



ActionLine

A publication of The Florida Bar's Real Property, Probate & Trust Law Section

www.flabarrpntl.org

SPECIAL
LEGISLATIVE
"E-ISSUE!"

Vol. XXV, No. 1
THE FLORIDA BAR
August 2003

2003 RPPTL Section-Supported Legislation in Review:

Special Thanks to Those Who Made it Happen

The 2003 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of Real Property, Probate and Trust Law Section members. Many of such changes were a part of the Section's legislative package. This electronic issue of ActionLine is dedicated solely to the 2003 legislation that relates to Section members' practices. While not intending to be a comprehensive review of all of the legislation, this issue does highlight most of the relevant Section-supported legislation.

Most of the legislation has been acted on by the Governor. The final status and full text of each enrolled bill, including the final status of bills not yet acted upon, are available on the Legislature's web site, Online Sunshine: www.leg.state.fl.us. Additionally, the legislative history and the legislative staff summary are also available at the web site.

A number of House of Representatives and Senate Legislators made key contributions to this year's legislative initiatives. The following Legislators provided special help in 2003 and deserve special recognition for their efforts on behalf of the RPPTL Section.

In the Senate:

** **Senator Skip Campbell** from Ft. Lauderdale was the prime sponsor of the Section's major probate and trust law legislation. Senator Campbell also contributed significantly by supporting other initiatives as a member of the Senate Judiciary Committee.

** **Senator Jeff Atwater** from West Palm Beach was the prime sponsor of the Section's legislation dealing with Florida's Uniform Principal and Income Act.

** **Senator Mike Fasano** from New Port Richey was the sponsor of the Section's initiatives to revise the Marketable Record Title Act and clarify the vested rights provisions for members of mandatory homeowners' associations.

** **Senator Steve Geller** of Hallendale was the prime sponsor of the Section's revisions to the Condominium Act.

** **Senator Dan Webster** from Orlando and **Senator Jim Sebesta** from St. Petersburg facilitated the passage of the Section's initiative to clarify the status of continuously maintained roadways.

** **Senator Burt Saunders** of Naples was the Senate sponsor of the Section's guardianship initiatives.

** **Senator Alex Villalobos** from Miami, as Chairman of the Senate Judiciary Committee, helped with the scheduling and passage of four of the Section's probate and real property initiatives.

In the House of Representatives

** **Representative Jeff Kottkamp** from Cape Coral was the prime sponsor of the Section's major probate and trust law legislation. Representative Kottkamp also contributed significantly by supporting other initiatives as the Chairman of the House Judiciary Committee.

** **Representative Dudley Goodlette** from Naples was the prime sponsor of the Section's legislation dealing with Florida's Uniform Principal and Income Act and the Florida Corpo-

See "Section-Supported," next page



INSIDE THIS LEGISLATIVE ISSUE:

Changes to the Florida Construction Lien Law ...	2
Miscellaneous 2003 Legislative Changes	4
New Lien Rights on Decedent's Protected Homestead: Do Not Be Caught Off Guard	5
Presumed Dedication of Roads after 7 Years Maintenance by Governmental Entity	6
Disclosure Summary on Residential Property	6
Guardianship Law Changes Originating From the RPPTL Section	8
Changing Landscape for Residential Communities	9
Probate Law Changes	14
Clarifications Enacted to New Principal and Income Law	15

rations Act. Representative Goodlette also helped with the scheduling of the Section's initiatives before the full House of Representatives as the Chairman of the House Policy Committee.

- ** Representative Andy Gardiner** from Orlando and **Representative Ron Reagan** from Sarasota facilitated the passage of the Section's initiative to clarify the status of continuously maintained roadways.
- ** Representative Gus Bilirakis** from Palm Harbor was the sponsor of the Section's initiatives to revise the Marketable Record Title Act and clarify the vested rights provisions for members of mandatory homeowners' associations.
- ** Representative Carole Green** from Ft. Myers and **Representative Heather Fiorentino** from New Port Richey were the House sponsors of the Section's guardianship initiatives.
- ** Representative Jack Seiler** from Pompano Beach was a prime supporter of the Section's disclosure initiatives and its real property and probate bills.

In addition to the Legislators, who supported the Section's legislative initiatives, the Section's Legislation Committee worked diligently to get this legislation passed. This Legislation Committee is composed of the Section's 2002-2003 officers and a Legislative Review Committee. The Committee met with the Section's lobbyists (led by

Peter Dunbar) by telephone at least once a week during the session and often times carried on vigorous debate and analysis by e-mail.

The Section's Legislative Review Committee is chaired by Sandra F. Diamond. Burt Bruton is the Committee's vice-chair. Additionally, the Legislative Review Committee was composed of Mike Dribbin, Ed Koren, George Meyer, Charlie Nash, Pam Price, and Julie Williamson.

The Committee relied heavily on all of the Section's committee chairs, but specific individuals who gave a lot of time to these legislative efforts should also be recognized: Fletcher Belcher, Debra Boje, Brian Felcoski, Michael Gelfand, Bob Hunkapiller, Glenn Mednick, Jeff Price, and Lee Weintraub.

Also, the authors of the reviews in this issue are very likely individuals who were involved in the legislation at least from the grass roots levels. Appreciation is expressed to all Section committee members for their labor of love for the good of Florida practitioners and residents.

For additional information, the annual Legislative Update and Recent Case Law Update is a comprehensive CLE overview of recent statutory and case law developments impacting the real estate, probate and trust law practitioner. Although the 2003 seminar was held on August 1, the audiotape and/or the course book are available for purchase. Enclosed in this issue are the speaker and topic list as well as an order form for the materials. The materials can be ordered from The Florida Bar.

*This special legislative issue of ActionLine will **only** be disseminated electronically. It will be posted on the RPPTL Section's website: www.flabarrpntl.org.*

Changes to the Florida Construction Lien Law (Effective June 25, 2003)

By Lee Weintraub, Esq., Becker & Poliakoff, Ft. Lauderdale, Florida

Chapter 713 of the Florida Statutes was revised in 2003 to become more consumer friendly. Although consumers are theoretically afforded some protection against construction liens if they followed the requirements for proper payments, the statutory code is complex, difficult to understand, and not readily clear to consumers. The Legislature endeavored to increase the warnings owners on construction projects will receive to advise them of the potential liability they bear under the Lien Law. Most of these changes apply only to construction of single or multiple family dwellings up to and including four units.

A new statute, Section 713.015, was created to require a mandatory provision in contracts between an owner and a contractor on single or multiple family dwellings up to and including four units. The mandatory provision must be in at least 18 point capitalized bold-faced type and is as follows:

ACCORDING TO FLORIDA'S CONSTRUCTION LIEN

LAW (§§ 713.001-713.37, FLORIDA STATUTES), THOSE WHO WORK ON YOUR PROPERTY OR PROVIDE MATERIALS AND ARE NOT PAID IN FULL HAVE A RIGHT TO ENFORCE THEIR CLAIM FOR PAYMENT AGAINST YOUR PROPERTY. THIS CLAIM IS KNOWN AS A CONSTRUCTION LIEN. IF YOUR CONTRACTOR OR SUBCONTRACTOR FAILS TO PAY SUBCONTRACTORS, SUB-SUBCONTRACTORS, OR MATERIAL SUPPLIERS OR NEGLECTS TO MAKE OTHER LEGALLY REQUIRED PAYMENTS, THE PEOPLE WHO ARE OWED MONEY MAY LOOK TO YOUR PROPERTY FOR PAYMENT, EVEN IF YOU HAVE PAID YOUR CONTRACTOR IN FULL. IF YOU FAIL TO PAY YOUR CONTRACTOR, YOUR CONTRACTOR MAY ALSO HAVE A LIEN ON YOUR PROPERTY. THIS MEANS IF A LIEN IS FILED, YOUR PROPERTY COULD BE SOLD AGAINST YOUR WILL TO PAY FOR LABOR, MATERIALS, OR OTHER SERVICES THAT YOUR CONTRACTOR OR

A SUBCONTRACTOR MAY HAVE FAILED TO PAY. FLORIDA'S CONSTRUCTION LIEN LAW IS COMPLEX AND IT IS RECOMMENDED THAT WHENEVER A SPECIFIC PROBLEM ARISES, YOU CONSULT AN ATTORNEY.

