ActionLine

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

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

Practical Considerations for Powers of Attorney Intended for Financial Institutions

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The RPPTL Legislative Role

One of the principal activities through which the RPPTL Section serves the public interest and advocates good public policy may be found in its well-recognized legislative program, which largely focuses on the development of legislation concerning real property, probate and trust law. The Section currently has more than 20 initiatives pending before the Florida Legislature in more than 10 bills.

A section legislative or political position may be in the form of opposition to or support of a particular matter and may be expressed as a general concept or statement of policy, or a comprehensive legislative proposal.[1] The type of activity may be a passive statement of support or opposition, or active support or opposition in appropriate public and governmental forums. Because the Section's effective legislative program has earned such a high degree of respect and a reputation for expertise and credibility among members of the legislature, legislative staff, and legislative consultants, the Section is frequently called upon to provide them with technical assistance.

CHAIR'S COLUMN

By W. Fletcher Belcher

Section Chair, 2012- 2013

Past Successes

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

Legislative Program Structure

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

The Section's legislative program is coordinated internally by its committee chairs, the directors of its two substantive Divisions (Real Property Law and Probate and Trust Law), and its Legislation Committee, which also acts as the Section's liaison for legislative matters with its outside legislative consultants, the Board of Governors of The Florida Bar ("BoG"), legislative and administrative bodies, and other groups having an interest in the Section's legislative initiatives.[2]

Chairing the Section's Legislation Committee is an extremely important and demanding responsibility that has historically been assigned to its most capable and dedicated leaders, including Bob Swaine, Barry Spivey, Michael Gelfand, Burt Bruton, Brian Felcoski, Sandra Diamond, Laird Lile, Bruce Stone, Bob Goldman, and Lou Guttmann.

The adoption of a proposed legislative position by the Section requires a two-thirds super majority vote of the Executive Council (or the Executive Committee when time constraints require that action be taken prior to the next Executive Council meeting).[3] The proposed legislative position then goes (via the very capable and always helpful General Counsel of The Florida Bar, Paul Hill, to the Executive Director of The Florida Bar) to BoG for review it to determine whether it should prohibit the Section from advocating it. The scope of that review, which is very narrow and important, is discussed below.

After obtaining BoG clearance, the Section's legislative consultants then recruit House and Senate sponsors for the Section's initiatives and shepherd them through the legislative process, including coordination with legislative staff and bill drafting, attending legislative committee meetings, and dealing with amendments and a wide range of issues raised by other interests and legislators. The Section's highly-skilled and effective legislative consulting team, which consistently does a phenomenal job for the Section, is composed of Pete Dunbar, Martha Edenfield, Gene Adams, Josh Aubuchon and Ashley DiNunzio, all from the Tallahassee offices of the Pennington law firm. In addition, they typically review more than 2,000 bills in each legislative session and identify and track the 200 or so that appear to be of particular interest to the Section. Leading up to and during each legislative session, the legislative consultants and approximately 20 Section leaders also participate in weekly telephone conferences. The legislative consultants are also subject to being called upon by The Florida Bar ("TFB") to provide assistance when necessary and in the best interest of the membership of Bar.

Authority & Limitations Governing Legislative and Political Activity

The Florida Constitution gives the Supreme Court the exclusive power to regulate the admission of persons to the practice of law and the discipline of persons admitted.[4] Pursuant to that power, the Supreme Court created TFB as its "official arm;"[5] authorized its BoG to create sections to accomplish the purposes and serve the interests of TFB and the sections;[6] authorized section involvement in legislation that is significant to the judiciary, the administration of justice,

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ABOUT THE COVER:

Biltmore Estate Vineyard

by Michael Gelfand

IN THIS ISSUE:

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the fundamental legal rights of the public, or the interests of the section or its programs or functions;[7] and required the BoG to prescribe the powers and duties of the sections,[8] which it has done through the adoption of Standing Policies. Sections are an integral part of TFB and have a duty to work in cooperation with it and under its supervision to accomplish the aims and purposes of TFB and that section."[9]

The U.S. Supreme Court has ruled that the First Amendment prohibits a state bar in which membership is a mandatory requirement for the practice of law from using compulsory dues to fund activities that are not germane to the regulation of the legal profession and the quality of the legal services for the people of the state.[10] Pursuant to that constitutional restriction, the Florida Supreme Court has determined that legislative activity by TFB is permissible in the following subject areas:[11]

1. Regulation of the legal profession, including discipline and client trust accounts;
2. Improvement of the functioning of the courts and judicial efficacy and efficiency;
3. Increasing the availability of legal services to society;
4. Education, ethics, competence and integrity of the legal profession; and
5. Matters of great public interest which affect the rights of those likely to come into contact with the judicial system if the issue is one for which lawyers are especially suited by their training and experience to evaluate and explain.

Because section membership is voluntary and advocacy by a section is not funded with compulsory dues, the permissible legislative activities of sections are not limited to the above subject areas. The financial resources that underwrite the Section's activities essentially come from three sources: annual section dues paid by its voluntary members, revenue from CLE programs produced by the Section, and payments by sponsors and exhibitors who offer products and services that are of interest to Section members and who have an interest in the fields of law within the Section's purview. Although the Section's dues are modest, they represent the largest component of revenue because of its large and loyal voluntary membership base.

A section's proposed legislative or political position may not be recognized by BoG or advocated or advanced by a section until proper written notice and opportunity to review the proposal has been given to BoG.[12] Before a proposed position may be presented to BoG, the section is required to give notice to all divisions, sections and committees that would likely have an interest in the matter.[13] BoG has 60 days from receipt of notice to review the proposal.[14] A shorter review period and special procedures may apply when a section requests an expedited decision.[15]

As previously noted, the scope of review that BoG must follow in determining whether to prohibit a section from advancing or advocating a position on a legislative or political issue is extremely narrow. The BoG may prohibit **only** if:[16]

1. The issue is not within the section's subject matter jurisdiction as described in its bylaws; or
2. The issue is within the scope of permissible legislative or political activity of TFB unless the proposed section position is not inconsistent with an official position of TFB on that issue; or
3. The issue carries the potential for deep philosophical or emotional division among a substantial segment of the membership of TFB.

The purview or subject matter jurisdiction of the RPPTL Section includes activities that: (a) are significant to the judiciary, the administration of justice, the fundamental legal rights of the public, or the interests of the section; (b) improve the administration of justice; (c) advance jurisprudence and further the knowledge and practices of its members in the fields of real property (including construction), probate, trust, or related fields of law; and (d) inculcate the principles of duty and service to the public in its members.[17] Under these criteria, the Section is permitted to lobby for legislative and political positions pertaining to real property, probate, trust, and related fields of law, whereas TFB would not be permitted to do so.

Disagreement or opposition to the merits of a section's proposed legislative or political position by BoG members, another section, or group, does not provide a basis for BoG to prohibit advocacy by the proposing section.

If BoG completes its review within 60 days, it is required to immediately provide written notice of its decision according to the above criteria to the section.[18] If BoG advises the section that its decision is not to prohibit, or if BoG fails to notify the section within 60 days of receiving notice that it proposed activity is prohibited, the section is free to lobby for and otherwise advocate for its legislative or political position.[19]

Obtaining "non-prohibit" clearance from BoG does not make the proposal a legislative or political position of TFB, or even signify its agreement with or approval of the merits of the position. The position is merely a section position, not a Bar position, and must always be carefully identified as such.[20]

It is hoped that this somewhat technical column will assist interested Section members in acquiring a greater appreciation and understanding of the Section's outstanding legislative program and perhaps generate interest in becoming actively involved in that important process.

Endnotes:

1 RPPTL Section Bylaws, Art. VIII, Section 2.
2 RPPTL Section Bylaws, Art. VIII, Section 3.
3 RPPTL Section Bylaws, Art. VIII, Section 4(c) and Art. IV, Section 3.
4 Florida Constitution, Art. 5, § 15.
5 R. Regulating Fla. Bar, Ch. 1, General Introduction.
6 R. Regulating Fla. Bar, 1-4.5; 2-7.3.
7 R. Regulating Fla. Bar, 2-7.5(a).
8 R. Regulating Fla. Bar, 1-4.5.
9 R. Regulating Fla. Bar, 2-7.2.
10 *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, L.Ed.2d 1 (1990). Also see The *Florida Bar Re Schwarz*, 552 So.2d 1094 (Fla.1989).
11 *The Florida Bar Re Schwarz*, 552 So.2d 1094 (Fla.1989).
12 R. Regulating Fla. Bar, 2-7.5(c); Standing Board Policies 9.50(a), (c) and (e); RPPTL Section Bylaws, Art. VIII, Section 4(d) and (e).
13 Standing Board Policy 9.50(c); RPPTL Section Bylaws, Art. VIII, Section 4(d).
14 Standing Board Policy 9.50(d).
15 Standing Board Policies 9.50(c), (d) and (g).
16 Standing Board Policies 9.50(a) and (e); RPPTL Section Bylaws, Art. VIII, Section 1.
17 R. Regulating Fla. Bar, 2-7.5(a); RPPTL Section Bylaws, Art. I, Section 2 and Art. VIII, Section 1.
18 Standing Board Policy 9.50(f).
19 Standing Board Policy 9.50(d).
20 R. Regulating Fla. Bar 2-7.5(d); Standing Board Policy 9.50(I); RPPTL Section Bylaws, Art. VIII, Section 4(h).

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Condominiums and the Interstate Land Sales Full Disclosure Act Part III:

"Has Time Rewritten Every Line?"

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

Time has not rewritten EVERY line. But, the courts have rewritten many lines as was explored in Part II.[1] Adding to the complexity of our current situation is a new regulatory agency.

Dodd - Frank

By now most attorneys have heard of Dodd-Frank[2] and its Wall Street and lending reform goals. However, Dodd-Frank also dealt with ILSA.[3] Surprised! Effective as of July 21, 2011, Dodd-Frank removed HUD from the administration of ILSA and replaced HUD with the Bureau of Consumer Financial Protection ("CFPB"). The CFPB's website states the following: "The central mission of the Consumer Financial Protection Bureau (CFPB) is to make markets for consumer financial products and services work for Americans — whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products." [4]

In December, 2011 CFPB published in the federal register and on their website a request for comments on proposed regulations. Their request indicated that they sought comment from the public for streamlining regulations relating to consumer financial laws. That statement was intended to include ILSA. The adopted regulations for the most part parallel the prior regulations. HUD's guidelines have not been readopted, which is unfortunate as they assisted practitioners.[5] Frankly, not much streamlining, but CFPB's hands are tied and ILSA assuredly is a stepchild.

ILSA compliance today is not for the lighthearted. A vast number of cases have been brought to rescind contracts for noncompliance. It is time to consider whether reform is required as to the sale of preconstruction condominiums. To fairly evaluate that need, a look at the origins and early years of ILSA is required.

1968

1968 was the year ILSA was adopted. The economy was booming. Real estate was booming. Condominiums were a relatively new statutory phenomenon in the United States. America was buzzing about this new phenomenon. ILSA was passed as an anti-fraud statute that was promulgated in response to increased fraud in the sale of undeveloped land. ILSA had a goal of protecting "purchasers from false and deceptive practices by unscrupulous sellers."[6] ILSA resulted from Congressional hearings to address concerns about widespread real estate land fraud. Purchasers were persuaded to buy land they had never seen by sophisticated sales forces promising that land (which might be under water or suitable only for grazing purposes) was a good investment, suitable for homesites and easily resalable.[7] Surely, that does not seem like a sound bite intended to include preconstruction condominiums. In light of the pervasive discussion of land fraud when ILSA was adopted, why not refer anywhere in ILSA when applied to condominiums to show some element of intent?

Lots

ILSA regulates "lots."[8] Even though ILSA regulates the sale of "lots," the word "lots" is NOT defined in ILSA. Lots is a somewhat peculiar word to use to cover un-built condominiums. It is clear that Congress intended ILSA to apply to unimproved land but did it intend the unimproved land and lot to include property on which a condominium was to be built?[9] ILSA was drafted to apply to subdivisions. ILSA regulates disclosures at the time of contract. Is a preconstruction condominium contract a sale in a subdivision? The courts, almost universally, have found that the language of ILSA is broad enough to include agreements for the sale of pre-constructed condominium units. The best reasoning in these decisions is not the original enactment of ILSA, but the amendment in 1979,[10] discussed below.

A look at the exemptions that were part of ILSA buttresses the notion that condominiums were not intended to be covered, or if they were, were not intended to be regulated.

Exemptions

The two year completion language in the original Act states: "land on which there is a residential, commercial, or industrial building or where the seller is obligated to construct such a building within two years."[11] As mentioned in early articles, this is a full exemption. Comply with this exemption and the anti-fraud provisions of ILSA don't even apply. In addition, the original Act contained the 100 lot exemption which is a partial exemption (anti-fraud provisions apply).[12] When I became a lawyer in 1977 (9 years after ILSA was adopted), I don't remember a condominium that was 100 units or more (although there must have been some!) and almost nothing couldn't be built in 2 years. I googled the Chrysler Building in New York and asked: "How

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long did it take to build the Chrysler Building?" The answer: "two years." So, I googled the Empire State Building and the answer was also two years. Both buildings were opened in 1931. Various buildings took longer to build, like the first tower of the World Trade Center, completed in 1972. This led me to start googling for the largest condominium or cooperative ever built. In 1968, Co-Op City was completed in the Bronx with a staggering 15,372 units, 35 high rise buildings. Construction started in May, 1966, and residents began moving in during December, 1968. Although it took more years to complete the last building, this is the largest residential project in the world and it was being completed at the time ILSA was enacted. I suspect that at that time there were few condominium projects, if any, that would not have qualified for a full[13] or partial exemption or a piggyback of exemptions.[14]

HUD must have been perplexed in the early years as they were the ones that had to regulate the statute. Were preconstruction sales of condominiums intended to be regulated? By 1974 it became clear that HUD believed that condominiums were covered by ILSA.[15] By 1979 ILSA was amended to include the word "condominium" for the first time.[16] In the two year completion exemption the word "condominium" was added as follows: "land on which there is a residential, commercial, CONDOMINIUM, or industrial building or where the seller is obligated to construct such a building within two years."[17]

Although this should have ended the debate, not only did it not, a federal district court subsequently held that the ILSA did not apply to condominiums.[18] This decision was ultimately reversed.[19] Since then the courts for any number of reasons have held that ILSA applies to condominiums,[20] however, developers and their lawyers continue to try to make the same arguments. As recently as December 12, 2012, an Ohio appellate court considered the issue and, not surprisingly, rejected the notion that ILSA did not apply to condominiums. [21]

Unintended Consequences

Has ILSA's goal of protecting "purchaser's from false and deceptive practices by unscrupulous sellers" been achieved by the avalanche of litigation? Most of the cases have dealt with the following topic areas: analyzing a force majeure provision, piggybacking of exemptions, available remedies, statute of limitations, and description of lot. The cases for the most part are based on technical noncompliance. Many of the lower courts have been overruled by appellate courts and many courts disagree with other courts. Some courts construe aspects of ILSA restrictively.[22] Some courts construe aspects of ILSA more flexibly.[23] A number of the appellate cases are reversals. Courts have the benefit of independent research, briefs, and legal arguments, still get it wrong! That is not because the judges are poor judges; it is because ILSA leaves too much to interpretation, and based upon different facts and situations, different results are obtained, particularly those judges that seek consumer protection. Interestingly, the cases rarely arise from "false and deceptive" practices. There always is a need to stop "false and deceptive" practices and I, for one, am not advocating against that public policy. ILSA's tenements and origins have been turned upside down. Buyers who have Buyer's remorse have relied on it when there were absolutely no false and deceptive practices.

It truly is time for another look. CFPB has its hands full on a number of issues unrelated to ILSA, which do involve false and deceptive practices in other areas. They can't be expected to nor do they have much appetite I suspect to dictate major changes in policy in ILSA. They certainly can and should refrain from being overzealous as to their interpretations when it comes to condominiums in light of the fact that few false and deceptive practices have been reported in the hundreds and hundreds of cases decided on ILSA over the last five years. The responsibility lies with Congress.

Has ILSA's goal of protecting "purchaser's from false and deceptive practices by unscrupulous sellers" been achieved by the avalanche of litigation?

ILSA'S Public Policy

Is there any longer a need for a statute to protect consumers from purchasing land that is "under water or rentable only for grazing." The land frauds of the early and mid twentieth century are over. For example, much of the Florida wetlands where the largest abuses occurred are either gone or now protected from development by federal or state statutes where they have become part of the largest wetland reclamation project ever known to mankind. Moreover, the internet allows us all to see by satellite the land we wish to buy. Can all of ILSA be replaced by a simple requirement that the seller provide a current Google Earth™ picture of the property and the surrounding properties as an attachment to the contract, if the property is in the United States,[24] specifically signed by the buyer? Has not the sophistication of parties acquiring real estate changed light years since the mid-1900's? How often during the last 10 years has a condominium buyer been fleeced because their unit was underwater? A very limited number of protections are still needed for buyers. There is a need for anti-fraud statutes where state law is inadequate. ILSA should be a true anti-fraud statute based upon the lessons of the last forty years. I submit that a simple disclosure statute[25] is all that is required in today's age of the internet. When a buyer makes a buying decision, it is rare that the state or federal disclosure requirements/

books make a difference to the buyer. Assuming we still need any mandatory disclosures, we should determine the three or four most important disclosures and attach them to or include them in all contracts.

Exempting Condominiums

Some say the answer is to exempt condominiums from ILSA. A compelling argument can be made that such an exemption likely parallels the intentions of Congress when ILSA originally passed. In addition, in Florida as in many states, condominium sales are highly regulated[26] and contain unfair and deceptive practice provisions to protect consumers.[27] Is this not sufficient? Representative Maloney from New York has taken action. She has a bill pending which would remove condominiums (except land condominiums) from ILSA.[28]

Final Words

Condominium practitioners must be vigilant in their understanding of ILSA.

The "Way We Were" almost always brings a smile to our faces as we reminisce about our youth. ILSA is no longer in its youth. ILSA has warts and wrinkles and is ill. It needs attention.

Jerry E. Aron *practices law in West Palm Beach, FL with the firm of Jerry E. Aron, P.A. He was chairperson of the Florida Real Property, Probate and Trust Law Section of the Florida Bar in 1991/1992. He was elected to the American College of Real Estate Lawyers in 1991. Mr. Aron would like to recognize the significant contribution in all parts of the ILSA trilogy of Danay Diaz-Pavon, Esq., also an attorney at Jerry E. Aron, P.A.*

Endnotes:

1 Since the research for Part II, we have found 13 new reported cases relative to ILSA. So, the litigation is not over, however, it is slowing down. The case of *Bacolitsas v. 86th& 3rd Owner,* LLC, 702 F. 3d 673 (2d Cir. 2012), is a very important case which reverses the lower court and decides that the developer's "description of the lot" was sufficient.

2 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203(2010) (codified in part at 12 U.S.C. §5481-5603 (2010).

3 *See Id.*

4 *See* www.consumerfinance.gov (last visited February 25, 2013).

5 The logic in not readopting is likely that the courts in a few instances disagreed with HUD's guidelines. The topic of "deference" is beyond the scope of these articles.

6 See *Winter v. Hollingsworth Properties, Inc.*, 777 F. 2d 1444, 1445-1446 (11th Cir 1985).

7 *See Id.* at 1447.

