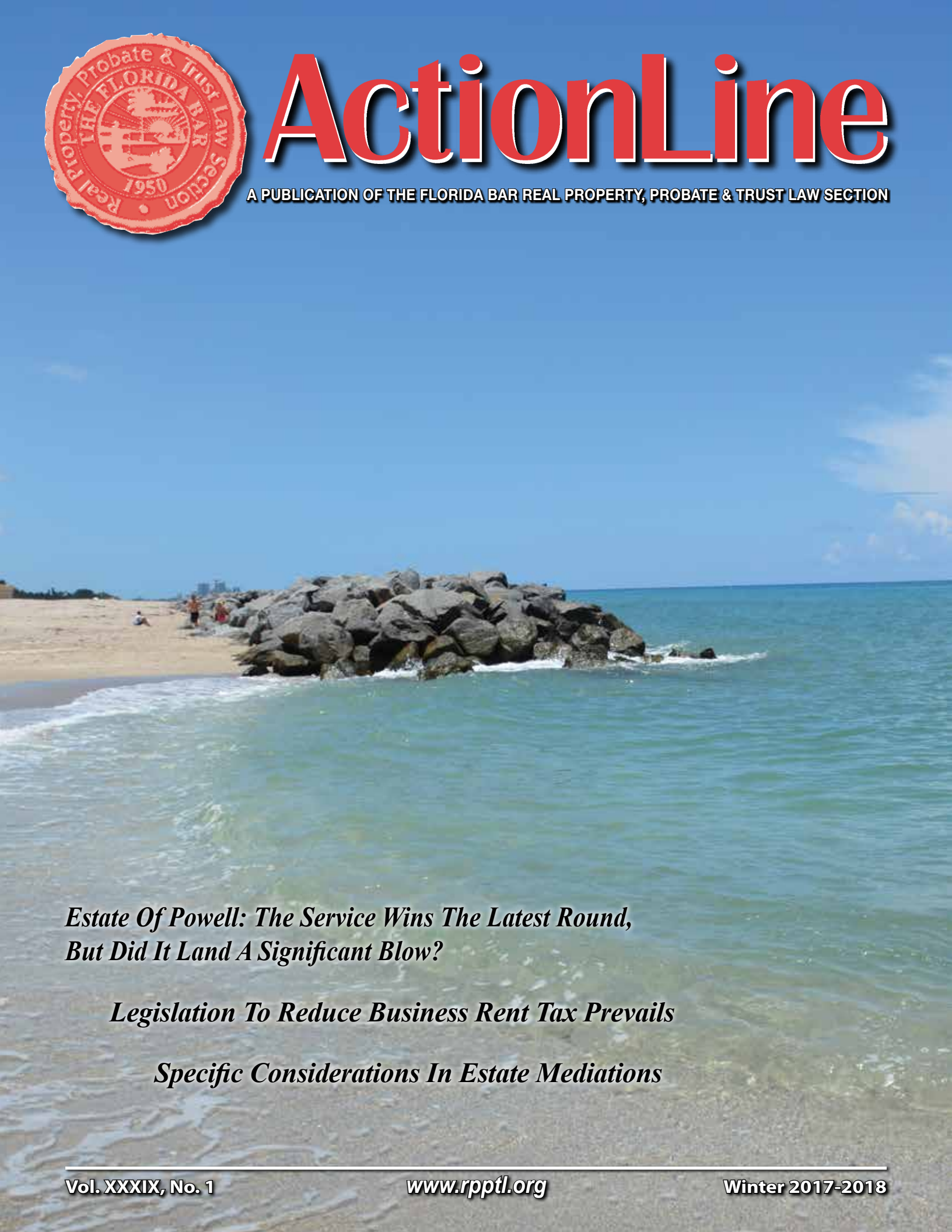
ActionLine

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



Estate Of Powell: The Service Wins The Latest Round, But Did It Land A Significant Blow?

Legislation To Reduce Business Rent Tax Prevails

Specific Considerations In Estate Mediations

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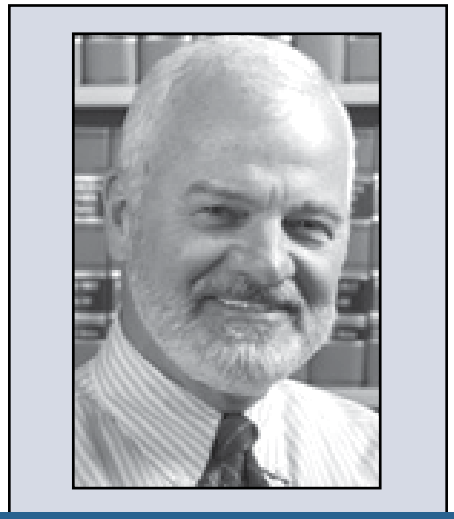
Fellows Plot The Path To The Future

The success of any organization relies upon continued addition of new members and the development of its future leaders. As the largest section of The Florida Bar, the Real Property Probate and Trust Law Section (the "Section") has spent generations building its membership and passing the baton of leadership. The importance that the Section puts on growing and maintaining our membership is evident in the existence of the Membership and Inclusion Committee, but how does the Section promote future leadership?



Chair's Column

By Andrew M. O'Malley
Section Chair, 2017- 2018

In 2008, the Section developed the Fellowship Program as a means of identifying talented individuals poised to become the future leadership of the Section. Now in its 8th Fellowship class, the Fellowship Program has developed leaders that are currently serving as co-chairs of standing committees and chairs of subcommittees, and many past Fellows now serve as At-Large members of the Executive Council. The Fellowship Program is designed to not only provide a way forward for the next generation of leaders, but also to serve as a means to introduce new attorneys to the Section dynamics, expectations, and network of Executive Council members available to them through active participation in Section activities. Each Fellow is assigned a social mentor, who is a member of the Executive Council, to assist the Fellow in maximizing his or her experience as a Fellow and attending Section social events. Each Fellow is also assigned a committee mentor to assist the Fellow's active involvement in the committee that most closely fits the Fellow's practice area with the goal of maximizing his or her professional development through the Fellowship Program. Additionally, every first year Fellow is paired with a second year Fellow who helps guide the new Fellow during the first year.

In the spring of each year, the Section solicits applications for its Fellowship Program from current and new members that are either under the age of 38 or whom have been admitted to the Florida Bar for less than 12 years. The application requests information on current Section involvement, requires references, and asks the applicant to share his or her reasons for seeking to become a Fellow. The applications are reviewed by the current Section leadership. Section leadership looks at a multitude of criteria in selecting Fellows, including professional experience, number of years in practice, likelihood of sustained involvement in the Section and prior involvement in the Section. Four Fellows are ultimately selected from a competitive field of applicants. Typically, two Fellows are selected from members of the Probate and Trust Law Division and two Fellows are selected from members of the Real Property Division. Each Fellowship lasts for two years such that, at any given time, there are eight Fellows participating in the Fellowship Program.

In each Fellowship year, in exchange for the Section providing mentors to the Fellows, a fast track to leadership development within the Section, and a travel stipend of up to $2,500, the Fellows are expected to attend no less than three Executive Council meetings, be active members of the Membership and Inclusion Committee and one substantive committee, and complete a work project on behalf of a substantive committee.

The involvement of the Section's current second year Fellows amply demonstrates the goals of the Fellowship Program in action. Stephanie Villavicencio, second year Fellow on the "death side," is currently a member of the Guardianship, Power of Attorney and Advance Directives Committee and recently joined a subcommittee to study 2015 Senate Bill 366, which seeks to amend Section 744.331(7)(c), F. S., to further address the payment of attorney's fees when a guardianship petition is brought in bad faith. Amber Ashton, a second year Fellow on the "dirt side," serves as the secretary of the Real Property Litigation Committee, and is a member of a subcommittee convened to revise the lis pendens statute, Section 48.23, F.S., to address the time period during which a lis pendens remains effective after entry of a final judgment.

In addition to their committee participation and work projects, Fellows are also responsible for preparing two sections of every ActionLine publication. In "The Practice Corner," Fellows provide practical tips and practice pointers derived from their own experience which they believe may be helpful to other Section members. For example, in the Spring 2017 edition of ActionLine, Scott Work, currently a second year Fellow, wrote an article about the application of the Marketable

continued, page 5

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

IN THIS ISSUE:

Chair's Column: Fellows Plot The Path To The Future 3
Estate Of Powell: The Service Wins The Latest Round, But Did It Land A Significant Blow? 6
Legislation To Reduce Business Rent Tax Prevails 12
Specific Considerations In Trust And Estate Mediations 14
Determining Reasonableness Of Attorney's Fees And Costs In Probate And Trust Proceedings 17
A Practical Guide To Florida's Construction Statute Of Repose After 2017 Legislative Changes 20
Section Spotlight: Winded: A Legal Career Is Not A Sprint 24
Must A Commercial Landlord Consent To A Lease Assignment? 26
RPPTL Section Executive Council Meeting Photographs 28
Roundtable: Real Property Division 30
Roundtable: Probate and Trust Division 33
Why Not Become Board Certified? 36
Political Roundup: State Politics Heat Up In Preparation For The 2018 Elections 38
The Fourth Annual Miami-Dade County Public School Legal Initiative 40
Probate and Trust Division Practice Corner 41
Real Property Division Practice Corner 42
Probate And Trust Case Summaries 44
Real Property Case Summaries 47
State Tax Case Summaries 50
What's Happening Within The Section 55
ActionLine Bulletin Board 56

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 Wm. Cary Wright at cwright@carltonfields.com. Deadlines for all submissions are as follows:

ISSUE	DEADLINE
Spring	January 15
Summer	April 15
Fall	July 15
Winter	October 15

ADVERTISING: For information on advertising, please contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Jeff Baskies at jane@emeraldgreenconsulting.com.

