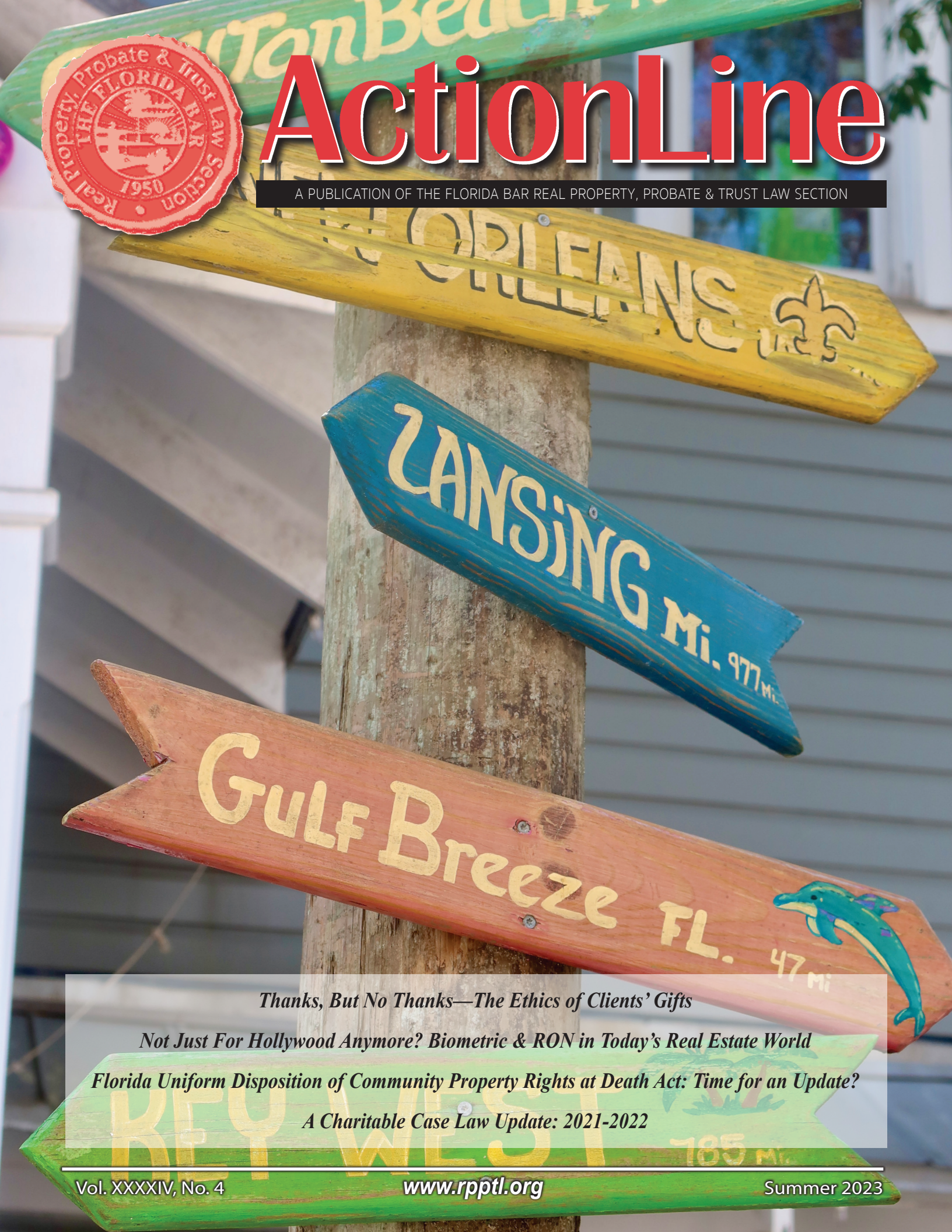

ActionLine

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

Thanks, But No Thanks—The Ethics of Clients' Gifts

Not Just For Hollywood Anymore? Biometric & RON in Today's Real Estate World

Florida Uniform Disposition of Community Property Rights at Death Act: Time for an Update?

A Charitable Case Law Update: 2021-2022

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Focus On The Future Of The Section

By Sarah Butters, Esq., Section Chair, 2022-2023

Wow. Has it already been a year? As I roll off as Chair and take my rightful place in the back row of Past Chairs, I would like to focus my final column on the future of the Section.

To say the Section is thriving is an understatement. We are one of the most productive, hardworking Sections of the Bar. We set an example every day of how Sections contribute to the profession and the community and deliver quality programming to the members we serve. We produce more CLEs than any other Section, and the quality of these programs is unrivaled. **While quantity is not always quality, this is not true regarding RPPTL CLE programming.**

We mentor young members and future leaders through our Fellows program, the Membership and Inclusion Committee, and the Law School Outreach Committee. We have robust outreach to every law school in Florida, most of which have affiliated student RPPTL sections on campus. Many new members and upcoming leaders came to us through one or more of these outreach initiatives.

Hundreds of us dedicate substantial time, daily, to Section projects and committees. Many of our substantive law committees, like Probate Law, Guardianship, Construction Law and Condominium Law have more than three hundred members in regular attendance. These members bring diverse experiences and perspectives on the law, which our committees use to shape solutions to current problems. We offer our members easy access options to participate in each committee and Section meeting, in-person or remotely.

For these reasons, when many Sections see declining membership and less active engagement, the RPPTL Section is growing and thriving. While this growth may present challenges in the years ahead, it is indeed a good problem. RPPTL leadership strives to create an inclusive, welcoming, and engaging community for newcomers and for longtime attendees. This is what makes the Section so great and what makes the future of the Section so bright.

Many thanks to **Hilary Stephens** and **Diana Kellogg** for their dedication, guidance, sharp wit and grace under fire; a hearty welcome as I pass the torch to our incoming **Chair**, **S. Katherine Frazier** (she has meticulously planned a year of incredible events and venues) and **Chair-Elect John Moran**; the Real Estate Division Director, **Wm. Cary Wright**; and the Probate and Trust Division Director, **Jon Scuderi**.

Thank you to our dedicated Section members. It has been an honor to serve as your Chair.

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

Cover photo - Destin, Florida
by John Neukamm

IN THIS ISSUE:

Get Included In ***ActionLine!***

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

ARTICLES: Forward any proposed article or news of note to Erin Farrington Finlen at erin@estatelaw.com. Deadlines for all submissions are as follows:

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
2	Winter	October 15
3	Spring	January 15
4	Summer	April 15

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GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Hilary Stephens at The Florida Bar at 850-561-3155, or at HStephens@floridabar.org.

Hilary can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

Greeting Fellow Section Members!

We apologize for the delay in getting our summer issue out; going forward the issues will be released per their regular schedule, and our Fall issue will be coming to you in the very near future.

We have had a changing of the guard in several respects since our last issue. The esteemed **Sarah Butters** is now past chair (as you will notice the perpetual smile on her face when you see her at the meetings), and **S. Kathrine Frasier** is the current chair of the Section. I'd like to extend a formal welcome to Katherine, who has been working very hard on behalf of the Section in all respects. She coordinated a wonderful out of state trip to Quebec City in September for our Executive Committee meeting. We were able to see the sights in the midst of perfect fall weather. We also had a highly informative meeting with our Canadian counterparts about the death and dirt side of things north of the border. Bien joué Madam!

Second, we would like to express our sincerest gratitude to our outgoing Program Administrator, **Diana Kellogg**. This position is the glue that holds us all together and we want to thank Diana for all that she has done for us. Congratulations Diana on your new position! We will miss you - onward and upward. I'd also like to welcome Diana's replacement **Hilary Stephens**! Hilary has worked as our Assistant Program Administrator for a while now, so she is adept at the necessary cat-wrangling. We are in great hands with Hilary and look forward to a successful year. Lastly, welcome **Jeremy Citron** as our new Assistant Plan Administrator. If you see him around the meetings, please be sure to welcome him and congratulate Hilary on her new position.

We have a potpourri of topics for you in this issue: Past Chair, **Bill Hennessy** reminds us of what not to do as drafting attorneys; **Lindsey Shomali** discusses biometrics and remote notarization; **Anthony P. Guettler** and **Patrick Lannon** discuss the downside of the Florida Uniform Disposition of Community Property Rights Act ; **Adam S. Goldberg** gives us an update on charitable case law; and **H. French Brown** provides us with the Leadership Priorities of the 2023 Session. In our Practice Corner, **Sandra Boisrond** discusses how to address non-speaking wards in incapacity and guardianship proceedings and **Jade Davis**, discusses the Homestead Tax Exemption in relation to renting out Homestead property.

Lastly, I would like to thank my counterpart Michael Bedke for his support and hard work on ActionLine through the years. Thank you, Mike, for being you. Michelle Hinden our new co-editor-in-chief has taken over for Mike and is doing a fantastic job. Welcome to the family, Michelle!

Best,
Erin


M. BEDKE


E. FINLEN


M. HINDEN

Thanks, But No Thanks— The Ethics of Clients' Gifts

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

You have spent your entire career striving to make the "right" choices and decisions - doing your best to practice with professionalism and integrity. You know better than to prepare a will for a client making a gift to you or your family. However, *in this instance*, *with this particular client*, you think, "*What's the harm?*"

You are now faced with a real mess. Your integrity is being questioned. The other beneficiaries under the will are claiming that you procured the gift through undue influence or by breaching your fiduciary duty. Your ticket to practice law is on the line, and all you have left is a litany of excuses.

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

You disclaim the gift thinking that it will stop the undeserved attacks on your character. Unfortunately, the family still questions the validity of the document you prepared and your motives. You are defending a bar grievance. Your thoughts of "*What's the harm?*" seem like a distant memory. Your mind is now filled with "W*hat did I get myself into?" "It wasn't worth it!" "I should have just said no." "If only I had thought about the consequences!*"

The reality is that once you prepare a testamentary instrument for a client making a gift to you, it is impossible to pretend it never happened. Like Pandora's Box, it is impossible to reseal the box and, more importantly, impossible to keep the potential trouble lurking inside from getting out and wreaking havoc.

I am certain that most attorneys reading this article would never solicit a substantial gift from an unrelated client or consider preparing an instrument making a substantial gift to the lawyer or the lawyer's family because of the obvious ethical implications; however, every year, The Florida Bar receives complaints alleging this very practice.

In most instances, the lawyers feel like they have done nothing wrong. They raise the defenses and excuses noted above. In many instances, the gift to the lawyer is not unnatural given the length and depth of the relationship between the attorney and the client. The key problem for the lawyer is that the transaction is tainted by irreconcilable conflicts of interest.

The issue of whether an attorney may draft a will in which he or she is named as a beneficiary is not a new or novel question. As explained by Honorable Judge Lauren C. Laughlin in the *Estate of Virginia Murphy* [1], the prohibition on the scrivener of a will inheriting under it dates back to Roman law.[2]

Florida Rule of Professional Responsibility 4-1.8(c), entitled "Gifts to Lawyer or Lawyer's Family," directly addresses the issue of client gifts for Florida lawyers and provides:

> A lawyer is prohibited from soliciting any gift from a client, including a testamentary gift, or preparing on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

There are two significant components to this rule. First, it prohibits a lawyer from soliciting *any* gift. It is never proper or appropriate for a lawyer to suggest that the client should offer them a gratuity or a benefit of any type in addition to their legal fee unless they are related to the client.[3]

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The comment to Rule 4-1.8(c) explains that:

> [A] lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift. For example, a simple gift such as a present given on a holiday or as a token of appreciation is permitted.

However, if the client offers a more substantial gift, the gift may be, "voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent."[4]

The difficulties of proof and the nature of the confidential relationship between a lawyer and a client have caused courts and commentators to conclude that the lawyer must prove that the gift was free of undue influence by clear and convincing evidence.[5]

Second, Rule 4-1.8(c) prohibits a lawyer from preparing any instrument on behalf of a client which makes a gift to the lawyer or to any person related to the lawyer, unless the lawyer is related to the client by blood or by marriage. The Comment to the Rule notes that:

> If effectuation of a gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide, and the lawyer should advise the client to seek advice of independent counsel.

Given the nature of the confidential relationship between a lawyer and a client, Rule 4-1.8(c) serves the important purpose of protecting the client from potential overreaching and impropriety by the lawyer by prohibiting the lawyer from preparing the instrument making the gift.[6]

The prohibition on lawyers drafting wills that name themselves as beneficiaries extends to other lawyers in the same firm. *See* R.Regulating Fla. Bar4-1.8(k) [7] ("while lawyers are associated in a firm, a prohibition in the foregoing subdivisions (a) through (i) that applies to anyone of them shall apply to all of them"). Thus, a lawyer cannot avoid the rule simply by requesting a partner or associate prepare the document. Further, the rule applies to gifts by a client to members of the lawyer's family. Accordingly, the ethical rule prohibits a lawyer from drafting an instrument making a substantial gift to the lawyer's wife, children, and grandchildren.

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However, the rule alone does not solve the problem. As explained by Judge Laughlin in the *Murphy* decision, a lawyer, tempted by the value of a potential bequest, is placed in the position of violating the ethical rule or ultimately letting go of the potential bequest.[8] No discussion of the *Murphy* case would be complete without mentioning Judge Laughlin's eloquent analogy of this ethical dilemma in describing the *South Indian Monkey Trap*.

> The "South Indian Monkey Trap" was developed by villagers to catch the ever-present and numerous small monkeys in that part of the world. It involves a hollowed-out coconut chained to a stake. The coconut has some rice inside which can be seen through the small hole. The hole is just big enough so that the monkey can put his hand in, but too small for his fist to come out after he has grabbed the rice. Tempted by the rice, the monkey reached in and is suddenly trapped. He is not able to see that it is his own fist that traps him, his own desire for the rice. He rigidly holds on to the rice because he values it.[9]

That is precisely what happened in the *Murphy* case. Judge Laughlin was placed in the unenviable position of meting out justice to an attorney who had, up to that point, served our profession honorably. Not only did the lawyer lose the gift under the client's will, but he was also ultimately disbarred and his name and career are forever tagged with an asterisk.

At common law, the violation of Rule 4-1.8 *did not* render a gift to the lawyer void as a matter of law. As a consequence, a lawyer could violate the rule and, under certain circumstances, still be entitled to retain the gift or bequest from his or her client even though the lawyer was subject to discipline. Courts in Florida refused to declare a gift in violation of the ethical rule void as a matter of law. For example, in *Agee v. Brown*,[10] the 4th DCA reversed the trial court, which had found that a gift to a drafting lawyer under a will was void as a matter of law because it violated Rule 4-1.8 and public policy.

On appeal, the 4th DCA held that the trial court had improperly, "incorporated Rule 4–1.8(c) of the Rules Regulating The Florida Bar into the statutory framework of the probate code."[11] The court found that this interpretation was erroneous as, "[i]t is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature."[12] The court noted that the, "best way to protect the public from unethical attorneys in the drafting of wills…is entirely within the province of the Florida Legislature."[13]

That gauntlet was picked up almost immediately, and two years later the Florida Legislature passed Fla. Stat. § 732.806 at the urging of the Real Property Probate and Trust Law Section of The Florida Bar.[14] That statute solved the *Agee* issue by rendering certain gifts made to a lawyer or person related to the lawyer *void* rather than merely *voidable*. Fla. Stat. § 732.806 provides that:

> [A]ny part of a written instrument which makes a gift to a lawyer, or a person related to the lawyer, is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

The statute applies to all manner of inter vivos and testamentary gifts.[15]

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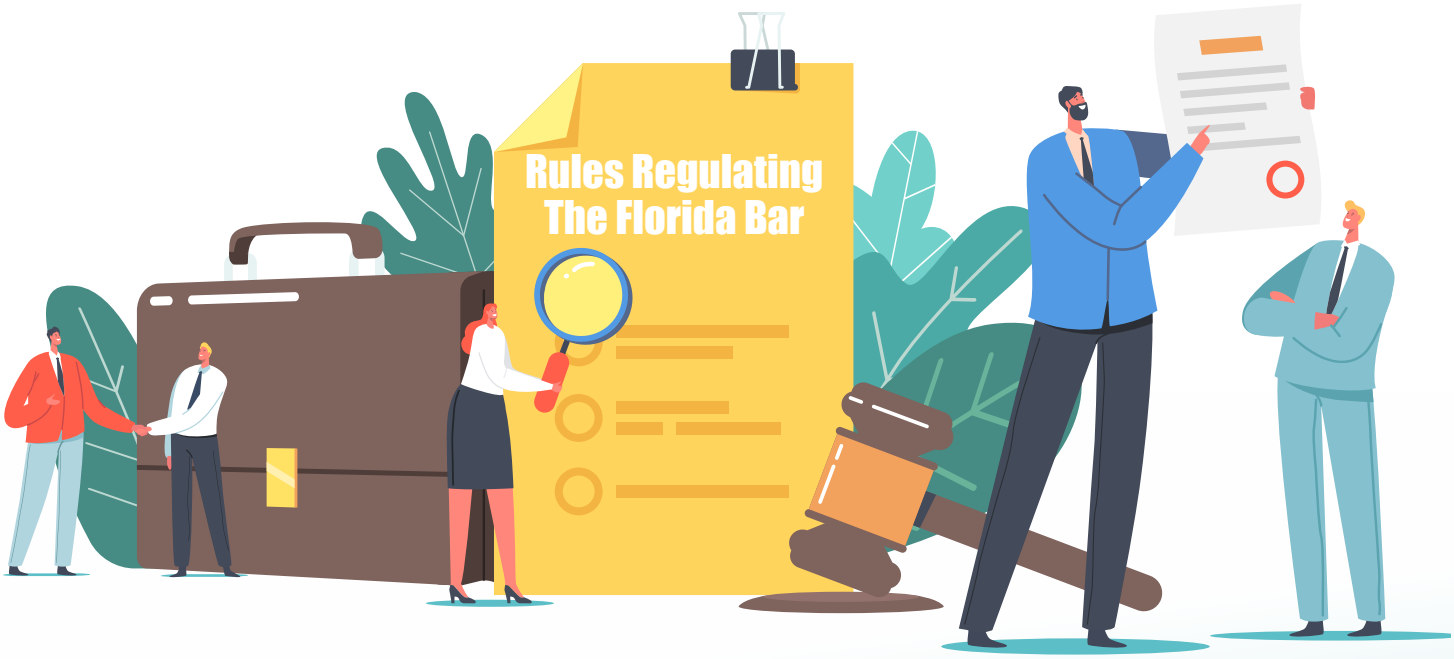