8 15 U.S.C. §1703 reads: "Requirements Respecting Sale or Lease of Lots."

9 *See* Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, §907(a)(i), 92 Stat. 2080, 2127.

10 See 15 U.S.C. §1702(a)(2). Note that a short version of this exemption in 1968 read as follows: "the sale or lease of any improved land on which there is a residential, commercial or industrial building, or to the sale or lease of land under and a contract obligating the seller to erect such building thereon within a period of two years." Pub. L. No. 90-448 (August 1, 1968). Arguably, this is what a preconstruction condominium contract involves. BUT, is such a contract the sale of "land" or airspace?

11 15 U.S.C. §1702(a) exemptions are full exemptions.

12 15 U.S.C. §1702(b) exemptions require compliance with 15 U.S.C. §1703(a)(2) and are referred to as "partial exemptions."

13 It should be remembered that the two years starts from the Purchaser's signing of the contract and most often there is time between the signing of a contract and commencement of construction of the building. So, the construction period needs to be shorter than two years if relying on the two year exemption, unless construction has commenced when the contract has signed.

14 Remember that "piggybacking" is allowed under ILSA, however, the cases as discussed in Part II bring into doubt how a developer is able to comply.

15 *See Winter*, 777 F. 2d at 1447.

16 Interestingly, in 1979 Congress conducted hearings to determine how serious consumer problems and developer abuses were in connection with condominium development and the applicable House committee concluded "it does not, at this time, see an overwhelming need for establishing national minimum standards of disclosure and protection." H.R. Rep. No. 96-154 (to accompany 3875) at 28-20, U.S. Code Cong & Admin. News 1979, at 2344-45.

17 15 U.S.C. §1702(a)(2) (emphasis added).

18 See *Winter v. Hollingsworth Properties,* 587 F. Supp. 1289 (S.D. Fla. 1984).

19 *See Winter,* 777 F. 2d 1444.

20 *See Smith v. Myrtle Owner,* LLC, 2011 U.S. Dist. LEXIS 71899 (E.D.N.Y. February 9, 2011); *Cruz v. Leviev Fulton Club*, LLC, 711 F. Supp. 2d 329, 331 (S.D.N.Y. May 14, 2010).

21 *See Allen v. NVR, Inc.,* 2012 Ohio App. Lexis 5320 (Ohio 12 Dist. Ct. App. December 28, 2012).

22 *Olsen v. Lake Country, Inc.,* 955 F.2d 203, 206 (4th Cir. 1991)

23 *De Luz Ranchos Inv., Ltd. v. Coldwell Banker & Co.,* 608 F. 2d 1297, 1302 (9th Cir. 1979); "The general purpose of the Land act was, of course, to prohibit and punish fraud in such land development enterprises … and the Act should be interpreted to attain that end. Such an act should be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *McCown v. Heidler*, 527 F. 2d 204, 207 (10th Cir. 1975) (quoting *SEC v. Capital Gains Research Bureau, Inc.* , 375 U.S. 180, 195, 84 S.Ct. 275, 285, 11 L. Ed. 2d 237 (1963)); *See Allen v. NVR, Inc.,* 2012 Ohio App. Lexis 5320.

24 ILSA applies to international properties if any means of interstate commerce is used to solicit offers to sell or lease lots. International properties may have some of the characteristics that ILSA was designed to address.

25 Anti-fraud should be added only where state law does not contain such protections.

26 *See* Chapter 718, Florida Statutes.

27 *See* Chapter 718.506, Florida Statutes.

28 *See* H.R. 6337, 112th :Cong. (2012) (10/1/2012 Referred to House subcommittees on Insurance, Housing and Community Opportunity). This Bill would amend the Interstate Land Sales Full Disclosure Act to clarify how the Act applies to condominiums.

Fiscal Cliff Retrospect as to Estate Planning – Where We Are for 2013

By George D. Karibjanian
Proskauer Rose, LLP, Boca Raton, Florida


G. KARIBJANIAN

After a December of implementing gifting plan after gifting plan involving clients' $5.12 million applicable exclusion amount[1] in anticipation of the pending "Fiscal Cliff," on January 2, 2013 estate planning attorneys were greeted with the signing and implementation of the American Taxpayer Relief Act of 2012 (the "2012 Act").

To briefly summarize, the 2012 Act permanently: (a) extends the estate, gift and generation-skipping transfer ("GST") tax provisions as modified by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "2010 Act"); (b) increases the top estate, gift and GST tax rate from 35% to 40%;[2] (c) extends the concept of "portability" (with one technical correction); and (d) extends most of the other tax cuts implemented in the Economic Growth and Tax Relief Reconciliation Act of 2001 (the "2001 Act") and the Jobs and Growth Tax Relief Reconciliation Act of 2003 (the "2003 Act"). The importance of permanency cannot be understated as all provisions of the 2010 Act, the 2003 Act and the 2001 Act were scheduled to "sunset" (*i.e.,* to be permanently stricken and deemed never to have existed as of December 31, 2012, which would have thereafter re-implemented the laws as they existed in 2001).[3] For transfer tax purposes, this would mean a top transfer tax rate of 55% and an applicable exclusion amount of $1,000,000. By permanently extending all such tax provisions, the "sunset" provisions of the 2010 Act, the 2003 Act and the 2001 Act were eliminated.

Estate and Gift Tax Changes

By way of background, under the 2010 Act, the Federal estate and gift tax "basic exclusion amount" (*i.e.*, the core component of the applicable exclusion amount) was increased to $5,000,000, with inflationary adjustments. Courtesy of the 2012 Act, the $5,000,000 basic exclusion amount has been made permanent, and, with the 2013 inflationary adjustment, is currently $5,250,000.

With the threat of a lower applicable exclusion amount, clients were in a quandary – do they wait and see what happens with potential new legislation, or do they use their respective applicable exclusion amounts based on the fear that the applicable exclusion amount would be lower in 2013 so that if it wasn't used in 2012, it would be forever lost – a "use it or lose it" proposition. For those clients that fully utilized their applicable exclusion amount in 2011 or 2012, because the 2012 Act did not lower (but rather maintained) the amount of the applicable exclusion amount, this was semi-troubling news. This is because whatever exemption was present in 2012 is the same exemption that will be applied in all transfer tax calculations in 2013 and beyond, so, retrospectively, there was no current benefit to such 2012 gifting. However, on the positive side, any post-gift appreciation on gifted assets will avoid future transfer taxation as to the clients, so if the gifted assets significantly appreciate or are used to acquire significantly appreciable assets, all such appreciation escapes the 40% transfer tax rate.

Taxpayers did receive a particular "quasi" benefit from the permanency of the 2010 Act with respect to the calculation of the estate and gift tax. As most estate planning practitioners are aware, the calculation of the estate and gift tax is a "two-part" calculation[4] – a tax is calculated on the sum of all assets currently subject to transfer taxation and the value of all prior taxable gifts. This tax is then reduced by the tax on all such prior gifts (taking into account any credits applied against such tax). The purpose for this "two-part" calculation is to ensure that currently taxable assets are taxed at the "marginal" rate. Prior to the 2010 Act, the two-part transfer tax calculation would calculate the tax on prior gifts (referred to as "adjusted taxable gifts") at the rate in effect at the time of the gift. Thus, if gift taxes were paid on a gift in 2000 at the highest rate, this rate would be 55%. As part of the 2010 Act, new § 2001(g) was added which provides that the tax on adjusted taxable gifts would be calculated at the *current* transfer tax rates instead of the rate applied at the time of the gift. The purpose for § 2001(g) was to prevent taxpayers from receiving a tax offset in excess of the current tax rates. For example, without § 2001(g), 2012 gifts would have been taxed at 35%, but the tax on the adjusted taxable gifts offset for the 2000 gift described above would have been calculated at the applicable tax rate for 2000, which was 55%. Congress desired to still allow for such offsets, but such offsets should be consistent and symmetrical with current rates. Thus, § 2001(g) applies the current rates to both parts of the "two-part" calculation.

Perhaps the most significant effect of the 2012 Act is the permanency of the portability provisions.

While Congress sought to prevent an excess benefit, the raising of rates to 40% could have lead to an opposite effect for the taxpayer in that, without § 2001(g), the first part of the "two-part" calculation would be taxed at a top rate of 40% but the tax on adjusted taxable gifts might

only be applied at 35%. The permanency of § 2001(g) prevents this from occurring so those taxpayers who fully utilized their applicable exclusion amounts in 2012 when rates were 35% will receive credit for those gifts in a future transfer tax calculation at 40%.

In addition, the permanency of the inflationary adjustment most likely will result in additional basic exclusion amounts in each year. Such additional basic exclusion amounts can result in additional tax-free gifting which can be an important planning tool.

Perhaps the most significant effect of the 2012 Act is the permanency of the portability provisions. "Portability" is the concept by which a deceased spouse's unused applicable exclusion amount can be transferred to the surviving spouse. The 2012 Act makes one change to the portability provisions, which codifies apparent Congressional intent by ensuring that a deceased spouse's unused applicable exclusion amount and not just the unused basic exclusion amount, is available for transfer to the surviving spouse.[5] With the permanency of portability, in certain circumstances practitioners may wish to re-evaluate standard credit shelter or bypass trust planning.

Finally, other significant estate tax provisions that are now permanent include the elimination of the qualified family-owned business interest deduction,[6] the expanded availability of the qualified conservation easement rules,[7] and, most importantly for Florida practitioners, the conversion of the state death tax credit against the estate tax into a deduction.[8] As most practitioners are aware, the Florida estate tax is an amount equal to the "state death tax credit" allowable against the calculation of the federal estate tax.[9] As part of the 2001 Act, the "state death tax credit" was phased out so that by 2005, it was no longer a credit but rather a deduction against the tax.[10] With the permanency of the 2001 Act, the Florida estate tax is permanently nonexistent. The possibility of enacting a separate Florida estate tax is unlikely as the Florida Constitution specifically prohibits the taxation of the estates, inheritances and income of its citizens; therefore, the implementation of any such tax would require a public vote to change the Constitution.[11] It is not a reach to state that the chances of the public voting for the implementation of a new tax are, at best, "one in a billion."

As a result of the permanent elimination of the Florida estate tax, a glitch appears within the Florida Statutes. After the passage of the 2001 Act, § 198.13, Fla. Stat., which provides the statutory authority for the filing of a Florida estate tax return, was amended in 2007 to add subsection (4), which provides that for those decedents who died after December 31, 2004, a Florida estate tax return would not be required.[12] However, the flush language at the end of this section (the "flush language") provided that the provisions of subsection (4) would not apply to estates of decedents dying after December 31, 2010 (which coincided with the sunset of the 2001 Act). After the implementation of the 2010 Act, the flush language was amended to defer the sunset until December 31, 2012.[13] With the permanency effected by the 2012 Act, at its February 2013 Executive Council Meeting in Tallahassee, the Real Property Probate & Trust Law Section of the Florida Bar overwhelmingly approved an emergency amendment to §198.13(4), Fla. Stat. to delete the flush language. It is anticipated that the Florida Legislature will pass this change and that it will become effective retroactive as of January 1, 2013.

GST Tax Changes

While the amount of the GST tax exemption and rate remain linked to the gift and estate tax exemption and rate,[14] the most important aspect of permanency as to the GST is the effect on deemed allocations, qualified severances and late allocations.

The rules in the 2001 Act which provide for deemed allocation of GST exemption to certain lifetime trust transfers will continue.[15] Previously, deemed or automatic allocation would only apply in the event of a direct skip;[16] under the 2001 Act changes, such automatic allocation was expanded to other forms of trusts under which the GST could occur. Practitioners feared that if the 2001 Act had sunsetted, any automatic allocation of the GST exemption to non-direct skips could potentially be lost because, as stated above, the sunset provisions provided that the law would be interpreted as if the sunsetted provisions had never existed.

Permanency also eliminates any doubts about the ability to effect or maintain "qualified severances." A "qualified severance" allows a trust with a mixed GST inclusion ratio to be severed into two trusts so that one trust has an inclusion ratio of zero and the other has an inclusion ratio of one.[17]

Finally, the provisions in the 2001 Act providing relief from late GST allocations and allowing extensions of time if certain conditions are met will continue.[18]

Income Tax Changes as to Trusts and Estates

The 2012 Act also extends the income tax provisions of the 2001 Act, with certain changes.

The top income tax rate of 39.6% was re-introduced, and, for trusts and estates, this rate applies to income in excess of $11,950.[19] By adding to this number the net investment income "Medicare" tax of 3.8%, which begins in 2013,[20] the top income tax rate for trusts and estates can equal 43.4%. Such top rate taxes are common in estates or trusts that are not grantor trusts under which the Trustees have total discretion to pay income and principal and, for various reasons, the taxable income is accumulated in the trust or estate.

In addition, with respect to capital gains, for trusts and

estates in the top income tax bracket, the capital gains tax rates increase to 20% for long term capital gains and 39.6% for short term capital gains.[21] In addition, as net investment income, the 3.8% net investment income "Medicare" tax applies.[22]

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Endnotes:

1 Section 2010(c)(2) of the Internal Revenue Code of 1986, as amended (the "Code"). Unless otherwise specified, all section references shall be to sections of the Code.

2 Section 2001(c).

3 *See* 2010 Act, § 304; 2001 Act, 2001 Act, § 901.

4 Section 2001(b).

5 *See* § 2010(c)(4); for a detailed explanation of this issue, see Richard S. Franklin, Lester B. Law and George D. Karibjanian, *Portability – The Regulations*, American Bar Association – Section of Real Property, Trust & Estate Law, Submitted January 16, 2013 http://apps.americanbar.org/dch/committee.cfm?com=RP512500; Richard S. Franklin, Lester B. Law and George D. Karibjanian, *Portability – The Game Changer*, American Bar Association – Section of Real Property, Trust & Estate Law, Submitted January 16, 2013

http://apps.americanbar.org/dch/committee.cfm?com=RP512500.

6 Section 2057(j).

7 Section 2031(c).

8 Section 2058.

9 §198.02. Fla. Stat., *generally referencing* § 2011.

10 Section 2011(b)(2).

11 Florida Constitution, Art. VII, § 5.

12 Ch. 2007-106. § 7, effective July 1, 2007.

13 Ch. 2011-86, § 1, effective May 31, 2011.

14 Section 2641(a)(1).

15 Section 2632(c).

16 Section 2632(b).

17 Treas. Reg. § 26.2642-6.

18 Section 2642(g).

19 Section 1(e).

20 Section 1411(a)(2).

21 Section 1(h).

22 Section 1411(c)(1)(A)(iii).

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Practical Recommendations for Managing Liability in the Face of FDIC Coverage Reductions

Alan B. Fields, Esq., St. Petersburg, Florida


A. FIELDS

As was reported in The Florida Bar News[1] as of December 31, 2012, the FDIC coverage on your trust account reverted back to $250,000 from its previously unlimited coverage. This reduction in protection for client funds raises a number of questions about our ethical duties as attorneys, our duties and liabilities as fiduciaries, and best practices for protecting the funds entrusted to us by our clients.

Ethics Opinion 72-37 addresses this subject directly, providing:

> "a lawyer is not an insurer of clients' funds in his possession, and there is no ethical requirement that he keep such funds in numerous separate accounts so as to assure complete FDIC insurance coverage of all funds. However, in handling clients' funds, the lawyer is acting as a fiduciary or trustee and is expected to act as a prudent man. Obviously the size of the deposit should be prudent in relation to the size and reputation of the financial institution where it is placed."

As attorneys, we routinely hold funds far exceeding the new FDIC limits and take these responsibilities very seriously. In real estate transactions, the entire purchase price passes through our trust accounts, such that the funds for a single real estate transaction will often exceed the FDIC insured limits. Subdivision of that individual transaction among multiple insured banks is simply impractical. Yet, as we continue to see bank failures in the news, this reduction in FDIC coverage is cause for concern.

While we would all hope that no court would impose liability on an attorney for choosing to maintain his or her trust account in a failed bank, if the worst happens, your clients will make exactly that claim – probably naming both your firm and its title insurer(s). We can all envision unhappy results for the law firm in this situation. Regardless of the ultimate ruling, this will be an expensive case to defend and harmful to the firm's ongoing business and reputation.

While the specific duties owed by an attorney in selecting a bank and the standards for liability are less than clear – and fortunately have not been tested in Florida courts – the reduction in FDIC coverage levels provides an opportune time to review the FDIC rules. This article suggests a five part approach to reduce your exposure in the event of a bank failure.

Summary of Recommendations:

So, how can we protect our client's money while also protecting our firm from unexpected and perhaps unreasonable liability? In this article, I offer five recommendations:

- In your engagement letter, disclose to your client the bank(s) you use for your trust account.
- Move your trust accounts to a "Safe" Bank – Easier said than done, right?
- Structure your trust account to maximize the extent of your FDIC coverage. There are ways to qualify your trust account for $250,000 of coverage for <u>each of your customers</u>, instead of $250,000 for your entire trust account (sometimes referred to as "Pass-through coverage"). Even with Pass-through coverage, amounts held in your trust account will be aggregated with your customer's other accounts to limit how much is covered.
- Expressly limit your liability to customers in your escrow agreements. Bank failures are matters beyond your control and should be disclaimed.
- Explore other options with your banker.

Recommendations:

Disclose to your Customer.

Full disclosure to your client is always the best policy.

FDIC insurance coverage limits are not per account but per owner. If your client happens to already have a large deposit or CD in the bank where your firm's trust account resides, the addition of moneys to your trust account might push the client outside of coverage limits unwittingly. So the recommendation is to advise your clients of the choice of banks, FDIC's $250,000 coverage limitation, and that the limitation applies to the aggregate of all deposits they may have in the same bank – preferably in your engagement letter. Encourage them to discuss any concerns with you. A separate account may be established at another bank to address a client's legitimate concerns. This approach also bolsters the argument that your client has approved and assumed the risk of the choice of banks.

Move to a "Safe" Bank.

The best answer is to avoid the problem entirely by keeping your trust accounts in "safe" banks. That begs the real questions –

"Which banks are safe?"

"Which banks are *too big to fail*?"

A wealth of financial data on individual insured institutions is available directly from the FDIC.[2] However, that data requires a careful evaluation and regular updating, something few of us have the expertise or time to do well. Fortunately, there are several services that have evaluated the filings made by each bank and offer their "opinion" of the risk of holding deposits in those banks. Some are subscription

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services, some free. One of my personal favorites – because it is easy to use and inexpensive – is bankrate.com.[3]

Keep in mind that these are nothing more than the opinion of the various services, and we have all seen how well that worked out for mortgage backed securities. In a worst case analysis, no single "opinion" will protect you from liability. Your reliance on any rating (by then proven tragically wrong) will be questioned just as it has been for mortgage backed securities. But if the worst happens, I would rather justify my bank selection based on an expert opinion rather than a referral relationship I might have with a banker.

The best advice is to check the rating of your chosen bank. If they are not rated well – MOVE YOUR TRUST ACCOUNT. It is simply not worth the headache of dealing with a bank failure, even if the account is fully insured. Update your search regularly – perhaps monthly, and anytime the rumors start to fly – as things can change quickly.

One additional caution: For smaller banks, the sudden removal of a large trust account balance may be enough to trigger the very bank failure you are hoping to avoid. Where your trust account balance constitutes in excess of 1% of the bank's total deposit assets, you may want to consider a phased reduction of the account balance, redirecting some incoming deposits into a trust account at the "safer" bank, and probably having a candid discussion about the process with your bank officer.

