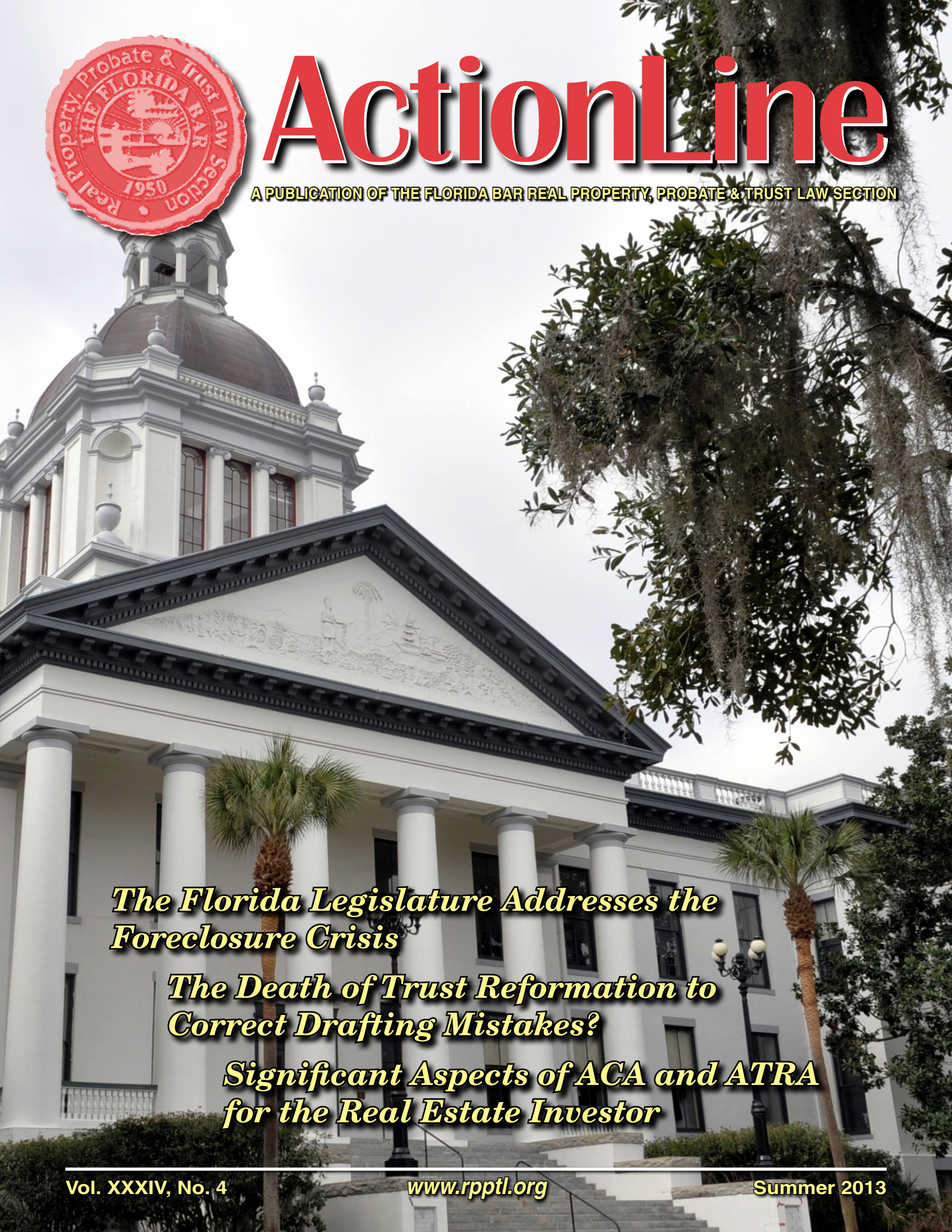


ActionLine

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

The Florida Legislature Addresses the Foreclosure Crisis

The Death of Trust Reformation to Correct Drafting Mistakes?

Significant Aspects of ACA and ATRA for the Real Estate Investor

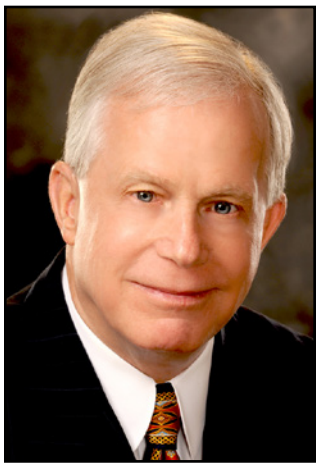
Vol. XXXIV, No. 4 www.rpptl.org Summer 2013

The Solid State of the Section

Good Works on Many Fronts

The RPPTL Section's officers and 244 member Executive Council are preparing to mark its 60th birthday by continuing a long tradition of dedicated service to the Section's more than 10,500 members, the members of The Florida Bar, and the citizens of Florida. The many ways in which the Section serves its members, the Bar, and the public, are centered around the following activities:

- Communication with its members through ActionLine; the Section's website, rpptl.org (which is currently undergoing a major upgrade); circuit-based e-mail communications from the Section's At-Large Members; and direct e-mail messages from Section leadership.
- Production of extensive education programs and materials. With the resources and amazing support of the Section's nearly 40 substantive working committees, approximately 16 live programs and 8 webinars are being produced this year. The Section has been in the forefront of educating the Bar on how to navigate the complexities of electronic service and filing.
- Development of legislation reflecting good public policy in real property, probate, trust, and related fields of law. Historically, the Section's efforts to develop and implement 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 had more than 20 initiatives pending before the 2013 Florida Legislature in more than 10 bills, including mortgage foreclosure reform legislation. The Section's ambitious and well-regarded legislative program is the result of hard work by its many substantive working committees, complimented by the extraordinary skill and dedication of its Legislation Committee and team of legislative consultants.
- Participation as an amicus curiae, frequently at the request of our appellate courts, in select cases involving significant issues within the Section's fields of law. The Section's Amicus Coordination Committee is composed of four highly-skilled appellate lawyers, including a former Supreme Court Justice and former District Court of Appeal Judge.



CHAIR'S COLUMN

By W. Fletcher Belcher

Section Chair, 2012- 2013

The Section's forward-thinking committees that have responsibility for membership and leadership development have taken great strides to bolster section membership, including multiple initiatives to attract, train, and retain capable future Section leaders. Examples of the Section's recent accomplishments through these committees include:

- Production of a professional video graphically highlighting the many benefits of RPPTL Section membership and active participation. The video may be viewed on the RPPTL Section website (rpptl.org) and "vignettes" from the video will be shown in conjunction with the many CLE programs produced by the Section.
- Implementation of a Fellowship Program which selects several young Section members as Fellows and sponsors their attendance at Executive Council meetings and events, and fosters their active participation in Section committees.
- Working closely with student organizations at several Florida law schools to familiarize their members with the Section, involve them in Section activities, and organize receptions for law students and Section members to network and socialize. Since the beginning of this year, approximately 40 students attending accredited Florida law schools have become affiliate members of the Section.
- Participation in The Florida Bar Leadership Academy for the 2012-13 year, including direct reimbursement of most expenses incurred by RPPTL Section nominees attending the Academy.

Safeguarding the Independence and Integrity of the Section

The Section enjoys and greatly benefits from its excellent working relationships with title insurers, corporate fiduciaries, and other industry groups that have a natural interest in the Section's fields of law. Fortunately for the Section, many persons associated with those industries actively participate and contribute to the work of the Section. However, there is a caveat. Although the Section strives to learn and understand the points of view of related industry groups and to always treat them fairly, it must remain vigilant to conduct its business in a manner that will insure that it is never perceived as a trade association or advocate for the promotion of their economic interests.

The true strength of the Section does not come not from its size or expertise. Rather, it comes from the widespread

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

ABOUT THE COVER:

The Old Florida Capitol Building

by John Neukamm

IN THIS ISSUE:

Get Included in *ActionLine!*

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

ARTICLES: Forward any proposed article or news of note to Scott Pence at spence@carltonfields.com. Deadlines for all submissions are as follows:

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Spring	January 31
Summer	April 30
Fall	July 31
Winter	October 31

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PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Kelly Nicole Catoe at kcatoe@hnh-law.com

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Yvonne Sherron at The Florida Bar at 800-342-8060 extension 5626, or at ysherron@flabar.org. Yvonne can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

reputation that it has earned as a knowledgeable and independent problem-solver that is consistently guided by principle in advocating good public policy. The simple term that best describes those qualities is integrity.

In order to preserve the Section's reputation for integrity, it has adopted important bylaw provisions regarding disclosure of conflict and recusal by committee and Executive Council members participating in Section matters. Those provisions require the full disclosure by any member having knowledge of any fact or circumstance that may reasonably bring into question an accusation of conflict of interest on the part of any participating member, including conflicts arising from the member's personal interests, employment, or client relationships.

To further protect the Section's reputation from being harmed by conflicts, both actual and perceived, a new Integrity Awareness and Coordination Committee has been created. The mission of that Committee is to preserve the Section's reputation for integrity by:

- Promoting awareness and understanding of applicable conflict of interest principles and bylaw provisions among components of the Section,

continued, page 7

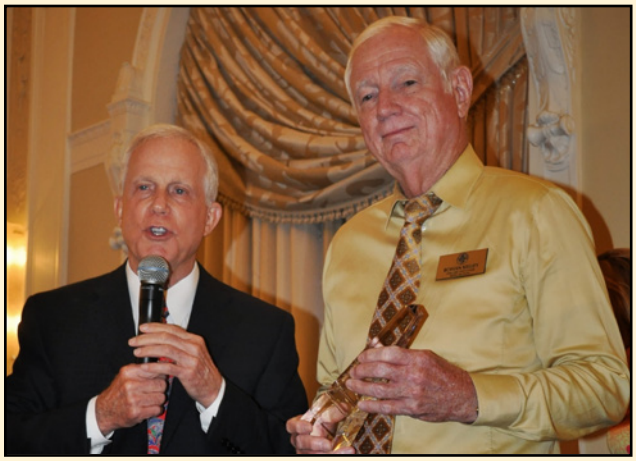
Rohan Kelley Receives the William S. Belcher Lifetime Professionalism Award

By Deborah Packer Goodall, Esq., Boca Raton, Florida

On Friday, May 24th, 2013, at the Section's Annual Convention, Rohan Kelley received the William S. Belcher Lifetime Professionalism Award from our Section chair, William F. Belcher. In presenting the award to Rohan, Fletch noted that it could be renamed the "Long Overdue Award" in recognition of the tremendous contributions that Rohan has made to our Section, the Executive Council, Florida attorneys and the public in promoting the highest standards of ethics and professionalism. Although Rohan served as Section chair in 2006–2007, examples of his dedicated service extend from decades before until the present. His accomplishments are well known and too numerous to detail here. Rohan's highlights include his efforts in promoting diversity within the Section. In 2008, Frank Angones, then president of The Florida Bar, presented Rohan with the President's Award of Merit in recognition of his leadership and activities in that endeavor.

Rohan is a frequent author and lecturer on a wide range of topics. He is well known for being ahead of the technology curve. Currently, Rohan serves as co-chair of the Section's Florida Electronic Filing and Service Committee. Together with Laird Lile, Rohan has spent countless hours in producing and presenting CLE seminars to assist and educate Florida lawyers and paralegals on the technical aspects of e-filing, e-service, and the e-portal.

Rohan may be best known for his work as author of The Florida Bar Probate System, a comprehensive manual on handling Florida estates. The Florida Bar first published this book in 1979 and it has been most recently released in its fourth edition which Rohan co-authored with his daughter, Tae Kelley Bronner.



Fletch Belcher presenting the Lifetime Professionalism Award to Rohan Kelley during the Section Convention at The Vinoy Hotel in St. Petersburg, Florida

Perhaps most important from Rohan's perspective is the role his family has played in his career. Rohan is a third generation Florida attorney. He practiced law with his father from the time he graduated from law school in 1964 until the time of his father's death in 1977. Three of Rohan's five children are skilled probate and trust lawyers and each is very active in the Section. Rohan currently practices with his son, Shane, in Fort Lauderdale. His daughter and co-author, Tae, lives and works in Tampa. His son, Sean, practices in St. Augustine. Even after witnessing first-hand the countless hours that Rohan has devoted to our Section, our profession and the public, they each appear committed to continuing the family legacy of service.

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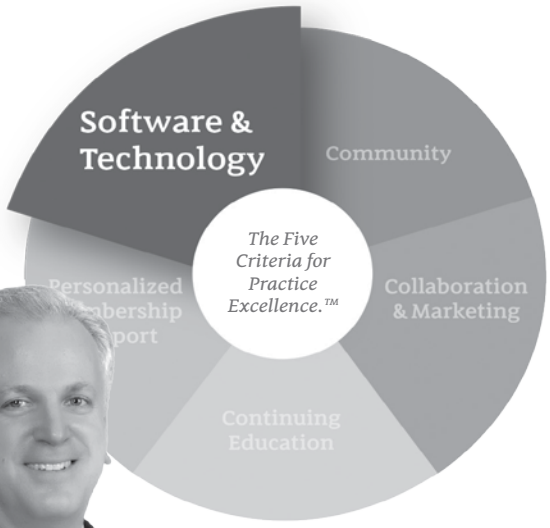

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- Coordinating the uniform and consistent application of these principles and provisions within components of the Section, and
- Other appropriate means.

This important new General Standing Committee will be composed of past Section Chairs and other highly respected members of the Executive Council who will guide the Section on these vital issues.

Recognizing the Contributions of Our Leaders

I am delighted to share the identities of those dedicated Section members who have received richly deserved Section awards for 2012-13.

- **Rohan Kelley** is the long overdue recipient of the William S. Belcher Lifetime Professionalism Award, which recognizes Rohan's lifetime of contributions to the Section, the Bar, and the public in promoting the very highest standards of ethics and professionalism.
- **Silvia Rojas** is a second-time recipient of the John Arthur Jones Annual Service Award, which recognizes her dedicated service to the Section during the year by providing the outstanding leadership necessary to take the Section's ActionLine publication to a new level of excellence.
- **Elaine Bucher** is the recipient of the Rising Star Award for the Probate and Trust Law Division, which recognizes her demonstrated ability and commitment for future Section leadership through service as Chair of the Estate and Trust Tax Planning Committee and active participation in other Section Committees, projects, and related activities.
- **Steven Mezer** is the recipient of the Rising Star Award for the Real Property Law Division, which recognizes his demonstrated ability and commitment for future Section leadership through service as Chair of the Condominium and Planned Development Committee and active participation in other Section Committees and projects.
- **Alex Hamrick** is the recipient of a new award recognizing him as the At-Large Member of the Year because of his dedicated and outstanding service to the Section as the Lead ALM for the Ninth Judicial Circuit and his development and implementation of numerous projects for the Section in the Orlando area.

I would like to close this, my last column, by offering heartfelt thanks and best wishes to each and every member of the Section, its Executive Council, and its Executive Committee for your dedication and support to the Section during this eventful, productive, and fulfilling year.

— Fletch Belcher

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See pages 53 - 56 for details.

The Florida Legislature Addresses the Foreclosure Crisis

By Kathleen C. Passidomo, Esq., Kelly, Passidomo & Alba, LLP, Naples, Florida, and Florida State Representative, Dist. 106


K. PASSIDOMO

During the 2013 Legislative Session, HB 87 containing significant revisions to Chapters 95 and 702 of the Florida Statutes[1] passed the Florida House and Senate with bi-partisan support and was signed into law by Governor Scott on June 7th, 2013

The Foreclosure Crisis

When I was first elected to the Florida House of Representatives in 2010, one of my priorities was to address Florida's backlog of mortgage foreclosure cases which saw the average time between foreclosure filing and conclusion of the case taking over 850 days, more than double the national average. For the past five or six years, the foreclosure crisis has negatively impacted neighborhoods, the judicial branch in terms of both funding and caseloads, and impeded Florida's economic recovery. In 2008, as a response to the problem in my community, a group of Naples attorneys partnered with the Legal Aid Service of Collier County to form the Collier County Foreclosure Task Force, a consortium of community, civic, and governmental organizations created to provide pro bono advice and assistance to people living in Collier County and facing foreclosure. The Task Force's holistic approach to the problem has been of great benefit to people in Collier County who are facing foreclosure or who have been foreclosed upon. Our first goal was to help people stay in their homes by working with them and their lenders (through pro-bono attorneys and HUD certified credit counselors), and if that was not an option, giving them advice and counsel on how to "depart with dignity" (particularly to avoid deficiencies and negative impacts on their neighborhoods from abandoned homes, etc.).

The RPPTL Section Provides Assistance

In the summer of 2011, I contacted Peggy Rolando, then the Real Property Law Division Director for the RPPTL Section. From my law practice, I knew that the Section regularly provided technical support to our elected officials in converting our ideas for public policy into workable legislation.

Peggy assembled an impressive team of lawyers to help craft then HB 213. The *Ad Hoc* committee appointed to assist in this effort included Jerry Aron, Burt Bruton, Mark Brown, Alan Fields, and Jeff Sauer. They donated thousands of hours helping transform my legislative vision into proper language, arguing fine points of the law, addressing constitutional issues, interfacing between this bill with the Uniform Commercial Code and generally helping create a bill to facilitate a recovery from the foreclosure crisis. We also worked closely with our Senate sponsor, Sen. Jack Latvala, whose practical input was invaluable to the process.

Additionally, we circulated our draft to the various RPPTL committees, gathered input from within the Section and from other groups, including attorneys representing borrowers and lenders, consumer groups, MERS, mortgage bankers, and the Florida Bankers Association, and then spent hours discussing the comments and suggestions and further fine-tuning our draft. The draft bill was ultimately adopted as a RPPTL Section position and passed overwhelmingly through the Florida House in the 2012 Session. Unfortunately, the Florida Senate was unable to hear the bill due to time constraints, and the 2012 Session ended without this important piece of legislation being taken up in that Chamber.

After the conclusion of the 2012 Session, the *Ad Hoc* committee was re-convened and created HB 87 ("Bill") which was filed on January 3, 2013. Senator Latvala filed the Senate companion bill shortly thereafter.

Misconceptions about HB 87

During the 2013 legislative session special interest groups from all sides of the issue misquoted or misconstrued the contents of the Bill. There were many misstatements and sweeping allegations made in an attempt to derail the Bill. So it is important to point out what the Bill does NOT do:

- The Bill does not create non-judicial foreclosure. The courts are involved at every step of the process.
- The Bill does not abrogate due process or deprive anyone of the opportunity to present a legal defense.
- The Bill does not "disregard" the evidence code, or for that matter change it in any way.
- The Bill does not "presume liability" or deprive a homeowner of any opportunities to take discovery or present his or her best case. Nor does it shift the burden of proof.

It is not a "Bankers' Bill," nor does it take away any incentive for lenders to participate in short sales and restructurings. Those will continue to be evaluated on their merits.

What HB 87 Actually Does

Shortens Statute of Limitations and Adds Savings Clause

Section 1 of the Bill shortens the statute of limitations

continued, next page

period under § 95.11, Fla. Stat., for a lender to seek a deficiency judgment from the current five years to one year. This shortening of the statute of limitations becomes effective July 1, 2013. Because a shortening of this period would deprive a lender who foreclosed more than a year ago of its current right to pursue a deficiency judgment, Section 2 of the Bill includes a constitutional "savings" provision. It allows a one year window, until July 1, 2014, for the filing of deficiency actions which are not currently barred (less than five years old) but which would not meet the new one year limit.

Plaintiff Must Line Up Key Information to Foreclose

New § 702.15, Fla. Stat., created by Section 3 of the Bill, is an attempt to expedite the foreclosure process and avoid a repeat of some of the "robo-signing," fraud, and other problems of the past. It requires the foreclosing lender to do its homework before filing and to provide certain key information at the time of filing the original foreclosure complaint. Among other things, the lender must certify that it is in physical possession of the original promissory note and where it is located; the details of any delegated authority under which the foreclosing plaintiff is operating;[2] and, when the complaint seeks to re-establish a lost note, a lost note affidavit and evidentiary backup must be attached to the complaint.

What we are essentially saying to the foreclosing lender is "Don't file a foreclosure complaint until you have it right!"

Currently, in any contested foreclosure, the Borrower's attorney will routinely file pleadings requiring each of these items which serves only to increase the homeowners' costs and adds delay. What we are essentially saying to the foreclosing lender is "Don't file a foreclosure complaint until you have it right!"

This requirement is also expected to eliminate the practice of pleading BOTH that the lender is the owner and holder of the note AND that the note has been lost, destroyed or stolen. If you are filing a lawsuit to foreclose, it is not an unreasonable burden to check whether you have the original note first.

This provision generated criticism from those who felt it was inappropriate (and a violation of the spirit of the Rules of Civil Procedure) to require pleading of specific facts regarding the ownership of the note and other details. This section triggered sometimes heated debate as to whether it was necessary to prove the plaintiff was BOTH the holder of the note AND the owner of mortgage as a precondition to filing foreclosure. The *Ad Hoc* committee did substantial research on this question and concluded that (a) being the "person entitled to enforce" under § 673.3011, Fla. Stat., was the core requirement for filing a foreclosure suit; and (b) the mortgage "followed the note," regardless of whether there was a complete chain (or any) of recorded mortgage assignments.[3]

Finality of the Proceedings

New §702.036, Fla. Stat., under Section 4 of the Bill was created in an effort to eliminate the current uncertainty about when a final judgment of foreclosure is truly "final." It provides certainty that a good faith purchaser of a previously foreclosed property will not be dispossessed in a later challenge.

Generally, a judgment is final when all of the appeals periods have run and any appeals resolved; however, there are exceptions. Motions for relief from a judgment based on mistake, newly discovered evidence, or fraud can be filed up to a year after the judgment.[4] Motions alleging that the judgment was void or discharged must be filed within a "reasonable time" and are not subject to the one year bar. The allegations that underlying mortgage ownership documents were being *created* by "robo-signing" creates the potential for attempts, perhaps years later, to reopen completed foreclosures as having been filed by the "wrong" lender. The potential for post-foreclosure purchases to be "unwound" makes it difficult to counsel a potential buyer of any foreclosed property. In the absence of certainty, some title insurance policies insuring buyers post-foreclosure have included sweeping exceptions for defects in the foreclosure.

Section 4 provides that (1) after the homeowner has been properly served, (2) lost the home in a final judgment of foreclosure, (3) the appeals period has expired, AND (4) the property has been sold to a party unrelated to the lender, for value, there can be no further challenges that call into question the new owner's interest in the property. The former homeowner's claim is converted into one for money damages (including punitive) against the lender who wrongly foreclosed, and that damages claim may not impact the marketability of the property for the new owner.