Fla. Stat. § 732.806 prevents unnecessary litigation over whether the client intended to make the gift to the lawyer, taking the case out of a contested evidentiary proceeding after the decedent's death. The statute does not prevent a lawyer from inheriting from a client. Indeed, a client is free to sign a will or other instrument making a gift to the lawyer or the lawyer's family. The statute merely prevents the lawyer or persons related to the lawyer from preparing the document making the gift. In such circumstances, the client should be advised to go to an independent lawyer to have the instrument making the gift prepared. Indeed, this tracks the recommendation in the Comment to Rule 4-1.8(c). Note, an independent lawyer means someone *outside* of the lawyer's firm. The statute (and the ethical rule) makes it clear that a gift in a document cannot be prepared by an employee such as a paralegal or other lawyer in the same law firm.[16]

There are countless situations where a gift to the drafting lawyer or the lawyer's family may be natural, given the nature or extent of the relationship. For example, beyond the situation of a longtime client of the lawyer, the lawyer or lawyer's spouse may have a life-long friend who wishes to make them a substantial gift. There is nothing which prohibits a lawyer from accepting an unsolicited gift or which prohibits the client from making such a gift. However, regardless of the situation, it is important to be mindful of the ethical rule, and the potential consequences of violating it, as well as Fla. Stat. § 732.806. If an instrument needs to be prepared to effectuate a "substantial" gift, Rule 4-1.8(c) requires the client to have independent counsel. Yet, even with independent counsel, the drafting lawyer may still be placed in the uncomfortable position of having to defend claims of undue influence and breach of fiduciary duty with the client's lips sealed and unable to provide support. Maybe the overarching lesson is that *no gift* is worth risking your livelihood and having your integrity questioned.


B. HENNESSEY

William T. Hennessey *practices with the law firm of Gunster, Yoakley & Stewart, P.A. in West Palm Beach, Florida He leads the firm's probate and trust litigation practice and is a chair of its Private Wealth Services group. He is a past chair of RPPTL and a Fellow of the American College of Trust and Estate Counsel where he serves as vice chair of its Professional Responsibility Committee. Mr. Hennessey served as Chair of the Ad Hoc Estate Planning Conflicts of Interest Committee for RPPTL which proposed the statutory and rule changes discussed in this article concerning gifts to lawyers.*

Endnotes

1 *Estate of Virginia Murphy Case* no. 06-6744ES-4 (Fla. Cir. Ct. August 1, 2008).

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

3 *See* comment to R. Reg. Fla. Bar 4-1.8 noting that this prohibition is in place to prevent overreaching and imposition on clients.

4 Comment to Rule 4-1.8(c)

5 *See* Stacy B. Rubel and J. Eric Virgil, Probate Litigation, PRACTICE UNDER FLORIDA PROBATE CODE §21.3A1.b.xii (Fla. Bar CLE 2023) citing *Ritter v. Shamas*, 452 So. 2d 1057 (Fla. 3d DCA 1984).

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

7 *See* R.Regulating Fla. Bar4-1.8(k).

8 *See Murphy* at 22.

9 *Id.* Judge Laughlin cites to Chapter 26 of Robert M. Pirsig's, *Zen and the Art of Motorcycle Maintenance. An Inquiry Into Values*. (William Morrow & Co., ed. 1974). [For those not offended by the idea of capturing pesky monkeys, the editor of this article (not its author) suggests a visit to YouTube and a search for "Trapping a Monkey in Colonial Times."]

10 73 So. 3d 882 (Fla. 4th DCA 2011).

11 *Id*. at 886

12 *Id.*

13 *Id.* at 887. The *Agee* decision is particularly interesting because the lawyer in that case was the one contesting the last will of the decedent in the hopes of reinstating a bequest to the lawyer and his wife under a prior will of his former client (and friend). *Id.* at 884. The beneficiaries successfully convinced the trial court to dismiss the will contest on the basis that the lawyer lacked standing to contest the validity of the last will because the gift to the lawyer and his wife violated the ethical rule. *Id.* at 885. The 4th DCA reversed. *Id*. at 887. On remand, the personal representative and beneficiaries will be forced to defend the validity of the decedent's last will against a challenge by the lawyer. *Id.*

14 Another tidbit from the editor: The author of this article, William T. Hennessey, chaired the *ad hoc* committee that drafted the proposed legislation which was enacted by the Legislature.

15 *See* Fla. Stat. § 732.806(7) (2023):

(7) For purposes of this section:

(a) A lawyer is deemed to have prepared, or supervised the execution of, a written instrument if the preparation, or supervision of the execution, of the written instrument was performed by an employee or lawyer employed by the same firm as the lawyer.

(b) A person is "related" to an individual if, at the time the lawyer prepared or supervised the execution of the written instrument or solicited the gift, the person is:

1. A spouse of the individual;
2. A lineal ascendant or descendant of the individual;
3. A sibling of the individual;
4. A relative of the individual or of the individual's spouse with whom the lawyer maintains a close, familial relationship;
5. A spouse of a person described in subparagraph 2., subparagraph 3., or subparagraph 4.; or
6. A person who cohabitates with the individual.

(c) The term "written instrument" includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract or any other contractual arrangement that creates an ownership interest or permits the naming of a beneficiary.

(d) The term "gift" includes an inter vivos gift, a testamentary transfer of real or personal property or any interest therein, and the power to make such a transfer regardless of whether the gift is outright or in trust; regardless of when the transfer is to take effect; and regardless of whether the power is held in a fiduciary or nonfiduciary capacity.

16 *See* Fla. Stat. § 732.806(7)(a) (2023); Rule 4-1.8(k).

Not Just For Hollywood Anymore?

Biometric & RON in Today's Real Estate World

By Lindsey Shomali, Esq., WFG National Title Insurance Company, Lake Mary, Florida

While Remote Online Notarization ("RON") was not a new concept in 2020, RON became prevalent in the title industry nationwide when the COVID-19 pandemic spread in the United States in the spring of 2020 and eventually led to lockdowns. RON appears to have saved the real estate industry, which strongly relies on human contact, by allowing notarized signing to occur while the parties could social distance and sign documents from the safety of their own homes. Though a majority of people are back to the hustle and bustle of their pre-pandemic routines, RON usage has not fallen into the backdrop.[1] People have learned to use technology as a common tool in daily life to ease some of the burden of their hectic schedules, navigate geographical restraints, and avoid in-person signings when a notary is needed.

RON: What is it?

Fla. Stat. § 117.265 (2022) allows an online notary physically present in Florida to notarize documents of the signor as long as the online notary abides by the procedures outlined in the statute and confirms the identity of the principal signor and the witnesses.[2] The online notary can confirm the identity of the signor by means of: "(a) Personal knowledge of each principal; or (b) All of the following . . . 1. Remote presentation of a government-issued identification credential by each principal. 2. Credential analysis of each government-issued identification credential. 3. Identity proofing of each principal in the form of knowledge-based authentication or another method of identity proofing that conforms to the standards of this chapter.[3] The most common means of identifying the signor under Fla. Stat. § 117.265(4)(b)(3), is by knowledge-based authentication.[4] Knowledge based authentication ("KBA") takes the form of KBA questions, which are derived from credit reporting companies.[5] KBA questions take the form of a question with four answer choices provided, such as "Did you previously own a: (a) 2010 White Honda Civic; (b) 2014 Blue Toyota Corolla; (c) 2009 Red VW Jetta; or (d) 2017 Black Nissan Sentra?" Foreign persons do not usually have a credit history in the United States (unless they have done significant amounts of business in the U.S.), which hinders the creation of KBA questions and brings the need for another method of identity verification.

Florida RON & Biometrics

A question on the rise is whether the use of biometrics to confirm the identity of a signor in a RON transaction is authorized by Florida law. Under Fla. Stat. § 117.265(4)(b)(3), an acceptable means of confirming the identity of the signor includes "another method of identity proofing that conforms to the standards of this chapter."[6] Fla. Stat. § 117.201(7) requires that a, "third party affirms the identity of an individual through use of public or proprietary data sources."[7] Though these data sources can include "means of knowledge-based authentication or biometric verification," biometric verification falls short of the statutory requirement when a third party is not confirming the person's identity against a data source (whether public or private).[8] Therefore, to stay in compliance with Florida Statutes, a Florida RON notary can rely on biometrics only when those biometrics used to affirm the individual's identity are in a database.[9]

This makes logical sense when thought of in real world application. While those in the title industry are learning more ways to catch fraudsters, fraudsters are getting smarter and thinking of more innovative ways to defraud parties. Under the current Florida Statutes, it would be impermissible to use the identification produced by the individual as the source to which the person's biometrics are compared against.[10] In that case, the person's identity is not being affirmed by a "public

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or proprietary data source."[11] John Doe could claim to be Joe Shmoe and provide a fraudulent ID which has his photo with Joe Shmoe's information. By ensuring the signor's identity is affirmed though use of public or proprietary data sources, defrauding attempts such as this will fail.

At the moment, biometrics do not appear to be the best method to confirm identity when Florida remote online notarization is performed due to the apparent lack of reliable "public or proprietary data sources." Until such data sources are proven to be both reliable and consistent, it appears the strongest route to curb fraudulent signors is to continue to rely on the use of KBAs and identity affidavits.

A Glimpse at Another State's Approach to Reliance on Biometrics for RON

A Virginia RON notary is also unable to rely on biometrics to confirm the signor's identity when the biometrics are not analyzed against a third-party database. A Virginia RON notary is required to rely on "satisfactory evidence of identity" (unless the signor is personally known to the notary).[12] For electronic notarization, "satisfactory evidence of identity" can be based on video or audio technology that allows the notary to identify and communicate with the signor.[13] The notary's identification of the signor must be, "confirmed by (a) personal knowledge, (b) an oath or affirmation of a credible witness, or (c) at least two of" the four options.[14] Those options include: (1) credential analysis of government issued ID, (2) prior in-person identity proofing, "(3) another identity proofing method authorized in guidance documents, regulations, or standards adopted pursuant to Va. Code § 2.2-436 . . . or (4) a valid digital certificate accessed by biometric data or by use of an interoperable Personal Identity Verification card ..."[15] Since the only option to confirm identity with biometrics requires "a valid digital certificate accessed by biometric data . . .", Virginia RON notaries cannot rely on biometrics that are not checked against a third party database.[16]

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Failure to Comply with Florida Notary Laws? Is My Document Still Validly Recorded?

Average parties to a real estate transaction can easily feel overwhelmed by the steps and procedures taken to complete the transaction, and that is before they consider, if they consider it at all, the notarization process. What happens to their documents if the notary fails to comply with Florida's notary laws? Will their documents still be considered validly recorded?

All minds can be at ease thanks to the safe harbor language included in Fla. Stat. § 117.265(9), which states:

Any failure to comply with the online notarization procedures set forth in this section *does not* impair the validity of the notarial act or the electronic record that was notarized but may be introduced as evidence to establish violations of this chapter or as an indication of possible fraud, forgery, impersonation, duress, incapacity, undue influence, minority, illegality, or unconscionability, or for other evidentiary purposes[17] (emphasis added).

Fla. Stat. § 695.03(4) states, "The affixing of the official seal or the electronic equivalent…*conclusively establishes* that the acknowledgment or proof was taken, administered, or made in full compliance with the laws of this state…"[18] (emphasis added). It goes on to state:

> All affidavits, oaths, acknowledgments, legalizations, authentications, or proofs taken, administered, or made in any manner as set forth in subsections (1), (2), and (3) are validated and upon recording may not be denied to have provided constructive notice based on any alleged failure to have strictly complied with this section.[19]

Lastly, Fla. Stat. § 695.28(1) states, "A document that is otherwise entitled to be recorded and that was or is submitted to the clerk of the court or county recorder by electronic or other means and accepted for recordation is deemed validly recorded…"[20]

Therefore, based on Fla. Stat. § 117.265(9) (failure to comply with procedures does not invalidate notarial act), §695.03(4) (once the notary affixes their seal, the notarization becomes legal), and § 695.28(1) (documents submitted and accepted to be recorded provides notice regardless of error in notarization procedure), an instrument will be considered validly recorded despite a notary's failure to follow all of the procedures set forth in Florida's notary laws.

Conclusion

While RON did not turn out to be the panacea everyone hoped it would be during the pandemic, it has proven helpful in closing deals where in-person contact was a bar to notarization. Going forward, it will be interesting to see how the increasing reliability and reliance on improved biometrics will enhance the RON process. Now if we could only get the major banks to rely on e-notes! That's when we will really see RON usage pick up!


L. SHOMALI

Lindsey Shomali *is Underwriting Counsel for WFG National Title Insurance Company and provides underwriting support to WFG's title agents in Florida. She believes anything is possible with hard work, dedication, and drive. Lindsey received her Bachelor of Arts in Legal Studies from the University of Central Florida with honors and her Juris Doctor from FAMU College of Law with honors. Before joining WFG, Lindsey gained experience in estate planning, probate, guardianships, and government contractor work.*

Endnotes

1 *RON Use Projected to Increase in 2022*, ALTA Blog (Sept. 28, 2022, 10:04 AM), https://blog.alta.org/2022/09/ron-use-projected-to-increase-in-2022.html.
2 Fla. Stat. § 117.265 (2022).
3 Fla. Stat. § 117.265(4)(b) (2022).
4 Fla. Stat. § 117.265(4)(b)(3) (2022).
5 Annie M., *Knowledge-Based Authentication (KBA) Question Generation*, Safe Send Returns (Nov. 21, 2022), https://safesendreturns.zendesk.com/hc/en-us/articles/360010993774-Knowledge-Based-Authentication-KBA-Question-Generation#:~:text=Yes.,rideshare%20services%2C%20and%20cellphone%20providers.
6 Fla. Stat. § 117.265(4)(b)(3) (2022).
7 Fla. Stat. § 117.201(7) (2022).
8 Fla. Stat. § 117.201(7) (2022).
9 Fla. Stat. § 117.201(7) (2022).
10 Fla. Stat. § 117.201(7) (2022).
11 Fla. Stat. § 117.201(7) (2022).
12 Va. Code Ann. § 47.1-2 (2022); Va. Code Ann. § 47.1-14(B) (2022).
13 Va. Code Ann. § 47.1-2 (2022).
14 Va. Code Ann. § 47.1-2 (2022).
15 Va. Code Ann. § 47.1-2 (2022).
16 Va. Code Ann. § 47.1-2 (2022).
17 Fla. Stat. §117.265(9) (2022).
18 Fla. Stat. § 695.03(4) (2022).
19 Fla. Stat. § 695.03(4) (2022).
20 Fla. Stat. § 695.28(1) (2022).

Florida Uniform Disposition of Community Property Rights at Death Act:

Time for an Update?

By Anthony P. Guettler, Esq., Gould Cooksey Fennell, Vero Beach, Florida
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Immigration into Florida from other states and countries continues apace, and Florida property continues to be an attractive investment opportunity for outsiders. As attorneys rush to help the recent arrivals and outside investors adjust to our legal landscape, it is a worthwhile effort to consider how Florida law may be modernized and expanded to accommodate the legal baggage that these immigrants and investors bring with them. The need for review and modernization is particularly relevant in the often-overlooked area of marital property rights.

The assets of married Florida residents are subject to what is known as a "separate property" regime. Under the separate property regime assets earned by a spouse are, in the absence of spousal gifts or a valid marital agreement to the contrary, wholly owned and controlled by the spouse who earns them.[1] Subject to the earning spouse's duty of support, the non-earning spouse has no right to own or to control the earning spouse's assets unless or until those assets are divided upon death or dissolution of marriage.

Many other states and foreign countries have a very different marital property regime known as community property.[2] While community property rights vary from jurisdiction to jurisdiction, in a community property jurisdiction income earned during marriage does not belong solely to the earning spouse but instead is owned by the spouses equally. Importantly, unless the couple has taken formal steps to transmute their wealth into separate property, the community property nature controls even if the title to the assets is in the sole name of just one spouse. Among other consequences, this means that upon the death of the first spouse to die, the surviving spouse is entitled to outright ownership of one-half of the community property assets however titled.