This is not a time to let loyalty to a local bank, or a good referral relationship, interfere with your objective analysis and protecting your client's funds.

Maximize the Extent of FDIC Coverage.

Under some circumstances, the FDIC will provide "pass-through" coverage for each of your clients/customers up to $250,000 limit. Regardless of the rating of your chosen bank, your goal should be to make sure that each of your customers has as much FDIC insurance protection as possible.

The basic rule,[4] as set forth in 12 C.F.R. §330.5(b)(2), states:

> The FDIC will recognize a claim for insurance coverage based on a fiduciary relationship only if the relationship is expressly disclosed, by way of specific references, in the "deposit account records" (as defined in § 330.1(e)) of the insured depository institution.

The express indication that the account is held in a fiduciary capacity will not be necessary, however, in instances where the FDIC determines, in its sole discretion, that the titling of the deposit account and the underlying deposit account records sufficiently indicate the existence of a fiduciary relationship (emphasis added). As one delves further into

the regulation and the few opinions issued on this subject by the FDIC, it quickly becomes apparent that the FDIC always retains significant discretion in its interpretation of these rules, the adequacy of the disclosure in the "deposit account records," and which of the bank's records will be considered.

So as an attorney holding a trust account, your basic goal is to build a paper trail that fully and clearly discloses the fiduciary nature of the account in the "safe" bank's "deposit account records."[5] It is not enough that your checks and deposit slips both describe it as a "Trust Account."

While it seems obvious to all Florida lawyers that trust accounts are the property of the client, not the law firm; given the degree of discretion maintained by the FDIC, there is no clear – absolutely certain – way to assure that the FDIC will provide "pass through coverage" to protect each customer's interest in the trust account after a bank has failed.

Thus, these recommended steps are offered in an abundance of caution and a sincere hope that their adequacy will never be tested:

> Make certain that the deposit opening documents are updated to reflect the name of the account as "[Law Firm Name] Trust Account"[6]
>
> Ask that the updated account opening documents – and which piece of paper this appears on may be critical under the FDIC rules – clearly recite that:
>
> "This is a law firm trust account under Chapter 5 of the Rules Regulating the Florida Bar containing funds belonging to others received by the law firm in a fiduciary capacity."

File the required IOTA designation and give notice to the Florida Bar Foundation as required by Rule 5-1.1(g)

12 C.F.R. 330.5(b)(2) requires that the details of the relationship and the interests of other parties "must be ascertainable either from the deposit account records of the insured depository institution or from records [of the law firm/title agent]". So you have to keep good trust account records. No surprise there.

While it is arguably unnecessary under the language of the rule, given the scope of the FDIC's discretion, I recommend you formally supplement the bank records by hand-delivering to your bank officer (and getting them to acknowledge receipt) a document entitled "Supplement to Deposit Account Record" and again recite that

> "[Name of Account] [account number]
>
> This is a law firm trust account under Chapter 5 of the Rules Regulating the Florida Bar containing funds belonging to others received by the title agent/law firm in a fiduciary capacity. The relationship and the interests of other parties in this account are ascertainable from records maintained, in good faith and in the regular course of business, by [the law firm]."

Taking these steps to assure coverage of each customer's interest in a trust account is not a panacea. Because the entire purchase price for each transaction is usually in a trust account at the moment of closing, many customer sub-accounts will exceed the $250,000 insurance level at some point during the transaction. So at best, maximizing the FDIC coverage is a supplement to picking a "safe" bank.

Limit Your Liability with a Well Written Escrow Agreement.

While I would hope that the courts will not impose liability on a law firm for bank failures and other matters clearly beyond its control, that result is by no means certain. An escrow relationship may be modified or limited by contract at least where not contrary to statute or notions of unconscionability.

"Best Practices" have long dictated that no funds should be held without an express written escrow agreement or engagement letter. Today, I will go a step further and suggest that those escrow agreements and engagement letters should expressly disclaim liability for, among other things,

> "Any loss or impairment of funds that have been deposited in escrow while those funds are in the course of collection or while those funds are on deposit in a financial institution if such loss or impairment results from the failure, insolvency or suspension of a financial institution, or any loss or impairment of funds due to the invalidity of any draft, check, document or other negotiable instrument delivered to the Escrow Agent."

This recommendation can be problematic when handling routine real estate closings. The FR/BAR and other "standard" real estate contracts do not include this level of protective language in their escrow provisions. Because the attorney/title agent is not usually a party to the initial contract, and not obligated to accept an escrow simply because a contract has been signed, the limitation on liability needs to be agreed by way of a supplemental letter "accepting" the escrow subject to the various terms and conditions.

Discuss Other Options with Your Banker

Bank services and offerings continue to evolve. I am aware of at least three bank programs which effectively

supplement FDIC coverage and suspect there are others. After maximizing the FDIC coverage for the benefit of each client, limiting your liability in your engagement letter and escrow agreements, and moving to a "safe" bank, discuss other options with your banker. These are the three programs which might provide additional protections:

Trust Accounts Collateralized by Securities. Florida law has long required state government deposits (over the FDIC limits) to be secured by pledges of additional collateral.[7] Banks have created programs which provide this additional collateral (for a fee) to back government deposits. These programs are available to other depositors. Clarification of whether any specific collateralized account (and its fees) qualifies under IOTA rules should be sought from The Florida Bar before use.

Institutional Deposits Corp. of Miami has created a money-market deposit account, in which the funds are deposited throughout a network of 184 banks in order to assure full FDIC coverage. The author has not investigated whether the details of this Miami-based program comply with The Florida Bar requirements, but it is an intriguing approach.

Repurchase Sweep Accounts. In a sweep account, the balance in the trust account at the end of the day is "swept" and invested in U.S. Government securities. The IOTA program permits the use of such accounts if they meet certain requirements.[8] While U.S. Government securities are not insured by the FDIC, they are backed by the "full faith and credit" of the United States. There is a risk of principal loss should the market fluctuate suddenly, and, because the funds are in the bank account at least part of each day, FDIC coverage may still be a relevant concern depending on the time of day when the bank was shut down.

Conclusion

The decision to implement any of these recommendations is a matter of business judgment to make considering the size of a law firm's average client deposit, the overall size of the trust account, the reputation of the financial institution, and the firm's overall adversity to risk and evaluation of the uncertainties using the prudent man standard.

Regardless of the business judgment reached on any specific recommendation, these are certainly the "interesting times" of the Chinese curse. With regard to FDIC insurance, we are operating in largely (and fortunately) untested legal waters – either as to the FDIC interpretations in a particular case or as to our liability as escrow agents for bank failures and other matters beyond our control. Absolute safety is not possible.

However, by keeping your trust accounts in "safe" banks, building a paper trail to support maximum FDIC coverage, and contractually limiting your liability and utilization of alternative bank vehicles, you can reduce your exposure to this "interesting" issue.

Endnotes:

1 Blankenship, Gary, Unlimited FDIC Protection for Trust Accounts Expires, *The Florida Bar News*, Jan. 15, 2013.

2 http://www.fdic.gov/bank/index.html

3 http://www.bankrate.com/brm/safesound/ss_home.asp

4 The pertinent portions of the FDIC rules have been consolidated at: http://www.flta.org/resources/Documents/Govt%20Affairs%20Committee/FDIC%20Rules.pdf

5 "Deposit account records" are defined term in 12 C.F.R. 330.1(e)

(e) Deposit account records means account ledgers, signature cards, certificates of deposit, passbooks, corporate resolutions authorizing accounts in the possession of the insured depository institution and other books and records of the insured depository institution, including records maintained by computer, which relate to the insured depository institution's deposit taking function, but does not mean account statements, deposit slips, items deposited or cancelled checks.

6 We describe it as updating, because the path of least resistance is to submit all new paperwork, even if the account numbers remain the same. The same process applies to special purpose and interest-bearing trust accounts established at client request. Even though all of the initial funds may come from a single person – and therefore be subject to one $250,000 coverage limit – at some point during the process, other parties will acquire some rights to or interest in the escrow funds. Having appropriate language in the bank's "deposit account records" preserves the ability to argue that multiple parties are affected and additional "pass through" coverage should be available.

7 See e.g., Ch. 280, Fla. Stat. (2012).

8 Rule 5-1.1(g), Florida Bar Rules Regulating Trust Accounts.

Hillsborough County Bar Association Diversity Networking Event

By Tara Rao, Esq., The Rao Law Firm, P.L., Lutz, Florida


T. RAO

On Saturday, February 16, 2013, the Hillsborough County Bar Association (HCBA) held its annual Diversity Networking Event in downtown Tampa at the HCBA building. The event had a great turnout with 84 students traveling to Tampa from various law schools, including University of Florida Levin College of Law, Stetson University College of Law, Ave Maria Law School, Thomas M. Cooley Law School, Florida State College of Law, Florida A & M University, and one out-of-state school, Southern Illinois College of Law.

Law School Students Caitlin Powell (FSU), Sam Craparo (UF), and James Glover (UF) all attended The Real Property, Probate and Trust Law Section (RPPTL) Conference in Tallahassee and attended this HCBA event as well. The RPPTL Section sponsored a booth and the members who attended had an opportunity to engage with students of all classes. Sam Craparo and James Glover also helped with the booth and were able to share their conference experience with potential student members.

The event included a one hour CLE panel discussion about diversity showcasing local voluntary bar associations. Navin Pasem (RPPTL Executive Council Member and past Fellow) served as a panelist on behalf of the South Asian Bar Association of Florida, along with Victoria Cruz-Garcia from the Tampa Bay Hispanic Bar Association, Jason Liu from the Asian Pacific Bar Association of Tampa Bay, Ric Asfar representing people of Middle Eastern and North African descent, Kim Byrd from the National Lesbian, Gay, Bisexual and Transgender Bar Association, Christine Derr from the Hillsborough Association for Women Lawyers and Cory Person of the George Edgecomb Bar Association. Caroline Johnson Levine moderated the discussion which provided law students with varying perspectives from the diverse panel of local attorneys. Local law firms, substantive Sections of the Florida Bar, and voluntary bar associations sponsored the event with booths and giveaways for the students.


At the microphone, the moderator of the event, Caroline Johnson Levine, Asst. Attorney General, Tampa, FL

Membership, Diversity and Law School Liaison Committee Update – Focus on Law Students

By Stacy Kalmanson, Co Vice-Chair of the Committee


S. KALMANSON

The 2012/2013 school year has been very busy for the Membership, Diversity and Law School Liaison Committee. Melissa Murphy hosted a pre-game tailgate event for University of Florida students at her home. Next, the Committee held a panel event at Florida A & M Law School in Orlando. We also enjoyed being one of the sponsors of the Kozyak Minority Mentoring Picnic in Miami. Last fall, members also spoke at Nova Southeastern School of Law. This February, we finally began our new law student affiliate membership program. For $20, law students can become affiliate members of RPPTL and take advantage of the many benefits offered by being part of the RPPTL group. So far, the program has been a huge success. Students from UF, Florida State University, and Stetson have already joined in just the first two weeks (and we expect many more).

Additionally, we have been busy hosting and planning events around the state. In February 2013, we held a speaker event at FSU. In addition, thirteen students from three schools attended the Executive Council meetings in Tallahassee. We also took part and enjoyed being one of the sponsors of the Hillsborough County Bar Association Diversity Committee's Networking Event on February 16th. In March and April 2013, panels and speakers are scheduled (or are being planned) for Barry University School of Law (March 13th), UF, Nova, Florida International School of Law, and University of Miami. A Meet and Greet for Stetson is to be held at the Tampa Club on March 14th.

Thank you to our Chair of the RPPTL Section Fletch Belcher, Chair-Elect Peggy Rolando, and all of the participating RPPTL Executive Council members, especially the At-Large Members, for their help and support with these events and programs. We look forward to hosting student attendees at the May 2013 meeting in St. Pete and welcome our new student affiliate members.

Photos from UF pre-game tailgate event

Welcome to Our New Law Student RPPTL Affiliate Members!

A. Cody Emerson
Andrew Oates
Ashley Duz
Austin Hale
Brandon Pfluger
Caitlin Powell
Cari Allen
Carter McMillan
Charis Campbell
Christina Doan
Daniel K. Miles
Danielle Amico
David Houston
Dean Makris
Dylan Shea
Eric Fisher
Eula T. Bacon
James Glover
Jessica Baker
Justin Bennett
John Loar
Laura Jo Lieffers
Michael Niles
Michelle Adams
Paige Baker
Phylicia D.C. Pearson
Robert Laur
Robert Volpe
Ryan Abernethy
Sam Craparo
Scott Foss-Kilburn
Sean Hernandez
Seth Benes
Stuart Boone
Thomas Hagen

Practical Considerations for Powers of Attorney Intended for Financial Institutions

By Deborah L. Russell, Esq., Cummings & Lockwood LLC, Naples, Florida


D. RUSSELL

The Florida Power of Attorney Act[1] became law on October 1, 2011. Since the Act's effective date, it has become evident to all attorneys that drafting an effective power of attorney is no longer as simple as it used to be. There are now estate planning "super powers" that must be initialed. There are new default rules, and there are new mandatory rules. There has not been enough time to have anecdotal evidence of how receptive third parties will be to powers of attorney executed after the effective date and those executed prior to the effective date. This article will focus primarily on powers of attorney that are intended to be used for banking and investment purposes. Due to space limitation, "best practices" for drafting and executing the estate planning super powers will be covered in a later article.

Although springing powers of attorney executed before October 1, 2011, are valid under the new Act, it is unknown whether having such a power may delay the acceptance of the document by a financial institution. If you ask an estate planning attorney to describe the most common use of a power of attorney, the estate planning attorney will probably answer that the primary purpose of a durable power of attorney is to provide an agent with the ability to handle the principal's financial affairs in the event the principal is unable to do so.

For example, the attorney may have drafted a revocable trust for the client. Ignoring the attorney's written instructions, the client may have neglected to fund the client's revocable trust. The client now has a serious illness and is completely incapacitated. The attorney instructs the client's child to use the durable general power of attorney that names the child as agent to transfer ownership of the client's $3,000,000 account at a financial institution to the name of the client's revocable trust. Assuming the client only has days to live, it is imperative that the durable general power of attorney be recognized as valid by the financial institution where the assets are held. Whether or not the document is timely accepted (i.e., before the client dies) may depend on whether the client signed the power of attorney before or after October 1, 2011.

Under the prior law governing Florida powers of attorney, there was no guidance as to how much time a financial institution could take when determining whether the institution would accept a power of attorney presented to the institution. When a power of attorney is presented to a financial institution, it may routinely be shuttled to in-house counsel for legal review. Section 709.2120 of Florida's new statute now provides a roadmap for limiting the time a financial institution has to accept or reject a power of attorney under certain circumstances. If the power of attorney expressly contains the authority to conduct banking transactions pursuant to Section 709.2208(1), Fla. Stat., or the authority to conduct investment transactions pursuant to section Section 709.2208(2), Fla. Stat., then the period allowed for review by a financial institution is shortened to four business days.[2]

Section 709.2208(1) and 709.2208(2), Fla. Stat., are the only two sections of the new statute that can be incorporated by reference into a Florida power of attorney. All other powers must be expressly enumerated in the document.[3] Nevertheless, even though the new statute permits incorporation by reference for banking and investment transactions, merely referencing the section numbers in a power of attorney may not be the best practice for two reasons, both of which are practical reasons and not legally mandated.

First, consider that the power of attorney may be used outside of Florida. An out-of-state financial institution, not being familiar with Florida law, will have no idea what powers are being incorporated by reference. Second, even if such a power of attorney is presented to a financial institution in Florida, the teller or customer service representative at that financial institution may not recognize the statute number, whereas he or she would clearly understand the authority granted if the powers listed in the document were a mirror image of the wording of the statute.

To ensure that a durable power of attorney has the best chance of being immediately accepted, without being routed for legal review, the best practice may be to create a durable limited power of attorney that includes only the authority to conduct banking transactions and/or the authority to conduct investment transactions. Although there is no guarantee of immediate acceptance by a financial institution, the probability is much higher that this type of document would sail through any type of legal review faster than a ten or twelve page durable general power of attorney.

The durable limited power of attorney is also effective to ensure that all of the client's assets pass in accordance with the client's estate plan. Many clients will title a checking account or a brokerage account in joint names with one child. The client's explanation will be that the client wants the child to have immediate access to the funds in the event the client becomes incapacitated. This creates a problem on the client's later death if a substantial sum of money remains in the jointly owned account. The child who owns the account is under no obligation to return the assets to the deceased client's estate as an account that is titled in the names of two persons is presumed to be jointly owned with rights of survivorship.[4] This statute provides that the presumption of survivorship rights created by the statute can

only be overcome by proof of fraud or undue influence or clear and convincing proof of a contrary intent, a challenge that can be costly to overcome. A durable limited power of attorney for banking transactions can specifically state that it applies only to one identified account, thus eliminating the need for joint ownership of an account.

If a power of attorney complies with the new statute, Section 709.2120(1)(c), Fla. Stat., provides that a third party may not require an additional or different form for authority granted in the power of attorney presented. This will prevent financial institutions from requiring that a client sign a separate power of attorney on the financial institution's form.

A certain amount of confusion will undoubtedly arise when two agents are named in one document. The third party who is presented with the document will want to know whether each agent has independent authority or whether concurrence of the agents is required. If the document is silent on the issue, the answer will depend on whether the document was executed prior to October 1, 2011, or on or after October 1, 2011. The default rule under the old statute provided that multiple agents must act in concert (or by majority if more than two agents were named) unless the document specified otherwise. In contrast, the default rule under the new statute allows each agent named to act independently unless the document otherwise provides.[5]

Many clients prefer to have two or more children acting together for making major financial decisions but are concerned about the administrative difficulty of requiring two or more signatures on every banking transaction. Section 709.2111(6), Fla. Stat., provides a solution to this dilemma. If a power of attorney requires that two or more agents must act together, the new statute provides that one or more of the agents may delegate to a co-agent the authority to conduct banking transactions. This allows the agents to decide whether one agent should be entrusted with check writing. Because the persons named as co-agents may not be aware of this new statute, the power of attorney should contain specific language requiring concurrence but allowing delegation for banking transactions.

Serving as an agent under a durable power of attorney is not an easy job. Section 709.2114(1)(c) of the statute mandates that the agent has a duty to keep a record of all receipts, disbursements, and transactions made on behalf of the principal. This is a non-modifiable duty as evidenced by the word "must" in the statute. For the agent who is tasked with bill paying, hiring caregivers, and monitoring investment accounts, this can be a time consuming task.

Section 709.2112(2) of the statute provides that, unless the power of attorney provides otherwise, a qualified agent is entitled to compensation that is reasonable under the circumstances. The term "qualified agent" includes family members, financial institutions that have trust powers and a place of business in Florida, an attorney or certified public accountant licensed in Florida, or any natural person who is a Florida resident and who has never been an agent for more than three people at any one time.[6] If the client is naming a family member and does not wish for that family member to be compensated, the power of attorney must include specific language negating any compensation.

The power of attorney can no longer be considered a form document full of boilerplate provisions where one size fits most. It is a document that requires specific input from the client and careful attention by the drafting attorney to ensure that the document will be accepted without delay when presented. Only time will tell whether some of the suggestions recommended here have the intended effect.