This provision was also a focus of the opposition to the bill. A sizeable number of consumer advocates and members of the foreclosure defense bar would strike the public policy balance on this question in favor of ousting a subsequent purchaser (usually occupying the property) in order to restore ownership to a fraudulently foreclosed former owner (usually no longer living on the property after completion of the foreclosure). While this is certainly an arguable public policy position, it was not the public policy balance the majority of the Florida Legislature felt was appropriate. The majority of the Legislature and the RPPTL *Ad Hoc* committee and Section were of the view that (a)

the original homeowner had the opportunity to conduct discovery and assert fraud and any other defenses during the original foreclosure; (b) the original homeowner is no longer in possession after a foreclosure and appeals are completed, or would be subject to the issuance of a writ of possession; and (c) that, on the whole, the equities favored the new purchaser.

The finality provision was criticized as an unconstitutional taking. Opponents also argued that the remedy of money damages against the lender for an improper foreclosure was inadequate. The criticism is not well founded as the preconditions to finality included proper service, a full judicial foreclosure, and the opportunity for appellate review. Also, the statute provides an alternative remedy. These are the "Gold Standard" for meeting due process. No one disputes that land is unique, especially one's former homestead with all of its memories. However, that same parcel is just as unique to the new buyer. Besides which "unwinding" of the foreclosure would still leave the prior homeowner subject to a mortgage, usually in excess of the value of the property and facing a second, properly conducted foreclosure.

Deficiency Judgment

Section 5 of the Bill revises § 702.06, Fla. Stat., to clarify the computation of the amount of a deficiency judgment for an owner-occupied residence as the difference between the judgment amount (or, in the case of a short sale, the outstanding debt) and the fair market value of the property on the date of sale. It also rephrases some archaic and confusing language based on the historic distinction between courts of equity and law.

Order to Show Cause

The "Show Cause" mechanism of § 702.10, Fla. Stat., has been little used for years by practitioners who have stated it was too cumbersome, required too many hearings, and that its intent was easily thwarted by defense counsel. Section 6 of the Bill substantially revises §702.10, Fla. Stat., to make it a more usable tool. Specific changes to existing law include the following:

- Allowing a condominium or homeowners' association or other subordinate defendant to use this mechanism to move a case forward even when the foreclosing lender has elected not to do so. *Any* lienholder who is a party to the action may now request and schedule the show cause hearing. We expect the court to exercise its inherent authority to set firm deadlines for the foreclosing lender to provide affidavits and other paperwork and to carefully scrutinize any attempts to slow the process, especially when a condominium or homeowners' association is being adversely impacted.
- Eliminating the requirement under current law to schedule a judicial hearing simply to issue the order to show cause and then to hold a second hearing to hear the response. As revised, an order to show cause will be issued in chambers upon an *ex parte* review of the court file without the need for a separate hearing.
- Eliminating the mandate in the current law to hold the second hearing within 60 days, leaving the scheduling to the discretion of the courts and their calendars.
- Clarifying current law to expressly provide that the standard for granting a final judgment at an order to show cause hearing is the same standard as for granting summary judgment, while at the same time clarifying that a responsive pleading or other papers filed by the defendant must raise a genuine issue of material fact or constitute a legal defense to foreclosure in order to preclude the court from issuing a final judgment.
- Expressly allowing the court to extend and continue the order to show cause hearing without further notice if the time originally scheduled is insufficient.

Section 6 also generated substantial comment and criticism during the legislative process. Those critiques can be characterized as falling generally into three categories as follows:

One set of critiques seemed to overlook that the show cause mechanism has been part of Florida's foreclosure law for many years and that the first section of the statute sets forth what is to be in the notice given to the property owner (which should warn them of the "worst" case) rather than setting forth the more deliberative and balanced legal standards for entering a final judgment. There was also the continuing confusion about the distinction between § 702.10(1), Fla. Stat., allowing a show cause for a final foreclosure judgment applicable to any type of property, and § 702.10(2), Fla. Stat., allowing a hearing to show cause why interim payments should not be required during the pendency of the foreclosure, a remedy that is limited to commercial and non-owner-occupied residential properties.

A second set of critiques were based on the belief that the time frames for a show cause hearing were too short for the property owner to properly respond. A subset of this argument was that it would force the property owner to file responsive papers before receiving necessary discovery. The *Ad Hoc* committee felt that the times for a show cause hearing (as amended in the Bill) were reasonable as they exceeded the times for entry of a default and were not outside of the current time frames for scheduling a summary judgment hearing. The standard for decision in the show cause context was the easily defeated standard of a summary judgment. As with a summary judgment, an affidavit from the party opposing the entry of judgment demonstrating the need for further discovery should be sufficient to avoid entry of a final judgment.

continued, next page

The third set of critiques emerged only after the ruling in *BarrNunn, LLC v. Talmer Bank and Trust,*[5] in February 2013. In that case, the Second District Court ruled that, under the language of the existing statute, the filing of *any paper* in opposition to foreclosure, whether or not meritorious or legally relevant, was sufficient to preclude the entry of a final judgment at the show cause hearing. We believed that the efficient use of judicial resources should permit the court to review and rule on the legal sufficiency of an asserted defense in the same manner as it would address a motion for summary judgment. If the matters raised in opposition to foreclosure did not rise to the level of stating at least a colorable defense, the court should have the authority to proceed with entering judgment. In response to this case, the amendments to §702.10, Fla. Stat., allowed the court to distinguish between a filing asserting "My dog ate my homework," which is generally not a legally cognizable defense, and one asserting "The bank's dog ate my check," which may create a disputed issue of material fact.

Lost, Destroyed, or Stolen Promissory Notes

Adequate protections have been a requirement for the re-establishment of a lost note since the Uniform Commercial Code was adopted. Unfortunately, compliance has been spotty, and it is hoped that by restating the requirement for adequate protections under § 673.3091, Fla. Stat., within the mortgage foreclosure statutes, the requirement will be applied consistently in foreclosure actions. New § 702.11, Fla. Stat., created under Section 7 of the Bill, provides examples of acceptable means of providing adequate protection for lost and stolen notes under § 673.3091, Fla. Stat. While resisted by bankers, Section 7 was not considered a material change in the law.

One of the listed methods of providing adequate protection was a "written indemnification agreement by a person reasonably believed sufficiently solvent to honor such an obligation." While an individual bank will hopefully meet that standard, few banks acting in the capacity of trustee of a mortgage-backed bond pool will. Given the current market, those situations where the outstanding bond obligations far exceed the value of the mortgages in the pool call into question the solvency of the trust and limit the availability of this option.

The same provision also creates a new cause of action allowing the actual holder of a "lost note" enforced by someone else to recover directly from the adequate protection without the need to name the wrongly foreclosed homeowner in the suit. Because the Bill's finality provision also applies to an action by the "rightful" note holder, the ability to recover directly against the judicially established adequate protection is an important protection.

Remedial in Nature

Seeking as it does to address the current foreclosure situation, the Bill is remedial and applies to notes and mortgages made before or after the effective date. However, the new complaint requirements are only applicable to lawsuits filed after July 1, 2013.

Special Thanks

I once again thank the Real Property, Probate and Trust Law Section for its support, encouragement, and hard work on bringing this Bill to fruition and our Senate sponsor, **Sen. Jack Latvala,** who worked closely with us to create this important piece of legislation.

Representative Kathleen C. Passidomo *is a member of the Florida House of Representatives, District 106, Naples, and a partner in the law firm Kelly, Passidomo & Alba LLP. Rep. Passidomo was President of the Bar Association and the Women's Bar Association and the founding Chairman of the Juvenile Justice Council in Collier County. She served as Chairman of the Florida Commission on the Status of Women and currently serves as Vice-Chairman of the Collier County Foreclosure Task Force. Rep. Passidomo is a graduate of Leadership Florida and Leadership Collier and a member of the Board of Trustees of Hodges University.*

Endnotes:

1 Ch. 2013-137, Laws of Florida

2 It is important to note that providing the details of any delegated authority is expressly "intended to require initial disclosure of status and pertinent facts and not to modify law regarding standing or real parties in interest." Lines 115-117 of the Enrolled Bill.

3 *See* e.g. *Johns v. Gillian*, 134 Fla. 575, 184 So. 140 (Fla. 1938) ("The transfer of the note … operates as an assignment of the mortgage securing the debt, and it is not necessary that the mortgage papers be transferred …. [I]f there had been no written assignment, [Plaintiff] would be entitled to foreclose in equity upon proof of his purchase of the debt."); *Perry v. Fairbanks Capital*, 888 So. 2d 725 (Fla. 5th DCA 2004) ("A mortgage is the security for the payment of the negotiable promissory note, and is a mere incident of and ancillary to such note."); *Chemical Residential Mortgage v. Rector*, 742 So. 2d 300 (Fla. 1st DCA 1998) ("Because the lien follows the debt, there was no requirement of attachment of a written and recorded assignment of the mortgage in order for the appellant to maintain the foreclosure action); and *WM Specialty Mortgage v. Salomon*, 874 So. 2d 680 (Fla. 4th DCA 2004).

4 Fla. R.Civ. Pro. 1.540

5 106 So. 3d 51 (Fla. 2d DCA 2013)

The RPPTL Section expresses its deep gratitude and appreciation to ***Florida State Representative Kathleen Passidomo*** *and* ***Florida State Senator Jack Latvala*** *for their leadership and dedication in successfully sponsoring foreclosure reform legislation supported by the RPPTL Section and enacted by the 2013 Florida Legislature.*

Significant Federal Income Tax Aspects of the Affordable Care Act of 2010 and the American Taxpayer Relief Act of 2012 for the Real Estate Investor

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Real estate investors and their counsel should be alert to the effects of the American Taxpayer Relief Act of 2012 ("ATRA" or the" Act")[1], which became law on January 2, 2013. A legislative compromise, ATRA was intended to address the expiration of certain provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA")[2] and the Jobs and Growth Tax Relief Reconciliation Act of 2003,[3] both signature pieces of tax legislation of the Bush Administration (collectively, the "Bush tax cuts").

Effects of ATRA on Assets Available for Investment

The Act continues the lower marginal rates of much of the Bush tax cuts while retaining the higher tax rate on upper income levels that became effective on January 1, 2013, when the Bush tax cuts expired. ATRA also establishes caps on tax deductions and credits for upper income taxpayers, while leaving intact the 3.8% surtax on investment income and capital gains, effective for 2013, added under the Affordable Care Act enacted in 2010 (discussed in more detail below). The Act enhances and extends certain allowable depreciation deductions for commercial real estate investments, and extends the effectiveness of economic development incentives, such as the New Market Tax Credit and Empowerment Zone initiatives under existing federal law.

The Act permanently extends the tax rates enacted in 2001 under the Bush Administration for taxpayers with taxable income at or below $400,000 for unmarried individuals, $425,000 for heads of households and $450,000 for married couples filing jointly.[4] Any taxable income in excess of those thresholds will be taxed at the maximum tax rate in effect prior to 2001 (i.e., a rate of 39.6%).[5] The threshold amounts are indexed for inflation beginning in 2014, using 2012 as the base year.[6]

The Act permanently repeals the phase-out of itemized deductions for taxpayers with Adjusted Gross Income ("AGI") at or below $250,000 for unmarried individuals, $275,000 for heads of households and $300,000 for married couples filing jointly. For taxpayers with AGI in excess of those thresholds, the total amount of itemized deductions that may be claimed is reduced by 3% of the amount by which the taxpayer's AGI exceeds the taxpayer's applicable threshold, up to a maximum 80% reduction in itemized deductions.[7]

The Act permanently extends marriage penalty relief, which relief has been in the form of (i) an increase in the standard deduction for a married couple filing jointly to twice the standard deduction that is provided for an unmarried individual filing a single return and (ii) an increase in the 15% tax bracket for a married couple filing jointly to twice the size of the corresponding 15% tax bracket for an unmarried individual filing a single return.[8]

One interesting side effect of the new, higher top tax bracket is that, with the top corporate tax rate unlikely to increase above the current rate of 35%, ATRA may make pass-through business entities (such as S corporations, partnerships, and LLCs,) less desirable to high income earners and, perhaps, C Corporations more desirable. A host of other countervailing tax considerations may make the tax bracket advantages of C Corporation ownership more apparent than real, however, including taxation of corporate asset sales at ordinary C corporation rates instead of at capital gains rates, double taxation of corporate income (first at the corporate level and again when paid out as a dividend), and IRS scrutiny of executive compensation.[9]

The Act permanently extends the maximum 15% income tax rate for long term capital gains (gains from the sale of capital assets held for more than one year) and qualified dividends for taxpayers with taxable income at or below $400,000 for unmarried individuals, $425,000 for heads of households and $450,000 for married couples filing jointly. For taxpayers with taxable income above those thresholds, the maximum income tax rate on long-term capital gains and on qualified dividends is 20%.[10] These threshold amounts are also indexed for inflation beginning in 2014, with 2012 as the base year.[11] Net short-term capital gains will continue to be taxed at the same tax rates as ordinary income.

Surtax on Investment Income

The Act makes no change to the 3.8% surtax on investment income engrafted into the Internal Revenue Code (the "Surtax"),[12] beginning in 2013, by the Patient Protection and Affordable Care Act, ("PPACA"),[13] commonly called "Obamacare" or the "Affordable Care Act," which became law on March 23, 2010. Together with the Health Care and Education Reconciliation Act,[14] which amends PPACA, the Affordable Care Act is arguably the most significant government overhaul of the U.S. healthcare system since the passage of the Medicare and Medicaid statutes in the mid-1960s. The interplay between higher long term capital gains tax rates and the Surtax bears closer consideration when applied to investment income and capital gains on sales of investment real estate for high income taxpayers.

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The Surtax applies to most forms of taxable investment income: dividends, interest, rents, royalties, and gains on the sale of capital assets (short and long term, including a primary residence or investment property),[15] to the extent that a taxpayer has modified adjusted gross income ("MAGI") (not adjusted gross income or taxable income)[16] in excess of $200,000 for unmarried taxpayers and $250,000 for married taxpayers filing a joint return, with no indexing for inflation.[17] Certain items are excluded from investment income for these purposes, including tax-free income from municipal bonds and distributions from IRAs, 401(k) plans and similar retirement products.[18]

The Surtax applies to the *lesser of* (i) the taxpayer's net investment income and (ii) the amount by which the taxpayer's MAGI exceeds the threshold amount.[19] For example, in the case of an unmarried individual with $30,000 in wages and taxable social security benefits and $180,000 in net investment income, the taxpayer's MAGI would be $210,000, so the Surtax would be imposed on the $10,000 excess of MAGI over the $200,000 threshold amount at the rate of 3.8%, for a tax due of $380 ($10,000 x .038).

Of course, of particular interest to the real estate investor is the applicability of the Surtax to rental investment income. For example, suppose that Harry, a single taxpayer, earns $185,000 a year in salary and also owns several rental apartment units from which he receives gross rents of $160,000. He also has expenses related to that income. The Surtax would apply as indicated in Example #1.

Example #1

MAGI Before Rental Investment Income	$185,000
Gross Rents	$160,000
Rental Expenses (including depreciation and debt service)	$120,000
Net Rents	$40,000
New MAGI ($185,000 + net rents)	$225,000
Excess of MAGI over $200,000	$25,000
Lesser Amount (Taxable)	$25,000
Tax Due ($25,000 x 0.038)	$950[20]

The Surtax applies not only to rental income, but also to capital gains from the sale of investment property. Suppose, for example, that Ian acquires a small shopping center for $1,000,000 and during his ownership claims $300,000 in depreciation deductions, in addition to making substantial improvements to the property. Ian accepts an offer to purchase the property for $1.5 million at a time when his adjusted basis in the property is $800,000. In the year of sale, Ian is single and reports self-employment income of $320,000. Accordingly, Surtax would apply as indicated in Example #2.

Example #2

Gain on sale ($1.5 million - $800,000)	$ 700,000
Depreciation recapture/unrecaptured Section 1250 gain[21]	$ 300,000
Total gain on sale	$1,000,000
Self-employment income	$ 320,000
New MAGI ($320,000 + $1,000,000)	$1,320,000
Excess MAGI over $200,000 ($1,320,000 - $200,000)	$1,120,000
Lesser of MAGI or investment income	$1,000,000
Surtax due (1,000,000 x .038)	$38,000

The Surtax also applies to the lesser of MAGI or taxable gain realized upon the disposition of a taxpayer's principal residence, to the extent that the taxable gain exceeds $250,000 for single individuals or $500,000 for married couples.[22] This is because, under the Internal Revenue Code, the first $500,000 of gain from the sale of a principal residence is subject to a special capital gains exclusion, regardless of the taxpayer's MAGI; however, any gain above such threshold is taxed at the applicable rate for capital gains (either long or short term, depending upon the holding period).

For example, if married, jointly filing taxpayers Jack and Jill, who already have MAGI (before taxable gain) of $400,000, sold their principal residence and realized a gain of $600,000, the tax would apply as indicated in Example #3.

Example #3

MAGI Before Taxable Gain	$400,000
Gain on Sale of Residence	$600,000
Taxable Gain (Added to AGI) ($600,000 – $500,000)	$100,000
MAGI after Taxable Gain ($400,000 + $100,000 taxable gain)	$500,000
Excess of MAGI over $250,000 ($500,000 – $250,000)	$250,000
Taxable Lesser Amount (Taxable gain)	$100,000
Tax Due ($100,000 x 0.038)	$ 3,800

It's important to note that if Jack and Jill realized a gain of less than $500,000 on the sale of their residence, none of the gain would be subject to the 3.8% tax. Whether they then paid the 3.8% tax would depend on the other components of their $400,000 MAGI. The interplay between the

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Surtax and ATRA means that, effectively, taxpayers in the top 39.6% bracket could expect to pay tax at a rate of up to 43.4% for short-term capital gains and other investment income taxed at ordinary income rates and up to 23.8% for long-term capital gains.

It's also worth mentioning that the Surtax applies "in addition to any other tax imposed by this subtitle" under the Internal Revenue Code.[23] Thus, the Surtax applies in addition to regular income tax and is in addition to any alternative minimum tax (AMT) imposed.[24] To avoid or minimize the effect of the Surtax and its enhanced capital gains rate, taxpayers should consider spreading income recognized from the sale of investment property and from the receipt of other investment income into different tax years. This could be accomplished by deferring some sales with large gains or by structuring transactions to take advantage of installment treatment of gain whenever possible.

Shortening of Built-in Gain Recognition Period

The general rule is that when a C corporation converts to an S corporation, for a period of ten years after the date of the S election (the "Recognition Period"), any net unrealized built-in gain of the corporation's assets existing as of the effective date of the S election would remain subject to tax at the corporate level at C corporation rates. Then, after the expiration of that Recognition Period, any unrealized built-in gain would no longer be subject to tax at the corporation level. The Recognition Period had been shortened to seven years for sales of assets in 2009 and 2010 and to five years for sale of assets in 2011. The Act extends the five year Recognition Period for sales of assets in 2012 and 2013.[25]

Depreciation

ATRA continues a number of accelerated depreciation methods that were scheduled to expire with the Bush tax cuts. First, the Act extends 50% "bonus depreciation" treatment to certain taxpayers through 2013 (2014 in the case of certain property having longer production periods and specified aircraft).[26] Bonus depreciation generally is not allowed for real estate investments, but is available for "qualified leasehold improvement property."[27] "Qualified leasehold improvement property" consists of improvements to a nonresidential building interior, provided that they are (a) made according to the terms of a commercial lease by the lessor or lessee, (b) the building is to be occupied exclusively by the lessee (or any sub-lessee), and (c) the improvements are placed in service more than 3 years after the building was first placed in service.[28] From 2008 through 2010, Congress allowed eligible taxpayers to take an additional depreciation deduction allowance equal to 50% of the cost of allowable depreciable property. The bonus depreciation allowance was increased under subsequent amendments to the law that allowed 100% bonus depreciation for investments placed in service after September 8, 2010 and before January 1, 2010, and 50% bonus depreciation for investments placed in service after such date during 2012. ATRA extends the current 50% expensing provision for eligible property, including qualified leasehold improvement property, purchased and placed in service before January 1, 2014 (before January 1, 2015, for certain longer-lived and transportation-related assets).

Second, ATRA extends for two years special depreciation treatment for other qualified leasehold improvement property, qualified retail improvement property, and qualified restaurant property.[29] Such properties are eligible for a 15-year recovery period, rather than the 39-year recovery period that would ordinarily be applicable to such property. Taxpayers who wish to take advantage of such enhanced cost recovery, however, must place the qualified property into service before January 1, 2014. "Qualified retail improvement property" is any improvement to the interior portion of a commercial building if (i) the portion improved is open to the general public and is used in the retail trade or business of selling tangible personal property to the general public, and (ii) the improvement is placed in service more than 3 years after the building was first placed in service.[30] Finally, "qualified restaurant property" is any "section 1250 property" (that is a building or an improvement to a building) if more than 50% of the building's square footage is devoted to preparation of, and seating for on-premises consumption of, prepared meals.[31]

Deduction of Expenses for Qualifying Real Property

Finally, for tax years beginning in 2012 and 2013, a taxpayer other than an estate, trust or certain corporate lessors may elect to deduct as an expense, rather than depreciate over time, up to $500,000 of the cost of "Section 179 property" placed in service during the tax year in the taxpayer's trade or business.[32] Typically, Section 179 consists of tangible personal property, but certain types of real property improvements ("qualifying real property") may also qualify, such as qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property (as previously discussed). Under prior law, a taxpayer with a relatively small amount of annual investment in Section 179 property could elect to deduct a specified amount of the cost in the year it was placed in service, rather than depreciate such costs over time. The maximum dollar amount that could be deducted and the so-called "phase-out threshold" for the deduction (the cost limit after which a dollar-for-dollar limitation on deductibility was imposed) had both been adjusted several times, so that by 2012 the law provided for a deductible amount of $125,000 and a phase-out threshold of $500,000 for the year. These thresholds were to have decreased to $25,000 and $200,000, respectively, for taxable years beginning in 2013. However, ATRA increased the

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maximum deduction and phase-out threshold to $500,000 and $2,000,000, respectively. Within such thresholds, ATRA also permits taxpayers to expense up to $250,000 of the cost of qualifying real property.