Tax Consequences of Community Property

Community property is subject to many tax consequences that are not applicable to separate property. The best known of these is likely the step up in basis in both halves of appreciated community property (i.e., the one-half passing through the taxable estate of the decedent and the one-half owned by the surviving spouse) upon the death of the first spouse to die, but there are many other tax consequences to consider. For example, recognizing community property can also reduce or avoid the payment of estate tax upon the death of the first spouse to die, if such property is properly reported as belonging one-half to the surviving spouse notwithstanding title in the name of the decedent, or can create an estate tax once community property titled in the name of the survivor is counted.[3] As another example, a U.S. taxpayer spouse married to a non-resident alien who resides in a community property jurisdiction must report and pay taxes on the spouse's earnings as well as his or her own, while such earnings in a separate property jurisdiction need not be reported or taxed. As another example, a married couple with community property cannot undertake most common estate tax minimization strategies, such as, for example, transferring property earned during the marriage to a grantor retained annuity trust, with community property, unless or until such property is first transmuted into separate property. In fact, when one spouse transfers community property to an irrevocable trust with the other spouse as a beneficiary (such as an irrevocable life insurance trust), the primary purposes of the trust may be frustrated. It is incumbent upon the owners of community property, and their advisors, to understand how the community property nature of the ownership affects their tax situation during the marriage and upon the death of a spouse.

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Community Property Rights in Florida

Given the differences between the separate property regime and the community property regime, much confusion ensues when a married couple purchases Florida property with community property assets or moves to Florida while owning community property. Florida attorneys, accountants, bankers, and other professionals often fail to realize the community property nature of the assets they are dealing with or planning for.[4] Without proper planning, valuable spousal rights and valuable tax characteristics may be lost. While issues can arise while both spouses are still alive, errors are particularly impactful upon the death of the first spouse to die. Community property assets that are titled in the name of the surviving spouse may inadvertently fail to pass in accordance with the estate plan of the first to die, and assets that are titled in the name of the decedent spouse may inadvertently fail to be equally divided with the surviving spouse. Appreciated assets not recognized as community property may also lose the generous income tax treatment afforded to community property in the step up in basis applicable to both spouses' one-half ownership interest on the death of the first to die. To assist with tracing, division, and taxation of community property, assets are often held in joint revocable trusts specifically formulated to treat separate and community property in accordance with their respective character.[5]

Florida Law on Community Property

In 1992, Florida adopted the Florida Uniform Disposition of Community Property Rights at Death Act ("FUDCPRDA").[6] This Act, which has seen only minor revisions since its passage, offers some much-needed guidance regarding division upon death of community property assets. To oversimplify, FUDCPRDA generally applies to property which was or is traceable to assets originally acquired as community property. FUDCPRDA confirms that upon the death of a married person, such property belongs one-half to the deceased spouse (which one-half is not part of the elective estate for elective share purposes) and one-half to the surviving spouse. Importantly, a purchaser for value or a lender with a security interest takes title after the death of the first spouse to die (but interestingly, not during their joint lives) free of any rights of the other spouse or his or her personal representative or beneficiary.[7] The probate court has no duty to discover whether assets titled in a decedent's name are community property and a personal representative has no duty to discover whether property titled in the decedent's name is community property unless a written demand is made by the surviving spouse within three months after service of a copy of the notice of administration.[8] FUDCPRDA also attempts to exempt real property titled as tenants by the entireties and protected homestead from its scope, though it is not entirely clear that a vested right in property can be lost without any knowing waiver.[9]

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While FUDCPRDA is helpful clarification of the law in many circumstances, FUDCPRDA is based on a uniform act originally proposed in 1971, and for the most part, it does not consider the evolution of the law and society over the last fifty years. Among other shortcomings, FUDCPRDA does not take into account the application of community property to certain unmarried couples, is essentially silent with respect to treatment of community property during the joint lives of the couple,[10] does not cover non-probate transfers, and lacks a clear legal mechanism for claiming community property rights upon the death of the first spouse to die.[11]

New Uniform Act

In 2021, the National Conference of Commissioners on Uniform State Laws promulgated a new and improved Uniform Community Property Disposition at Death Act (UCPDDA"). UCPDDA offers an expanded roadmap for treatment of community property and provides guidance on questions, which are currently unclear under Florida law. It seems likely that the IRS will have an easier time respecting this more comprehensive and up-to-date approach to community property treatment for property in (and residents of) separate property states, including the double step up in basis for appreciated property.[12] Importantly, UCPDDA guidance reduces the chance of inadvertent failure to respect the formalities sufficient to maintain community property treatment.

UCPDDA provides a statutory framework for ownership and control of community property by residents of non-community property states by explicitly importing the rights commonly attached to community property status in community property jurisdictions. In doing so UCPDDA keeps the core components of FUDCPRDA, but also covers many issues left uncertain by FUDCPRDA.[13] For example, UCPDDA provides protections to a third party who transacts with a spouse with apparent title to community property without the FUDCPRDA limitation of such protections only to transfers upon or after the death of an owner.[14]

In a significant departure from FUDCPRDA, UCPDDA expands the definition of spouse, for community property purposes, to include an individual in a legal relationship (such as domestic partnership or common law marriage) in which community property could be acquired.[15] UCPDDA also explicitly allows for partial or proportionate community property treatment, recognizes community property in community property trusts to the extent that the applicable law and trust terms so provide, and explicitly excludes property that has been partitioned or reclassified or with respect to which rights have been waived.[16] UCPDDA covers the partition or reclassification of community property by allowing such transmutation by "a record signed by both community-property spouses"[17] – a significant simplification over the formalities that may be required in some community property jurisdictions, if partition or reclassification is even possible in those jurisdictions.[18] UCPDDA also allows for a spousal waiver of community property rights,[19] though as a uniform law it does so by reference to the law of the adopting jurisdiction, generally, and without specifying the necessary formalities for what is essentially a gift from the waiving spouse.[20]

FUDCPRDA by its terms arguably applies only to probate assets of the deceased spouse and not the increasingly popular probate alternatives such as revocable trusts, joint tenants with right of survivorship title, beneficiary designations, etc., and FUDCPRDA does not offer any redress to a spouse whose community property rights have been diminished by lifetime acts of the other spouse. By contrast, upon the death of the first spouse to die, UCPDDA allows the impacted spouse or his or her representative or transferee to petition a court to assert rights based on either lifetime actions or transfers at death by granting the court discretion to apply equitable principles and to consider the law of the original applicable community property jurisdiction.[21] By adopting a flexible remedy, UCPDDA attempts to permit the law of the original community property state or foreign jurisdiction to influence the outcome without imposing a solution, which may fit poorly with the law of the adopting jurisdiction.[22] Query whether UCPDDA goes too far in its quest for flexibility such that inconsistent and uncertain results may make litigation expensive and make out of court settlement difficult. It is also worth noting that a person seeking redress for malfeasance by a spouse with respect to lifetime actions does not have a statutory remedy under UCPDDA until the death of a spouse.

UCPDDA's treatment of non-probate property significantly departs from FUDCPRDA's approach because FUDCPRDA, in an attempt to reduce the application of community property rights, attempts to exclude property held as tenants by the entireties and homestead property.[23] While these exclusions do simplify estate administration and avoid title concerns, they are arguably unconstitutional in that they attempt to remove a vested property interest without any knowing waiver of community property rights. Any consideration of UCPDDA in Florida would have to revisit these concerns.

In what is arguably a significant improvement on the FUDCPRDA provisions, UCPDDA specifically provides mechanisms by which a surviving spouse can claim community property rights on the death of the first to die, as well as statutes of limitations with respect to those claims. Importantly, the surviving spouse can make a claim in probate but may also proceed directly against an heir, devisee, or non-probate transferee of the decedent who is in possession of the property.[24] Given the lack of specificity in FUDCPRDA,

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one Florida court has determined that such rights must be pursued by creditor claim,[25] which is a poor fit for securing vested ownership rights in property titled in the name of the decedent. Unlike FUDCPRDA, UCPDDA also goes an extra step to provide a mechanism for an heir, devisee, or non-probate transferee to raise community property claims with the personal representative or directly with the surviving spouse in possession of the property.[26]

Conclusion

Community property rights will likely never fit comfortably within Florida's separate property marital property regime, and FUDCPRDA contains only guidance for Florida advisors. UCPDDA offers great insight into ways that Florida law could be expanded and modernized. A thorough review and at least a partial adoption of UCPDDA will likely provide great comfort to Floridians who have immigrated from community property jurisdictions, community property investors, and attorneys advising with respect to community property.


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Endnotes

1 The earning spouse can invest separate property in ways that mitigate this sole ownership and control. For example, the earning spouse can establish joint accounts, tenancy by the entireties property, homestead, property with spousal ERISA rights, and similar investments with the non-earning spouse that provide shared current rights to ownership and control.

2 Under Florida's new Community Property Trust Act, married couples may now establish community property, but only through a specially formed and administered trust known as a community property trust. Fla. Stat. §§ 736.1501-1512 (2023). This article does not cover Florida community property trusts, except to mention the overlap between property held in such trusts, and property traceable to community property established by a married couple in a community property jurisdiction.

3 Recognizing community property is particularly important for non-resident aliens with property located in Florida, since these property owners are eligible for only a very small estate tax exemption and no estate tax marital deduction.

4 While there is some debate as to the best way to refer to the rights associated with assets located in a separate property state but traceable to community property, this article will simply refer to the assets themselves as community property assets.

5 Such trusts are not to be confused with trusts established under Florida's Community Property Trust Act. The trusts referred to in the preceding sentence need no specific statutory enabling language to maintain community property status.

6 Fla. Stat. §§ 732.216-732.228 (2021).

7 Fla. Stat. § 732.222 (2023).

8 Fla. Stat. § 732.223 (2023). In addition, pursuant to Fla. Stat. §732.221 (2023), the personal representative has no duty to uncover any community property titled in the name of the surviving spouse, unless a written demand is made by a beneficiary or creditor.

9 Community property acquired by a married couple in a community property jurisdiction "does not lose its character by virtue of a move to a common law state." See *In re: Marriage of Moore & Ferrie*, 18 Cal. Rptr. 2d 543 (Court of Appeal, First District, Division 2, 1993).

10 In addition, Fla. Stat. §61.075(8) (2018), makes it clear that community property is not taken into account in the division of property upon divorce.

11 This lack of clarity is showcased in the case of *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th DCA 2018), in which the court determined that a surviving spouse can lose his or her vested property rights in community property titled in the name of the deceased spouse if he or she fails to file a creditor claim with respect to such property.

12 *See* IRS Field Service Advisory, 1993 WL 1609164 (Nov. 24, 1993).

13 Community property rights not covered by FUDCPRDA presumably still attach to community property in Florida, but without specific statutory authority and with uncertain and perhaps inconsistent results. Without any clarifying Florida law, a holder of community property rights in Florida must look back to the rights granted in the relevant community property jurisdiction where the rights arose, which may differ from jurisdiction to jurisdiction and may be difficult to determine especially with respect to jurisdictions outside the U.S.

14 Uniform Community Property Disposition at Death Act, § 10 (2021). Unlike FUDCPRDA, which provides protection to a purchaser or a lender for value whether or not such person was on notice of the community property nature of the property, UCPDDA extends liability protection only to those who in good faith do not know or have any reason to know (but without any duty to inquire) that the other party is exceeding or improperly exercising such party's authority.

15 Uniform Community Property Disposition at Death Act, § 2(1) (2021).

16 Uniform Community Property Disposition at Death Act, § 3 (2021).

17 Uniform Community Property Disposition at Death Act, § 4 (2021).

18 Note that an equal division of community property into separate property of each spouse may have the unexpected consequence of providing an elective share right in the now separate property that would have been avoided had the property remained community property.

19 Uniform Community Property Disposition at Death Act, § 4 (2021).

20 It is possible or even likely that Florida would require a prenuptial agreement or a postnuptial agreement for a valid waiver.

21 Uniform Community Property Disposition at Death Act, § 4 (2021).

22 *Id.*

23 Fla. Stat. § 732.218 (2023).

24 Uniform Community Property Disposition at Death Act, § 8 (2021).

25 *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th DCA 2018).

26 Uniform Community Property Disposition at Death Act, § 8 (2021).

A Charitable Case Law Update: 2021-2022

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Despite Covid 19 there have been a number of federal court decisions involving charities or issues affecting charitable organizations or contributions. This is a review of some of the more interesting decisions made during 2021-2022.

Excise Taxes

The IRS uses excise taxes as a penalty for bad taxpayer behavior. Charities are not exempt from these penalties. The case of *Ononuju v. Commissioner*[1], involved the excise tax on "excess benefit" and a husband and wife who founded the American Medical Missionary Care, Inc. (AMMC) as a tax-exempt charitable organization. Neither Dr. nor Mrs. Ononuju had an employment contract with AMMC, but Mrs. Ononuju received regular payments from the organization as compensation for her services. On its Form 990 for 2013, AMMC reported paying her compensation of $21,000, for her services as Secretary/ Director. It also reported paying Dr. Ononuju $21,000 in his capacity as "Pres/Dir." The following year, AMMC reported that the Ononujus received zero reportable compensation.

Upon audit, it was determined that Dr. Ononuju[2] had, in fact, received hundreds of thousands of dollars. These amounts were reflected in AMMC's records as "officer's receivable;" although there was not a written loan agreement covering the receivable. Likewise, Mrs. Ononuju received $130,000 of excess benefits. The revenue agent determined that AMMC and the Ononujus were required to file a return to report the excess benefits, but neither AMMC nor the Ononujus did so. The revenue agent thereafter reported a first-tier excise tax of $32,500 (25% of the excess benefit). The IRS later issued a notice to Mrs. Ononuju, requiring her to pay the $32,500, plus a second-tier excise tax of $260,000 (200% of the excess benefit). The IRS also added penalties for failure to file a return and failure to pay the excise tax. When the petitioner sought redetermination of the excise tax liability, the Tax Court sustained the IRS' determination that they were liable for the excise taxes. The court did remove the $15,000 payment for the family's insurance, as they did not deem it excessive. This reduced the excess benefits received to $115,000, adjusting the excise taxes to $28,750 and $230,000. The court also determined that Mrs. Ononuju could avoid the second-tier tax by "undoing the excess benefit to the extent possible, and taking any additional measures necessary to place the organization in a financial position not worse than that in which it would be if the disqualified person were dealing under the highest fiduciary standards."

Qualification

According to the IRS, over 90 percent of all applications for tax exempt status are eventually accepted. Here is one of the few cases where tax exempt status was denied. The case of *New World Infrastructure Organization v. Commissioner*[3], involved a for-profit entity attempting to convert to a tax-exempt entity. The petitioners, Scott Johnston and Pam Johnston, owned a for-profit company in Nevada known as The Pipe Man Corp., which never made a profit. They believed that this makes the corporation eligible for nonprofit status. In 2015, they were incorporated as a nonprofit organization, under the name New World Infrastructure Organization, and soon after submitted an application to the IRS for tax-exempt status. There was no record of the adoption of any bylaws or any affiliation with a government or public institution. The petitioner's "charity" built large pipes, with the intention of standardizing the construction of highway overpasses, reducing costs and increasing the possibilities of new construction, ideally generating more jobs, while also reducing the disruption to the environment and local economies. This development was used for the benefit of the public, but the petitioner would retain ownership and control of any intellectual property generated.

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The IRS quickly pointed out that, under the regulations, the petitioner's intentions to design and construct machinery are specifically excluded from the definition of scientific research as a means of charity work. Since the petitioner would be manufacturing and selling these pipes to contractors at market rate for the use in infrastructure projects, the IRS determined that the organization did not qualify for tax-exempt status. The IRS also clarified that the organization did not demonstrate any way in which the proposed charity would lessen the government's burden, or that they are allowed to be incorporated as a nonprofit, as they are a successor to a for-profit company.

When brought up to the United States Tax Court, they argued that the petitioner's organization appeared as a "facade for a failed pipe making for-profit company," clarifying that the benefits of the nonprofit would have gone to the owners of said company. The Tax Court upheld the IRS's denial of tax-exempt status for the organization.

Appraisals

The need for proper appraisals to support charitable deductions has become so important in recent years, yet there are still taxpayers and tax professionals who feel the rules do not apply to them. In the case of *Pankratz v. Commissioner*[4], the taxpayer donated land and a conference center built on the land to a religious organization. The taxpayer hired an appraiser, but the appraiser turned down the job as being too complex. Rather than hire another appraiser, the taxpayer based his deduction solely on the price he paid for the property and the price of the improvements. The same taxpayer, a year earlier, donated $2,000,000 worth of oil and gas projects to a local church and took the deduction based on his tax basis in the investment, rather than on a qualified appraisal. The court felt some sympathy for the taxpayer, but they completely denied both deductions, and added numerous penalties. The taxpayer's argument that he relied upon the advice of bookkeepers, Realtors, and other financial professionals did not sway the court in abating the penalties. The fact that the taxpayer was a self-made multi-millionaire also did not help when arguing to the court that he acted upon the reliance of professionals in filing the returns.

