida

In the upcoming issues of *ActionLine*, we want to provide an introduction to the activities of our many and diverse committees. This month we start by directing the ActionLine spot light on the Title Insurance Committee.


K. FERNANDEZ

The Title Insurance Committee is headed by **Kristopher Fernandez**. Kris is a board certified real estate attorney and has been chair since July, 2011. His co-vice chairs are Raul Perez-Ballaga and Daniel DeCubellis. Kris states, "I believe the Title Insurance Committee is one of the most important committees because title insurance issues affect so many areas in which our section is involved, including estate planning and probate, as well as traditional real estate."

Kris reports that the Title Insurance Committee is constantly asked by other committees which recognize its expertise in real estate law and the importance of title insurance to provide input because there is so much crossover in the law and the work of so many other committees has implications on title insurance law or is impacted by title insurance law. Kris offers the example of dealing with the issue of homestead in a trust situation. Kris further relates that the committee typically reviews and comments on all proposed legislation such as last year's proposed statute regarding revisions to the notice of commencement statute. As Kris says, "Title insurance touches everything that Reptiles do."

Kris states that his goal as chair of the Title Insurance Committee is multi-fold: to have an active committee that is attractive to real estate practioners and that will continue to grow; to continue to keep Section members informed of legislative and administrative actions affecting the issuance of title insurance; and to support and promote the role of real estate attorneys in insuring real estate transactions for the good of the public.

Kris does not want to see his committee recreate what others are doing but seeks ways to make the committee stand out. In order to attract and be beneficial to real estate practitioners, a sub-committee has been created to look at the long-range goals of the committee and to develop a plan to meet those goals. The strategic planning process requires the committee members to ask themselves what the Title Insurance Committee can do to make itself more helpful to real estate practioners and what the committee can do to be more attractive to new members and to develop future committee and RPPTL Section leaders.

Kris believes that the strategic plan can be adopted and implemented by May of 2013 and the people on his sub-committee are working hard to make that a reality.

Kris invites everyone to attend future meetings of the Title Insurance Committee.

Resolution

The Executive Council of the Real Property, Probate & Trust Law Section
Of The Florida Bar
Recognizing the Service and Contributions of

William James Haley

Whereas, WILLIAM JAMES HALEY of Lake City, Florida, was a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar who passed away on August 6, 2012, survived by his wife of 51 years, Jo; three daughters, Mary Nell Haley, Meg Haley, and PJ Haley Hottenstein; a son, Dr. Jimbo Haley; a son-in-law, David; a daughter-in-law, Heni; three grandchildren, Annabella, Sebastian, and Christian; and a step-granddaughter, Chelsea; and

Whereas, Bill received his undergraduate degree from the University of Wisconsin, his JD degree from Washington & Lee University in Lexington, Virginia, and was admitted to The Florida Bar in 1960; and

Whereas, Bill served his country with distinction as a Captain and Judge Advocate General in the United States Air Force from 1960 to 1963; and

Whereas, after coming to Lake City in 1963, Bill had a long and distinguished career as a real estate attorney with the law firm of Brannon, Brown, Norris & Vocell (later named Brannon, Brown, Haley & Bullock, P.A.), which included private practice; extensive involvement with Attorneys' Title Insurance Fund ("The Fund") and the Florida Association of Realtors ("FAR"); and dedicated service to the Real Property, Probate & Trust Law Section of The Florida Bar; and

Whereas, Bill served as a Municipal Judge in Lake City during 1965 and 1966 and was elected County Attorney for Columbia County, Florida, and served in that capacity from 1969 - 1977; and

Whereas, Bill's extensive relationship with The Fund began when he became a Fund Member Agent in 1977 and progressed to him becoming a Trustee, a Director, and Chairman of the Board; and

Whereas, Bill was a distinguished Board Certified real estate attorney and a Florida Supreme Court Certified Mediator; and

Whereas, Bill gave unselfishly of his time and devoted his legal acumen not only to his profession, but also to the real estate industry throughout the State of Florida, which he served during his more than 50 years as a member of The Florida Bar through his service as an attorney member on the Florida Realtor-Attorney Joint Committee from 1977 to 2011, to which he was appointed by the Board of Governors of The Florida Bar; through his service as Chair of the FAR/BAR Contract Committee for many years; and through his service as Counsel for the Lake City Board of Realtors for more than 40 years, and on FAR's Local Board Attorneys Forum which he chaired for several terms; and

Whereas, Bill's long-standing and dedicated service to the Real Property, Probate & Trust Law Section of The Florida Bar was recognized in 2008 when he was chosen as the recipient of the Robert C. Scott Memorial Award, an honor reserved for those Real Property, Probate & Trust Law Section members who best exemplify devotion and service to the Section; and he will best be remembered for long-standing membership and active participation on its Executive Council, his tireless efforts to develop and improve the FAR/BAR contract, and his service in educating others through his participation in numerous continuing legal education programs; and

Whereas, Bill also had a history of dedicated involvement with his community through his memberships with the Lions Club, the Elks Lodge, the Moose Lodge, the Lake City Chamber of Commerce, and the Epiphany Catholic Church; and

Whereas, notwithstanding his Minnesota roots and the universities he attended, upon moving to Lake City, Bill became a true "Floridian," an avid Florida Gator fan who supported the University of Florida as a Gator Booster, and the "Captain" of his houseboat upon which he spent many hours on the Crystal River with family, friends, and colleagues; and

Whereas, the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Bill has provided during his lifetime to the nation, his community, his family, and The Florida Bar, particularly its Real Property, Probate & Trust Law Section, and acknowledges that he will be sorely missed.