New Markets Tax Credit

ATRA extends the life of a few targeted federal economic incentive programs as well. Through the so-called New Markets Tax Credit (NMTC) program, the federal government uses income tax credits to encourage significant private investment in businesses within low income communities.[33] The awards to Community Development Entities (CDEs) under the program enable them to sell tax credits to investors and make loans to or investments in "qualified active low-income community businesses."[34] Since many businesses include a manufacturing plant, office building, or other facilities, real estate developers have used the NMTC program in structuring new developments. ATRA retroactively extends the New Markets Tax Credit program for two years, authorizing the Treasury Department to allocate an additional $3.5 billion for 2012 and 2013.[35]

Low Income Housing Credit

Section 42 of the Internal Revenue Code also provides a low income housing tax credit (LIHTC) equal to the "applicable percentage" of the "qualified basis" of each "qualified low-income building" as defined in the law.[36] The credit is taken over 10 years. In practice, the credit provided each year is determined by a present-value formula based on the federal cost of borrowing. Over the past few years, as the federal government's cost of borrowing has declined (the result of historically low interest rates), so has the amount of tax credits that could be used to build a project under the LIHTC program. Thus, in 2008, Congress adjusted the formula for award of the tax credits and established a minimum credit amount of 9% per year (90% over 10 years), which is based on the original credit rate when the program was created. The Act extends the minimum percentage applicable to housing credit dollar allocations made before January 1, 2014.

Additional Extension of Benefits

Finally, the Act provides an extension through December 31, 2013 for various tax benefits available to businesses located in economically depressed census tracts designated as "empowerment zones."[37] The program provides tax incentives which include a 20% credit for wages paid to employees who work and live in the empowerment zone, tax-exempt bond financing for facilities and equipment used in the active conduct of a business in the zone, certain capital gain rollovers, and the exclusion of up to 60% of gain on the sale of certain small business stock in empowerment zone businesses.

Conclusion

Congress has once again made numerous changes to the tax code, many of which have been designated as "permanent." However, only time will tell how permanent the "permanent changes" will be and what happens to the temporary changes. Stay tuned.


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Endnotes:

1 Pub.L. 112–240, H.R. 8, 126 Stat. 2313.

2 Pub.L. 107–16, 115 Stat. 38, enacted by Congress on May 16, 2001 and signed into law by President George W. Bush on June 7, 2001.

3 Pub.L. 108–27, 117 Stat. 752), enacted by Congress on May 23, 2003 and signed into law by President George W. Bush on May 28, 2003.

4 *See* 26 USC §1(i).

5 *See* 26 USC §1(i)(3)(A)(ii).

6 *See* 26 USC §1(i)(3)(C).

7 *See* 26 USC §68.

8 See 26 USC §1(f).

9 *See* Burke, "Passthrough Entities: the Missing Element in Business Tax Reform," 40 Pepperdine Law Review 1329 (2013).

10 *See* 26 USC §1(h).

11 *See* 26 USC §1(f).

12 *See* 26 USC §1411(b).

13 Pub.L. 111–148, 124 Stat. 119.

14 Pub.L. 111–152, 124 Stat. 1029.

15 *See* 26 USC §1411(c).

16 *See* 26 USC §1411(a)(1) for application of the Surtax to individuals. MAGI (modified adjusted gross income) and AGI (adjusted gross income) are similar, but not identical, values. AGI consists of all of the taxpayer's income, less certain adjustments such as IRA and self-employed retirement plan contributions, alimony payments, self-employed health insurance payments, and one-half of any self-employment taxes paid. *See* 26 USC §62. The definition of MAGI varies according to the purpose for which the related calculation is being used. For purposes of the Surtax, MAGI is a person's adjusted gross income with certain adjustments for foreign income. *See* 26 USC §1411(d)(MAGI definition).

17 However, the 3.8% Surtax does not apply to tax exempt entities, including charities, charitable remainder trusts, traditional IRAs, and Roth IRAs.

18 *See*, e.g., 26 USC §1411(c)(5) (exception for distributions from qualified plans).

19 *See* 26 USC §1411(b).

20 However, if Harry is a real estate operator, none of the rental income would be subject to the Surtax. *See* 26 USC §1411(c) and 26 USC §469(c)(7). However, PPACA also created a separate tax of .9% on wages and self-employment business income in excess of $200,000 for single taxpayers ($250,000 for married joint filers), which could apply to the income from the rental business, as well as self-employment taxes. See 26 USC §1401(b)(2)

21 Depreciation recapture is a tax code concept whereby the accelerated depreciation taken in excess of straight line with respect to an asset must be recognized as ordinary income (not capital gain) in the year of sale. In addition, gain arising from the straight line depreciation is taxed at a special 25% rate. However, whether ordinary income or capital gains, the amount realized remains subject to Surtax. *See* 26 USC §1250 as applied to real estate investments and 26 USC § 1(h).

22 *See* 26 USC §121(a), (b). Gross income does not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more.

23 "This subtitle" refers to the part of the Code that contains both the general income tax and the alternative minimum tax.

24 ATRA includes some degree of permanent relief from the AMT. The Act increased the AMT exemption amounts for 2012 to $50,600 (for single taxpayers) and $78,750 (for married individuals filing jointly). The exemption phases out when income subject to the AMT exceeds certain thresholds. The AMT exemption amounts and phase-out thresholds are indexed for inflation, beginning in 2013.

25 *See* 26 USC §1374(d)(7).

26 See 26 USC §168(k).

27 *See* 26 USC §168(k)(3).

28 *Id.*

29 *See* 26 USC §168(e)(3)(E).

30 *See* 26 USC §168(e)(8).

31 *See* 26 USC §168(e)(7).

32 *See* 26 USC §179(d); *see also* 26 US §1245 (certain eligible real estate investments).

33 *See* 26 USC §45D.

34 *See* 26 USC §45D(d)(2).

35 *See* 26 USC §45D(f)(1).

36 *See* 26 USC §42.

37 *See* 26 USC §1396-1397D.

You De-Can't Do That! Common Decanting Mistakes

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Although permitted in Florida by case law since the 1940 Florida Supreme Court decision in *Phipps v. Palm Beach Trust Company*,[1] decanting has become increasingly popular since its codification in the Florida Trust Code in 2006.[2] Decanting can be used to non-judicially modify both the administrative and dispostive provisions of otherwise irrevocable trusts. Currently 19 states have decanting statutes, with provisions that range from authorizing the removal of certain beneficiaries, extending the terms of a particular beneficiary's interest, adding substance abuse or supplemental needs provisions, changing a trust's situs or governing law, effecting a change of current and successor trustee appointments, and modifying the trustee's investment and other administrative powers.

Florida's decanting statute allows a trustee with the absolute power to invade the principal of a trust (the "Distributing Trust") for the benefit of one or more beneficiaries to appoint part or all of the principal of the Distributing Trust to another trust (the "Continuing Trust"). The decant is allowable so long as the Continuing Trust, among other items, only includes beneficiaries of the Distributing Trust, does not limit any beneficiary's current right to income, annuity or unitrust payments, and does not extend the perpetuities period of the Distributing Trust.[3] The trustee may exercise the power to decant only by written instrument and upon sixty days notice to the beneficiaries of the Distributing Trust.[4] If all of the beneficiaries waive the notice requirement, the decanting will be effective immediately.[5]

The increased use of decanting to "cure" issues in otherwise irrevocable trusts has led to an increase in mistakes associated with decanting. Some common mistakes include, (1) providing incorrect or inadequate notice of the trustee's exercise of the power to decant; (2) improperly violating the perpetuities period for the trust, (3) ignoring the generation-skipping transfer ("GST") tax aspects of the trust; and (4) obtaining the consent of the beneficiaries of the Distributing Trusts (which, depending on future Internal Revenue Service or Treasury guidance, could cause those beneficiaries to be deemed to have made taxable gifts to the other beneficiaries). This article will focus on discussing these four particular, but common, mistakes.

Notice Issues - Satisfying the Notice Requirement of Sec. 736.04117, Fla. Stat.

Florida's decanting statute requires that all "Qualified Beneficiaries" of the Distributing Trust receive notice of the trustee's exercise of the power to decant and that the decant does not take effect until the expiration of sixty days after the service of such notice (the "Notice Period"). The Florida Trust Code defines "Qualified Beneficiaries" on a specific date broadly so as to include, (a) all current distributees or permissible distributees of principal or income of the Distributing Trust; (b) those individuals who would be distributees or permissible distributees of principal of income if the interests of those individuals in (a) terminated on such date; and (c) those individuals who would be distributees of principal or income if the trust terminated on such date.[6] When exercising its power to decant, the trustee of the Distributing Trust must provide written notice along with a copy of the document exercising the power to decant.[7] As with any set of statutory guidelines, the failure to properly follow one of the steps could lead to future issues. For example, if a Qualified Beneficiary for whom the requisite notice was not provided is subsequently apprised that a decant occurred which eliminates the beneficiary as a Qualified Beneficiary of a trust, theoretically said beneficiary could object to the decant well after the expiration of the Notice Period. Such objection could lead to an undoing of the decant or a surcharge against the trustee for breach of fiduciary duty.

The broad definition of "Qualified Beneficiary" means that trustees may have to provide many different people with the required notice. This notice requirement is increasingly difficult to satisfy when remote relatives, minors or charities are considered to be Qualified Beneficiaries, and in some instances, the proper notice is not given to all Qualified Beneficiaries. For some trusts that seemingly have an unlimited class of permissible beneficiaries (for example, if the trustee can distribute to any individual other than himself or if the permissible recipients are the descendants of some remote ancestor), practitioners have recommended publishing notice in a newspaper, similar to the procedure for publishing a Notice to Creditors in a probate proceeding.

In all decants, unless global waivers of the Notice Period are provided by all Qualified Beneficiaries, the trustee of the Distributing Trust should be careful to wait for the expiration of the Notice Period before actively transferring assets to the Continuing Trust. This way, all Qualified Beneficiaries will have had the full opportunity to provide any objections to the decant and, if no objections to the decant are served, such inactivity during the Notice Period should be available as an absolute defense if a Qualified Beneficiary raises an objection to the decant after the expiration of the Notice Period.

Invalid Attempts to Extend the Perpetuities Period

At 360 years, Florida's statutory rule against perpetuities contains one of the longest perpetuities periods in the nation.[8] However, for Florida trusts that were irrevocable prior to January 1, 2001, the rule against perpetuities was the more traditional "lives in being plus 21 years" or 90 years, whichever occurred first. Suppose then that the Distributing Trust is a Florida irrevocable trust that was created before January 1, 2001, and provides that upon the death of the current permissible income beneficiary (to whom principal may be distributed at the trustees' absolute discretion), the balance is divided, per stirpes, among such beneficiary's descendants. Each descendant's separate share is then held in further trust with mandatory principal distributions at interval ages, i.e., one-third at age twenty-five, one-half of the balance at age thirty and the balance at age thirty-five. The trustee desires to decant this trust to a new Florida Continuing Trust which provides that the resulting shares for the descendants should be held in trust for perpetuity. Because the new trust became irrevocable after December 31, 2000, the new trust provides that the applicable rule against perpetuities is the current Florida time period of 360 years.

Technically, the new trust violates the provisions of § 736.04117(3), Fla. Stat., which provides that for a Florida decant, the Continuing Trust must maintain the perpetuities period of the Distributing Trust. While the likely result will be that the court would apply the "cy pres" doctrine of § 736.04117(3), Fla. Stat., and apply the proper perpetuities provision, such a result is clearly a trap for the unwary and could lead to confusion and potential surcharge actions against the trustee for the costs involved in applying the "cy pres" or other reformation proceedings.

GST Tax Issues with Decanting

A further perpetuities trap awaits the trustee who attempts to decant a trust that is "grandfathered" for GST tax purposes (i.e., was irrevocable as of September 25, 1985) (a "grandfathered trust"). A grandfathered trust is completely exempt from the GST tax; however, the Treasury Regulations contain certain restrictions with respect to the decanting of a grandfathered trust that if violated, will cause the trust to lose its GST tax exempt status. Such a trust will then become subject to the GST tax upon a taxable termination or distribution.

Under the Treasury Regulations, the vesting of all interests in a grandfathered trust cannot be extended unless, (a) the trust was created under the laws of a jurisdiction (like Florida) under which decanting was allowable at the time of the creation of the trust, or (b) the trust agreement specifically provides for decanting authority (i.e., a common "pay or apply in trust" provision).[9] If neither of these two provisions is present, no term of any interest in the trust can be extended.[10] While native Florida trusts fit within this exception courtesy of the *Phipps* decision, certain trusts which were created in other jurisdictions, but subsequently were modified so that the governing law was shifted to Florida, may not.

For example, suppose that a grandfathered trust is created under a New Jersey will upon a decedent's death in 1983. Because the trust was irrevocable as of September 25, 1985, the trust is a "grandfathered trust." Because the trustee and all of the beneficiaries are Florida residents, the trustee subsequently has the governing law of the trust judicially changed to Florida. The provisions of the trust are similar to the trust described above; further note that the trust does not contain a "pay or apply in trust" provision. Suppose that the Continuing Trust provides for dynasty trusts instead of mandatory payout trusts and has a perpetuities period that utilizes the current Florida 360 year period. Because, (a) in 1983, upon the creation of the trust, New Jersey law did not provide for decanting, and (b) the trust did not contain any provisions authorizing decanting, the Continuing Trust is not a grandfathered trust as it violates the provisions of the Treasury Regulations. Thus, a GST tax will be imposed upon any transferee who, as to the decedent, would have been a "skip person."[11]

As a planning note, it may be desirable that future contributions be made to the Continuing Trust. If so, and if it is desired that the decanted assets retain their grandfathered status, the Continuing Trust should contain two sets of dispositive provisions. The first set should provide that any property transferred to it as a result of a decant should remain subject to the perpetuities period of the Distributing Trust and not extend the vesting period of any beneficial interests. The second set should provide that any new property added to the Continuing Trust should be disposed of in dynasty-style trusts and be subject to the longest perpetuities period permissible by law.

Other issues involving the GST tax arise even if the Distributing Trust is not a grandfathered trust. One of the most common reasons for decanting is to eliminate mandatory lifetime principal distributions to the more desirable (especially for protection from creditors) lifetime discretionary trust approach. If a trust provided for outright distributions of principal during a beneficiary's lifetime, it is likely that the settlor "opted out" of GST tax exemption allocation.[12] If the trusts under the Distributing Trust are being converted to lifetime trusts, a settlor may want to allocate GST tax exemption to the trusts. Making the correct decision regarding GST tax allocation for a Continuing Trust will likely require that the estate planning attorney confer with both the accountant and the drafting attorney of the Distributing Trust (if different than the current attorney) to determine whether GST tax exemption was previously allocated to the Distributing Trust and discuss the ramifications of a "late

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allocation" of settlor's GST tax exemption.

Likewise, if a trust is already exempt from GST tax, the attorney should take special care not to jeopardize the exempt status. As described above, Treasury Regulations specifically provide guidance as to grandfathered trusts, but there is currently no guidance for the effect of decanting on non-grandfathered trusts which are nevertheless GST exempt through the allocation of the transferor's GST tax exemption (i.e., "Exempt Trusts"). While the Internal Revenue Service has sought comments from practitioners on this topic,[13] official guidance has not yet been released (referred to herein as the "Guidance"). Practitioners should proceed with caution with respect to decanting an Exempt Trust. The safest course of action would be to wait for the issuance of such Guidance. If the trustee nevertheless desires to proceed, presumably no violations should occur if the vesting period of all beneficial interests in the Continuing Trust is identical to those in the Distributing Trust. If any such beneficial interest is extended in the Continuing Trust, the trustee would be best to follow the regulatory provisions for grandfathered trusts.

If the vesting of any beneficial interest is extended and the Distributing Trust is not an Exempt Trust, it may be desirable for the Continuing Trust to become an Exempt Trust. The problem with attempting to allocate GST exemption is that a decant is generally considered to be a continuation of the Distributing Trust. Thus, if the settlor of the Distributing Trust is not living, it would not be possible to allocate GST exemption to the Continuing Trust because only the "transferor's" (i.e., the settlor's) GST exemption may be allocated to the decanted assets, and if the settlor is deceased, there is no "transferor" for GST purposes. If the settlor is living, it may be possible to effect a late allocation of GST exemption with respect to the decanted property, while making a timely allocation with respect to any new property.

The Qualified Beneficiaries' Consent to a Decant Could Potentially Create Gift Tax Consequences

The power of a trustee to appoint the assets of the Distributing Trust to the Continuing Trust is most analogous to the exercise of a limited power of appointment. In fact, the Florida Trust Code specifically says that the exercise of the power to decant shall be considered "the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate or the creditors of the trustee's estate."[14] If the trustee is not a Qualified Beneficiary of the trust, the exercise of the decanting power is strictly the exercise of a power in a fiduciary capacity. There is a well-settled distinction between a power a trustee holds in a fiduciary capacity and one that is held for the possible benefit of the powerholder.[15] As such, there should be no adverse gift tax consequences to the trustee of the Distributing Trust that exercises his or her power to appoint the principal to the Continuing Trust, and

it is anticipated that the Guidance will confirm this belief.

Problems may occur, however, if the trustee requests that the Qualified Beneficiaries consent to the decant. While there may be a variety of reasons that consent is sought (not the least of which is to relieve the trustee of any liability for the decant), the "elephant in the room" is whether the Qualified Beneficiaries have made taxable gifts as a result of their respective consents. This issue is especially prevalent if any beneficial interests are diminished by the distribution to the Continuing Trust. Suffice to say, this question is not a well-settled area of law. In Florida, in particular, the consent of the Qualified Beneficiaries to a trustee's exercise of the power to decant is not required. However, if upon the termination of the life beneficiary's interest, (a) the Distributing Trust has four potential remainder beneficiaries, (b) as a result of a decant the Continuing Trust only has two such potential remainder beneficiaries, and (c) all four potential remainder beneficiaries under the Distributing Trust formally consented to the decant, have the removed remainder beneficiaries "gifted" their interest in the Distributing Trust to the other two beneficiaries? If so, how would the value of such gifts be determined? These questions remain open pending issuance of the Guidance.

If the trustee has the absolute power to invade trust principal, a beneficiary likely has no recourse against a trustee unless such distribution was an abuse of that trustee's discretion. Thus, the best course of action would appear to not require any consents to the decant. A Qualified Beneficiary's waiver of the Notice Period should not be likened to a consent because such a waiver affects a procedural, and not substantive, provision of the decanting statute. For these reasons, obtaining a Qualified Beneficiary's consent is likely unnecessary and should be avoided.

Conclusion

Decanting can be an attractive option for anyone looking to modify the administrative or dispositive provisions of an otherwise irrevocable trust. It's important for practitioners to follow the requirements proscribed in Florida's decanting statute. The practitioner, however, must take special care to tailor the provisions of the Continuing Trust to account for all issues – state law and federal tax law - in order to accomplish the settlor's objectives while ensuring that the Continuing Trust does not run afoul of any negative legal or tax provisions.

Catrina A. Sveum *is an associate in the Personal Planning Department of Proskauer Rose LLP and practices in Proskauer's Boca Raton office. She advises clients on a wide range of tax and estate planning matters, as well as estate and trust administration. Ms. Sveum received her B.A. from the University of Florida in 2005, her J.D. from Syracuse University College of Law in 2008, and her Master of Laws in Taxation from the University of Florida in 2009. While at the University of Florida, Ms. Sveum served as a Graduate Editor of the Florida Tax Review.*

Endnotes:

1 *Phipps v. Palm Beach Trust Company*, 196 So. 299 (Fla. 1940).
2 § 736.04117, Fla. Stat.
3 § 736.04117(1)(a), Fla. Stat.
4 § 736.04117(4), Fla. Stat.
5 *Id.*
6 § 736.0103(14), Fla. Stat.
7 § 736.04117(4) , Fla. Stat.
8 § 689.225(2)(f), Fla. Stat.
9 Treas. Reg. § 26.2601-1(b)(4)(i)(A)
10 *Id.*
11 § 2613(a) of the Internal Revenue Code of 1986, as amended.
12 *See, for example,* Treas. Reg. § 26.2632-1(b)(2)(iii).
13 Internal Revenue Service Notice 2011-101, 2011-52 I.R.B. 932 (December 20, 2011).
14 § 736.04117(3), Fla. Stat.
15 Restatement (Third) of Trusts, section 75 comments.

2013 FR/BAR Residential Contract documents APPROVED by the RPPTL Section and Florida Realtors – Release date set: August 2013

The final "red-line" versions, showing the additions and deletions, of the 2013 revised FR/BAR Residential Contract For Sale and Purchase, FR/BAR "AS/IS" Residential Contract and the FR/BAR Comprehensive Rider, as approved by the RPPTL Executive Council on May 25, 2013, are posted on the Section website at the Residential Real Estate & Industry Liaison (RREIL) Committee homepage (replacing the earlier "draft" documents posted). Once the 2013 contract documents are prepared in final format and typeset, they will be released and ready for use in August, 2013. FLSSI will be provided electronic versions of the final contract documents and copies should be posted on the Section website soon after their release.

1031 (g)(6) Limitations: "What You Need to Know"

By Stephen A. Wayner, Esq, C.E.S.


S. WAYNER

My primary goal as a Qualified Intermediary (QI) is to ensure that our client engages in a successful 1031 exchange, resulting in deferred capital gains taxes, etc. 1031 exchanges are not successful every single time. So what happens when the transaction hits a glitch? Many times we find ourselves dealing with clients who want their money back right now! Sometimes, we just cannot make that happen and here is why.

Over 20 years ago (1991), the Treasury Department established safe harbors for effectuating 1031 exchanges. Arguably, the most common of these safe harbors is the use of a Qualified Intermediary (QI). Under § 1031 of the Internal Revenue Code, a QI is supposed to acquire the relinquished property from the taxpayer, transfer title to the purchaser of that property and then hold the proceeds from that sale. Once a replacement property has been identified and placed under contract by the taxpayer, the QI will use the funds that it is holding to purchase that property and then it will complete the exchange by transferring that property to the taxpayer. This process is outlined in the requisite exchange agreement entered into between the taxpayer and the QI. One important requirement outlined in the exchange agreement limits the taxpayer's access to his or her funds throughout the exchange period and is set out in Treasury Regulations 1.1031(k)-(1)(g)(6), commonly referred to as the "(g)(6) limitations." If the exchange agreement fails to limit the taxpayer's rights to *receive, pledge, borrow or otherwise obtain the benefits of the relinquished property sale proceeds prior to the expiration of the exchange period*[1], the QI will be deemed to have allowed the taxpayer access to those funds and may be viewed as an agent of the taxpayer causing the 1031 exchange to fail and the transaction to be treated as a sale. While no taxpayer wants the exchange to be treated as a taxable sale, many taxpayers become suddenly uncomfortable when they realize they are bound by § (g)(6). As of today, there is no creative way around these limitations.