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

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

Record Title Act to eliminate title defects, while Angela Santos, also currently a second year Fellow, shared her article on recently adopted reporting requirements for foreign-owned disregarded entities. Fellows are also responsible for the "Real Property Case Summaries" and "Probate and Trust Case Summaries" sections of ActionLine. These sections highlight recent important decisions from the appellate courts which may be of interest to Section members.

It is our belief and hope that, through their activities and efforts within the Fellowship Program, Fellows will develop not only the life-long friendship and business relationships that many of the members of the Executive Council enjoy, but also develop into the future leaders of the Section. All of the Section's prior Fellows are continuing their Section work, and many have taken on significant leadership positions within the Section since their Fellowships ended. Just to name a few of our current leaders that came through the Fellowship Program: Josh Rosenburg currently serves as Co-Vice Chair of the Fellows Committee, Hung Nguyen is the Co-Chair of the Guardianship Committee, Brenda Ezell is the Co-Vice Chair of both the Real Estate Leasing Committee and the Membership and Inclusion Committee, and Sean Lebowitz is the Co-Vice Chair of the Publications-ActionLine Committee. These leaders represent only a handful of the past Fellows who are paving the way for the future of the Section. The full list of past and current Fellows is below:

Inaugural Class (2008-2010): Brenda Ezell, Aniella Gonzalez, Hung Nguyen, John Cardillo

2010-2012 Class: Benjamin Bush, Theo Kypreos, Elisa F. Lucchi, Navin Pasem

2012-2014 Class: Brian Hoffman, Nishad Khan, Noelle Melanson, Tara Rao

2013-2015 Class: Douglas Christy, Sean Lebowitz, Joshua Rosenberg, Kymberlee Smith

2014-2016 Class: T. John Costello, Julia Jennison, Michael Sneeringer, Melissa VanSicle

2015-2017 Class: Christopher A. Sajdera, Bridget M. Friedman, Jennifer Grosso, Stacy B. Rubel

2016-2018 Class: Amber Ashton, Angela K. Santos, Scott Work, Stephanie Villavicencio

2017-2019 Class: Jami Coleman, Lian de la Rive, Daniel L. McDermott, Jacqueline J. Peregrin

One of the best ways to identify strong Fellow candidates is for you, the members of the Section, to encourage the new members of your committees to apply for the Fellowship Program. New Section members in particular may be unaware of the availability of the program and the benefits that it provides. By talking with candidates who you believe deserve the opportunity to develop into the section leaders of tomorrow, you ensure the success of the Section for the future. So, take note of that new member who volunteers for every subcommittee, reach out to that established young member who took the initiative to write an *ActionLine* article about your committee's most recent legislative effort, and not only encourage them to apply for the Fellowship Program, but offer to serve as a reference in support of their application. You, too, can be part of the selection and development of the membership of the Executive Council of the future.

Applications for the Fellowship Program will be accepted from February 1 through March 31, 2018. Information regarding the application process will be posted with the application on the Section's website, or can be obtained by mail to RPPTL Fellowship Program c/o Mary Ann Obos, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300. The chair of the Fellows Committee for 2017-2018 is Benjamin F. Diamond. Completed applications should be submitted to: mobos@floridabar.org. Special thanks to current fellow, Amber Ashton, of DSK Law in Tampa, Florida, for assistance in writing this column.

Letter From The Editors

Dear Readers

We hope you enjoy the new "Political Roundup" column. The newest feature in ActionLine is presented by Pete Dunbar and others at Dean, Mead & Dunbar. The Section's lobbyists have interesting and unique insights to share with section members on the internal workings in Tallahassee.

The Political Roundup joins another new feature in ActionLine – introduced in the last issue – the Section Spotlight. The Section Spotlight allows us to feature various section members and/or activities of interest. This Winter issue features an article by a RPPTL section member sharing her experiences balancing practicing law with marathon running.

The Winter issue also includes a story on the Fourth annual Miami-Dade County Public School initiative. This is an outreach and diversity program hosted at St. Thomas University School of law.

The editors appreciate hearing from Section members regarding feature articles, so do not hesitate to contact us if you want to share a personal story, a local bar event, a public service program or anything else of interest to RPPTL members. The editors hope you like the changes being made to move the publication from a newsletter to a magazine. —*The Editors*

Estate Of Powell: The Service Wins The Latest Round, But Did It Land A Significant Blow?

By Douglas J. Elmore, Esq.,Williams Parker Harrison Dietz & Getzen, Sarasota, Florida

In the wake of *Estate of Strangi*, the Internal Revenue Service (the "Service") appeared to have a new weapon against family limited partnerships - Section 2036(a)(2). In *Strangi*, the Tax Court concluded that Section 2036(a)(2) was triggered by a decedent's ability, as a non-controlling general partner, to band together with family members to control partnership distributions and dissolution. The Tax Court's analysis significantly detracted from the fiduciary duty limitation to Section 2036(a)(2) established in *United States v. Byrum*. To some, it foretold the demise of an important segment of family limited partnership planning.

In the fourteen years since *Strangi*, however, the Service has not actively or successfully deployed Section 2036(a)(2) as a weapon against family limited partnerships.[4] As a result, concern that the Tax Court's analysis in *Strangi* would derail partnership planning has slowly faded. Concern regarding Section 2036(a)(2) may be renewed, however, due to the Tax Court's decision in *Estate of Powell*.[5]

In *Estate of Powell*, the Tax Court applied Section 2036(a)(2) in the context of a decedent who owned a 99 percent limited partner interest, but not a general partner interest, in a family limited partnership controlled by her sons.[6] The result is not surprising considering the aggressive nature of the planning – a partnership consisting primarily of liquid assets, involving only family members as owners, formed by the decedent's son via the use of a power of attorney, and funded just seven days prior to the decedent's death.[7]

The Tax Court's analysis, however, is somewhat of a surprise. For one, it arguably expands the scope of Section 2036(a)(2) by applying it to a decedent who did not own (and had never owned) a general partner interest in the family limited partnership.[8] In addition, it creates the possibility that Section 2036 estate inclusion may involve a "duplicative transfer tax" relative to the assets contributed to the partnership.[9] These potential implications, in combination with its resurrection of the Tax Court's analysis in *Strangi*, make *Estate of Powell* a case that practitioners should understand.[10]

Background

In recent years, Section 2036 has been the primary means by which the Service has attacked family limited partnerships. Most Section 2036 challenges involve the assertion that the contributor retained the right to the income or the enjoyment of partnership property under Section 2036(a)(1). On rare occasions, though, the Service has attempted to apply Section 2036(a)(2). In these cases, the Service has asserted that the decedent's retention of managerial authority gives the decedent the right to "designate," within the meaning of Section 2036(a)(2), who receives partnership income or who enjoys partnership property.[11]

Section 2036(a)(2) attacks have been limited, however, due to the result of *United States v. Byrum*. In *Byrum*, the Supreme Court held that Section 2036(a)(2) did not apply when a decedent, who owned a controlling interest in each of three different corporations, transferred shares of stock in each corporation to an irrevocable trust for the benefit of his children and simultaneously retained the right to vote the transferred shares.[12] Following this result, *Byrum* has evolved to stand for the general proposition that a decedent's managerial authority, in connection with a family limited partnership, does not trigger Section 2036(a)(2) if the authority is constrained by one or more fiduciary duties.[13]

In *Estate of Strangi*, however, the Tax Court chipped away at *Byrum's* fiduciary duty limitation on the application of Section 2036(a)(2). In *Strangi*, the decedent's son-in-law, acting as his agent under a durable power of attorney, formed and funded a family limited partnership with liquid assets comprising approximately 98 percent of the decedent's wealth. At the time of the decedent's death (two months from the date that the partnership was funded), the decedent owned a 99 percent limited partner interest. The decedent also owned 47 percent of a corporation that owned the 1 percent general partner interest. The decedent's family owned 52 percent of the corporation, and the remaining 1 percent was owned by a charity. [14]

Under these facts, the Tax Court held that the partnership's assets were includable in the decedent's gross estate under Section 2036(a)(2).[15] The court reasoned that, because the decedent could band together with the other shareholders of the corporation to determine partnership distributions and to dissolve the partnership, the decedent retained the ability to designate who could enjoy partnership income and property. In concluding that the decedent was not subject to *Byrum*-like fiduciary duties, the Tax Court commented that "[i]ntrafamily fiduciary duties within an investment vehicle simply are not equivalent in nature to the obligations created by the [*U.S. vs. Byrum*]...scenario."[16] Although it affirmed the result on appeal,

continued, page 7

the Fifth Circuit did not address the Tax Court's analysis of Section 2036(a)(2). As a result, the Tax Court's analysis of Section 2036(a)(2) in *Strangi* remains dictum.[17]

Although some practitioners feared that *Strangi* would result in a wave of Section 2036(a)(2) attacks, the Service has rarely litigated Section 2036(a)(2) claims since this decision. In fact, since *Strangi*, the Service has only pursued Section 2036(a)(2) in two Tax Court cases.[18] Thus, in recent years, concern has faded regarding the impact of the Tax Court's analysis in *Strangi* and the effectiveness of Section 2036(a)(2) arguments.