Section 713.06, Fla. Stats., addresses construction liens of subcontractors, sub-subcontractors and suppliers. Among other things, this statute creates the requirement to serve a Notice to Owner as a condition precedent to a lien claim if the lienor lacks contractual privity with the property owner. The statutorily prescribed form of the Notice to Owner was changed to include the following warning in capital letters at the top of the Notice:

WARNING! FLORIDA'S CONSTRUCTION LIEN LAW ALLOWS SOME UNPAID CONTRACTORS, SUBCONTRACTORS, AND MATERIAL SUPPLIERS TO FILE LIENS AGAINST YOUR PROPERTY EVEN IF YOU HAVE MADE PAYMENT IN FULL.

The rest of the Notice to Owner form remains unchanged.

Section 713.06 also establishes the manner by which the owner must make payments to exonerate themselves from liability under the Lien Law. One of the statutory requirements is to obtain a Contractor's Final Affidavit before the owner makes final payment to the general contractor. This Affidavit must identify all unpaid subcontractors and suppliers who timely served a Notice to Owner and the amount they remain unpaid. Although this legal requirement has been in Section 713.06 for years, the 2003 change to the statute provides a mandatory form to be used for the Contractor's Final Affidavit. As a practical matter, most construction lawyers were always counseling their clients to use a similar form as that now required by statute.

Section 713.08, Fla. Stats., creates the Claim of Lien, perhaps the most powerful document in perfecting a construction lien. The statute has long provided the form that should be used for the Claim of Lien, but now adds the following warning to the top of the Lien in capital letters:

WARNING!

THIS LEGAL DOCUMENT REFLECTS THAT A CONSTRUCTION LIEN HAS BEEN PLACED ON THE REAL PROPERTY LISTED HEREIN. UNLESS THE OWNER OF SUCH PROPERTY TAKES ACTION TO SHORTEN THE TIME PERIOD, THIS LIEN MAY REMAIN VALID FOR ONE YEAR FROM THE DATE OF RECORDING, AND SHALL EXPIRE AND BECOME NULL AND VOID THEREAFTER UNLESS LEGAL PROCEEDINGS HAVE BEEN COMMENCED TO FORECLOSE OR TO DISCHARGE THIS LIEN.

Section 713.135, Fla. Stats., creates the Notice of Commencement, recorded in the public records when commencing construction projects to notify the public of the existence of ongoing construction and notify potential

lienors of vital information necessary for perfection of lien rights. It also establishes priority for mortgages, liens and other encumbrances pertaining to the construction. Under the 2003 change to the statute, when any person applies for a building permit, the permitting authority is required to provide the applicant and the owner of the property a printed statement obtained from the Department of Business and Professional Regulation explaining the owner's rights under the Lien Law. The notice must specifically address the owner's rights when a lienor fails to furnish a Notice to Owner and the statutory vehicles available to shorten the duration of a Claim of Lien; i.e., Notice of Contest of Lien and Order to Show Cause.

Section 713.31 creates statutory liability for fraud. The 2003 legislative change to this statute provides, whenever a contractor is prosecuted for fraud, the State Attorney is required to notify the Department of Business and Professional Regulation, which in turn shall promptly investigate the matter and take appropriate disciplinary action against the contractor's license.

Section 713.345, Fla. Stats., involving misapplication of construction funds, now creates a permissive inference that a person knowingly and intentionally misapplied construction funds whenever 1) a valid lien has been recorded against the property, 2) the person who ordered the labor, services or materials received sufficient funds to pay for same, and 3) the person failed for a period of at least 45 days from receipt of the funds to remit sufficient payment to the lienor. This provision appears to impose potential criminal liability upon a contractor who fails to pay, or makes untimely payment to, subcontractors or suppliers.

Section 713.3471, Fla. Stats., pertaining to responsibilities of a construction lender, now provides that, before a construction lender makes any loan disbursement directly to the owner or jointly to the owner and any other party, the lender is required to give the following written notice to the borrowers in bold type larger than any other type on the page:

WARNING!

YOUR LENDER IS MAKING A LOAN DISBURSEMENT DIRECTLY TO YOU AS THE BORROWER, OR JOINTLY TO YOU AND ANOTHER PARTY. TO PROTECT YOURSELF FROM HAVING TO PAY TWICE FOR THE SAME LABOR, SERVICES OR MATERIALS USED IN MAKING THE IMPROVEMENTS TO YOUR PROPERTY, BE SURE THAT YOU REQUIRE YOUR CONTRACTOR TO GIVE YOU LIEN RELEASES FROM EACH LIENOR WHO HAS SENT YOU A NOTICE TO OWNER EACH TIME YOU MAKE A PAYMENT TO YOUR CONTRACTOR.

Many construction lenders fund progress payments by wire transfer without providing any written receipt, confirmation, or remittance advice. Now those lenders must forward some written information containing this warning simultaneously with the wire transfer.

Miscellaneous 2003 Legislative Changes

By Sandra Fascell Diamond, Esq., Williamson, Diamond & Caton, P.A., St. Petersburg, Florida

Anti-Lapse - Extending the Coverage

Beneficiaries who were deemed to have predeceased the testator because of operation of law were previously not specifically covered by the anti-lapse statute.

Probate Code: The anti-lapse statute **F.S. 732.603** was extended to devisees or beneficiaries of testamentary trusts who are treated as having predeceased the testator when such lapse is caused by operation of law as under the Killer Statute.

Trust Code: A new trust anti-lapse was created for intervivos trusts: **F.S. 737.6035**. It will prevent a lapse when a beneficiary of an intervivos trust who is a grandparent, or a lineal descendant of a grandparent:

1. is dead at the time the trust was executed or at the termination of a trust interest created by an intervivos trust;
2. fails to survive the grantor; or
3. is required by the intervivos trust or by operation of law to be treated as having predeceased the grantor.

Awarding Taxable Costs

The intent of Florida Statutes Section 737.627 and its probate counterpart Section 733.609 has been to authorize the court to award taxable costs, including attorney's fees, as "in chancery actions" when the litigation involves issues of breach of fiduciary duty. The general rule is that costs follow the judgment and the prevailing party would recover from the non-prevailing party.

Sec. 737.627(2) was changed to clarify that the court, in its discretion, "may direct payment from a party's interests, if any, in the trust or enter a judgment which may be satisfied from other property of the party or both." The change will apply to all proceedings commenced after the effective date of the act, without regard to the date the trust was created or the date of the settlor's death.

The statutory changes override the holding in *Snyder v. Bell*, 746 S.2d 1100 (Fla. 2d DCA 1999) in which the court found that liability for attorneys fees could not extend beyond a party's interest in the trust.

Coordinating changes were made to Section 733.609 which is the predecessor companion in the Probate Code.

Technical Corrections to the Trust Code

Several sections of the Trust Code were amended to make them consistent with prior changes to the Probate Code.

Section 737.106 provides that when a trust instrument is executed prior to marriage, any provision which affects the divorced spouse shall become void and the spouse will be treated as having died upon the entry of the dissolution. **Annulment** was added to the statute and will have the same effect as divorce.

Section 737.2035(2). Any attorney who has rendered services to a trust may "be awarded reasonable compensation from the trust." This change conforms subsection (2) to the 2001 changes in the Probate Code. **F.S. 733.106(3)**.