Now, Therefore, be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar that the loss of William James Haley is mourned, and that his distinguished service and rich contributions to the practice of law, particularly to the practice of real estate law, are respected, appreciated, acknowledged, and will be remembered forever.

Unanimously Adopted by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar at Key Biscayne, Florida, this 15th day of September, 2012.

William Fletcher Belcher, Chair
Real Property, Probate & Trust Law Section
The Florida Bar

RPPTL PACs – Part of the Political Process

By Sandra F. Diamond, Esq.,
Williamson, Diamond, & Caton, P.A., Seminole, Florida

The Real Property, Probate and Trust Law Section has a vigorous legislative agenda. Our Section lobbyists from the Pennington firm in Tallahassee are active throughout the year, working with members of the Florida Legislature and Section committees to ensure that proposed legislation impacting the practice areas of RPPTL Section members is carefully reviewed and structured. We are aided in these efforts by the RPPTL PACs – political action committees that assist in the implementation of issues impacting real property, probate, trust, guardianship, and construction attorneys.

The RPPTL PACs are not officially associated with the RPPTL Section. The original RPPTL PAC was formed in July of 2001 by a group of lawyers who wanted to have a more effective voice in the legislative process. Its sister organization, Real Property, Probate and Trust Law PAC, was formed several years later. The PACs hold joint meetings several times a year. All PAC members are invited for vigorous discussions of politics, statewide races and a review of each Florida House and Senate seat. These meetings have raised our political awareness and helped us understand the complexities of the political process. The PACs provide financial support to candidates, particularly those who support and understand real property, probate and trust issues. Currently, the PACs have almost 100 members. Since they have virtually no overhead, the funds raised by these PACs are used entirely to support political campaigns. During the 2012 primaries, the PACs contributed to 37 Florida House races and 10 Florida Senate races. The PACs have a policy of supporting members of the RPPTL Section (and sometimes their spouses) who are courageous enough to throw their hats into the political ring, as it is important to us to have elected officials who are familiar with our issues.

The current officers of the RPPTL PAC are: Laird Lile, Chairman; Sandra Diamond, Vice Chairman and Treasurer; Peter Dunbar, Secretary. Additional directors are Homer Duval, Margaret Rolando, Melissa Murphy, Charlie Nash, Bruce Stone and Burt Bruton.

The current officers of the Real Property, Probate and Trust Law PAC are:

Roland "Chip" Waller, Chairman; Laird Lile, Vice Chairman; Sandra Diamond, Treasurer; Peter Dunbar, Secretary. The current officers serve as directors along with Brian Felcoski, Michael Gelfand, Bob Goldman, William T. "Toby" Muir, Steve Hearn and Burt Bruton.

The members of the PACs have a wide variety of political and personal views, as well as party affiliations, but they normally reach consensus on the political campaign contributions to be made by the PACs. If you are not already a PAC member, please join now and be part of this important process. All PAC members participate equally regardless of their level of contribution. Start coming to these PAC meetings. You can join by completing and returning the form below. Have some fun and learn a lot about Florida politics!

RPPTL-PAC

Real Property, Probate and Trust Law PAC

❑ Yes! Sign me up for RPPTL-PAC!

Name: _____

Address: _____

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Membership Level:

❑ Regular ($50)	❑ Century ($100)
❑ Silver ($250)	❑ Executive ($500)
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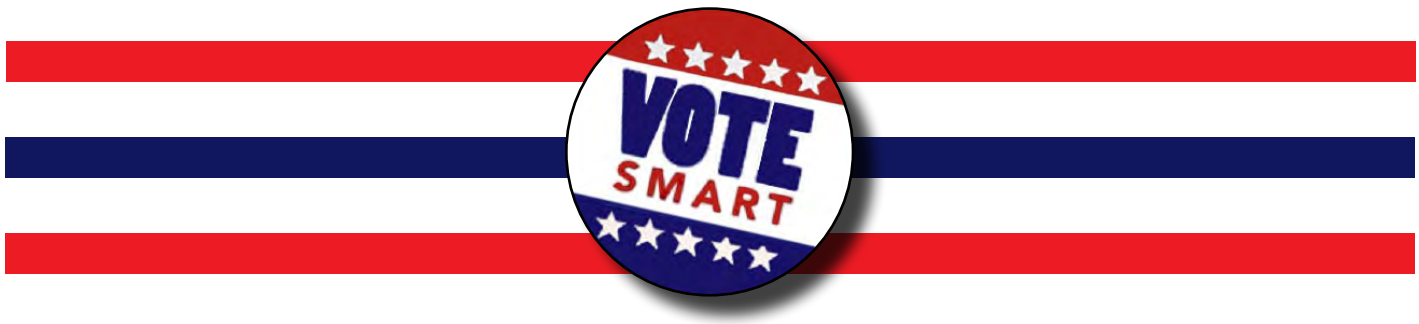
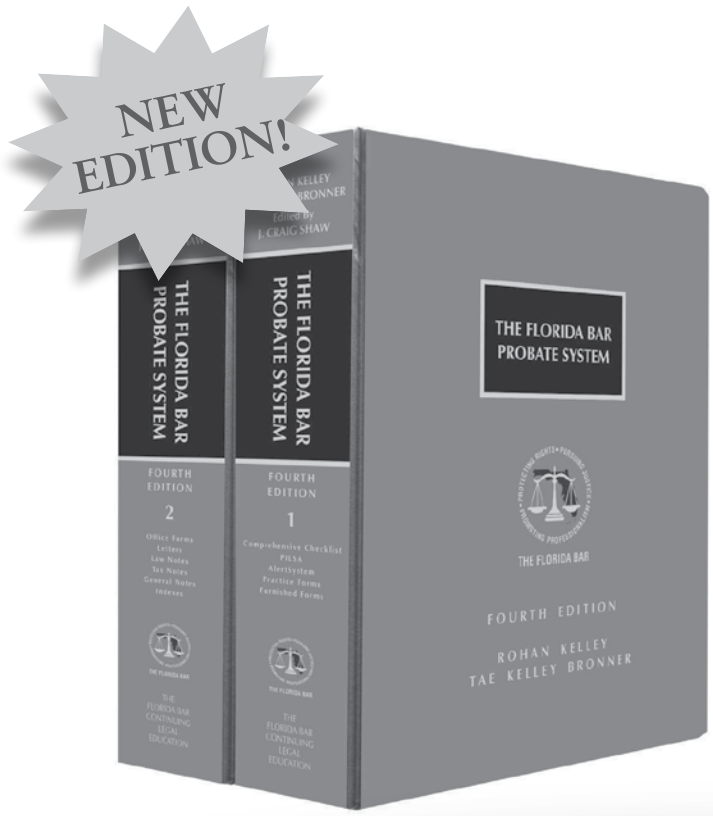
❑ Platinum ($5,000)	❑ Double Platinum ($10,000)