Estate of Powell

The facts in *Estate of Powell* typify the brand of "aggressive deathbed tax planning" that the Service frequently condemns.[19] On August 6, 2008, Jeffrey Powell ("Jeffrey"), Nancy Powell's son, formed NHP Enterprises LP ("NHP") as a general partner. Two days later, acting as Mrs. Powell's agent under her durable power of attorney, Jeffrey funded NHP with approximately $10,000,000 of marketable securities and cash from Mrs. Powell's revocable trust.[20] At the time NHP was funded, Mrs. Powell may not have had capacity.[21] Just one week after NHP was funded, Mrs. Powell passed away.[22]

As a result of NHP's funding, Mrs. Powell received a 99 percent limited partner interest. Jeffrey and his brother each received a general partner interest, with each contributing an unsecured promissory note. In addition, on the same day that NHP was funded, Jeffrey transferred Mrs. Powell's limited partner interest to a charitable lead annuity trust (the "CLAT"). Jeffrey made this transfer as Mrs. Powell's agent under her power of attorney.[23]

Under the terms of the limited partnership agreement, Jeffrey, as general partner, could unilaterally determine the amount and timing of partnership distributions. NHP could be dissolved with the written consent of all partners, including the consent of the limited partner.[24]

Estate of Powell was fully reviewed by the Tax Court, with seventeen judges participating in the decision. The primary opinion, however, is only a plurality opinion joined by eight of the seventeen judges. Seven judges instead partnered in a concurring opinion, and two judges agreed with the plurality in result only.[25]

The plurality opinion held that Mrs. Powell's right to act in conjunction with the other partners to dissolve NHP was a right "to designate the persons who shall possess or enjoy" the cash and securities, "or the income therefrom," transferred to NHP within the meaning of Section 2036(a)(2).[26] Thus, the value of the assets transferred to NHP was includable in her gross estate under either Section 2036(a)(2) or Section 2035(a), depending upon the validity of her gift to the CLAT.[27] In addition, the plurality noted that Mrs. Powell held the right, through her son as agent under her power of attorney, to determine the amount and timing of partnership distributions. This also triggered the application of Section 2036(a)(2).[28]

The concurring opinion agreed with the plurality's Section 2036(a)(2) analysis.[29] As a result, fifteen of the seventeen judges in *Estate of Powell* explicitly agreed that Section 2036(a)(2) applied. Two other judges agreed with the result.[30]

To reach this holding, the plurality opinion analogized *Estate of Powell* to *Strangi*. The plurality noted that, in both cases, the decedent could act with other family members to dissolve the partnership. In both cases, a partnership dissolution would likely cause the majority of the assets contributed to the partnership to be distributed back to the taxpayer. The plurality also pointed out that, in both *Powell* and *Strangi*, the decedent indirectly retained the ability to control partnership distributions via an agent under a power of attorney.[31]

Furthermore, the plurality opinion distinguished *Byrum* on the same grounds that the Tax Court distinguished *Byrum* in *Strangi*. In distinguishing *Byrum*, the plurality noted that, while Jeffrey had fiduciary duties as NHP's general partner, he also owed duties to Mrs. Powell as an agent under her power of attorney.[32] Moreover, the plurality noted that nothing suggests that Jeffrey would have "exercised his responsibility as general partner of NHP in ways that would've prejudiced [Mrs. Powell's] interests."[33] It also remarked that, because Mrs. Powell owned a 99 percent limited partner interest, "whatever fiduciary duties limited [Jeffrey's] discretion in determining partnership distributions were duties that he owed almost exclusively to [Mrs. Powell]."[34] Therefore, like the Tax Court did in *Strangi*, the plurality concluded that any limitations imposed by the general partner's fiduciary duties to the decedent were "illusory" and do not prevent the application of Section 2036(a)(2).[35]

The plurality opinion does not address, however, a key distinction between *Estate of Powell* and *Strangi* - the decedent in *Strangi* retained a general partner interest; Mrs. Powell did not.[36] Also noteworthy is that, for some reason, the *Powell* estate did not contest Section 2036(a)(2) inclusion.[37] Furthermore, the *Powell* estate conceded that Section 2036's "bona fide sale for an adequate consideration" test was not met.[38]

The plurality opinion, *sua sponte*, also analyzed the amount of estate inclusion. The plurality held that, regardless of whether inclusion was under Section 2036(a)(2) or Section 2035(a), neither section requires inclusion of the "full date-of-death value of the cash and securities transferred to the [NHP]; only the excess of that value over the value of the limited partner interest" that Mrs. Powell received in connection with the funding of the partnership.[39] Additionally, the plurality noted that, if Mrs. Powell's gift to the CLAT was either void or revocable, then the deemed retained partnership interest would also be included in her gross estate.[40] Per the plurality's analysis, both the "doughnut" (the limited partner interest, including future appreciation) and the "hole in the doughnut" (the future appreciation) would be included in Mrs. Powell's gross estate.[41] In footnote 7 of the opinion, the plurality

continued, page 8

acknowledged that, under its approach, a "duplicative transfer tax" would apply to the extent of the post-contribution increase in the value of the assets that funded the partnership.[42]

The plurality's double inclusion analysis is technically dictum and lacks precedential value.[43] The amount of estate inclusion was not an issue being litigated by the parties and was not central to resolving the other litigated issues.[44] Moreover, the seven-judge concurring opinion did not adopt the plurality's technical analysis regarding the amount of estate inclusion.[45] The concurring opinion reasoned that only the value of the partnership's assets should be included in Mrs. Powell's gross estate because Section 2036 inclusion renders the partnership a mere alter ego of its assets.[46]

Assessing the Impact

To some, *Estate of Powell* is the most significant family limited partnership case in years.[47] It arguably strengthens Section 2036(a)(2) as a weapon for the Service by expanding its application to a limited partner that did not concurrently own a general partner interest.[48] Through this lens, the plurality's Section 2036(a)(2) analysis is important because it illustrates that the decedent need not retain, nor formerly own, a general partner interest in order to trigger estate inclusion.[49] Under the plurality's reasoning, the "mere possibility" that a limited partner may vote or band together with the general partner appears to be sufficient to cause inclusion under Section 2036(a)(2).[50] Notably, per this analysis, a taxpayer cannot circumvent the application of Section 2036(a)(2) by simply relinquishing or avoiding a general partner interest.[51]

In addition, under its most expansive interpretation, *Estate of Powell* could be read as causing Section 2036(a)(2) to apply when a decedent retains *any* interest in a family limited partnership.[52] While it seems doubtful that the plurality opinion intended this result, without further explanation, the door remains open to this type of argument.

Estate of Powell also bolsters the effectiveness of Section 2036(a)(2) by resurrecting *Strangi's* limitations on the application of *Byrum*-like fiduciary duties.[53] In distinguishing *Byrum* on the same grounds that it did in *Strangi*, the plurality opinion incorporates the *Strangi* limitations to *Byrum* in a manner that could have precedential value.[54] This is important considering that the Section 2036(a)(2) analysis in *Strangi* is dictum.