Almost every taxpayer that familiarizes themselves with 1031 exchanges knows about the 45 day and 180 day rules. The taxpayer has 45 days from the date that the benefits and burdens of ownership in the relinquished property are transferred to identify a replacement property and 180 days from the transfer of the relinquished property to close on the replacement property that was previously identified. However, these rules do not indicate that the exchange period is over in 180 days. Depending on the taxpayer's situation, it may be over sooner. Pursuant to the "(g)(6) limitations," the exchange period is over when the soonest of the following events occurs:

If the taxpayer fails to identify any replacement properties, the exchange period ends on the 46th day after the transfer of the relinquished property[2]; or

If the taxpayer has received every property identified during the identification period, the exchange period ends on the day following the acquisition of the last of the identified properties[3]; or

If after the identification period, a material, substantial contingency occurs that does not practically allow for acquisition of the replacement property, the contingency must satisfy the following three conditions:

1. Relate to the exchange[4]
2. Be provided for in writing[5], and
3. Be beyond the exchanger's control or the control of a disqualified party other than the QI[6]; or

On the 181st day following the transfer of the relinquished property[7].

The limitations set out in (g)(6) are not elective. Nevertheless, a certain amount of confusion and misunderstanding surrounds (g)(6) and its often ill-received restrictions.

The following are some examples:

Tax Folklore #1: If the taxpayer changes his mind about participating in a 1031 exchange before the 45 day identification period is over, all he has to do is ask the QI for his money back and the funds will be immediately returned.

Tax Truth #1: The Treasury Regulations are clear on the fact that if a taxpayer elects not to identify replacement property, the taxpayer must wait until the 46th day following the transfer of the relinquished property to receive any proceeds from the sale of that property. There is no allowance for a taxpayer who changes his mind to receive his proceeds any sooner.

A 1031 exchange that is structured with a QI will involve an exchange agreement and that agreement will contain the (g)(6) restrictions. If the agreement does not contain the language, the QI may be deemed the agent of the taxpayer because the QI is not limiting the taxpayer's access to the funds from the transfer of the relinquished property. In accordance with § 1031, if the QI is the agent of the taxpayer, the exchange will fail and the transfer will be treated as a taxable sale. The (g)(6) language is in effect for the entire exchange period. Therefore, if a taxpayer changes his mind about participating in a 1031 exchange before he or she identifies a replacement property, the taxpayer will have to

continued, next page

fail to identify a replacement property and will then have to wait until the identification period is over, i.e. the 46th day after the transfer of the relinquished property, to receive any funds from the transfer of that relinquished property.

Tax Folklore #2: Suppose the taxpayer used the three property identification rule to identify three properties but decided to purchase only one property and used most of her exchange proceeds to do so. If the taxpayer closed on that replacement property on day 80, and is not going to purchase any more of the identified replacement properties, she may immediately receive her left over exchange proceeds.

Tax Truth # 2: The exchange period is not terminated until the taxpayer has acquired every property identified as replacement property. Therefore, if the taxpayer identified more than one property using any of the identification rules and did not close on all of the identified properties, she must wait until the 181st day following the transfer of the relinquished property to receive any of the remaining exchange funds. The "(g)(6) limitations" are clear on the issue of acquiring identified property and the exchange period is not over until all identified properties have been received by the taxpayer. If a taxpayer identifies three properties but knows that she only intends to acquire one of the properties, the taxpayer should state clearly on the identification statement that she is identifying three properties but is only purchasing one of the identified properties. In that event, the exchange period terminates when the replacement property is received by the taxpayer and any excess exchange funds may be distributed to the taxpayer immediately thereafter.

Tax Folklore #3: In the event that the taxpayer has identified a replacement property but for reasons out of his control fails to close on that property, the taxpayer may immediately receive the exchange funds and the exchange period terminates because he would have purchased the replacement property but for "material and substantial contingency(ies) that are beyond the control of the taxpayer."

Tax Truth #3: While there is an exception for material and substantial contingencies under (g)(6), the exception is very narrow and strictly construed. In order to qualify for the exception, the taxpayer must have identified property during the 45 day identification period and the identification period must have already expired eliminating the taxpayer's ability to revoke his identification of the property and/or to identify additional property. Therefore, the taxpayer cannot claim the material and substantial contingencies exception

until after the 45 day identification period.

Examples of material and substantial contingencies described by the Treasury Department include a determination that the regulatory approval necessary for the transfer of the replacement property cannot be obtained in time for the taxpayer to receive that property prior to the termination of the exchange period, as well as instances where the replacement property is destroyed, stolen, seized, requisitioned or condemned.

Certain aspects of this narrow exception are either not well-defined or not defined at all by the Treasury Regulations. However, the term "regulatory" is understood to mean governmental. Material and substantial contingencies do not include properties that are on the market for a price that is too high or property that has been taken off the market or sold to another party. The IRS's position on the issue of material and substantial contingencies with regards to unreasonable asking prices for replacement property has been that the taxpayer is in a position to offer enough money and thus pressure to make the seller sell. Under these circumstances, the decision to offer more money and force a sale is not out of the control of the taxpayer. That type of situation will simply not satisfy the material and substantial contingencies exception under (g)(6).

Conclusion

The 1991 Safe Harbors were created to aid taxpayers and their advisors in structuring 1031 exchanges with minimal fear of invalidation. The Safe Harbors and Qualified Intermediaries' compliance with them, particularly "(g)(6) limitations", have facilitated millions of successful exchanges and the provisions simply cannot be swept aside. The "(g)(6) limitations" are not elective or optional; if a taxpayer wants to take advantage of using a QI to structure a 1031 exchange, then the "(g)(6) limitations" are something a taxpayer has to live with. Perhaps, the greatest disservice that a QI can do to a client is to bend these rules and risk harming all of the client's interests in a seamless exchange. Reputable and reliable QIs are wise to inform their clients of the "(g)(6) limitations" and the need for strict compliance – a warning that should go a long way for clients who want their money yesterday!

Stephen A. Wayner, Esq., C.E.S., *is a member of The Florida Bar and is Managing Director of Liberty 1031 Exchange Services, LLC, where he has handled over 10,000 Section 1031 transactions. He has an AV® PreeminentTM rating by Martindale-Hubbell, and is a former Vice President and Board Member of The Federation of Exchange Accommodators, the National Trade Organization for QI's. He can be reached at waynerlaw@bellsouth.net. or toll-free at (866) 903-1031*

Endnotes:

1 Reg. Section 1.1031(k)-1(g)(6)(i)
2 Reg. Section 1.1031(k)-1(b)(2)(i)
3 Reg. Section 1.1031(k)-1(g)(6)(iii)(A)
4 Reg. Section 1.1031(k)-1(g)(6)(iii)(B)(1)
5 Reg. Section 1.1031(k)-1(g)(6)(iii)(B)(2)
6 Reg. Section 1.1031(k)-1(g)(6)(iii)(B)(3)
7 Reg. Section 1.1031(k)-1(b)(2)(ii)

RPPTL Law School Liaison Committee Update

By Stacy Kalmanson and Jason Ellison

Barry Scholnik with Nova's RPPTL student association members and officers.

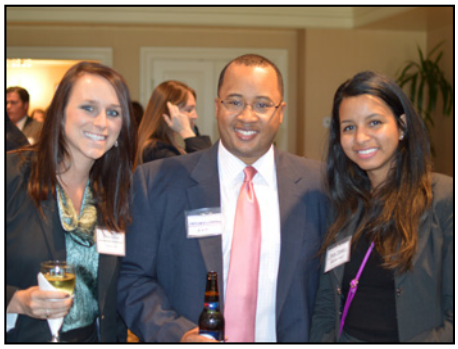
The Stetson Real Property, Probate and Trust Law (RPPTL) Association hosted its annual 'Meet & Greet' networking event in March at the Tampa Club Ballroom. The event was sponsored by the Real Property, Probate and Trust Law Section of The Florida Bar along with Wells Fargo Wealth Management, and hosted approximately 40 professionals and 30 students from not only Stetson, but also Thomas M. Cooley Law School, Florida State University College of Law and University of Florida Levin College of Law. The yearly event provides law students an opportunity to meet RPPTL Section members and other attorneys in the Tampa Bay area, and this year's Meet and Greet highlighted the new affiliate RPPTL Section membership available to law students. The Stetson RPPTL Association has approximately 20 student members who have taken advantage of affiliate membership, which allows students to attend certain RPPTL Section events, including the Executive Council meetings.

Stetson RPPTL Association President Sean Hernandez hopes to utilize the RPPTL Section's affiliate membership opportunity to connect more law students with local attorneys. "The new affiliate membership is an important tool for students who can use the membership not only to connect with practicing attorneys, but also to explore different and cutting edge practice areas under the real property, probate, or trust law banner," said Hernandez. "The Meet & Greet played a crucial role in connecting the new student members with RPPTL Section members." On April 18, Stetson hosted a panel including local attorneys Lara Fernandez and RPPTL Executive Council member Rob Stern.

The University of Florida hosted its inaugural Orange & Blue BBQ on April 6th before the annual spring Orange and Blue Gator football game. The event was sponsored by the University of Florida Levin College of Law along with RPPTL, and hosted approximately 30 students, along with 30 members of the Levin College of Law's Board of Trustees. "Because the football games are so well attended by members across the state, the barbecue was a great way to encourage attorney-student interaction," said James Glover, University of Florida RPPTL Student President. "Tying the barbecue with the spring game made it a fun event that was very well received by our practicing attorneys. After all, who doesn't love good barbecue? It was an especially good opportunity for our student members, and we got the chance to discuss many of the benefits of the RPPTL section while also introducing them to attorneys in many different practice areas."

With 74 members, the student association at Nova Southeastern School of Law had an active year. Its two most recent events involved speakers from the RPPTL Executive Council – attorneys Bill Parady and Barry Scholnik. "Through the combined support of the RPPTL Law School Liaison Committee, and our past and present NSU Organization Advisors, Joseph Grohman, Ronald Brown, Donna Litman and Kenneth Lewis, we have welcomed over 15 attorneys from some of the most prestigious firms in South Florida to participate in our Distinguished Speaker Series," said Christophal Hellewell, current NSU RPPTL President. "With so much support and so many great speakers, our organization has inspired a core group of students who share a passion for property law and actively participate in organization events. The mission of the NSU RPPTL chapter is to provide value to our members and we believe the value of our organization is derived from the participation of our members."

The committee would also like to welcome our newest law student RPPTL affiliate members: Chelsea Sims, Frank Leung and Jonathan Wells.



Jessica Cahoon, Stephen Liverpool and Suani Edwards

Michael Bedke, James Glover (UF), Laura Jo Lieffers (Stetson), and Lynwood Arnold

RPPTL Section Executive Council Meeting

Hotel Duval, Tallahassee
February 7th through February 10th, 2013

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

The winter meeting of the Real Property, Probate and Trust Law Section of The Florida Bar took place February 7th through February 10th at the Hotel Duval in Tallahassee. The Hotel Duval is located in downtown Tallahassee, within walking distance to the Capital.

Committee meetings began on Thursday, February 7th at 10:00 a.m. and continued throughout the day until 6:00 p.m. Among the committees holding meetings that day were Probate & Trust Litigation, Condominium & Planned Development, Title Insurance, Trust Law and At Large Members. A number of committees of both the House and the Senate were meeting down the street at the House of Representatives and the Florida Senate. Section Members were invited to attend and many took advantage of that opportunity to mingle and chat with our legislators. Some of the legislators returned the favor by attending committee meetings throughout Thursday and Friday.

A very well attended welcome reception was held Thursday evening at the top floor of Hotel Duval's beautifully decorated conference area next to the Level 8 Lounge. While it was a brisk, chilly evening, the view from the outside terrace was really spectacular. Following the welcome reception, the lounge was open for hospitality until 11:30 p.m. that evening.

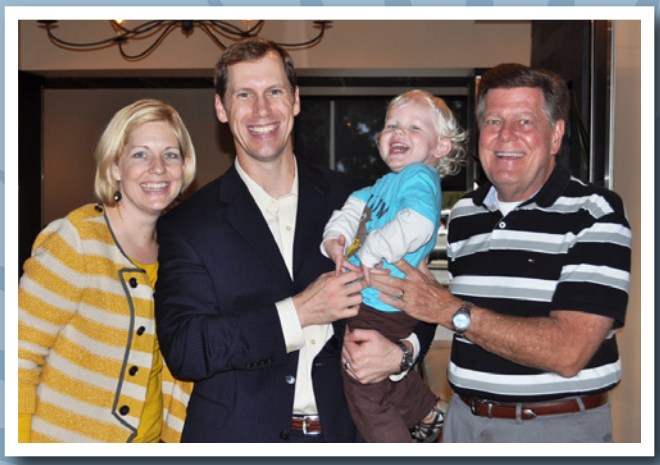
Friday saw meetings of sixteen (16) different committees. The attendees had an excellent opportunity to see our legislature in action and to speak directly to the folks at the center of all of that action. Our Section is really, really busy! Section business kicked off at 7:30 a.m. on Friday morning with a complimentary continental breakfast and committee meetings began at 8:00 a.m. continuing until 4:00 p.m. Section Members attending those meetings were also treated to a complimentary lunch. In an attempt to accommodate a "jam packed" schedule, the Probate and Real Property Roundtables took place from 4:00 p.m. until 5:30 p.m. on Friday.

On Friday evening, Section Members were driven by motor coach to an off site location called "Goodwood Plantation Carriage House." Everybody enjoyed an extensive buffet of southern gourmet food and entertainment by a local band which played "newgrass" music. And once again, the evening was capped off with drinks and desserts in the lounge on top of the hotel.

Saturday morning started off with a buffet breakfast complimentary to attendees and spouses or guests. Then motor coaches took everyone to the Executive Council meeting at the First District Court of Appeal. The First DCA sits in a large field on the outskirts of Tallahassee and is really quite impressive from any view. Be sure and take a look at the photographs of our fearless leaders seated on the Grand Dais.

The buses returned everybody to the hotel for lunch and a free afternoon to visit the Capital or just nap. Saturday evening was a reception at the Front Porch, a coastal casual seafood restaurant. Once again, the company was outstanding and the food was great.

Sunday morning was a farewell continental breakfast including spouses and guests before everyone got on the road to home.



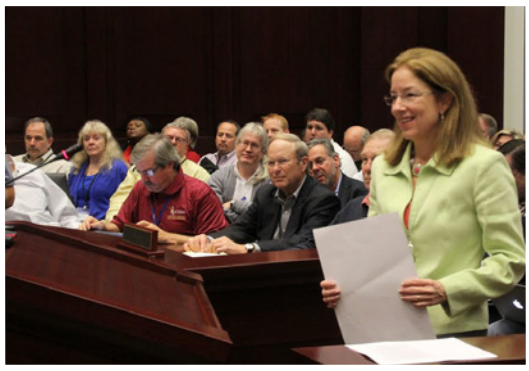
All smiles with Jennifer and Reed Bloodworth, Grandpa Fred Jones and grandson, Brennan

Full house for the Real Property Problems Study Committee meeting

Carlos Batlle from J.P. Morgan offering a toast at the Thursday night reception

Carl Eldred speaking on environmental issues at the Commercial Real Estate Committee meeting

Welcome reception at the top of the Hotel Duval with George Lange, Deborah Ezell, Kathy Neukamm, Joan Lange and Peggy Rolando



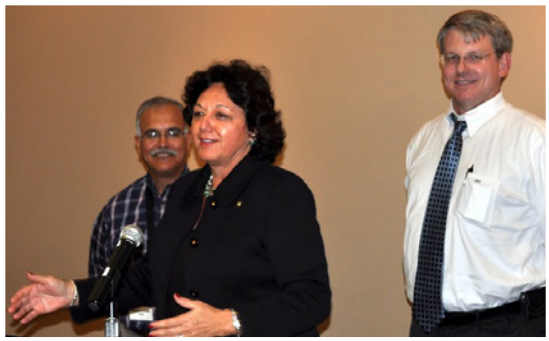
Debbie Goodall addressing the Executive Council

Division Director Michael Gelfand guiding the Real Estate Roundtable

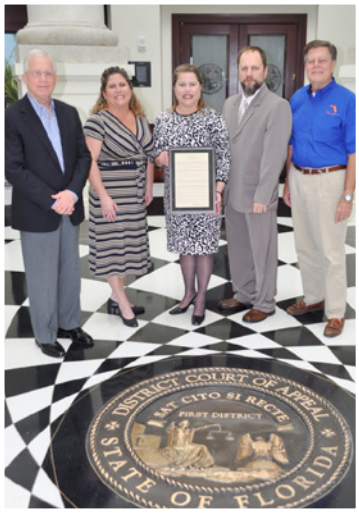
PAC lunch meeting with Nicole Kibert at the microphone

Jessica Urbanski from Iberia Wealth Advisors flanked by George Karibjanian and Domenick Macri

RPPTL Section Executive Council Meeting
Hotel Duval • Tallahassee • Feb. 7 - 10, 2013

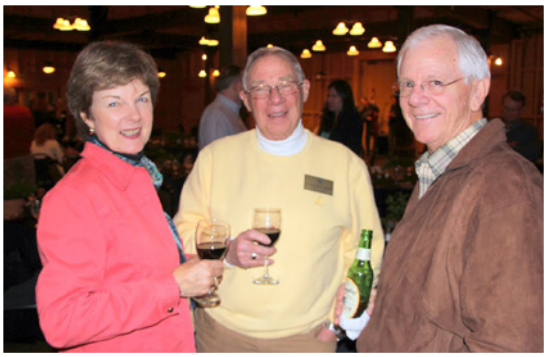


Representative Passidomo discussing the foreclosure bill alongside Kris Fernandez and Alan Fields

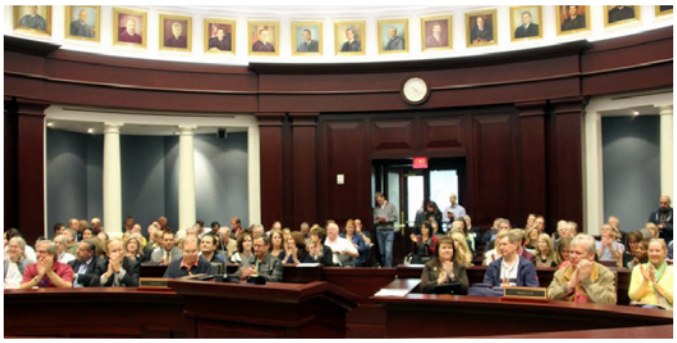


Fletch Belcher and Fred Jones with the family of Bill Haley, whom we will all miss dearly

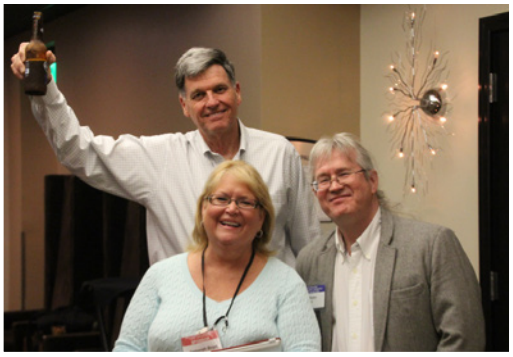
To see more photos, log in to www.rpptl.org, "Section Information" tab



Jennie and Tom Smith with Pete Dunbar at the Friday night dinner

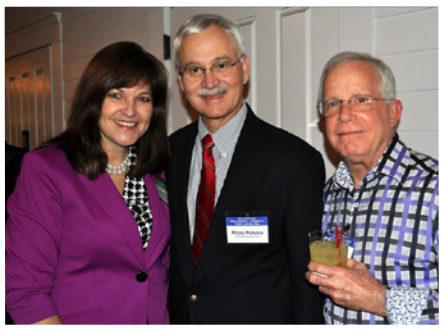


Executive Council meeting in progress at one of the courtrooms of the First District Court of Appeal



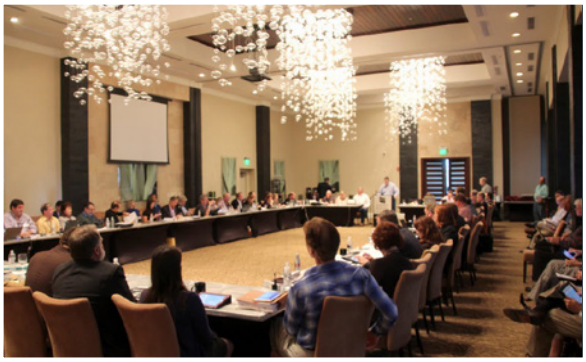
Chip Waller enjoying refreshments between meetings with Deborah Boyd and Burt Bruton

Two Mikes: one representing each Division



Chief Justice Ricky Polston with wife, Deborah, and Fletch Belcher

Our Executive Committee officers presiding over the Executive Council meeting



Trust Law Committee meeting with Shane Kelley at the podium

Photos by John Neukamm, Michael Gelfand, and Silvia Rojas.

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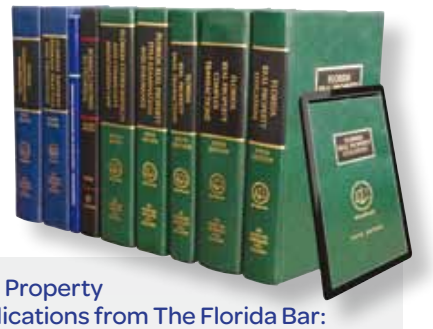

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Roundtables

Friday, February 8, 2013
Tallahassee, 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.

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

Thank you to the Roundtable Sponsors: HFBE and BMO (Harris) Private Bank

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

The following action items, information items and committee reports were discussed at the Roundtable. The meeting began with Ralph Freedman, the chairman of CLE committee requesting topics that can be presented as one hour lunchtime CLE. He is setting the calendar now for rest of the year.

Action Items

Former Durable Power of Attorney Committee - Tammy Conetta, Chair: The committee finalized proposed legislation to fix some glitches in the recently passed durable power of attorney statutes. This action item was approved by the Executive Committee during the break between council meetings. These glitches include: clarifying the definition of a financial institution to include broker dealers; exceptions to the statutes; referencing the statute which allow a notary to sign on behalf of a disabled person; clarifying that the original power of attorney must be provided for recordation in real estate transactions; providing that translations need only to be verified; and when written notice of rejection must be provided.