Substantiation

Proper substantiation cases are closely related to qualified appraisal cases, and historically the IRS wins these cases much more often than they lose. See *Chiarelli v. Commissioner*[5].

If a taxpayer donates property other than money, the amount of the contribution is generally equal to the fair market value of the property at the time of the gift[6]. When the contribution

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of property is valued in excess of $5,000, the taxpayer must, "obtain a qualified appraisal of such property[7]". A taxpayer claiming a noncash contribution valued in excess of $5,000 must, "attach to the return ... such information regarding such property and such appraisal as the Secretary may require.[8]" Generally, failure to comply with these requirements precludes a deduction. In the case of *Schweizer v. Comm'r of Internal Revenue*[9] petitioner donated a sculpture to the Minneapolis Institute of Art (MIA) to honor a colleague who was in poor health. Before filing his return, petitioner's accounting firm requested a Statement of Value from the IRS regarding the sculpture. A Statement of Value can be requested in hopes of receiving assurance that the IRS will accept the value claimed.

Petitioner did not receive a response from the IRS and filed a return which valued the sculpture at $600,000. The IRS issued a timely notice of deficiency, asserting that no deduction was allowable because petitioner failed to satisfy the statutory substantiation requirements for his donation. Petitioner argued that a deduction may be allowed despite failure to satisfy substantiation requirements, "if it is shown that the failure...is due to reasonable cause and not to willful neglect.[10]" "Reasonable cause" requires a taxpayer to exercise ordinary business care and prudence" and all the facts and circumstances will be taken into consideration. Petitioner said he received and reasonably relied upon the advice of his accounting firm that it was unnecessary to include either a qualified appraisal or an additional form with his 2011 tax return. The court found that there was no proof of the accounting firm saying such things and even if it were true, petitioner could not have reasonably relied in good faith upon it. Taking all the facts into consideration, the court reasoned that petitioner was an educated and sophisticated individual with a law degree and five years of doctoral study. Although he may lack training in tax law, he was familiar with the substantiation requirements because he had made at least three prior tax-deductible contributions of art in 2007, 2009, and 2010. Petitioner may not have tax law experience, but what was required was in plain English for him to see and read. Therefore, the court found that petitioner did not have reasonable cause for his failures, and no deduction was allowed.

Attorney Luke Chiarelli donated multiple pieces of personal property that he inherited from his grandmother. In filing his return, he left out several pieces of data, including a description of the property, the charity's name and address, an explanation of how the fair market value of the personal property was calculated, the date of the donation, when he inherited the property and how, and his cost or adjusted basis. Instead, Chiarelli just labeled the property he donated as "miscellaneous household items" that were appraised in total at around $90,000. He also did not identify an appraiser.

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As a result, the IRS' denied all his deductions. The Tax Court affirmed the IRS denial of Chiarelli's deductions because he failed egregiously to provide the necessary substantiation to claim the deductions. For the noncash donations worth over $250, Luke did not follow the statutory requirement of collecting written acknowledgments from the charity to which he donated; for the noncash donations worth over $500, he did not keep the required records with detailed descriptions of the property; and for the noncash donations worth under $5,000, Chiarelli did not keep the required receipts that could identify the different pieces of property that he donated. For the noncash donations worth more than $5,000, Luke did not get a qualified appraisal, and since he did not even substantially comply with the deduction substantiation requirements or show reasonable cause why he did not, he was also charged a 20 percent negligence accuracy-related penalty.

Conservation Easements

The IRS continues to challenge as many easement cases as they can, and they also usually win. But here is an example of an easement case the IRS lost — *Hewitt v. Comm'r of IRS*[11], No. 20-13700, 2021 U.S. App. LEXIS 38555 (11th Cir. Dec. 29, 2021).

David and Tammy Hewitt resided in Randolph County, Alabama, where David owned a large tract of land. On December 28, 2012, David donated an easement on the property to and for the benefit of the Pelican Coast Conservancy, Inc., a subsidiary of the Atlantic Coast Conservancy, Inc. The deed provided that the property would be protected and preserved in perpetuity, but that if conservation were not possible, the proceeds of a judicially approved sale of the property would be divided between the Hewitts and the Conservancy. Additionally, the grant excluded any future value attributable to improvements made by David after the grant. The IRS denied the deduction (which had been taken by the Hewitts in the year of the donation and carried forward to later years). The Hewitts filed a petition with the United States Tax Court to challenge the disallowance. The Tax Court sided with the IRS, explaining that the Treasury Regulation, "does not permit the value of post-easement improvements to be subtracted from the proceeds before determining the donee's share." The Hewitts appealed the decision. The appeals court reversed the decision, finding the IRS' reading of the regulation to be "arbitrary and capricious" because in promulgating the regulation they had not followed specific procedures in the Administrative Procedures Act dealing with how comments to the regulation, in proposed form, were handled. Because the appeals court found the commissioner's interpretation invalid, the court decided that the easement deed did not violate the protected-in-perpetuity requirement and allowed the deductions. This case was a big victory for the taxpayer and should be reviewed whenever the IRS challenges an improvement provision or formula in a conservation easement deed.

Several months later, in *Oakbrook Land Holdings, LLC v. Comm'r of Internal Revenue*[12], 28 F.4th 700, (6th Cir. 2022), the 6th Circuit upheld the validity of the regulation that the 11th Circuit had found "arbitrary and capricious," finding the 11th Circuit's reasoning to be "unpersuasive" deference, and the regulation was not arbitrary and capricious. A writ of certiorari was filed with the United States Supreme Court, but, unfortunately, it was denied.

This split has set up an interesting (and not unprecedented) situation in the Tax Court. Except for cases that are appealable to the 11th Circuit, the Tax Court will follow its own precedent and find the Regulation valid. For cases where an appeal lies in the 11th Circuit, it will find the Regulation to be invalid.

For another easement case where the IRS won, see *901 South Broadway Limited Partnership v. Commissioner of Internal Revenue*[13]. In this case, the IRS denied a deduction reported by the partnership for its contributions to the Los Angeles Conservancy of a facade easement on a historic building in Los Angeles. At the time, the property in question was subject to five mortgages. The IRS claimed that the contribution did not qualify for a deduction as a "qualified conservation contribution." To meet this definition, a contribution must ensure for perpetuity that the organization would have their rights to insurance or condemnation proceeds placed above the mortgagee's rights. The easement deeds stated that should the historic building be damaged or condemned, the lenders would have priority for the right to the value of the property. This would mean that the charity would not be assured perpetuity rights in the property. Because the partnership failed to subordinate all rights in the property to the organization to enforce the

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conservation purposes, the IRS deemed that the contribution could not be defined as a "qualified conservation contribution." Since the donation was not deemed as a "qualified conservation contribution" the partnership cannot be allowed a deduction for a contribution of part of the taxpayer's interest in property. The Tax Court agreed.

Substantiation

Taxpayer losses in insufficient substantiation cases are common. In *Chancellor v. Commissioner*[14], the taxpayer deducted $6,500 on her tax returns, claiming that she contributed $6,000 to her church, and spent another $500 directly on volunteer work for her church; however, she provided no documentation whatsoever to substantiate these contributions, and the IRS subsequently denied all of them. The denial was upheld by the court because, although cash gifts are usually more easily substantiated with evidence, a taxpayer claiming such a deduction is still required by law to provide either: (1) a bank record/written communication from the receiving charity with that charity's name, when they received the donation, and for how much, or (2) some other reliable, written records showing those same three pieces of information. Because the taxpayer provided none of this information, the IRS rightfully denied her deductions.

According to the IRS, you cannot deduct charitable contributions made to private individuals. In *Scholz v. Comm'r of Internal Revenue*[15], Suzanne M. Scholz made several cash and non-cash charitable contributions, including cash donations made to various charitable organizations, as well as non-cash contributions of a used car, food, clothing and other household items to individuals in her community. To claim a deduction for a charitable contribution, a taxpayer must satisfy both statutory and regulatory substantiation requirements that depend on different factors, such as the size of the donation and whether it is cash or property being contributed. The court emphasized that all charitable contributions must be made to government entities or corporations, trusts, community chests, funds, or foundations for the specific purposes that are listed in the statute. Accordingly, the IRS disallowed all her contributions to the individuals in her community.

Let us finish with the amusing case of *Mann v. United States.*[16] Ms. Mann owned a house that she wanted to tear down to build a new home on the lot. At the suggestion of several builders, she decided to donate the house (but not the lot) to Second Chance, a public charity that offers "deconstruction" services, employing disadvantaged people to salvage the property's building materials, furniture and other fixtures. Mann had the house appraised at its greatest potential for profit, which valued the entire house at $675,000 (they had paid $2.25 million for the house and lot). A second appraisal valued the components of the house at $313,353, assuming that the house was to be conveyed to Second Chance for training purposes and that Second Chance would sell any salvaged materials. The Manns deducted $675,000 for gifting their house based on the first appraisal, $24,206 for the new value of all the personal property left in the house (not depreciated values), and another $11,500 for their cash donations to Second Chance. The IRS proceeded to deny every single one of Mann's deductions, including Mann's effort to amend the deduction down to the $313,353 figure. The court found that the Manns never actually transferred their entire interest in the property to Second Chance because they failed to record the deed actually transferring the house out of their ownership. Instead, the donation granted Second Chance a license to train/salvage out of the home. Unfortunately for the Manns, a license is a non-deductible partial interest. Moreover, even if they had properly transferred the whole interest in the property, the appraisals were not properly conducted/qualified because the house was valued based on the resale value of the building materials despite the conditions of Second Chance's training program being inconsistent with being able to salvage all these materials.

Dr. Adam Scott Goldberg *is an attorney with Revis, Hervas & Goldberg in Weston, Florida. He holds a Master of Laws degree in Estate Planning from the University of Miami, and a Juris Doctor and a Doctorate in Education from Nova Southeastern University. Adam is a recent graduate of the Florida Fellows Institute, sponsored by The American College of Trust and Estate Counsel. Adam is a member of the United States Supreme Court and the Washington D.C. Bar. Adam is an adjunct law professor at the University of Miami and Nova Southeastern University.*

Endnotes

1 *Ononuju v. Comm'r*, T.C. Memo. 2021-94

2 In 2015, Dr. Ononuju's license to practice medicine was revoked by the State of Michigan. He left for Nigeria in 2017 and has not returned to the United States.

3 *New World Infrastructure Organization v. Comm'r,* T.C. Memo. 2021-91.

4 *Pankratz v. Comm'r,* T.C. Memo 2021-26.

5 *Chiarelli v. Comm'r,* T.C. Memo. 2021-27.

6 Treas. Reg. § 1.170A-1(c)(1).

7 IRC § 170(f)(11)(C).

8 *Ibid.*

9 *Schweizer v. Comm'r,* T.C. Memo. 2022-102.

10 *Oakhill Woods, LLC v. Comm'r,* T.C. Memo. 2020-24.

11 *Hewitt v. Comm'r,* 21 F.4th (11th Cir. 2021).

12 *Oakbrook Land Holdings, LLC v. Comm'r,* 28 F.4th 700, (6th Cir. 2022).

13 *901 South Broadway Limited Partnership v. Comm'r,* No. 14179-17 (U.S.T.C. 2021).

14 *Chancellor v. Comm'r,* T.C. Memo. 2021-50.

15 *Scholz v. Comm'r,* No. 20743-19S (U.S.T.C. 2022).

16 *Mann v. United States,* 984 F.3d 317 (4th Cir. 2021).

Political Roundup:
Leadership Priorities of the 2023 Session

By H. French Brown, IV, Esq., Dean Mead, Tallahassee, Florida

As discussed in the Spring 2023 ActionLine Pre-Session Political Roundup, Governor DeSantis, Senate President Passidomo, and House Speaker Paul Renner each had very bold agendas for the Regular Legislative Session, and it was predicted that a significant amount of priority legislation would pass. It is safe to state that the accomplishments of the 2023 Session met and exceeded all forecast expectations for Governor DeSantis and the presiding officers. Additionally, the RPPTL Section successfully passed a number of Section priorities and provided technical assistance on many pieces of legislation.

During the 2023 Regular Session, House and Senate members filed 1,679 general bills. Of this number, 320 general bills were ultimately approved by both chambers and either have been or will be presented to the Governor. Not since the 2006 Regular Session has the Legislature approved more than 300 general bills during the sixty-day session. Session concluded in a timely and orderly fashion on the morning of May 5.

The state's strong financial position allowed Legislators to send a record-setting $117 billion budget to the Governor while setting aside $10.9 billion in reserve funds.[1] *See* Senate Bill 2500. Increased sales tax and corporate income tax revenues helped the Legislature approve $2.7 billion in tax cuts for Florida's consumers and businesses included in the annual "tax package," the Senate President's Live Local affordable housing legislation, and the Governor's toll road relief approved during a Special Session in December 2022. The tax package legislation itself included nearly $1.3 billion in temporary and permanent tax relief, including two 2-week Back-to-School Sales Tax Holidays; two 2-week Disaster Preparedness Holidays; a 1% reduction of the Business Rent Tax starting December 1, 2023; an exemption from special assessments for specific agricultural properties; and a whole "Freedom Summer" of sales tax relief for numerous events and items.[2]

RPPTL Section Priorities

While the next volume of the ActionLine will include a deeper summary of the Section priorities that passed, a list of approved initiatives includes:

- *Kearney Constr. Co., LLC v. Travelers Casualty & Surety Co. of America* Case Fix / Secured Transactions[3]
- *Wells Fargo Bank, N.A. v. Tan* Case Fix[4]
- Condominium / Surfside Glitch[5]
- Start-Stop / Construction Liens[6]
- Assignment of Rents [7]
- Clarification of Witness Definition for Remote Online Notary[8]
- Florida Estate Tax[9]
- Fraudulent Deeds[10]

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Governor DeSantis' Priorities

Governor DeSantis tackled many national-level issues during the 2023 Regular Session with the help of the Republican-supermajority Florida Legislature. Some of the Governor's budget priorities that passed included $1 billion in teacher salary increases, $1 billion for Everglades restoration, and $4 billion to expedite major roadway projects over the next four years. The Governor pushed and approved the Heartbeat Protection Act, limiting abortions after six weeks.[11] He continued his stance over "woke corporations" by attacking the globalist ESG movement and prohibited the financial sector from considering so-called "Social Credit Scores" in banking and lending practices.[12] Late in Session, he pushed reforms associated with development orders related to the actions taken by Disney before the appointment of the Governor's Central Florida Tourism Oversight District board.[13]

Senate Priorities

In late January, President Passidomo unveiled "Live Local," a comprehensive workforce housing strategy designed to increase the availability of attainable housing options for Florida workers who seek to live in the communities they serve. This legislation will substantially change the legal and funding challenges associated with these affordable housing developments.[14]

The legislation preempts local governments' requirements regarding zoning, density, and height to allow for streamlined development of affordable housing in commercial and mixed-use zoned areas under certain circumstances to make it easier to build without a zoning change or compressive plan amendment. Counties and cities are required to update and electronically publish the inventory of publicly owned properties for counties, including property owned by a dependent special district, which may be appropriate for affordable housing development. Local governments are required to maintain a public written policy outlining procedures for expediting building permits and development orders for affordable housing projects. The bill prohibits local governments from imposing rent control ordinances. Also included is substantial property tax relief for qualifying affordable housing projects:

ad valorem tax exemption for land owned by a nonprofit entity leased for a minimum of 99 years to provide affordable housing,

ad valorem tax exemption that applies to rent-restricted units within newly constructed or substantially rehabilitated developments, setting aside at least 70 units for affordable housing for households earning 120 percent of the area median income or less, and

authorizes counties and municipalities to offer an ad valorem tax exemption to property owners who dedicate units for affordable housing for households earning 60 percent of the area median income or less.

The bill provides for appropriations to stimulate affordable housing development, expands tax exemptions for development, and creates a new tax credit program available to any corporate income tax or insurance premium taxpayer, including:

$150 million annually to the State Apartment Incentive Loan (SAIL) program. Up to $100 million of this amount will be funded through taxpayers who may choose to redirect corporate income tax or insurance premium tax liabilities through the program, thereby receiving a dollar-for-dollar credit against the state-imposed taxes,

$252 million in funding for the State Housing Initiatives Partnership (SHIP) program for the 2023-2024 state fiscal year,

$100 million to implement a competitive loan program to reduce inflation-related cost increases for approved multifamily projects that have yet to commence construction,

$100 million to the Hometown Heroes down payment assistance program created in 2022. These loans are generally available to those first-time homebuyers seeking first mortgages whose family incomes do not exceed 150 percent of the state or local AMI, whichever is greater, and are employed in certain necessary professions such as law enforcement officers, educators, healthcare professionals, and active military or veterans (first-time homebuyer not required for active military or veterans),

increases the amount of available community contribution tax credits from $14.5 million to $25 million annually, further encouraging Florida businesses to make donations toward community development and housing projects for low-income persons, and creates a sales tax exemption for building materials for developments financed through the Florida Housing Finance Corporation. This sales tax exemption is limited to $5,000 per affordable housing unit.