Further, the plurality opinion raises the risk that a "duplicative transfer tax" may apply in the context of Section 2036 inclusion.[55] Although its analysis is dictum, the plurality's approach is important because the inclusion of both the "doughnut" and the "hole in the doughnut" could produce a dramatically unfavorable result. In some cases, a taxpayer may be worse off than had they retained the contributed assets and done no further planning.[56] Since seven judges explicitly rejected the plurality's analysis, however, and since the plurality's approach deviates from that of prior cases, it remains unclear how the Tax Court would address this issue in the future.[57]

From another perspective, it seems premature to elevate *Estate of Powell* to the status of a landmark family limited partnership case. For one, *Estate of Powell* can easily be characterized as a product of bad facts and a suspect litigation strategy.[58] Along with the aggressive nature of the planning, the estate did not contest the application of Section 2036(a)(2). As the concurring opinion suggested, the analysis in *Estate of Powell* seems propelled by the Tax Court's view that NHP was a sham partnership which was "invalid ab initio."[59] Despite the fact that the Service "had available a number of theories on which to challenge the transactions," it did not clearly articulate a "partnership invalidity" theory.[60] The concurring opinion also suggests that Section 2036(a)(2) was employed by the plurality because the record may have been insufficient to prevail under a partnership invalidity claim.[61] Considering this, the plurality's Section 2036(a)(2) analysis could be nothing more than a means to an end.[62]

If this characterization is accurate, then the plurality's analysis may be more of a warning shot at similar brands of planning rather than a true extension of the law.[63] Going forward, if the Tax Court's reasoning was primarily a means to an end, then it may not apply similar reasoning in cases involving less egregious facts. Considering this backdrop, *Estate of Powell* seems unlikely to usher in a Section 2036(a)(2) offensive against family limited partnerships. Moreover, to the extent that the plurality's reasoning is another means of saying that sham partnerships won't be respected, it fails to chart new territory.[64]

Additionally, an argument can be made that *Estate of Powell* does not necessarily strengthen the force of Section 2036(a)(2). Per this theory, the plurality merely follows the Tax Court's approach in *Strangi* and, in doing so, does not expand the scope of Section 2036(a)(2). From one viewpoint, *Strangi* stands for the proposition that, if a partnership is funded by and controlled by an agent of the decedent under the decedent's power of attorney, then the agent's authority as controlling general partner will in effect be attributed to the decedent. The Tax Court in *Strangi* did not expressly discuss an attribution of authority, but the concept seems consistent with the court's Section 2036(a)(2) holding and its focus on the fiduciary duties owed by the agent to the decedent under the decedent's power of attorney. Because of these fiduciary duties, the Tax Court in *Strangi* seems to have impliedly attributed the agent's control-flavored authority to the decedent. It is as if the Tax Court deemed the decedent to have retained, at death, a controlling interest in the general partner.

The plurality in *Estate of Powell* seems to take a similar approach when assessing similar facts. By observing that Jeffrey would not have "exercised his responsibility as general partner of NHP in ways that would've prejudiced [Mrs. Powell's]

continued, page 9

interests," the plurality seems to be using Jeffrey's fiduciary duties to her as a basis to impliedly attribute to Mrs. Powell his authority as the controlling general partner.[65] While the plurality does not discuss attribution, a *Strangi* form of "implied attribution" seems to be embedded in its analysis. It's as though the Tax Court deemed Mrs. Powell to have retained, at death, a controlling interest in the general partner because of Jeffrey's duties under her power of attorney. And if you tack this hypothetical controlling general partner interest to Mrs. Powell's 99 percent limited partner interest for purposes of analyzing Section 2036(a)(2), the result in *Estate of Powell* parallels that of *Strangi* and seems far less remarkable. From this perspective, by adopting *Strangi's* implied attribution approach, the plurality's Section 2036(a)(2) analysis does not expand existing law.

Furthermore, while the plurality's double taxation analysis could certainly discourage partnership planning, whether or not the Tax Court would adopt this analysis remains unclear. Not only is the analysis dictum, seven judges explicitly disagreed with this technical approach, an approach that deviates significantly from that of existing case law.

Planning Implications

At this point, it's difficult to gauge the weight that practitioners should give *Estate of Powell*. The good news is that, even if you believe it heightens the risk relative to partnership planning, a number of helpful techniques remain available to mitigate this risk. At the end of the day, a family limited partnership should be respected if it has economic substance and meets the "bona fide sale for adequate and full consideration" exception.[66] As such, practitioners should continue to emphasize the "legitimate and significant non-tax reason[s]" for forming a family limited partnership.[67] Practitioners should also guide clients towards the proper documentation and maintenance of partnership capital accounts.[68] To date, virtually all successful defenses to a Section 2036 challenge have involved satisfying this exception.[69]

In addition, a taxpayer can still mitigate the risk of estate inclusion by effectively parting with partnership interests before death. The plurality's analysis in *Estate of Powell* does not change this result. Instead, it amplifies the importance of this planning technique.[70]

Finally, a decedent's retained power over partnership distributions may avoid Section 2036(a)(2) if the distribution power is ascertainable and can be enforced by a court. Although a discussion of this concept is beyond the scope of this article, Revenue Ruling 73-143 bolsters this concept.[71]

Conclusion

Estate of Powell is certainly a case with which practitioners should be familiar. It arguably extends the reach of Section 2036(a)(2), and it generates the risk of double taxation relative to assets contributed to a family limited partnership. Despite this, *Estate of Powell* is in many ways a prototypical case of "bad facts make bad law." In addition to the view that *Estate of Powell* may not expand the scope of Section 2036(a)(2), the plurality's "duplicative transfer tax" analysis is merely dictum and may never be established as binding precedent. While the Service prevailed in this round, time will tell whether *Estate of Powell* will ultimately be considered a ground-breaking family limited partnership case. At this point, however, the author would bet against *Estate of Powell* becoming an important round in the fight for family limited partnership planning.

D. ELMORE

***Douglas J. Elmore** is a shareholder with the law firm of Williams Parker Harrison Dietz & Getzen. He counsels individuals, families, and institutions in estate planning, business succession, and estate and trust planning and administration matters. Mr. Elmore designs multi-purpose testamentary trusts; prepares customized beneficiary designations; creates irrevocable trusts to achieve tax, family, charitable, and legacy-oriented goals; prepares federal estate tax returns (Form 706); administers trusts and estates that hold business interests; and implements sophisticated, post-mortem planning techniques. He earned his LL.M. in Taxation, J.D., M.Acc., and B.A. in accounting from the University of Florida.*

Endnotes

1 T.C. Memo 2003-145, aff'd, 417 F.3d 468 (5th Cir. 2005).

2 *Id*. at 37.

3 408 U.S. 125 (1972).

4 *Estate of Turner* is the only reported decision since *Strangi* in which the Service prevailed arguing for Section 2036(a)(2) inclusion. *Estate of Turner*, 138 T.C. No. 14 (March 29, 2012). *See also*, Steve R. Akers, Esq., *In Plurality Opinion, Tax Court Holds that FLP Assets are Included in Estate Under §2036(a)(2) : Possibility of Double Inclusion Remains Uncertain*, 42 EGTJ Issue No. 04 (July 13, 2017), at 156-157.

5 148 T.C. No. 18 (May 18, 2017).

6 *Powell,* 148 T.C. at 20.

7 *Id*. at 5.

8 *See* Akers, *supra* note 4, at 155.

9 *Powell,* 148 T.C. at 27.

10 Akers, *supra* note 4, at 157.

11 Akers, *supra* note 4, at 156, 158, 164, 169.

12 *Byrum*, 408 U.S. at 144.

13 Ronni G. Davidowitz and Jonathan C. Byer, *United States V. Byrum: Too Good To Be True?,* 42 ACTEC LJ No. 1, Spring 2016 at 97, 98.

14 *Strangi*, T.C. Memo 2003-145 at 2-14.

15 *Id*. at 37.

16 *Id*. at 41.

17 *See* Akers, *supra* note 4, at 169.

18 *See Id*. at 156, 168, 169.

19 *Powell,* 148 T.C. at 48.

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22 *Powell,* 148 T.C. at 5.

23 *Id*. at 5-7.

24 *Id*. at 5, 6.

25 *See Id*.

continued, page 11

26 *Id*. at 2; *see Id*. at 14-21.

27 *Id*. at 2. The plurality opinion separately held that Jeffrey's transfer of the limited partner interest was either void or revocable under applicable state law. *Id*. at 2.

28 *Id*. at 5, 6.

29 *Id*. at 48-53.

30 *See Id*.

31 *Id*. *at* 16-19.

32 *Id*. at 20.

33 *Id*.

34 *Id*.

35 *Id*.

36 In addition, the Tax Court did not explicitly address the impact, if any, the size of Mrs. Powell's retained limited partner interest had on the Section 2036(a)(2) analysis. Akers, *supra* note 4, at 164, 165.

37 *Powell,* 148 T.C. at 14.

38 *Id*.

39 *Id*. at 37.

40 *Id*. at 40.

41 *Id*. at 26, 27.

42 *Id*. at 27.

43 Akers, *supra* note 4 at 165.

44 *Id*.

45 *Powell,* 148 T.C. at 48-53.

46 *Id*.

47 Akers, *supra* note 4, at 155.

48 *Id*.

49 *Id*. at 164.

50 *Id*. at 167, citing the "mere possibility" language from *Estate of Tully*, 528 F.2d 1401 (Ct. Cl. 1976).

51 *Id*. at 167.

52 *Id*. at 164, 165. The plurality opinion does not address the extent to which its holding is based upon the size of Mrs. Powell's retained limited partner interest. In this event, a Section 2036 analysis relative to a retained partnership interest would collapse into whether or not the family limited partnership meets the "bona fide sale for adequate and full consideration" exception. *Id*. at 167.