Checks should be payable to "RPPTL-PAC" and sent to:

Pete Dunbar
Pennington Law Firm
Post Office Box 10095
Tallahassee, Florida 32302-2095

(850) 222-3533





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Real Estate Case Summaries

Prepared by Brian W. Hoffman, Esq.,
Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux LLC, Pensacola, FL

For purposes of attaching constructive notice to subsequent purchasers for value, compliance with the recording statute, Section 695.11, Fla. Stat. (2011), is determinative of whether constructive notice attaches. If there is compliance with the recording statute, error by the clerk after the instrument is recorded will not affect constructive notice, irrespective of whether the subsequent purchaser had actual notice in the public records

Mayfield v. First City Bank of Florida, 37 Fla. L. Weekly D1848 (Fla. 1st DCA 2012)

The trial court granted summary final judgment of foreclosure in favor of the Plaintiff, First City Bank of Florida ("First City"). Michael D. Mayfield, Bonnie J. Mayfield (collectively the "Mayfields") and Branch Banking and Trust Company ("BB&T"), Defendants in that action, appealed to set aside the summary final judgment of foreclosure.

In October 2009, the Mayfields purchased real property (hereinafter "Lot 2") from Blue Water Bay Real Estate Investments, LLC ("Blue Water"), and the Mayfields granted a purchase money mortgage to Old National Bank, which was subsequently acquired by BB&T. The Mayfields' deed and the BB&T mortgage were recorded in the public records on November 2, 2009. Unbeknownst to the Mayfields, in 2006 Blue Water had previously conveyed Lot 2 to Wright and Associates of Northwest Florida ("W&A"), and W&A had granted a mortgage to First City Bank. The W&A deed and First City mortgage were sent to the clerk of Walton County for recording, and on July 2, 2006, the clerk opened a recording transaction in the computer and affixed an official register book and page number on the original documents, which were then returned to the parties. Shortly after recording those instruments, the clerk realized an error had been made and voided the W&A deed and First City mortgage with the intention of re-recording those instruments to correct the error, which the clerk failed to do and mistakenly recorded similar instruments concerning another parcel of property. Since the W&A deed and First City mortgage were voided those instruments no longer appeared in the Walton County electronic official records except for a brief period of 73 minutes on July 6, 2006.

In 2010, First City filed foreclosure following default by W&A, and named the Mayfields and BB&T as subordinate lien holders in that action. The Mayfields and BB&T filed for summary judgment on the grounds they were bona fide purchasers without notice, and First City filed for summary judgment contending that it complied with the recording statute, which resulted in constructive notice. The trial court found that although the W&A deed and BB&T mortgage were voided from the public records, they were recorded in accordance with Section 695.11, Fla. Stat. (2011). Since those instruments were recorded, the Mayfields and BB&T were not entitled to protection under Section 695.01, Fla. Stat. (2011) for subsequent purchasers without notice.

The First District Court of Appeal noted that prior Florida cases have found that when a party complies with the recording statute, constructive notice attaches and will not be destroyed by errors committed by the clerk. The Court concluded that under the current version of Section 695.11, Fla. Stat. (2011), constructive notice attaches upon compliance with the recording statute. The Court concluded that since First City complied with the recording statute constructive notice attached at the time of recording, and dismissed the Mayfields and BB&T's argument that the W&A deed and First City mortgage had to remain in the public records to impart constructive notice. The Court noted the harsh result, and that the Mayfields and BB&T may have a cause of action against the clerk of Walton County.

Where the final judgment of foreclosure specifically adopts the framework of Section 45.031, Fla. Stat. (2011), publication of the notice of sale is required, and failure to so publish is grounds to set aside the foreclosure sale irrespective of the adequacy of the foreclosure bid or whether mistake, fraud or other irregularity was present

Simonson v. Palm Beach Hotel Condominium Assoc. 37 Fla. L. Weekly D1631 (Fla. 4th DCA 2012)

The trial court denied a homeowner's Objection and Motion to Set Aside Judicial Sale on the grounds that no pre-sale publication notice was made pursuant to Section 45.031, Fla. Stat. (2011).