Estate & Trust Tax Planning Committee – Elaine Bucher, Chair: This action item is a quick fix to chapter 198 regarding Florida Estate Tax. To eliminate the requirement to file an F706 when no federal estate tax is due, the bill supported by the Section adds a sentence that it will not apply to estates for decedents dying after December 2012.

Information Item

Presentation by George Karibjanian: This presentation

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 meeting began with a resolution commending **Bill Hailey**, a distinguished member of the Section.

Announcements

Michael made several announcements of general interest to the Division including: Introduction of the Fellows, underscoring the importance of getting proposed bills ready by the May annual meeting (in proper format), identifying future leadership for the Section and planning for CLE that is both relevant and successful.

Action Items

Condominium & Planned Development Committee – Steven H. Mezer, Chair.

The committee proposed to adopt a legislative positing supporting an amendment to Florida law to deal with the failure to respond to a request for estoppel letters, duration for which the estoppel letters would be good, content of the estoppel letters, fees to be charged and other related matters. The proposal was unanimously approved.

The committee proposed to adopt a legislative position supporting proposed amendments to § 718.116, Fla. Stat., and § 720.3085, Fla. Sta., dealing with charges permissible as late fees. This is an area where the law has not been changed in over twenty (20) years. The proposal was unanimously approved.

The committee proposed to adopt a legislative position supporting the differentiation of statutory regulations for non-residential condominiums, including amendments to Ch. 718, Fla. Stat. The proposal was approved with one vote in opposition.

See "Real Property Division," next page

PROBATE & TRUST DIVISION

dealt with the "same sex" marriage cases: *Windsor v. United States*, 833 F.Supp.2d 394 (S.D.N.Y. 2012); Affirmed, 699 F.3d 169 (2d Cir. 2012) and the U.S. Ninth Circuit Court of Appeals, in *Perry et al. v. Brown et al*., 671 F.3d 1052 (9th Cir.) being reviewed by the U.S. Supreme Court on equal protection grounds and the effect that the Supreme Court's possible decisions would have on estate planning in Florida.

Committee reports:

Digital Assets and Information Study (DAIS) Committee – Travis Hayes, Chair: Eric Virgil reported that we have new types of property that our laws do not address. Of all the states, Oregon has the best statute to date regarding digital assets. The ABA RPPTL Sec. Uniform Laws Committee is preparing proposed legislation and Travis Hayes is an observer on this committee. They are working with in-house counsel for Facebook and Google. There are two federal acts that preempt a lot of what the states are trying to do. The DAIS Committee will recommend creating a sub-committee to track the Uniform Laws Committee and modify their proposed legislation to meet Florida's needs. The DAIS Committee will make a recommendation at the RPPTL Section's May meeting to draft legislation at this time or to wait.

Ad hoc Committee on Personal Representative Issues – Jack Falk, Chair: The committee is focusing on the *Hill v. Davis*, 70 So.3d 572 (Fla. 2011) decision in which the Florida Supreme Court created a huge exception to the time requirement to object to the validity of a will. If there are allegations of fraud in connection with the proceeding, you can get around the three month time requirement. The problem is everyone can allege it and it will be easy to get around, giving anyone objecting to the validity of the will an unlimited amount of time to file an objection and/or challenge. A recent case, *Shuck v. Smalls*, 101 So.3d 924 (Fla. 4th DCA 2013) demonstrates what the committee foresaw has happened. The committee is also reviewing the qualification requirements for a personal representative to determine if these need to be changed.

Ad Hoc Committee on the Treatment of Life Insurance Payable to a Revocable Trust – Rick Gans, Chair: The sense of the committee thus far is to want to preserve the exemption under section 308 notwithstanding the *Morey v. Everbank*, 93 So.3d 482, (Fla. 1st DCA 2012) case. The committee will be proposing legislation.

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair: The committee is working on making the incapacity standard understandable and coming up

continued, next page

REAL PROPERTY DIVISION

Information items

Condominium & Planned Development Committee – Steven H. Mezer, Chair. Steve reported on a bill proceeding through the legislature that will clear up some "glitches" in time share foreclosures. Steve also reported on an upcoming seminar by the Committee in April.

Ad Hoc Trust Accounting Committee – Roland "Chip" Waller, Chair. Jerry Aron reported on § 626.8473(8), Fla. Stat., and progress relative to separate trust accounts for real estate transactions. Chip Waller reported that the Ad Hoc Trust Accounting Committee had met with the Professionalism & Ethics Committee. The hope of the joint group is to come up with a new proposal to be considered at the June Professionalism & Ethics Committee meeting.

Ad Hoc Trust Account Committee – Roland "Chip" Waller, Chair. Chip Waller reports that the committee feels its charge regarding trust account debit authority is completed.

Landlord & Tenant Committee – Neil Shoter, Chair. Neil reported a conflict with § 83.595, Fla. Stat., as the lease form does not provide as stated in the addendum with regards to early termination fees for residential leases. The committee has proposed a correction.

Residential Real Estate & Industry Liaison (RREIL) Committee – Frederick W. Jones, Chair. Fred announced new appointments of Section members as liaison with the Florida Realtors: Kerry Anne Schultz, Navarre; Mercedes Gonzalez-Hale, Wesley Chapel; Thomas Wright, Marathon; Gary Nagle, Juno Beach; and G. Thomas Ball, Orlando. Fred further reported that the 2013 revised FR/BAR form will be available for approval at the May meeting and will also be available on the Section website.

Committee Administration

Legislation for 2014 Session. Michael reported that any legislation for the 2014 session must be ready for approval by the annual meeting in May. Pete Dunbar emphasized the importance of getting bills ready early.

Google Docs. Michael encouraged folks to use Google Docs for the roll call at meetings.

CLE. Rob Freedman announced some changes in scheduling of upcoming seminars on e-filing. Rob also said web-based seminars are the wave of the future.

PROBATE & TRUST DIVISION

with a methodology that works on its own. There is a lot of concern for respecting rights of the incapacitated.

Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets - Angela Adams, Chair: The proposed legislation has been submitted to Bill Hennessey and it will be an action item at the RPPTL Section's May meeting in St. Petersburg. The final version will be posted on the RPPTL Section webpage.

Ad Hoc Committee on Estate Planning Attorney Conflict of Interest – William Hennessey, Chair: Though an attorney can seek and accept a fiduciary position, the Florida Bar wants clients to be given adequate disclosure about options or fees that the attorney may earn. It has encouraged lawyers to come up with a procedure to explain to the client the consequences of an attorney taking a fiduciary position. The committee is looking at this situation which presents itself as an opportunity for abuse and is in the process of drafting: guidelines on what a lawyer ought to do when appointed as a fiduciary, the options available, the implications, etc. We do not want courts questioning lawyers' integrity.

Asset Protection Committee- Brian Sparks, Chair: Linda Griffin reported the committee's CLE seminar was well attended in November. They are going to work with the IRA, Insurance & Employee Benefits Committee and the Estate & Trust Tax Planning committee to put on a joint seminar. Subcommittees were appointed to work on case law, legislative proposals, etc.

Attorney/Trust Officer Liaison Conference office – Jack Falk, Chair: There will be a lot of good speakers including Sam Donaldson at the June 21-23 attorney/trust officer liaison conference at the Ritz Carlton in Naples.

Estate & Trust Tax Planning Committee – Elaine Bucher, Chair: The proposed family trust company legislation is moving along well. The Office of Financial Regulation is working with this subcommittee on family trust company legislation and had a few tweaks to the language. It looks like it will be ready for 2014. The tenants by the entireties subcommittee is working on revising the legislation for the RPPTL Section's May meeting in St. Petersburg. The Ad Hoc LLC Monitoring Committee reports the proposed LLC legislation is ready. A presentation was made summarizing pertinent topics from the 47th Annual Heckerling Institute on Estate Planning held January 14-18, 2013.

Guardianship & Power of Attorney Committee – Sean Kelly, Chair: The 9th circuit proposed another local rule for professional guardians which the committee may need to address in the future. They discussed the *Bishullang Shen, s/h/a Bisullang Shen v. Kathleen Parkes*, 37 Fla. L. Weekly D2559 (Fla. 4th DCA, October 31, 2012) case in which examining committee reports are found to be inadmissible hearsay when there is an objection. A determination of incapacity based solely on the examining committee's reports was invalid. A subcommittee was appointed to work on proposing legislation. The committee is also working with the Probate Rules Committee to draft a guardianship accounting rule.

IRA, Insurance & Employee Benefits Committee – Linda Griffin/Howard Payne, Co-Chairs: There was a discussion on converting qualified plans into Roth IRA plans. Also discussed were issues related to annuities. There are two bills pending addressing the over-selling of annuities and asking for more time for the purchaser to back out and asking planners to get a lot more information on suitability for the client.

Liaison with Elder Law Section – Charlie Robinson, Chair: The Elder Law Section has found a lot of abuse in the sale of estate plans, Medicaid plans and VA plans by non-attorneys. They are seeking an advisory opinion from the Florida Bar's Unlicensed Practice of Law Committee. There will be a public hearing soon in Tampa and **attorneys are requested to appear at the hearing and give testimony on UPL activities they have observed**.

Probate & Trust Litigation – Tom Karr, Chair: The committee will have an action item at the RPPTL Section's May St. Petersburg meeting regarding the burden of proof in a trust contest and with regards to undue influence objections. Jon Scudder reported the committee is discussing whether legislation should be proposed for the following issues: if a party is entitled to an accounting during a will contest; If a computer generated copy is acceptable for a lost or destroyed will; and regarding Sec. 736.0802(10), Fla. Stat., whether attorneys can pay fees out of a trust when there is an allegation of breach of fiduciary duty.

Probate Law & Procedure Committee – Tae Kelley Bonner, Chair: The committee is still looking at creditor statutes and sent the study back to the subcommittee. It will be reviewed again by the committee in May. The committee is also working on artificial reproduction technology issues and decided to draft legislation. A subcommittee is looking at summary administration statutory revisions.

Trust Law Committee -Shane Kelly, Chair: Discussed dynasty trusts. Currently you cannot opt out of non-judicial modification and want to propose legislation to change this and make it an action item at the next RPPTL Section meeting. The committee also discussed revising the anti-lapse statute.

The Death of Trust Reformation to Correct Drafting Mistakes?

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Reformation of trust instruments based upon mistake (i.e. scrivener's error) was first introduced into Florida as common law in 1998[1] and was subsequently codified and broadened by the adoption of § 736.0415, Fla. Stat. in 2007.[2] Such expansion, however, may have been limited in 2011 by the Third District Court of Appeal's decision in *Reid v. Estate of Sonder*.[3] Ultimately, the *Reid* decision may significantly affect the future of causes of action for trust reformation based upon a drafting mistake. This article will examine Florida common law on trust reformation based upon mistake, the related Florida statute and the *Reid* decision addressing this unique cause of action.

Background and *Estate of Robinson* Decision

A cause of action to reform a trust based upon mistake can be an effective, yet often overlooked, technique for a probate litigator or estate planning lawyer seeking the reformation of a trust instrument to reflect the settlor's true intentions even if the trust provisions appear unambiguous. In this context, a mistake occurs when there is a unilateral drafting error that is inconsistent with the settlor's intent.[4] Historically, to reform a trust, it was generally believed that courts needed only to elicit testimony from the drafting attorney admitting to having made a scrivener's error that was contrary to the settlor's intent.[5] Florida common law and the Restatement of Property specifically authorize reforming trust instruments to correct drafting mistakes.[6]

Often, the trustee and beneficiaries[7] of a trust file an agreed upon complaint and seek court approval to reform a trust due to an innocuous drafting mistake. This, of course, benefits all parties, including the estate planning attorney who may have made an innocent drafting error.[8] In some instances, however, a party who seemingly would benefit from the apparent drafting mistake will seek to prevent a change in the document, thus resulting in litigation.

In 1998, in a case of first impression, the Fourth District Court of Appeal announced the existence of a cause of action for reformation of a trust based upon mistake.[9] In *In re Estate of Robinson,* the settlor's surviving spouse sought reformation of her husband's trust to effectuate his alleged intent to fund her marital trust with one-third of the residuary estate *before* reduction for applicable transfer taxes (as opposed to "after" taxes).[10] While the settlor's will reflected this intent, the revocable trust, which was executed on the same day as the will, directed that the marital trust be funded *after* the imposition of such taxes.[11]

The probate court, applying the standard of clear and convincing evidence, found that a unilateral mistake existed and reformed the trust instrument to conform to the settlor's intent of funding the marital trust before payment of transfer taxes.[12] The settlor's daughter, whose trust was now required to bear the impact of significant estate taxes, filed an appeal. The appellate court affirmed the lower court's decision and explained that "clear and convincing evidence" was a standard borrowed from other jurisdictions that have permitted trust reformation based upon mistake.[13] Although the decision does not provide substantial detail of the evidence presented to the lower court, the appellate court's affirmance is significant because it represents the first Florida appellate decision recognizing reformation of a trust to cure a drafting mistake.[14]

Post-*Robinson* Case Law

Four years after *Robinson*, the Fifth District Court of Appeal in *Schroeder v. Gebhart* further developed the evidentiary burden which must be met before a court can reform a trust based upon a mistake.[15] In *Schroeder,* a dispute arose over whether the settlor's use of the term "*per stirpes*" was intended to exclude beneficiaries who were removed from her intestacy family line by being adopted from an unrelated person.[16] The adopted family members initiated a lawsuit seeking to reform the trust based upon mistake, alleging that they were intended beneficiaries.[17]

The appellate court examined the trial court testimony and determined that the adopted family members met their burden of proof for reformation.[18] The appellate court pointed out that, while there was "conflicting testimony," the "most relevant testimony" came from the drafting attorney.[19]

During the trial, the court heard testimony both supporting the settlor's intent to include her adopted grandchildren and testimony supporting the position that the settlor's intent was only to provide for her biological grandchildren.[20] The *Schroeder* court focused on the drafting attorney's testimony that the decedent told her that she wanted all "five" of her grandchildren to be beneficiaries of her trust.[21] The only way for the decedent to have "five" grandchildren was if the adopted grandchildren were included in the class. According to the drafting attorney, by stating that she wanted to include her "five" grandchildren, the decedent had intended for the legal term *per stirpes* to include *all* of her grandchildren, including those adopted by another family.[22] At the time, the drafting attorney was not told, and did not know, that some of the settlor's grandchildren had been "removed" by being adopted by another family,[23] and

this omission was compounded because the decedent was apparently unaware that § 63.172, Fla. Stat., provides that adoption of a child by another family terminates all legal relations between such child and natural parent, and consequently, removes such child from an intestacy or *per stirpes* designation.[24] The court held that the drafting attorney and settlor "erroneously assumed" that a *per stirpes* disposition would distribute the property to *all* of the settlor's grandchildren, including her blood related grandchildren who had been adopted by a third party, regardless of whether the blood related grandchildren were considered to be intestate descendants.[25] Despite conflicting testimony, by relying on the precedent of *Robinson* and focusing on the concept of equity,[26] the court reformed the trust to include the settlor's "removed" grandchildren as beneficiaries of the trust.[27]

A few years after the *Schroeder* decision, the Fourth District Court of Appeal once again weighed in on a reformation of a trust cause of action based on a drafting mistake.[28] In *Popp v. Rex,* the settlor created a trust providing for the trust residue to pass in installments to her two children.[29] The trust provided dispositive instructions for the subsequent death of a child who died *with* children, but failed to include instructions with respect to the subsequent death of a child who died *without* children.[30]

Like *Schroeder*, the court resolved the issue by primarily relying on the drafting attorney's testimony.[31] The drafting attorney, as well as the settlor's financial advisor, testified that it was the settlor's intent that if a child died without children, that child's share would pass to the surviving child so that the assets stayed within the settlor's immediate family.[32] The witnesses specifically recollected their particular conversations with the settlor regarding this intent.[33] The court also attached importance to the settlor's testamentary scheme in her other trust, wherein she had consistently provided for her assets to be distributed to the other child if one died without children.[34] Finding that the testimony of the drafting attorney and financial advisor established the "actual but unwritten intent" of the settlor, the court affirmed the reformation of the trust based on mistake.[35]

The Florida Trust Code

To better effectuate a settlor's intent, as part of the implementation of the new Florida Trust Code in 2006 (effective 2007), the Florida legislature added § 736.0415, Fla. Stat., to codify existing common law permitting reformation of a trust to cure a mistake.[36] The statute specifically allows an "interested person," as defined in § 731.201(23), Fla. Stat., to seek reformation of the terms of a trust to conform to the settlor's intent, and provides a burden of proof based on clear and convincing evidence.[37] The statute even permits reformation that is completely inconsistent with the apparent terms of the trust.[38] The staff analysis from both the Florida House and Senate expressly state that the statute is an expansion of existing law because it permits reformation "for mistakes both in the expression and in the inducement."[39] Indeed, the statute is consistent with the Restatement of Property, which specifically approves reformation of a trust to correct a drafting mistake.[40] Due to the statute's relatively new existence, there have been only two reported appellate cases addressing this new statutory cause of action, *Reid v. Estate of Sonder* and *Morey v. Everbank*.[41]

The *Reid* Decision

In *Reid,*[42] the first appellate decision to interpret § 736.0415, Fla. Stat., the Third District Court of Appeal affirmed the probate court's denial of a trust reformation based on a drafting mistake. This is significant because all prior reported appellate cases under the common law involving a reformation of trust to cure a mistake permitted the reformation.

In *Reid,* the settlor's revocable trust contained several specific gifts, including gifts to a charity and to a trustee.[43] However, the trust had insufficient assets to fund all of the gifts.[44] The trustee sought to prevent part of her gift from being abated[45] based upon the trustee's alleged knowledge of the settlor's intent, even though the plain language of the trust indicated that this gift should be reduced.[46] In particular, the pertinent provision of the trust stated that after giving effect to certain specific devises, the sum of $25,000 and the settlor's apartment were to be given to the trustee.[47] Although the trust dictated that the trustee's bequests were to be satisfied subsequent to the satisfaction of other bequests, the trustee sought to reform the trust to correct a perceived mistake so that the bequest of the apartment was not subordinate to the other bequests, thereby allowing the trustee to receive her whole beneficial interest.[48]

Conducting a brief analysis of § 736.0415, Fla. Stat., the *Robinson* decision and the evidentiary burden of clear and convincing evidence, the appellate court upheld the probate court's decision denying the effort to reform the trust.[49] The court explained that its role was to determine whether the probate court relied on competent substantial evidence to support its decision.[50] The court cited to the testimony of the drafting attorney, who admitted a mistake and indicated that inclusion of the terms which created the priority in gifts was solely his error.[51] Specifically, the drafting attorney testified that the settlor "never instructed him to create a priority between the gifts" and the bequest of the apartment was not meant to have a lower priority than the other bequests.[52] The drafting attorney further stated that the priority between the gifts was "a drafting error on my part, and it did not reflect the intent of [the settlor]."[53] Notwithstanding this testimony from the drafting attorney, the court relied on other testimony from the drafting attorney that the settlor "read and approved the [trust] language" and

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that the settlor later executed two trust amendments which ratified his trust.[54] The court also held that there was no evidence presented that the settlor "would not have been capable of understanding the trust as written" or that the settlor was not able to understand the relatively simple and clear terms regarding the subordination of his bequests.[55]

The majority opinion was authored by one judge, with the second concurring and the third, Judge Wells, filing a sharp dissent advocating for the use of the reformation statute.[56] As in the prior reformation decisions, the dissent relied on the testimony of the drafting attorney. The dissent stressed that the drafting attorney's testimony was not refuted or rebutted.[57] Significantly, the drafting attorney admitted a drafting error and that the language as drafted did not conform to the settlor's intent.[58]

Judge Wells cited to the fact that the settlor's prior trust already provided for a monetary gift to the trustee.[59] The evidence indicated that the settlor later decided, through a restatement, to also make a specific devise of his apartment to the trustee.[60] The decision regarding the location of this gift within the trust was made entirely by the drafting attorney.[61] According to the drafting attorney, the settlor had no role in deciding where to place this gift within the trust, and the placement of the gift after other gifts was not intended to reflect that the settlor intended for this gift to be treated less favorably than other gifts.[62] Further, Judge Wells focused on an exhibit, written in the settlor's handwriting, which set forth all of the gifts that settlor intended to make.[63] The exhibit did not delineate any priorities for the gifts.[64] Moreover, the exhibit did not set forth any priorities between the two gifts to the trustee.[65] Further, it was acknowledged that the exhibit was reviewed with the settlor contemporaneously with the execution of the trust.[66]

Indeed, the dissent stressed that the drafting attorney testified that he specifically advised the settlor that placing the monetary and apartment bequests in the same paragraph within the trust "would have no effect on the gift of the apartment and its contents."[67] The drafting attorney's testimony was also supported and confirmed by the only other testifying witness who was the settlor's friend and physician.[68] The dissent criticized the majority for "ignoring" the uncontradicted evidence and the mandate of § 736.0415, Fla. Stat.[69]

The troublesome aspect of the *Reid* decision is that when presented with a fact pattern that is seemingly the exact scenario contemplated by § 736.0415, Fla. Stat., both the probate court and the appellate court disregarded the statutory intent. The *Reid* opinion did not compare or analyze the prior Florida cases permitting reformation based upon the drafting attorney's testimony. Perhaps the trier of fact was influenced by the clear and simple terms of the settlor's trust[70] or was not persuaded by the drafting attorney's

testimony.[71] In the earlier cases, the courts may have been inclined to find a mistake if the trust instrument contained language concealed in obscure legalese (i.e. the term "*per stirpes*"),[72] if the trust instrument contained a potential void or gap which the settlor may not have detected,[73] or if the settlor's intent was apparent from a contemporaneously executed document.[74] The majority in *Reid* may have concluded that the testimony from the drafting attorney and the settlor's physician was inadequate to meet the clear and convincing burden of proof and that the clear terms of the settlor's trust were enough to counter the witnesses' testimony. As a result, perhaps these elements caused the majority to conclude that the trustee failed to meet her "clear and convincing" burden of proof.[75]

Even if such elements were what swayed the respective courts, the *Reid* decision conflicts with prior case law which relied solely on the testimony of the drafting attorney. In *Schroeder,* the court permitted reformation even when presented with testimony that contradicted that of the drafting attorney.[76] There was no conflicting testimony cited in *Reid.*[77] *Reid* is also inconsistent with the *Rex* decision, where the court also reformed the trust based upon the testimony of the drafting attorney.[78] In *Reid,* not only was there testimony from the drafting attorney, but there was also supporting testimony from the Settlor's friend and physician. An additional concern of the *Reid* decision is that it may defy a rationale of *Robinson,* which announced that equity, in part, is a reason for permitting reformation of a trust to cure a mistake.[79] As the Fourth District Court of Appeal expressed in *Robinson*, equity empowered the court not only with the right, but with the duty to reform an instrument to conform to the settlor's intent.[80]

