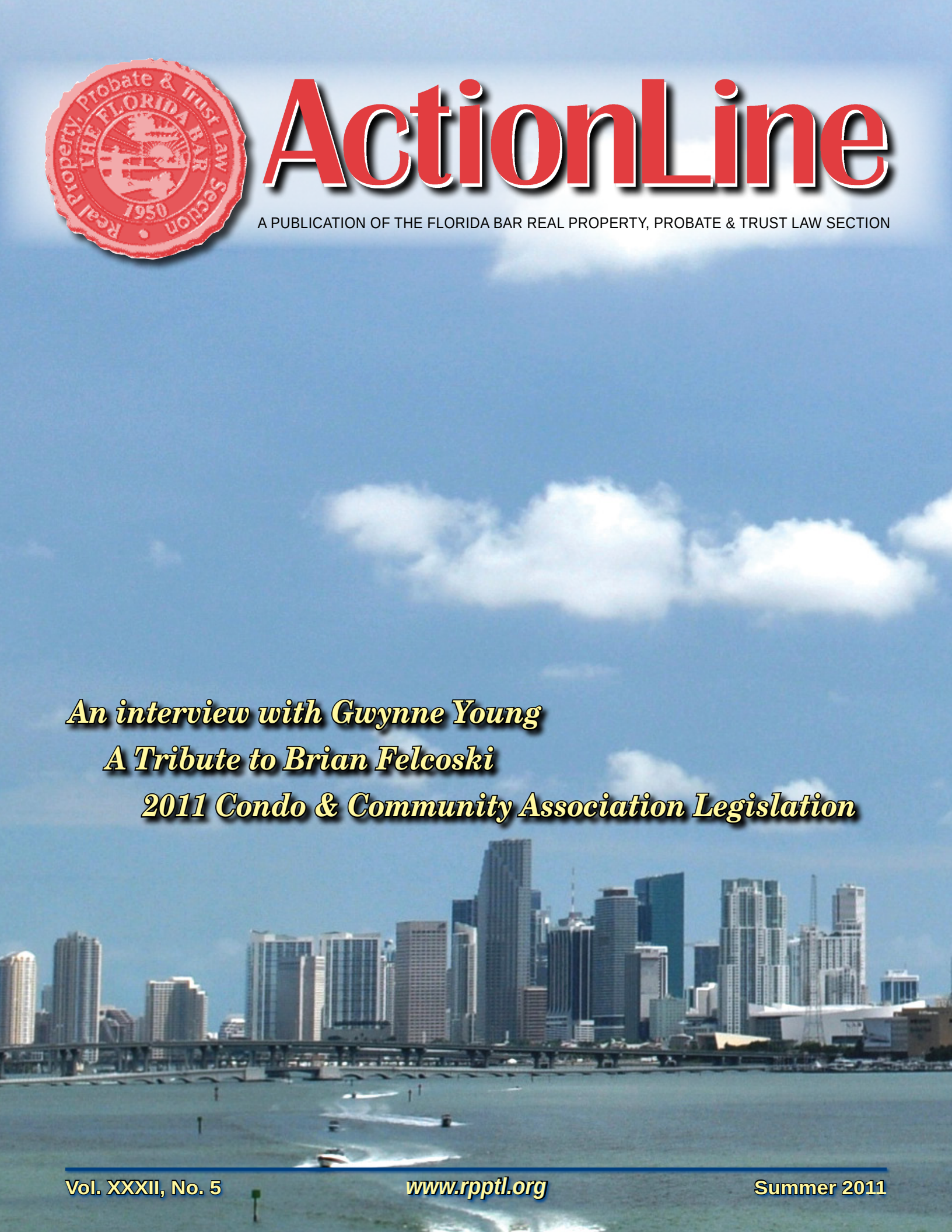
ActionLine

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

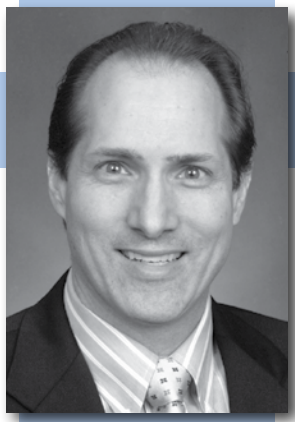


An interview with Gwynne Young

A Tribute to Brian Felcoski

2011 Condo & Community Association Legislation

Vol. XXXII, No. 5 www.rpptl.org Summer 2011



Chair's Column

By Brian J. Felcoski

Section Chair, 2010 - 2011

RPPTL 2011 Section Convention *"Sun, Sea and CLE"*

What a great way to end this Section's fiscal year, with our annual Convention at the wonderful Eden Roc hotel on Miami Beach! Our Convention coordinators, Katherine Frazier, Jon Scuderi and Michael Dribin did a spectacular job helping to coordinate this end-of-year program, with some special assistance from Carlos Batlle. Our free CLE program was filled up. The CLE was cutting edge and, if you missed it, please consider ordering it online from The Florida Bar. Many thanks to Katherine, Jon, Mike and Carlos for all of their work in making the Convention a big success.

This Section has continued to do so much great work for the profession and the public over the last year. Our membership remains strong. Our financial picture is bright. Our legislative activities shined again this year. Our CLE programs were on the forefront and innovative. Our Section committees have continued to address pressing issues and provide an invaluable education to us on the latest developments in the law. Our Section's great work is the result of so many incredibly hard working Section members.

It has truly been an honor to serve you as your 2010-2011 Chair. I cannot imagine a more professional, hard working group of attorneys who volunteer so much of their time for the benefit of the profession and the public. I am simply quite fortunate to be a part of this group.

So as the sun sets on this year and begins to rise on our next fiscal year, under the leadership of outstanding lawyer and Chair-Elect George Meyer, your Section's ship continues to sail a steady course with an extremely talented crew who will keep the ship headed in the right direction.

There are so many people who contribute to the Section. It is difficult to single out a few people among so many who give back. But I would like to recognize some of these special folks.

The members of the Executive Committee devote countless hours to running the Section during the course of its fiscal year. I was fortunate to have the assistance of the following talented attorneys as part of the Executive Committee this past year:

John Neukamm, your immediate Past Chair;
George Meyer, your Incoming Chair;
Fletch Belcher, your Probate Division Director;
Peggy Rolando, your Real Property Division Director;
Michael Dribin, your Treasurer;
Debra Boje, your Secretary;
Drew O'Malley, your Director of At Large Members;
Debbie Goodall, your CLE Chair; and
Michael Gelfand, your Legislation Chair.

All of these individuals have done so much over the year, and they continue to provide invaluable services to the Section. They made this year enjoyable, enlightening and rewarding. I want to thank each of them for letting me play on their team.

Of course, there is someone else I must recognize and thank. You know her well. She always has a smile on her face. She reminds you that, notwithstanding the thousands of details that must be remembered for each meeting, everything is under control, the sun is shining, and all is good in the world. That person is none other than **Elizabeth Gerstman**. Liz helped to make this year fun and exciting. I know it was not easy for her to do her job and juggle a wedding at

See "Sun, Sea and CLE," page 9

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

ABOUT THE COVER:

A photo of the Miami Skyline on a typical sunny day.

Photo by John Neukamm.

IN THIS ISSUE:

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Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments. **We also accept paid advertising from outside vendors.**

ARTICLES: Forward any proposed article or news of note to J. Richard Caskey at *jrcactionline@gmail.com.*

ADVERTISING: For information on advertising, please contact Scott Pence at *spence@carltonfields.com.*

PHOTO SUBMISSIONS: If you have a photo of a "reptile," a Florida scene, or other interesting subject matter that you'd like to have considered for the cover, please send it to the editor, J. Richard Caskey, at *jrcactionline@gmail.com* or our Program Administator, Liz Smith Gerstman at *lgertsman@flabar.org.*

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Liz Smith Gerstman at The Florida Bar at 800-342-8060 extension 5619, or at *lgerstman@flabar.org.* Liz can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

DEADLINES for all submissions are as follows:

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

2011 Florida Condominiums and Community Association Law Update

By Robert S. Freedman, Nicole C. Kibert, Richard C. Linquanti, Jin Liu and Brett B. Pettigrew
Carlton Fields, P.A., Tampa, FL

The 2011 Florida legislative session had several bills passed into law impacting condominiums, homeowners associations and cooperatives. This article is a summary of relevant changes and accordingly is not intended to be a comprehensive overview of every change. Please refer to the referenced bills for details.

CS/CS/CS/HB 1195 was signed into law by Governor Scott on June 21, 2011, and became effective on July 1, 2011, and is now known as Chapter 2011-196, Laws of Florida. This legislation was the major community association package for the 2011 legislative session, and addressed a number of separate areas:

Board Meetings and Election of Directors

The law clarifies procedures for condominium and homeowners association board of directors meetings with regard to use of speakerphones, the ability to record a meeting and the right of members to speak at board meetings. The law also clarifies condominium association procedures to eliminate the requirement for an election if the number of vacancies equals or exceeds the number of candidates and to provide that any vacancies remaining after an election are to be filled by the affirmative vote of the majority of the directors making up the newly constituted board, even if the directors constitute less than a quorum or there is only one director. Clarifications were made with regard to a condominium director's requirement for certification of compliance with statutes and the governing documents. The speaking privileges for members of a mandatory homeowners association have been conformed to those of unit owners at a meeting of a condominium association board of directors. Finally, in a homeowners association, a person who is delinquent in the payment of any monetary obligation for more than 90 days is not eligible for board membership, and a person who has been convicted of a felony is not eligible for board membership unless such person's civil rights have been restored for at least five years prior to the date of the election.