After entering a judgment of foreclosure for $66,314.12, the trial court set the date of the foreclosure sale for several months later. The Final Judgment of Foreclosure stated that "the clerk of this Court shall sell the subject property at public sale . . . to the highest bidder for cash . . . in accordance with section 45.031, Florida Statutes". A third party purchaser was the high bidder at the online public auction for $100,100.00. On the same date as the sale, the condominium association filed a motion to vacate and

continued, next page

set aside the foreclosure sale because the Notice of Sale had not been published. The third party purchaser then moved to confirm the sale. At the hearing to confirm the sale, counsel for the condominium association and the third party purchaser presented the trial court with an agreed order admitting publication had not occurred and confirming the sale. One day after that hearing, the homeowner received the signed order that directed the clerk to issue a Certificate of Sale to the purchaser. The homeowner served and filed Objections to Judicial Sale and Motion to Set Aside Judicial Sale. Two days after the agreed order was entered the clerk issued the Certificate of Sale that contained language stating that the Notice of Sale had been published as shown by the Proof of Publication.

At the hearing on the Motion to Set Aside Judicial Sale, the homeowner argued that Section 45.031, Fla. Stat. (2011) requires advance notice of a sale, while the purchaser and condominium association argued that Section 45.031 does not provide a mandatory framework, and further argued that the homeowner failed to demonstrate that the foreclosure bid was grossly or startlingly inadequate, and that the inadequacy of the bid resulted from some mistake, fraud, or other irregularity in the sale. The Fourth District Court of Appeal reviewed the requirements of Section 45.031 and confirmed the plain reading of that statute supports the interpretation that a foreclosure sale should not be confirmed if the notice of sale was not published. The Court acknowledged the purchaser and condominium association's argument that Section 45.031 is not the exclusive procedure for scheduling a foreclosure sale, but deemed that issue moot since the final judgment of foreclosure explicitly adopted the statutory framework of Section 45.031. The Court also dismissed the argument that the trial court must find the foreclosure bid grossly inadequate and resulting from mistake, fraud or other irregularity to set aside the sale. Failure to publish the notice of sale is sufficient by itself to set aside the sale, irrespective of the foreclosure bid, when final judgment specifically adopts the framework of Section 45.031. *See also HSBC Bank , N.A. v. Nixon*, 37 Fla. L. Weekly D2011 (Fla. 4th DCA 2012) (adhered to ruling in *Simonson* and reversed trial court order denying motion to vacate sale for failure to publish notice of sale as required by Section 45.031(3), Fla. Stat.).

In a betterment action, where it is undisputed that a third party made the improvements to the subject property and that the party claiming betterment never had title to the property improved, it is then irrelevant whether the party claiming betterment actually believed it held title to the property improved. In such instance, evidence of improvements made by a third party to the subject property would be properly excluded

Centennial Homeowners Assoc. Inc. v. Dolomite Co. Inc., 37 Fla. L. Weekly D1763 (Fla. 3rd DCA 2012)

The trial court granted Dolomite Co. Inc.'s ("Dolomite") motion in limine to exclude evidence presented by Centennial Homeowners Association, Inc. ("Homeowners Association") as to improvements made by the developer of the residential community in support of the Homeowners Association's betterment action against Dolomite.

The developer of a residential community made improvements to common areas (the "Common Areas") before the developer abandoned the community. The developer still had title to certain common areas after abandonment. Thereafter, in 1999, Dolomite's predecessor-in-interest purchased the Common Areas at a sheriff's sale. The Homeowners Association then moved to set aside the sale; however, the trial court confirmed the sale after the Homeowners Association was unable to submit proof of ownership of the Common Areas. Dolomite then pursued an ejectment action against the Homeowners Association and obtained final judgment of ejection, which was affirmed by this Court. The Homeowners Association then filed a betterment action seeking compensation for improvements made to the Common Areas by the developer before the developer abandoned the community. Dolomite filed a motion in limine to exclude evidence related to improvements made by the developer, which was granted by the trial court. The jury found that although the Homeowners Association occupied the Common Areas, it did not make any permanent improvements. After the jury made its findings, the trial court entered final judgment in favor of Dolomite. The Homeowners Association did not challenge the jury's findings, but contended that the trial court erred by excluding evidence of improvements made by the developer.

The Third District Court of Appeal found that the evidence of improvements made by the developer were properly excluded, noting that "the betterment cause of action was created to prevent unjust enrichment by compensating a party that has lost an ejectment case for any value of improvements that were made by the losing party and are received by the successful party along with the land." Sec-

tion 66.014(3), Fla. Stat. (2009) requires the party seeking betterment to establish he or she "made the improvements or purchased the property improved." Since the improvement were undisputedly made by the developer, and since the Homeowners Association never had title, it is irrelevant whether the Homeowners Association actually believed it held good and valid title. Accordingly, the trial court properly excluded the evidence.

The exception to the local action rule provided for in Section 702.04, Fla. Stat. for a mortgage encumbering property in more than one county, also includes separate and distinct mortgage instruments each encumbering property in different counties, as long as those mortgages both secure the same promissory note, and are accordingly part of one transaction

Frym v. Flagship Community Bank, 37 Fla. L. Weekly D2001 (Fla. 2nd DCA 2012)

The trial court denied Catherine M. Frym's ("Frym") writ of prohibition to restrain the circuit court in and for Pinellas County from exercising jurisdiction in a foreclosure action over property located in Hillsborough County.