Section 737.204. Proceedings to review the employment of agents and

review compensation of the trustee and employees of the trust is addressed in revision to this statute.

a. The revisions state that when a trust is the beneficiary of a probate estate, the reasonableness of compensation of the trustee or any person employed by the trust may be determined in the probate estate.

b. The burden of propriety of employment and reasonableness of compensation is upon the trustee and the employee.

c. If it is determined that excessive compensation has been paid, then the court may order appropriate refunds.

d. The costs, including attorneys fees, to determine reasonable compensation shall be determined by the court and paid from the assets of the trust. Then court shall direct from which part of the trust assets the compensation shall be paid.

e. No expert testimony is required by the court to determine reasonable compensation. If expert testimony is offered, an expert witness fee shall be awarded and the court shall direct from which part of the trust assets the fee shall be paid.

f. Petitioners seeking to determine compensation under this provision may serve formal notice as provided in the Probate Rules.

Section 737.404 is changed to clarify that when there are three or more trustees, a dissenting trustee is not liable for the consequences of an action if the dissent is in writing at or before the time of the action.

New Lien Rights on Decedent's Protected Homestead: Do Not Be Caught Off Guard

(Applies to Estates of Decedents Dying after June 12, 2003)

By Debra L. Boje, Esq., Ruden, McClosky, Smith, Schuster & Russell, P.A., Tampa, Florida

In 2001, several revisions were made to the Florida Probate Code. One of those revisions was to Florida Statutes, Section 733.608. The 2001 revision allowed the personal representative, in certain instances, to take control and to expend probate funds to preserve, insure and protect the decedent's protected homestead during the estate administration. The 2001 revision, however, did not (i) provide guidance as to how the personal representative went about taking control over the protected homestead; (ii) protect the personal representative in the event he or she did not take control over the protected homestead; and (iii) provide a mechanism for the personal representative to recoup monies spent on the protected homestead. The latter left many personal representatives who did take control of the protected homestead and expended estate funds in the position of having to justify to creditors and residuary beneficiaries who did not receive the protected homestead, why their funds were expended for the benefit of others. The 2003 revision to §733.608 hopes to solve all three of the foregoing problems.

When does the Personal Representative have the right to take control of Protected Homestead?

The first revision that was made to Section §733.608(2) was to change the term "in possession of" to "occupied by". The statute now makes it clear that if the decedent's protected homestead is not being occupied by a person who would appear to be entitled to receive all or a portion of the property following the decedent's death, that the personal representative has the right, but not the obligation to take control of the property.

What if the Personal Representative Chooses not to take control of the Property?

Recognizing that some personal representatives may not want the added burden or responsibility of taking control of the protected homestead §733.608(11) was added to the Statutes. This provision relieves the personal representative from liability when he or she decides not to take possession of the protected homestead and details what happens if the court later determines that the property was not the protected homestead of the decedent.

How are funds expended on the Protected Homestead, Recouped or Abandoned by the Personal Representative?

The remaining revisions to §733.608 establish the mechanism whereby a lien on the property is created, paid off, terminated and in certain circumstances abandoned.

If the personal representative has expended or is obligated to expend estate funds to preserve, maintain, insure or protect the protected homestead, the personal representative is entitled to a lien on the protected homestead. §733.608(3). The lien includes attorney's fees and costs incurred for the benefit of the protected homestead. §733.608(3). Section 733.608(4) sets forth the elements that must be contained in the notice of lien. The statute requires that a copy of the notice of lien must be served by formal notice on each person appearing to have an interest in the protected homestead and filed in the probate proceeding.

Before or after the lien is filed any interested person may petition the court to adjudicate the amount of the debt. The procedure for adjudicating the amount of the lien is set forth in §733.608(3)(a). The petition must be served by formal notice on the persons appearing to have an interest in the protected homestead.

Section 733.608(3)(b) provides that the personal representative may enforce payment of the debt by (i) foreclosure of the lien (§733.608(7) provides that this is done in the same manner as foreclosing a mortgage); (ii) by a pro rata offset of the debt against any other property in the personal representative's possession that otherwise would be distributed to a beneficiary with an interest in the protected homestead; or (iii) offset against the revenues from the protected homestead. This subsection also makes it clear that the ultimate recipients of the protected homestead are not personally liable for the debt.

Section 733.608(5) provides that the lien terminates upon the earliest of (i) the recording of a satisfaction or release of lien; (ii) discharge of the personal representative; (iii) one year after the lien is recorded unless a proceeding is brought prior to the one year period to determine the amount of the debt or enforce the lien; or (iv) entry of an order releasing the lien.

An interested person may make a written request for an estoppel letter from the personal representative setting forth the unpaid balance of the debt. §733.608(6). The personal representative has fourteen (14) days from receipt of the letter to provide the information. §733.608(6).

If the personal representative receives complete payment of the debt, the personal representative must record a satisfaction of lien within thirty (30) days of payment. §733.608(6). If a judicial proceeding is necessary to compel the filing of a satisfaction §733.608(6) allows the prevailing party attorney's fees and costs.

Section 733.608(9) provides that by order of the court

continued, next page

the personal representative may be relieved of the duty to collect the debt if (i) the estimated court costs and attorney's fees to collect the debt will approximate or exceed the amount of the recovery, or (ii) it is impractical to enforce collection in view of the improbability of collection.

In order to accommodate the sale of the protected homestead secured by a lien, the proceeds from the sale may be placed in a restricted account or in escrow pending the determination and payment of the lien. §733.608(12). The

transfer of the lien can be accomplished by the written consent of the personal representative and the apparent owners of the property or by court order. §733.608(12).

This Statute applies to all estates of decedents dying after the date on which the act became law: June 12, 2003. Before allowing a personal representative to expend funds for the benefit of a protected homestead, a careful reading of §733.608 is strongly advised. Do not be caught off guard.

Presumed Dedication of Roads after 7 Years Maintenance by Governmental Entity

Session Law Ch. 2003-286 (Senate Bill 0676), Effective July 14, 2003

Submitted by the RPPTL Section Problems Study Committee

Prior to July 14, 2003, Florida Statutes Section 95.361, "Roads Presumed to be Dedicated," required that a road must be both constructed and maintained "continuously and uninterruptedly" for four years by a governmental entity before it was deemed dedicated to the public. The only access to many parcels of land is by roads that have been maintained by governmental entities for many years, but there are no records of who constructed the road. Records either were not kept then or they have been destroyed. Ironically, the longer the roads have been maintained, the less likely there are records of construction. Because it was uncertain who constructed the road, title insurers refused to insure access, and lenders refused to lend.

To help remedy this problem, the RPPTL Section proposed an amendment to F.S. § 95.361 which became a part of Senate Bill 0676. Senate Bill 0676 adds a new subsection (2) to F.S. § 95.361 that provides a presumed dedi-

cation upon the passage of seven years of regular maintenance and repair by a governmental entity regardless of who (private or public entity) constructed the road. The provision vests title in the applicable governmental entity that has maintained the road for the seven years. (The "constructed and maintained for 4 years" requirement remains in F.S. § 95.361 as an alternative method of vesting.)

The bill also provides a new subsection (4) that allows persons having an interest in a roadway (that is the subject of (2) above) a one-year period from the effective date of the legislation or seven years after the initial date of maintenance and repair on the subject roadway, whichever is greater, to file an action to cause a cessation of the maintenance and occupation of the property. Such a timely filed action adjudicated in favor of the persons filing the claim will prevent the presumed dedication to the public under subsection (2).

The Governor signed the bill July 14, 2003.

Disclosure Summary on Residential Property

(Effective July 1, 2003)

By William J. Haley, Esq., Brannon, Brown, Haley, Robinson and Bullock, Lake City, Florida

Effective July 1, 2003, Senate Bill 1220, which amended Section 689.26, Florida Statutes, requires a revised Disclosure be given to purchasers of real estate. It is the belief of many attorneys that the Disclosure must be given on Contracts for all property, both residential and commercial, although it was more than likely intended to cover only property with a Homeowner's Association. The Florida Association of Realtors (FAR) is advising its members that the Disclosure is only required for property that has covenants and restrictions; however, it is the opinion of a number of attorneys that it is not worth taking the chance so they will recommend the inclusion of the Disclosure at the time of signing the Contract. The problem comes about because the Amendment to the Statute states that it covers all trans-

actions in a "community," but "community" is not defined. Although the Disclosure mentions Homeowner's Associations, it does not cross reference Chapter 720, Florida Statutes, that regulates Homeowner's Associations.