53 *Id*. at 159.

54 *Powell,* 148 T.C. at 16-18.

55 *Id*. at 27.

56 Akers, *supra* note 4, at 157.

57 *Id*.

58 *Id*. at 164.

59 *Powell,* 148 T.C. at 48-53.

60 *Id*. at 48, 49.

61 *Id*.

62 Akers, *supra* note 4, at 164.

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64 *Id*. at 167, citing Louis S. Harrison, *Stupid Is As Stupid Does: Does the Powell Case Spell the Demise of Discount Partnership Planning or Does It Merely Restate What We Already Know?*, 20 J. Passthrough Entities No. 4 (July/Aug. 2017).

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70 S. Stacy Eastland, *Some of the Best Family Limited Partnership Planning Ideas We See Out There (That Also Have the Merit of Playing Havoc with Certain "Conventional Wisdom"),* ALI-ABA Course of Study: Planning Techniques for Large Estates, May 16-20, 2011, 195.

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Legislation To Reduce Business Rent Tax Prevails

By Arthur J. Menor, Esq., Shutts & Bowen, LLP, West Palm Beach, Florida

Florida businesses will be granted some tax relief beginning in 2018 by way of a reduction in the sales tax payable on rents under non-residential leases. Currently, all Florida for profit businesses, regardless of their size or financial situation, are required to pay state sales tax on their rental fees at the rate of 6 percent (referred to as Florida Business Rent Tax). In addition, some counties levy local surtaxes on transactions that are subject to state sales tax, including rents under non-residential leases. House Bill 7109, which was signed into law by Governor Rick Scott on May 25, 2017, and has an effective date of January 1, 2018, amends Section 212.031, Florida Statutes, by reducing the sales tax levied on commercial real estate rental fees to 5.8 percent statewide.

Business Rent Tax Background

The concept of a statewide sales tax on commercial real estate rentals, levied since 1969,[3] is unique to the state of Florida.[4] Although a number of states, such as New York, Arizona, Hawaii, and New Mexico, have a commercial real estate leasing tax in some form,[5] only Florida's tax is specifically designed to apply to commercial leases *and* to have a statewide effect. For example, New York's tax is limited to certain types of real estate in Manhattan only and Arizona's tax may be levied in limited circumstances at the municipal level.[6]

Although the Florida Business Rent Tax is a necessary and significant part of Florida's revenue, amounting to approximately $1.7 billion annually,[7] numerous business groups, most prominently including the Florida Association of Realtors, have lobbied for years for a phased elimination of the tax, arguing that it puts Florida businesses at a competitive disadvantage against businesses in the rest of the country and is a significant disadvantage in economic development efforts to recruit new businesses to Florida and to retain and expand existing businesses. According to a report by Florida Tax Watch, high taxes do in fact factor into business relocation and expansion decisions.[8] The statewide average additional rental cost to businesses as a result of the Florida Business Rent Tax is $1 per square foot of space rented.[9] Furthermore, in 61 Florida counties, the already taxable rental payment is subject to further local sales taxes (up to 2 percent in some counties).[10] The county taxes alone could add up to $230 million more to the annual revenue raised by the Business Rent Tax.[11]

The currently Republican-dominated State Legislature, urged on by Florida Governor Rick Scott, has been sympathetic to these arguments, but has wrestled with the budget balancing issues that would result from a decrease in the substantial revenues raised by the Business Rent Tax.

The currently Republican-dominated State Legislature, urged on by Florida Governor Rick Scott, has been sympathetic to these arguments, but has wrestled with the budget balancing issues that would result from a decrease in the substantial revenues raised by the Business Rent Tax. Several bills were introduced in Florida's 2016 Legislative Session to reduce the Business Rent Tax. Many of them would have cut the tax much more drastically than House Bill 7109, which ultimately became the compromise by balancing the issues of revenue loss against the "job killing" effect of the tax.

When and How Does the New Tax Rate Apply?

New subsection (e) of Section 212.031(1), states:

"The tax rate in effect at the time that the tenant or person occupies, uses, or is entitled to occupy or use the real property is the tax rate applicable to the transaction taxable under this section, regardless of when a rent or license fee payment is due or paid. The applicable tax rate may not be avoided by delaying or accelerating rent or license fee payments."

The intent of this language can be somewhat confusing. Does it mean that the new 5.8 percent tax rate only applies to leases under which the tenant takes occupancy after January 1, 2018, the effective date of the bill? According to the Department of Revenue, the answer to this question is "no." Rather, the intent of the language is to address situations where rent for a defined period is paid other than in that period so that the delay or acceleration of payments will not affect the rate that applies to them.

continued, page 13

As an example, for a lease that is executed prior to January 1, 2018, a 6 percent tax rate would be assessed for the rent payments for the period through the month of December 2017, while a 5.8 percent tax rate would be assessed for the rent payments for the period of January 2018 and thereafter. Therefore, if a tenant paid the December 2017 rent in January of 2018, the prior 6 percent tax rate would apply rather than the new 5.8 percent rate.

Conclusion

House Bill 7109 implements a much lower tax rate reduction than any of the other 2017 legislative proposals. Still, the amendment signifies a small step forward in the business industry's war against Florida's Business Rent Tax, and it offers a compromise between maintaining necessary state revenue and further reducing the tax to allay the significant competitive disadvantages to Florida businesses that enter into rental agreements.

A substantial contribution to this article was made by Yugma Desai, a student at Stetson University College of Law and 2016 summer clerk in the West Palm Beach office of Shutts & Bowen LLP.

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Endnotes

1 §212.031, Fla. Stat. (2016).

2 Fla. HB 7109 §21 (2017).

3 Kurt Wenner, *Business Rent Tax: Now is the Time to Begin Eliminating a Clear Competitive Disadvantage for Florida Businesses*, Florida Tax Watch 6 (Apr. 2017), http://www.floridataxwatch.org/resources/pdf/BRT2017-FINAL.pdf.

4 *Id*. at 1.

5 *Id*.

6 *Id*.

7 *Id*.

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9 *Id*.

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Specific Considerations In Trust And Estate Mediations

By Amy B. Beller, Esq., Beller Smith Attorneys at Law, Boca Raton, Florida

It is a widely accepted belief that trust and estate matters are highly specialized and clients are best served by experienced trust and estate counsel with in-depth knowledge of the substantive law. This premise applies equally to mediation of trust and estate matters. Mediators with substantive trust and estate knowledge are a great asset in efforts to resolve a case. To maximize the potential of reaching resolution, the participating professionals should give due attention to the special considerations involved in preparing for and conducting mediation in this niche area. This article will identify some of these considerations and will provide some practical recommendations for mediations of trust and estate disputes.

Choice of Mediator

"The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute." Florida Rules for Certified and Court-Appointed Mediators, Rule 10.220.[1] While selection of a mediator should be deliberate and with forethought, picking a mediator in a trust or estate litigation is of particular importance when the emotional temperature is running high and when the matter involves complex tax matters or substantive issues of law.

Many estate and trust cases involve personal and emotional issues, and it is sometimes those issues which actually drive litigation. In such matters, having a mediator with excellent people skills is essential. The mediator must be able to connect and earn the litigant's trust. He or she must be a great listener, and must be able to make the litigant believe they were heard and understood. Sometimes a shared cultural or geographical background, similar age, or even a shared hobby, can be helpful. Gender may also play a factor: since about half of the litigants in these matters are women, consideration should be given as to whether a female mediator might more easily establish a rapport with a female party. If the litigant prides him or herself on a prestigious academic background, choosing a mediator with a similar background could be wise. Of course, there are those litigants for whom a retired judge or similarly-seasoned and established mediator with a premier resume may be the best choice.

It is also important that the mediator has the essential knowledge base and skill set. Under Rule 10.370(c), a mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Ironically, it is the certified mediator's statutory prohibition against rendering an opinion on the matter that sometimes causes advocates to prefer a non-certified mediator.[2] However, a mediator may provide relevant information, raise issues, and discuss strengths and weaknesses of positions underlying the dispute. Experience with similar cases is also important. The mediator can then credibly speak to his or her own history in helping the client explore what might occur with continued litigation.

A mediator may also help the parties evaluate resolution options, draft settlement proposals, and "may call upon their own qualifications and experience to supply information and options."[3] Thus, while the mediator will not be called upon to make decisions, a mediator's experience in trust and estate law remains an essential component of a successful mediation.