In 2006, Frym executed and delivered a promissory note which was secured by two mortgages: one on commercial property in Pinellas County and one on Frym's personal residence in Hillsborough County. In 2009, the Bank filed a complaint in Pinellas County seeking to foreclose on each mortgage. Frym filed a motion to dismiss, alleging that the trial court lacked subject matter jurisdiction to foreclose on the mortgage encumbering land in Hillsborough County. Frym challenged the denial of that motion by filing the current petition for writ of prohibition. Frym claimed that Section 47.011, Fla. Stat. (2011) requires that actions involving property shall only be brought in the county in which the property is located, known as the "local action rule." Section 702.04, Fla. Stat. provides an exception to the local action rule when a mortgage includes lands lying in two or more counties, which allows the foreclosure to proceed in any one of said counties as if it had all the mortgaged land. Frym claimed that exception does not apply in this case because the mortgage in Pinellas County secures only the commercial property, and not her personal residence in Hillsborough County. In support of that position, Frym cited *Hudlett v. Sanderson*, 715 So. 2d 1050, 1052 (Fla. 4th DCA 1998), which ruled that an exception to the local action rule is not applicable to a mortgage which on its face is applicable to property in only one county.

The Second District Court of Appeal noted that although two separate mortgages existed in this case encumbering property in two different counties, both mortgages secured the same promissory note. In contrast, *Hudlett* dealt with three separate promissory notes, each secured by a separate mortgage instrument. The Second District Court of Appeal confirmed the trial court's reasoning that since the two mortgages secured the same promissory note, both mortgages were part of the same transaction. Therefore, this case falls under the umbrella of Section 702.04, Fla. Stat, and the trial court's denial of the writ of prohibition was proper.

Summary final judgment cannot be granted in favor of a defendant as to a plaintiff's stated cause of action when such judgment is based on a determination by the trial court that the facts supporting the stated cause of action are actually another cause of action that is barred by the statute of limitations

Bistricer v. Palmer, 37 Fla. L. Weekly D1914a (Fla. 2nd DCA 2012)

The trial court granted summary final judgment in favor of William and Cathy Palmer (the "Palmers"), and against Alex Bistricer, as limited partner of Gulf Island Resort, L.P., and Gulf Island Resort, L.P. ("Bistricer") who had filed a quiet title action against the Palmers.

In March 2008 Bistricer filed a quiet title action challenging the validity of a deed that transferred property to the Palmers in March 2003. Bistricer was a limited partner of a limited partnership that owned several condominium units in one development. The general partner of that limited partnership was a corporation, and Bistricer and two other men were the sole shareholders. Those three shareholders had entered a restrictive covenant agreement whereby the conveyance of any of the condominium units required the signature of all three men. One of the two shareholders filed improper documents with the Florida Secretary of State that made it appear that that one shareholder had authority to sign deeds on behalf of the corporate entity. In March 2003, that one shareholder signed the deed to the Palmers without Bistricer's consent. Bistricer claimed the deed to the Palmers was voidable since it was not signed by a person legally authorized to do so.

The Second District Court of Appeal determined that the sole issue before the court was whether this action to quiet title is barred by the statute of limitations for actions alleging fraud. The Court noted the trial court's findings that the claim in this case, although captioned as a quiet title action, was primarily founded on allegations of fraudulent misconduct. The Court disagreed with the trial court's ruling because the complaint simply does not allege a claim in fraud. The Court concluded that if the Palmers believed the Complaint was not a quiet title action, but a claim for fraud, then the Palmers should have filed a motion to dismiss for failure to state a cause of action. The Palmers could not simply file a motion for summary judgment on the theory that a different complaint would have been barred by the statute of limitations for fraud. Accordingly, the Court reversed and remanded the summary final judgment entered by the trial court in favor of the Palmers.

Probate Case Summaries

Prepared by Tara Rao, Esq.,
The Rao Law Firm, P.L., Lutz, FL

Where an Emergency Temporary Guardian is granted the right to contract, the ward can no longer exercise that power. The Court held that where a trust was executed by the settlor when an Emergency Temporary Guardian was appointed for the settlor and all legal rights were removed from the settlor, except the right to vote, the trust was void

Summer Jasser, Lena Mamone and Anthony Saadeh, as Co-Trustees of the Trust Agreement of Karim H. Saadeh dated June 24, 2009 v. Karim H. Saadeh, 37 Fla. L. Weekly D1696 (Fla. 4th DCA 2012)

Karim Saadeh's children consulted an attorney who worked with a professional guardian to assess Mr. Saadeh's capacity. After meeting with Saadeh, the professional guardian filed a petition to determine Saadeh's incapacity and a petition for appointment of an emergency temporary guardian ("ETG"). The court appointed an attorney to represent Mr. Saadeh and an examining committee. After a hearing on the petition to appoint an ETG, the court appointed the professional guardian as the ETG and removed all of Saadeh's rights, even though it did not make a formal determination of incapacity. A day after the hearing, two members of the examining committee filed their reports finding Saadeh completely competent. Subsequently, Saadeh's personal attorney filed an emergency petition to set aside the guardianship and for rehearing.

Three days after appointment of the ETG, the ETG's attorney and the court-appointed attorney submitted an agreed order to "settle" the guardianship. The Order provided for Mr. Saadeh to execute a trust agreement with his children as co-trustees, and in its last provision dismissed "all pending incapacity proceedings" and retained the Court's jurisdiction to enforce the terms of the Order, if necessary.