The Statute, as amended, specifically excludes Condominiums, Cooperatives, Timeshare, and Mobile Home Parks.

Should the Disclosure **not** be given at the time of the signing of the Contract, the Statute gives the Buyer the right to void the Contract within three days of receiving the Disclosure, or, up to the time of closing, whichever is less.

The Disclosure proposed for FAR/BAR contracts is as follows. (See *HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE* form on next page.)



HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE

BUYER'S INITIALS—SELLER'S INITIALS: If to be made a part of the Contract.

() () -- () ()

IF THE DISCLOSURE SUMMARY REQUIRED BY SECTION 689.26, FLORIDA STATUTES, HAS NOT BEEN PROVIDED TO THE PROSPECTIVE PURCHASER BEFORE EXECUTING THIS CONTRACT FOR SALE, THIS CONTRACT IS VOIDABLE BY BUYER BY DELIVERING TO SELLER OR SELLER'S AGENT WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS AFTER RECEIPT OF THE DISCLOSURE SUMMARY OR PRIOR TO CLOSING, WHICHEVER OCCURS FIRST. ANY PURPORTED WAIVER OF THIS VOIDABILITY RIGHT HAS NO EFFECT. BUYER'S RIGHT TO VOID THIS CONTRACT SHALL TERMINATE AT CLOSING.

BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THIS DISCLOSURE.

DISCLOSURE SUMMARY FOR _____
(Name of Community)

1. AS A BUYER OF PROPERTY IN THIS COMMUNITY, YOU ☐ WILL ☐ WILL NOT BE OBLIGATED TO BE A MEMBER OF A HOMEOWNERS' ASSOCIATION ("ASSOCIATION").
2. THERE HAVE BEEN OR WILL BE RECORDED RESTRICTIVE COVENANT ("COVENANTS") GOVERNING THE USE AND OCCUPANCY OF PROPERTIES IN THIS COMMUNITY.
3. YOU ☐ WILL ☐ WILL NOT BE OBLIGATED TO PAY ASSESSMENTS TO THE ASSOCIATION. YOU ☐ WILL ☐ WILL NOT BE OBLIGATED TO PAY SPECIAL ASSESSMENTS TO THE RESPECTIVE MUNICIPALITY, COUNTY, OR SPECIAL DISTRICT. ALL ASSESSMENTS ARE SUBJECT TO PERIODIC CHANGE.
4. YOUR FAILURE TO PAY SPECIAL ASSESSMENTS OR ASSESSMENTS LEVIED BY A MANDATORY HOMEOWNERS' ASSOCIATION COULD RESULT IN A LIEN ON YOUR PROPERTY.
5. THERE ☐ IS ☐ IS NOT AN OBLIGATION TO PAY RENT OR LAND USE FEES FOR RECREATIONAL OR OTHER COMMONLY USED FACILITIES AS AN OBLIGATION OF MEMBERSHIP IN THE HOMEOWNERS' ASSOCIATION. (If such obligation exists, then the amount of the current obligation is \$ _____.)
6. THE COVENANTS ☐ CAN ☐ CANNOT BE AMENDED WITHOUT THE APPROVAL OF THE ASSOCIATION MEMBERSHIP OR, IF NO MANDATORY ASSOCIATION EXISTS, PARCEL OWNERS.
7. THE STATEMENTS CONTAINED IN THIS DISCLOSURE FORM ARE ONLY SUMMARY IN NATURE, AND, AS A PROSPECTIVE PURCHASER, YOU SHOULD REFER TO THE COVENANTS AND THE ASSOCIATION GOVERNING DOCUMENTS BEFORE PURCHASING PROPERTY.
8. THESE DOCUMENTS ARE MATTERS OF PUBLIC RECORD AND CAN BE OBTAINED FROM THE RECORD OFFICE IN THE COUNTY WHERE THE PROPERTY IS LOCATED.

DATE

BUYER

DATE

BUYER

Guardianship Law Changes Originating From the RPPTL Section

(Effective May 30, 2003)

By Glenn M. Mednick, Esq., Boca Raton, Florida, Chair of Guardianship Law Committee

Three items within Senate Bill 2568 originated from the Real Property, Probate and Trust Law Section's Guardianship Law Committee. Specifically, Section 7 of the Bill, regarding F.S. §744.108, Section 11, regarding F.S. §744.3145, and Section 12, regarding F.S. §744.444, were sponsored by the Section. Senate Bill 2568 contains many other sections which directly impact the practice of guardianship law but were not sponsored by the Real Property, Probate and Trust Law Section and did not arise out of the Guardianship Law Committee. While the RPPTL Section did not sponsor the other sections, they were in fact passed. Because those sections did not arise from the Guardianship Law Committee and were not sponsored by the RPPTL Section, they will not be addressed herein.

Attorney's Fees.

Section 7 created Subsection (8) to F.S. §744.108. By virtue of this change, proceedings to review or determine guardian's or attorney's fees under F.S. §744.108(2) will be part of the guardianship administration. Accordingly, the cost and fees of the guardian's attorney incurred in conjunction with that proceeding shall be determined by the court and paid from the guardianship estate, unless the court finds the requested compensation to be substantially unreasonable. This addition to F.S. §744.108 is based on similar language contained within the Florida Probate Code, i.e., F.S. §733.6175 (2).

Education Requirements for Parents.

Section 11 amended F.S. §744.3145 so as to reduce the guardian education requirements for parents appointed by the court to be the guardian of the property of his or her minor children to four (4) hours, as contrasted with eight (8) hours as is presently required. It further delineates the specific areas within which they must receive training. Many of the existing training courses are structured around the needs or requirements of wards who are elderly and are not geared toward the role of a guardian for a minor and especially toward those situations where a parent is appointed to serve as guardian of his or her minor child. Training sessions for parents appointed as guardians of their minor children will now be shortened to four (4) hours and will be streamlined to areas germane to this specialized type of guardianship proceeding.

Payments Without Court Approval.

The most significant change implemented by Senate Bill 2568 is set forth in Section 12 which creates Subsection (16) of F.S. §744.444. Section 12 also created Subsection (17) within the same statute; however, that sub-

section was not sponsored by RPPTL and will therefore not be discussed in this article. Subsection (16) authorizes payment without court approval of costs and reasonable fees or compensation to persons, INCLUDING ATTORNEYS, employed by the guardian from the assets of the guardianship estate. The legislature added some language to the version of the legislation prepared and approved by the Guardianship Law Committee which states: "subject to obtaining court approval of the annual accounting." Insertion of all costs and fees paid into the annual accounting would be required even without this additional language and was always assumed by the Guardianship Law Committee in its discussions regarding the proposed legislation.

Prior to Senate Bill 2568, F.S. §744.108 was revised in 1990, and that legislation was intended to authorize payment of professional fees without court approval. However, F.S. §744.108 was interpreted differently within various counties around the State. Many of the larger counties required the filing of a petition for payment of attorneys' fees and costs, while some of the smaller counties did not and allowed the guardian to pay attorneys' fees and costs from the guardianship estate provided that the sums paid were reflected in the annual accounting. In those counties where a petition was required, court hearings were required by some of the judges, while other judges within the same county reviewed the petitions and determined without a hearing what hours were compensable and at what rate. This procedure not only created inconsistency from county to county, but it caused unnecessary expense to be incurred by way of preparation of petitions and attendance at hearings. It also would delay payment to attorneys in some cases for an extended period of time as many judges did not want to review more than one (1) or two (2) fee petitions per year. In addition to the logistical problems previously addressed, this also led to an exodus of quality practitioners from the area of guardianship law. It is hoped that this change will effectuate a reversal of that trend. One of the problems not addressed by Section 12 is guardianship estates in which all the liquid funds must be held in restricted depositories. The solution thereto is a standing order in guardianship estates requiring restricted depositories to allow the attorneys' fees and costs to be paid without the necessity of going back before the court to obtain specific authority for each payment which is to be made.