In addition, President Passidomo passed priority legislation regarding local government's ability to pass ordinances and individuals' ability to challenge such ordinances.[15] Counties and cities are required to produce a "business impact estimate" before passing an ordinance, with some exceptions. The business impact estimate must be published on the local government's website and include certain information, such as the proposed ordinance's purpose, estimated economic impact on businesses, and compliance costs. The bill also provides that properly noticed consideration of a proposed ordinance may be continued to a subsequent meeting under

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certain circumstances without further publication, mailing, or posted notice addressing the issue created by the recent case of *Testa v. Town of Jupiter Island*.[16]

House Priorities

Like Senate President Passidomo, Speaker Renner was successful in the early weeks of session passing one of his key legislative initiatives for 2023, expanding school choice for parents and students. The legislation provided universal school choice, allowing the state funding to follow the student to a public or private school. The bill expanded the impact of the state's current programs: the Florida Tax Credit Scholarship (FTC), the Family Empowerment Scholarship for students attending private school (FESEO), and the Family Empowerment Scholarship for students with disabilities (FES-UA). Under the bill, parents of eligible students will receive empowerment savings accounts to take education dollars earmarked for their children in the public education system and choose among a variety of options to customize their children's K-12 education.[17]

In addition, Speaker Renner and President Passidomo's leadership resulted in the passage of the most significant legislation overhauling the civil justice system in decades.[18] This legislation reduces the statute of limitations for general negligence from 4 years to 2 years, limits the one-way attorney fee provisions for insurance cases, limits the applicability of contingency fee multipliers, and creates uniform jury standards related to the accurate valuation of medical damages in personal injury or wrongful death actions while also allowing the comparative negligence of all persons who contributed to the injury. The legislation modifies the comparative negligence system so that a plaintiff who is more at fault for his or her own injuries than the defendant generally may not recover damages from the defendant, except for medical negligence cases. Additionally, the legislation modifies Florida's "bad faith" framework for insurers.

Speaker Renner and Governor DeSantis approved legislation allowing the "constitutional carrying" of concealed firearms.[19] The legislation does not allow individuals to carry firearms in the open. The bill allows any person to carry a concealed firearm as long as the individual otherwise satisfies the criteria for obtaining and maintaining a license.

Conclusion

The 2023 Regular Session landed smoothly, with the Governor and Legislative leaders capitalizing on opportunities. The Legislature passed transformative laws impacting affordable housing, educational choice, and litigation reform by capitalizing on supermajority control. The Legislature passed a historic budget and reserves thanks to the strong financial position of the state.

F. BROWN

French Brown *is a shareholder with Dean Mead in Tallahassee, Florida. He has a dozen years of experience specializing in Florida's state and local taxation. He formerly held leadership positions at the Florida Department of Revenue.*

Endnotes

1 Senate Bill 2500 (2023) Chapter 2023-289, Laws of Florida.
2 House Bill 7063 Chapter 2023-157, Laws of Florida.
3 Senate Bill 978 Chapter 2023-266, Laws of Florida.
4 Senate Bill 286 Chapter 2023-215, Laws of Florida.
5 Senate Bill 154 Chapter 2023-203, Laws of Florida.
6 House Bill 331 Chapter 2023-226, Laws of Florida.
7 Senate Bill 286 Chapter 2023-215, Laws of Florida.
8 *Ibid.*
9 House Bill 619, Chapter No. 2023-207, Laws of Florida.
10 House Bill 1419 Chapter 2023-238, Laws of Florida.
11 Senate Bill 300; Chapter 2023-21, Laws of Florida.
12 House Bill 3; Chapter 2023-28, Laws of Florida.
13 Senate Bill 1604; Chapter 2023-31, Laws of Florida.
14 Senate Bill 102; Chapter 2023-17, Laws of Florida.
15 Senate Bill 170 Chapter 2023-309, Laws of Florida.
16 *Testa v. Town of Jupiter Island*, 2023 WL 1808293 (Fla. 4th DCA, Feb. 8, 2023).
17 House Bill 1; Chapter 2023-16, Laws of Florida.
18 House Bill 837; Chapter 2023-15, Laws of Florida.
19 House Bill 543; Chapter 2023-18, Laws of Florida.

ActionLine Call for Articles

ActionLine is seeking articles that:

- ***Address timely topics in real estate, probate, trust and guardianship law; or share Section member activities or news.***
- ***Consist of 1,000-3,000 words (one to four printed pages).***
- ***Contain endnote references with links as appropriate.***
- ***Engage and inform readers.***

Forward any proposed article overview or news of note to Erin Farrington Finlen at erin@ estatelaw.com.

Deadlines for all submissions are as follows:

Volume Number	Issue	Deadline
1	Fall	July 15
2	Winter	October 15
3	Spring	January 15
4	Summer	April 15

Executive Council Meeting

FEBRUARY 22 – 26, 2023

Sandestin Golf and Beach Resort • Destin, Florida

Kathy Neukamm, Adele Stone, and Salome Zikakis.

Sandy Boisrond and Iris Elijah

Sarah Butters with Cathy Hennessey

Leroy Smith, Hilary Stephens, Diana Kellogg, and Terry Hill

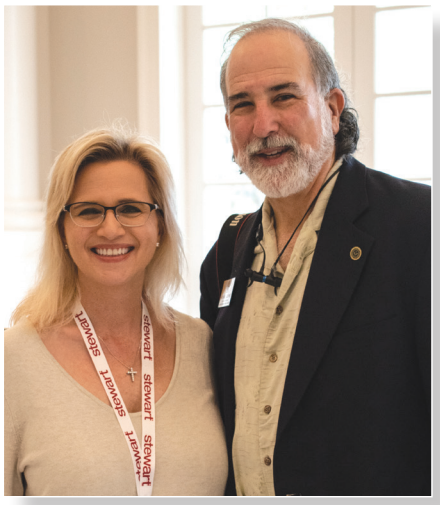
Susan Fernandez, Terrance Harvey, Janaye Pieczynski, and Amanda Cummins

Debbie Goodall and Carlos Battle

Leroy Smith, Katherine Frazier, and Terry Hill

Ann Beller and Yoshi Smith

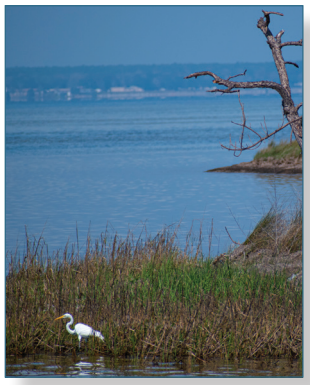
Sarah Butters with her family and Steven Goodall and Dan Siegel



Wilhelmena Kightlinger and Michael Gelfand

Susan Spurgeon

Melissa Scaletta, Marcia Taback, and Fred Jones



Cary Wright, John Moran, and Bill Hennessey

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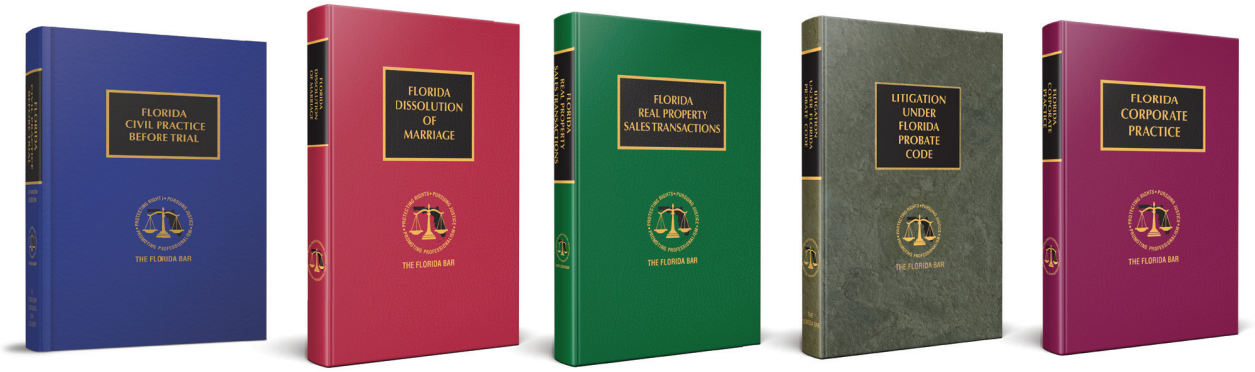

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Roundtable

Highlights of the Meeting of the RPPTL Section
REAL PROPERTY DIVISION

SATURDAY, FEBRUARY 25, 2023

Sandestin Golf and Beach Resort • Destin, Florida
Prepared by Colleen Sachs, Esq., Santa Rosa Beach, Michelle Hinden, Esq. Orlando, and Jin Liu, Esq., Tampa

Thank you to the Fidelity National Title Group for Sponsoring the Real Property Division Roundtable

The Director of the Real Property Law Division, Wm. Cary Wright called the meeting to order at 7:31 a.m. The meeting was in person and via Zoom.

Sponsor Announcement. The Director recognized and thanked the Roundtable Sponsor, Fidelity National Title Group. Karla Staker, representing the Sponsor, thanked the Division for the opportunity.

Action Item

Insurance and Surety Committee - Katherine Heckert, Chair, and Debbie Crocket, Vice Chair.

The Division considered the approval of the Insurance and Surety Committee pursuing an application to establish new Board Certification in Insurance Law.

Katie Heckert reported on the committee's continued efforts to promote a board certification program in Insurance law. She commented that the committee has been discussing this since the Duck Key Meeting, so the committee is excited for this to be an Action Item on the Agenda today. She further commented that the committee had provided details of its proposed written application and its minimum standards, so everything is ready to move forward. She also took a moment to recognize her team for their efforts in promoting this board certification. She reported that the committee has circulated a petition to propose an insurance law board certification program, and to date, they have obtained 195 signed petitions in support of the "Insurance Coverage Law" board certification. She reported that the committee has letters of support from the Trial Lawyers Section of the Florida Bar and some outside organizations. She further commented that the committee has also contacted bar standing committees, the Florida Bar Board of Governors, and the Board of Legal Specialization & Education. She then asked for a member of the Division to make a motion.

A motion was made to establish the Insurance Coverage Law certification program, focusing on the law and insurance coverage. The motion was seconded and passed.

The Director recognized the hard work and the efforts of the committee and commented that this will be an information item at the Executive Council meeting later today.

Information Items

Title Insurance and Title Insurance Industry Liaison - Chris Smart, Chair; Jeremy Cranford, Len Prescott, and Michelle Hinden, Co-Vice Chairs.

Chris Smart spoke on a proposed amendment to Fla. Stat. § 28.223, governing Clerks of the Circuit Courts, to ensure the availability of necessary information about deceased individuals contained in the land records maintained by the Clerks so that proper heirs can be identified in the chain of title and to protect the public interest of certainty in the ownership of real property.

Chris explained that currently, only certain documents, such as wills, codicils, and certain orders, can be recorded in the public records, and this proposed amendment would permit other types of documents to be recorded in the public records so that title examiners and title insurance underwriters can confirm the state of title in the public records.

Publications Committee - Erin Finlen and Michael A. Bedke, Co-Chairs (Editors in Chief), Alexander Douglas, Daniel L. McDermott, Jeanette Moffa, Paul E. Roman, Seth Kaplan and Michelle Hinden, Co-Vice Chairs

Michael Bedke reported that the committee is looking for Real Property Division submissions for ActionLine. He can be contacted at michael.bedke@dlapiper.com for more information. The Director encouraged members of the Division to draft articles for ActionLine.

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Legislative Update. Wilhelmina Kightlinger, Legislation Committee, Co-Chair. Wilhelmina Kightlinger gave a friendly reminder that if anyone is considering proposing legislation, it will be for the 2024 session. The proposed legislation will have to be an Information Item by the Delray Beach meeting and an Action Item for the Breakers meeting, so there is not much time left for the 2024 session. It is also time to think about 2025 and getting that legislation geared up. She thanked the Ad Hoc Series LLC Committee for their hard work. She commented that this is a great example of how our Section can work with other Sections in the Florida Bar, the Business Law Section in this case, to get the best legislative product out there. She also recognized Allison L. Hertz and Alex Dobrev for their work on the Surfside glitch bill. She reminded the members that she would contact committee leaders for subject matter area experts who can provide comments immediately. She also noted the Division has been fantastic at doing this so far

CLE Committee. Lee Weintraub, CLE Committee Co-Chair. Lee A. Weintraub reported that it seems like the transition from program chairs to substantive committee chairs has been problematic, which has caused Bar staff issues with keeping up. He commented that the substantive committee chairs are still responsible for CLE programs as they need to bring their knowledge to the area. Lee asked that substantive chairs ensure their program chair is involved with running the CLEs. He commented that there are road maps on the CLE webpage: one is for a webcast, and the other is for full-day programs. He recommends checking the road map first, and then reviewing the deadlines and sticking to them. He commented that the first deadline is the program worksheet. He commented that once the program worksheet is submitted, it is final. It cannot change because once submitted, about 12 departments at the Florida Bar are working on the CLEs. He encouraged members to look at the roadmap to get everything straight and meet their deadlines. He encouraged members to use their CLE liaisons. He commented that every year the CLE Committees ask substantive committees to give two CLEs, and so far, that has happened. He asks for people to get ideas for him for the fall.

The Director encouraged everyone to forward ideas to address the transition issues. He suggested that each committee and subcommittee have written protocols in place to ensure transitions are smooth. He suggested setting up an ad hoc committee to oversee each Division Chair responsible for submitting the written protocol. Manny Farach asked for a protocol example, and the Director responded that he would circulate the one from the ABA as a helpful start.

Committee Reports

Ad Hoc Hayslip - Brian W. Hoffman, Chair; Michael V. Hargett and James C. Russick, Co-Vice Chairs: Brian W. Hoffman reported that a proposed bill supported by FLTA did not pass this year, but they received much commentary. They will revisit and determine what is on the horizon for next year.

Ad Hoc UCRERA - Manuel Farach, Chair; Jason M. Ellison and James C. Russick, Co-Vice Chairs: Manny Farach reported that the task force had had conversations with FLTA, and they have put together proposals to address FLTA's concerns. He commented that FLTA is uncomfortable with the proposed bill, so he does not think they will support it. He further commented that the Business Law Section (BLS) is also interested in the proposed bill, but it has stayed on the sidelines while the FLTA tried to work out its differences with the task force. He commented that there had been a very respectful impasse with FLTA. He noted BLS will step up.

Attorney Banker Conference - Salome J. Zikakis, Chair; Kristopher E. Fernandez, and R. James Robbins, Jr., Co-Vice Chairs: Salome J. Zikakis reported that the conference is scheduled for April 21, 2023, at the Funky Buddha Brewery. She commented that anyone who does lender work or represents borrowers will want to be at this conference. She commented that this was an event that had been done pre-Covid and is now returning in a good way.

Commercial Real Estate- E. Ashley McRae, Chair; Alexandra D. Gabel and Brian W. Hoffman, Co-Vice Chairs: E. Ashley McRae reported that the committee had a great discussion on mobile home park redevelopment. She further commented that for the next meeting Adele Stone and others will speak on boilerplate provisions in contracts. She commented that she did this several years ago, and by the time she finished, she had pages of notes, and she will do this event again with some other people to help.

Condominium and Planned Development -Alexander B. Dobrev and Allison L. Hertz, Co-Chairs; and Russell Robbins, Vice Chair: Alex Dobrev reported that the committee had its board certification examination prep course earlier this month in Orlando, with many committee members in attendance. He commented that the committee has been busy providing technical advice on SB 4-D. We have put together a substantive subcommittee to take a closer look at possible substantive changes, but it is not in the lineup for information or action items. He further commented that the committee has several CLE presentations in March and in April, including one on constitutional issues in Community Association and the other on technology in April. He also shared that the committee has collaborated successfully with the Division of Condominiums on education on presentations that target the public. He commented that when this was started, the Division

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had an educational requirement, but it was attracting single-digit attendance. For the last presentation, the event attracted more than 800 statewide registrants, representing phenomenal growth over the last year.

Condominium and Planned Development Law Certification Review Course - Jane L. Cornett and Christine M. Ertl, Co-Chairs; Allison L. Hertz, Vice Chair: Jane L. Cornett reported that the committee had its board certification review course the first weekend in February with 13 hours of excellent instruction. More than 60 people registered, making it a very successful program. Planning for next year has started.

Construction Law - Sanjay Kurian, Chair; Bruce D. Partington and Elizabeth B. Ferguson, Co-Vice Chairs: Sanjay Kurian reported that the Construction Law Committee had a couple of meetings since the last Executive Council meeting. He commented that the committee met this week where insurance was discussed. Charles Kominski, an insurance broker from Texas, presented. There were more than 50 people for the Zoom CLE, and the January and February committee meetings had 80 to 85 in attendance. He further commented that HB 85 is legislation of interest to the committee, and the committee hopes to provide technical advice on the proposed legislation.

Construction Law Certification Review Course - Gregg E. Hutt, Chair; Scott P. Pence and Jason J. Quintero, Co-Vice Chairs: Jason Quintero reported that planning for the certification review course is going well. He encouraged registration to anyone interested in becoming board certified in construction law.

Construction Law Institute- Brad R. Weiss, Chair; Deborah B. Mastin and Trevor Arnold, Co-Vice Chairs: Trevor Arnold reported that the committee is on track for the Construction Law Institute scheduled for March 16, 2023, in Orlando at the JW Marriot Grand Lakes. It will be 13.5 CLE credit hours. The event will include a combination of transactional and litigation issues. He further commented that the event will have a speaker from Brightline. There will also be a golf tournament.