Subsequently, the court-appointed attorney filed a motion for clarification of the Order appointing the ETG. A hearing was held, at which the court confirmed that all of Mr. Saadeh's rights, except the right to vote, had been removed. However, the same afternoon, the ETG had Saadeh sign a new trust agreement which, contrary to its title as a "revocable trust," was irrevocable.

At a subsequent hearing, the court allowed Saadeh to choose his own attorney and appointed a new examining committee; however, the guardianship continued in all other respects. The new examining committee unanimously found Saadeh was competent, and the court dismissed the petition.

Afterwards, Saadeh filed a petition to revoke the trust and moved for summary judgment. The trial court found that its May 2009 order did not authorize the execution of an irrevocable trust and that when the ETG was appointed all of Saadeh's legal rights were removed from Mr. Saadeh, who thus had no legal capacity to enter into the trust agreement. Therefore, the June 2009 trust agreement was void *ab initio*. In affirming the trial court's ruling, the Court of Appeal noted that, when the trial court conferred Saadeh's rights on the ETG, it removed those rights from Saadeh, and that both Saadeh and the ETG could not simultaneously exercise those rights.

Where a trust beneficiary has not received an account or statement, the limitations period in Sec. 737.307, Fla. Stat., is inapplicable. Sec. 95.11(3)(o), Fla. Stat., does not apply to actions for breach of trust. The trial court erred in dismissing the complaint with prejudice

Andrew S. Taplin v. Martin W. Taplin, 88 So. 3d 344 (Fla. 3rd DCA 2012)

The Court reversed the trial court's order and final judgment that dismissed with prejudice the Appellant's amended complaint.

Mr. Taplin set up a trust agreement in 1981 for the use and benefit of his son Martin's three children. Martin and Mr. Chorowski were the Co-Trustees. One of the grandchildren, Andrew Taplin, brought suit alleging that his father and Mr. Chorowski breached their duties as trustees by their failure to properly account for the trust assets, self-dealing, and withholding distributions.

The trustees argued that Andrew's causes of action were barred by his failure to object within the limitation periods set forth in Sec. 737.307, Fla. Stat. (2007) (now 736.108), or, alternately, by the four-year limitation period for bringing an action for an intentional tort under Sec. 95.11(3)(o), Fla. Stat. (2007). The trial court dismissed the complaint with prejudice.

The Court of Appeal reversed the trial court's ruling, reasoning that the limitation period in Sec. 737.307, Fla. Stat., only applies in situations where the beneficiary actually received accountings. The Court further reasoned that the second amended complaint, when read in the light most favorable to the plaintiff, did not allege that Appellant received an accounting and should not have been subject to dismissal under section 737.307.

Citing *Nayee v. Nayee*, 705 So. 2d 961, 963 (Fla. 5th DCA 1998), the Court of Appeal indicated that the second amended complaint was not barred by the statute of limi-

tations set forth in Sec. 95.11, Fla. Stat., as the statute is inapplicable to shield trustees from their responsibilities to their beneficiaries.

The joint tenancy nature of the funds in a joint account with right of survivorship was terminated upon their withdrawal by the decedent. The trial court erred in modifying its initial determination that a watch and ring purchased by decedent were assets of the estate, not the sole property of decedent's wife, due to the fact that items were purchased with funds from the spouses' joint checking account. The order on rehearing was reversed on appeal

William P. Connell v. Fana Connell, 93 So. 3d 1140 (Fla. 2nd DCA 2012)

Pete Connell died in 2010 survived by wife, Fana. Prior to this marriage an Antenuptial Agreement was executed by the couple, which specifically provided for the decedent's acquisition of separate and of jointly-held property during the marriage. After the execution of such Agreement, the couple opened a joint tenancy with the right of survivorship checking account at Bank of America. Thereafter, the decedent purchased a Rolex watch at $58,350 with funds from his joint account, from his son, his son's friend and from Fana. The son and friend were reimbursed. A ring was purchased in 2010. Both the watch and ring were worn by decedent everyday. He gave them to his wife, Fana, for safe-keeping when he was being admitted to the hospital just prior to his death.

After his death, the watch and the ring were listed on the estate inventory, but Fana refused to turn the items over to the decedent's son, the Personal Representative. In May 2011, the trial court ruled that the watch and ring were the assets of the estate, that the decedent purchased them with his own assets, they were masculine in nature, used by decedent on a daily basis and the decedent did not gift them to Fana, but only gave them to Fana for safe-keeping when he was being hospitalized. After a motion for rehearing, the trial court ruled, based on the language in the Antenuptial Agreement, that the watch and ring should be considered joint property because they were purchased with funds from the Connells' joint account.

On appeal, there was no issue of whether decedent intended a gift to Fana prior to his hospitalization because there was already a factual determination. The issue was whether the decedent individually owned the watch and ring, or whether the Connells' jointly owned the watch and ring, and thus it passed to Fana by right of survivorship.

Citing *Wexler v. Rich*, 80 So. 3d 1097, 1100 (Fla. 4th DCA 2012) (quoting *Sitomer v. Orlan ex rel. Sitomer*, 660 So.

continued, next page

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2d 1111, 1114 (Fla. 4th DCA 1995) (alteration in *Sitomer*), "[W]hen a joint account holder withdraws funds from a bank account that is held as a joint tenancy with the right of survivorship, it "terminates the 'joint tenancy nature of the [funds] and severs the right of survivorship as to the funds withdrawn.' " Fana had consented to the withdrawal of funds for both the watch and the ring.