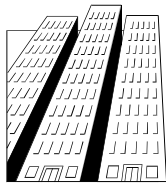
Editor's Note: A comprehensive review of the new guardianship laws is available in the 2003 23rd Annual Legislative Update and Recent Case Law Update CLE materials.

Changing Landscape for Residential Communities

By Peter M. Dunbar, Esq., RPPTL Legislative Counsel, Tallahassee, Florida

In the ever-changing world of community living, the 2003 Legislative Session has produced several new laws governing residential real property and those who provide services to residential communities. The outline which follows offers a summary of the significant items by topical category and identifies the measure by the bill number, as well as by the corresponding Chapter Law number for those measures acted on by the Governor by the time this article was prepared.

CONDOMINIUM AND COOPERATIVE LEGISLATION



A. Condominium and Cooperative Associations (CS/CS/CS/SB 592: Chapter 2003-14, Laws of Florida.)

Most of the Session's significant changes to the laws governing condominiums and cooperatives are found in CS/CS/CS/SB 592. Among the sections in the bill, there are provisions to authorize the optional "electronic transmission" of meeting notices; a provision to permit the domestication of foreign not-for-profit corporations; clarification of the property insurance requirements for condominiums; authorization for associations to charge for requested information and estoppel assessment certificates; and authorization for condominium and cooperative associations to waive the retrofit installation requirement for fire sprinklers upon a two-thirds vote of the association membership.

- 1. Electronic Notice:** Sections 617.01401 and 617.0141 of the Corporate Not-for-Profit Act are revised to define "electronic transmission" to include fax and e-mail and to authorize their use for the delivery of notice for association meetings.
- 2. Proof of Notice:** Under the amendments to the Corporate Not-for-Profit Act, an affidavit of the secretary or other authorized agent of the association that the notice has been given by a form of electronic transmission, in absence of fraud, is prima facie evidence that the notice has been given and of the other facts stated in the notice.
- 3. Association Domestication:** New Section 617.1803 is created to provide procedures for the domestication of foreign not-for-profit corporations, allowing condominium and cooperative associations organized outside the state to domesticate in Florida.
- 4. Association Records:** The bill modifies Section 718.111 (12)(a)7 and includes e-mail addresses and designated fax numbers provided by unit owners to implement the new electronic notice as a part of the official records of the association. As such, the addresses and numbers are available to other members of the association as provided in the Act.
- 5. Use of Electronic Notice:** Paragraphs (c), (d), and (e) of Section 718.112 (2) are modified to permit the use of the electronic notice format for meetings of the board, the membership, board elections, budget meetings of the board, and committee meetings. Special meetings of the membership to recall members of the board are excluded and notice must be given in the traditional manner.
- 6. Closed Circuit Television Notice:** New provisions have been added to Paragraphs (c) and (d) of Section 718.112 (2) to authorize notice for board and membership meetings by closed-circuit cable television. The newly authorized notice for the meetings may be used in lieu of, or in addition to, the conspicuous posting of the notice requirement currently in the law, and if the option is used, the notice and agenda must be continuously broadcast on the closed-circuit channel at least four times an hour for the required time period.
- 7. Implementation of Electronic Noticing:** The electronic notice provisions are optional for communities, and the option must be added to the bylaws of the association to be used. To use the closed-circuit television notice option in addition to or in lieu of physical posting, the board must adopt a rule to implement the option.

- 8. Electronic Notice – Cooperatives:** The same changes for electronic noticing and broadcast notices are extended to cooperatives by terms of the new act by amending Sections 719.104 (2)(a); 719.106 (1) (b), (c), (d), (e) and (f); and 719.106 (2)(c) of the Cooperative Act.
- 9. Insurance:** Section 718.111 (11) is modified by this year's legislation, and it revises the mandatory property insurance coverages that the condominium association is required to maintain for the benefit of the unit owners. There is no comparable change to the Cooperative Act.
- 10. Fees for Requested Information:** A new Paragraph (e) of Section 718.111 (11) is created to limit the amount of information that an association is required to provide a prospective purchaser or lienholder, and it permits the association to charge a fee, not to exceed \$150, for voluntary responses for requested information. The new provision limits the liability of the association when the information is provided in good faith. Section 719.104 (2)(d) provides the same change for cooperative associations.
- 11. Limited Proxies – Waiver of Financial Reporting:** The new law modifies Section 718.112 (2)(b) concerning limited proxies and extends their use to votes taken by the association membership to waive the annual financial reporting requirements of the Act. The same change appears in Section 719.106 (1)(b) for cooperative associations.
- 12. Estoppel Certificates:** Section 718.116 (8) now permits the condominium association or its authorized agent to charge a reasonable fee for the preparation of an estoppel certificate reflecting the status of assessments due or other monies owed the association by an owner. A corresponding change in Section 719.108 has also been made in the Cooperative Act.
- 13. Enforcement Proceedings:** Section 718.303 has been amended to provide that actions arising under the subsection (1) shall not be deemed to be actions in specific performance. The same change has been made to the Cooperative Act in Section 719.303.
- 14. Fire Sprinkler Retrofit and Waiver:** The most controversial provision in this year's legislation is the change to Section 718.112 (2)(l) relating to the mandatory fire sprinkler systems for buildings greater than 75 feet in height. The provision authorizes a partial waiver of the installation requirements upon two-thirds approval of all the voting interests in the condominium. If the waiver is approved, it may apply to the individually owned units but may not apply to the common areas of the building consisting of enclosed hallways, corridors, lobbies, stairwells, and entryways.
- 15. Waiver and Notice:** The waiver vote to avoid fire sprinkler installation must be done in person or by written consent and cannot be done by limited proxy. Once approved, a written notice of the waiver must be provided to all unit owners within 20 days by certified mail. Notice of the waiver must also be provided to new purchasers and renters in the building, and the waiver vote must be reported to the Division of Land Sales, Condominiums and Mobile Homes.
- 16. Fire Sprinklers – Cooperatives:** Corresponding changes that permit the same option for retrofit waivers in cooperatives are found in a new subsection (5) of Section 719.1055.



B. Condominiums – Display of Armed Services Flags (CS/SB 260: Chapter 2003-28, Laws of Florida.)

This bill modifies Section 718.113 of the Condominium Act to permit unit owners to display service flags of the Army, Navy, Air Force, Marine Corps and Coast Guard on designated holidays (Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day). The flags may not exceed 4 ½ feet by 6 feet in size and must be displayed in a respectful manner.

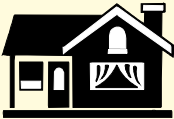


C. Florida Clean Indoor Air Act (SB 63-A: Chapter 2003-____, Laws of Florida.)

The act is implementing legislation for the "Smoke Free Workplace" constitutional initiative that passed in November 2002, effectively eliminating indoor smoking except for a few narrow exceptions. The new law was passed by the Legislature in special session (Session 2003A), and it took effect on July 1, 2003, as required by the constitutional amendment. The act applies to condominiums, cooperatives and homeowners' associations during meetings of the board and the membership, and it is applicable to all enclosed common areas on the property.