Collection of Rents from Tenants; Delinquencies

The law clarifies procedures for an association attempting to collect rent from a tenant of a delinquent owner have been clarified and includes a form notice letter that must be delivered by an association when an association makes a demand to collect rental payments. An association, or its successor or assignee, that acquires title to a unit or lot through the foreclosure of its lien for assessments is not liable for any unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the association's acquisition of title in favor of any other owners association. A tenant is not liable for increases in the amount of the monetary obligations due unless the tenant was notified in writing at least 10 days before the date the rent is due. If a tenant paid rent to the delinquent landlord owner for a given rental period before receiving the demand from the association and provides written evidence to the association of having paid the rent within 14 days after receiving the demand, the tenant shall begin making rental payments to the association for the following rental period. A tenant is immune from any claim by the delinquent landlord owner relating to the rent timely paid to the association after the association has made written demand.

Distressed Condominium Relief Act

The law clarifies and improves certain provisions of The Distressed Condominium Relief Act (Section 718.701, F.S., et seq.) that came into existence on July 1, 2010. Most importantly, changes were made to explicitly state that bulk assignee and bulk buyer status is available only as to condominium parcels acquired on or after the July 1, 2010 effective date. A bulk assignee is now permitted to appoint or elect members to the board of directors; the statute previously only permitted an election. A bulk assignee's liability for actions taken by the board of directors begins when the bulk assignee elects or appoints a majority of the board of directors. If a bulk assignee assumes the developer's right to guarantee assessments and fund budgetary deficits, the liability for that guarantee obligation now begins upon its acquisition of title to the units (previously, the language could have been interpreted as requiring the bulk assignee to assume all such liability, including the obligations of the previous holder of the guarantee right). A unit owned by a bulk assignee is not deemed "conveyed to a purchaser or owned by an owner other than the developer" until conveyed to an owner other than the bulk assignee (i.e., the conveyance to the bulk assignee does not trigger turnover thresholds). The law also clarifies disclosure requirements to a prospective unit purchaser from a bulk assignee or bulk buyer.

Enforcement Actions

If a unit owner is more than 90 days delinquent in paying a monetary obligation due to the association, the associa-

continued, next page

tion may suspend the right of the owner or an occupant, licensee, or invitee to use common elements, common areas, common facilities, or any other association property until the monetary obligation is paid in full. Note that this suspension right does not pertain to limited common elements intended to be used only by a condominium unit, common elements or common areas needed to access the unit or lot, utility services provided to the unit or lot, parking spaces, or elevators. A voting interest which has been suspended for nonpayment of monetary obligations may not be counted towards establishing a quorum, the voting interests required to conduct an election, or the number of voting interests required to approve an action.

Fire Alarm Systems

The law amends Section 633.0215(14) (which was signed into law per Chapter 2010-174, Laws of Florida) to clarify that, in addition to condominiums, cooperatives or multifamily residential buildings that are less than four stories in height are exempt from installing and maintaining a manual fire alarm system if the building has an exterior corridor providing a means of egress.

Homeowners Associations - Bulk Communications Contracts

The law creates statutory provisions to govern homeowners association contracts for bulk communications services. If the governing documents allow for the cost of communications services, information services, or internet services to be obtained pursuant to a bulk contract, then such expense shall be deemed an operating expense of the association. If the governing documents do not so provide, the board of directors may contract for such services, and the cost shall be deemed an operating expense of the association but must be allocated on a per parcel basis rather than a percentage basis (even if the governing documents provide for other than an equal sharing of operating expenses). A majority of the voting interests present at the next regular or special meeting of the association, whichever occurs first, may cancel any such contract entered into by the board. The contract must enable permit a parcel being occupied by a person who is hearing impaired or legally blind or who receives supplemental security income or food assistance administered by the Department of Children and Family Services pursuant to Section 414.31, Florida

Statutes, to discontinue service without incurring disconnect fees, penalties, or subsequent service charges.

Hurricane Protection in Condominiums

A condominium association board of directors may now require retrofitting of impact glass or other code compliant windows; previously, the statute only spoke in terms of hurricane shutters and other hurricane protection. A vote of the owners is not required if the maintenance, repair, and replacement of hurricane shutters, impact glass, or other code compliant windows are the responsibility of the association pursuant to the declaration of condominium.

Official Records

Electronic mailing addresses and facsimile numbers are not accessible to owners if consent to receive notice by electronic transmission is not provided by the owner, but the association is not liable for an inadvertent disclosure of the electronic mail address or facsimile number for receiving electronic transmission of notices. Attorney/client privileged documents include those prepared in anticipation of litigation or proceedings (deleting "adversarial or administrative") until the conclusion of the litigation or proceedings. Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health and insurance records, are not accessible to unit owners ("personnel records" do not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee).

Termination of the Condominium – Partial Termination

Section 718.117 underwent minor revisions in 2010 in an effort to address the problem of "phantom units" (condominium units that exist legally but that have not been constructed). The 2011 amendments go much further towards addressing this problem by updating multiple provisions to explicitly establish a "partial termination" process by which certain portions of an existing condominium can be terminated without disturbing the remaining units and their mortgages. The optional termination provision now allows termination "for all or a portion of the condominium property." The plan of termination must identify the units that will survive the partial termination and specifically provide that those units will remain in the condominium form of ownership pursuant to an amendment to the declaration of condominium or an amended and restated declaration. Title to the units and common elements that survive a partial termination remains unchanged and does not pass to the termination trustee. As to the surviving property, the partial termination of a condominium may provide for the simultaneous filing of an amendment to the surviving declaration of condominium or an amended and restated declaration of condominium.

Termination of the Condominium – Timeshare Property

The law includes a procedure for the termination of a condominium that includes both condominium units and timeshare estates upon the total destruction or demolition of the improvements. A unit owner (including a timeshare estate owner) can initiate such termination by (a) filing of a petition in court seeking equitable relief; (b) recording a proposed plan of termination; and (c) mailing a copy of the petition to certain individuals (including the association, managing entity, each unit owner, each timeshare estate owner, and each holder of a recorded mortgage lien affecting a unit or timeshare estate). The law establishes procedures by which the proposed plan of termination can be contested, and requires that a court enter a final judgment finding that the proposed plan of termination is fair and reasonable and authorizing implementation of the plan.

CS/CS/CS/HB 408 (Insurance) became effective on May 17, 2011, and is now known as Chapter 2011-039, Laws of Florida. This bill was the major legislation pertaining to insurance across many areas. There were significant changes to the regulatory scheme for property insurance, particularly with regard to sinkhole insurance, wind insurance and the role of public adjusters. The exclusions from the definition of "loss" in the Florida Hurricane Catastrophe Fund were expanded to encompass amounts "paid to reimburse a policyholder for condominium association or homeowners' association loss assessments or under similar coverages for contractual liabilities."

CS/CS/CS/HB 883 (Vacation Rentals) became effective on June 2, 2011, and is now known as Chapter 2011-119, Laws of Florida. This law deals with vacation rentals, public lodging establishments and resort condominiums. The law amends the definition of a public lodging establishment to remove from its scope the terms "resort condominium" and "resort dwelling" and to add "vacation rental" (defined as "any unit or group of units in a condominium, cooperative, or timeshare plan or any individually or collectively owned single-family, two-family, three-family, or four-family dwelling house or dwelling unit that is also a transient public lodging establishment"). The law prohibits local governments from restricting the use of or prohibiting vacation rentals or regulating vacation rentals based solely on their classification, use, or occupancy. The law removes authority for local governments to ban or restrict vacation rentals; however, local law, ordinance or rule adopted on or before June 1, 2011 will be grandfathered in. As a result, some municipalities (including the Town of

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Surfside and villages of Key Biscayne and Bal Harbour) were able to adopt ordinances to regulate vacation rental by the June 1st deadline.

CS/HB 59 (Process Server Access to Gated Communities) was signed into law by Governor Scott on June 17, 2011, and became effective on July 1, 2011, and is now known as Chapter 2011-159, Laws of Florida. This legislation deals with service of process within gated residential communities. The statute provides that a gated residential community, including a condominium association or a cooperative, must grant unannounced entry into the community, including its common areas and common elements, to a person who is attempting to serve process on a defendant or witness who resides within or is known to be within the community. There are a variety of problems with this legislation that will likely lead to litigation - who has an obligation to provide access, what is "unannounced entry" (since the concept is not defined)," is there redress against access being granted but notification being given to the person to be served, what constitutes a reasonable belief that someone resides in a community, what proof of identity as a process server can be provided or is appropriate, how this works with gated communities that do not employ a guard on-site – but the most important one is that this statute allows access by non-governmental employees in contravention of existing restrictive covenants for the community.

CS/CS/CS/HB 849 (Elevator Retrofit Repealed) was signed into law by Governor Scott on June 24, 2011, and became effective on July 1, 2011, and is now known as Chapter 2011-222, Laws of Florida. This legislation repealed the Section 553.509(2) requirement that residential multi-family buildings, including condominium buildings, at least 75 feet high and having a public elevator, are required to retrofit at least one elevator to operate on an alternate power source for emergency purposes.

the same time. But, as she always does, Liz took care of the Section with ease and grace this year.