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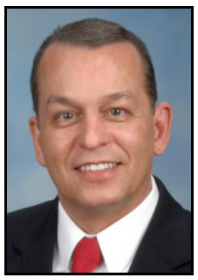
Endnotes:

1 §§ 709.2101 – 709.2402, Fla. Stat.
2 § 709.2120(1)(b), Fla. Stat.
3 § 709.2201(1), Fla. Stat.
4 § 655.79, Fla. Stat.
5 § 709.2111(1), Fla. Stat.
6 § 709.2112(4), Fla. Stat.

County Court Jurisdiction in Landlord-Tenant Actions for Possession—

Does § 34.011, Florida Statutes, Need to Be Clarified?

By Anthony J. Horky, Esq., Anthony J. Horky, P.A., Boca Raton, FL


A. HORKY

There is an open debate whether a county court in Florida has the power in a landlord-tenant eviction action to order the tenant to deposit rent monies into the court registry when the amount ordered exceeds the court's jurisdictional limit. One position holds that in every landlord and tenant action related solely to the right of possession of real property, regardless of the amount of rent alleged to be due or disputed, the county court has exclusive jurisdiction. The opposing view is that when the amount of rent alleged to be due exceeds $15,000.00, and the tenant asserts the defense of payment or contests the amount of rent alleged to be due, only the circuit court has jurisdiction over the eviction action. This article will examine the interaction between Florida's constitutional and statutory grant of jurisdiction and the procedural laws that govern landlord-tenant actions, identify a statutory ambiguity, and propose a remedy that will eliminate differences in how courts interpret § 34.011(2), Fla. Stat.

Circuit Court and County Court Jurisdiction in Florida

There are two types of jurisdiction: subject matter and personal. Subject matter jurisdiction means the power lawfully conferred upon a court to deal with the general subject involved in the action.[1] The subject matter jurisdiction of the circuit court and county court in civil cases is established by the Florida Constitution and statutory provisions allocating jurisdiction to these courts.[2] Every original action is within the subject matter jurisdiction of either the circuit court or county court.[3] The circuit court has original jurisdiction in all civil actions that are not vested in the county court.[4] County courts have original jurisdiction in all actions at law in which the amount in controversy does not exceed $15,000.00, exclusive of interest, attorneys' fees and costs.[5]

Circuit courts and county courts have concurrent jurisdiction to consider landlord and tenant claims within the amount of their respective jurisdictional limitations.[6] However, there are situations in which each court has exclusive jurisdiction. Circuit courts have exclusive jurisdiction in all cases of equity and in all actions for ejectment.[7] The circuit court also has jurisdiction over appeals from the county court.[8] The following statutory grant of jurisdiction to county courts in landlord and tenant actions is ambiguous.

Pursuant to § 34.011(2), Fla. Stat.:

> The county court shall have exclusive jurisdiction of proceedings relating to the right of possession of real property and to the forcible or unlawful detention of lands and tenements, except that the circuit court also has jurisdiction if the amount in controversy exceeds the jurisdictional limits of the county court or the circuit court otherwise has jurisdiction as provided in s. 26.012. Emphasis added.

The key to determining which court has jurisdiction in a landlord and tenant action relating to the right of possession is the amount in controversy limitation. The issue is what does the legislature mean by "amount in controversy" in the context of an action relating to the right of possession of real property? If an action relating to the right of possession centers on the "right of possession" where does an "amount in controversy" arise in that action?

Landlord and Tenant Eviction Actions

Florida's Landlord and Tenant Statute, Chapter 83, Part I (nonresidential tenancies) and Part II (residential tenancies) governs the rights and obligations of landlords and tenants including the legal proceedings by a landlord to recover possession of real property from a tenant. This article focuses on nonresidential tenancies under Part I.

When a tenant leasing any land or premises fails to pay the landlord rent at the time it becomes due, the landlord has the right to file an eviction action to recover possession of the premises.[9] After the tenant is served with the complaint and summons in an action to recover possession, unless the tenant contests the amount of rent alleged as unpaid, the tenant must deposit into the court registry the amount alleged in the complaint.[10] The tenant may also assert the defense of payment or satisfaction.[11] If the tenant contests the amount of rent alleged to be due, a hearing is held by the court to determine the amount of rent that the tenant is required to deposit into the court registry and any amounts that accrue during the pendency of the action. If the tenant answers the complaint and asserts the defense of payment or satisfaction, the case proceeds to final hearing or trial.

In the context of a pure possession action, that is, a one-count complaint that seeks only possession, there are different interpretations whether the county court has exclusive jurisdiction when the amount of rent alleged as unpaid exceeds $15,000.00 and is contested by the tenant, or the tenant raises the defense of payment. Both interpretations are reasonable but result in different outcomes. One interpretation is that the phrase "amount in controversy" found in § 34.011(2), Fla. Stat., applies only when the landlord also seeks to recover damages in the same action, or where

continued, next page

the tenant brings a counterclaim against the landlord in excess of $15,000.00. Under this interpretation, a county court retains exclusive jurisdiction of the action regardless of the amount of rent contested. The county court determines the amount of rent a tenant must pay into the court registry and enters an order requiring the tenant to deposit the rent to avoid entry of a default. If the tenant fails to pay the rent into the registry it waives all defenses other than payment. In order to avoid a jurisdictional issue when the amount of unpaid rent exceeds $15,000.00, practitioners routinely file a pure possession action in county court and file a separate action in circuit court to recover monetary damages. However, not all courts agree that this is sufficient to prevent the action from being transferred to the circuit court.

The fact that reasonable minds differ on this jurisdictional issue leads to the conclusion that something more is needed in order to establish a consensus amongst Florida courts.

The alternate interpretation is that "amount in controversy" means the amount of rent alleged to be owed and contested by the tenant in pure possession actions. If the complaint contains an allegation that the unpaid rent exceeds $15,000.00, and/or the tenant contests the amount alleged as unpaid, the county court's jurisdictional limit is exceeded, it cannot order the tenant to pay that amount of rent into the registry, and the case must be transferred to the circuit court.[12] This interpretation transforms an action where the right of possession is at issue into an action where the issue is the amount of rent that is unpaid. For the following reasons, this interpretation undermines the summary nature of eviction proceedings and results in an adverse financial impact on landlords.

Actions for removal of the tenant for failure pay rent are governed by the summary procedure statute, § 51.011, Fla. Stat.[13] The summary procedure statute envisions an expedited procedure to determine the right to possession promptly and without the necessity of deciding all other issues between the parties.[14] All defenses of law or fact must be contained in the tenant's answer which must be filed within five (5) days after service of process.[15] The summary procedure is not applicable to suits for damages (past due and/or future rents or other monetary obligations under the lease). In order to preserve the statute's intent—to quickly remove nonpaying tenants from possession—eviction actions must move in an expedited manner through the court system.

Under the latter interpretation, every contested nonresidential action relating solely to the right of possession and involving unpaid rent over $15,000.00 would require commercial landlords to file pure possession actions in circuit court. This is inconsistent with the policy favoring the summary nature of possession actions. For a variety of reasons, circuit courts are not structured to summarily adjudicate eviction proceedings and the costs to the parties, as well as the time required to remove a nonpaying tenant, would increase as a result. County courts are more familiar with the eviction process and adjudicate these types of actions routinely and efficiently. Pure possession actions need to remain the exclusive jurisdiction of the county court if the summary procedure statute is to serve its intended purpose.

In the context of nonresidential tenancies, Chapter 83, Part I, the author posits that the solution to this jurisdictional issue may already exist in a limitation found in § 83.232(2), Fla. Stat.:

> (2) If the tenant contests the amount of money to be placed into the court registry, any hearing regarding such dispute shall be limited to only the factual or legal issues concerning:
>
> (a) Whether the tenant has been properly credited by the landlord with any and all rental payments made; and
>
> (b) What properly constitutes rent under the provisions of the lease.

The purpose of this subsection seems aimed to remove the "amount in controversy" trigger that would require transfer of the eviction action from the county court to the circuit court. Under this procedure, the court makes a factual determination whether the landlord properly credited the tenant for all rent payments made, and a legal determination of what constitutes "rent" under the lease. The requirement for payment of rent into the court registry is not an adjudication of the merits and is procedural rather than substantive. Chapter 83 is contained in Title VI of the Florida Statutes titled: Civil Practice and Procedure. Arguably, landlord and tenant eviction proceedings are governed by procedural laws and no more impact a court's jurisdictional limitations than the Florida Rules of Civil Procedure. However, it does not appear that this theory has solved the problem.

Finding a Solution Rests with the Legislature

Because the jurisdictional limitation in § 34.011(2), Fla. Stat., is subject to more than one interpretation, the result is uncertainty and a lack of uniformity in outcome. An ambiguity suggests that reasonable persons can find different meaning in the same language.[16] For purposes of statutory interpretation, a statute is regarded as ambiguous when the language may permit two different outcomes.[17] The fact that reasonable minds differ on this jurisdictional issue leads to the conclusion that something more is needed in order to establish a consensus amongst Florida courts. What practitioners and commercial landlords need is uniformity in the application of the law governing eviction actions where the amount of unpaid rent exceeds $15,000.00. An amendment

to § 34.011(2), Fla. Stat., can solve the problem.

Proposal to Clarify § 34.011(2), Fla. Stat.

It is recommended that § 34.011 be amended to clarify the extent of the county court's exclusive jurisdiction in pure possession actions. Specifically, the statute needs to clarify that the "amount in controversy" applies when a claim for damages exists in the same proceeding, whether for unpaid rent or a counterclaim by the tenant, or the circuit court would otherwise have jurisdiction. The clarification could read as follows:

§ 34.011(1), Fla. Stat., is amended to read:

(1) The county court shall have jurisdiction concurrent with the circuit court to consider landlord and tenant cases involving claims for money damages in amounts which are within its jurisdictional limits. The county court may issue a temporary and permanent injunction where appropriate for violation of ss. 83.40 et. seq.

§ 34.011(2), Fla. Stat., is amended to read:

(2) The county court shall have exclusive jurisdiction of proceedings relating to the right of possession of real property and to the forcible or unlawful detention of lands and tenements, except that the circuit court also has jurisdiction if the amount in controversy exceeds the jurisdictional limits of the county court or the circuit court otherwise has jurisdiction as provided in s. 26.012. For purposes of this subsection "amount in controversy" means a claim for money damages and is not applicable to the procedure for determination of rent proceedings pursuant to s. 83.232(1) and (2), F.S. and s. 83.60(2), F.S., or to the disbursement of money from the court registry pursuant to s. 83.323, F.S. and s. 83.61, F.S. In cases transferred to the circuit court pursuant to Rule 1.170(j), Florida Rules of Civil Procedure, or Rule 7.100(d), Florida Small Claims Rules, the demands of all parties shall be resolved by the circuit court.

Amending §34.011, Fla. Stat., will promote uniformity in court decisions throughout Florida by eliminating any ambiguity as to the grant of exclusive jurisdiction of county courts in landlord-tenant possession actions. The amendment will promote judicial economy by eliminating delays caused by the transfer of cases and the resulting increase in costs to the parties involved. Actions relating solely to the right of possession of real property should unquestionably be within the exclusive jurisdiction of the county court regardless of the amount of rent alleged as unpaid. ◼

Anthony J. Horky *is a member of the Landlord/Tenant Committee of the Real Property, Probate and Trust law Section of the Florida Bar, and wishes to thank members, Michael L. Grant and Gil O. Acevedo, for their assistance in working on the problem discussed in this article. Please submit your comments about this article to: ahorky@horkylaw.com.*

Mr. Horky was admitted to the Florida Bar in 1999. He earned his law degree from Nova Southeastern University, Shepard Broad Law Center in 1998, and graduated with honors from Florida Atlantic University in 1994. Mr. Horky focuses his practice on business and commercial litigation where he represents business owners in the areas of contract disputes, real estate litigation including foreclosures, landlord-tenant leasing and evictions, construction law and employment violations. His law practice is located in Boca Raton, Florida.

Endnotes:

[1] *Malone v. Meres,* 109 So. 677, 683 (Fla. 1926).

[2] Art. V. § 5(b), 6(b), Fla. Const.; §26.012, 34.01 and 34.011, Fla. Stat.

[3] Art. V, § 5(b), Fla. Const. [4] Art. V. § 5(b), Fla. Const.

[5] § 34.01, Fla. Stat.

[6] *Id.* at (1).

[7] § 26.012(2)(e), Fla. Stat.

[8] § 26.012(1), Fla. Stat.

[9] § 83.05, Fla. Stat.

[10] § 83.232, Fla. Stat.

[11] § 83.232, Fla. Stat.

[12] *See Lewis v. Williams,* Case No.: COCE 07-10704, Broward County, Florida, 14 Fla. L. Weekly Supp. 982b (Fla. 2007). *See also Good to Go Food Store, Inc. v. LRM Realty, LLP,* 2012 WL 2125943 (Fla. 2d DCA 2012) (county court's order to deposit past due rents was not void where the order specified an amount less than $15,000). *Cf. Alexdex Corp. v. Nachon Enterprises, Inc.,* 641 So.2d 858 (Fla. 1994) (although an action to foreclose a construction lien is an action seeking to judicially convert a lien interest against a land title to a legal title, the central focus is on the actual debt and not the underlying securing property).

[13] §§ 83.21 and 51.011, Fla. Stat.

[14] *Premici v. United Growth Properties, L.P.,* 648 So.2d 1241 (Fla. 5th DCA 1995).

[15] § 51.011, Fla. Stat.

[16] *Blanton v. City of Pinellas Park,* 887 So.2d 1224 (Fla. 2004).

[17] 4bA Fla. Jur. 2d Statutes § 14.

The RPPTL Visits The Biltmore House and Estate – a National Treasure

The Biltmore Estate – a Hub of Activity

The annual out-of-state meeting of the Real Property, Probate and Trust Law Section of The Florida Bar was held from November 14 through 18, 2012 at the site of one of our own national treasures: The Biltmore Estate. Our group was privileged to stay on-site at the four-star Inn on Biltmore Estate, which was built to accommodate visitors to The Biltmore House, which is the main house on the Estate.

The Inn on Biltmore Estate provides its guests with picturesque views of the Biltmore Estate's grounds and is a gateway of trails for its guests to explore all that the Biltmore Estate has to offer. In addition, the Biltmore Estate includes a winery that produces wines that are now being sold throughout the country, the Historic Horse Barn, designed by architect Howland Hunt (originally the hub of the Estate's agricultural operations), Antler Hill Village, which includes restaurants and shops of the Biltmore lifestyle, an Outdoor Adventure Center and the Biltmore Legacy Museum, highlighting the times of the Vanderbilts. The Biltmore Estate is still family-owned and is passionate about its mission of preservation through self-sufficiency. It does not receive any government funding or grants. It remains self-sustaining through innovation, creative thinking and through exploring venues such as wine-making in order to support itself. George W. Vanderbilt, at a very young age came upon the perfect spot in North Carolina's Blue Ridge Mountains and envisioned building a 250-room French Renaissance chateau. He hired the architect Richard Morris Hunt to build his mansion, The Biltmore House. Construction began in 1889. The Biltmore House and grounds located on The Biltmore Estate contains approximately 8,000 acres, including formal and informal gardens designed by Frederick Law Olmstead, the father of Landscape Architecture of America and creator of New York's Central Park. The Biltmore House is the centerpiece of Vanderbilt's legacy and remains the largest private residence in America and is a national historic landmark. George Vanderbilt officially opened the home to friends and family on Christmas Eve in 1895. The Biltmore House features 250 rooms and is still owned by the Vanderbilt descendants.

— Katherine S. Frazier

The RPPTL members and their families enjoyed many activities during the out of estate meeting, the following segments highlight some of events and adventures in their own words:

RPPTLs Take to the Trees – on a Zipline Adventure

It was a cool yet balmy Blue Ridge Mountain morning as we left the Biltmore Inn for the trees. As our bus approached the canopy in the valley of the ziplines, wild turkeys alerted white tail deer to take flight. Up above the tree tops and over snow fed streams, we would learn how to fly. Ten unique ziplines were waiting to take us on an adventure of a lifetime.

We began our treetop tour single file led by mountain guide Icarus "Fletch" Belcher, traversing a windswept rope bridge to the top of an ancient oak. There on our platform perch, we listened to instructions to stay far from the sun and watched as the orb burned off surly valley mists. Looking down, a panorama of forest privilege was exposed, breathtaking. From tree to tree, we were at the flagship location of Bonsai Design, Inc., America's leading canopy tour designer. Totally tree based, it was described by some of the more chimp-like members of our group as "a sculpture in the woods, built with environmental respect for minimal impact." Yet, as our body harnesses were locked on to the lines, the adrenaline impact was immediate and exhilarating. A thousand feet up and a thousand feet across, who goes first!?

Then, in an instant, whoosh! Icarus was flying through the trees, over the falls, birdlike, prehensile fingers seeking the wind, and a quick glance back with a smile.

— Joseph P. George, Jr.

Candlelight Christmas Tour of Biltmore House and Welcoming Reception at Lioncrest Veranda

The holidays arrived early for those of us who attended the Candlelight Christmas Tour of the Biltmore House. As our tour buses pulled into the Biltmore House grounds, we were greeted by an enormous and brightly lit Christmas tree in the center of the massive circular drive. Though Thanksgiving was still several weeks away, each room of the mansion was decorated and lit for the holidays.

Our tour started in the Entrance Hall and wound past the Winter Garden, lit by day from the glass roof and illuminated that evening by candlelight. A local high school choir was performing Christmas carols next to the fountain sculpture. The line of visitors snaked through the Billiard Room and into the Banquet Hall. The enormous dining space often used for dinner parties has a seven story ceiling which easily accommodated a towering live tree decorated for the season. George Vanderbilt opened the house for his family on Christmas Eve, 1895, and the docent explained that the annual Christmas party for Biltmore workers and their families was held in this Banquet Hall.

The Breakfast Room, the Second Floor Living Hall, sitting rooms and family bedrooms, all bathed in candlelight, provided a glimpse into the lives and the times of the Vanderbilts. Continuing on, we moved through the Damask Room, named for the draperies which originally framed the windows and the Claude Room honoring the French

painter Claude Lorrain whose prints hung on the walls. We moved downstairs to view the bowling alley, indoor swimming pool and gymnasium, used to entertain the family and their guests.

Though dazzled by the upper floors of the mansion, *Downton Abbey* fans were intrigued by the lower floor servant areas and the contrast between the upstairs and the downstairs. A household staff of between 30-35 servants supported the family and worked in the Pastry Kitchen, Rotisserie Kitchen, Main Kitchen and Laundry. The female servants lived in the house in small heated and furnished bedrooms. The male servants lived nearby over the stables.

As our tour ended at the chilly courtyard, we were anxious to return and learn more about the Vanderbilt family and the grand Biltmore House. The Candlelight Christmas Tour was a wonderful introduction to a great estate.

— Sandra F. Diamond

Blue Ridge Mountain Trail Hiking Adventure

Western North Carolina is well known for its hiking adventures and the areas around Asheville are a great example. The only problem is deciding which trail to take on any particular day. Adding a hiking adventure to the Section itinerary was a natural, and having Jerry and Sally Aron make the selection of trails was a natural too because they are avid hikers. Thank you Jerry and Sally for two great hikes, both of which were on or adjacent to the Blue Ridge Parkway!

First was a hike through the wooded grounds of the North Carolina Arboretum, and as the name implies, what better place could be found to see the native trees and plants of North Carolina. Our three mile hike on a brisk morning was principally along the Bent Creek Trail. For this trek we had a merry band of approximately 50 hikers. Having gotten the blood flowing, the hearty band next hopped on the Blue Ridge Parkway for a beautiful drive through tunnels and past mountain vistas to the trailhead on the parkway for the hike up to the top of Mt. Pisgah.