Finally, the *Reid* Court's focus[81] on the clear and convincing evidentiary standard appears blurred. The probate court determined that the moving party did not meet her burden of proof of clear and convincing evidence even though the court elicited unrebutted testimony from the drafting attorney and settlor's doctor.[82] The Court instead relied on the settlor's review of the trusts and intelligence level.[83] The *Reid* decision retracts from other appellate cases holding that the scrivener's uncontradicted testimony meets this high evidentiary burden. However, the *Reid* majority may have determined that § 736.0415, Fla. Stat., being the only trust code provision requiring this elevated burden, requires significant evidentiary proof exceeding the testimony of two disinterested witnesses.[84]

The *Morey* Decision

Although trust reformation was a collateral issue, the First District Court of Appeal in *Morey v. Everbank* relied in part on the *Reid* decision when it affirmed a lower court's denial of reformation of a trust based on mistake in 2012.[85] In *Morey,* the settlor, an astute businessman, created a revocable trust.[86] A month later, he purchased a life insurance policy naming his trust as the beneficiary.[87] Four years later, the settlor amended and restated his trust, and created a subtrust for the benefit of his children.[88] The settlor did not change the beneficiary of his life insurance policy to the subtrust.[89] Indeed, the settlor later amended his revocable trust and expressly reaffirmed the provisions therein.[90]

The revocable trust, as amended, contained a clause requiring the trustee to pay any obligations, debts and taxes of the estate.[91] While life insurance proceeds payable to a trust are generally not required to satisfy estate obligations, the revocable trust's explicit terms to the contrary made the insurance proceeds available for such debts.[92] Between the time period of the creation of revocable trust, and the settlor's ultimate demise, his net worth dwindled from about $8,000,000.00 to insolvency.[93]

Upon the settlor's death, the trustee filed a lawsuit requesting the trial court to determine that the life insurance proceeds payable to the revocable trust were exempt from the estate's obligations.[94] Based upon the clear terms of the life insurance policy and revocable trust, the trial court denied the trustee's position and determined that the life insurance was payable to the estate to satisfy the creditors.[95] Dissatisfied with the result, the trustee subsequently filed a supplemental lawsuit seeking to reform the revocable trust based upon a drafting mistake pursuant to § 736.0415, Fla. Stat.[96] The trial court denied the reformation.[97]

Relying only in part on *Reid,* the appellate court affirmed the trial court's denial of the reformation.[98] The appellate court cited to the drafting attorney's testimony that the settlor, an experienced businessman, read his testamentary documents.[99] The appellate court noted, however, conceivably inconsistent with the *Reid* decision, but consistent with the Restatement, that proof of a decedent reviewing the documents does not "alone preclude an order of reformation."[100] The drafting attorney further testified that when the settlor executed his revocable trust, his primary concern was for his estate to have liquidity.[101] Significantly, the appellate court noted that reformation is not available to cure a settlor's "post-execution change of mind."[102] As a result, the appellate court appeared to have relied on the drafting attorney's testimony, which did not support a finding of reformation. With its reliance on the drafting attorney's testimony, the question is whether this result would have been different had the drafting attorney testified that the revocable trust contained a "drafting error," or would the court have placed greater emphasis on other circumstances (which is the approach taken by the Third District Court of Appeal in *Reid*).

Conclusion

Nonetheless, although only an appellate case containing a sharp dissent, the *Reid* decision is significant because it is the first judicial interpretation of § 736.0415, Fla. Stat.

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The importance of the *Reid* decision may be magnified because the Florida legislature recently enacted a companion mistake statute for wills, § 732.615, Fla. Stat., which mirrors § 736.0415, Fla. Stat. The interesting aspect of § 732.615, Fla. Stat., is that the statute is a considerable expansion of existing law because reformation of an unambiguous will was previously never permitted by case law or statute in Florida.[103] As additional cases based on § 736.0415, Fla. Stat., as well as § 732.615, Fla. Stat., proceed through the judicial process and arrive at the appellate level, the potential impact of *Reid* on §§ 736.0415, and 732.615, Fla. Stat., is undetermined. The question therefore remains whether §§ 736.0415 and 732.615, Fla. Stat., will survive *Reid's* ruling.

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Endnotes:

1 *In re Estate of Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998). Reforming bilateral contracts based upon a mistake has long been held valid. *See, e.g., Steffens v. Steffens,* 422 So. 2d 963 (Fla. 4th DCA 2002) ("equity will reform the instrument so as to conform to the intent of the parties").

2 § 736.0415, Fla. Stat.; *see also* Fla. S. Comm. On Banking & Ins., CS/SB 1170 (2006) Staff Analysis; Fla. H. Florida HB 425 CS (2006) Staff Analysis.

3 *Reid v. Estate of Sonder*, 63 So. 3d 7 (Fla. 3d DCA 2011).

4 *See*, *e.g.,* § 736.0415, Fla. Stat.

5 *See*, *e.g., Schroeder v. Gebhart,* 825 So. 2d 442 (Fla. 5th DCA 2002). Of note for estate planners, when a drafting attorney admits a "mistake" in accordance with the statute, does that equate to an admission of professional malpractice? An attorney may be liable for malpractice if the "the testator's intent as expressed in the will is frustrated by the negligence of the testator's attorney." *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993). Perhaps the attorney admitting a mistake can minimize his potential damages in a legal malpractice case to attorney's fees with the utilization of the mistake statute. However, if the court discounts the drafting attorney's testimony and does not permit reformation, did the drafting attorney's admission result in an unforgiving malpractice confession resulting in exorbitant damages?

6 Restatement (Third) of Prop.: Wills & Other Donative Transfers (2003) ("A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.").

7 Prior to the enactment of the Florida Trust Code in 2006 (effective 2007), it was often uncertain as to which remainder beneficiaries were required to consent to the Complaint. Now, § 736.0103(4) and (14) , Fla. Stat., provide the definitions.

8 Specifically, the reformation of the trust may serve to limit the potential damages against the drafting attorney, should the parties bring a malpractice action. *See also supra* note 5.

9 *In re Estate of Robinson*, 720 So. 2d at 540. The Real Property, Probate & Trust Law Section of the Florida Bar succinctly summarized the purpose for reformation: "Reformation is a civilized society's recognition that humans, including estate planning attorneys, can make mistakes. If a mistake occurs in the drafting of a trust, the court, wearing its equity robe, has a duty to correct the mistake." *See* Amicus Curiae Brief of the Real Property, Probate & Trust Law Section of the Florida Bar, *Reid v. Temple Judea,* 994 So. 2d 1146 (Fla. 3d DCA 2008).

10 *In re Estate of Robinson*, 720 So. 2d at 540.

11 *Id.*

12 *Id.* at 541

13 *Id.; see, e.g. Reinberg v. Heiby,* 404 Ill. 247, 88 N.E.2d 848 (1949); *Berman v. Sandler,* 379 Mass. 506, 399 N.E.2d 17 (1980) and *Roos v. Roos,* 42 Del.Ch. 40, 203 A.2d 140 (1964).

14 *In re Estate of Robinson*, 720 So. 2d at 543. Specifically, the Court held as follows: "Like *Reinberg, Berman* and *Roos*, we hold that a trust with testamentary aspects may be reformed after the death of the settlor for a unilateral drafting mistake so long as the reformation is not contrary to the interest of the settler." *Id.*

15 825 So. 2d 442 (Fla. 5th DCA 2002).

16 *Id.* at 443. *Per stirpes* is an equal distribution to each family branch. Fla. Stat. § 63.172 specifically provides that adopted out children are excluded from a *per stirpes* allocation. § 63.172, Fla. Stat. The court specifically stated that the term *per stirpes* was "unambiguous." *Schroeder,* 825 So. 2d at 445.

17 *Schroeder,* 825 So. 2d at 443. It should be noted that for some reason, the moving party did not seek reformation in the pleadings. *Id.* at 446. However, the court held it had the authority to reform the trust based upon equity. *Id.*

18 *Id.* at 444-45

19 *Id.* At 443. Significantly, the court stated as follows, "[w]hile there was conflicting testimony at trial regarding Eleanor's [settlor's] intent to include all, or some of the adopted in and adopted out children in the trust in the event that Tommy [settlor's son] predeceased her, the most relevant testimony regarding his intentions and the trust drafting process came from Stalnaker, the attorney who drafted the trust agreement."

20 *Id.* at 443.

21 *Id.*

22 *Id.* The drafting attorney also included the two "removed" children in her notes because they were specifically mentioned by the decedent during their meeting. *Id.* at 444.

23 *Id.* at 444.

24 *Id.* at 445.

25 *Id.*

26 *See supra* notes 1, 9; *see also* § 736.0106, Fla. Stat. ("[t]he common law of trusts and principles of equity supplement this code, except to the extent modified by this code or another law of this state.").

27 *Schroeder,* 825 So. 2d at 446. The court held that reformation based upon mistake "is consistent with general equitable principles well-established in Florida and other states." *See also supra* notes 1, 9, and 26.

28 There are two related appellate decisions for this matter. In the first case, *Davis v. Rex*, the court held that "material issues of fact remain as to whether reformation is appropriate" and the court remanded the case back to the trial court. 879 So. 2d 609, 610 (Fla. 4th DCA 2004). The second appellate case is the appeal of the trial court's reformation decision. *Popp v. Rex,* 916 So. 2d 954 (Fla. 4th DCA 2005).

29 *Popp,* 916 So. 2d at 956.

30 *Id.*

31 *Id.* at 958.

32 *Id.* at 957.

33 *Id.* at 958. The settlor's attorney testified, in pertinent part, as follows: "I believe that that was what I said in my dispositive provisions, but to the extent that I did not specifically delineate in more lay terms what would

happen in the event of a child who died without issue, then to that extent I omitted that from the document." *Id.; see also supra* note 5.

34 *Id* at 958.

35 *Id.*

36 § 736.0415, Fla. Stat.

37 § 736.0415, Fla. Stat. The case of *Slomowitz v. Walker* provides detailed definitions of the burden of clear and convincing evidence. 429 So. 2d 797, 799-800 (Fla. 4th DCA 1983) (internal quotations and brackets omitted). The definitions of clear and convincing evidence are as follows: "evidence making the truth of the facts asserted highly probable or highly probably true;" "[c]lear and convincing evidence will produce in the mind of the fact finder a firm belief or conviction as to the truth of the facts sought to be established;" "[c]lear and convincing evidence has also been defined as having a high capability of inducing belief . . . leaving no substantial doubt;" clear and convincing evidence will "instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true;" clear and convincing evidence is "evidence which is positive, precise and explicit, which tends directly to establish the point to which it is adduced and is sufficient to make out a prima facie case;" and clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."

38 § 736.0415, Fla. Stat.

39 *See supra* note 2.

40 *See supra* note 6 and *infra* note 55.

41 *Reid,* 63 So. 3d at 7; *Morey v. Everbank,* 93 So. 3d 482 (Fla. 1st DCA 2012).

42 In a companion case, *Reid v. Temple Judea,* the Court held the trustee had standing to seek reformation of the trust. 994 So. 2d 1146 (Fla. 3d DCA 2008).

43 *Reid*, 63 So. 3d at 9.

44 *Id.*

45 Consistent with § 733.805, Fla. Stat.

46 *Reid*, 63 So. 3d at 9. There was no dispute that the trustee's cash gift was subject to apportionment and abatement; however, the trustee alleged this was not the case for the devised apartment (and contents). *Id.* at 13-14 (Wells, J., dissenting).

47 *Id.* at 9.

48 *Id.* at 9-10.

49 *Id.* at 10; *see also In re Estate of Robinson*, 720 So. 2d at 540; *see* § 736.0415, Fla. Stat.

50 *Reid*, 63 So. 3d at 10. The court specifically held, "we conclude a reasonable trier of fact could have been left without a firm belief or conviction that the trust terms were contrary to Sonder's [settlor's] intent." *Id.*

51 *Id.*

52 *Id.*

53 *Id.* at 13. (Wells, J., dissenting).

54 *Id.* at 10.

55 *Id.* The court also stated that just as it was clear the settlor intended for the trustee to have his apartment, it was equally apparent he intended the other beneficiaries to receive their bequests. *Id.* The court's rationale that the settlor reviewed the trust and was capable of understanding such terms appears to conflict with the Restatement. *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 (2003) (Proof that the donor read the document or had the opportunity to read the document before signing it does not preclude an order of reformation).

56 *Id.* at 11-18 (Wells, J., dissenting).

57 *Id.* at 12 (Wells, J., dissenting). The dissent opinion cited to the case law providing that a court cannot arbitrarily reject uncontested testimony. *Id.* at 15 (Wells, J., dissenting); *see, e.g., Republic Nat'l Bank of Miami, N.A. v. Roca,* 534 So. 2d 736, 738 (Fla. 3d DCA 1988).

58 *Id.* at 13 (Wells, J., dissenting). In particular, the drafting attorney testified that after the lower court construed the document, he realized he made a "*scrivener's error* because it was never *my* intent or Edgar Sonder's [settlor's] intent to have the apartment and the contents that were devised put in with the priority system for pecuniary gifts." *Id.* at 15 (Wells, J., dissenting) (emphasis added).

59 *Id.* at 14 (Wells, J., dissenting).

60 *Id.* (Wells, J., dissenting).

61 *Id.* (Wells, J., dissenting).

62 *Id.* (Wells, J., dissenting).

63 *Id.* at 12 (Wells, J., dissenting).

64 *Id.* (Wells, J., dissenting).

65 *Id.* (Wells, J., dissenting).

66 *Id.* (Wells, J., dissenting).

67 *Id.* at 14 (Wells, J., dissenting).

68 *Id.* at 13 (Wells, J., dissenting).The friend testified, in pertinent part, as follows, "he [settlor] told me that he was going to leave her his apartment." *Id.* (Wells, J., dissenting).

69 *Id.* at 15-16 (Wells, J., dissenting).

70 Although § 736.0415, Fla. Stat. specifically allows reformation when there is evidence to contradict "an apparent plain meaning of the trust instrument." Sec. 736.0415, Fla. Stat.

71 The determination of the truthfulness and credibility of a sole witness's uncontradicted alleged statements belongs to the trier of fact. *See Berlanti Const. Co. v. Miami Beach Federal Sav. & Loan Ass'n*, 183 So. 2d 746, 746 (Fla. 3d DCA 1966).

72 *See, e.g., Schroeder,* 825 So. 2d at 442.

73 *See, e.g., Popp,* 916 So. 2d at 954.

74 *See, e.g., Robinson*, 720 So. 2d at 541.

75 *See supra* note 37.

76 *Schroeder,* 825 So. 2d at 443.

77 *Reid*, 63 So. 3d at 12. (Wells, J., dissenting); *see also supra* note 57.

78 *Popp,* 916 So. 2d at 958.

79 *Robinson*, 720 So. 2d at 542; *see also supra* notes 9 and 26.

80 *See supra* note 79.

81 *Reid*, 63 So. 3d at 10.

82 *Id.* at 14. (Wells, J., dissenting)

83 *But see supra* note 55.

84 *But see supra* note 57.

85 *Morey,* 93 So. 3d at 482.

86 *Id.* at 484-85, 490.

87 *Id.* at 484.

88 *Id.* at 485.

89 *Id.*

90 *Id.*

91 *Id.* at 484-85. The trust further stated that "[a]fter payment of all matters discussed above [satisfaction of debts], the balance of the principal and undistributed income" shall be paid in trust for the benefit of settlor's children." *Id.* at 485.

92 *Id.* at 486

93 *Id.* at 490-91. The settlor's estate consisted of eight business entities, twenty-six rental properties, an apartment complex and over twenty-five vehicles having a value of over $8,000,000.00 before offsetting liabilities. *Id* at 490.

94 *Id.* at 489.

95 *Id.* at 487.

96 *Id.* at 489.

97 *Id.* at 491.

98 *Id.*

99 *Id.* at 490. The appellate court further stated that the settlor's trust "plainly" described that his children were to receive the residue as described in the trust. *Id.*

100 *Id.* The appellate court cited to the Restatement and further indicated that there was "no evidence in the present case that the decedent was not fully capable of understanding the trust documents, as written." *Id.* This reasoning was articulated in *Reid. See supra* note 55 and accompanying text.

continued, next page

101 *Id.* at 490.

102 *Id.* at 491. The appellate court specifically held that "[r]eformation is not available to modify the terms of a trust to effectuate what the settlor would have done differently had the settlor foreseen a change of circumstances that occurred after the instruments were executed. *Id.* (citing to the Restatement (Third) of Prop.: Wills & Other Donative Transfers (2003)).

103 *See, e.g., In re Mullin's Estate,* 128 So. 2d 617 (Fla. 2d DCA 1961) (not permitting reformation of a will even when a scrivener's error exists); *see also Azcunce v. Estate of Azcunce,* 586 So. 2d 1216 (Fla. 3d DCA 1991).

Ethics Database Now Available

By Robin J. King, Esq., Buckingham, Doolittle & Burroughs, LLP, Boca Raton, Florida, and on behalf of the Professionalism and Ethics Committee


R. KING

The Real Property, Probate and Trust Law Section ("RPPTL") Professionalism and Ethics Committee ("PEC"), working with the following law students: *Christina Cacchio, Antionette Vanterpool, Casey Ferri, James Glover, Eric Fisher, Dillon McLean, Joe Kovecses, and Ashley Rector,* compiled a database of cases, opinions and rules pertaining to ethics and professional responsibility. The ethics database is indexed according to categories of ethical issues. Under each category, there are cases and ethics opinions which deal specifically with the issues being researched, cross-referenced with the appropriate rule(s) and/or section(s) of the rules.

The Professionalism and Ethics Committee's goal in developing this database was to allow attorneys working in the areas of real property, probate, and trust law to be able to have easy access to an online database which would allow them to research ethics issues pertaining to individual practices.

The database, which is linked to the PEC webpage within the RPPTL website, was designed to be specific to RPPTL subject areas, dealing with real property, probate, trust law and guardianship ethical issues.

The development of the database was the result of a collaboration between the PEC Committee and the Law School Liaison Committee, as the Liaison Committee recruited students to work on the database. Each student was paired with a "mentor" who worked with the student to decide which cases/opinions and additional materials were suitable to be included in the database. The students were asked to research the rules, opinions, case law and other relevant materials that would be placed in the database, and to coordinate their research with the appropriate ethics and professionalism rules.

For example, under the Probate/Trust/Guardianship index, the only index available thus far (the real estate database will be developed next, although most of the categories are universal to probate and property), an attorney can find cases and opinions dealing with the following topics:

(1) Competence and diligence – cases regarding malpractice issues and disciplinary measures against attorneys;

(2) Scope of representation & allocation of authority between client and lawyer;

(3) Communication – cases discussing the right of an estate planning client to make informed decisions and termination of the lawyer/client relationship;

(4) Attorney's fees – cases and opinions that deal with excessive and unreasonable fees, contingent fee agreements, payment of fees by a person other than a client, rebates, and referral fees;

(5) Confidentiality of information;

(6) Conflicts of interest – addressing required disclosures for joint representation, gifts to attorneys, attorneys serving as fiduciaries and counsels for fiduciaries and duties to former clients;

(7) Charitable organization as client;

(8) Clients with diminished capacity – dealing with a client's capacity to establish a client-attorney relationship, testamentary capacity and execution of documents, inter vivos transfers, third party conflicts of interests, and disciplinary proceedings of attorneys who did not follow the ethical rules of professional responsibility;

(9) Lawyer as a witness; and

(10) The unauthorized practice of law – relating to the multijurisdictional practice of law and interstate law firms.

Attorneys who practice in the area of real property, probate or trust law will find this ethics database to be helpful in their individual practices. The PEC would like to hear your thoughts about the database so future updates and the upcoming real property portion of the database can be adjusted to meet your needs. Please contact Lawrence J. Miller at lmiller@floridatax.com with your suggestions.

Spotlight on the Membership, Diversity and Law School Liaison Committee

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

A few years ago, three separate Committees were merged into the Membership, Diversity and Law School Liaison Committee of the Real Property, Probate and Trust Law Section of The Florida Bar. The Committee, in May of this year, premiered three professional, short videos that showcase the topics encompassed by this Committee.

Over the past several years, members of this Committee have been working on a unique project. The project involved the professional creation of short videos that can be used to spread the word about both the Committee activities and the benefits of Section membership. One of the videos explains the mentoring program, another provides details of the fellowship program, and the third video focuses on the benefits of being an active member of the Section.

View the RPPTL videos now at www.rpptl.com

The videos were presented to the Executive Council at the meeting in St. Petersburg on May 25, 2013, and are now available on the Section's website. A comprehensive video entitled "Learn About RPPTL" is also available for viewing.

Phil Baumann, one of the Vice-Chairs of the Committee, reports that this project started three to four years ago and took most of this year to bring to completion. Phil found the most challenging part being that of assembling the ideas about the content for the videos. In a Section as large as ours, a lot of people had really good ideas but it became vital for the Committee, both from a talent standpoint and a financial standpoint, to narrow the videos to the three that were finally produced.

A professional firm was retained to assist with the final product, providing producers and cameramen. While there was an outline of the concepts to be presented, the project was not tightly scripted; rather, people who have had experience in the Section and the Committee programs were interviewed, and their comments became the script. Phil reports that it was the consensus of the group to use the videos to convey the "feel" of the Executive Committee and what it is to be a Section Member.

Phil also shared that the genesis of the idea for the videos came from Florida Bar Section Coordinator Yvonne Sherron. Yvonne had pointed out that seminars are attended by a good percentage of folks who are not Section Members and so the "dead air" during breaks in the seminar presentations provided an opportunity to present short but succinct "infomercials" about the Section and its benefits.

You can view the videos on your own by going to the Section website and decide which of our Section Members deserves an Oscar for his or her performance. You might want to ask for an autograph the next time you run into them at an Executive Council function. The website is at www.rpptl.org .

The interviews, which make up much of the videos, were shot at The Breakers in 2012. The final production can now be seen by any of our Section Members and can be viewed by lots of folks who are not Members of the Section. Phil wanted to be sure to mention others in the Committee who were very active in the production of these videos including Mike Bedke, the Chair of this Committee, Lynwood Arnold and Navin Pasem, Co-Vice Chairs, and one of its members, Guy Emerich.