Each year we recognize a few Section members for their extraordinary accomplishments through some special awards. The Section's **Rising Star Award** recognizes members of the Section who demonstrate the potential for future Section leadership through their active participation in Section committees and projects. This year's recipients are **Robert S. Swaine** and **William T. Hennessey**. These attorneys have demonstrated much Section leadership already. They are always willing to take on new projects. Every time we have needed to call on their help, they have always said yes; and they get the job done.

The Section also presents an **Annual Service Award** to a Section member who has rendered dedicated and significantly outstanding service to the Section, and its varied programs, throughout the current year. **Kristen Lynch** is the recipient of this year's award. Because of Kristen's extraordinary efforts during these difficult recessionary times, sponsorships have remained incredibly strong. Congratulations to Kristen on a job well done.

The **William S. Belcher Lifetime Professionalism Award** is presented to an Executive Council member in recognition of their lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public in promoting the highest standards of ethics and professionalism. **Barry F. Spivey** is the recipient of this year's award. Barry's professionalism and "give back" attitude are without question. Since I have been involved in the Section, he has devoted countless hours to Section projects, including professionalism and ethics issues. Most recently, he spearheaded the Section's efforts on Ethic's Opinion 10-3 to assist the Bar's Ethics Committee in formulating that very important advisory opinion.

The **Robert C. Scott Memorial Award** was established in 1985 by the Section to memorialize the memory and many extraordinary accomplishments of Robert C. Scott. While not granted on an annual basis, the award will be granted, when the occasion requires, to those Section members who best exemplify the devotion and continued service of Robert C. Scott to the Section and its membership. **Peter M. Dunbar** and **Martha J. Edenfield** are the recipients of this year's award. This dynamic duo has served the Section for many years. I have seen firsthand what it takes and costs to get a single bill passed in our state capitol. When you multiply that by 10 or 20 fold in a single year and then add on the efforts that need to be spent stopping bad legislation and correcting non-Section legislative initiatives, you can understand why the accomplishments and devotion of these two Section members to the Section cry out for special recognition.

Thanks again to all of you for contributing to another great Section year. The Section remains in extremely capable hands under your new leader, George Meyer, and your Executive Committee. I look forward to continuing to work with all of you in the years to come.

Sincerely yours,
Brian J. Felcoski

(See photos from the meeting on pages 18 & 19.)

A Tribute to Brian J. Felcoski

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

The 2010-2011 Chair of the Executive Council of the Florida Bar Real Property, Probate and Trust Law Section was Brian J. Felcoski of Miami. Brian is one of those "rare birds," being a Florida native who grew up in the Pinecrest area of Miami-Dade county. Brian must be very attached to South Florida because he earned his undergraduate and law degrees in the neighborhood. His undergraduate degree in 1985 was from Florida International University. His law degree followed shortly thereafter in 1988 from the University of Miami where Brian served as a member of the Order of the Coif and on law review. Brian first got started with the Section when he was an associate at Steel, Hector and Davis. An attorney there who later became his partner, Robert Goldman, encouraged Brian's involvement in the Section and continued to do so after they began to practice together in 1999.

The firm of Goldman, Felcoski & Stone P.A. has three (3) principal shareholders, all of whom have served as Chairs of the Section. The firm was started in 1996 by Robert Goldman and ever since 1999, Brian and Robert have practiced together. Robert observes that Brian is a very hard working and cautious person, and is extremely detailed oriented. Robert relates that this makes for a great partnership, as each of the partners has different strengths. Robert observes that Brian, as Chair of the Section, was extremely cautious with the budget. Robert was quite adamant that their firm support Brian in his extensive involvement with the Section, especially in the year that Brian served as Chair. Robert stated: "It is the firm culture to give back to the Bar. That is an important part of who we are and what we do and Brian is exemplary of that firm culture."

While Brian acknowledged that serving as Chair can be tough at times, he also observed that it was incredibly enjoyable to work with so many talented people. He described his year as "a total pleasure and a complete honor." Brian also described the year as "fast and furious" and said the most fun was the opportunity to plan the great venues and locations for the Section members to meet. Brian was especially pleased by the fact that many Section members have expressed to him their appreciation for all the efforts that went into organizing the meetings. Brian had anticipated that he would hear complaints and gripes, but fortunately that wasn't his experience this past year.

Brian confirms that his firm strongly endorses the importance of Bar involvement. Brian expressed gratitude to his partners and firm staff for support throughout the long year. When asked to look back over his fifteen (15) plus years of involvement with the Executive Council, Brian cited to his time as Legislative Chair which he described as an incredible amount of work but also extremely rewarding. Brian felt his most significant contribution was in 2006 with the adoption of the totally revised trust code. Brian served as Co-Chair of the Trust Code Revision Committee.

Brian's parents were both school teachers so the value of education was emphasized to him from a very early age. Coming from modest means, Brian learned the benefits of hard work and, at an early age, started his own landscaping business. Not only did the landscaping business give him an opportunity to earn some needed spending money and save for college, it also gave him an appreciation for his current job as a Trust and Estate litigator where he can work indoors as opposed to outside in the hot Florida sun.

Brian acknowledged that the position of Chair sometimes forced him to work seven days a week and called for some personal sacrifices, but he still characterized the year as fun and rewarding. When Brian was asked to come up with something that he disliked over the past year, he simply could not produce an answer. Rather, Brian focused again on how great it was to work with so many wonderful people. Brian especially singled out our own Liz Gerstman who he described as wonderful to work with and a fantastic organizer.

In addition to the position of Chair which he held the last year, Brian has also been the Probate Division Director of the Section, Co-Chair of the Ad Hoc Trust Code Revision Committee, and Chair of the Section's Legislative and Trust Law Committees. Additionally, Brian is a fellow in the American College of Trust and Estate Counsel and past President of the Estate Planning Council of greater Miami. Brian is a frequent lecturer for the Florida Bar on probate and trust topics and has been listed in Florida's Super Lawyers, Best Lawyers in America and Florida Trend's Florida Legal Elite.

Brian has devoted a great deal of his time and effort to serving as the public face of The Florida Bar Real Property, Probate and Trust Law Section for the past year. All Section members owe Brian a deep and heart-felt expression of gratitude for all his time and sacrifice. Brian has worked hard and well deserves his honored position in the "back row." AL

An Interview With Gwynne Young, President-Elect of The Florida Bar

By Scott P. Pence
Carlton Fields, P.A., Tampa, FL

I recently had the pleasure of sitting down with my friend and partner, Gwynne Young, the President-Elect of The Florida Bar, to get her views about some of the issues facing both The Florida Bar (the "Bar") and the RPPTL Section. Following are the questions I asked Gwynne and her responses:

Scott: What position, if any, do you believe the Bar should take with respect to judicial foreclosure reform?

Gwynne: I don't see judicial foreclosure reform as an issue on which the Florida Bar would take a position. Rather, I see this as being an issue where the RPPTL Section and the Business Law Section would likely take positions in opposition to any non-judicial foreclosure legislation. Governor Scott mentioned his interest in exploring non judicial foreclosure in his remarks at the Judicial Luncheon at The Florida Bar Annual Convention in Kissimmee on June 23, 2011. I suspect we may see this issue raised again during the upcoming legislative session.

Scott: What are your thoughts about the ongoing issues regarding adequate funding for the courts?

Gwynne: Securing adequate and necessary funding for the courts remains the Florida Bar's number one legislative priority. The Florida Bar will continue to work toward securing a permanent stable source of funding for the judicial system. In his remarks at the Judicial Luncheon at The Florida Bar Annual Convention, Governor Scott stated that he supports legislation providing for an adequate and stable source of funding for the judiciary. This is an issue that impacts all lawyers, including those within the RPPTL Section.

Scott: How do you feel about the current status of relations between the Bar and the RPPTL Section?

Gwynne: I think the relationship between the Bar and the RPPTL Section has never been better. The RPPTL Section's Legislative Team was an effective member of The Florida Bar's legislative team in opposing the "court reform" proposed in the Florida Legislature last session. The Section's contribution to this effort further strengthened the relationship between the Board of Governors and the Section. There are five members of the RPPTL Section Executive Council currently serving on the Florida Bar Board of Governors, including two past Section chairs. The Bar recognizes the quality of work being done by the RPPTL Section and sees many of its programs, such as its Fellowship Program and its various CLE programs, as models that other sections within the Bar can follow.

Scott: What, if anything, is the Bar doing to help real estate lawyers recover from the historic downturn in Florida's real estate market?

Gwynne: The Bar isn't doing anything specifically targeted at helping real estate lawyers, but it has taken a number of steps to help its members, in general, recover from the effects of the adverse economy. For example, if you visit the Bar's recently revamped website, you will find a link entitled "Lawyers Helping Lawyers." There, conveniently located in one place, lawyers will find a vast collection of information. Lawyers can find access to free legal research and access to free and reduced rate CLE programs online. There is also a place for employers to post jobs and for lawyers to search for jobs. In addition to what it has and is currently doing, the Bar continues to consider other things it can do to assist its members in these tough economic times.

Scott: Of the various issues currently being addressed by the Bar, which of those do you believe will have the greatest impact upon the RPPTL Section and/or those on which the RPPTL Section could provide assistance?