It is also very helpful if the mediator can identify problems and solutions which may arise in connection with a settlement. In some trust and estate mediations, the mediator's familiarity with estate and trust administration or tax issues may be essential in achieving a settlement, at least one which does not later turn into additional litigation. A mediator without a sufficient background will not be able to assess whether a party's concerns about a particular issue are justified (e.g., that there may be an estate tax liability), whether there are additional steps which will need to be taken (e.g., obtaining a Private Letter Ruling or noticing other interested persons with a motion for court approval of a settlement), or whether a provision contemplated as part of a settlement may be a non-starter (e.g., the decedent's friend who is not a Florida resident wants to serve as Personal Representative). While it is not the mediator's job to provide legal advice to anyone, a knowledgeable and experienced trust and estate mediator may prove to be an invaluable asset.

Non-Party Participants

Often a party attending a trust or estate mediation will want to bring a spouse, adult child, friend, or other confidante. The other party, or other party's lawyer, may initially react in a

continued, page 15

knee-jerk fashion and seek to block the non-party's attendance. The better approach, however, is to determine whether the non-party is likely to assist in achieving a settlement. If the non-party's attendance is likely to be a positive factor, or at minimum it will not be an impediment, then it may be useful to have such person attend and participate.

Consider for example a dispute involving a surviving second spouse litigating against adult children by an earlier marriage of the decedent. The surviving spouse may be elderly, vulnerable, insecure, or unsophisticated. Perhaps the party's relationship with his or her own lawyer is not strong, and he or she would be very hesitant to enter into any settlement without the advice and approval of his or her own adult child. In that case, having the adult child present at mediation may be useful or even necessary to resolving the case.

If, on the other hand, the non-party's attendance is likely to increase the level of hostility, or that person may be unreasonable, then the other party's counsel may wish to exclude the non-party from attending. This decision, which should be communicated by the mediator if possible, may start the mediation off on a bad foot, as the party being denied will at best be irked and, at worst, may resolve not to settle. It may be best if counsel determines in advance whether a non-party's attendance will be permitted, so as to avoid the possibility of increasing tension on the actual day of mediation.

A middle ground may be to allow the non-party to sit with the accompanying party during private caucus sessions or at least during those periods where the mediator is working with other parties.

A non-party who attends and participates in mediation is a mediation participant under Fla. Stat. §44.403(2) even though he may not be a mediation party under Fla. Stat. §44.403(3). A mediation participant shall not disclose a mediation communication to any other person other than another mediation participant or a participant's counsel. Fla. Stat. §44.405(1). Such mediation participant should be informed of the rules regarding confidentiality set forth in the Mediation Confidentiality and Privilege Act, Fla. Stat. §44.401 et seq., and that he or she is bound thereby. The mediator may wish to have this confirmed in writing.

Preparation for Mediation

Attorneys know that it is important to provide the mediator with a summary of the case and important pleadings and documents. In trust and estate litigation, the operative testamentary documents should be summarized and provided with the mediation summary. If there are multiple competing instruments, the mediator will appreciate a chart or other summary of the differences among the instruments.

It is also helpful in a trust and estate mediation for the parties to provide a chart or list of all assets at issue, including current values. Account statements for estate and trust accounts or other assets in dispute should be available at least online. For real estate and tangible personal property, valuations may be essential. The parties should, at a minimum, have informal estimates of the value of assets obtained through internet research or other means. Do not wait until a settlement agreement is being inked to start looking on Zillow or ebay to determine the value of a disputed asset. The parties expecting to receive items to be shipped should also have estimates of shipping costs.

Attorneys often prepare for mediation but fail to prepare for settlement. In an estate litigation, a settlement may require a party to sign a document to be filed in the probate, such as a waiver of service of a petition for discharge of a Personal Representative, or a Satisfaction of Claim.

Attorneys are often reluctant to provide the mediator a candid assessment of the weaknesses or problems in that party's case. A mediator is not a decision-maker, and it is not the job of an attorney for a party going to mediation to convince the mediator that he or she will prevail. Rather, the mediator's task requires that he or she is armed with the negative aspects of the case so that he or she can assist the parties in making a sound decision on settlement. For that reason, a confidential mediation summary should include brief discussions concerning evidentiary issues, credibility problems, financial concerns and other factors which will have an impact on the case.

A mediation summary should also include a summary of prior settlement discussions. While the parties are not bound to pick up where they left off, it does help the mediator to know the context of such prior discussions. In addition, the parties' counsel should know the amount of fees and costs incurred if there is going to be any chance of payment from an estate or trust or any fee-shifting.

Preparation for Settlement

Attorneys often prepare for mediation but fail to prepare for settlement. In an estate litigation, a settlement may require a party to sign a document to be filed in the probate, such as a waiver of service of a petition for discharge of a Personal Representative, or a Satisfaction of Claim. Having such documents ready to be signed at the mediation is very helpful, and sometimes essential. Counsel must determine in advance of mediation what documents and instruments may be needed to wind up administration or accomplish some other task, such as transfer of real property or ownership of accounts. If there are small items in dispute which may have to change hands,

continued, page 16

such as keys to a house or a photograph album, it makes sense to have the client bring those items to the mediation.

If a settlement may require a successor fiduciary, a lawyer should come to mediation with suggestions for such appointment. If appropriate, fee schedules, resumes or CV's, or other information about potential fiduciaries should be available to provide to the other parties.

While not specific to trust and estate mediation, it is worth mentioning that counsel for parties going to mediation must be prepared with at least a shell settlement agreement and a means for revising, printing, and executing that agreement.[4] Attorneys would not go to court on a motion without having an order granting the relief being requested, because if the judge is deciding in your favor, you want the judge to sign the order on the spot. This same logic applies to mediation. Once an agreement is reached, you will want the parties to sign an agreement as soon as possible. Lawyers who are not prepared with a draft settlement agreement may cost their client money as the lawyers begin drafting something from scratch on the spot, or worse yet, may jeopardize finalizing an agreement altogether.

Settlement of a trust and estate matter may require the joinder or consent of other individuals who are not present. The mediator is to promote awareness by the parties of the interests of persons affected by actual or potential agreements who are not represented at the mediation.[5] It is wise for attorneys at mediation to have a contact list including cell numbers and email addresses for all persons who may need to be consulted about settlement or who may need to sign an agreement.

Finally, if there will be tasks required after mediation in order to implement a settlement, such as moving for court approval or filing a final accounting, counsel should be aware of those tasks in advance, think through who can accomplish the tasks most efficiently, and have an idea of what it will cost to get to the finish line.

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Endnotes

1 All references in this article to "Rules" are referenced to the Florida Rules for Certified and Court-Appointed Mediators.

2 Although perhaps it is a biased view, in this certified mediator's experience, being unable to render "an opinion" on the merits or likely outcome of a case during mediation has never impeded the ability to get a case settled. The approach has a little more finesse – it involves the power of identification and trust more than coercion – but for a skilled and experienced mediator, the desired outcome is just as achievable. For an interesting analysis relating to this issue, see Mediator Ethics Advisory Committee ("MEAC") Opinion 2010-006 (October 12, 2010).

3 Rule 10.370, Committee Notes, 2000 Revision.

4 See Rule 10.420(c)(the mediator shall cause the terms of any agreement reached to be memorialized appropriately).

5 Rule 10.320.

Determining Reasonableness Of Attorney's Fees And Costs In Probate And Trust Proceedings

By Brandan J. Pratt, Esq., CFP®
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Motions to determine entitlement and amount of attorney's fees almost always follow the completion of a trial in trust and estate disputes. There are many articles written about entitlement to attorney's fees. However, determining entitlement to attorney's fees is only half the battle. Under Section 733.6175 of the Florida Probate Code, the personal representative has the burden to prove that the attorney's fees are related to probate and are reasonable. Specifically, Section 733.6175(3) provides that the personal representative has the burden of proof regarding the propriety of the employment of any person that the personal representative employs and the reasonableness of their compensation. In the trust context, Section 736.0206(3) puts the burden of proof of the propriety of the employment and the reasonableness of the compensation on the trustee.