1. **“Work”– Defined:** By definition in 386.203 (12), “Work” means any person's providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part time, whether legally or not. “Work” includes, without limitation, any such service performed by an employee, independent contractor, agent, partner, proprietor, manager, officer, director, apprentice, trainee, associate, servant, volunteer, and the like.
2. **Meetings of the Board and Membership:** Under the new definition of “work,” all indoor meetings of the board, committees of the board, and the membership are now “smoke free” unless held in a private residence as permitted by Section 386.2045 (1).
3. **Enclosed Common Areas:** Assuming that someone cleans and maintains the areas, enclosed common areas are also “smoke free” under terms of the Act.
4. **Guest Rooms – Resort Condominiums:** Section 386.2045 (3) permits a smoking exception for designated smoking guest rooms in a resort condominium considered a public lodging establishment. A “designated guest room” includes the sleeping room and directly associated private areas, such as bathrooms, living rooms, and kitchen areas, if any.

HOMEOWNERS ASSOCIATION LEGISLATION



A. Homeowners' Association Powers and Covenants (CS/HB 861: Chapter 2003-79, Laws of Florida.)

This legislation contains changes which expand the powers of homeowners' association to represent the membership, and it contains two provisions that preserve and clarify community covenants and restrictions that were recommended for passage by the Section.

1. **Homeowners' Association Powers:** The act expands the powers of mandatory homeowners' associations under in Section 720.303 (1) by permitting them to represent their members in disputes concerning matters of common interest. In any dispute in excess of \$100,000, the association must obtain the approval of the membership before commencing litigation. Approval may be obtained by majority vote at a meeting of the membership where a quorum is present.
2. **Vested Rights of Members:** The act amends 720.306 (1) to clarify that the voting rights of a member and the percentage by which a parcel shares in the common expense of the association are vested rights of the parcel owner and may not be materially or adversely altered without the consent of the affected owner. The undefined term “vested rights” found in current law has been eliminated from the Chapter, and vested rights, other than those specified in Section 720.306 (1), must be created by the community covenants.
3. **Marketable Record Title Act:** The act modifies Sections 712.05 and 712.06 of the Marketable Record Title Act to permit covenants and restrictions that are expiring to be extended upon a 2/3rds vote of the board of directors of the homeowners' association. Current law permits the extension upon a majority vote of the lot owners. The act also provides for the notice and recording procedures to be followed when covenants are extended by the board under the new procedures.

B. Homeowners' Associations (CS/CS/CS/SB 592: Chapter 2003-14, Laws of Florida.)

The provisions of the act make minor technical changes to the law governing mandatory homeowners' associations and expand the notice options to permit electronic transmission of notices for meetings in mandatory homeowners' associations.

1. **Applicable Statutes and Electronic Notice:** Section 720.302 is amended to clarify that Chapter 720 is limited to not-for-profit corporations and to clarify that the provisions of Chapter 617 govern mandatory homeowners' associations unless expressly superceded by Chapter 720. The cross-reference between the Chapters permits the use of the new electronic notice format for both meetings of the board and the membership.
2. **Association Records:** The act modifies Section 720.303 (4)(g) to make e-mail addresses and designated fax numbers provided by home owners official records of the association.

- 3. Closed Circuit Television Notice:** Section 720.303 (2) is amended to authorize notice for meetings of the board of directors and the membership by closed-circuit cable television. The newly authorized notice for the membership may be used in lieu of, or in addition to, the conspicuous posting of the notice, and the notice and agenda must be continuously broadcast on the closed-circuit channel for the required time period.
- 4. Foreclosure:** Section 702.09 is amended to provide that the liens to secure the payment of assessments arising under recorded homeowners' association documents are included with the meaning of the Chapter. Liens created under condominium and cooperative documents are already covered by the Chapter.

D. Tax Deeds on Property Contiguous to Subdivision Lands (CS/HB 1721: Chapter 2003-284, Laws of Florida.)

Under the provisions of the act, the Legislature has attempted to resolve problems created by undeveloped parcels created at the time that a subdivision is platted and common areas adjacent to the platted lots are not conveyed to a homeowners' association. Effective January 1, 2004.

- 1. Notice by Tax Collector:** The act amends Section 197.502 to require the tax collector to notify the record owner of contiguous property in a subdivision when application is made for a tax deed on submerged land or common elements within the subdivision.
- 2. Notice by the County:** If there are no bidders for the certificates on such properties and the county does not elect to purchase the land, the county must notify the contiguous property owner that the land is available for taxes within 90 days of placing the property on the list of lands available for taxes.
- 3. Subdivision Assessments:** The act also creates a new Section in the ad valorem tax code to provide that ad valorem and non-ad valorem assessments for "common elements" of a subdivision shall be made against the lots in a subdivision and not against the subdivision property as a whole. By terms of the act, "common elements" include subdivision property not included within the lots; easements through the subdivision that have been dedicated or reserved for the benefit of the subdivision; and any other part of subdivision designated on the plat or designated on the site plan for drainage or retention areas.

OTHER LEGISLATION AFFECTING RESIDENTIAL PROPERTIES



A. Residential Construction Defect Disputes (CS/CS/SB 1286: Chapter 2003-49, Laws of Florida.)

The act provides an alternative dispute resolution procedure for construction defect claims or claims relating to defective materials or products in residential communities. The new provisions are applicable to single family homes, manufactured or modular homes, duplexes, residential apartment units, and association-maintained common areas and improvements. The act contains mandatory pre-suit procedures, which provide the contractor or design professional an opportunity to cure alleged defects prior to the claimant's institution of court action. Effective May 27, 2003.

- 1. Written Notice of Claim:** Prior to filing an action against a contractor, subcontractor, supplier, or design professional related to alleged construction defects, the association or other claimant must file written notice of the claim on the potential defendant at least 60 days prior to filing the action in court. The Notice of Claim must describe the claim in reasonable detail sufficient to determine the general nature of the defect and the damage or loss resulting from the defect.
- 2. Inspection of Premises:** Within 5 days of the Notice, the association or other claimant must provide reasonable access to the property by the contractor or design professional to inspect the defect and the extent of the repairs necessary to correct the defect. When subcontractors are involved, a reasonable opportunity for inspection is also extended to them under the act.
- 3. Written Offer to Remedy the Defect:** Within 25 days after receiving the Notice of Claim, the contractor or design professional must serve a written response on the association or other claimant with findings and results from the inspection. The response must (1) offer a detailed description of the repairs to remedy the defect at no cost to the association, together with a timetable for their completion; (2) offer to compromise and then settle the claim by monetary payment; or (3) dispute the claim, stating that no repair or monetary

payment will be made.

4. **Acceptance or Rejection of Offer:** If the contractor or design professional offers to remedy the defect or make a monetary payment to settle the claim, the association shall be deemed to have accepted the offer if it is not rejected within 45 days of its receipt. If the claimant is an individual, the offer will be deemed accepted if not rejected within 15 days of receipt. The claimant's rejection of the settlement must contain the settlement offer with the word "rejected" printed on it. After service of the rejection, the claimant may proceed with court action.
5. **Access to Premises:** If the association or other claimant accepts the offer to repair the defect, reasonable access to the premises during normal working hours must be provided to perform the repair by the agreed-upon timetable stated in the offer.
6. **Contract for Sale – Notice by Contractor:** Upon entering into a contract for sale, design, construction or remodeling of a dwelling, the contractor or design professional must provide notice to the owner of the property of the contractor's or design professional's rights to cure construction defects or pay to settle defect claims before the owner of the property may commence a court action. The form of the notice is contained in the new act.

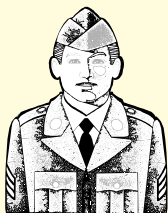
B. Mobile Homes – Affixed to Real Property (CS/HB 1431: *Chapter 2003-282, Laws of Florida.*)

The act modifies Section 316.261 to permit the owner of a mobile home which is permanently affixed to real property owned by the same person to permanently retire the title to the home. The procedure permits the affixed mobile home with a retired title to be conveyed by deed and to be financed by a conventional mortgage secured by the real property and affixed mobile home. Effective July 11, 2003.

C. Landlord and Tenant (SB 482: *Chapter 2003-30, Laws of Florida.*)

The act revises provisions relating to the termination of residential tenancies and liquidated damages, and it creates an anti-discrimination policy for members of the United States Armed Forces. Effective May 23, 2003.