Gwynne: As I mentioned, I think finding a stable source of funding for the judiciary is the Bar's top priority. As such, the Bar will need the continued support of the RPPTL Section and its Legislative Team to assist in those efforts. Additionally, the Bar must continue to review and evaluate the effectiveness of its lawyer regulation system. To that

continued, next page

end, Scott Hawkins is in the process of appointing a commission to review certain aspects of the Bar's disciplinary system. There are a number of issues that could affect real estate and probate practitioners (e.g. misuse of escrow funds & mortgage fraud). The Bar will be reviewing recent trends to see if there have been increases in certain types of behavior leading to disciplinary complaints, whether there are any trends in the level of discipline imposed against lawyers, whether programs offered as alternatives to discipline are effective and how to deal with the issues resulting from an aging lawyer population. Finally, three of Florida's Supreme Court justices will face merit retention in the next cycle and the Bar will be looking into what it can do to educate and train its members and the public on these issues, including developing symposia and other training for its members. I strongly believe that all lawyers have a responsibility to educate the public about the role of the judiciary and the importance of the separation of powers between the executive, legislative and judicial branches of our government. It is critical that members of the RPPTL Section take every opportunity to do this.

I would like to thank Gwynne, personally and on behalf of the RPPTL Section, for taking the time out of her schedule to sit down with me and provide her insight into these issues. We congratulate Gwynne on her recent victory and look forward to her terms as President-Elect and President of The Florida Bar. 4l

Marital Deduction?

Not For Florida Residents With Joint New York Real Estate

By Michael P. Stafford, Farrell Fritz, P.C., New York, N.Y.

Florida estate planners should be aware of a not-so-obvious quirk in estate tax schemes of states like New York that will result in estate tax liability for a Florida decedent leaving real property (or tangible personal property) in another state, even if the property was owned jointly with a surviving spouse.

Consider the case of a former New York couple with just under $10 million in assets, including their jointly-held former New York residence, where they now spend a couple of months in the summer. The New York property is worth $675,000.00 when the husband dies in 2011.

The personal representative (the surviving spouse) naturally wants to take full advantage of the maximum federal exemption, so $5 million of the deceased husband's assets go into a credit shelter trust, provided for with mandatory or disclaimer language in his Will. Under the husband's Will, the balance of his property passes outright to his surviving spouse, and of course all joint property with the surviving spouse passes outright to her, including the real property in New York.

New York has a $1 million estate tax exemption, and also has an unlimited marital deduction. So no New York estate tax, right?

Although that result might appear logical, the reality is that under the fact pattern above, the husband's estate would pay a New York Estate Tax of approximately $23,000.00. The reason is that New York's Estate tax is computed on the ratio that the value of the New York property (one half of the $675,000.00, plus the value of any tangible personal property in New York), bears to the value of the entire estate ($5 million, assuming the couple's assets were split evenly).

The Florida couple is treated the same way they would be treated if they had remained New York residents. The New York Estate tax is collected for the privilege of funding a credit shelter trust to the full amount of the permissible Federal exemption, which is currently $4 million more than what New York allows.

A New York resident under the above scenario would pay a New York Estate tax of approximately $369,000.00, because all of the decedent's property over the $1 million exemption would be in play for purposes of computing the New York Estate Tax. For the Florida decedent, the tax is computed on the ratio, so it's obviously much less than the New York resident decedent pays. The same amount of New York State Estate tax would be paid in the Florida wife's estate, assuming the same asset values when the wife dies.

In the context of a $10 million joint estate, it's obviously not a calamity to pay about $46,000.00 in estate taxes for the life-style privilege of keeping a second home in New York, or another state with a similar estate tax scheme. But even that relatively small amount may come as a shock to some clients who thought they were ridding themselves of all non-federal estate tax problems by moving to Florida. Therefore, Florida planners should raise the issue with clients, who may decide to sell the property or otherwise remove it from their names altogether. 4l

Real Estate Case Summaries

Prepared by Benjamin J. Bush, Section Fellow
Gardner, Bist, Wiener, Wadsworth & Bowden, P.A., Tallahassee, FL

Summary judgment against property owner was prematurely entered where affirmative defenses and counterclaim for fraud in connection with purchase of property, which was a compulsory counterclaim, were still pending—Allowing foreclosure action to proceed before deciding counterclaim, effectively denied property owner right to a jury trial.

Peterson v. Affordable Homes of Palm Beach, Inc., 36 Fla. L. Weekly D1384 (Fla. 4th DCA 2011)

In March 2009 Affordable Homes of Palm Beach, Inc. ("Affordable Homes") sued Peterson to foreclose a mortgage alleging that she defaulted under her promissory note and mortgage. Peterson filed a counterclaim against Affordable Homes alleging that Affordable Homes perpetrated fraud on the Petersons by failing to disclose that the house did not include plumbing. Peterson also requested a trial by jury. Affordable Homes answered the counterclaim and filed a motion to dismiss arguing that none of the loan documents made any mention of plumbing and that Affordable Homes was a third party lender and had no duty to make disclosures relating to the plumbing. Peterson argued that Affordable Homes was more than merely the third party lender due to the fact that Affordable Homes' principal was the seller.

The trial court granted Affordable Homes' motion to dismiss Peterson's counterclaim but granted leave to amend the counterclaim within 20 days. The trial court later granted an additional 30 day extension on Peterson's leave to amend the counterclaim.

Before the last extension ran, Affordable Homes moved for summary judgment. Despite the fact that a hearing to resolve Peterson's counterclaim was scheduled and despite the fact that no motion to sever the counterclaim was made, the trial court granted Affordable Homes' motion for summary judgment.

On appeal, the Fourth District Court of Appeals found that the trial court had effectively denied Peterson's request for a trial by jury by allowing the foreclosure action to proceed before deciding Peterson's counterclaim. *Citing Del Rio v. Brandon*, 696 So. 2d 1197, 1198 (Fla. 3d DCA 1997). The Fourth District Court of Appeals noted that "the purpose of the compulsory counterclaim is to promote judicial efficiency by requiring defendants to raise claims arising from the same transaction or occurrence as the plaintiff's claim." *Id.* The Fourth District Court of Appeals reasoned that Peterson's counterclaim alleging fraud by Affordable Homes in conjunction with the purchase of the property and the loan that Affordable Homes was suing to foreclose, thus the counterclaim arose from the same transaction or occurrence. The Fourth District Court of Appeals reversed the trial court's ruling and remanded for further proceedings noting that "final summary judgment of foreclosure should not have been ordered before the trial court considered Peterson's counterclaim for fraud against Affordable Homes.

Error to grant summary judgment of foreclosure where default date in complaint and dates referred to in "cure letters" were not identical.

Valencia v. Deutsche Bank National Trust Company, 36 Fla. L. Weekly D1337 (Fla. 4th DCA 2011)

Deutsche Bank National Trust Company (the "Bank") filed an action for foreclosure against Valencia claiming that they failed to make the required loan payments due on December 1, 2003. The mortgage contained a requirement that the borrowers be given written notice of the default, the action needed to cure the default and a time period of 30 days in which to cure. Upon filing the foreclosure action, the Bank could not produce a copy of the actual default notice sent to Valencia, instead the Bank produced two "drafts" that might have been the one actually sent to Valencia. The "drafts" each contained a cure date of October 8, 2003. The original default notice letter was later produced and contained a different date and a different amount owed. The trial court granted summary final judgment to the Bank and Valencia appealed.

The Fourth District Court of Appeals noted that "before a court may grant summary judgment, the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, must conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Citing Allenby & Assoc., Inc. v. Crown St. Vincent Ltd.*, 8 So. 3d 1211, 1213 (Fla. 4th DCA 2009). The Fourth District Court of Appeals also noted that the burden is on the moving party to conclusively show the absence of any genuine issue of material fact. *Id*. The Fourth District Court of Appeals reversed the trial court's ruling and remanded for further proceedings noting that the date of default alleged in the complaint was not identical to the dates referenced in the cure letters; thus, by definition, creating a genuine issue of material fact.

continued, next page

Trial court's rejection of tenant's defense that landlord orally modified the lease after finding tenant's witnesses were "less than credible" was supported by competent substantial evidence—Based on trial court's credibility finding, trial court's incorrect legal conclusion that defendant was precluded from pursuing an oral modification defense as a matter of law was harmless error—Harmless error to trial court to exclude, on hearsay grounds, certain proffered testimony from one of tenant's witnesses when such testimony was merely cumulative to the testimony found to be less than credible—Error to include prejudgment interest on alleged past due rent where record indicates tenant timely paid.

Sand Dollar Distributors, Inc. v. EastGroup Properties, LP, 36 Fla. L. Weekly D1348 (Fla. 4th DCA 2011)

Following a non-jury trial, the trial court issued its final judgment finding the tenant breached the lease by vacating the premises early and not paying the accelerated rents. The trial court rejected the tenant's defense that the landlord orally modified the lease allowing the tenant to vacate early by its finding that the testimony of witnesses in support of the defense was "less than credible."

The Fourth District Court of Appeals affirmed the trial court's rejection of the defense of oral modification finding that substantial evidence presented at the trial supported the court's factual finding that no oral modification occurred. Because of the trial court's finding on the credibility of supporting witnesses, the Fourth District Court of Appeals also deemed as harmless the trial court's incorrect legal conclusion that the tenant was precluded from raising the defense of oral modification as a matter of law. The Fourth District Court of Appeals also deemed as harmless the trial court's exclusion of certain evidence on the grounds of hearsay. The Fourth District Court of Appeals reversed the trial court's ruling on prejudgment interest for amounts that were, in fact, paid timely by the tenant.