Real Estate Case Summaries

Prepared by Nishad Khan, Esq., Orlando, Florida

A municipality does not have the authority to enact an ordinance stating that recorded code enforcement board liens have super priority.

City of Palm Bay v. Wells Fargo Bank, N.A, 2013 WL 2096257, 38 Fla. L. Weekly S322 (Fla., 2013)

In 2007, Wells Fargo filed an action to foreclose its mortgage, recorded in 2004, on residential property located in Palm Bay, Florida. The City of Palm Bay (hereinafter "Palm Bay" or "City") had filed two code enforcement liens on the property after the Wells Fargo mortgage was recorded, and was therefore named as a defendant in the foreclosure suit. In response to the Complaint, Palm Bay filed an answer and asserted that its code enforcement liens had priority over the mortgage pursuant to City of Palm Bay Ordinance 97-07, which provided for the operation of the City's Code Enforcement Board and contained the following super priority provision:

> "Liens created pursuant to a Board order and recorded in the public record shall remain liens coequal with the liens of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims until paid, and shall bear interest annually at a rate not to exceed the legal rate allowed for such liens and maybe foreclosed pursuant to the procedures set forth in Florida Statutes, Chapter 173."

Wells Fargo moved for summary judgment. At the hearing, the trial court rejected the City's claim that the liens had super priority, and reasoned that the Legislature's failure to expressly give code enforcement liens priority over a prior recorded mortgage or judgment lien, indicated its intent that these liens do not have priority and thus, the common law principle of first in time, first in right, applies.

The City of Palm Bay appealed the trial court's decision to the Fifth District Court of Appeal. The District Court considered the City's primary challenge to the trial court's ruling, which is that the City had authority to enact ordinance 97-07, and grant its code enforcement liens super priority, under the "Home Rule Powers" granted under Article VIII, Section 2(b), of the Florida Constitution which provides as follows:

"Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes *except as otherwise provided by law.* "

and the related provisions in § 166.021, Fla. Stat. Palm Bay argued that the City Ordinance did not encroach into any of the areas expressly prohibited by § 166.021, Fla. Stat., and that because the Legislature made certain exceptions to the general rules governing the priority of liens, municipalities have the power to also make exceptions. The District Court rejected this argument and held the ordinance conflicted with state statute and was therefore invalid. The District Court affirmed the trial court's ruling and granted summary judgment in favor of Wells Fargo. The City sought review of the decision of the District Court and the Florida Supreme Court (hereinafter "Court") granted review.

The Court established that the priority of interests in real estate under Florida law is generally determined by three statutes: (1) § 28.222(2), Fla. Stat., which requires the circuit court to record instruments in the official records and keep a register in which the time of filing of each instrument is entered; (2) § 695.11, Fla. Stat., which provides that the sequence of the documents registered under § 28.222(2), Fla. Stat., determine priority of recordation; and (3) § 695.01(1), Fla. Stat., which codifies the common law rule of first in time, first in right.

The Court also noted that the Legislature has recognized priority of certain liens over the priority established in Chapter 695, Fla. Stat. These include taxes imposed on property and individuals under the § 197.122(1), Fla. Stat., and special assessments liens under § 170.09, Fla. Stat.

The Court held that the Palm Bay ordinance establishes a priority that is inconsistent with the priority established by the pertinent provisions of Chapter 695. Though a "municipality may legislate concurrently with the Legislature on any subject which has not been preempted by the State", the Court emphasized that, "the critical phrase of Article VIII, Section 2(b) – 'except as otherwise provided by law' – established the constitutional superiority of the Legislature's power over municipal power." The "preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." *Barragan v. City of Miami,* 545 So. 2d 252, 254 (Fla. 1989).

In conclusion, the Court held that validating the super priority provision in the city ordinance would allow a municipality to "displace the policy judgment reflected in the Legislature's enactment of the statutory provisions, and would allow the municipality to destroy rights that the Legislature established by state law." Approving the decision of the District Court, the Court held that this conflict was sufficient grounds to conclude the ordinance was invalid.

Where a trial court has entered a final foreclosure judgment, it may not thereafter reopen the case to entertain a re-foreclosure action to eliminate a subordinate lienholder that had been missed in the original foreclosure, unless the final judgment of foreclosure specifically retains jurisdiction for the original court to handle re-foreclosure of an omitted party.

Ross v. Wells Fargo, 38 Fla. L. Weekly D350 (Fla. 3d DCA 2013)

The trial court entered an order which reinstated Plaintiff Wells Fargo Bank's ("Wells Fargo") post judgment re-foreclosure proceedings against Defendant Alec Ross ("Ross") after that re-foreclosure action had been dismissed for lack of prosecution. Defendant appealed the trial court's order.

On March 21, 2008, Wells Fargo filed a mortgage foreclosure action against defendant borrower Zion Tarazi ("Tarazi") and obtained a final judgment of foreclosure in July of the same year. On November 24, 2008, Wells Fargo then filed a motion for leave to file a supplemental complaint to add and foreclose on Defendant Ross, an inferior lien holder who was not included in the original complaint. After some time, the trial court entered an order dismissing the re-foreclosure for lack of prosecution. This order was later vacated by the same court and Ross appealed the trial court's order vacating the dismissal order and reinstating the re-foreclosure action.

The Third District Court of Appeal noted *Patin v. Popino,* 459 So. 2d 435 (Fla. 3d DCA 1984), in which the Court held that a trial court loses jurisdiction upon rendering a final judgment and expiration of the time allotted for altering, modifying or vacating the judgment. The Court further noted that "a court retains jurisdiction to the extent such is specifically reserved in the final judgment or to the extent provided by statute or rule of procedure." *Ross v. Damas,* 31 So. 3d 201 (Fla. 3d DCA 2010). The Court made a distinction that in the instant case, the final judgment contained only a general reservation of jurisdiction: "The Court retains jurisdiction of this action to enter further Orders that are proper, including without limitation, writs of possession and deficiency judgments", and the final judgment did not retain jurisdiction to allow for a supplemental complaint to add an omitted party post judgment. The Court held that the trial court acted in the absence of jurisdiction by permitting the supplemental post-judgment proceeding and nullified the following three orders: (1) the order granting Wells Fargo's motions for leave to file a supplemental complaint to add Ross as a party; (2) the order dismissing the re-foreclosure for lack of prosecution; and (3) the subsequent order vacating that dismissal. The case was reversed and remanded with directions to vacate these three orders and reinstate the final judgment entered on July 8, 2008.

An oral extension of the contractual due diligence period is not enforceable and the doctrine of promissory estoppel is not an exception to the requirements of Florida's Statute of Frauds.

DK Arena, Inc. v. EB Acquisitions I, LLC, 38 Fla. L. Weekly S187 (Fla. 2013)

DK Arena, Inc. ("DK") filed a breach of contract suit against EB Acquisitions I, LLC ("EB") in circuit court in Palm Beach County. In response, EB asserted several counterclaims as provided below. The trial court issued a final judgment finding in favor of EB on all claims. DK appealed the final judgment to the Fourth District Court of Appeal, which affirmed in part and reversed in part. DK then petitioned the Florida Supreme Court to review the decision of the Forth District Court, and the Supreme Court granted review of the decision.

On July 20, 2004, DK, a Delaware corporation wholly owned by celebrity boxing promoter, Don King ("King"), entered into a written contract to sell a piece of property known as the Mangonia Park Jai Alia Fronton, located in Mangonia Park, Florida. EB, the buyer, agreed to purchase the property for $23,000,000.00 and placed $1,000,000.00 into escrow as a deposit. The contract allowed for a 60-day due diligence period and during this time, EB was permitted to conduct any and all inspections to determine whether the property was suitable for EB's intended use, which was a mixed-use commercial and residential development. The contract further provided that any modifications to the contract would "not be binding unless in writing, signed and delivered by the party to be bound."

On the same day the contract was signed, both parties entered into an addendum which clarified that EB was permitted to terminate the contract at any time during the due diligence period, and if EB did not give notice of termination within this period, the deposit would be released to DK. The addendum also required that DK and its principal, Don King, participate in the process of seeking local government approval for EB's development project and to participate in the project's marketing and promotion.

Shortly after the contract and addendum were executed, EB proposed that the parties amend the agreement to make Don King a partner in EB's development project. The terms of this proposal were negotiated by both parties and on September 13, 2004, the parties entered into an amendment extending the due diligence period by 14 days, but did not include any language regarding the partnership. On October 4, 2004, the day the due diligence period was set to expire, both parties and their attorneys met at DK's office to discuss the status of the project and whether it would be approved by the Mangonia Park Town Council ("Council"). EB was concerned that the due diligence period would expire before the terms of the proposed partnership were finalized. According to EB, DK agreed to hold the due diligence period in indefinite "abeyance" until the partnership could be completed. By contrast, DK claimed

continued, next page

that although it agreed to an extension of the due diligence period, the extension was limited to one week and unless EB terminated the contract within this week, the deposit would be released to DK. The parties failed to make any written memorandum of these alleged agreements.

The following evening, the parties attended a meeting with the Council to present site plans, renderings of the project, and discuss the benefits the project would bring to the community. The Council then scheduled an informational meeting on October 26, 2004, which Don King stated he would attend.

King, under the belief that EB was in breach of contract for not releasing the deposit after the due diligence period had passed, did not attend the October 26th meeting. Evidence was presented at trial that DK faxed a demand letter to the escrow agent asserting that the due diligence period had expired, but EB did not receive this letter until October 27th. EB instructed the escrow agent not to release the deposit, and instead sent DK a letter asserting that King had breached the contract by failing to "cooperate in the governmental and quasi-governmental processes".

DK filed suit alleging a single count of breach of contract and seeking release of the escrow deposit. EB filed an answer and asserted several counterclaims, including breach of contract, breach of oral joint venture agreement, and breach of fiduciary duty.

The trial court rejected DK's claim that EB breached the contract, and determined that the due diligence period was extended for an indefinite period of time at the parties' meeting on October 4th. Although the court acknowledged that the contract contained a provision requiring all amendments to be in writing, the court concluded that this provision did not render the oral extension of the due diligence period invalid and relied upon *Blue Paper, Inc., v. Provost*, 914 So. 2d 1048, 1052 (Fla. 4th DCA 2005), which states that "[a] written contract may be modified by an oral agreement if the parties have accepted and acted upon the oral agreement in a manner that would work a fraud on either party to refuse to enforce it." The trial court further stated that the seller cannot take advantage of a delay in the buyer's performance which the seller approved, even where time is of the essence under the contract." (Citing *Forbes v. Babel*, 70 So. 2d 371, 372 (Fla. 1953)).

The trial court further held that King's failure to attend the meeting on October 26th constituted a breach of DK's obligations under the contract, and if DK believed that EB was in breach of the contract, then DK had a duty to use reasonable efforts to notify EB of King's unwillingness to attend unless the deposit was released.

Lastly, the trial court concluded that the October 4th meeting resulted in the creation of an oral joint venture agreement which required both parties to act in "good faith" to finalize the partnership, and DK's actions constituted a breach of those duties.

DK appealed the trial court's decision to the Fourth District Court of Appeal challenging both the trial court's finding of an oral joint venture agreement and its conclusion that EB was entitled to the return of the escrow deposit. The Fourth District agreed that there was insufficient evidence to support the trial court's conclusion, stating: "At best, DK and EB had an 'agreement to agree' on a joint venture in the future," and reversed the trial court's joint venture determination.

On appeal, DK argued that King's agreement to hold the due diligence period in abeyance was unenforceable under the Statute of Frauds. The Fourth District rejected this argument, holding: "[T]he doctrine of estoppel prevents DK from relying on the Statute to invalidate its agreement to extend the due diligence period. EB could therefore terminate the contract during the extended due diligence period and obtain the return of its deposit."

Acknowledging that under the Statute of Frauds all contracts for the sale of land must be in writing, the Fourth District reasoned that in the instant case "EB changed its position in reliance upon the oral agreement to extend the due diligence period -- it did not give notice . . . that it intended to terminate the contract" and held that DK was estopped from arguing that the agreement was invalid under the Statute of Frauds. On that basis, the Fourth District affirmed the trial court's finding that EB was entitled to the return of the deposit.

DK then petitioned the Florida Supreme Court to review the decision of the Fourth District Court. Upon review, the Supreme Court found that the oral extension of the contractual due diligence period was unenforceable under Florida's Statute of Frauds. More importantly, the Supreme Court held that the district court's holding violated *Tanenbaum v. Biscayne Osteopathic Hospital, Inc.*, 190 So. 2d 777 (Fla. 1966), in which the Supreme Court held that the doctrine of "promissory estoppel" is not an exception to the Statute of Fraud's requirements under Florida law.

The Court further explained that the application of the Statute of Frauds is a matter of legislative prerogative and the judicial doctrine of promissory estoppel may not be used to circumvent its requirements. The Court held that since the parties failed to place any of the post-contract agreements in writing as required by the Statute of Frauds, the parties were bound by their original written contract. Accordingly, the due diligence period expired on October 4, 2004, and EB lost its right to terminate the contract without penalty. The Supreme Court noted how this case illustrates the usefulness of a writing requirement and that much confusion could have been avoided had the parties simply placed their post-contract agreements in writing.

When a bank fails to refute a homeowner's affirmative defense of lack of notice of acceleration as required by the mortgage, and fails to prove that it complied with the notice requirements within the mortgage, summary judgment of foreclosure is improper.

Kurian v. Wells Fargo, 38 Fla. L. Weekly D804 (Fla. 4th DCA 2013)

The trial court entered an order granting final summary judgment of foreclosure in favor of plaintiff, Wells Fargo Bank, National Association ("Wells Fargo"). The defendants, Jessy Kurian and Anil Thomas (collectively "Kurian"), appealed the order and argued that the trial court erred in granting summary judgment because the bank failed to refute two of their affirmative defenses, specifically dealing with notice and acceleration. The Fourth District Court agreed and reversed the ruling.

Kurian executed a mortgage and note with Wells Fargo and a section of the mortgage stated in pertinent part:

"Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument…The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument.."

Wells Fargo filed a complaint to foreclose the mortgage alleging that Kurian defaulted on December 1, 2008. Attached to the complaint was a letter from Wells Fargo that notified Kurian that the mortgage was in default and the bank had accelerated all sums due. An answer was filed by

continued, next page

Kurian that included the following affirmative defenses (1) lack of timely notice of the acceleration; and (2) failure of conditions precedent concerning the "acceleration" terms and conditions.

The bank then moved for summary judgment. Kurian filed oppositions, attesting that they never received notifications of the acceleration of the mortgage or note; were never contacted by the bank about the acceleration; and never waived their right to receive such notices. The trial court entered final summary judgment in favor of the bank and Kurian appealed.

Under *de novo* review, The Fourth District Court of Appeal held that the bank failed to refute Kurian's affirmative defense of lack of notice of acceleration thirty days prior to filing of the complaint as required by the mortgage. The court highlighted the letter attached to the complaint and noted that it was only six days prior to the filing of the complaint. The Court stated that "when a party raises affirmative defenses, a summary judgment should not be granted where there are issues of fact raised by the affirmative defenses which have not been effectively factually challenged or refuted, and the movant must disprove the affirmative defenses or show they are legally insufficient." *Alejandre v. Deutsche Bank Trust Co. Ams.*, 44 So. 3d 1288, 1289 (Fla. 4th DCA 2010).

Although Wells Fargo argued that the defenses were not pled with specificity, the Fourth District Court relied on previous opinions and held that the defenses pled by Kurian were legally sufficient to defeat summary judgment, especially since they were not refuted, and nothing in Well Fargo's complaint, motion for summary judgment or affidavits indicated that the bank gave Kurian the notice required by the mortgage.

Because Wells Fargo failed to refute Kurian's affirmative defenses of lack of notice of acceleration thirty days prior to the filing of complaint as required by the mortgage, and the letter attached to the complaint was dated only six days prior to the filing of the complaint, the trial court ruling was reversed by the District Court and the case was remanded.

Recording Documents Containing False, Fictitious, or Fraudulent Statements Is Now a Felony

By Joseph J. Tschida, State Counsel and Vice President
WFG National Title Insurance Company

Senate Bill 112 and House Bill 915 passed both houses of the Florida legislature to create Sec. 817.535, F.S. The intent of this new statute is to deal with abuses of the recording system by persons who file fraudulent judgments, liens, and other documents against public officials and private persons for the purpose of harassment. The dispositive provision of the new statute is as follows: "*A person who files or directs a filer to file, with the intent to defraud or harass another, any instrument containing a materially false, fictitious, or fraudulent statement or representation that purports to affect an owner's interest in the property described in the instrument commits a felony of the third degree…*". The degree of felony will be increased in the following situations: (1) when the victim is a public official; (2) when the violator committed the offense while incarcerated or while on pretrial or post-trial release; (3) when the owner of the property affected by the false instrument suffers a financial loss as a result of the instrument being filed in the Official Records; or (4) when the violator is a repeat offender. After conviction, the sentencing court is required to enter an order declaring the fraudulent instrument void. Additionally, the sentencing court may order the fraudulent instrument sealed from the Official Records and removed from the on-line system. Any person adversely affected by the fraudulent instrument has a civil cause of action and may recover actual damages and punitive damages, as well as a civil penalty of $2,500 for each instrument determined to be in violation.

This new statute may raise concerns in the title industry because innocent errors do occur in title transactions. However, since the new law requires an "intent to defraud or harass" the owner of the property, unintended errors would not be a violation of the statute. Nevertheless, be careful and quickly correct any errors in recorded documents.

The law takes effect October 1, 2013.

Probate Case Summaries

Prepared by Noelle M. Melanson, Melanson Law, P.A., Ft. Myers, Florida

When order granting petition to determine incapacity was reversed, companion order granting petition for order authorizing payment of attorney's fees and expenses is also reversed.

Losh v. McKinley, 106 So. 3d 1014 (Fla. 3d DCA 2013)

The Third District Court of Appeal reversed the decision by the trial court authorizing payment of attorney's fees and expenses.

In the underlying case, *Losh v. McKinley*, 86 So.3d 1150 (Fla. 3d DCA 2012), the Third District Court of Appeal reversed the trial court's order granting McKinley's Petition to Determine Incapacity of her mother, Frances L. Losh. In that case, Mrs. Losh, a 93 year old widow, suffered a fall and was eventually hospitalized. Mrs. Losh paid for her daughter, Ms. McKinley, to fly from Washington (state) from her home to Miami to help care for her. Although Ms. McKinley stayed only 10 days in South Florida, she shortly thereafter filed a Petition to Determine Incapacity. Two of the members of the court-appointed examining committee determined that no guardianship was warranted, and Ms. McKinley subsequently moved to strike the committee report. Based on a conflict of interest, one committee member was replaced and a second evaluation was required. Despite some specific report facts to the contrary, the trial court held that a guardianship was warranted.

On appeal, the Third District Court of Appeal reversed. In determining that the trial court was anticipating future decisions given the presence of caregivers and non-family members, the Third District concluded that the case lacked clear and convincing evidence as to the need for a guardianship.

Related to the guardianship matter was a separate order granting Ms. McKinley attorney's fees related to the guardianship proceeding. Based on the reversal of the guardianship order, the issue of the granting of attorney's fees was also the subject of an appeal. Referencing §744.108(1), (2), Fla. Stat. (2012) and *In re Guardianship of Ansley*, 94 So. 3d 711, 713 (Fla. 2d DCA 2012), the Third District determined that Ms. McKinley's original petition did not provide any benefit to Ms. Losh. Without any such benefit, there could not be an award for attorney's fees.

Order granting temporary injunction must state sufficient factual findings in support of each element.

Saunders v. Butler, 2013 WL 514057, 38 Fla. L. Weekly D346 (Fla. 2 DCA 2013)

On an appeal of a trial court's order granting a temporary injunction with respect to matters involving the ownership of certain funds, the Second District Court of Appeal reversed the order, stating that the trial court's order failed to state sufficient factual findings in support of each element entitling a party to a temporary injunction.

In this case, Mr. and Mrs. O'Connor were married for 12 years and, in a prenuptial agreement executed by the parties, each expressed his or her desire to retain his or her individual property in separate trusts. Each had previously created and maintained a revocable trust, with Mrs. O'Connor's trust having been executed in 1984 and Mr. O'Connor's trust having been executed in 1998. The schedule of assets on the prenuptial agreement listed Mrs. O'Connor's assets as $17,704,386.83 and Mr. O'Connor's assets as $1,100,942.00. Subsequently, Mr. O'Connor executed a second revocable trust in 2005 which was subsequently amended in 2008 (the "2008 Trust"). Jeanne Saunders, stepdaughter of Mrs. O'Connor and daughter of Mr. O'Connor, was one of the trustees of Mr. O'Connor's 1998 Trust as well as his 2008 Trust. The Scolaro law firm, which drafted the 2008 Trust, was also one of the trustees of the 2008 Trust.

The Department of Children and Family Services filed a petition for incapacity against Mrs. O'Connor in 2011, alleging that she was "susceptible to being exploited either financially or physically." As a result of the petition, M. Ashley Butler was appointed as the emergency temporary guardian for Mrs. O'Connor. After this particular hearing, the Scolaro law firm prepared new estate planning documents for Mrs. O'Connor (which would have deleted grandchildren and certain charities as beneficiaries), and a representative of the firm visited Mrs. O'Connor hoping to have the new documents signed. No documents were signed, and, at a subsequent hearing, Ms. Butler was appointed as Mrs. O'Connor's plenary guardian. The Department also filed a petition for incapacity against Mr. O'Connor and the trial court appointed Ernie C. Lisch as his plenary guardian.

Upon review of Mrs. O'Connor's assets, Ms. Butler was unable to account for approximately $6 Million of assets originally owned by Mrs. O'Connor or her trust. Ms. Butler suspected that these funds may have been retitled to Mr. O'Connor's trust and petitioned the court for a temporary, emergency injunction against Ms. Saunders, the Scolaro law firm, individual members of the Scolaro law firm and Mr. Lisch, from using any of Mr. O'Connor's funds or any funds held in Mr. O'Connor's trusts. She also sought to suspend Mrs. Saunders and Mr. Scolaro as trustees of Mr. O'Connor's trusts. The court granted the emergency, temporary injunction and appointed Mr. Lisch as special

continued, next page

fiduciary to administer Mr. O'Connor's 2008 trust.