Further citing *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 53 (Fla. 2001), '[A] joint tenancy has the characteristic of survivorship and to create a joint tenancy four unities must be present: the unities of possession, interest, title, and time." There is no unity of possession because the decedent had possession and used the watch and ring exclusively for himself. The appellate court reversed the order on rehearing finding that the trial court had made the proper determination in its original order that the watch and ring were assets of the estate.

A Will that devised the rest and residue to a named beneficiary, "having full confidence he will honor all requests made to him by me prior to my death as to friends whom I desire to benefit," was not an unauthorized oral will. The language in the Will is merely precatory and not mandatory

Terry Glenn v. Dawn Roberts, 37 Fla. L. Weekly D1460 (Fla. 3rd DCA 2012)

Ms. French executed a Will in 2003 and devised her residuary estate to her friend, Terry Glenn. Upon Ms. French's passing, Glenn, named as the Personal Representative, opened the probate. Thereafter, Ms. Roberts, French's grandchild, filed a petition to set aside the Will. She argued that a provision in Article Third of the Will was ineffective as a testamentary disposition because it was an oral instruction and, thus, did not meet the statutory requirement that a Will be in writing. Article Third of the Will provided: "I hereby give, devise and bequeath all of the rest, residue and remainder of my estate, both real and personal, of whatsoever kind and nature, and wheresoever the same may be situate unto my friend, **TERRY GLENN**, having full confidence he will honor all requests made to him by me prior to my death as to friends whom I desire he benefit."

Roberts argued that all of French's property should be distributed in accordance with intestate laws. The trial court granted Roberts's motion for judgment on the pleadings.

The Court of Appeal reversed the trial court. In doing so, the Court of Appeal distinguished the case at bar from *Estate of Corbin v. Sherman*, 645 So. 2d 39 (Fla. 1st DCA 1994), the case on which Roberts had relied for support. The Court noted that, unlike in *Corbin*, the language in Ms. French's Will was "merely precatory, and not mandatory." In *Corbin*, the language was mandatory because it referenced oral instructions for the distribution of the decedent's property; and, therefore, constituted an unauthorized oral will. French's Will, however, did not mandate Glenn to distribute the residuary according to French's instructions, but simply expressed her hope that Glenn would honor her requests.

Life insurance proceeds payable to decedent's revocable trust were not exempt from claims of creditors of decedent's estate where trust language provided for payment of estate's expenses and obligations from trust before distribution of residue to subtrust for the benefit of decedent's daughters. The trial court did not err in ruling that Trustee failed to prove grounds for reformation of the trust by clear and convincing evidence that the trust did not reflect the settlor's intent at the time he executed the trust

Kevin A. Morey, as personal representative of the estate of Carlton W. Morey, Jr. and as trustee of the amended and restated revocable trust of Carlton W. Morey, Jr. dated October 1, 2004 v. Everbank and Air Craun, Inc., 93 So. 3d 482 (Fla. 1st DCA 2012)

In 2000, Mr. Morey executed a trust, purchased two $250,000 life insurance policies and designated his trust as beneficiary. In 2004, he amended and restated his trust to change its name to "[T]HE CARLTON W. MOREY, JR. REVOCABLE TRUST." The trust directed the Trustee to pay the Personal Representative as may be required from time to time the decedent's "death obligations" including but not limited to funeral expenses, debts, taxes, then directed payment of any cash bequests and specific devises. The remainder was distributed via the "Morey Family Trust" to a subtrust for the benefit of Mr. Morey's three daughters.

Trustee filed a petition requesting a determination pursuant to Sec. 222.13(1), Fla. Stat., that the life insurance proceeds payable to the trust were exempt from all of the "death obligations" and unavailable to the estate or Mr. Morey's creditors. The Court noted Sec. 222.13, Fla. Stat., can be waived "…by naming as beneficiary a trust whose terms direct distribution of the trust assets to the personal representative, if requested." The trial court found that the clear and explicit terms of the trust, which contained more than a general direction for payment of 'death obligations,' make the policy proceeds available to satisfy obligations of the estate and ruled that the life insurance proceeds were not exempt.

Trustee then filed a supplemental petition for reformation of the trust to express the settlor's purported intent that life insurance proceeds be exempt. This was denied by the Trial Court because the Trustee failed to prove entitlement to reformation of the trust by clear and convincing evidence and ordered compliance with the trust provision concerning the disposition of the trust assets. The appellate court found the trial court did not err in denying reformation of the trust documents. Even though decedent's financial situation was declining from the time he executed his estate planning documents to the date of his death and subsequently caused his subtrust, the Morey Family Trust to lack funds, this did not constitute a "mistake" requiring reformation of the trust document. Reformation is not available to modify the trust terms just to do what the settlor would have done, if he had foreseen a change in his circumstances.

If a majority of the examining committee members in a guardianship proceeding conclude that the alleged incapacitated person is not incapacitated in any respect, the Court shall dismiss the petition

Rothman v. Rothman, 93 So. 3d 1052 (Fla. 4th DCA 2012)

Mr. Rothman's ("alleged incapacitated person" or "AIP") grandchildren started guardianship proceedings for Mr. Rothman. The court appointed an evaluating committee. Two of three committee members found Mr. Rothman capacitated, whereas the third member recommended a limited guardianship. A second evaluation was performed by a different committee, with the same result.