In *Donovan Marine, Inc. v. Delmonico*, the court ruled that "[w]hile a trial court has broad discretion when determining the reasonable amount of attorney hours expended, it is "well-settled that an award of attorney's fees must be supported by substantial competent evidence and contain express findings regarding the number of hours reasonably expended' [internal citation omitted]."[1] *Florida Patient's Compensation Fund v. Rowe* is Florida's seminal case on determining the reasonableness of attorney's fees. In *Rowe*, the Florida Supreme Court adopted the federal "lodestar" method for computing reasonable attorney fees in contested proceedings.[2]

In determining the reasonableness of attorney's fees, courts should consider the following factors set forth in Fla. Bar. Code Prof. Resp. DR 2-106(b) and Rule 4-1.5 of the Rules Regulating the Florida Bar: (1) the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyers; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.[3]

The first step of the lodestar equation requires the court to determine the number of hours reasonably expended on the litigation. The second step of the lodestar equation requires the court to determine a reasonable hourly rate for the services of the prevailing party's attorney. The number of hours reasonably expended determined in the first step, multiplied by a reasonable hourly rate determined in the second step, produces the lodestar, which is an objective basis for an award of attorney's fees.[4]

The opponent of the attorney's fee has the burden of pointing out with specificity which hours should be deducted.[5] The author has identified nine specific objections to attorney's fees and costs in trust and estate proceedings, which are: (1) duplicated time, (2) unreasonable rates, (3) unreasonable time, (4) legal services not necessary or beneficial, (5) lack of specificity, (6) fees for fees, (7) clerical work, (8) executorial services, and (9) costs that violate the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

First, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney performed duplicated legal services. When awarding attorney's fees, "the court must consider the possibility of duplicate effort arising from multiple attorneys, in determining a proper fee award (internal citation omitted). Fees should be adjusted and hours reduced or eliminated to reflect duplications of services."[6] A party has the right to hire as many attorneys as it desires (internal citation omitted), but the opposing party is not required to compensate for overlapping efforts.[7] In *N. Dade Church of God, Inc. v. JM Statewide, Inc.*, the court did not award compensation for time sheets reflecting a significant amount of time spent in conferences between the partner and the associate who were working on the case.[8] Further, "[i]f three attorneys are present at a hearing when one would suffice, compensation should be denied for two."[9] Similarly, in *Florida Birth-Related Neurological Injury Comp. Ass'n v. Carreras*,[10] the Third District Court of Appeal held that intercommunication between co-counsel constituted a duplication of work and such hours could not be considered when calculating attorney's fees.

In contrast, in *Centex-Rooney Constr. Co. v. Martin County*, the court ruled that "[w]here a party engages separate counsel to represent it on various aspects of an action, attorney's fees to each counsel are not precluded provided that the services

continued, page 18

rendered are necessary, not duplicative, and the total fee is reasonable."[11] In *Centex,* thirty-five attorneys and twenty-nine paralegals represented Martin County during five years of litigation; however, only seventeen of those individuals billed more than thirty hours. The court held that it was reasonable for the county's attorneys to hold one hour monthly "team meetings" to coordinate legal services due to the complexity of the case and in order to avoid duplicated efforts. Additionally, the court held that the county was justified in having several attorneys at trial to cover specific parts of the litigation because of the technical complexities involved in the case.

Second, a respondent can object to a petitioner's attorney's fees on the grounds that the rate charged by the attorney is unreasonable. In *Rowe,* the Supreme Court ruled that "[t]he party who seeks the fees carries the burden of establishing the prevailing 'market rate,' *i.e.*, the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services."[12] However, under Fla. Stat. § 733.6175(4), expert testimony is not required.

Third, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney spent an unreasonable amount of time. A claim for hours that the court finds to be excessive or unnecessary may result in a reduction in the number of hours claimed.[13] The novelty and complexity of the issue should normally be reflected by the number of hours reasonably expended on the litigation.[14] Excessive time spent on simple ministerial tasks such as reviewing documents or filing notice of appearance is noncompensable.[15]

Fourth, a respondent can object to a petitioner's attorney's fees on the grounds that the legal services were not necessary and/or beneficial to the estate. "[I]n order to be entitled to a reasonable attorney's fee from estate funds, the lawyer's services must have been either necessary for or beneficial to the probate estate."[16] In *Rowe*, the Supreme Court of Florida held that "[t]he 'results obtained' may provide an independent basis for reducing the fee when the party prevails on a claim or claims for relief, but is unsuccessful on other unrelated claims."[17] In *Goldworn v. Estate of Day*, the court stated, "[i]n the instant case, the estate and its beneficiaries derived no necessary or beneficial services from the efforts of appellant's attorneys. While appellant was not removed as co-personal representative, the trial court spoke disparagingly about the performance of his duties in that position."[18]

Fifth, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney's invoices lack specificity. "To accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed…. Inadequate documentation may result in a reduction in the number of hours claimed."[19]

Sixth, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney should not be awarded fees incurred in litigating the reasonableness of fees. In *State Farm Fire & Casualty Co. v. Palma*, the Florida Supreme Court held that fees incurred in determining the prevailing party's entitlement to fees are properly recoverable, but that fees incurred in litigating or quantifying the amount of fees due to the prevailing party are not recoverable.[20] The Court based its holding on an interpretation of the language in Fla. Stat. § 627.428, which permits a prevailing insured to recover reasonable attorney's fees from the insurer in a dispute arising under an insurance contract, but it does not specifically permit an award of fees for fees.[21] Routinely, appellate courts have followed *Palma* in ruling that fees incurred in litigating the amount of fees are generally not recoverable.[22] This rule may not apply when litigating the amount of fees owed to personal representatives or in guardianships.[23]

Seventh, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney billed for clerical work. Fla. Stat. § 57.104, governs fees recoverable for work performed by legal assistants and paralegals. The statute provides that fees for such work may be awarded when the work constitutes "nonclerical, meaningful legal support to the matter." However, purely clerical tasks should not be billed at paralegal rates regardless of the qualification of the biller. Courts have reversed an award of paralegal fees where there was no evidence that the work was paralegal work as opposed to secretarial work.[24] In *Youngblood v. Youngblood,* the court explained that typical "clerical work" such as sending mail or e-mails to the clerk or the opposing party, scheduling a hearing, or "file maintenance" is not compensable under this statute.[25]

Eighth, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney's fees include executorial services. In *In re Estate of Goodwin*, the personal representative (whose law firm served as the attorney for the personal representative) bore the burden of distinguishing between the time spent doing executorial services (non-legal services) versus the time spent performing legal services.[26] In *Heirs of Estate of Waldon v. Rotella*, the court held that "[it] is, of course, a fundamental principle of probate law that an attorney for the personal representative is only entitled to compensation for necessary legal services rendered for the estate; while there is nothing to prohibit the attorney from doing executorial services which the personal representative would normally perform, he must look to the personal representative for payment of those services, not the estate."[27] In *In re Estate of Lieber*, the Florida Supreme Court explained that executorial services include marshalling estate assets, protecting estate assets, interesting purchasers in the sale of estate assets, and selling estate assets.[28] Further, the Court explained that:

"[t]here is nothing improper in a personal representative engaging attorneys or others to perform the services which he should perform, but it is improper for the court to pay fees to attorneys for the personal representatives for purely executorial services, the reason being that a duplicate cost to the estate usually results, in that the personal representative gets paid for the work as an executorial service and the attorney is compensated for the same work as a legal service."[29]

continued, page 19

Ninth, a respondent can object to a petitioner's costs on the grounds that the costs violate the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. Pursuant to the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, "the burden is on the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case."[30] The guidelines are categorized as follows: (1) litigation costs that should be taxed, (2) litigation costs that may be taxed as costs, and (3) litigation costs that should not be taxed as costs. Litigation costs that should be taxed include expenses for depositions, documents and exhibits, witnesses, and court reporting costs other than for depositions. Litigation costs that may be taxed as costs are mediation fees and expenses, reasonable travel expenses, and electronic discovery expenses. Litigation costs that should not be taxed as costs include the costs of long distance telephone calls with witnesses, expenses relating to consulting but non-testifying experts, travel time, travel expenses of attorneys, costs of privilege review of documents, and costs incurred regarding any matter which was not reasonably calculated to lead to the discovery of admissible evidence. The guidelines are advisory only and are within the broad discretion of the trial court.[31]

In conclusion, a petitioner has the burden of proving that the attorney's fees and costs sought are reasonable with respect to the hourly rates charged and the number of hours worked. However, a respondent has the burden of pointing out with specificity which hours should be deducted. Specific objections to attorney's fees and costs in trust and estate proceedings may include the nine grounds discussed in this article.

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Endnotes

1 *Donovan Marine, Inc. v. Delmonico*, 174 So. 3d 534, 537 (Fla. 4th DCA 2015); *Mitchell v. Mitchell*, 94 So. 3d 706, 707 (Fla. 4th DCA 2012).

2 *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

3 *Id.*

4 *Id.*

5 *Brake v. Murphy*, 736 So. 2d 745 (Fla. 3d DCA 1999), citing *Centex –Rooney Construction Co. v. Martin County*, 725 So. 2d 1255 (Fla. 4th DCA 1999).

6 *Brevard County v. Canaveral Props.*, 696 So. 2d 1244, 1245 (Fla. 5th DCA 1997).

7 *Brake v. Murphy* at 748.

8 *N. Dade Church of God, Inc. v. JM Statewide, Inc.*, 851 So. 2d 194, 196 (Fla. 3d DCA 2003).

9 *Brake v. Murphy, supra, citing Jane L. v. Bangerter, 826 F. Supp. 1544 (D.Utah 1993).*

10 633 So. 2d 1103 (Fla. 3d DCA 1994).

11 *Centex-Rooney Constr. Co. v. Martin County*, 725 So. 2d 1255 (Fla. 4th DCA 1999), citing *Florida Drilling & Sawing v. Fohrman*, 635 So. 2d 1054, 1055-56 (Fla. 4th DCA 1994).

12 *Florida Patient's Compensation Fund*, 472 So. 2d at 1151.

13 *Id*. at 1150.