Second was the 1.5 mile (one way) hike to the 5,721 ft. summit of Mt. Pisgah. The trail head is just shy of 5,000 ft. in a high-elevation northern hardwood forest. We hiked ever upward through these leaf bare trees with views out to the valleys below. This was a rocky trail and the last half was the steepest but the reward was great. At the summit was an observation deck with spectacular views of the Pisgah Forest below, Cold Mountain, the Great Smokey Mountains far to the west and Asheville (Biltmore House) and Mt. Mitchell to the North.

It was a beautiful day, wonderful company and fun hikes. Interestingly, for those who toured the Biltmore House and stood on the outdoor verandah looking south, in the distance you can see Mt. Pisgah. All those lands (now parklands) were once a part of the original tract owned (and later conveyed to the US) by George W. Vanderbilt.

— Louis and Paula Guttmann

Lioncrest Veranda and Brief History of Vanderbilt Family and Biltmore Estate

By the time of the Executive Council meeting on Saturday morning, the RPPTLs, their spouses and guests had toured the Biltmore House. In fact, many of us had been through twice: once during the daytime, with or without audio supplement, and once at night, when the house was stunningly lit by candles – or, for the most part, electric lights that looked like candles.

One of the most interesting and informative highlights of the Asheville trip occurred on Saturday morning when the RPPTL members, spouses, and several of their children assembled in the chilly Veranda at Biltmore's Lioncrest Veranda, for two very special presentations: one by a descendant of Commodore Cornelius Vanderbilt, who built the fortune that enabled the estate to exist, and another by the general counsel for the Biltmore entities.

Diana Cecil Pickering, known to most everyone as Dini, traced her line through her grandfather and Cornelius's grandson, George W. Vanderbilt, who was just 25 when he came to western North Carolina in the 1880's. Charmed by the area, he purchased 125,000 acres in the Blue Ridge Mountains and commissioned his friend, architect Richard Morris Hunt, to design Biltmore House. The mansion is resplendent with its original antique furnishings as well as paintings by Renoir, prints by Durer, and family portraits by John Singer Sargent.

After George Vanderbilt's death, his widow, Edith, sold nearly 87,000 acres to the federal government to become the nucleus of Pisgah National Forest. George and Edith's only child, Cornelia, married a British diplomat, the honorable John Francis Amherst Cecil, in 1924. Biltmore House opened to the public in 1930. Cornelia and John's son, William Amherst Vanderbilt Cecil, retained the Biltmore House with 8,000 acres of land when he and his brother, Henry Vanderbilt Cecil, divided the estate in 1978. William Amherst Vanderbilt Cecil is the present-day owner of the Biltmore House and estate through the Biltmore Company. On the 100th anniversary of the opening of the home in 1995, he shocked guests by announcing his retirement as CEO of the company. It was only after he did not show up for work the next day that he was believed. Today the Biltmore Company's CEO is his son and Dini's brother, William Cecil, Jr.

Following Dini Pickering's presentation, Jack Stevens, former president of the North Carolina Bar and long-time general counsel for the Biltmore Company and related entities, also spoke to our group. Mr. Stevens explained how each family generation has added new concepts and operations, such as the Inn on Biltmore Estate (where we stayed), the vineyards and the winery, which ships its products throughout the United States.

Mr. Stevens also explained that some of the more recently-developed operations are held in different entities owned

continues after photos

RPPTL Section Annual Out-of-State Meeting

Biltmore Estate, Asheville, NC Nov. 14-18

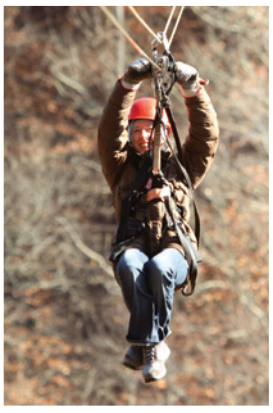
Taking a morning walk around the Biltmore House

A misty morning at the Biltmore Estate

Jerry Aron's happy hiking group along the Bent Creek trail

Robert and Jo Ann Graham, Joseph George, Nancy Baumann, Louis Guttmann, Phillip Baumann and Paula Guttmann after a fantastic zip line experience

Anne and Woody Pollack, Fletch Belcher, Chip Waller, Yvonne Sherron and Tray Goldman after a most exciting ride



Here comes Anne Pollack

Some fearless young members of the Kelley Clan

Laura Sundberg and Judge Patricia Thomas with her daughter, Brittany Vitter, at the Lioncrest Veranda

Sharaine Sibblies, Marsha Madorsky and Gwynne Young at the Lioncrest Veranda

Jerry Aron leading the way through the trail

Pete and Susan Dunbar with Martha Edenfield and her guest, Clay Newton, at a viewing spot on the trail

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

The happy group of Blue Ridge Mountain hikers

Kathy and Mike Stafford with Jennie and Jeff Goethe at Diana dinner

Diana "Dini" Pickering speaking at the Executive Council meeting

Fletch Belcher with Jack Stevens and Dini Pickering

Barry Spivey and Tami Conetta relaxing between activities

View of Biltmore House glowing with Christmas lights from the site of the Diana dinner

Diane Timpany from one of our general sponsors, Wright Private Asset Management, with daughter, Helena, and John Peterson at the Diana dinner

Photos by Michael Gelfand, Rob Freedman and Debbie Goodall.

by family members representing different generations. The vineyards and winery, which are located across the French Broad River on property originally owned by France, are held and managed by Dini and her brother, William. Mr. Stevens also works closely with Dini and the Cecil family to inculcate the new generations with the heritage and values of the family and the property.

— Mary Ann Marger

Diana Reception and Dinner

Diana "Dini" Pickering, at the Saturday morning meeting, highlighted the Biltmore winery production, which wines are now distributed in 28 states, including Florida, and remarked that she hoped we would enjoy sampling the Biltmore wines that evening at the Diana reception and dinner.

The dinner on a bluff in front of the Biltmore House was a stunning venue. We entered through a lovely foyer and a statute of the goddess Diana set high on top of a hill overlooking the Biltmore House was within view. With clear skies and crisp, cold air, the view of the house illuminated at nighttime was breathtaking. The tables were set with candles and orchids and everyone enjoyed great conversation and cocktails with light music in the background. Dinner was a four-course affair, each one better than the last, and everything paired perfectly with wine selections from the Biltmore's award winning wineries. The award winning Biltmore North Carolina Chardonnay was the compliment to seafood and chicken, while the Biltmore Red Blend of Cabernet Sauvignon and Merlot was poured with the steak. Those were only two of the eight Biltmore wine selections on offer.

Our distinguished RPPTL Chair, Fletch Belcher, thanked everyone for attending the out of state meeting and thanked the Biltmore staff for their amazing hospitality, making all of us feel so welcomed and comfortable. He thanked our reception sponsor, Wells Fargo Private Bank, and dinner sponsors, First American Title Insurance Company and Regions Private Wealth Management for their generosity and support. All of the guests cheered and toasted the evening's and the meeting's success. Dessert and cordials followed for a late night enjoyed and remembered by all for the graciousness of the Biltmore setting.

Many thanks to Fletch and Gayla Belcher for this fabulous choice of venue for the out-of-state meeting.

—Amber Jade Johnson

Roundtables

No Real Property or Probate and Trust Law Roundtables were held at the RPPTL Section's November, 2012, Executive Council out-of-state meeting. The summary of the minutes of each Roundtable held at the February, 2013, RPPTL Executive Council meeting will appear in the summer issue of *ActionLine*.

Statutory Proposals for Settlement In Probate and Trust Litigation

By Jonathan Galler, Esq., and Payal Salsburg, Esq., Proskauer Rose LLP, Boca Raton

Florida's statutory proposal for settlement is a powerful, yet often misunderstood, litigation tool. A valid statutory proposal certainly has the potential to bring about the early resolution of a lawsuit. Even when it does not, however, a valid statutory proposal for settlement – and the possibility of an attorney's fees judgment that comes with it – can nevertheless dramatically change the dynamics of a litigation matter. To say that the practical application of the statute is a complex matter would be a serious understatement. For this reason, this article will review the ever-changing scope of the statute and dissect some of the numerous appellate opinions interpreting the statute.[1]

The Basics

Section 768.79, Fla. Stat., [2] commonly known as the "proposal for settlement" or "offer of judgment" statute (referred to herein as the "statutory proposal statute"), provides that in any civil action for damages, either party may formally offer to settle all or some portion of the case for a specific monetary sum. The heart of the statute, and the source of most of its jurisprudential twists and turns, is its fee-shifting provision. The specific way in which the provision works is described below, but the general principle is this: if a party (the "offering party") proposes a formal settlement offer and the other party (the "rejecting party") rejects said over, and the dispute is subsequently resolved with a judgment that leaves the rejecting party in a less favorable position that it would have been under the settlement proposal,[3] the offering party may be entitled to an award of its reasonable attorney's fees and costs (referred to herein as the "fee-shifting provision").

The procedural framework for offering and accepting a proposal for settlement is found in Rule 1.442 of the Florida Rules of Civil Procedure.[4] Thus, to be valid, a statutory proposal for settlement must comply with the requirements of both Section 768.79, Fla. Stat., and Rule 1.442.[5]

The fee-shifting provision was designed to promote settlement, reduce litigation costs, and conserve judicial resources.[6] However, as the Florida Supreme Court (the "Fla. Sup. Ct.") recently noted, the statute "has not produced the desired outcome as the validity and applicability of section 768.79 and Florida Rule of Civil Procedure 1.442 have produced a significant amount of independent litigation."[7]

At first glance, it might not seem obvious as to why the statute has generated so much independent litigation or, for that matter, whether any of the numerous issues discussed by the appellate courts have any particular application in the context of probate and trust litigation. Moreover, it might not even necessarily seem desirable to consider yet another avenue for obtaining attorney's fees in probate and trust litigation, which is a field already crowded with various types of fees provisions.

However, many of the issues and scenarios addressed in the abundant case law interpreting the statute will likely be quite familiar to probate and trust litigators. For instance, and as discussed below, Florida courts have grappled with questions such as whether Section 768.79, Fla. Stat., applies to lawsuits that seek both equitable and monetary relief, whether it applies to declaratory judgment actions, and whether it applies to lawsuits that are governed by the substantive law of another jurisdiction. Further, the unique nature of the fee-shifting provision warrants its consideration even in probate and trust litigation where other fees options may already be available.

The Statute

Section 768.79(1), Fla. Stat., provides, in pertinent part, as follows:

> In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him . . . from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. . . . If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.[8]

In other words, if a plaintiff does not accept a defendant's valid proposal for settlement, and the judgment that is ultimately entered is at least 25 percent less than the defendant's proposed settlement amount, the defendant may obtain an attorney's fees judgment against the plaintiff. If, on the other hand, a defendant does not accept a plaintiff's valid proposal for settlement, and the judgment ultimately entered is at least 25 percent greater than the plaintiff's proposed settlement amount, the plaintiff may obtain an attorney's fees judgment against the defendant. The statutory proposal statute has been described as the legislature's attempt to provide a way to encourage parties to realistically review at their claims and defenses and settle matters before protracted litigation ensues.[9]

With respect to attorney's fees, Florida courts generally follow the common-law rule known as the "American Rule," under which each party bears its own fees regardless of the

prevailing party.[10] The American Rule may be modified by statute or by contractual agreement of the parties.[11] Section 768.79, Fla. Stat., therefore, is an example of a statutory modification of the American Rule – one that creates a substantive right to an award of attorney's fees.[12]

Because the fee-shifting provision is in derogation of common law, Florida courts strictly construe both the statute and the corresponding rule of civil procedure.[13] Proposals that do not unambiguously comply with the requirements of both the statute and the rule are likely to be deemed invalid.[14]

The Rule

Florida Rule of Civil Procedure 1.442 sets out the format and content of formal proposals for settlement. Subsection (c) provides as follows:

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080.

A plaintiff must wait at least 90 days after service of process before serving a statutory proposal for settlement (a "statutory proposal") on the defendant.[15] A defendant, on the other hand, must wait at least 90 days after the complaint is filed before serving a statutory proposal on the plaintiff.[16] Neither party can serve a statutory proposal within the 45-day period before trial or the first day of the docket on which the case is set for trial, whichever is earlier.[17]

An offeree who wishes to accept a statutory proposal must do so in writing within 30 days of service.[18] A statutory proposal may not be accepted, however, after entry of summary judgment even if said 30 days has not yet run.[19]

Although Rule 1.442 authorizes statutory proposals to be made to "any combination of parties properly identified in the proposal," the rule also requires that a joint statutory proposal state the amount and terms attributable to each party.[20] Indeed, in multi-party litigations, joint statutory proposals are often deemed invalid for failure to expressly apportion the amount between the offerors or offerees.[21]

Entitlement To Attorney's Fees

If an offeree rejects a valid statutory proposal and the judgment that is ultimately entered meets the 25 percent threshold amount (the "threshold amount"), the offeror may seek to invoke the fee-shifting provision and can do so by filing a motion for his or her reasonable attorney's fees within 30 days of entry of the judgment.[22] If the statutory proposal was valid and the threshold amount has been met, the court has no discretion to deny entitlement to such an award.[23] The court may, however, disallow an award of fees if the offeree demonstrates that the statutory proposal was not made in good faith.[24] This "good faith" obligation requires that the offeror merely have some reasonable foundation on which to base its offer.[25] Indeed, even nominal statutory proposals may be made in good faith so long as the court finds that the offeror had a reasonable basis in making the offer and had the intent to settle the case.[26] Furthermore, a statutory proposal that is made solely to obtain the right to attorney's fees is not grounds for a finding that the offer was made in bad faith.[27]

The amount of the fees award is determined by the court after an evidentiary hearing, and the statute expressly sets forth some of the factors for the court's consideration. Section 768.79(7)(b), Fla. Stat., provides:

> (7)(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:
>
> The then apparent merit or lack of merit in the claim.
>
> 2. The number and nature of offers made by the parties.
>
> 3. The closeness of questions of fact and law at issue.
>
> 4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
>
> 5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
>
> 6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

The party entitled to attorney's fees has the burden of demonstrating the reasonableness of the fees sought by "substantial competent evidence."[28] This evidence typically includes invoices and other information detailing the services provided, as well as the testimony of the attorney who provided the services and an expert witness.[29] The

party liable for fees, in turn, has the burden of identifying, with specificity, which hours claimed by the party entitled to fees are either excessive or not reasonable.[30]

Actions for Damages vs. Equitable Relief

Section 768.79, Fla. Stat., is limited by its own express terms to civil actions for damages.[31] An "action for damages" includes tort and contract claims in which the plaintiff seeks a monetary judgment. The scope of "civil actions for damages" includes appellate actions.[32] Also included within such scope are subrogation claims,[33] class actions,[34] and interpleader actions.[35]

By contrast, the statute does not apply to cases in which litigants seek equitable relief. "Equitable relief" can refer to virtually anything other than a monetary judgment and typically involves a court order for a defendant to do or not do a specific act.[36] Statutory proposals have been held inapplicable to actions for equitable relief such as attempts to establish a common law way of necessity across private property,[37] forfeiture actions,[38] and will revocations.[39]

In *Miller v. Hayman*, the plaintiff sought to set aside her mother's will on the ground of lack of testamentary capacity and undue influence.[40] The plaintiff rejected a statutory proposal in the amount of $100,000 and ultimately did not prevail on her action.[41] The trial court assessed attorney's fees against her on the basis of Section 768.79, Fla. Stat., but the Fourth District Court of Appeals (the "4th DCA") reversed, holding that the statute did not apply to the equitable proceedings even though the offerors argued that the case was "at all times, about money."[42]

Given that the statute does not apply to actions for equitable relief, one might conclude that it will be of little to no use in the probate and trust context. After all, it is often said that a probate court is a court of equity,[43] and, indeed, many proceedings in the probate court seek equitable relief. This seemingly includes most of the proceedings that Florida Rule of Probate Procedure 5.025 characterizes as "specific adversary proceedings," such as actions to remove a personal representative, probate a lost will, or determine beneficiaries. Probate courts also hear a fair number of injunction actions, which are classic examples of actions for equitable relief.[44]

Probate and trust litigators would agree that, regardless of the relief sought, most litigation is, at its core, "at all times, about money." Yet, as the 4th DCA made clear in *Miller v. Hayman*, the motivation of the litigants is not the test for determining the applicability of Section 768.79, Fla. Stat.,. It is the relief sought that matters, and, for the statute to apply, the plaintiff must plainly be seeking relief in the form of monetary damages. Without a doubt, probate courts clearly hear plenty of those types of actions, as surcharge petitions, actions for tortious interference, and many breach of trust actions are all actions that seek monetary relief.

It is common, though, for probate and trust litigation matters to be "hybrids," i.e., to involve multi-count complaints seeking some combination of both monetary and equitable relief. The Fla. Sup. Ct. recently addressed the applicability of Section 768.79, Fla. Stat., to such a hybrid matter, albeit outside of the probate and trust litigation context. In *Diamond Aircraft Indus. v. Horowitch*, the plaintiff filed an action for specific performance of a contract or, in the alternative, to recover damages.[45] The case was removed to federal court where the defendant served a statutory proposal to resolve the entire case.[46] The plaintiff rejected the offer and did not prevail at trial.[47] The Middle District of Florida held that the statutory proposal was not valid because it included a count for equitable relief.[48] On appeal, the federal Eleventh Circuit Court of Appeals certified several issues to the Fla. Sup. Ct., which ultimately agreed with the Middle District of Florida that the statutory proposal for settlement was invalid.[49] Specifically, the Fla. Sup. Ct. held that "section 768.79 does not apply to an action for both damages and equitable relief and no exception for a meritless equitable claim exists"[50]

Notably, the Fla. Sup. Ct. expressly declined to answer the question of whether the statutory proposal could have been deemed valid if it had been proposed as an offer to resolve only the count that sought to recover damages.[51]

Thus, a plaintiff who asserts at least one count for equitable relief may be shielding himself or herself from the fee-shifting provisions of any potential statutory proposal (and may, by the same token, also be precluding himself or herself from serving a statutory proposal). It is yet to be seen, however, whether the courts will enforce the fee-shifting provision where a statutory proposal is offered to settle only the counts of the complaint that seek monetary relief.

Claims for Breach of Fiduciary Duty and Declaratory Relief

Certain causes of actions can be difficult to categorically label as either actions for damages or for equitable relief. Two such actions that frequently arise in probate and trust litigation are claims for breach of fiduciary duty and claims seeking declaratory relief.

Breach of Fiduciary Duty

As the 4th DCA has explained, a "[b]reach of fiduciary duty is an ambiguous expression."[52] Fiduciaries typically have a number of legal and equitable duties towards their beneficiaries. Personal representatives and trustees are certainly no exceptions. For example, trustees owe duties to make proper and timely distributions, to properly invest trust assets, and to inform and account to the beneficiaries.

"Thus, it has been said that, '[a] fiduciary who commits a breach of his duty as fiduciary is guilty of tortious conduct and the beneficiary can obtain redress either at law or in

equity for the harm done."[53] For that reason, the question of whether a statutory proposal for settlement will apply to an action for breach of fiduciary duty likely will turn on the particular breach alleged to have occurred and the nature of the remedy sought.