Development & Land Use Planning- Colleen C. Sachs and Lisa B. Van Dien, Co-Chairs; Jin Liu, Vice Chair: Colleen C. Sachs reported that the committee had a great joint CLE meeting with the Commercial Real Estate committee on mobile home park redevelopment. She asked members to please keep attuned for upcoming CLEs the committee is organizing with practical information on land use and development.

Insurance & Surety - Katherine L. Heckert, Chair; Debbie Crockett, Vice Chair: Katie Heckert reported that the committee had a great meeting with the Real Estate and Leasing Committee. She further commented that we had a great CLE on drafting insurance provisions for commercial leases.

Liaisons with FLTA - Alan K. McCall, Melissa Jay Murphy, Alan B. Fields, and James C. Russick: Melissa Murphy reported on SB 708 and HB 43. She reported that Florida Land Title Association (FLTA) is only sponsoring this bill this legislative session. The bill concerns the mortgage payoff estoppel letters and the process. She noted FLTA is always working with RPPTL, and it is an ongoing effort. She encouraged everyone to join the FLTA because of the common ground between title agents and real estate attorneys, and it is important to continue to work together.

Liaison with American College of Real Estate Lawyers (ACREL) - Martin A. Schwartz and William P. Sklar: William P. Sklar reported that the organization's mid-year meeting is in Charleston, and there is active participation by many members of the Executive Council.

Liaison with American College of Construction Lawyers (ACCL) - George J. Meyer: Nothing to report.

Liaison with Florida Realtors - Louis E. "Trey" Goldman: Trey Goldman reported on the Realtor board certification program. He said that once a realtor has a license and keeps it for two years, without any work, the Realtor can get their broker license. He commented that the Florida Realtors would like to see the bar raised so that Florida Realtors will promote board certification. It will cover various areas in the real estate industry. He commented that the organization has 240,000 members, and it is hoped this will improve the program for everyone.

Real Estate Certification Review Course - Lloyd Granet, Chair; Martin S. Awerbach, Laura M. Licastro, and Jason M. Ellison, Co-Vice Chairs: Lloyd Granet reported the committee will have its seminar on March 31st and April 1st. The venue is locked in, and the committee is reviewing documents. The committee should release the seminar materials next week.

Real Estate Leasing - Christopher A. Sajdera, Chair; Kristen K. Jaiven and Ryan McConnell, Co-Vice Chairs: Kristen K. Jaiven reported that the committee had a successful joint CLE with the Insurance and Surety committee moderated by the committee's Vice Chair, Ryan McConnell. She further reported that Michelle Hinden provided an update on the lease and revised civil procedure forms.

Real Property Finance & Lending-, Jason M. Ellison, Chair; Deborah B. Boyd and Jin Liu, Co-Vice Chairs: Jason M. Ellison reported on the *Overture Realty* case. He further reported that UCRERA was a finance committee endeavor, but it is important to have RPPTL stay involved in the initial glitch bill presented by the Business Law Section since it did not address many of the issues identified by RPPTL.

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Real Property Litigation - Manuel Farach, Chair; Amber E. Ashton, Shawn G. Brown, and Amanda Kison, Co-Vice Chairs: Manuel Farach commented that the litigation committee presented an excellent CLE on preserving error. He further commented that the committee discussed the *AFP 103 Corp. v. Commonwealth Trust Services LLC* case, where the 3rd DCA said a property owner could not create easements that benefit the property owner on their land. It disregarded the merger issue completely, which is an issue for any development project as every development has cross easements on its own land. Per this opinion, all these cross-easements and complicated deals put together would be void *ab initio*. He suspects there will be much discussion on this. The director congratulated Manny on being elected to the Board of Governors.

Real Property Problems Study - Anne Q. Pollack, Chair; Susan K. Spurgeon, Brian W. Hoffman, and Reese Henderson, Co-Vice Chairs: Anne Q. Pollack reported that the committee had a great meeting. She reported that they discussed the issue of whether a property owner can create an easement on benefitting property it owns when it is intended to benefit a future owner. There have been several cases that have come out recently on this topic. She commented that the court is taking a hard line in interpreting the black letter law. She commented that a motion was made for a subcommittee to quickly look at a potential legislative fix in 2023, as there is a fear of potential ramifications since the courts are saying these easements are void ab initio. She further commented that Susan Spurgeon is heading the subcommittee, and the committee has decided to support an amicus brief on this issue. She also reported that Ellie Taft and Amber Ashton discussed the USPS certified green card mailing issue, as there are many statutes throughout the State of Florida that require that process, and some post offices are no longer offering a green card option. A legislative fix is needed.

Residential Real Estate and Industry Liaison - Nicole M. Villarroel and Kristen K. Jaiven, Co-Chairs; James A. Marx, and Rich Mciver, Co-Vice Chairs: Kristen reported that the committee learned about escrow fraud and best practices if you are going to implement remote deposit products in a discussion led by Erin Miller. She further reported that the committee had a good discussion on pending legislation.

Title Insurance and Title Insurance Industry Liaison - Chris W. Smart, Chair; Leonard F. Prescott, IV, Jeremy T. Cranford, and Michelle G. Hinden, Co-Vice Chairs: Chris Smart reported that most of the committee discussion involved the proposal to amend Fla Stat. § 28.223. There was also discussion concerning proposed legislation relating to Marital Settlement Agreements and accepting acknowledgments by licensed attorneys in other states (in lieu of a notary).

Title Issues and Standards - Rebecca L.A. Wood and Amanda K. Hersem, Co-Chairs; Robert M. Graham, Karla Staker, and Melissa Scaletta, Co-Vice Chairs: Rebecca Wood reported that their working meeting via Zoom was led by Amanda Hersem. The committee is making a big effort to host a CLE in Delray Beach. She concluded by congratulating the Insurance and Surety Committee on their board certification endeavor.

Adjournment. The meeting was adjourned at 9:23 a.m.

ROUNDTABLE

Highlights of the Meeting of the RPPTL Section
PROBATE AND TRUST DIVISION

SATURDAY, FEBRUARY 25, 2023

Sandestin Golf and Beach Resort • Destin, Florida
Prepared by Amanda C. Cummins, Esq., St. Petersburg, Florida

Thank you to the Roundtable Sponsors:
Stout and Guardian Trust

The Director of the Probate and Trust Law Division, John Moran, called the meeting to order at 7:35 am CST.

Sponsor Announcement. The Division Director thanked the sponsors, Stout and Guardian Trust.

Announcements. The Division Director requested each attendee make sure they sign the attendance sheet at the Executive Council Meetings. He recommended attendees check the minutes at the next meeting to make sure their attendance is properly recorded.

Report of Liaison with Professional Fiduciary Council – Darby Jones. Darby Jones provided information about the upcoming Fourth Annual Florida Fiduciary Conference, which will be held on March 10, 2023. The mission of the Council is to educate, vet and identify individuals and corporate fiduciaries to hopefully serve important fiduciary capacities. The Council has monthly webinars and an annual conference. The conference will have virtual and in-person attendance options and will provide tips and tools for dealing with difficult beneficiaries, a panel discussion on similarities of serving as guardian and power of attorney, guardian of the person and healthcare surrogate, a discussion on the difference between ad litem and curator, and an hour-long roundtable discussing a variety of subjects affecting this area of practice.

Legislative Committee – Larry Miller, Chair. Larry Miller highlighted the Probate and Trust Division's legislative initiatives for the 2023 session, including:

- Proposed amendments to the electronic wills/remote notarization statute to include a definition of "witness."
- Florida estate taxes: proposed legislation that would amend Fla. Stat. § 198.41 to render Chapter 198 (that imposed the Florida Estate Tax) ineffective for as long as there is no federal state death tax credit or no federal-skipping transfer credit allowable under the Internal Revenue Code. In short, Florida estates would no longer have to be held open if they are not taxable.
- The *Kearney* fix is back on the agenda: This legislation seeks to clarify that a security agreement to pledge exempt assets must specifically identify the pledged asset in order to constitute a valid and intentional waiver. Last year, it was vetoed by the Governor for the effective date language, so that issue has been revisited and hopefully addressed to the Governor's satisfaction.
- Guardianship Code Rewrite: We are continuing to work with stakeholders on this proposed legislation.

Other proposed legislation of interest to the RPPTL Section includes:

- Carolyn's Law: This mirrors a method used in New York to ensure certain rights of visitation with wards who have been determined to be incapacitated. This bill was withdrawn for further study.
- Baker Act and Marchman Act changes: The proposal to change these laws was withdrawn for further study.
- DNR Statute with respect to guardians: This statute addresses the authority of guardians to achieving and obtaining DNR with respect to wards. The Guardianship Committee is currently studying this.
- Sale of DNA for DNA analysis: The proposed bill proposed limits the sale of DNA.

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CLE Report – Angela Adams, Co-Chair. Angela Adams gave the report. Angela stressed the importance of adhering to CLE deadlines to ensure that our Section administrators have adequate time to plan and prepare.

Report of Liaison with Florida State Guardianship Association – Stephanie Cook. Stephanie Cook advised the first board meeting occurred during the last quarter of 2022. The January meeting was cancelled as board members met with representatives. There are two main projects: (1) continuing education of guardians on ethics, end of life, and fiduciary duties, and (2) implementation of rules governing the disciplinary process. OPPG has not yet implemented the disciplinary process. The annual conference will occur late this summer.

Update on Report and Recommendations of the Workgroup on Improved Resolution of Civil Cases – Florida Supreme Court's January 12, 2023 Order in Case No. SC22-122 – John Moran. John Moran reported the Florida Supreme Court issued an opinion on Thursday January 12, 2023, in which they declined to adopt the proposed amendments because additional refinements are necessary. In their referral to the Civil Rules Committee, the Florida Supreme Court specifically noted that eminent domain, probate, guardianship and trust cases must be excluded from the case management requirements.

Federal Trade Commission's Proposed Rule to Ban Noncompete Clauses – Amanda Cummins. Amanda Cummins advised that an Executive Order, signed by President Biden in July 2022, included an initiative that promoted federal agencies' tackling of issues that inhibit competition in the American economy. It specifically encouraged the Federal Trade Commission to ban or limit non-compete agreements as they are an unfair method of competition for an employer to limit future endeavors of employees. President Biden has a long-standing hostility towards non competes so it is speculated that he will push for an outright ban rather than a limitation. On January 5, 2023, the FTC proposed a rule banning non-compete clauses and the rule is prospective and retroactive. The proposed rule requires any existing noncompete clauses to be rescinded. There is a 60-day comment period. The rule provides an exception for 25% ownership.

Report of Principal and Income Committee – Jolyon Acosta. Jolyon Acosta advised that potential Changes to Fla. Stat. Ch. 738, (Florida Principal and Income Act) are currently in draft form but are expected to be presented as an Information Item at the next meeting in Delray Beach. The committee is currently soliciting comments and feedback. RPPTL, Tax, Fla. Bankers Association, FICPA are all involved and want to adopt UFIPA to promote uniformity with other states and to retain Florida specific provisions with sound public policy. Mr. Acosta reported that the proposed statute preserves current Florida law but continues to deviate from the Uniform Act in the following matters: carrying value, fiduciary disgorgement, rate bumpers, fiduciary receipts from entities, productive property rules, successor beneficiary liability consideration, and legal life estate apportionment of expenses. Proposed changes to current Florida law include: numbering scheme, terms of trust, governing law provision, standard of impossibility changed to standard of assistance, single statute replaced by a series of statutes, capital distribution, 3% return catch up limited to 3 year lookback period, IRA/deferred compensation accounts, rules updated to match uniform rules, productive property rules updated, new section for other financial instruments, and a provision for grantor trust reimbursement.

Report of Ad Hoc ART Committee – Alyse Comiter. Alyse Comiter advised that under current Florida law, afterborn children are not entitled to inherit. The committee drafted a proposed statute that extends inheritance rights to afterborn children up to two years after the decedent's death. They conducted a study to narrowly carve out that the statute does not apply if and to the extent it would affect marital deduction. The proposed statute and white paper are posted on their site.

Report of Ad Hoc Committee on Electronic Wills – Ricky Hearn. Ricky Hearn advised the committee studied how much, if any, these wills are being used. The committee will collect more information on this and other states' use of and issues with e-wills.

Report on Title Insurance and Title Liaison Committee's proposed amendment to Fla. Stat. § 28.223, regarding recording of probate orders and records – Chris Smart. Chris Smart advised this is expected to be an Information Item at the next meeting in Delray Beach. The amendment will require certain documents in probate and guardianship proceedings to be filed to assist title companies in determining beneficiaries of a property.

Update on Ad Hoc Committee on Revocable Transfer on Death Deed Act – John Moran. John Moran advised there is a large collection of materials compiled from feedback collected after the last meeting, including a comparison chart reflecting similarities and differences between the proposal and the uniform law.

Anticipated Information Items for Delray Beach – John Moran. John Moran advised of anticipated information items at the next meeting including the Revised Principal and Income Act, the *Johnson v. Townsend* Fix, and the a Trust Law/Probate and Trust Litigation Committee proposal dealing with the statutory discharge of trustees.

Adjournment. The meeting was adjourned at 8:43 am CST.

Guardianship and Autism:

How To Address the Non-Speaking Ward in Incapacity Determination and Guardianship Proceedings

By Sandy Boisrond, Esq., Spectrum Law Florida, Miami/Fort Lauderdale, Florida

Autism spectrum disorder (ASD), often known as autism, is a developmental disability that affects a person's social interaction, communication, and behavior. An awareness of what autism actually looks like is still largely not commonplace, particularly in the legal profession. The most recent data on autism, according to the Centers for Disease Control (CDC), estimates that about 1 in 36 children have been identified with autism spectrum disorder. With the increasing prevalence of autism, the guardianship practitioner is likely to encounter a number of cases that involve an autistic alleged incapacitated person (AIP), so having a general understanding of the spectrum of conditions that present as "autism" can minimize issues pertaining to the language of the guardianship pleadings, the interactions with court-appointed counsel, and the evaluations conducted by the examining committee members.

Non-verbal and Non-speaking

The National Institutes of Health estimates that the proportion of children with autism spectrum disorder who are minimally verbal varies from 25% to 35%. When an autistic adult is deemed non-verbal, the reference is regarding their lack of use of words to communicate, with devices often being used to verbalize their "words." When an autistic adult is deemed non-speaking, the reference points to their lack of use of oral speech to communicate. The considerations pertaining to communication abilities, communication methods, and intellectual levels of autistic adults must be explored by those representing the interests of an autistic ward.

When an autistic AIP is unable to verbalize their thoughts and wishes, there still remains the ability to communicate via devices or alternative methods. If an autistic AIP does not physically "speak," caution must be taken to avoid making an instinctual association between their lack of speech with a low intellectual ability, as this may interfere with the proper assessment of the autistic AIP's condition. To evaluate the capacity of an individual who is non-verbal or non-speaking, a guardianship practitioner must turn to alternative or augmentative methods and/or devices to ensure that the appropriate rights are maintained in line with the rights that are delegated.

Communication Methods and Devices

Guardianship practitioners may benefit from educating themselves further and including questions regarding the communication methods and devices utilized by the autistic AIP in their intake process. There are a number of different devices and methods employed by autistic AIPs that support a proper incapacity determination for an autistic adult. An augmentative and alternative communication (AAC) device is a tablet or a laptop that helps someone with a speech or language impairment to communicate. The Picture Exchange Communication System (PECS) is an augmentative and alternative communication system that allows people with little or no communication abilities to communicate using pictures. Visual boards may be used by autistic AIPs to communicate their feelings, preferences, decisions, etc. There is also communication software that autistic adults often utilize on their mobile devices or tablets, which use similar communication methods as an AAC device. Some autistic adults may have also learned sign language in their toddler or adolescent years to serve as an alternative or a main form of communication.

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Incapacity Determination and Guardianship

According to the Centers for Disease Control (CDC), "Of the children who received an ASD diagnosis, the average age of diagnosis was a little under four and a half years (4 years and 4 months)." For many families, at the point in which their child becomes an adult, parents may operate with the misconception that they may continue to manage all of their child's medical and financial affairs due to their child's autism diagnosis. Of particular note are the families who have a non-verbal or non-speaking autistic child. The mental health and guardianship court process operates with a foundation that anticipates a "speaking" alleged incapacitated person, both in the interaction between the court-appointed counsel and the AIP, as well as in the evaluation process employed by the examining committee members. The deficit, however, in performing the assessments of the autistic AIP's condition and capacity may create some concerns regarding the restrictions imposed upon the autistic AIP who may utilize alternative means of communication such as devices and/or sign language.

Pursuant to Fla. Stat. § 744.3215 (2022), extra consideration should be given in determining the rights of persons determined incapacitated, and often the autistic adult would benefit from a careful evaluation of their skills and abilities to ensure the least restrictive outcome in the incapacity determination and guardianship process. For example, the right to vote, the right to seek or retain employment, and the right to make decisions about his or her social environment or other social aspects of his or her life could potentially be rights retained by the autistic adult by the order determining incapacity.