Error to appoint receiver to take control of and manage condominium association without requiring plaintiff or the receiver to furnish a bond where there was no showing of exceptional circumstances which preclude the need or ability to furnish bond—Court's comments regarding receiver's background and experience do not constitute exceptional circumstances.

Hollywood, LLC v. Sures, 36 Fla. L. Weekly D994 (Fla. 4th DCA 2011)

Sures moved to appoint a receiver to take control of and manage the condominium association due to the association's unwillingness to repair a roof leek that was damaging Sures' unit. In his motion, Sures requested that a receiver be appointed to serve "without bond or other security." Sures did not explain why his request was that the receiver serve "without bond or other security." After conducting an evidentiary hearing the trial court orally appointed a receiver and named a specific person because he "knows what [he is] doing, and [the receiver] has that background and experience…[H]e is a very well respected lawyer in Fort Lauderdale for many years and he has … the ability to do it." (Punctuation in the original). In its written order, the trial court ordered that the receiver was to serve "without bond or other security."

The condominium association appealed arguing that the trial court erred by not requiring the plaintiff or the receiver to post a bond without the showing of "exceptional circumstances which would preclude the need or ability to furnish such a bond." The Fourth District Court of Appeals noted that the applicant for the appointment of a receiver should be required to post a bond in an amount sufficient to protect the opposing party from any losses arising from the improvident appointment of a receiver, "unless exceptional circumstances are shown which preclude the need or ability to furnish such a bond." *Citing Comprop Inv. Props., Ltd. v. First Tex. Sav. Assoc.*, 534 So. 2d 418, 418 (Fla. 2d DCA 1988) (emphasis omitted).

The Fourth District Court of Appeals remanded the matter to the trial court to require Sures or the receiver to furnish a bond; unless the Sures could show that exceptional circumstances existed that would preclude the need or ability to furnish the bond.

Error to dismiss, for failure to state a claim, complaint against developer in which purchasers alleged developer violated section 718.503 by converting condominiums into a "luxury rental community" without providing purchasers notice—Whether change to

offering was material, such that it would alter reasonable buyer's decision to enter into the contract, is a factual issue which is not appropriately disposed of on motion to dismiss.

Scarfone v. P.C. –Plantation, LLLP, 36 Fla. L. Weekly D938 (Fla. 4th DCA 2011)

In 2005, P.C.-Plantation, LLLP ("Plantation") created a subdivision and offered condominium units for sale. Scarfone and other investors ("Scarfone") entered into pre-construction contracts for the purchase of the condominium units to be built in the subdivision. In 2008 at a groundbreaking ceremony, Plantation announced that the subdivision would be developed into a "luxury rental community." Scarfone was never given notice of the change in the development plan. Scarfone filed a complaint alleging that Plantation violated section 718.503, Florida Statutes, by converting the condominiums into a luxury rental community, which constituted a change that was material and adverse to them. Plantation filed a motion to dismiss the complaint arguing that the complaint failed to state a claim because the purchase agreements contain the following provision:

> Seller's salespeople can show Units, the Association Property and/or the Common Elements, erect advertising signs and do whatever else is necessary in Seller's opinion to help sell, resell, finance or lease Units.

Plantation argued that this language reserved to them the right to convert the subdivision into a rental community. The trial court dismissed the complaint for failure to state a cause of action.

The Fourth District Court of Appeals noted that Section 718.503(1)(a)(1), states, in relevant part, that a contract for the sale of a residential unit must:

> Contain the following legend in conspicuous type: … THIS AGREEMENT IS ALSO VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF RECEIPT FROM THE DEVELOPER OF ANY AMENDMENT WHICH MATERIALLY ALTERS OR MODIFIES THE OFFERING IN A MANNER THAT IS ADVERSE TO THE BUYER.

In reviewing this case under a de novo review, the Fourth District Court of Appeals ruled that Scarfone sufficiently stated a claim under Section 718.503 by alleging that Plantation's change constituted a material and adverse change. The Fourth District Court of Appeals noted that changes to condominium offerings are material where a reasonable buyer would view the change as "so significant that it would alter the buyer's decision to enter into the contract." *Mastaler v. Hollywood Ocean Group, L.L.C.*, 10 So. 3d 1114, 1116 (Fla. 4th DCA 2009). The Fourth District Court of Appeals noted that Plantation had reserved the right to lease some of the units in the subdivision; however, a full scale conversion of the subdivision into a "luxury rental community" might constitute a change that would "frustrate a buyer's reasonable expectations as to the material nature of the offering and alter their decision to enter the agreement." The Fourth District Court of Appeals noted that this constitutes a question of fact that is not appropriately disposed of on a motion to dismiss. The Fourth District Court of Appeals reversed the trial court's order stating that the complaint sufficiently stated a claim under Section 718.503, Florida Statutes.

Second-tier review of circuit court order reversing a county court judgment entered in favor of association—Circuit court sitting in its appellate capacity departed from essential requirements of law when it reweighed evidence to reach a different conclusion from the county court with regard to homeowner's entitlement to damages based on association's failure to comply with homeowner's written record request.

Wekiva Springs Reserve Homeowners, Etc. v. Binns, 36 Fla. L. Weekly D964 (Fla. 5th DCA 2011)

Wekiva Springs Reserve Homeowner Association, Inc. (the "Association") sought second tier review of circuit court opinion in its appellate capacity. The circuit court overturned a county court judgment awarding damages to the Binns based on the Association's failure to comply with the Binns' written record request pursuant to section 720.303(5), Florida Statutes (2006). The circuit court determined that damages were not appropriate because the Association's actions were not willful.

The Fifth District Court of Appeals noted that, on a second tier review, district courts should determine whether the circuit court applied the correct law and whether the circuit court afforded the procedural due process. Citing Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195, 199 (Fla. 2003). The Fifth District Court of Appeals also noted that the district court should grant the second tier certiorari review "only when there has been a violation of a clearly established principle of law resulting in the miscarriage of justice." Quoting Custer Med. Ctr. V. United Auto. Ins. Co., 35 Fla. L. Weekly S 640, S641 (Fla. Nov. 4, 2010). Lastly, the Fifth District Court of Appeals noted that "[i]t is axiomatic that an appellate court, in this case the circuit court, is not permitted to reweigh the evidence or substitute its judgment for that of the county court." Citing State v. Kirby, 752, So.2d 36, 37-38 (Fla. 5th DCA 2000).

The Fifth District Court of Appeals granted the petition for certiorari and quashed the circuit court's order reasoning that the circuit court departed from the essential requirements of law due to the circuit court, in its appellate capacity, effectively reweighing the evidence of the trial court.

"Sun, Sea and CLE" meeting photos by Michael Gelfand.
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Probate Case Summaries

Prepared by Elisa F. Lucchi, Section Fellow
Goldman, Felcoski & Stone, P.A., Coral Gables, FL

TRUSTS

Attorneys-in-fact brought action against trustee and contingent beneficiaries of trust to remove trustee and surcharge them for allegedly funneling funds from the trust to themselves.

Bogert v. Walther, **54 So. 3d 607 (Fla. 5th DCA 2010)**

The petitioner seeks certiorari review of a discovery order in which the trial court compelled Ms. Walther to produce documents relating to her personal finances and medical records.

Ms. Walther is an 89 year-old woman and is the beneficiary of a trust created by her husband in 1953. Ms. Walther's son, the respondent, has been the trustee of the trust for the past 16 years. Ms. Walther's brother, the petitioner, is her attorney-in-fact. There was much litigation between Ms. Walther's siblings and her son. The gravamen of the suit was to remove Ms. Walther's son as trustee and to surcharge him for funneling funds from the trust to himself.

The order that is the subject of the petition for certiorari arose out of a motion filed by the trustee for payment of attorney's fees from the trust. Ms. Walther objected to the request and the matter was set for hearing. The trustee filed a motion to compel discovery which far exceeded the scope of the trustee's discovery requests and requested all of Ms. Walther's financial records from 2006 to the present. The trustee also filed a motion in limine to prohibit the introduction of non-disclosed evidence at the hearing on attorneys fees and requested that Ms. Walther produce all documents which would provide a reasonable basis to conclude that a breach of trust had occurred.

Citing *Spry v. Prof't Emp'r Plans*, 985 So. 2d 1187 (Fla. 1st DCA 2008), the court noted that an appellate court will grant a certiorari petition to quash a discovery order when the order departs from the essential requirements of the law and causes irreparable harm to a person forced to disclose them. The court also noted that the production of financial records that are not relevant can cause irreparable harm to a person forced to disclose them. Applying these principals, the court found that the challenged order was overbroad, unduly burdensome and would have caused irreparable harm to Ms. Walther. The appellate court granted the petition for writ of certiorari and quashed the trial court's discovery order.

Appellee filed a petition for administration and appellant filed an objection and counter-petition challenging the will and trust which reduced appellant's bequest as compared to a prior will; the trial court found that the decedent had testamentary capacity and that the appellee did not exert undue influence over the will and trust; however, the trial court did not determine whether the decedent suffered from an insane delusion.