Declaratory Relief

Declaratory relief actions can similarly be ambiguous. These types of actions are also fairly common in probate and trust litigation.[54] In determining whether Section 768.79, Fla. Stat., is applicable to an action for declaratory relief, Florida courts examine – not surprisingly – "whether the 'real issue' is one for damages or declaratory relief."[55]

In *Nat'l Indemnity Co. of the So. v. Consol. Ins. Servs*, the 4th DCA held that the statutory proposal statute was inapplicable because the plaintiff's cause of action sought a declaration as to whether an insurance policy was in full force and effect on the date of an automobile accident.[56] The 4th DCA held that such a declaratory relief action could not be deemed a civil action for damages.[57]

However, the 4th DCA reached a different conclusion in both *Nelson v. The Marine Grp. of Palm Beach, Inc.*[58] and *Coast to Coast Real Estate, Inc. v. Waterfront Props., Inc.*[59] In *Nelson*, the declaratory judgment action at issue sought a determination as to whether a seller was entitled to retain an escrowed deposit as liquidated damages.[60] The 4th DCA deemed that to be an action for monetary relief and held that the statutory proposal statute was applicable.[61]

In *Coast to Coast*, the declaratory judgment action at issue sought a determination as to who was entitled to real estate commissions.[62] Again, the 4th DCA deemed that to be an action for monetary relief and held that the statute was applicable.[63]

Judgment vs. Net Judgment

In construing the statutory proposal statute, courts have also considered the relationship between the fee-shifting provision and other fee-shifting statutes and agreements.

As discussed above, the question of whether a party who has made a statutory proposal will be entitled to an award of attorney's fees turns, in part, on whether the judgment meets the threshold amount above or below the settlement offer. That calculation, however, is not always as straightforward as it might seem.

The Fla. Sup. Ct. has "interpreted the 'judgment obtained' under Section 768.79, Fla. Stat., to include the total net judgment, which includes the plaintiff's taxable costs up to the date of the offer and, where applicable, the plaintiff's attorney's fees up to the date of the offer."[64]

In other words, to determine whether a plaintiff has obtained a judgment that is at least 25 percent lower than the settlement amount proposed by the defendant, or at least 25 percent greater than the settlement amount proposed by the plaintiff itself, the courts must take into account, among other things, any attorney's fees to which the plaintiff might otherwise be entitled under any other statute or contractual agreement. Adding that amount to the judgment obtained by the plaintiff can end up determining whether the threshold amount is satisfied and, thus, whether the fee-shifting provision is triggered.[65]

For probate and trust litigators, this can be a particularly significant aspect of the case law interpreting statutory proposals. That is because many types of probate and trust litigation are already subject to one or more statutory attorney's fees provisions. For example, in actions for breach of fiduciary duty against a trustee, the court is authorized to award fees and may direct that those fees be satisfied from the personal property of another party.[66] Other statutes authorize an award of fees where an attorney has rendered services to an estate or trust and permit the court to direct that those fees be directed from another party's share of an estate or trust.[67] Further, personal representatives and trustees are generally permitted to pay their reasonable attorney's fees from estate or trust assets.[68]

The specific manner in which these variations of attorney's fees provisions would be considered by the courts in calculating a plaintiff's "net judgment" is yet to be examined in the case law. But probate and trust litigators would be wise to consider the potential that exists for an award of attorney's fees under these statutes when attempting to decide on a particular dollar amount to offer as part of a statutory proposal and also when determining whether an offeror has satisfied the threshold amount.

Given that these other avenues for obtaining fees already exist in probate and trust law, it is worth considering what role, if any, the fee-shifting provision might play in probate and trust litigation and whether there is even a need for it. The answer, of course, depends on the circumstances of each litigation. A particularly interesting aspect of the fee-shifting provision is that it allows for the possibility that a non-prevailing party might nevertheless obtain a fees judgment against a prevailing party if the prevailing party has not obtained a judgment that is greater than the requisite threshold amount. The possibility that such a scenario could arise might, under certain circumstances, be a sufficient reason to serve a well-considered statutory proposal.

Cases Governed By Law of Another State

Another issue recently addressed by the Fla. Sup. Ct. is whether statutory proposals for settlement are valid and enforceable when served in connection with lawsuits that are governed by the substantive law of another jurisdiction.

This is an issue that may not arise quite as frequently in probate and trust litigation as it does in commercial litigation where, for example, a contractual agreement of the parties may include a choice of law provision designating the law of a foreign state. However, there are occasions

when a trust instrument may be governed by the laws of another state and, yet, the parties find themselves litigating in a Florida court.

In *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, the Fla. Supreme Court held that a statutory proposal is invalid when served in connection with a lawsuit that is governed by the laws of another jurisdiction.[69] This particular case began in the federal court where, on appeal, the federal Eleventh Circuit Court of Appeals certified the issue, among others, to the Fla. Sup. Ct,[70] which held that the fee-shifting provision creates a right that it is substantive, not procedural, for conflicts of law purposes.[71] For that reason, the Fla. Sup. Ct. determined that the statute is "inapplicable in instances where the parties have agreed to be governed by the substantive law of another jurisdiction."[72]

Conclusion

A statutory proposal can be an effective way of resolving a litigation. It can also be used as a means of recovering attorney's fees when a lawsuit does not reach a pre-judgment settlement. Case law interpreting Section 768.79, Fla. Stat., however, is constantly evolving, and the issues that arise in these cases are seemingly endless. Although the courts have rarely discussed the scope and applicability of the statute in the context of probate and trust litigation in particular, many of the issues explored in the case law are issues that frequently surface in probate and trust litigation. Litigants who wish to serve a valid and enforceable statutory proposal should take care to comply not only with the strict requirements of Section 768.79, Fla. Stat., and Florida Rule of Civil Procedure 1.442 but also with the many nuances of the statute that are addressed in the numerous appellate opinions.


J. GALLER

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P. SALSBURG

Endnotes:

1 As of January 2013, there were over 700 reported cases citing § 768.79, Fla. Stat. (the proposal for settlement statute).

2 Unless specifically stated to the contrary, all section references in this article shall be references to the Florida Statutes.

3 To trigger a defendant's entitlement to attorney's fees, the judgment must be at least 25 percent less than the defendant's settlement proposal. To trigger a plaintiff's entitlement to attorney's fees, the judgment must be at least 25 percent greater than the plaintiff's settlement proposal. § 768.79(1), Fla. Stat.

4 Unless specifically stated to the contrary, all references in this article to a "Rule" shall be to the Florida Rules of Civil Procedure.

5 *Campbell v. Goldman*, 959 So. 2d 223, 224 (Fla. 2007).

6 *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 79 (Fla. 2012).

7 *Id.*

8 The statute itself contains an ambiguity. While subsection (1) provides that attorney's fees accrue "from the date of filing of the offer," subsections 6(a) and (b) provide that fees will accrue "from the date the offer was served," which is an earlier date. The courts have adopted the latter as the correct approach. *See Jordan v. Food Lion, Inc.*, 670 So. 2d 138, 142 (Fla. 1st DCA 1996).

9 *McMullen Oil Co. v. ISS Int'l Serv. Sys.*, 698 So. 2d 372, 373-74 (Fla. 2d DCA 1997).

10 *Price v. Tyler*, 890 So. 2d 246, 250 (Fla. 2004).

11 *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993).

12 *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995).

13 *Ledesma v. Iglesias*, 975 So. 2d 1240, 1242 (Fla. 4th DCA 2008).

14 *Campbell*, 959 So. 2d at 225 (citing several examples).

15 Rule 1.442(b).

16 *Id.*

17 *Id.*

18 Rule 1.442 (f)(1). The provisions for "mail time" do not apply.

19 *Kroener v. Fla. Ins. Guaranty Assn.*, 63 So. 3d 914, 920 (Fla. 4th DCA 2011).

20 Rule 1.442(c)(e).

21 *See, e.g., Duplantis v. Brock Specialty Servs., Ltd.*, 85 So. 3d 1206, 1209 (Fla. 5th DCA 2012); *Arnold v. Audiffred*, 98 So. 3d 746, 747 (Fla. 1st DCA 2012); *C & S Chemicals, Inc. v. McDougald*, 754 So. 2d 795, 798 (Fla. 2d DCA 2000).

22 § 768.79(6), Fla. Stat.

23 *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th DCA 1993).

24 *Id.* at 1040; § 768.79(7)(a), Fla. Stat.

25 *Schmidt,* 629 So. 2d at 1039.

26 *Talbott v. Am. Isuzu Motors, Inc.*, 934 So. 2d 643, 647 (Fla. 2d DCA 2006).

27 *Ryan, IV* v. *Lobo De Gonzalaez,* 841 So. 2d 510, 522 (Fla. 4th DCA 2003).

28 *Quality Holdings of Fla. Inc. v. Selective Instrs., IV, LLC*, 25 So. 3d 34, 37 (Fla. 4th DCA 2009).

29 *Id.*

30 *Centex-Rooney Constr. Co. v. Martin County*, 725 So. 2d 1255, 1259 (Fla. 4th DCA 1999).
31 Section 768.79(1).
32 *Metropolitan Dade County v. Cerezo*, 774 So. 2d 1 (Fla. 3d DCA 1996).
33 *Stewart v. Tasnet, Inc.*, 718 So. 2d 820 (Fla. 2d DCA 1998).
34 *Oruga Corp. v. AT&T Wireless of Fla., Inc.*, 712 So. 2d 1141 (Fla. 3d DCA 1998).
35 *Duncan v. Prudential Ins. Co.*, 690 So. 2d 687 (Fla. 1st DCA 1997).
36 *Hutchens v. Maxicenters, USA*, 541 So. 2d 618, 620-21 (Fla. 5th DCA 1988).
37 *Palm Beach Polo Holdings, Inc. v. Equestrian Club Estates Prop. Owners Assn., Inc.*, 22 So. 3d 140, 144-145 (Fla. 4th DCA 2009).
38 *Rosado v. Bieluch*, 827 So. 2d 1115, 1117 (Fla. 4th DCA 2002).
39 *Miller v. Hayman*, 766 So. 2d 1116, 1117 (Fla. 4th DCA 2000).
40 *Id.* at 1117.
41 *Id.*
42 *Id.*
43 *Aiello v. Hyland*, 793 So. 2d 1150, 1152 (Fla. 4th DCA 2001); *In re Estate of Howard*, 542 So. 2d 395, 397 (Fla. 1st DCA 1999).
44 *Clevens v. Omni Healthcare, Inc.*, 83 So. 3d 1011, 1012 (Fla. 5th DCA 2012).
45 *Diamond v. Horowitch*, __ So. 3d __, No. SC11-1371, 2013 WL 105328, 38 Fla. L. Weekly 517 (Fla. Jan. 10, 2013).
46 *Id.* at *2.
47 *Id.*
48 *Id.* at *3.
49 *Id.* at *8.
50 *Id.*
51 *Id.* at *11.
52 *King Mountain Condo. Assn. v. Gundlach*, 425 So. 2d 569, 571-72 (Fla. 4th DCA 1982).
53 *Id.* (citing Restatement of Restitution § 138 cmt. a (1937)); *see also* Restatement (Second) of Torts § 874 cmt. b (1979).
54 *See, e.g.*, § 86.041 (authorizing declaratory actions in estate administration context); § 736.0201(4)(f) (authorizing declaratory actions in trust context).
55 *Nat'l Indem. Co. of the So. v. Conso. Ins. Servs.*, 778 So. 2d 404, 408 (Fla. 4th DCA 2001).
56 *Id.* at 406.
57 *Id.* at 408.
58 *Nelson v. The Marine Grp. of Palm Beach, Inc.*, 677 So. 2d 998 (Fla. 4th DCA 1996).
59 *Coast to Coast Real Estate, Inc. v. Waterfront Props., Inc.*, 668 So. 2d 686 (Fla. 4th DCA 1996).
60 *Nelson*, 677 So. 2d at 999.
61 *Id.*
62 *Coast to Coast*, 688 So. 2d at 687-88.
63 *Id.*
64 *Shands Teaching Hosp. and Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 214 (Fla. 2010) (citing *White v. Steak & Ale of Fla., Inc.*, 816 So. 2d 546, 551 (Fla. 2002)).
65 *Id.*; *see also Frosti v. Creel*, 979 So. 2d 912, 916 (Fla. 2008); *White*, 816 So. 3d at 549-551.
66 § 736.1004, Fla. Stat.
67 §§ 733.106 and 736.1005, Fla. Stat.
68 §§ 733.6171 and 736.1007, Fla. Stat.
69 *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 81-82 (Fla. 2012).
70 *Id.* at 75.
71 *Id.* at 80.
72 *Id.* at 81.

Notice of Annual Election Meeting

The next annual election meeting of the Real Property, Probate and Trust Law Section will commence at or about noon on Friday, May 24, 2013, at the Vinoy Renaissance St. Petersburg Resort & Golf Club, 501 5th Avenue NE, St. Petersburg, Florida 33701, in conjunction with the Section's Convention.

The RPPTL Section Long-Range Planning Committee has made the following nominations for election to the Section offices and positions indicated for the 2013-2014 Bar year, and those names will be reflected in the official election ballot at that meeting:

Chair-Elect – Michael A. Dribin

Secretary – Andrew M. O'Malley

Treasurer – S. Katherine Frazier

Director of Probate & Trust Law Division – Deborah P. Goodall

Director of Real Property Law Division – Michael J. Gelfand

Director of At-Large Members – Debra Lynn Boje

Representatives for Out-of-State Members –
John Edward Fitzgerald, Jr. and Michael P. Stafford

At-Large Members:

David J. Akins
Lynwood F. Arnold, Jr.
Kimberly A. Bald
John R. Banister
Carlos A. Batlle
Michael A. Bedke
Brandon D. Bellew
David R. Carlisle
John P. Cole
Jane L. Cornett
Benjamin F. Diamond
Jeffrey R. Dollinger
Brenda B. Ezell
Joseph "Jay" W. Fleece, III
Gerard J. Flood
Michael L. Foreman
Jonathan A. Galler
Vinette D. Godelia
Alex H. Hamrick
W. Christopher Hart
Michael Travis Hayes
Thomas N. Henderson,III
Stephen Paul Heuston
Amber Jade F. Johnson
Darby Jones
Jennifer W. Jones
Robert B. Judd
George D. Karibjanian
Thomas M. Karr
Sean William Kelley
Alan Stephen Kotler
Keith S. Kromash
Theodore S. Kypreos
Robert L. Lancaster
George W. Lange, Jr.
Roger A. Larson
Brian D. Leebrick
Marsha G. Madorsky
Brian M. Malec
Stewart Marshall, III
R. Lee McElroy, IV
E. Ashley McRae
Rex E. Moule, Jr.
Marina C. Nice
Hung V. Nguyen
Margaret Palmer
William R. Platt
Stacey A. Prince-Troutman
Michael A. Pyle
Stephen H. Reynolds
Alexandra V. Rieman
R. James Robbins, Jr.
Marsha G. Rydberg
Colleen Coffield Sachs
Clay Alan Schnitker
P. Allen Schofield
Robert M. Schwartz
Jon Scuderi
Sandra G. Sheets
Sharaine A. Sibblies
Wayne J. Sobien
Robert G. Stern
Eleanor W. Taft
Richard W. Taylor
Matthew H. Triggs
Arlene C. Udick
Hanton H. Walters
Jerry B. Wells
Richard M. White, Jr.
Charles D. Wilder
G. Charles Wohlust
Thomas D. Wright

Spotlight on Real Estate Entities and Land Trusts Committee

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


W. KIGHTLINGER

A short conversation with the chair of this committee, Wilhelmina F. Kightlinger, quickly convinced me that this committee is downright *awesome*. As a result, I am suspicious that Real Estate Entities and Land Trusts is the only REEL committee in the Section as she claimed.

Several years ago, the Trust Law Committee of the Probate Division approached the Real Estate Entities and Land Trusts Committee with a number of concerns about the Florida Land Trust Law, § 689.071, Fla. Stat. This discussion caused the REEL committee to embark on a four year project of extensive revisions to the land trust law. The Real Estate Entities and Land Trusts Committee, in close coordination with the Trust Law Committee and Title Insurance Committee, came up with a bill that was approved by the Executive Council in Key Biscayne in September, 2012. The bill is an extensive redraft of the land trust law including a highly refined definition of a land trust, a sharper definition that make clear the distinctions between §689.071, Fla. Stat., land trusts, and property that is operated by a trust pursuant to Chapter 736 of the Florida Statutes. In addition to this highly refined definition, the bill also creates a whole new section which will protect third parties who rely on trust powers stated in a deed. These revisions are of great benefit for people who hold their property in trust, act as trustees and also provide protection for those who are issuing title. The statutory revisions also clarify the common law position that the statute of uses and doctrine of merger do not apply. This clarification is necessary since the trustee holds both equitable and legal title.

The committee's bill (at the time of this article in January) has found a Senate sponsor in Senator David Simmons of the 22nd District. The bill is being shepherded by this committee as the committee has, most recently, responded to comments from the folks in bill drafting in Tallahassee. The committee will continue to track the bill as it moves through the legislative session. It is a sincere hope of the committee that its next project relative to this bill will be to focus on educating the Section about the bill after it becomes law.

The committee is not now resting on its laurels but rather will be actively commenting on any legislation that might be relative to Real Estate Entities or Land Trusts. The committee is also working with the Business Law Section on a substantial rewrite to the LLC Act. This project falls under the "Real Estate Entities" portion of the committee's title and deals with the LLC Act's impact on entities that hold title to real estate.

REEL is a very active committee with regular meetings by conference calls occurring on the second Tuesday of every month at 9 a.m. Membership in the committee is not required to participate in those calls and the chairperson advises that it is not unusual for land trust practitioners to participate. The access dial-in number is 1-888-376-5050 and the conference code is 2010210354.

One other project the committee hopes to address, which would be unique to committees of the Section, is to come up with an official committee song. Since the committee's co-chair, Burt Bruton is a known "rock-n-roller," there are high hopes that this goal can be accomplished in 2013.

As can easily be seen, this is a committee heavily involved in shaping Florida law that relates to Real Estate Entities and Land Trusts, as well as having a lot of fun. If you are interested in getting in on the ground floor of issues relative to these important topics, you're invited to join the committee at its next regular monthly meeting.

Residential Contracts for Sale and Purchase Updated

NOTICE: The FR/BAR Residential Contracts for Sale and Purchase and various Riders **have been updated and revised and will be released soon for review and comments.** Please watch for an email from the Section with details of posting of the "draft" forms on the Section website and timeframe for submitting comments. It is anticipated that the 2013 Revised FR/BAR Contracts and Riders will be presented to the RPPTL Executive Council for approval at the Section Convention/EC meeting at the Vinoy in May.

Real Estate Case Summaries

Prepared by Brian Hoffman, Esq., Pensacola, Florida

When the boundary line of land is bounded by a non-navigable stream or highway, meaning by reference to a monument and not a metes and bounds description, then a rebuttable presumption exists that the boundary extends to the center line of the stream or highway, unless such evidence exists that conveying to the centerline was not the intent of the grantor.

Bischoff v. Walker, et. al., 37 Fla. L. Weekly D2850a (Fla. 5th DCA 2012), re-hearing 2013 WL 461805 (Fla. 5th DCA 2013)

The trial court granted summary final judgment in favor of Robert Walker ("Walker") and against Rhoni Barton Bishoff ("Bishoff") with respect to Bishoff's claims seeking ownership of the underlying land of a lake and canal adjoining Bishoff's property. Bishoff appealed to set aside the summary final judgment in favor of Walker.