Emergency Temporary Guardianship

There may be instances in which a family contacts you shortly before or after their autistic child turns 18, and due to their child's condition, an emergency temporary guardianship may be warranted. Pursuant to Fla. Stat. § 744.3031 (2022),

> "A court, *prior to appointment of a guardian but after a petition for determination of incapacity has been filed* pursuant to this chapter, may appoint an emergency temporary guardian for the person or property, or both, of an alleged incapacitated person. The court must specifically find that there appears to be *imminent danger* that the *physical or mental health or safety* of the person will be seriously impaired or that the person's *property* is in danger of being wasted, misappropriated, or lost unless immediate action is taken." [Emphasis added.]

In the case of autistic adults, the "imminent danger" will often surround their social, communication, and behavior issues, particularly for those who are non-verbal or non-speaking. These issues may appear as self-injuring behaviors, mental health episodes, recurring hospital visits due to self-injury, repetitive behaviors which pose a harm to the alleged incapacitated person's physical or mental health, exposure to online exploitation, etc.

Practical Considerations

The guardianship process can tend to overlook the accommodations necessary to ensure that the non-speaking autistic AIP is appropriately evaluated if specific considerations are not included. It is important for guardianship practitioners to incorporate extra attention in the intake, pleadings, and testimony presented to the court to ensure that the capabilities of the autistic ward are fully addressed. This may require the inclusion of the following in the pleadings and/or testimony pertaining to the autistic AIP:

- Individualized Education Plan (IEP) from their current or previous school
- Reports of their Board Certified Behavior Analyst (BCBA) or their Registered Behavior Technician (RBT)
- Reports of their Speech Therapist or their Occupational Therapist
- Primary Physician assessments
- Developmental Pediatrician or Neurologist assessments

Lastly, the autistic AIP's experience with their court-appointed attorney and examining committee members must be prefaced with an understanding of their specific communication methods and devices. This requires that the factual information used as the basis of the Petition to Determine Incapacity and the rights that the autistic AIP is incapable of exercising must align with an understanding that non-speaking autistic AIP's have a voice that must be included and taken into consideration, with the proper support.

S. BOISROND

Sandy Boisrond *has been practicing law since 2015. She earned her J.D. from Thomas M. Cooley Law School (Michigan) and completed her undergraduate studies at the University of Miami (Florida). She currently works as a solo practitioner handling estate planning, guardianship, and probate matters. Before law, she was a public-school teacher and worked for a nonprofit organization. Sandy is an Autism Advocate and hosts a variety of educational programs year-round. She is also an active member of the RPPTL Law School Programming Committee, serving as one of the Liaisons for St. Thomas and Nova Southeastern law schools.*

Homestead Tax Exemption Reduced Where Portion Of Homestead Is Rented Out

By Jade Davis, Esq., Hall Booth Smith, P.C., Tampa, Florida

After two lower-court decisions[1] in favor of a homeowner that rented a portion of his home, the Florida Supreme Court approved the property appraiser's assessment changing the homestead exemption from 100% to 85%. This decision is significant. People are continuing to migrate to sun and fun—Florida. In 2022, the National Association of Realtors reported that 318,855 people moved to Florida, a population gain of almost 2%. According to Florida Trend, Florida is projected to have a population of 25 million in 2032 (up from 22.6 million in 2023) and a projected 22.9 million in April 2024.

Rebounding from a pandemic has been incredibly difficult for Floridians. Inflation, mass migration, and storm damage have exacerbated real estate options. Therefore, it is not a shock to note that more and more homeowners have turned to renting a portion of their primary residences to supplement their income and to recover from the rising costs of living, but doing so can affect property taxes.

Although the *Furst v. Rebholz*[2] case emanated from a 2015 case regarding taxation from 2004 through 2013, this decision has a widespread impact, as it has split the treatment of homesteaded property by tax and by creditor protection. Before we dissect the Florida Supreme Court's decision, let's review the facts.

Rebholz was the sole owner of his home and used it as his permanent residence. The first floor of the two-story home consisted of Rebholz's primary bedroom, a living room, and a kitchen. The second floor included four bedrooms, each with a lockable door and an internal bathroom, and a laundry room.

In 1996, Rebholz applied for and received a homestead exemption on 100% of his residence, pursuant to Fla. Stat. § 196.031 and Article VII, Section 6(a), of the Florida Constitution.

Rebholz received the full homestead exemption through the 2014 tax year, as the property appraiser continuously classified the home as an owner-occupied residential property.

In late 2014, the property appraiser received a complaint about Rebholz and discovered that he was renting one of his upstairs bedrooms to a tenant who had been renting the room since March 1996 and that another upstairs bedroom had been rented sporadically during that same period.

On September 24, 2014, the property appraiser sent a letter to Rebholz advising him that he may have improperly received the 100% homestead exemption from 2004 through 2013. Citing Fla. Stat. § 196.012(13), the property appraiser asserted that Rebholz's rental of the two bedrooms was a commercial use which rendered 15% of his residence ineligible for the homestead tax exemption.

> The property appraiser divided Rebholz's home for taxing purposes into 85 percent homestead property and 15 percent commercial-use property The property appraiser retroactively removed the homestead exemption on the 15 percent it deemed commercial use. Shortly thereafter, the property appraiser recorded a tax lien against Rebholz's residence in the amount of $7,023.87 to recover taxes it claimed Rebholz should have paid on 15 percent of his residence for the years 2004 through 2011 and 2013.[3]

An interesting point about this case that will have the most effect is the method by which the property appraiser determined the percentage of commercial use. The deputy property appraiser who made the ultimate determination that 15 % of Rebholz's home was being used for a commercial purpose testified during the proceedings. The deputy property appraiser testified that she,

> never visited Rebholz's home but based her decision *in part* on information gathered by a department appraiser who made physical inspections of the property and based on the information she received from the appraiser, she initially determined that possibly 70 to 75 percent of the residence could be nonexempt due to commercial use. She then spoke to Rebholz on the

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> phone and later met with him and his attorney. Rebholz told her that most of the upstairs of his home was used for storage except for one bedroom that was used by his son when he visited and the other bedroom that a tenant had rented for years. After receiving that information from Rebholz, the deputy property appraiser concluded that only 15 percent of Rebholz's home was used for commercial purposes.
>
> At no time did she offer a formula or other procedure by which the commercial-use percentage of the home was determined. [4] [Emphasis added.]

While the holding supports the broader issue regarding the commercial use of a residential property claimed as homestead, property appraisers have not been given adequate guidance to calculate the percentage of commercial use to assess a property. An initial finding of 70 to 75% is arguably excessive.

After Rebholz satisfied the lien to stop the interest accrual, he subsequently filed suit, seeking a refund of the retroactive taxes he paid. Rebholz's two-count amended complaint alleged unlawful tax lien and sought a declaratory judgment finding Fla. Stat. §196.012(13) unconstitutional. The trial court entered final judgment in favor of Rebholz, concluding that, "Florida law does not authorize the Property Appraiser to deny a homeowner his constitutional homestead exemption for a room rented within his residence while he simultaneously maintains the property as his permanent residence." The court concluded that the section was unconstitutional as applied because it, "exceed[s] the authority of the [l]egislature [by] impos[ing] an additional substantive restriction [on] the constitutional right to a homestead exemption." The property appraiser appealed. The Second District Court of Appeal affirmed in part and reversed in part holding: (1) state constitutional and statutory homestead provisions did not authorize division of homeowner's permanent residence, in which he rented bedrooms with lockable doors to tenants, into tax-exempt residential and nonexempt commercial-use portions; (2) statute defining "real estate used and owned as a homestead" as not including "any portion thereof used for commercial purposes" did not apply to the homeowner because he was not a permanently disabled person or disabled veteran, and thus trial court could not declare this statute unconstitutional as applied; and (3) administrative rule, providing that property used as a residence and also used by the owner as a place of business did not lose its homestead character and was to be separated with the residence portion being granted homestead tax exemption and the remainder being taxed, was an invalid exercise of delegated legislative authority.

The property appraiser then petitioned the Florida Supreme Court, arguing again that the property was not eligible for a full homestead exemption. Ultimately, the basis of the Florida Supreme Court's decision hinged on the application of the lower court's reasoning, which would essentially, "allow a property's structure—and the labels used to describe the property—to dictate the application of the homestead tax exemption."[5] The Court continued by stating, "[t]he result would be to make arbitrary distinctions between functionally similar homeowners and properties, without any constitutional or statutory basis for doing so."[6] The Court described Rebholz's property as a "boarding house," a part of which Rebholz lived in and used as his own residence. Because there was a specific portion of the property Rebholz did not use as his residence and the record supported that Rebholz gave exclusive use of that portion to a tenant, subject to the tenant's compliance with a lease, the rented portion could be separated. While explaining how the decision did not implicate homeowners working from home, the Court doubled down by emphasizing how, "Rebholz gave a tenant exclusive use of a portion of Rebholz's property, reserving to himself only the access rights of a landlord."[7] The Court stated that the rented portion of the property was not Rebholz's residence.

Where does that leave us today? Homeowners can: 1) analogize these specific facts to any leasehold situations they have currently in their homesteaded primary residences or refrain from leasing a portion thereof, and 2) follow cases by homeowners objecting to the commercial use percentage assessed to attempt to find a trend in how appraisers are calculating such assessments. Either way, I anticipate additional litigation because further guidance is needed for all stakeholders involved.

J. DAVIS

Jade Davis *is Of Counsel at Hall Booth Smith in Tampa, Florida. Jade focuses her practice on construction and data privacy law, and cybersecurity prevention and response in the healthcare, manufacturing, real estate, corporate, technology and public sectors. She received her Juris Doctor with honors from Stetson University College of Law and her BA from Florida State University.*

Endnotes

1 See *Furst v. Rebholz as Trustee of Rod Rebholz Revocable Trust*, 302 So. 3d 423 (Fla. 2d DCA 2020); *Rebholz as Trustee of Rod Rebholz Revocable Trust v. Furst, et al.*, Case No. 2015 CA 1039 NC (12th Jud. Cir. Ct. 2015).

2 *Furst v. Rebholz*, 2023 WL 2799413 (Fla. Apr. 6, 2023).

3 Id.

4 *Furst v. Rebholz as Trustee of Rod Rebholz Revocable Trust*, 302 So. 3d 423, 427 (Fla. 2d DCA 2020), quashed and remanded sub nom. *Furst v. Rebholz*, No. SC2020-1479, 2023 WL 2799413 (Fla. Apr. 6, 2023) (emphasis added).

5 *Id*. at 2023 WL 2799413, at *4.

6 *Id*.

7 *Id*. at 2023 WL 2799413, at *4.

SECTION SPOTLIGHT

ALMs Mix A Lively Alphabet Soup in Gainesville

By Rebecca L.A. Wood, Esq., Sr. Underwriting Council, The Fund

Eighth Circuit ALMs Jeff Dollinger, Norm Fugate and Rebecca Wood coordinated "Alphabet Soup," a networking event held in Gainesville, Florida, on February 21, 2023. The local Real Estate Council (REC) hosted the event under the name North Florida Association of Real Estate Attorneys (NFAREA). RPPTL's Law School Programming Committee sponsored the event for the benefit of University of Florida students who are interested in death and in dirt law, including student members of the Real Property Law Association, the Trust and Estates Law Society, and the Environmental and Land Use Law Society, and mentees from the Eighth Judicial Circuit Bar Association mentorship program chaired by Magistrate Jodi Cason.

The 8th Circuit ALMs extend a special thank you to Professor **Danaya Wright**, who encouraged student participation. Professor Wright is the T. Terrell Sessums and Gerald Sohn Professor of Constitutional Law and the Co-Director of the Center for Governmental Responsibility at the University of Florida, Levin College of Law. Professor Wright has made significant contributions as an active member of the RPPTL Section's Ad Hoc Committee on proposed Revocable Transfer on Death Deed legislation.

The following 8th Circuit members of RPPTL shared their stories and advice to students:

- Emcee **Rebecca Wood** explained how her role as a title insurance underwriter plays in the practices of the other speakers. Rebecca is a Sr. Underwriting Counsel at Attorneys' Title Fund Services, LLC (The Fund) and RPPTL's Liaison to UF.
- **Blake Fugate** rose to the occasion as the night's first speaker, sharing the advantages of combining a real estate practice with a probate and estate planning practice. Blake is a partner at Fugate & Fugate, in Williston. His partner is 8th Circuit ALM, Norm Fugate.
- **Stephanie Emrick** spoke on becoming a real estate litigator with a thriving practice after graduating first in her class from UF in 2017. Stephanie is an associate at Scruggs, Carmichael & Wershow in Gainesville.
- **Patrice Boyes** shared her career story and how environmental law led her to practice in land use. She offered sage advice on work-life balance: her interest in the environment spills over to her painting hobby, and her hobby inspires her practice. Patrice is a sole practitioner at Patrice Boyes, PA, in Gainesville.
- **John Roscow** explained his residential transaction practice is operated through his law firm and how the pricing is competitive with title companies. He emphasized the importance of including an attorney at the closing table. John is a partner at Holden Roscow & Caedington, P.L., in Gainesville.
- **Jeff Dollinger** emphasized the importance of participating in the RPPTL Section, recommending membership to the students and encouraging participation to the lawyers in the room. Jeff is a partner at Scruggs, Carmichael & Wershow, in Gainesville.

The 8th Circuit ALMs thanked the attendees and expressed appreciation to Rene Rutan, Fund Affiliate and Real Estate Council Relations Manager, for her event planning support. The Fund is a general sponsor of RPPTL, and the Attorney's Real Estate Councils of Florida (Florida ARECS, of which NFAREA is the local chapter) is the committee sponsor for Residential Real Estate Industry Liaison Committee.

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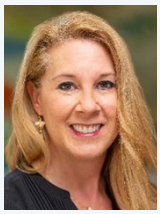

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Real Property Case Summaries

Prepared by Janaye Pieczynski, Esq., Ausley & McMullen, P.A., Tallahassee, Florida

Appellee's motion for attorney's fees was denied by the district court following its affirmance of final judgment.

***Destiny Fulfilled Outreach Ministries, Inc. d/b/a Little Walker's at the Early Learning Center v. Investments SWK, LLC*, 48 Fla. L. Weekly D573 (Fla. 4d DCA March 15, 2023).**

In a separate opinion, the Fourth District Court of Appeal ("Fourth DCA") affirmed the trial court's final judgment for eviction in favor of Investments SWK, LLC, the Appellee in this case. Appellee then moved for prevailing attorney's fees under Florida Rule of Appellate Procedure 9.400(b) and Fla. Stat § 83.231 (2022) governs nonresidential cases and states, in relevant part, "*[w]here otherwise authorized by law, the plaintiff in the judgment for possession and money damages may also be awarded attorney's fees and costs.*"[1]

The Fourth DCA concluded that the language "[w]here otherwise authorized by law" meant that there must be additional legal basis for the fee award outside of section 83.231. In contrast, the court noted that the fee statute regarding residential tenancies provided for an outright recovery of attorney's fees by the prevailing party.[2] Ultimately, the court found that Appellee's motion did not identify the requisite legal basis for a fee award and denied the motion.

A nondisclosure claim under Johnson is not available if "reasonable due diligence" would have revealed the defect.

***Sage v. Pahlavi*, 48 Fla. L. Weekly D575 (Fla. 4d DCA March 15, 2023).**

In this case, Charles Sage and Riki Sage ("Buyers") appeal the final summary judgment entered in favor of Sarvenaz Pahlavi, individually and as Trustee of the Sarvenaz Pahlavi Living Trust U/A/D June 10, 2015 ("Seller"). The underlying matter consisted of a breach of real estate contract and failure to disclose action following the closing on an "AS-IS" Residential Contract for the Sale and Purchase of a condominium unit.

In the property disclosure form, Seller noted the following: the property was located seaward of the coastal construction control line; past or present settling, soil movement, or sinkhole(s) affect at least some portions of the Association's property; and that additional structural reinforcement had been added to a part of the Association's property. When asked to explain, Seller stated "there is an assessment, part of which I paid." Both parties signed the property disclosure form. Additionally, Buyers' personal inspection uncovered that there were issues with settlement and cracking in the exterior and the interior of the unit. Buyers later revealed that they did not read the property disclosure form nor their own inspection report.

Following the completion of the sale, Buyers sued Seller for breach of contract and failure to disclose what the Buyer described as, "latent and material defects that materially affected the value of the real property." Buyers further argued that disclosure was required under *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

Both parties filed for summary judgment. Seller argued that she disclosed the defect and that Buyers' own inspection report disclosed the same information, thus putting them on notice of the potential issues. Buyers countered that the Seller's disclosure was insufficient. The trial court concluded that Buyers, "were sufficiently informed that a settling condition existed at the Condominium Property and that [Buyers] did not rely on [Seller's] disclosures in purchasing the Condominium Unit" and entered summary judgment in favor of Seller. The Fourth DCA agreed with the trial court's conclusion and affirmed the ruling.