1. **Termination and Liquidated Damages:** The act repeals the current provisions relating to liquidated damages when a lease is terminated, and it creates a new Section 83.575 to provide that a rental agreement may not require more than 60 days notice before a tenant vacates the premises. Under the new provisions, the landlord is entitled to liquidated damages for failure of the tenant to give proper notice at the termination of the rental agreement or when holding over with the landlord's permission after the lease has expired.
2. **Discrimination – Military Personnel:** The act also provides in Section 83.67 that no landlord shall discriminate against a member of the United States Armed Forces in offering a dwelling unit rent or in any of the terms of the rental agreement.



D. Landlord and Tenant – Military Personnel (CS/SB 1098: *Chapter 2003-72, Laws of Florida.*)

The act provides for a series of accommodations for U. S. Military personnel, at least three of which involve residential real property. Effective June 2, 2003.

1. **Discrimination – Military Personnel:** The act contains the identical provision found in SB 482 providing that a landlord may not discriminate against a member of the Armed Forces. The bill places the provision in a different subsection of Section 83.67, and it presents the possibility for confusion until the permanent placement is made by Statutory Revision.
2. **Rental Agreement Termination:** The act amends Section 83.682 to include members of the United States Reserve Forces and the Florida National Guard as qualified military personnel who may terminate a rental agreement when moving into government quarters or when being transferred. The amended section also provides for more specificity when the right of termination is exercised by a member of the Military.
3. **Purchase Contract Termination:** The act also creates a new Section 689.27 permitting a member of the armed forces to terminate contracts for the purchase of a house, condominium or mobile home prior to closing when the dwelling is intended as a primary residence and when the member is transferred or required to move into military quarters. The section provides for the cancellation of a pending mortgage and a refund of any monies previous paid to the lender.

Probate Law Changes

(Effective June 12, 2003)

By Gwynne Young, Esq., Carlton Fields, Tampa, Florida

During the 2003 Legislative Session, the following probate proposals were enacted on April 12, 2003 and effective as of June 12, 2003. This article will summarize the changes. It is not meant to provide an in-depth analysis of the changes.

I. §733.608 Amendment

The 2001 Probate Code Revisions provided that the personal representative of an estate has the power to take control of potential homestead during the administration of the estate. The 2003 Amendment provides guidelines and specific details on what a personal representative needs to do when he or she actually takes control. This section does not apply where a beneficiary actually occupies the property as his or her residence and thus possibly his or her homestead. The statute does the following:

- Grants the personal representative a lien if he or she expends funds for the homestead.
- Provides procedures for the recording of a Notice of Lien and for enforcement of the lien.
- Provides for the termination or satisfaction of the lien or for release of the lien if the property is determined not to be homestead.
- Provides for prevailing party attorney's fees if legal action is necessary to collect the debt or to compel the recording of a satisfaction upon payment in full.
- Relieves the personal representative from the duty to seek collection of the funds where it is uneconomical or impractical.
- Provides that upon the petition of an interested party for the sale or encumbrance of the property the lien may be transferred to a restricted account or escrow pending termination or payment of the lien.
- Applies to estates of decedents dying

after the date on which this act became effective.

II. 733.103(3) Amendment

This amendment adds a "specific peril" ground for presumption of death to enable a court to find that death has occurred in a major disaster situation such as September 11, 2001, without waiting five years. The statute provides that a Petition for Determination of Death in connection with the death of a Florida resident may be filed in the county where the decedent was domiciled or, in the case of a non-resident, in any county of the state.

III. §732.217(2) Amendment

The statute does the following:

- Deletes the homestead exception from §732.217(2) of the Florida Uniform Disposition of Community Property Rights at Death Act (FUDCPRDA) to resolve the conflict with §732.225 so that the substantive limiting language of §732.225 concerning homestead in the context of community property rights stands.
- 732.225 provides that the reinvestment of any property to which these sections apply in real property located in this state which is or becomes homestead property creates a conclusive presumption that the spouses have agreed to terminate the community property attributed to the property reinvested.

IV. §733.2121 Amendment

The statute does the following:

- Corrects the undesired result of the 2001 Probate Code revisions which required the inclusion of the two year claims rule of §733.710 in the Notice to Creditors. These undesired effects included: (1) creating confusion as to the wording of Notice to Creditors, (2) doubt as to the efficacy of many Notices which have been published statewide since the Revi-

sion effective date, and (3) changing §733.710 from being a statute of repose (an absolute end of creditors' claims) to a statute of limitations (non-absolute end to creditors' claims). For this reason, the last sentence was revised by deleting the reference to §733.710 and changing "within" to "during."

V. §732.502 Amendment

The statute adds a military will provision which reads as follows:

(3) Any will executed as a military testamentary instrument in accordance with Section 1044d of Title 10 United States Code Chapter 53, by a person who is eligible for military legal assistance is valid as a will in this state.

V. §732.603(1) and (2) Amendment

The statute inserts the expression "or by operation of law" into 732.603(1)(c) and 732.603(2)(c). This change makes the antilapse statute applicable when someone is deemed to predecease the decedent by operation of law such as by the killer statute §732.802 or the simultaneous death law §732.601.

VI. §732.205 Amendment

The statute adds an additional means of authentication in connection with the probate of a notarial will by providing for authentication of a foreign notary's official position, signature and seal of office by means of the Hague Convention of 1961.

VIII. §735.2063(2) Amendment

The statute inserts "not" in subsection 2 and corrects a typographical error in the 2001 Revisions to the Code. Reasonably ascertainable creditors would not be barred in this fashion since they would require service of notice.

IX. §733.609 Amendment

The statute does the following:

- Clarifies that taxable costs and

attorney's fees for breach of a personal representative's fiduciary duty may come from direct payment from a party's interest in an estate or from other property of the party, or both.

- Corrects problem created by *Snyder v. Bell*, 746 So.2d 1100 (Fla. 2d DCA 1999).

X. §731.201(2), (9) and (21) and §731.303 Amendment

The statutes do the following:

- Clarifies that a conflict of interest exists where a Trustee of a Trust that is a beneficiary of the estate is also a personal representative of the estate.

- Provides that in this circumstance the beneficiaries of a trust shall be regarded as devisees under the will and as interested persons.
- Clarifies that notice must be sent to the trust beneficiaries.
- Applicable to all open estates.
- Effective June 12, 2003.

Clarifications Enacted to New Principal and Income Law

(Effective Retroactively to January 1, 2003)

By Edward F. Koren, Esq., Holland & Knight, Lakeland, Florida

Last year, after several years of discussions among representatives of the Florida Bankers, the Florida Institute of CPAs, and the RPPTL and Tax Law Sections of The Florida Bar, the Florida Legislature adopted the revised Uniform Principal and Income Act, effective January 1, 2003. After its adoption, a glitch was discovered that had occurred as a result of the statutory revision process, and other questions arose upon further review of the rather lengthy statute itself. In addition, the Florida Bankers belatedly recognized that professional fiduciaries could benefit from the ability to use the unitrust option, which had been denied in the original statute.

Using the same multidisciplinary "team," the expansion of the unitrust and several other clarifications were prepared, and then introduced to the Legislature for the past session. Sheperded once again through the legislative process by Pete Dunbar and our Legislation Committee, the Legislature amended the UPIA in the 2003 session with the enactment of S 2450 (similar to H 1749). Upon signature by the Governor on May 23, 2003, the Bill was retroactively effective to January 1, 2003.

Although there were a number of specific changes to the statute, primarily the revisions relate to the trustee's power to adjust or the new statutory unitrust. Indeed, there was only one other revision, which clarified that money received from a REIT is principal to the trust if it is attributable to either short term or long term capital gain that is realized within the entity. F.S. § 738.401.