Levin v. Levin, **36 Fla. L. Weekly D997 (2011)**

In 1987, the decedent executed a will dividing her estate equally between her daughter and son (the appellant and the appellee). In 2008, the decedent executed a new will and trust which appointed the appellee as personal representative and trustee and which left $350,000 for the appellant and left $150,000 and other bequests for the appellee's children and the remainder of the assets in the will and trust to the appellee. There was evidence that the estate was valued in excess of $3 million at the decedent's death.

After the decedent's death, her will was admitted to probate. The appellant filed an objection to the Petition for Administration and a Counter Petition for Administration and challenged the will and trust executed the decedent, on several grounds. The trial court determined that the appellee did not exert undue influence over the will and trust and that the decedent had testamentary capacity. This appeal ensued.

Prior to the trial, the appellant filed a motion for continuance based on a letter from her doctor stating that she was scheduled for surgery and due to the fact that she did not receive the decedent's psychiatric medical records until the eve of trial. The trial court denied the motion to continue, but made arrangements for the appellant to attend by telephone. An appellate court reviews the denial of a motion for continuance under the standard of abuse of discretion. The appellate court concluded that the appellant: (1) made the motion for continuance days before a trial which had been set several months in advance, (2) offered no evidence as to whether the surgery was elective or medically required, and (3) received the psychiatric medical records before trial and had the benefit of the records at trial.

During trial, the appellant sought to introduce the testimony of an expert witness concerning whether the decedent was signing something she did not want to sign. The appellant court found that the trial court did not abuse its discretion by refusing to permit this witness to testify as the acceptance or rejection of expert testimony is a matter within the discretion of the lower tribunal and such a decision will not be overturned absent an abuse of discretion.

As to the issue of undue influence, appellate court looked to *In re Estate of Carpenter*, 253 So. 2d 697, 701 (Fla. 1971), stating that the appellant had the burden of

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proving the undue influence alleged by showing that the appellee: (1) was a substantial beneficiary (2) who occupied a confidential relationship and (3) was active in procuring the will and trust. The trial court found that the appellee conceded to the first two factors and found overwhelming evidence that the appellee did not use undue influence to procure the 2008 will and trust. The appellate court found that the trial court did not abuse its discretion in determining the facts did not show active procurement.

However, the appellant also claimed that the will and trust were based upon an insane delusion. Citing *Miami Rescue Mission, Inc. v. Roberts*, 943 So. 2d 274, 276 (Fla. 3d DCA 2006), the appellate court noted that "[w]here there is an insane delusion in regard to one who is the object of the testator's bounty, which causes him to make a will he would not have made but for the delusion, the will cannot be sustained." Citing *McCabe v. Hanley*, 886 So. 2d 1053, 1055 (Fla. 4th DCA 2004), the appellate court noted "an insane delusion is a 'spontaneous conception and acceptance as a fact, of that which has no real existence adhered to against all evidence and reason'."

The appellate court also noted that the decedent persisted in the belief that the appellant had only visited her once in about ten years, while the record had evidence showing that the appellant and the decedent had seen each other multiple times in the years preceding the execution of the 2008 documents. The appellate court noted that the trial court did not decide whether the evidence of the contradiction in visitation rose to the level of an insane delusion and whether the decedent's incorrect belief was linked to the reduction of the appellant's bequest from the 1987 to the 2008 documents.

In sum, the appellate court reversed and remanded the case with directions for the trial court to decide whether the decedent suffered from an insane delusion at the time she executed the will and trust. The appellate court affirmed all other grounds.

Trial court correctly dismissed complaint filed against bank for allowing transfer of funds from Totten trust account based on the terms of a durable power of attorney which authorized the attorney-in-fact to act for the decedent; withdrawing money from a Totten trust does not change the disposition effective at principal's death; banks are authorized to allow individuals with a durable power of attorney to transfer money from a Totten trust.

Beane v. SunTrust Banks, 47 So. 3d 933 (Fla. 4th DCA 2010)

At issue is whether a bank is authorized to allow an individual with a durable power of attorney to transfer money from a Totten trust.

In 2002, the decedent executed a durable power of attorney naming her niece, Deborah Lorenzo, as her attorney-in-fact and stated that the niece could "demand, sue for, collect, recover and receive all goods, claims, debts, monies, interest and demands whatsoever now due, or that may hereafter be due, or belong to me." The next day, Lorenzo used the power of attorney to transfer $150,000 from the decedent's Totten trust account at SunTrust Bank which named Frances Wallin as the beneficiary to another account in the name of Orson Lorenzo.

In 2007, the appellant, as guardian and personal representative of the decedent's estate, filed suit against SunTrust for allowing the transfer of funds from the decedent's Totten trust account. The appellant claimed that the power of attorney did not expressly authorize the withdrawal of money from the Totten trust. Relying on Fla. Stat. § 709.08(7)(b)(5) (2002) which states that an attorney-in-fact may not "[c]reate, amend, modify, or revoke any document

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or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal unless expressly authorized by the power of attorney." Appellant claimed that a Totten trust is a disposition effective at the principal's death.

The trial court determined that the power of attorney allowed Lorenzo to transfer the funds and that SunTrust could not be held liable as a matter of law. The appellate court found the trial court was correct in dismissing the complaint and noted that a trial court's ruling on a motion to dismiss based on a question of law is subject to de novo review and that the interpretation of a power of attorney is a question of law subject to de novo review.

Citing *Seymour v. Seymour*, 85 So. 2d 726, 727 (Fla. 1956), the appellate court noted that a Totten trust has been defined as "a tentative trust merely, revocable at will, until the depositor dies" and furthered that a Totten trust is not created with the formalities of a trust or will and is excluded from the provisions and restrictions that apply to revocable trusts under the 2007 Florida Trust Code. The court noted that because the owner of the Totten trust retained the unfettered ability to withdraw any or all of the funds, the attorney-in-fact retained the same authority as a result of the power of attorney. The court furthered that since the owner of a Totten trust can withdraw from the account without constraint, the prospective Totten trust beneficiary cannot object to the depositor's withdrawal from the Totten trust and therefore has no standing to object.

The appellate court found: (1) withdrawing the money from the Totten trust did not as a matter of law change the disposition effective at the principal's death; (2) the bank was authorized to honor the transfer of money; and (3) the transfer of money did not violate the enumerated powers of the durable power of attorney. The trial court's dismissal of appellant's complaint was affirmed.

Action arose from a California court's issuance of a quitclaim deed and post-judgment order requiring defendant to convey Florida homestead property to a receiver with instructions to sell; while the quitclaim deed issued by the California court was not entitled to full faith and credit as California lacked in rem jurisdiction over the property, an equitable exception applied to lift the veil of homestead protection over the property.

Hirchert Family Trust v. Hirchert, 36 Fla. L. Weekly D1290b (2011)

This appeal involves residential property situated in Florida that is owned by the appellee. The property is subject both to a constructive trust imposed by a California court via judgment domesticated in Florida and to post-judgment orders from the California court directing the transfer of property to a receiver. The appellant, the Hirchert Family Trust, contends that the final judgment rendered by a Florida court finding the Trust was not permitted to use the California judgment and post-judgment orders to force the sale of the residential property is erroneous and should be reversed.

At issue is whether the Florida court erred as a matter of law by: (1) failing to accord full faith and credit to the California judgment, the post-judgment orders, and a quitclaim deed executed under the direction of the California court; and (2) finding that an equitable exception to Florida's homestead exemption under Article X, Section 4 of the Florida Constitution was inapplicable.

Here, Mr. Hirchert and his first wife lived in California where they created the Trust which included their California marital home. At first wife's death in 1996, the marital home was divided pursuant to the terms of the Trust as follows: 25% into a survivor's trust and 75% into a residuary trust. Mr. Hirchert became the sole trustee of both trusts and was entitled to principal and earnings of the survivor's trust, but was only permitted to access the earnings of the residuary trust until his assets were fully dissipated.

Two years later, Mr. Hirchert married the appellee and conveyed title to the California marital home from the residuary trust to himself without fully dissipating his assets. Mr. Hirchert sold the California marital home and used the proceeds to purchase a new California home with the appellee as joint tenants. At Mr. Hirchert's death several years later, the appellee sold the new California home and used the proceeds to purchase a home in Florida.

The successor trustee of the Trust later discovered Mr. Hirchert's misappropriation of the original California marital home and filed suit in California against the appellee seeking that 75% of the proceeds Mr. Hirchert obtained from the sale of the California marital home be returned to the residuary trust. The California court found that Mr. Hirchert breached his fiduciary duty by conveying the California marital home to himself and that the residuary trust's share of the proceeds was traceable to the Florida property. As such, the California court imposed a constructive trust over the Florida property in favor of the residuary trust. Appellee did not appeal the California judgment.

Over the appellee's objection, a Florida trial court entered an order domesticating the California judgment in Florida, but declined to rule on appellee's homestead argument. On appeal, the Florida appellate court affirmed the domestication order but remanded the case to determine whether the Florida property was protected homestead and whether the California judgment would affect the Florida property. Before the remand proceedings were initiated in Florida, the California court entered a post-judgment order requiring appellee to convey the Florida property to a receiver with instructions to sell the property. When appellee failed to comply the California court had a quitclaim deed executed on appellee's behalf in favor of the receiver.