The AIP sought dismissal of the petition based on Sec. 744.331(4), Fla. Stat. which states that the court **shall** dismiss the petition to determine incapacity when the majority of the committee members conclude that the alleged incapacitated person is not incapacitated in any respect. The trial court found the statute unconstitutional and denied the motion to dismiss the proceedings. The AIP filed a writ of mandamus requiring the trial court to dismiss the petition to determine his incapacity.

The Court of Appeal granted the petition for writ of mandamus. In so doing, the Court cited to *In re Keene*, 343 So. 2d 916 (Fla. 4th DCA 1977), noting that Sec. 744.331(4), Fla. Stat., should be strictly construed. The Court further noted that where a statute prescribes a certain method of proceeding to determine a person's competency, the statute must be strictly followed.

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Charles (Chad) Callahan III, Tampa and Lester Law, Naples – Program Co-Chairs

8:20 a.m. – 9:10 a.m.
Panel Discussion: The Latest Out of Washington – Where We Are and Where We Are Headed
Ronald Aucutt, Tysons Corner, VA, James Carlisle, Washington, DC, and Brian Sparks, Tampa

9:10 a.m. – 9:20 a.m. **Break**

9:20 a.m. – 10:00 a.m.
Latest Cases, Law, and Trends in Asset Protection Planning
Gideon Rothschild, New York, NY

10:00 a.m. – 10:40 a.m.
Status of the Estate Tax and Planning for 2012 and 2013
Ron Aucutt, Tysons Corner, VA

10:40 a.m. – 10:50 a.m. **Break**

10:50 a.m. – 11:40 a.m.
Panel Discussion: Domestic and Offshore Asset Protection Trusts: Challenges and Opportunities
Gideon Rothschild, New York, NY,
Barry Nelson, Miami Beach,
Chris Riser, Athens, GA and
Rob Lancaster, Naples

11:40 a.m. – 12:20 p.m.
Portability – Panacea? Pariah? or Placebo?
Richard Franklin, Washington, DC

12:20 p.m. – 1:30 p.m. **Lunch** (on your own)

1:30 p.m. – 2:00 p.m.
Homestead and Creditors - What Works and What Doesn't
Charlie Nash, Melbourne

2:00 p.m. – 2:20 p.m.
Top Ten Planning Tips for the Year-End – Income Tax Issues in Estate Planning
Lester Law, Naples

2:20 p.m. – 2:30 p.m. **Break**

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Year-End Charitable Planning
Lou Nostro, Miami

3:00 p.m. – 3:35 p.m.
Putting the "D'OH in DOMA: Recent Judicial Challenges to DOMA and Other Same-Sex Planning Ideas and Pitfalls
George Karibjanian, Boca Raton

3:35 p.m. – 4:15 p.m.
Asset Protection and Estate Planning – Why Not Have Both in the Best Jurisdictions
Barry Nelson, Miami Beach

4:15 p.m. – 4:20 p.m.
Closing Remarks
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AL 2012

What's Happening Within the Section...

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

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

SCHEDULE

EXECUTIVE COUNCIL MEETING

NOVEMBER 15-18, 2012

The Inn on Biltmore Estates
Asheville, NC

Reservations: 1-866-779-6277
www.biltmore.com/stay/rates
Room Rate ~~$219.00~~ **SOLD OUT**
Email Yvonne Sherron: ysherron@flabar.org to be placed on the waitlist for rooms, or to cancel a room.

Watch your email for more information.

2012 - 2013 CLE SCHEDULE:

Detailed information can be found on The Florida Bar website: www.floridabar.org/CLE. Search by course number.

NOVEMBER 30, 2012
Joint Estate Tax/Asset Protection*
(Course #1509)
Tampa*

FEB. 28, 2013
Alternate Dispute Resolution*
(Course #1507)
Ft. Lauderdale

** Webcast & Live*

Courses scheduled later in the year will appear in future editions of ActionLine.

NEW!!! One Hour Webcast Programs

(12:00 noon – 1:00 EST)

October 30, 2012
E-Ethics for E-Discovery: Considerations and Solutions for the E-Practitioner

December 5, 2012
What Every RPPTL Lawyer Needs to Know About Corporate Entities: Selection, Function and Utilization

January 23, 2013
What Every RPPTL Lawyer Needs to Know About the Fight against Money Laundering and Terrorist Financing

February 26, 2013
'Til Divorce Do Us Part… The New Beneficiary Designation Legislation

March 20, 2013
The New E-Filing Requirements - What Every Practitioner Needs to Know

More information will be forthcoming at www.rpptl.org. After you log in, click on "CLE," "Upcoming CLE."

Registration information is posted on-line four weeks prior to each program date.

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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Scan here for instant access to the Section website.

RPPTL ON THE GO

ACTIONLINE BULLETIN BOARD

DID YOU KNOW … there are new form FNMA and Freddie Mac arm's length affidavits for SHORT SALES. *See article on page 7.*

MARK YOUR CALENDAR!

The Minority Mentoring Picnic is Nov. 10, 2012. *See article on page 42.*

ARTICLES

... for the next issue of ActionLine are being accepted. Contact: spence@carltonfields.com

BE AWARE— The FR/BAR Contract, Rider A. "Condominium Association Disclosure" has been revised, effective September 2012. *See article on page 18.*

DISCOVERY RULES

For More Information… and a free 3 hour CLE on Florida's e-discovery rules, visit www.floridabar.org and click on "complimentary three-hour CLE program."

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