On appeal to the Second District Court of Appeal, Mr. and Mrs. Saunders raised several issue relating to the lower court's findings and procedures. Citing *Randolph v. Antioch Farms Feed & Grain Corp.*, 903 So. 2d 384 (Fla. 2d DCA 2005), the Second District found that the trial court's order failed to state sufficient factual findings in support of each of the four elements that must be established in order to enter a temporary injunction, which are, (1) the plaintiff will suffer irreparable harm absent the entry of the injunction, (2) no adequate legal remedy exists, (3) the plaintiff enjoys a clear legal right to the relief sought, and (4) the injunction will serve the public interest. The Second District also noted that the case's remand was not conclusive that the allegations contained in the verified motion were insufficient, but rather only that the trial court's order is facially insufficient due to the lack of factual findings supporting the four elements.

Summary Judgment is not appropriate when a disputed issue of fact remains.

Mariani v. Mariani, 2013 WL 440105, 38 Fla. L. Weekly D293 (Fla. 4th DCA 2013)

The Fourth District Court of Appeal reversed and remanded the trial court's finding of summary judgment because an issue of fact remains in dispute and summary judgment was not proper.

Michael Mariani, the grandchild of Jane Mariani, brought an action involving the Jane Mariani Irrevocable Wealth Trust ("Trust"). The trial court granted the defendants' motion for summary judgment, stating that Mr. Mariani was not a current beneficiary under the "clear" and "plain language" of the Trust and was therefore ineligible to request or receive discretionary distributions from the Trust.

On appeal, the Fourth District Court of Appeal reversed, finding that the terms of the Trust were ambiguous with regard to the settlor's intent as to the eligibility of a grandchild to receive discretionary distributions from the trust during the lifetime of the grandchild's parent who was a child of the settlor. With a disputed issue of fact outstanding, the Fourth District cited *Knauer v. Barnett*, 360 So. 2d 399, 405 (Fla. 1978) which held that, "when the trust instrument is ambiguous, the intent of the settlor may be ascertained from extrinsic evidence." Thus, the granting of summary judgment was improper.

Trial court was not divested of jurisdiction to render orders of incapacity and appointment of plenary

guardian while appeal was pending from prior order denying motion to dismiss for lack of personal jurisdiction.

Garrison v. Vance, 103 So. 3d 1041 (Fla. 1st DCA 2013)

The First District Court of Appeal held that notwithstanding the pendency of an appeal regarding issues involved with a guardianship proceeding, the trial court maintained authority to proceed with issuing an order determining incapacity.

Connie Greenman Vance and her sister Suzanne Daughtry petitioned the court to determine the incapacity of, and appoint a guardian for, their mother, Dorphia Sue Garrison. Jeannie Garrison, the petitioners' sister, challenged the trial court's jurisdiction. Eventually, the trial court dismissed her challenge. Jeannie Garrison sought review of this order with the First District Court and the Court affirmed the trial court's order in Case Nos 1D12-1398 and 1D12-1399.

During the time the appeal was pending, the trial court determined that Mrs. Garrison was incapacitated and appointed a plenary guardian. Jeannie Garrison appealed this ruling, contending that the lower court was divested of jurisdiction to decide these matters while the initial appeal was pending.

On appeal, the First District Court affirmed the trial court's findings, citing Fla. R. App. P. 9.130(f) which provides that, in the absence of a stay entered by the appellate court, a trial court can move forward on all matters in the case while an interlocutory appeal is pending except that the trial court "may not render a final order disposing the cause pending such review." The First District Court further explained that the finding of incapacity and appointment of a guardian are indeed reviewable final orders; however, in a guardianship case, the finding of incapacity and appointment of a guardian does not dispose of the cause but is really the "beginning of the judicial labor in the guardianship case… because the case will remain open until the trial court terminates the guardianship…"

Court determined that petitioner's failure to give notice to the mother, as natural guardian of his children, during the proceedings by the petitioner for the adoption of his 42 year old girlfriend was extrinsic fraud on the court and rendered the judgment of adoption void.

Goodman v. Goodman, 2013 WL 1222944, 38 Fla. L. Weekly D696 (Fla. 3d DCA, 2013)

The Third District Court of Appeal reversed the trial court's order denying a motion to intervene and set aside a Final Judgment of Adult Adoption, thus vacating and setting aside the previously approved adoption of an adult by another adult.

In 1991, Mr. Goodman and his then wife ("Mrs. Goodman") established an irrevocable trust (the "Trust") for the benefit of their children in 1991 wherein all Goodman children would share equally in the trust corpus.

In 2010, Mr. Goodman was involved in litigation with Mrs. Goodman regarding the management of the trust. Around the same time, Mr. Goodman was involved in an automobile accident in which the driver of the other car was killed. Accusations of driving under the influence were raised, and, further, the estate of the deceased driver filed suit against Mr. Goodman seeking access to Mr. Goodman's assets.

In response to the civil action, Mr. Goodman filed a petition to adopt his then 42 year old girlfriend (the "Girlfriend"), seeking to have her recognized as his child with the intent to have the Girlfriend included in the class of beneficiaries under the Trust. In the adoption proceeding, Mr. Goodman failed to give notice of the proposed adoption to both Mrs. Goodman, as the mother of Mr. Goodman's minor children, and the guardian ad litem for said minor children (the "GAL"). The lower court approved the adoption, which recognized her as a Goodman "child" for purposes of the irrevocable trust.

After the appeal period for the adoption expired, Mr. Goodman finally provided notice of the adoption to all appropriate parties. Mrs. Goodman and the GAL moved to intervene and set aside the adoption which the lower court denied. They then appealed this denial.

The Third District found that because the adult adoption "directly, immediately, and financially impacted the children," Mrs. Goodman was entitled to notice of the adoption as natural guardian of the natural Goodman children so that the children's due process rights could be protected. A natural guardian's right to act remains intact even where a guardian ad litem has been appointed. Thus, the violation of the due process guarantee of notice and an opportunity to be heard rendered the judgment void and was extrinsic fraud on the court. Further, citing *Richard v. McKesson*, 774 So.2d 838, 839 (Fla. 4th DCA 2000), the Third District remanded the case back to the trial court to set aside the adult adoption and allow Mrs. Goodman to intervene in any further proceedings, indicating Mr. Goodman's intentional failure to provide appropriate notice of the adult adoption constituted fraud on the court.

Once a caveat is filed in a probate proceeding, the caveator is entitled to formal notice prior to admitting a will to probate.

Platt v. Osteen, 103 So.3d 1010 (Fla. 5th DCA, 2012)

The Fifth District Court of Appeal reversed and remanded the trial court's order admitting a decedent's will to probate thus allowing a proceeding to contest the will to proceed.

After Sharon Day Osteen filed a petition for administration of the Last Will of Martin S. Day, Elaine D. Platt filed a caveat with an answer and objection to the administration of the will, alleging that she had been "virtually adopted."

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Without addressing Ms. Platt's caveat or answer and objections, and without providing notice to her, the probate court admitted Mr. Day's will to probate and appointed Ms. Osteen as personal representative. Ms. Platt appealed.

Citing *Rocca v. Boyansky*, 80 So. 3d 377 (Fla. 3d DCA 2012), the Fifth District found that "…will contests and the rights of caveators must be determined prior to admitting a will to probate, appointing a personal representative or issuing letters of administration." Finding that the probate court's statement that "no objection had been made to the probate of the will" was erroneous, the Fifth District remanded the case back to the probate court so that Ms. Platt's objections could be heard.

Order on attorney's fees must contain findings regarding the reasonable number of hours expended and reasonable hourly rate(s).

Bishop v. Estate of Rossi, 2013 WL 132449, 38 Fla. L. Weekly D128 (Fla. 5th DCA 2013)

In a probate litigation matter, the Fifth District Court of Appeal affirmed the trial court's award of attorney fees and remanded the case to the trial court to make its determination of the reasonable amount of attorney fees.

In an undisclosed contested matter, Linda Bishop brought an action against the Estate of Edward D. Rossi. The estate prevailed and was awarded attorney's fees. Ms. Bishop appealed the judgment, arguing that the trial court failed to have an evidentiary hearing to determine the entitlement to, and reasonableness of, the attorney's fees.

Although the Fifth District was not provided a transcript of the hearing at which the trial court awarded the attorney fees, from the face of the trial court's order, the Fifth District was able to determine the existence of the hearing. Thus, fees were allowable and it affirmed the trial court's award of fees. However, citing *Quality Holdings of Fla., Inc. v. Selective Invs., IV, LLC*, 25 So.3d 34, 37 (Fla. 4th DCA 2009), the Fifth District stated that "[t]he law is clearly established that an award of attorney's fees 'must . . . contain ***express findings*** regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved…" Because there was no record of any hearing directly concerning the fee determination, the Fifth District – stating that it did so reluctantly - remanded the case for the fee determination. The opinion did, however, state that a new hearing was not necessary so long as the trial court could obtain the necessary information from the court notes or the hearing transcript.

A natural guardian's lawsuit on behalf of a ward cannot implicate the assets held by a court appointed guardian not a party to the lawsuit.

J.S.J. v. Pena, 109 So.3d 1281 (Fla. 5th DCA 2013)

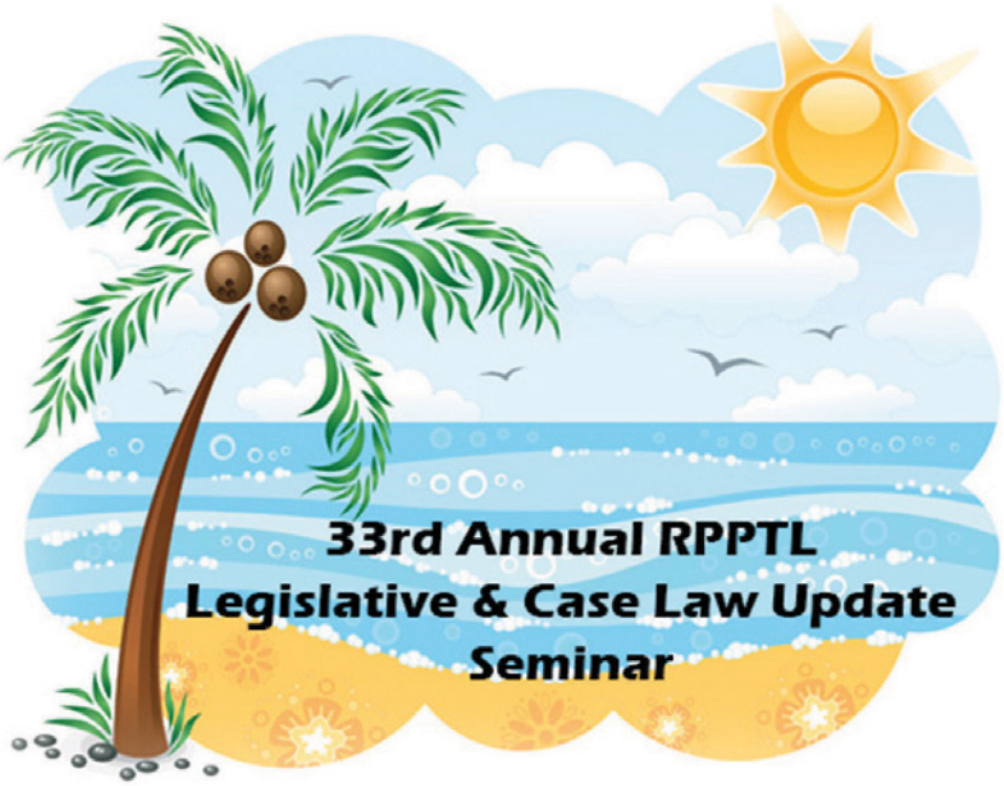
The Fifth District Court of Appeal reversed the trial court's order requiring the legal guardian to complete a form 1.977 (Fact Information Sheet) where the guardianship was not involved in the underlying litigation.

J.S.J. was born in 1999 with severe brain damage and a guardianship was established in 2002. In 2003, the parents, Mr. and Mrs. Jackson, individually, and as J.S.J.'s natural guardians, sued Physicians Associates of Florida, Inc. and Alejandro J. Pena, M.D. for malpractice. Although Mrs. Jackson was the acting guardian of J.S.J. at the time that the initial litigation was filed, she did not file the litigation as guardian of J.S.J. and also did not obtain approval from the probate court to place the assets of J.S.J. at risk. Further, the guardianship was not named in the lawsuit nor was the litigation noticed to or approved by the probate court. Dr. Pena and Physicians eventually prevailed in the action and were awarded attorney fees.

In an attempt to collect the award, the trial court ordered Martha Smith, the then serving guardian of J.S.J., to complete a Form 1.977 (Fact Information Sheet) in aid of execution of the judgment held by Physicians and Dr. Pena. Ms. Smith appealed and argued that under Florida Statutes, Mr. and Mrs. Jackson, acting as natural guardians, were not authorized to incur debt or place J.S.J.'s assets held under the guardianship at risk (the presumption being that the guardianship's assets may have been required to expend assets in furtherance of the fee award).

The Fifth District reversed trial court's order providing that "(t)he natural guardians' decision to bring the lawsuit, as next friend, on behalf of the minor cannot implicate the assets held by the legal guardian where the legal guardian has not consented to or participated in the litigation, and where no court approval for the expenditure of the minor's assets has been sought or obtained." Further, the Fifth District found that the legal guardian of J.S.J. was not a party to the lawsuit and was therefore not liable for the attorney's fees nor required to complete the Form 1.977.

The Florida Bar Real Property, Probate and Trust Law Section, the Real Property, Probate and Trust Law PAC & the RPPTL-PAC present the Section's



Friday, July 26, 2013

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Course No. 1611R

33rd Annual RPPTL Legislative and Case Law Update

Friday, July 26, 2013

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7:30 a.m. – 8:00 a.m.
Registration

8:00 a.m. – 8:05 a.m.
Opening Remarks

8:05 a.m. – 8:25 a.m.
Legislative Potpourri
Peter M. Dunbar, Tallahassee

8:25 a.m. – 8:45 a.m.
The Florida Power of Attorney Act Redux – Practitioner Improvements
Tami F. Conetta, Sarasota

8:45 a.m. – 8:55 a.m.
Limitations on Design Professional Liability and the Abolition of the Economic Loss Rule
Lee A. Weintraub, Fort Lauderdale

8:55 a.m. – 9:15 a.m.
Revamping Florida's mortgage foreclosure laws Amendments to Chapters 95 and 702 of the Florida Statutes
Representative Kathleen Passidomo, Naples

9:15 a.m. – 9:30 a.m.
Land Trust Amendments
Burt Bruton, Miami

9:30 a.m. – 9:50 a.m.
Practical Pointers for Probate Administration
Tae Kelly Bronner, Tampa

9:50 a.m. – 10:10 a.m.
Break

10:10 a.m.– 10:25 a.m.
Residential Landlord/Tenant Act: An Omnibus of Recent Changes Affecting Leases and Procedure
Neil Shoter, West Palm Beach

10:25 a.m. – 10:45 a.m.
What's Left of Development Permitting? – 2013 Legislative Update
Vinette D. Godelia, Tallahassee

10:45 a.m. – 11:00 a.m.
Trust Legislation – What's New For Trustees, Beneficiaries and Charities
Shane Kelley, Fort Lauderdale

11:00 a.m. – 11:15 a.m.
Community Associations From the Good Guys' Perspective: The Developer's Viewpoint
Robert S. "Rob" Freedman, Tampa

11:15 a.m. – 11:35 a.m.
Jurisdiction Over Nonresidents in Trust Litigation
Barry F. Spivey, Sarasota

11:35 a.m. – 12:00 p.m.
The Florida Revised LLC Act of 2013 – Selected Highlights
Louis T.M. "Lou" Conti, Tampa

12:00 p.m. – 1:15 p.m.
Lunch (included in registration)

1:15 p.m. – 1:30 p.m.
2013: Legislating the Fun Out of Dysfunctional
Robert S. "Bob" Swaine, Sebring

1:30 p.m. – 1:45 p.m.
Legislative Developments Impacting Litigation and Arbitration
Thomas M. "Tom" Karr, Miami

1:45 p.m. – 2:05 p.m.
Community Associations from the Good Guys' Perspective: The Association's Viewpoint
Steven H. "Steve" Mezer, Tampa

2:05 p.m. – 2:30 p.m.
Ethics – Stay Up to Date, So You Don't Stay Up Late
R. James "Jim" Robbins, Tampa

2:30 p.m. – 2:50 p.m.
Thanks, But No Thanks: The Ethics of Client Gifts
William T. "Bill" Hennessey, West Palm Beach

2:50 p.m. – 3:10 p.m.
Break

3:10 p.m. – 3:50 p.m.
Real Property Judicial Review: A Swift Survey for the Dirt Lawyer
Michael J. Gelfand, West Palm Beach

3:50 p.m. – 4:30 p.m.
Probate and Trust Case Law Update & News from Planet Zarcon
David C. Brennan, Orlando

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*The seminar registration fee is payable to the RPPTL-PAC. The RPPTL-PAC is a political action committee, which is not affiliated with, or controlled by The Florida Bar Real Property, Probate and Trust Law Section. This seminar is being held in conjunction with the Section's Executive Council Committee meetings on July 25th and the Executive Council meeting on July 27th, also at The Breakers, Palm Beach. All RPPTL section members are invited to participate in the programs and receptions. The registration form for the executive council meeting can be found at www.rpptl.org. Should you have additional questions, please call (850) 561-5626.

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ELECTRONIC COURSE MATERIAL NOTICE: Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. The Course Book can be purchased separately. Effective July 1, 2010.

____ **LIVE WEBCAST Friday, July 26, 2013** over the internet to your home, office or laptop
Cost: $335 (LOCATION CODE 317) **1611R**

____ **AUDIO CD** (includes electronic course book) **1611C**
Cost: $285 plus your local tax

____ **VIDEO DVD** (includes electronic course book) **1611D**
Cost: $500 plus your local tax

____ **COURSE BOOK ONLY** (hard copy) **1611M**
Cost: $100 plus your local tax

Contact Information: **The Florida Bar**
ATTN: Order Entry
651 East Jefferson Street
Tallahassee, Florida 32399-2300
850-561-5831

WEBCAST CONNECTION

Webcast registrants receive an email two days prior to the seminar, with log-in credentials to access course materials and the webcast link. Call The Florida Bar Order Entry Department at 800-342-8060, ext. 5831 with questions.

Return this completed form with payment to The Florida Bar

Course # 1611R

Florida Lawyers Support Services, Inc.
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REAL PROPERTY FORMS

(Please note this disk DOES NOT include the FR/BAR Contracts or Riders, those are available at www.flssi.org.)

Interactive CD Formatted for both WordPerfect and MS Word

Fill In The Forms, Save Updated Form To Your Computer & Print

(Current update 2008)

The Real Property Forms Committee of the Real Property, Probate & Trust Law Section of The Florida Bar has completed the arduous task of preparing suggested forms with comments for the Real Property Practitioner. The forms are available through Florida Lawyers Support Services, Inc. to RPP&TL Section members.

ONLY $100

INCLUDES SALES TAX AND SHIPPING

2013 forms to be released soon! See page 23 for details.

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PROBATE & GUARDIANSHIP FORMS

The FLSSI forms are developed by members of the Real Property, Probate and Trust Law Section of The Florida Bar. **Forms carry the Supreme Court required 3" x 3" blank square for Court Clerk's use. Probate Judges prefer and some require the use of 2013 FLSSI forms.**

Firm: _____

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

Physical Address: _____

City/State/Zip: _____

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

2013 PROBATE FORMS

OPTION #1	**2013 FORMS AND INDEX - .PDF ON DISK**	**$370.10**
OPTION #2	**2013 NEW & REVISED FORMS ONLY - .PDF ON DISK**	**$180.20**
OPTION #3	**2013 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH**	**$390.30**

2013 GUARDIANSHIP FORMS

OPTION #1	**2013 FORMS AND INDEX - .PDF ON DISK**	**$334.10**
OPTION #2	**2013 NEW & REVISED FORMS ONLY - .PDF ON DISK**	**$146.20**
OPTION #3	**2012 FORMS AND INDEX - 1 PHYSICAL COPY OF EACH**	**$354.30**

If you would like to order individual forms, please visit www.flssi.org to download our "long" order form which lists each form for separate purchase.

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METHOD OF PAYMENT

Either mail this form with check to the address listed above or include credit card information and fax to 407.515.1504. Prices include shipping, handling and sales tax. **VISA or MasterCard Only.**

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AL 2013

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

2013 EXECUTIVE COUNCIL MEETINGS

July 24 – 28, 2013
EXECUTIVE COUNCIL MEETING &
LEGISLATIVE UPDATE
The Breakers
Palm Beach, Florida
Reservation Phone # 888-211-1669
www.thebreakers.com
Room Rate: $206.00
Cut-off Date: June 24, 2013

September 18 – 22, 2013
EXECUTIVE COUNCIL MEETING/OUT OF STATE
Four Seasons Hotel Ritz Lisbon
Lisbon, Portugal
Phone # 351 (21)381-1400
www.fourseasons.com/lisbon/
Room Rate: 245 Euros
Cut-off Date: August 28, 2013

November 20 – 24, 2013
EXECUTIVE COUNCIL MEETING
Ritz Carlton Sarasota
Sarasota, Florida
Reservation Phone # 800-241-3333
http://www.ritzcarlton.com/sarasota
Room Rate: $205.00
Cut-off Date: October 21, 2013

2013 CLE SCHEDULE:

LEGISLATIVE UPDATE (#1611)
July 25, 2013 – Palm Beach***
(The Breakers Resort & Spa, #105)
July 25 – Webcast***

TRIM THOSE TAXES#1618)
August 21 (Audio Webcast)

REAL PROPERTY LITIGATION (#1506)
October 4 –Tampa***
October 4 – Webcast***

** Webcast & Live*
Courses scheduled later in the year will appear in future editions of ActionLine.
Detailed information can be found on The Florida Bar website: www.floridabar.org/CLE. Search by course number.

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).

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

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Scan here for instant access to the Section website.

ACTIONLINE BULLETIN BOARD

View Informational videos on RPPTL Section benefits, fellowship/ mentoring programs on RPPTL website – scan QR Code above.

Proposed Advisory Opinion on Community Association Managers designated as High Profile Case with Fla. Sp. Court. See SC13-889.

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

Fla. R. Civ. P. 1.490 effective 5/9/2013 authorizes magistrates to preside over foreclosure cases.

Want to learn more about **sustainable development?** See page 22.

DO YOU KNOW.... The Florida Bar's CLE is available to you 24/7? Visit *www.floridabar.org/CLE* and check it out!

Fla. R. Jud. Admin. 2.420 amended on May 1, 2013, to revise the procedure concerning the confidentiality of court records.

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