> "A nondisclosure claim under *Johnson* has four elements: (1) the seller of a home must have knowledge of a defect in the property, (2) the defect must materially affect the value of the property, (3) the defect must be not readily observable and must be unknown to the buyer, and (4) the buyer must establish that the seller failed to disclose the defect to the buyer."[3]

The Fourth DCA concluded that the *Johnson* elements were not met in this case because, "[t]he property disclosure form, in conjunction with the inspection report, more than sufficiently put Buyers on notice of the foundation settling issue, thereby triggering Buyers' duty to further investigate the information provided to them by Seller." The Fourth DCA went on to say that "reasonable due diligence" would have revealed the issues to Buyers and, therefore, there was no actionable claim for nondisclosure under *Johnson*.

The district court found that reversal was required following a violation of Appellant's due process rights.

***James v. Teymorzadeh*, 48 Fla. L. Weekly D521 (Fla. 1st DCA March 8, 2023).**

In the present case, the First District Court of Appeal ("First DCA") reversed the trial court's order determining rent, writ of possession, and corrected the final judgment because the orders entered in the underlying ejectment action violated Appellant's due process rights.

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The parties entered into an agreement entitled "Lease Contract Agreement" which provided in the agreement that Appellant was to pay $1,100 per month for six months, then purchase the property for $165,000 after the lease ended. Under the Lease Contract Agreement, Appellant paid a non-refundable "down payment" in the amount of $6,600 that was to be credited towards the final purchase price. After negotiations broke down, Appellee filed an eviction complaint in the county court. Due to the amount of the down payment, the county court allowed Appellee to transfer the matter to circuit court within 60 days and to, "file any additional paperwork necessary and pay any addition fees required to complete the transfer of the case."

Appellee's newly filed Complaint for Ejectment did not contain a certificate of service and there was no record of notice of hearing and no hearing listed on the docket. Further, the documents filed by Appellee the day before the hearing did not include a certificate of service. The trial court's Order Determining Rent and notice that it had set a final hearing was sent to Appellant, via e-mail, even though she had not designated an e-mail address with the court. Additionally, there was a typo within the e-mail address.

The court ultimately entered a Writ of Possession and a Final Judgment in favor of Appellee, both of which were served to Appellant via the incorrectly spelled e-mail address. A corrected final judgment was entered shortly thereafter, and the same incorrect e-mail address was used to serve Appellant.

In its analysis of this matter, the First DCA found that the trial court had violated Appellant's due process rights because, Appellant did not have a meaningful opportunity to be heard. The First DCA also reasoned that reversal was proper because

> "[s]ervice on and by all parties who are not represented by an attorney and who do not designate an e-mail address . . . must be made by delivering a copy of the document or by mailing it to the party . . . at their last known address."[4]

Since there was, "no indication that Appellant had received service of a notice of hearing or service of any filing or order in the circuit court case," further proceedings were required.

The plain language of the lease supports reversal in this contract interpretation matter.

***KRG Oldsmar Project Company, LLC, v. CWI, Inc.*, 48 Fla. L. Weekly D597 (Fla. 2d DCA March 22, 2023).**

Appellee leased a space in a shopping center owned by Appellant for the purpose of opening a Gander Outdoors store. Appellee opened the store in accordance with the ten-year lease but closed the store after six months of operations. The parties sought the help of the trial court to interpret the lease agreement.

The lease agreement stated that Appellee shall, subject to "Permitted Cessations," continuously operate for one year after entering the premises, and after that period, a "Business Cessation" would not be considered an event of default under the lease agreement. "A 'Business Cessation' shall have occurred if Tenant elects to, or otherwise shall, cease its business operations in more than fifty percent (50%) of the Premises on substantially a full-time basis. *A Business Cessation shall not be deemed to be an event of default hereunder.*" [Emphasis added.]

Appellee's motion for summary judgment argued that if Appellee ceases its business operations before the first year has passed, it would not be in default of the lease agreement. The trial court agreed, and this appeal follows that decision.

> Appellant, "contend[ed] that the plain language of section 8.2 contains only one exception to the one-year requirement of continuous operation—'Permitted Cessations'—and that CWI did not allege that its reason for closing the store after six months was one of the permitted cessations listed in section 8.2.2," such as destruction of the premises or the landlord's default in the performance of an obligation under the lease agreement. The Second District Court of Appeal ("Second DCA") disagreed with the trial court's decision and determined that Appellant's interpretation of the lease agreement was correct.

The Second DCA went on to explain that Appellee's interpretation of the lease would render the one-year continuous operation requirement meaningless and would rewrite the lease agreement, running "afoul of the plain language of the lease."

The Second DCA reversed the final summary judgment and remanded the case for further proceedings.

J. PIECZYNSKI

Janaye G. Pieczynski *is a transactional attorney located in Tallahassee, Florida, with Ausley & McMullen, P.A. Her practice areas focus on real estate, land use and zoning, estate planning and administration, and corporate law. Janaye previously served as the senior law clerk to the Honorable Scott D. Makar of the Florida First District Court of Appeal. Janaye holds a bachelor's degree in legal studies from the University of Central Florida and a Juris Doctor from Florida State University College of Law.*

Endnotes

1 Fla. Stat. § 83.231 (2022) (emphasis in original).
2 *See* Fla. Stat § 83.48 (2022).
3 *Jensen v. Bailey*, 76 So. 3d 980, 983 (Fla. 2d DCA 2011).
4 Fla. R. Gen. Prac. & Jud. Admin. 2.516(b)(2) (2021).

Probate Case Summaries

Prepared by Jeanette Mora, Esq., Family First Firm, Orlando, Florida

The trial court erred in determining that wife had waived her homestead rights to her husband's one-half interest in the subject property when she executed a warranty deed conveying the property to herself and her husband as tenants in common.

Thayer and Jefferson v. Hawthorn, 48 Fla . L. Weekly D745a (Fla. 4th DCA 2023)

Husband and Wife were married from 1978 until husband's presumed death in July 2014. They had no children together, but Wife had five children from a previous relationship including appellants, Thayer and Jefferson ("Appellants"). Wife originally owned the property until 1987, when Wife quitclaimed the property to herself and her husband as joint tenants with rights of survivorship.

In 2002, as part of their estate planning, Husband and Wife executed a warranty deed conveying one-half (1/2) of the property to each of their revocable trusts as grantors and the grantees, as trustees of their respective individual trusts, with each trust having an undivided one-half interest as tenants in common. Their trusts provided that each trust would be for the surviving spouse's benefit. After the surviving spouse's death, Wife's trust was to be disbursed to her five children. Husband later amended his trust, with Wife's knowledge, providing that upon Husband's death, the trust was to be disbursed seventy percent (70%) to Husband's brother, Hawthorne ("Appellee"), and thirty percent (30%) to Wife's five children. Husband disappeared in 2014 and was presumed deceased in 2017. Husband had no lineal descendants. Wife died in 2018 survived by her five children.

After Wife's death, Appellee filed a petition to determine the homestead status of real property on Husband's one-half interest asserting that Wife had waived her homestead rights to Husband's half of the warranty deed, and that the house and 0.25 acres of property were exempt homestead property. Appellants filed a counter-petition to determine homestead status of real property arguing that Husband's devise of his one-half interest under the trust failed because Wife never waived her homestead rights in the property. At Husband's death, the property could only be devised to Wife. Appellants also argued that Wife's exempt portion constituted the home and the entire contiguous 0.695 acres because she owned the property before it was incorporated into a municipality.

Appellee responded and argued that Wife waived her homestead rights in the property by executing the deed in 2002 conveying half of the property into Wife's and Husband's respective trusts. Each party filed motions for summary judgment. Appellee relied on Fla. Stat. § 732.702(1) (2002) providing that a surviving spouse may waive his or her right to homestead property wholly or partially by written contract signed in the presence of two subscribing witnesses before or after entering a marriage and that a waiver of "all rights" or equivalent language is a waiver of homestead rights. Appellee also relied on an affidavit of the estate planning attorney who testified that they had intended to waive their homestead interests.

The trial court ruled in favor of Appellee. The trial court relied on Fla. Stat. § 732.702 and *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2014), holding that Husband and Wife had waived their own homestead rights in the other spouse's one-half interest in the property. The court also found that based on the affidavits from the estate planning attorney, there was no dispute that Wife intended to waive her homestead rights in the half of the property Husband transferred to his trust and that Husband's portion of the homestead was 0.25 acres. Appellants appealed.

The Fourth District Court of Appeal considered whether the 2002 warranty deed waived Husband's and Wife's homestead rights in each other's one-half interest in the property. The court concluded that the language in the deed was insufficient to waive homestead. The court reasoned that the language in the 2002 deed, *to wit*,

> *"That said grantor, for and in consideration of the sum of TEN ($10.00) DOLLARS, and other good and valuable consideration to said grantor in hand paid by said grantee, the receipt whereof is hereby acknowledged, has granted and sold to the said grantees, and grantee's heirs and assigns forever . . . ."* was distinct in the language of the deed in *Stone* where the spouse, "*grants, bargains, sells, aliens, remises,* ***releases****, conveys, and confirms"* the property, *"together with all the tenements, hereditaments, and appurtenances there to belonging or in anywise appertaining."* [1]

The court concluded that the language in the deed in *Stone* was, indeed, sufficient to waive homestead rights under the statute. More specifically, the language in *Stone* released the property and, also, conveyed the property "together with all... hereditaments." A hereditament is, "[a]ny property that can be inherited; anything that passes by intestacy." Therefore, in *Stone*, the deed did release the spouse's rights in the property whereas in the instant case, the deed contained no language of "release" or of conveyance of a hereditament. Language that simply "granted, bargained and sold" the property to the grantee was insufficient to constitute a written waiver of

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homestead rights as required under Fla. Stat. § 732.702(1).

The court concluded that the warranty deed did not waive homestead, because it lacked language specifically releasing inheritance rights, reversed the final summary judgment in favor of Appellee, and remanded the case for the trial court to enter summary judgment in favor of Appellants.

The Fourth District Court of Appeal affirmed the trial court's grant of summary judgment declaring that a subsequent holographic Will was ineffective to revoke a prior Will. The court properly revoked Appellants' letters of administration and appointed Appellee as personal representative based on the prior Will.

Caveglia and Caveglia v. Est. of Rory Ernest MacDowell, 48 Fla. L. Weekly D516a (Fla. 4th DCA 2023)

Decedent executed a last will and testament dated May 15, 2014 (the "2014 Will"). In 2015, the decedent handwrote a will, in which he stated he was revoking prior wills (the "2015 Will"); however, the 2015 Will was not witnessed. The decedent resided in Louisiana when he executed both wills.

The decedent moved to Florida in 2018 and died in Florida in 2019. The decedent's children ("Appellants"), unaware that he had a Will, filed a petition for administration for an intestate estate. The court appointed the Appellants and issued letters of administration. Later, the 2014 Will and the holographic 2015 Will were located. The decedent's longtime partner ("Appellee") filed a petition to probate the 2014 Will. Appellants argued that the holographic 2015 Will revoked the 2014 Will. Appellee argued that the 2015 Will was invalid under Florida law because it was holographic and unwitnessed. The parties filed cross-motions for summary judgment where Appellants also argued that the 2015 Will revoked the 2014 Will and, because the 2015 Will is not recognized in Florida, the decedent died intestate.

The trial court found that the decedent died a domiciliary of Florida. The court ruled that the 2015 Will was invalid under Florida law and was invalid as a revocation instrument. The trial court revoked the Appellants' letters of administration appointing Appellee as personal representative under the 2014 Will. Appellants appealed contending that Louisiana law should determine whether the 2015 Will revoked the 2014 Will because the decedent was domiciled in Louisiana when both wills were executed and claiming that when the decedent moved to Florida in 2018, the 2014 Will could not be revived because it had been revoked under Louisiana law by the 2015 Will.

The District Court of Appeals disagreed because it would require Florida to enforce a will not valid under Florida law. The court reasoned that it is well settled that strict compliance with the will statutes is required in order to effectuate a revocation of a will or codicil[2] and that a written revocation could not be found when not performed in compliance with Fla. Stat. § 732.505.[3] The court emphasized that a will speaks as of the time of the death of the testator [4] and that because wills are ambulatory, revocation is not determined until the death of the decedent.[5] With respect to revocation, the court relied on Fla. Stat. § 732.505(2) (2019) providing that a will is revoked, "[by] subsequent will, codicil, or other writing *executed with the same formalities required for the execution of wills* declaring the revocation." [Emphasis added.] The court concluded that the 2015 Will could not be recognized as a will or an instrument of revocation under Florida law affirming the trial court's ruling declaring that the holographic 2015 Will was ineffective to revoke the 2014 Will and properly revoking the Appellants' letters of administration and appointing the decedent's longtime partner as personal representative based on the 2014 Will.

The trial court erred in ordering disbursement of funds pursuant to a contingent fee agreement of an additional 5% of judgment amount obtained by counsel on behalf of the decedent and her sister in an unrelated civil suit.

Est. of Hollie A. Carter v. William Rambaum, P.A., 48 Fla. L. Weekly D534a (Fla. 2d DCA 2023)

Attorney William Rambaum represented Hollie Carter and her sister in a civil dispute between the sisters and their brother over ownership of their deceased father's homestead property under a contingency fee agreement. A final judgment was entered in favor of the sisters as being the fee simple owners of the property. It was agreed that Rambaum's fees and costs would be paid from the proceeds from the eventual sale of the property. Prior to selling the property, Hollie Carter passed away. Rambaum filed a statement of claim against her estate (the "Estate") for his legal fees and costs under the contingency fee agreement. The claim was challenged by the Estate and under two separate proceedings, the District Court of Appeal affirmed the trial court's first ruling that Rambaum's claim was a valid secured equitable lien against the property. Under the court's second ruling it held that the trial court's order determining Rambaum's claim for attorney's fees was to be computed on the gross recovery of the sale of the property. The property eventually sold for $2,700,000 in the fall of 2021. Rambaum claimed that, in addition to the contingency fee of $809,752, he was entitled to additional attorney's fees of 5% of the judgment for the work performed on the two appeals that ensued out of the probate proceeding. He relied on a specific paragraph in the contingency fee agreement, which provided for compensation of, "[a]n additional 5% of any recovery after institution of any appellate proceedings is filed or post [ ] judgment relief or action is required for recovery on the judgment." The Estate objected, and the amount equal to 5% of the judgment was held in escrow pending resolution. The Estate unsuccessfully sought disbursement of the funds in escrow arguing that paragraph 5(d) was limited to recovery on the judgment in the civil action.

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The court sought to review the construction of the contingency fee agreement entered into by the sisters and Rambaum. First, the scope of work under the contingency fee provided that representation was limited to representing the sisters in the civil action to recover their father's homestead property, which they claimed was wrongfully deeded to their brother. Second, the method of compensation provided that Rambaum was entitled to a percentage of the gross amount recovered for the sisters, structured as a percentage of the sale price of the property. The agreement also provided that Rambaum was to receive an additional 5% of the recovery if any appeal was filed or any postjudgment or other action was required to obtain recovery on the judgment.

The court reasoned that the only recovery obtained for the sisters was the recovery of the property pursuant to the final judgment.[6] No appeals were taken from the final judgment nor was there any post judgment work done on behalf of the sisters to obtain recovery on the judgment.

The District Court further noted that Rambaum sought recovery for his own attorney's fees for litigating the issue of his right to an equitable lien against the subject property and as to the establishment of the amount recovered.[8] Furthermore, the fee agreement did not include any language for the recovery of attorney's fees in the event of a dispute between Rambaum and the sisters.[9]

The court concluded that the statement of claim filed by Rambaum could not in any way be construed within the scope of work contemplated in the fee agreement, which limited Rambaum's representation to obtaining *recovery for the client*, that Rambaum's efforts fell outside of the scope of the contingency fee agreement and were not performed in obtaining a recovery for the clients. Therefore, the trial court erred in determining that Rambaum was entitled to the additional 5% attorney's fees under the contingency fee agreement.

J. MORA

Jeanette Mora *has been practicing law since 2019. Ms. Mora focuses her practice in probate and guardianship law with Family First Firm in Orlando, Florida. She completed her undergraduate studies at Stockton State University, obtained her graduate degree at the American University and graduated from the Dwayne Andreas Barry University School of Law with honors. Ms. Mora serves as Co-Chair of the Orange County Bar Association Elder Law Committee and the Estate, Guardianship, and Trust Steering Committee.*

Endnotes

1 *Stone* v. *Stone*, 157 So. 3d 295 (Fla. 4th DCA 2014).
2 *Cioeta v. Est. Of Linet*, 850 So. 2d 562, 564 (Fla. 4th DCA 2003).
3 *In re Est. of Dickson*, 590 So. 2d 471, 472 (Fla. 3d DCA 1991).
4 *Est. of Murphy*, 340 So. 2d 107, 109 (Fla. 1976).
5 *In re. Est. of Algar*, 383 So. 2d 676 (Fla. 5th DCA 1980).
6 *Gallager v. Manatee County*, 927 So. 2d 914, 917 (Fla. 2d DCA 2006).
7 *Brickell Place Condo. Ass'n v. Joseph H. Ganguzza & Assocs.*, 31 So. 3d 287, 290 (Fla. 3d DCA 2010).
8 *Brooks v. Degler*, 712 So. 2d 419, 421 (Fla. 5th DCA 1998).
9 *Cf. Waverly at Las Olas Condo. Ass'n v. Waverly Las Olas, LLC 88 So. 3d 386, 389 (Fla. 4th DCA 2012).*

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