In February 2000, Bishoff purchased real property that was described in the deed by reference to monuments rather than metes and bounds. Specifically, the description provided: "that part of the Northeast ¼ of the Southeast ¼ of Section 8, Township 22 South, Range 32 East *lying East of Canal and North of Lake…*" Several months later Walker purchased property adjoining Bishoff's property, which was conveyed from a common grantor. Walker's deed describes his parcel of land and excludes from that grant the land already deeded to Bishoff. Thereafter, Bishoff attempted to build a dock on the lake and a dispute arose between Bishoff and Walker. Bishoff filed a three count complaint seeking 1) a declaratory action that Bishoff had riparian rights to the center of the canal and lake, 2) quiet title to the boundary between the Bishoff property and Walker property, and 3) reformation of the Bishoff deed to describe the Bishoff property by metes and bounds to the center of the canal and lake. Both parties stipulated that the canal and lake are natural and non-navigable bodies of water. The trial court granted Count 1, but denied Count 2 and 3 seeking quiet title and reformation of the Bishoff deed. Bishoff then appealed as to Counts 2 and 3.

The Fifth District Court of Appeal noted the presumption is that ownership extends to the centerline of a monument unless a contrary intent is clearly expressed. The question for consideration was whether "east of" includes to the center of the canal, and whether "north of" includes to the center of the lake. The Court noted prior Florida case law on the issue that provides that unless a contrary intent is clearly expressed by the grantor, a presumption arises that the boundary line when the land is bounded by a non-navigable stream or highway, extends to the center line of the stream or highway, if the grantor is the owner of the fee. The Court concluded that Florida law is in accord with the general rule in other jurisdictions that there is a rebuttable presumption in favor of finding the boundary is the centerline of the monument referenced in the deed – in this case the canal and lake. In order to prevail, Walker would have to present evidence of the grantor's intent not to convey to Bishoff to the centerline of the canal and lake. Walker did not, and he admitted no facts at issue and no extrinsic evidence should be considered in deciding what the Bishoff deed meant. In absence of such evidence summary judgment in favor of Bishoff is appropriate. The Court reversed summary judgment entered in favor of Walker as to Count 2 for quiet title and Count 3 for reformation of deed, and remanded to the trial court for entry of summary judgment in favor of Bishoff as to both counts.

On re-hearing the Court addressed whether "east of canal" meant that the grantor was conveying to the center of the canal as a canal is a monument and the rebuttable presumption is that ownership extends to the centerline of a monument. . The Court remanded the case as to Count 2 for entry of summary judgment in favor of Bischoff that she owns the submerged land to the centerline of the canal and for further proceedings as to the submerged lake land. The Court noted that such summary judgment in her favor regarding the submerged lake land may be unnecessary as Count 1 granting riparian rights to the lake was affirmed and may resolve the parties' dispute. The Court did not grant relief as to Count 3 as it was unnecessary under the circumstances.

In a foreclosure action, the interest of a junior mortgage holder is foreclosed upon issuance of the Certificate of Sale, not solely by the issuance of Final Judgment of Foreclosure, and the trial court erred in finding the junior mortgage holder had no interest in the foreclosed property since no foreclosure sale had occurred, and thus no Certificate of Sale had been entered.

AG Group Investments, LLC v. All Realty Alliance Corp., 38 Fla. L. Weekly D86a (Fla. 3rd DCA 2012)

The trial court ruled that a junior mortgagee's interest in real property was extinguished upon entry of final judgment

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of foreclosure in favor of the first mortgage holder even though the foreclosure sale had not occurred.

In 2001, All Realty Alliance Corp. ("Owner") acquired real property (the "Property"), and subsequently obtained first mortgage financing secured by the Property from Globex Lending, Corp. The first mortgage was later assigned to Bank United FSB ("First Mortgage Holder"), and in 2005 the Owner obtained a second mortgage secured by the same Property from AG Group Investments, LLC ("Second Mortgage Holder").

In 2006, the Second Mortgage Holder commenced foreclosure proceedings against the Owner, and two months later the First Mortgage Holder followed suit with its own foreclosure action that named the Second Mortgage Holder. In May of 2007, summary judgment of foreclosure was entered in favor of the First Mortgage Holder (the "Judgment"). The Judgment stated that "on filing the Certificate of Sale…[the Second Mortgage Holder and all junior lien holders] are forever barred and foreclosed…" The foreclosure sale was scheduled for August 2007; however, days before the sale Pinnacle Three Corp. ("Pinnacle") paid all sums due to the First Mortgage Holder per the Judgment. Pinnacle then assumed all rights of the First Mortgage Holder by virtue of the doctrine of equitable subrogation. In July 2010, Pinnacle brought suit to establish and foreclose its equitable lien on the Property, and named the Second Mortgage Holder as a party. The Second Mortgage Holder opposed on the grounds the foreclosure sale had never occurred, and therefore the Second Mortgage Holder's lien had not been foreclosed based on the clear terms of Section 45.0315, Fla. Stat. (2007). The trial court ruled that the Second Mortgage Holder had no interest in the Property.

The Third District Court of Appeal noted that prior to enactment of the statute in 1993, the common law rule was that a junior mortgagee's lien was extinguished at the entry of the final judgment of foreclosure; however, the statute (Section 45.0315, Fla. Stat.) now provides that a junior lien holder's interest cannot be extinguished before the issuance of a certificate of sale. The Court noted that any other interpretation runs counter to the actual practice of foreclosure sales, in which a junior mortgage holder has a claim to money paid for a property at a foreclosure sale that is in excess of the value of the senior mortgage. Furthermore, the clear language of the Judgment indicates the junior lien is not foreclosed by the Judgment alone, but upon filing the Certificate of Sale. Accordingly, the Court determined the trial court erred since no foreclosure sale had occurred, and reversed the trial court's ruling that the Second Mortgage Holder had no interest in the Property.

The trial court erred in declining to issue the certificate of title to the foreclosing lender that was the high bidder at the foreclosure sale prior to the resolution of the objection to foreclosure sale and motion to vacate the sale filed by the property owner, since the objection to foreclosure sale only addressed conduct in the litigation and not related to the foreclosure sale, and since the motion to vacate was based on intrinsic fraud which was time barred since it was not filed within one year from the date of the final judgment.

IndyMac Federal Bank, FSB v. Kevin Hagan et. al., 38 Fla. L. Weekly D34a (Fla. 3rd DCA 2012)

The trial court entered an interlocutory order declining to issue the certificate of title to the foreclosing lender that was the high bidder at the foreclosure sale prior to the resolution of the objection to foreclosure sale and motion to vacate the sale filed by the property owner.

In February of 2009, IndyMac Federal Bank FSB (the "Bank") filed a foreclosure action against Kevin J. Hagan and Monica P. Hagan (collectively the "Borrower") to foreclose real property (the "Property") secured by a mortgage pertaining to a loan from the Bank to the Borrower. The Bank filed a motion for summary judgment, and on September 30, 2009 the trial court entered summary final judgment of foreclosure (the "Judgment"). The Borrower did not seek rehearing or appeal of the Judgment. On February 23, 2011, the Bank purchased the Property at the foreclosure sale, and the clerk thereafter issued a certificate of sale on March 2, 2011. Two days later on March 4, 2011, the Borrower filed its objection to the foreclosure sale and motion to vacate the final judgment. The basis for the Borrower's objection and motion to vacate was based on alleged fraudulent misconduct during course of litigation, but did not challenge any conduct that occurred at or related to the foreclosure sale itself. The trial court conducted a hearing on the Borrower's objection to the foreclosure sale and motion to vacate the final judgment, but deferred ruling prior to conducting an evidentiary hearing. The Bank filed a motion for the issuance of the certificate of title, which was denied by the trial court, which the Bank appealed. The evidentiary hearing later occurred on April 11, 2012, but this appeal was filed prior to a ruling being issued by the trial court on the evidentiary hearing.

The Third District Court noted that Section 45.031(5), Fla. Stat., provides, in pertinent part, that "[i]f no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party…" The Court further noted that the "shall" language confirms that the instruction is mandatory, creating an obligation impervious to judicial discretion. The Court confirmed the requirements of Section 45.031, Fla. Stat. that in order to vacate a foreclosure sale, the trial court must find: (1) that the foreclosure sale bid was grossly or startlingly inadequate; and (2) that the inadequacy of the bid resulted from some mistake, fraud or other irregularity in the sale. Although the Borrower titled the pleading an objection to sale, the content of the pleading did not allege any conduct that occurred at or related to the foreclosure

sale, and therefore, was facially deficient as a matter of law. Furthermore, the Court ruled the motion to vacate the final judgment was time barred by the clear requirements of Rule 1.540(b), Fla. R. Civ. Pro., which requires such motion be brought within one year of entry of final judgment when based on intrinsic fraud. Accordingly, the trial court was reversed and remanded for the immediate issuance of the certificate of title.

Non-owner spouse that did not sign a mortgage through inadvertent error of the closing agent, but was present at closing and would have signed if asked at closing, cannot claim homestead exemption against an equitable subrogation lien or an equitable vendors lien imposed for purchase money mortgage, regardless of whether the lien was imposed for fraud.

Spikes v. OneWest Bank FSB, 38 Fla. L. Weekly D2a (Fla. 4th DCA 2012)

The trial court granted a final order in favor of OneWest Bank FSB (the "Bank") imposing an equitable subrogation lien on the Steven and Nicole Spikes (the "Spikes") homestead property and granting foreclosure of the lien, but denied the Bank's request to impose and foreclose and equitable vendor's lien in the amount of the purchase money loan used to acquire the homestead.

Steven Spikes was loaned funds from the Bank to purchase a house which became his homestead. In exchange, he executed a purchase money note and mortgage. His wife, Nicole Spikes, was present during the signing of the documents and admitted that she would have signed each; however, she was not asked to join in the mortgage because of a mistake or inadvertence by the closing agent. Nicole thought her name was put on the deed; however, the property was conveyed to Steven with the indication that he was a married man. The money from Steven's loan was paid to satisfy two existing mortgages on the property given by the previous owners and the rest was paid to the previous owners.

The Fourth District Court affirmed the trial court order imposing an equitable subrogation lien and foreclosure of that lien, noting that the Court had previously held that the inadvertent failure to obtain a wife's signature on a mortgage when the wife attended the loan closing, knew the proceeds of the mortgage were being used to pay for the property, and would have signed the mortgage if requested to do so, does not preclude foreclosure of the mortgage upon default. *Countrywide Home Loans, Inc. v. Kim*, 898 So. 2d 250 (Fla. 4th DCA 2005). As to the claim for an equitable vendor's lien, the Court analyzed the three exceptions to homestead protection carved out in the

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Florida constitution and concluded those exceptions apply to the non-owner spouse to the same extent they apply to the owner spouse. The Court noted that if equity allows the innocent spouse to lose the protection of homestead when her spouse fraudulently obtains the funds to purchase the homestead, and equity will not protect the innocent spouse who will be unjustly enriched by the loan proceeds, then equity will not protect the innocent spouse from forced sale who attends the closing for a legitimate purchase money loan obtained by her husband, especially when she is willing to sign on the mortgage if asked. Moreover, to allow Nicole to avail herself of the homestead protection in this case would grant a non-owner spouse greater homestead protection than the spouse who owned the property.

Therefore, the Court affirmed the trial court's judgment granting equitable subrogation lien and foreclosure of that lien, and reversed and remanded to the trial court to enter judgment granting an equitable vendor's lien for the full amount of the loan, less payments received, and permitting foreclosure.

Under the provisions of Declaration of Condominium, limited common elements retained by the developer did not become property of the condominium association upon turnover of control of association to unit owners and the developer retained the right to assign exclusive use of limited common elements until such time as the developer had sold all Units owned by it the developer. Where developer still owned unsold condominium units, trial court erred in entering judgment ordering developer to turn over to the condominium association any limited common elements.

Courvoisier Courts, LLC v. Courvoiser Courts Condominium Assoc. Inc., 38 Fla. L. Weekly D36a (Fla. 3rd DCA 2012)

The trial court granted final summary judgment in favor of Courvoisier Courts Condominium Association, Inc. (the "Association") requiring Courvoisier Courts, LLC (the "Developer") to convey all limited commons elements still owned by the Developer to the Association.

On April 29, 2005, the Developer recorded the condominium declaration (the "Declaration") for Courvoisier Courts Condominium (the "Condominium"). Thereafter, the Developer assigned certain limited common elements, including parking spaces and storage units, to purchasing unit owners. On July 16, 2006, the Developer conveyed the remaining parking spaces and storage units to a penthouse condominium unit owned by the Developer. Two weeks later the Developer proceeded to transfer control of the Association from the Developer to the Association pursuant to of Section 718.301, Fla. Stat. (2004). In July of 2007 the Association filed suit against the Developer for construction defects, and later in 2009 amended the Complaint and added a count for declaratory action claiming the parking spaces and storage units assigned two weeks before the turnover should have been transferred to the Association. The trial court granted partial summary in favor of the Association and against the Developer.

The Third District Court reviewed the applicable provisions of the Declaration, and noted that the portion of the Declaration addressing the limited common elements stated "parking spaces and storage spaces shall initially be assigned by the Developer, and . . . [a]ny parking spaces and storage spaces that have not been assigned by the time Developer has sold all Units owned by it will become common elements and become the property of the Association." Citing other sections of the Declaration, the Association contended that the Developer was allowed to assign the limited common elements until either the Developer stops offering units for sale or the Developer turns over control to the Association, whichever occurs first. The Court affirmed controlling case law that provides a court may not violate the clear meaning of a contract in order to create an ambiguity. Since the provisions of the Declaration cited by the Association were not directly related to the limited common elements, the Court concluded that accepting the Association's interpretation would create such an ambiguity. Accordingly, the Court reversed and remanded to the trial court with instructions to enter partial summary judgment in favor of the Developer.

Probate Case Summaries

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

An Order denying motion for judgment on pleadings in a probate matter where there was a dispute over the recipient of the proceeds from a life insurance policy which did not specially designate a beneficiary, was neither a final nor an appealable non-final order.

Rafaela A. Castro, III v. Elda Hidalgo, 100 So. 3d 1180 (Fla. 4th DCA 2012).

The Fourth District Court of Appeal denied an appeal on a trial court order denying a motion for judgment on pleadings in a probate matter because the order was neither a final nor an appealable non-final order.

The decedent died testate, naming his surviving spouse as the Personal Representative. The spouse, however, did not believe that there was any reason to commence a probate, presumably because there were no probate assets. The decedent also owned four separate life insurance policies, one of which named his children (who were children from a prior marriage) as the beneficiaries, and one of which did not name a beneficiary (the "Open Policy"). Pursuant to the terms of the Open Policy, if no beneficiary is named, the owner (i.e., the decedent) becomes the beneficiary. The children collectively filed a Petition for Intestate Administration. The step-mother objected and, in response, submitted the decedent's will for probate. Probate proceedings were commenced and the spouse was appointed as Personal Representative of the decedent's estate. The decedent's will contained a provision under which the proceeds from life insurance were to be paid to his "established beneficiaries and survivors." The children then filed four adversary petitions against the spouse requesting that the court determine the beneficiaries and to partition personal property for distribution, i.e., the Open Policy proceeds. Both the children and the spouse filed memoranda of law in support of their respective positions. The decedent's son, acting individually and on behalf of his siblings, filed a motion for judgment on the pleadings and the trial court denied the motion. The son appealed the ruling, arguing that the trial court erred in denying the motion because the Open Policy proceeds should have inured to the children as a matter of law. Citing precedent, the Fourth District stated that a "denial" is not a "final order" and therefore the trial court's work is not finished. Therefore, the appeal was dismissed.

Where there are adjudicatory guardianship proceedings and the alleged incapacitated person objected to the admissibility of the examining committee members' reports, the court may not rely solely upon them and they would be considered inadmissible hearsay.

Shen v. Parkes, 100 So. 3d 1189, (Fla. 4th DCA 2012).

The Fourth District Court of Appeal reversed the trial court's reliance on the written reports of examining committee members, holding that the admission of such reports, without any live testimony, amounted to heresay.

Guardianship proceedings were initiated and a Petition to Determine Incapacity was filed against Bishullang Shen. As required by §744.731, Fla. Stat., an examining committee was appointed by the court, the committee members examined Shen and filed their required reports. During the adjudicatory hearing, the reports, which concluded that Shen was without capacity and was in needed of a limited guardianship, were presented without testimony from the examining committee members. Shen's counsel objected to the admission of the reports, claiming that they amounted to hearsay.

The Fourth District noted that the hearsay objections were well taken, since the hearing was contested, the committee members did not testify, and there did not appear to be any hearsay exception under which the reports could have been admissible. Section 744.1095, Fla. Stat., provides that at any hearing under guardianship law, the alleged incapacitated person has the right to remain silent, testify, present evidence, call witnesses, confront and cross-examine all witness, and have the hearing open or closed. Applying the rules of evidence to this matter, the Fourth District concluded that the trial court's decision was based on inadmissible hearsay and reversed. Further, the Fourth District instructed the trial court to order new evaluations since it had been over a year since the initial reports were filed.

A party's status as next of kin, without anything else, cannot entitle him or her to disclosure of all guardianship documents.

In re Guardianship of Erich Josef Trost, Tamara Swan, individually as Guardian of the Ward, and as Trustee of the Ward's Trust v. Matthias Trost, Dennis Swan and Swan Homes, Inc., 100 So. 3d 1205 (Fla. 2d DCA 2012).

The Second District of Appeal reviewed a decision from the Lee County Circuit Court granting the request of the estranged son of a ward for the removal of ward's guardian from positions as guardian and trustee of ward's revocable trust and the review of the annual accountings of guardianship and trust.

Tamara Swan is the niece and guardian of Erich Trust, the ward (the "Ward"). She is also the trustee of the Erich Trost Trust. Matthias Trost ("Trost"), claiming to be the

continued, next page

Ward's estranged son, sued Tamara Swan, the Ward's niece ("Swan") as trustee, for declaratory relief and seeking the production of various trust documents of the Ward. Pursuant to §736.0603(1), Fla. Stat., the general magistrate concluded that Trost was not entitled to discovery of these documents because the trustee owed duties to inform and account only to the settlor while the settlor is living. The general magistrate rendered his findings that because the Ward is still living, the trust was still revocable and that the trustee's duty to inform and account were owed solely to the settlor (i.e., the Ward). Once the trust became irrevocable, the trustee had 60 days to give notice of the trust and a copy of the same to the qualified beneficiaries of the trust.

Trost then filed a petition in a separate guardianship proceeding, alleging that Swan neglected and exploited her uncle's income and violated her fiduciary duties as a guardian. Trost further requested a number of documents pertaining to the trust, guardianship and corporate dealings of the ward. The trial court granted the motion in part, requiring Swan to produce many of the documents requested by Trost.

With respect to the trust documents, the Second Circuit indicated that because the Ward was living, §744.441, Fla. Stat., did not allow the trial court to require the trustee to disclose trust documents to Trost. In summary, while the ward was alive Swan had no duty to Trost.

With respect to the corporate documents, the Second Circuit indicated that Trost's status of next of kin does not justify his receiving confidential corporate records when he lacks standing as a shareholder. This finding is despite the provisions of §607.1602(5)(b), Fla. Stat., which provides that "a court, independently of this act, [may] compel the production of corporate records for examination."