The Florida trial court held that the California judgment was entitled to full faith and credit in Florida and that the Florida property was protected homestead which cannot be sold or conveyed without appellee's consent. This appeal

ensued. The appellate court held that the quitclaim deed is not entitled to full faith and credit in Florida because the California court lacked in rem jurisdiction over the property, but that the California court has jurisdiction over the appellee and that the post-judgment order establishing a mandatory injunction requiring appellee to convey the Florida property is entitled to full faith and credit. However, the trial court did not enforce the injunction based on its conclusion that the Florida Constitution prohibited the Trust from forcing the sale of the Florida property while it remained the appellee's homestead.

The Florida appellate court then turned to the issue of whether an equitable exception applied to lift the veil of protection afforded by the homestead exemption. Citing numerous cases, the appellate court noted that there is an exception to homestead protection if the property was acquired with funds generated by fraudulent activity and if a constructive trust is necessary to prevent unjust enrichment. The appellate court determined that Mr. Hirchert's constructive fraud emanating from his breach of fiduciary duty fits within the equitable exception to the homestead protections afforded by the Florida constitution.

In sum, the Florida appellate court held that while the quitclaim deed was not entitled to full faith and credit, and remanded the case to the trial court to enforce the injunction for the appellee to convey title of the Florida property out of comity with California.

ESTATES:

Case law update. Please note that the *Habeeb v. Linder* case reported in the Spring 2011 edition of ActionLine Vol. XXXII, No. 4 has been "withdrawn per court" and not reported in the Southern Reporter Third.

Habeeb v. Linder, 36 Fla. L. Weekly D300 (2011)

Trial court properly denied trustee's petition for reformation of trust determining that petitioner did not meet burden of proving by clear and convincing evidence that the trust, as written, did not reflect the settlor's intent.

Reid v. In re Estate of Edgar Sonder, 36 Fla. L. Weekly D611 (2011)

Reid, as trustee of the Sonder Trust, appeals an order denying her Amended Petition for Reformation of Trust after a trial on the merits. In 2000, Sonder executed a trust naming himself as trustee and later named Reid as sole successor trustee. The trust was funded by assets pouring over from Sonder's estate and provided for a number of gifts, specifically $31,000 of pecuniary gifts per Article II paragraph 1, $125,000 in endowment gifts per Article II paragraph 2 and pecuniary gifts to individuals after giving effect to the gifts in per Article II paragraphs 1 and 2. The pecuniary gifts to individuals included $25,000 along with Sonder's apartment to Reid per Article II paragraph 3. Reid was also Sonder's nurse.

In 2005, Sonder died and Reid was appointed personal representative. Finding the trust funds insufficient to pay all gifts provided for in Article II paragraphs 1, 2 and 3 of the trust, Reid moved to abate the enumerated pecuniary gifts proportionately. Reid also claimed that the apartment was a devise which was not subject to abatement. The motion to abate was denied and affirmed by the appellate court in proceedings taking place in 2007 (*Reid v. Hebrew Union College-Jewish Institute of Religion,* 947 So. 2d 1178 [Fla. 3d

DCA 2007]). Thereafter, Reid petitioned to reform the trust claiming that the trust did not give effect to Sonder's intent which was to give the apartment to Reid free of abatement. On remand, the probate court conducted the trial authorized by 2008 appellate proceedings (*Reid v. Temple Judea,* 994 So. 2d 1146 [Fla. 3d DCA 2008]). The appellate court now reviewed the decision from the 2008 trial.

Citing Fla. Stat. § 736.0415 and *In re Estate of Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998), the appellate court noted that although a trust with testamentary aspects may be reformed after the death of the settlor for a unilateral drafting mistake so long as the reformation is not contrary to the interest of the settlor, that the party seeking reform at all times has the burden to prove by clear and convincing evidence that the trust as written does not reflect the settlor's intent. As such, the appellate court stated that in denying the petition for reformation, the probate court determined Reid did not meet her burden of proving the allegations of the petition by clear and convincing evidence. Citing *McKesson Drug Co. v. Williams*, 706 So. 2d 352 (Fla. 1st DCA 1998), the appellate court noted that "an appellate court may not overturn a trial court's finding regarding the sufficiency of the evidence unless the finding is unsupported by record evidence, or as a matter of law, no one could reasonably find such evidence to be clear and convincing." Based on the appellate court's review of the record, they concluded that a reasonable trier of fact could have been left without a firm belief or conviction that the trust terms were contrary to Sonder's intent.

At trial, the scrivener of Sonder's trust testified that Sonder never instructed him to create a priority between the gifts and that the inclusion of the terms "after giving effect to" was his own doing. However, he also stated that Sonder read the trust and approved of the language. Sonder also made two amendments to the trust and confirmed the language. The appellate court affirmed the trial court's denial of reformation stating that there is no evidence that: (1) Sonder did not understand the terms of the trust, (2) that the trust did not reflect Sonder's intent, or (3) that Sonder would have preferred to gift to Reid over the endowment gift in the event that both could not be satisfied.

The appellate court also addressed Reid's appeal from the probate court's order determining entitlement to attorney's fees. The appellate court noted that it is well established that an order granting entitlement to fees is a non-final non-appealable order until the amount of the fee is set. However, since the trial court never fixed the amount of the fee (notwithstanding the fact that the parties agreed on an amount), this portion of the appeal was dismissed for lack of jurisdiction.

A judge concurred in part with the resolution of the attorney's fees, but dissented in the part of the opinion affirming the denial of reformation of Sonder's trust. The dissenting judge stated his opinion that it was proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a drafting mistake, that the evidentiary standard imposed by Fla. Stat. § 736.4015 was satisfied and that reformation should have been granted. The dissenting judge cited numerous excerpts from the testimony of the drafting attorney as well as Sonder's doctor (who affirmed the testimony of the drafting attorney) and concluded that there was uncontroverted testimony that the settlor did prefer the non-pecuniary gift of the apartment over all other gifts including the endowment gift and that the drafting attorney mistakenly believed that placing the non-pecuniary gift at the end of a pecuniary devise to the same beneficiary would have no effect on the nature of the non-pecuniary gift. As such, the dissenting judge would have reversed the trial court's denial of reformation.

Personal representative of testator's estate moved to determine ownership of promissory note mentioned in will and the status of forgiveness of testator's intent in note under the will; appellate court held that the note could be forgiven only to the extent that proceeds of the note were not needed to pay the estate's debts and expenses.

Lauritsen v. Wallace, 36 Fla. L. Weekly D699 (2011)

The issue on appeal is whether a decedent is permitted through his will to forgive a debt owed to him when his estate is not solvent to pay the debts and the costs of administration of the estate.

The only asset of the decedent's estate was a one-half interest in a promissory note and mortgage held on real property. The decedent's son and the decedent's wife executed the note and mortgage prior to the execution of the decedent's will. The decedent forgave his one-half ownership of the note and mortgage in his will. Several claims were filed against the estate, along with estate fees and costs. The decedent's interest in the note was the only non-exempt asset available to pay the estate's administrative costs, debts and expenses.

The personal representative argued that the decedent's interest in the note should be used to pay the estate's administrative costs, debts and expenses before the balance could be forgiven. The probate court ruled that the note was forgiven at the moment of the decedent's death.

The appellate court noted that it is a question of law as to whether the decedent's forgiveness of the note in his will could legally take effect before payment of the obligations and expenses of the estate and that the standard of review is de novo. The appellate court also noted that the note contained no provision stating that the obligation would be cancelled at the decedent's death and that forgiveness of the note was a testamentary devise subject to the dictates of the Florida Probate Code which state that a devise cannot be elevated over administrative expenses and the rights of creditors.

The appellate court held that the decedent could release

the debt owed to him through a testamentary devise only to the extent that the decedent's estate is solvent to pay all debts and administrative costs of the estate and reversed and remanded the case.

Personal representative of estate filed petition for construction of will as it concerned the disposition of property acquired after the will was drafted; appellate court held that after-acquired property passed under will rather than by rules of intestacy.

Basile v. Aldrich, 36 Fla. L. Weekly D861 (2011)

The appellants seek review of the summary final judgment entered in favor of the appellee in which the trial court held that Fla. Stat. § 732.6005(2) (2004) requires that all property the decedent acquired after she executed her will in 2004 passes under the will to the appellee as the sole remaining beneficiary named in the will. The appellate court affirmed.

In 2004, the decedent prepared an "E-Z Legal Forms" will. Under the article for bequests, the decedent hand-wrote that the possessions she listed be bequeathed to her sister if living and if not, to her brother (the appellee). The will contained no other distributive provisions or a residuary clause. Circa 2007, the decedent's sister died leaving her entire estate to the decedent, including real property and cash. In 2009, the decedent died without having revised her will to include the real property and cash devised to the decedent by her sister. Soon thereafter, the appellee (the decedent's brother) was appointed personal representative of the decedent's estate. In order to facilitate the payment of administrative expenses and claims, the appellee was authorized by court order to sell the real property. Subsequently, the appellee filed a petition for construction of the will and commenced an adversary proceeding in the case to construe the decedent's will as it concerned the disposition of the proceeds from the sale of the real property and cash the decedent inherited from her sister.

In his petition, the appellee alleged that there were two possible constructions of the will as it concerned the after-acquired property. Citing Fla. Stat. § 732.6005(2) which provides that a will is to be construed to pass all property that a testator owns at his death includ-

ing property acquired after the execution of the will, the appellee first argued that that the decedent intended her entire estate (including after-acquired property) to pass to the appellee. Citing Florida's intestate succession laws, the appellee also argued that the decedent by her will intended to dispose of only the property specifically listed in the will and not the after-acquired property which would then pass one-half to the appellee and one-quarter to the two children of the decedent's nieces (the appellants).