As previously noted, a major change was designed to permit corporate fiduciaries to use the unitrust option, by permitting them to release the power to adjust. Thus, under the new Bill, a trustee has the statutory ability to release the entire power to adjust "if the trustee desires to convert an income trust to a total return unitrust." (FS § 738.104(5)(a)) To eliminate some questions that had arisen regarding how to apply the power to adjust to trusts that were irrevocable prior to this year:

- A new provision allows a release of the power to adjust to be limited, so that a trustee may release only the power to adjust from income to principal or from principal to income, if there is uncertainty about whether the power will create adverse tax consequences or fall within certain statutory prescriptions. (FS § 738.104(5)(b)).
- As before, the release may be permanent or for a specified period, but the revised statute makes it clear that the release of the power is only effective so long as the trust is a unitrust. (FS § 738.104(5)(c)).
- The revised statute also makes it clear that the trustee does not have the power to adjust until the required statement under Subsection 9 has been provided and there either has been no objection or any objection has been terminated. (FS § 738.104(8)(a)).
- Under the revised statute, an objection is terminated once consent has been received from a supermajority of trust beneficiaries of the class that made the objection, or has been resolved by a court. (FS § 738.104(8)(a)(1)).
- The statute also has been amended to clarify that virtual representation applies to both objections and consents. (FS § 738.104(8)(a)(2)).
- Finally, the revised statute expressly provides that the statement from a trustee indicating an intention to exercise the power may be served on a legal representative or natural guardian of a beneficiary without the filing of any proceeding or approval of any court. (FS § 738.104(9)(c)).

There also were changes to the statutory unitrust provision, including elimination of a glitch in the statute that arose in the legislative drafting after enactment. That glitch

continued, next page

provides that the value of assets to determine the amount against which a unitrust percentage is to be applied may be based upon appraisals performed within two years "after" (instead of "of"), the statute now refers to appraisals performed within two years "before or after." In addition, there are several other clarifications to the unitrust statute:

- Due to some confusion by some parties, the definition of "interested trustee" has been revised to indicate that it includes any one whom an interested distributee has the power to remove and replace with the related or subordinate party. (FS § 738.1041(1)(d)).
- Of similar grammatical effect, some were concerned that a reference to the fact that the unitrust percentage could never be greater than five nor less than three percent was not clear, and so now it expressly provides that if the sum of 50 percent of the applicable Federal rate is more than five percent, then the percentage will be five, while if it is less than three percent (the case currently),

the unitrust percentage is three percent.

- Similar to the power to adjust, the revised statute makes it clear that notice can be served on a legal representative or natural guardian without the filing of any proceeding or approval. (FS § 738.1041(2)(c)).
- Similarly, an objection can be executed by a legal representative or natural guardian without the filing of any proceeding or approval. (FS § 738.1041(2)(e)).
- The revised statute also clarifies that a power of withdrawal over the trust includes a power to exercise a power in discharge of a duty of support of a beneficiary. (FS § 738.1041(12)(c)(2)).

As noted, these changes are effective retroactively to January 1, 2003. The only caution is that one should not try to apply the unitrust to a marital trust or a charitable split interest trust until the presently pending Proposed Regulations on the definition of income are finalized by the IRS.

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

Louis B. Guttmann III, Orlando Chair
 Laird A. Lile, Naples Chair-Elect
 Rohan Kelley, Ft. Lauderdale Director, Probate & Trust Law Division
 Julius J. Zschau, Clearwater Director, Real Property Law Division
 George Meyer, Tampa Director, Circuit Representatives
 John B. Neukamm, Tampa Secretary
 Melissa J. Murphy, Gainesville Treasurer
 S. Dresden Brunner, Naples Editor-in-Chief
 • Patricia J. Hancock, Maitland Co-Editor, Real Property Law
 • William M. Pearson, Naples Co-Editor, Probate & Trust Law
 • Jo Claire Spear, St. Petersburg Co-Editor, Features
 • George J. Meyer, Tampa Co-Editor, Advertisement
 Bonnie Elliott Bevis, Tallahassee Section Administrator
 Lynn M. Brady, Tallahassee Layout

Statements or expressions of opinion or comments appearing herein are those of the editors or contributors and not The Florida Bar or the Section.

Advertise in *ActionLine* !!

Do you or your company offer a product or service that may be useful to the members of the Real Property, Probate & Trust Law Section of The Florida Bar or their clients? Do you want to target your marketing efforts to the more than 8,000 attorneys who practice Florida real estate, probate and estate planning law within and outside the State of Florida? If so, an advertisement in *ActionLine* might be the perfect vehicle to reach your target audience. *ActionLine* is now accepting paid advertising from outside vendors; full-page, half-page and quarter-page advertising space is now available. If you are interested, please contact George J. Meyer at (813) 229-4133 or gmeyer@carltonfields.com for advertising guidelines and rates.

The Real Property, Probate and Trust Law Section and the RPPTL-PAC's

23rd Annual Legislative and Recent Case Law Update



August 1, 2003 • The Breakers, Palm Beach

Sponsored by Attorneys Title Insurance Fund, inc.

Program Topics/Speakers

Introduction

Louis B. Guttman, Orlando

Homestead: Seizing the Bastion

*Patricia Jones, Orlando,
G. Charles Wohlust, Winter Park*

Anatomical Gifts, Baker Act, Guardians ad Litem: "Sometimes You Feel Like a Nut, Sometimes You Don't"

Hon. Patricia Thomas, Inverness

Construction Law: Disclosures and Disputes

Lee Weintraub, Ft. Lauderdale

Changes to Florida Business Corporation Act (2003) and Summary of Jobs and Growth Tax Relief Reconciliation Act of 2003

Louis Conti, Orlando

FAR/BAR revisions: "Much to do about Contracts"

Frederick Jones, Winter Park

Guardianship News: "It Keeps Going, and Going and Going"

David Carlisle, Miami

Supporting the Troops

G. Thomas Smith, Pensacola

State Tax Law Domiciliary Issues: "The Ultimate Driving Machine"

Michael Stafford, Uniondale, NY

Legislative Potpourri

Peter Dunbar, Tallahassee

Lunch and Ethics Presentation: "Article V: Here's the Beef"

*Justice Kenneth Bell, Tallahassee
Rep. J. Dudley Goodlette, Naples*

UPIA Glitches Fixed: "You Deserve a Break Today"

Edward Koren, Lakeland

Evolving Condominium and HOA laws

Michael Gelfand, W. Palm Beach

Trust Law Changes: "Parts is Parts"

Sandra Diamond, Seminole

ABCs of Assignments for Benefit of Creditors

*Alan Perlman, Miami
Ronald Neiwirth, Miami*

Probate Law Changes: "A Little Dab'll Do Ya"

Gwynne Young, Tampa

Real Estate Case Law Update

Barbara Overton, Miami

Probate, Trusts & Estates Case Law Update

David Brennan, Orlando

CLER CREDIT

(Maximum 9.0 hours)

General: 9.0 hours
Ethics: 1.0 hour

CERTIFICATION CREDIT

(Maximum 6.0 hours)

Business Litigation: 6.0 hours
Real Estate: 6.0 hours
Tax: 6.0 hours
Wills, Trusts and Estates: 6.0 hours

23rd Annual Legislative Update and Recent Case Review

Presented August 1, 2003, The Breakers, Palm Beach

Order Your Audio Today!

Audiotape and/or Course Book

ORDER FORM

Name: _____ Florida Bar # _____

Address: _____

City/State/Zip: _____

_____ AUDIOTAPE (comes with course book) (RP010)
Cost: \$175 plus tax

_____ COURSE BOOK ONLY (RP015)
Cost: \$80 plus tax

No credit card, telephone or fax orders accepted.

Please mail this page (or a copy), along with your check, payable to "The Florida Bar" to:

The Florida Bar,
651 East Jefferson Street,
Tallahassee, Florida 32399-2300,
Attn: RPPTL Section 2003 Legislative Update.

THANK YOU!