With respect to the guardianship reports, §744.447(2), Fla. Stat., allowed Trost, as next of kin, to receive "[n]otice of the guardian's petitions to perform any acts requiring court approval under §§744.441 or 744.446, Fla. Stat., if he filed a request for notices and copies of pleadings, as provided in the Florida Probate Rules." Citing *Hayes v. Guardianship of Thompson,* 952 So. 2d 498, 507 (Fla. 2006), the Florida Supreme Court held that to determine whether someone has standing to participate in a guardianship proceedings, depends on whether they are an "interested person" which the trial court has to determine on a case-by-case basis.

The Second Circuit indicated that the trial court departed from the requirements of the law by compelling production of the remaining documents because Trost did not show that he had a "legally cognizable interest" in the Ward's trust or that he had any statutory right to the information belonging to the Ward's corporate interests. There should have been a limit to what discovery Trost was entitled to because he was not a shareholder or a beneficiary of the trust. He should have only received the guardianship reports and its attachments and not a disclosure of all

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Wright Private Asset Management, LLC	Diane H. Timpany	203-783-4320

guardianship reports, where they pertained to the trust or the corporate documents.

The trial court erred in admitting a lost or destroyed will into probate where the proponent failed to provide at least one disinterested witness to prove the execution and the content of the will.

Brennan v. Honsberger, 101 So. 3d 415 (Fla. 5th DCA 2012)

The Fifth District Court of Appeal reversed the trial court's order admitting a lost or destroyed will to probate because the proponent of the lost will failed to meet the statutory burden to prove the specific content of the will through the testimony of a disinterested witness.

The decedent executed a will in 2001 leaving his estate to his four children in unequal shares and then executed another will in 2002 leaving a home that he owned in Canada to a non-relative friend, Ruth Honsberger, who had been renting the home for years. The rest of the assets were left to the decedent's brother. The decedent died in 2007 and his brother had disclaimed his interest under the will. The children brought forth the 2001 will while acknowledging the 2002 will. The original 2002 will was not able to be found and the children believed that it no longer existed.

In 2008, Ms. Honsberger filed an objection and an amended objection to the probating of the 2001 will and petitioned to have the 2002 lost will established claiming that this will was lost or destroyed without decedent's knowledge or consent. Initially, the trial court granted Ms. Honsberger's petition to admit the lost will indicating that the decedent did want to leave her the house. Two of the decedent's children, Edward and Terrance Brennan, requested a rehearing arguing that the testimony of at least one disinterested witness was required to prove execution and content if the document that was submitted was a correct copy of the will. Affidavits of the witnesses were submitted by Ms. Honsberger and the trial court entered an amended order denying the Brennans' motion for rehearing.

On appeal, the trial court decision was reversed claiming that the 2002 will should not be submitted because Ms. Honsberger failed to present sufficient evidence to overcome the presumption that the will had been destroyed by the testator with the intent to revoke it. Even though Ms. Honsberger had both witnesses, through their affidavits, testify to the execution of the 2002 will, neither had knowledge of its content.

In Florida, when an original will is known to have existed but cannot be located after the death of the decedent, the presumption is that the testator destroyed the will with the intent to revoke it (*In re Estate of Parker,* 382 So. 2d 652 (Fla. 1980)). The proponent of the lost will has the burden of introducing competent, substantial evidence to overcome the presumption (*Lonergan v. Estate of Budahazi*, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996)).

Stock registration cannot be exclusively relied upon to determine the donative intent but must be considered amongst other relevant evidence.

Frank Welch v. Veronica Dececco, 101 So. 3d 421 (Fla. 5th DCA 2012)

The Fifth District Court of Appeal reversed the trial court's order determining that stocks had not been transferred by the decedent, Frank Kolbl, to his nephew, Frank Welch.

Citing *Mulato v. Mulato*, 705 So. 2d 57, 61 (Fla. 4th DCA 1997), the elements of an *inter vivos* gift are present donative intent, delivery, and acceptance. The trial court ruled that Welch failed to prove donative intent and that the evidence failed to prove testamentary intent. However, it was unclear from the trial court decision whether all of the relevant evidence was considered or whether the court solely focused on the stock registration. "[A]lthough stock registration is properly considered in analyzing donative intent, it is not necessarily dispositive where, as here, other evidence is presented for and against such intent." (*Id.*)

Trial court failed to prove that Trustee's actions were negligent and, further, erred by directing Trustee to repay certain amounts to trusts and directing the same amounts to be set off from Trustee's own share of trust, this constituting an award of double recovery.

Jeanne Chitty Campbell, Individually, as Trustee of the Jeannette Z. Chitty Revocable Trust, et. al. v. Henry M. Chitty, III, 37 Fla. L. Weekly D2799 (Fla. 1st DCA, December 5, 2012).

The First District Court of Appeal reversed a trial court order to liquidate the trust asset and impose monetary sanctions against Jeanne Chitty Campbell, as trustee of the Jeannette Z. Chitty Revocable Trust, the Henry M. Chitty, Jr. Trust, and the Louise Zetrouer Trust, for breach of her fiduciary duty.

The Jeannette Z. Chitty Revocable Trust contained an indemnification clause that held the trustee harmless from any damages or liabilities for the trustee's actions or omissions as long as such actions or omissions were not negligent. The trial court had directed Mrs. Campbell to repay certain amounts to the trusts and also directed those amounts to be set off from Mrs. Campbell's share of the trust, essentially awarding the Henry M. Chitty, III, appellee, a double recovery on all judgments.

The First District reversed the trial court's order as it determined that Mrs. Campbell's actions as trustee of the Jeannette Z. Chitty Revocable Trust were not proven to be negligent, the remaining money judgments imposed against Mrs. Campbell were reversed and the case was remanded for the trial court to enter an order directing Mrs. Campbell to repay the designated amounts or for those amounts to be set off against her share of the trust.

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

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Wills, Trusts and Estates Certification Review Course and Advanced Practice Update

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Live and Webcast Presentation: Friday & Saturday, April 5 - 6, 2013

Hyatt Regency Orlando Airport • 9300 Jeff Fuqua Blvd.
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Course No. 1451R

Topics include elective share and homestead, tenants by the entireties and jointly-held assets, estate administration, trust accounting, Florida Principal and Income Act, probate & trust litigation, and extensive coverage on taxes. Those who have applied to take the certification exam may find this course a useful tool in preparing for the exam. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program, however, have significant experience in their field and have tried to include topics the exam may cover. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination.

FRIDAY, APRIL 5

7:30 a.m. – 8:00 a.m.
Late Registration

8:00 a.m. – 8:05 a.m.
Introduction & Welcome
Richard R. Gans, Sarasota – Chair

8:05 a.m. – 9:15 a.m.
Case Law Update
Thomas M. Karr, Miami

9:15 a.m. – 10:30 a.m.
Estate Administration and Probate
Richard E. Warner, Marathon

10:30 a.m. – 10:45 a.m.
Break

10:45 a.m. – 12:00 p.m.
Elective Share and Homestead
Jeffrey A. Baskies, Boca Raton

12:00 p.m. – 1:05 p.m.
Lunch (on your own)

1:05 p.m. – 3:05 p.m.
Taxes I
Professor David Powell, Tallahassee

3:05 p.m. – 3:20 p.m.
Break

3:20 p.m. – 5:00 p.m.
Taxes II
Professor David Powell

SATURDAY, APRIL 6

8:30 a.m. – 10:00 a.m.
Taxes III
Professor David Powell

10:00 a.m. – 10:15 a.m.
Break

10:15 a.m. – 11:45 a.m.
Taxes IV
Professor David Powell

11:45 a.m. – 1:00 p.m.
Lunch (included in registration fee)
Ethics
Guy S. Emerich, Punta Gorda

1:00 p.m. – 2:00 p.m.
Tenants by the Entireties and Jointly-Held Assets
Rex E. Moule, Melbourne

2:00 p.m. – 3:00 p.m.
Trust Accounting, Florida Principal and Income Act
Linda Suzanne Griffin, Clearwater

3:00 p.m. – 4:15 p.m.
Probate & Trust Litigation
Kimberly A. Bald, Bradenton

4:15 p.m. – 4:45 p.m.
Discussion of Board Certified Exam
Robert C. Wilkins, Jr., Maitland

CLE CREDITS

CLER PROGRAM

(Max. Credit: 18.0 hours)

General: 18.0 hours
Ethics: 1.5 hours

CERTIFICATION PROGRAM

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Elder Law: 18.0 hours
Real Estate: 1.5 hours
Tax: 18.0 hours
Wills, Trusts & Estate: 18.0 hours

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HOTEL RESERVATIONS: A block of rooms has been reserved at the Hyatt Regency International Airport, at the rate of $169 single/double occupancy. To make reservations, call the Hyatt Regency International Airport directly at 888-421-1442. Reservations must be made by 03/04/13 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

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(234) Hyatt Regency Orlando Airport

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(317) Online

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REGISTRATION FEE (CHECK ONE):

❑ Member of the Real Property, Probate & Trust Law Section: $390

❑ Non-section member: $440

❑ Full-time law college faculty or full-time law student: $243

❑ Persons attending under the policy of fee waivers: $45

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and for personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

WEBCAST:

❑ $615

❑ $665

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TOTAL $ _____

❑ **AUDIO CD (1451C)**
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$390 plus tax (section member)
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THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate & Trust Law Section present

Community Association Law – The New Normal

• Live
• Live Webcast
• Audio CD
• Video DVD

COURSE CLASSIFICATION: ADVANCED LEVEL

Live and Webcast Presentation: Friday, April 5, 2013

Hyatt Regency Orlando Airport • 9300 Jeff Fuqua Boulevard
Orlando, FL 33607 • (888) 421-1442

Course No. 1456R

8:00 a.m. – 8:05 a.m.
Introduction and Welcome
Steven H. Mezer, Bush Ross, PA, Tampa

8:05 a.m. – 9:00 a.m.
2013 Case Law Update
Michael J. Gelfand, Gelfand & Arpe, PA, West Palm Beach

9:00 a.m. – 9:50 a.m.
Anatomy of a Leak – Who is Picking up the Tab?
Joseph E. Adams, Becker & Poliakoff, PA, Ft. Myers

9:50 a.m. – 10:20 a.m.
The Marketable Record Title Act: Someone's Idea of a Good Idea at the Time
H. Webster Melton, III, Bush Ross, PA, Tampa

10:20 a.m. – 10:35 a.m.
Break

10:35 a.m. – 11:20 a.m.
Bankruptcy – The Escape from Liability
Jason W. Johnson, Lowndes, Drosdick, Doster, Kantor & Reed, PA, Orlando

11:20 a.m. – 12:15 p.m.
Fair Housing Laws and Emotional Support Animals – Lions, Tigers and Bears, Oh My!!!
Jane L. Cornett, Becker & Poliakoff, PA, Stuart
Christopher N. Davies, Cohen & Grigsby, PC, Naples
David St. John, St. John Rossin Burr & Lemme, PLLC, West Palm Beach

12:15 p.m. – 12:30 p.m.
Box Lunch (included in registration)

12:30 p.m. – 1:25 p.m.
Developers and The Interstate Land Sales Full Disclosure Act: There is No Free Lunch
Jerry E. Aron, Jerry E. Aron, PA, West Palm Beach
Alexander Dobrev, Lowndes, Drosdick, Doster, Kantor & Reed, PA, Orlando
Robert S. Freedman, Carlton Fields, PA, Tampa

1:25 p.m. – 2:00 p.m.
Security and Neighborhood Watch in the Post Zimmerman/Martin Era
Mark E. Adamczyk, Goede, Adamczyk & DeBoest, PLLC, Naples
Richard D. DeBoest, II, Goede, Adamczyk & DeBoest, PLLC, Naples

2:00 p.m. – 2:45 p.m.
The Fair Debt Collection Practices Act: Revenge of the Debtor
Jeffrey A. Rembaum, Kaye Bender Rembaum, PLLC, Palm Beach Gardens

2:45 p.m. – 3:00 p.m.
Break

3:05 p.m. – 4:45 p.m.
Who is Going to Pay You? Attorney Fees: Statutes, Contracts, Rules, Ethical Considerations and Fatal Mistakes
James C. Hauser, Attorney's Fees in Florida, PL, Maitland

CLE CREDITS

CLER PROGRAM
(Max. Credit: 9.5 hours)

General: 9.5 hours
Ethics: 2.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 9.5 hours)

Business Litigation: 9.5 hours
Real Estate Law: 9.5 hours

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Register me for the "Community Association Law – The New Normal" Seminar

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LOCATION (CHECK ONE):

❑ **Orlando - Friday, April 5, 2013**
(234) Hyatt Regency Orlando Airport

❑ **Live Webcast / Virtual Seminar* Friday, April 5, 2013**
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REGISTRATION (CHECK ONE)

	WEBCAST
❑ Member of the Real Property, Probate & Trust Law Section: $245	❑ $360
❑ Non-section member: $295	❑ $410
❑ Full-time law college faculty or full-time law student: $170	
❑ Persons attending under the policy of fee waivers: $45	

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and for personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

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Card No. _____

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❑ **COURSE BOOK ONLY 1456M**	❑ **AUDIO CD 1456C**	❑ **DVD 1456D**
Cost $60 plus tax	(includes electronic course material)	(includes electronic course material)
(Certification/CLER credit is not awarded for the purchase of the course book only.)	$245 plus tax (section member)	$250 plus tax (section member)
	$295 plus tax (non-section member)	$300 plus tax (non-section member)
TOTAL $ _____	**TOTAL $ _____**	**TOTAL $ _____**

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The Florida Bar Continuing Legal Education Committee and the Real Property, Probate & Trust Law Section present

Attorney Fees: Statutes, Contracts, Rules, Ethical Consideration and Fatal Mistakes – Who is Going to Pay You?

• Live
• Live Webcast
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COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live and Webcast Presentation: Friday, April 5, 2013

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Course No. 1591R

Fees impact every aspect of your case -- the contract with your client, when to accept an offer or go to trial, and a host of other details. If you make decisions without one eye trained on the fees issue, you can trigger a financial and professional disaster. Navigate safely with this 2-hour crash course covering all aspects of this fluid area of Florida law.

2:45 p.m. – 3:05 p.m.
Late Registrations

3:05 p.m. – 4:45 p.m.
Who is Going to Pay You? Attorney Fees: Statutes, Contracts, Rules, Ethical Considerations and Fatal Mistakes
James C. Hauser, Attorney's Fees in Florida, PL, Maitland

James C. Hauser, served as a Circuit Court Judge for the Ninth Judicial Circuit of the State of Florida and County Judge in Orange County, in which capacity he was named Jurist of the Year by the Young Lawyers Division of The Florida Bar in 1989. A member of the faculty of the Judges College for the State of Florida, Judge Hauser lectures frequently before the bench, bar, and public on the subject of attorney's fees. He is a graduate of Boston University School of Law and the Wharton School of Finance at the University of Pennsylvania.

CLE CREDITS

CLER PROGRAM
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General: 2.0 hours
Ethics: 2.0 hours

CERTIFICATION PROGRAM
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Civil Trial: 1.5 hours
Construction Law: 1.5 hours
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(includes electronic course material)
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Related Florida Bar Publications can be found at http://www.lexisnexis.com/flabar/

The Real Property, Probate & Trust Law Section presents

Homestead Issues for Real Estate and Probate Lawyers – "Hitting a Home Run with Homestead"

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: Friday, May 24, 2013

Vinoy Renaissance Resort & Golf Club • 501 5th Avenue N.E.
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Course No. 1511R

8:20 a.m. – 8:50 a.m.
Late Registrations

8:50 a.m. – 9:00 a.m.
Opening Remarks

9:00 a.m. – 9:50 a.m.
Homestead – A View from the Bleachers
J. Michael Swaine, Swaine & Harris, P.A., Sebring

9:50 a.m. – 10:20 a.m.
The Suicide Squeeze – Revocable Trusts and Homestead?
Jeffrey S. Goethe, Barnes Walker, Goethe & Hoonhout, Chartered, Bradenton

10:20 a.m. – 10:35 a.m.
Break

10:35 a.m. – 11:05 a.m.
Homestead: Will the Creditors Strike Out or Tag It?
Charles I. Nash, Nash & Kromash, LLP, Melbourne

11:05 a.m. – 11:35 a.m.
Leaseholds and Cooperatives – Playing Beyond the 9th Inning
Jeffrey A. Baskies, Moderator, Katz Baskies LLC, Boca Raton
Rohan Kelley, The Kelley Law Firm, P.L., Ft. Lauderdale
Silvia B. Rojas, Attorneys Title Fund Services, LLC, Miami

11:35 a.m. – 12:05 p.m.
Hits, Runs and Errors – A Homestead Case Law Update
Manuel Farach, Richman Greer P.A., West Palm Beach

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REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Real Property, Probate & Trust Law Section: $95
- ❑ Non-section Member: $120
- ❑ Full-time law college faculty or full-time law student: $0
- ❑ Persons attending under the policy of fee waivers: $0
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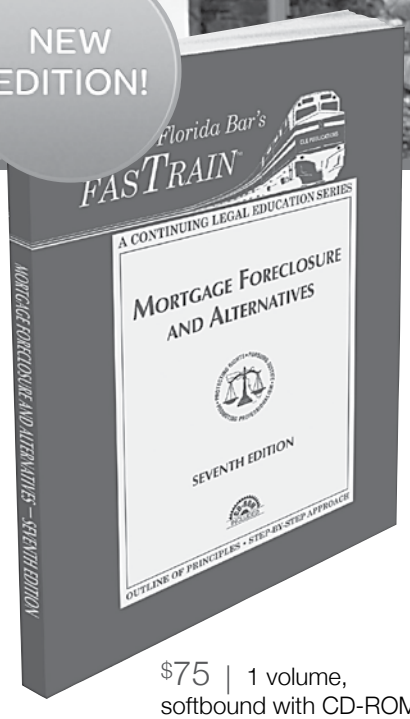

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(Current update 2008)

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.

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What's Happening Within the Section...

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

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

SCHEDULE

EXECUTIVE COUNCIL MEETINGS

July 24 – 28, 2013
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
OUT OF STATE MEETING
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
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:

April 5, 2013
CONDO LAW (#1456)
Orlando*

April 5-6, 2013
WILLS, TRUST & ESTATE CERTIFICATION REVIEW COURSE (#1451)
Orlando*

April 12, 2013
REAL PROPERTY LITIGATION (#1506)
Tampa*

May 10, 2013
TRUST & ESTATE SYMPOSIUM (#1460)
Tampa*

May 24, 2013
CONVENTION SEMINAR (#1511)
St. Pete

June 14-15, 2013
ATTORNEY/TRUST OFFICER LIAISON CONFERENCE (#1462)
The Breakers, Palm Beach

** 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).

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E-filing will be mandatory in civil, probate, small claims, and family divisions starting April 1, 2013. Mandatory E-Filing Resources are now available through a designated "E-Filing Resources" button on The Florida Bar homepage at www.floridabar.org.

Be on the lookout for the changes to the **ISO'S COMMERCIAL GENERAL LIABILITY FORMS AND ENDORSEMENTS** in April, 2013.

ARTICLES

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

Florida Bar Leadership Academy applications, available online, are due by April 1st. See http://www.floridabar.org/leadershipacademy

DO YOU KNOW....

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

New draft of FR/BAR Residential Contract available soon for review. See page 40.

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.)