At the hearing, all parties submitted motions for summary judgment. The appellee's motion sought a ruling as a matter of law that the will had been properly executed. The appellant's motion sought summary judgment on the issue of whether the property the decedent inherited from her sister passes under her will or by the rules of intestacy. The trial court granted the appellee's motion, but rejected the appellant's argument that the property should pass by intestacy on the ground that in light of the decedent's unambiguous intent as expressed in her will, which negated the necessity of resorting to extrinsic evidence, Fla. Stat. § 732.6005(2) mandated that all of the after-acquired property passes to the appellee under the will.

The appellate court noted that Fla. Stat. § 732.6005(2) states in part that "a will is construed to pass all property which the testator owns at death, including property acquired after execution of the will." The appellant's argue that Fla. Stat. § 732.6005 does not apply to wills that do not contain general devises or a residuary clause based on the historical sources from which Fla. Stat. § 732.6005 was derived. The appellant's also argue that the trial court's interpretation of Fla. Stat. § 732.6005 was contrary to the court's holding in two prior cases. However, the appellate court noted that neither case argued by the appellant involved after-acquired property.

Citing *Knowles v. Beverly Enterprises-Fla., Inc.*, 898 So. 2d 1 (Fla. 2004), the appellate court stated that when the language of the statute is clear and unambiguous and conveys a clear and definitive meaning, the statute must be given its plain and obvious meaning. The court also noted that although there was nothing on the face of the will indicating that the items listed by the decedent consisted of her entire estate, that there was also nothing on the face of the

will indicating the decedent's intent for anyone other than her sister and brother to inherit. Citing *In re Vail's Estate*, 67 So. 2d 655 (Fla. 1953), the appellate court noted there was "no expression of contrary intention" by the decedent that after acquired property "shall not pass under the will." As such, the appellate court noted that the property acquired by the decedent following the death of her sister would, by virtue of Fla. Stat. § 732.6005, pass under the will to the appellee and not according to the rules of intestacy.

The appellate court affirmed the summary final judgment and held that the trial court correctly interpreted and applied Fla. Stat. § 732.6005(2). Although one appellate judge concurred with the opinion, another dissented stating that the trial court "had no business supplying a residuary clause where none exists." The dissenting judge stated that the decedent's will was unambiguous in that it specifically stated the items the decedent desired to devise and that the assets not covered by the will (whether acquired before or after execution of the will) were therefore not disposed of under the will. The dissenting judge cited *In re Estate of Barker*, 448 So. 2d 28 (Fla. 1st DCA 1984), and stated in sum that because a testator is free to dispose of only a portion of his or her estate by will which allows the balance to descend under the laws of intestate succession and because the decedent's will lacked a residuary clause, that the order granting summary judgment should be reversed.

In relation to an agreement to make a will, where a complaint alleged that all conditions precedent to the agreement were met, waived or excused, it was error to dismiss complaint with prejudice based on finding that agreement did not include signatures of two attesting witnesses as required by statute (a finding that addressed matters outside four corners of the complaint) and it was error to prevent the plaintiff the opportunity to amend the complaint once as a matter of law.

Shapiro v. Tulin, 36 Fla. L. Weekly D1066a (2011)

Appellant and Rocco DeStefano executed an agreement which contemplated a devise to either gentleman upon the death of the other party. The agreement provided: (1) if DeStefano died first, jewelry would be given to the appellant; (2) if the appellant died first, $100,000 would be given to DeStefano; and (3) if either party failed to perform their obligation, the non-defaulting party would be a secured creditor in any claim against the estate. The agreement was signed by the appellant, DeStefano, and DeStefano's wife all in the presence of one another.

After DeStefano's death, appellant presented his claim for the jewelry to the appellee (the personal representative of DeStefano's estate). The appellee filed an objection and refused to deliver the jewelry. As a result, the appellant filed a complaint alleging that all conditions precedent were met, excused or waived and asserting three causes of action: (1) replevin; (2) breach of contract; and (3) breach of fiduciary duty. The appellee then filed a motion to dismiss the complaint on three grounds: (1) illegal gambling; (2) barring of the breach of fiduciary duty claim under Fla. Stat. § 732.515 [the statute titled "Separate writing identifying devises of tangible property"]; and (3) failure to state a cause of action because the agreement did not comply with Fla. Stat. § 732.701 [the statute titled "Agreements concerning succession"]. The trial court granted the motion to dismiss based on the third point on the grounds that the agreement failed because it lacked the signatures of two attesting witnesses, but failed to address points one and two. This appeal ensued.

At issue is whether the trial court erred in granting the appellee's motion to dismiss with prejudice because of its findings that two attesting witnesses did not sign the agreement. The appellate court noted that the appellant's complaint alleged that all conditions precedent (which would include the signatures of two attesting witnesses) were met, excused or waived and that such allegations must be accepted as true. Citing *Edwards v.* Landsman, 51 So. 3d 1208 (Fla. 4th DCA 2011) (*external citations omitted*), the appellate court noted that when reviewing an order granting a motion to dismiss, a court "may not go beyond the four corners of the complaint and must accept the facts alleged therein . . . as true. All reasonable inferences must be drawn in favor of the pleader." As such, the appellate court noted that the trial court's finding that Fla. Stat. § 732.701 was not complied with was based on facts not within the scope of the appellant's complaint. The appellate court held that the trial court erred in dismissing the appellant's complaint because a court may not look anywhere but to the document on a motion to dismiss and the trial court exceeded the boundaries of the four corners of the appellant's complaint in dismissing the claim on the basis that two attesting witnesses did not sign the agreement in accordance with Fla. Stat. § 732.701.

The appellate court also noted that the appellant pled generally that all conditions precedent were met and that he was not afforded the opportunity to amend his complaint to specifically plead the same in regards to the signatures of two attesting witnesses. The appellant contended that the trial court denied him the opportunity to amend his complaint to cure the defects discussed in the appellee's motion to dismiss. The appellate court noted that a motion to dismiss is not a responsive pleading and does not affect a party's ability to amend pursuant to the Florida Rules of Civil Procedure. The appellate court held that the appellant should have been afforded the right to amend his complaint before the trial court dismissed his claim with prejudice.

In sum, the appellate court found that the trial court erred in dismissing the appellant's claim and reversed for further proceedings consistent with the appellate court's opinion.

Where bank was a secured creditor of decedent's professional association under a note and mortgage with right of setoff in the account and with dece-

dent as personal guarantor of the note, it was error to enter an order directing transfer of funds in the account at the bank to the depository account established for the administration of the decedent's estate at another bank as it impaired the bank's right of setoff.

BankAtlantic v. Estate of Glatzer, 36 Fla. L. Weekly D1079a (2011)

BankAtlantic appeals two non-final circuit court orders directing it to transfer the funds in a deceased physician's professional association account to the depository account (at a different bank) established for the administration of his estate. BankAtlantic was a secured creditor of the decedent's professional association under a mortgage and a promissory note containing a right of setoff. The decedent personally guaranteed the note and his death constituted an event of default under the note.

The appellate court noted that while the appellee (the decedent's estate) was entitled to take possession of the professional association stock held by the decedent, the same could not be said for the association's funds on deposit with BankAtlantic. Citing *Gettinger v. Gettinger*, 165 So. 2d 757 (Fla. 1964), the court noted that "the affairs of a corporation, even though substantially owned by a decedent, cannot be administered by decedent's executor as assets of the decedent's estate."

The appellee seeks affirmance of the orders of the trial court on three grounds: (1) the orders are not appealable; (2) the estate has the power to take charge of and marshal the funds in the professional association account; and (3) the probate court ruling should be upheld because no decision was made regarding any competing claims to the funds. The appellate court found none of the arguments to be persuasive and noted: (1) the orders are non-reviewable final orders under Fla. R. App. Proc. 9.130(a)(3)(B); (2) the stock of the professional association is an estate asset, but the funds of the professional association are a step removed from the estate and the estate ignored the separate corporate existence of the association and the entity's obligations to its own creditors; and (3) BankAtlantic's rights are not protected just because the funds are frozen in a restricted depository, rather, BankAtlantic's possessory and contractual rights to setoff were impaired by the transfer to a different bank.

The appellate court reversed both non-final circuit court orders and remand for the entry of an order directing repayment of the funds (and any earnings thereon) to the account from which they were transferred.

Error to deny pro se petition for formal administration of wife's estate because petitioner was not represented by attorney where petition states that petitioner is wife's sole beneficiary.

Lituchy v. Estate of Lituchy, 36 Fla. L. Weekly D1158c (2011)

The trial court denied the pro se petition for formal administration of the estate of the appellant's wife because the appellant was not represented by an attorney. Citing Fla. Prob. R. 5.030(a), the appellate court noted that "every guardian and every personal representative, unless the personal representative remains the sole interested person, shall be represented by an attorney admitted to practice in Florida."

The appellate court noted that the petition for formal administration stated that the appellant is the wife's sole beneficiary and is thereby entitled to file the petition without the necessity of an attorney. As such, the decision of the trial court was reversed and remanded with directions to reinstate the petition for administration.

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Additionally, the Section is working on human resources 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, Section committees each have list serves that discuss issues and current hot topics, available to committee members.

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