14 *Id*.

15 *N. Dade Church of God, Inc.* at 196. See also *Haines v. Sophia*, 711 So. 2d 209, 212 (Fla. 4th DCA 1998); *Ziontz v. Ocean Trail Unit Owners Ass'n Inc.*, 663 So. 2d 1334, 1335-36 (Fla. 4th DCA 1993).

16 *Heirs of Estate of Waldon v. Rotella*, 427 So. 2d 261, 263 (Fla. 5th DCA 1983), citing *In re Gleason's Estate,* 74 So. 2d 360 (Fla.1954).

17 *Florida Patient's Compensation Fund*, 472 So. 2d at 1151.

18 *Goldworn v. Estate of Day*, 452 So. 2d 659, 660 (Fla. 3d DCA 1984).

19 *Id* at 1150.

20 *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993).

21 *Id.*

22 *See Wight v. Wight*, 880 So. 2d 692, 695 (Fla. 2d DCA 2004); *Oruga Corp. v. At&T Wireless*, 712 So. 2d 1141, 1145 (Fla. 3d DCA 1998).

23 See Fla. Stat. § 733.617 and Fla. Stat. §744.108.

24 *Dayco Prods. v. McLane*, 690 So. 2d 654 (Fla. 1st DCA 1997); *Moore v. Hillsborough County Sch. Bd.*, 987 So. 2d 1288 (Fla. 1st DCA 2008).

25 *Youngblood v. Youngblood*, 91 So. 3d 190, 192 (Fla. 2d DCA 2012).

26 *In re Estate of Goodwin*, 511 So. 2d 609 (Fla. 4th DCA 1987).

27 *Heirs of Estate of Waldon v. Rotella*, 427 So. 2d 261, 263 (Fla. 5th DCA 1983); *In re Estate of Lieber,* 103 So. 2d 192 (Fla.1958).

28 *In re Estate of Lieber* at 200.

29 *Id.*

30 Fla. R. Civ. P. Appx. II.

31 Fla. R. Civ. P. Appx. II.

A Practical Guide To Florida's Construction Statute Of Repose After 2017 Legislative Changes

By Bret M. Feldman, Esq., Phelps Dunbar LLP, Tampa, Florida

"God offers to every mind a choice between repose and truth. Take which you please—you can never have both."

— Ralph Waldo Emerson, The Essays of Ralph Waldo Emerson [Essay on Intellect]

The time for bringing a lawsuit for latent construction defects in Florida got a little tighter after the Legislature clarified the commencement time for the statute of repose. For all actions commencing after July 1, 2017, the 10-year statute of repose now clarifies a key element — the time when the contract is completed — as "the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made."

This might seem like a minor change, but the new definition was necessary to fix a fairly large loophole in the statute that could have permitted owners to manipulate the time they have to sue developers, contractors, or designers over latent defects. This article explores the purpose and evolution of the statute of repose, and explains how recent changes impact the timing of future construction claims.

Limitations and the Need for Repose

Section 95.11(3)(c), Florida Statutes set out a four-year limitation for bringing causes of action related to the design, planning, or construction of any improvement to real property. For patent, readily observable defects, it is relatively easy to determine the last date an owner can file a lawsuit for construction defects. The four-year limitation period commences on the later of:

1. actual possession by the owner;
2. issuance of a certificate of occupancy;
3. abandonment of the construction if not completed; or
4. completion or termination of the contract between the engineer, registered architect, or licensed contractor and his or her employer.[1]

For latent defects, however, the time period for bringing a claim does not begin to run until the defect is discovered or should have been discovered with the exercise of due diligence.[2] If a latent defect remains hidden and undiscoverable, the four-year statute of limitations for construction defect claims could, in theory, span decades. The statute of repose is intended to put a finite end date on construction claims.

Distinctions between Limits and Repose

The statute of limitations and the statute of repose for construction claims are inextricably linked, but they serve different purposes. Both create limits on the time frame in which plaintiffs can sue defendants for construction claims. Both are mechanisms that can bar a plaintiff's suit, and in each instance time is the controlling factor.[3]

Statutes of limitations are intended to require plaintiffs to pursue diligent prosecution of known claims. They promote justice and prevent surprise through plaintiffs' revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.[4]

Rather than establishing a time limit within which actions must be brought as measured from the time of accrual, statutes of repose "cut off the right of action after a specified time measured from the delivery of a product or completion of work."[5] Statutes of repose cut off these rights regardless of the time of accrual of a cause of action or whether claimants have notice that their legal rights have been invaded.[6]

History and Tolling of the Statute of Repose

Literally, repose means to lay at rest. In regard to limitations, the Legislature does not use the term in Chapter 95 to define the limitation of actions.[7] Rather, the term "repose" is derived from judicial decisions. Courts have recognized statutes of repose as reflecting a legislative decision restricting or limiting actions in order to achieve certain public interests.[8] Initially, the construction statute of repose ran for 12 years. After a brief period where it was held unconstitutional,[9] the statute of repose was reenacted and extended to 15 years in 1980.[10] In 2006, the Legislature reduced the statute of repose to its current 10-year cutoff.

Under the current version of Section 95.11(3)(c), the statute of repose runs 10 years from the later of the same four occurrences that commence the statute of limitations for patent defects: the date of actual possession by the owner, issuance of a certificate of occupancy, abandonment of the construction if not completed, or completion or termination

continued, page 21

of the contract between the engineer, registered architect, or licensed contractor and his or her employer. Any defect claim – latent or patent – is untimely if not sued upon within 10 years after the latest of these four events.

Given the legislative intent, Florida courts have wrestled with questions of tolling the statue of repose. One of the first tolling questions relating to the statute of repose was addressed in 1999 when the Sabal Chase Homeowners Association sued the developers of its condominium after the property was damaged by Hurricane Andrew in 1992.[11] The plaintiff, through its insurer, brought suit in 1994 seeking damages for alleged latent defects discovered after the storm. The developer established through testimony that the last certificate of occupancy for the condominium was issued in 1978, more than 15 years before the plaintiff brought its suit and beyond the cutoff of the statute of repose (which at that time ran 15 years).

One of the most heavily litigated sections of the statute of repose involves the date of completion for the contract between an owner and a contractor, architect, or engineer.

The plaintiff argued that the statute of repose should be tolled like the statute of limitations and should begin to run for condo associations only after the date when the developer had turned over control of the association to the individual unit owners.[12] The court disagreed, however, and held that the statute of repose cannot be extended by rules or statutes that toll the statute of limitations.[13]

More recently, another Florida court held that the construction defect notice provisions of Fla. Stat. § 558.004 (2017), do not impact the running of the statute of repose.[14] In Chapter 558, Florida Statutes, Florida's construction defect statute requires a claimant to serve written notice of a claim on a party believed to be responsible for the defect 60 days prior to filing suit. Though the construction defect statute may toll the running of the statute of limitations as to the parties providing and receiving notice, the court held that it does not affect the running of the statute of repose.[15]

The Thorny Issue of Contract Completion

Even though the statute of repose is not subject to equitable tolling, the date when the 10-year cutoff begins to run is potentially subject to manipulation. One of the most heavily litigated sections of the statute of repose involves the date of completion for the contract between an owner and a contractor, architect, or engineer. This determination often turns on the terms of the contract, and therefore is within the control of the parties to the contract.

This issue was squarely addressed in *Clearwater Housing Authority v. Future Capital Holding Corp*.[16] Future Holding had been one of several entities hired to construct an apartment complex that Clearwater Housing purchased in 2000. The certificate of occupancy was issued and Clearwater Housing took possession of the property in 2000, but the final plat was not submitted by the engineers on the project until 2003. Clearwater Housing filed suit for negligence and construction defects in 2009, but did not name Future Capital as a defendant until it amended its complaint in 2011.[17]

Future Capital sought and obtained summary judgment in the circuit court, arguing that the 10-year statute of repose had expired in 2010 since Clearwater Housing took possession of the property with certificates of occupancy in 2000. On appeal, the district court reversed and remanded the summary judgment, holding that there was a genuine issue of material fact as to whether the issuance of the final plat in 2003 was part of the performance of the original contract. Consequently, the 10-year statute of repose might have started running in 2003 rather than in 2000.[18]

Critically, one party alone completing its contract with the owner might not commence the running of the statute of repose. In *Allan and Conrad, Inc. v. University of Cent. Florida*, the 5th DCA addressed the question of whether the statute of repose barred an owner's claims against architects whose contract was completed eight months prior to the construction project as a whole.[19] The architects argued that their portion of the construction project was completed on April 24, 1989, and that the owner took possession of the property on May 15, 1989. However, the contractors did not complete their contract with the owner until December 21, 1989. The owner filed suit against all the contracting parties on June 10, 2004. At the time, the statute of repose ran 15 years, so the owner's suit was timely if the statute began running at the completion of all the construction. The 5th DCA upheld the lower court's interpretation, finding that the statute of repose began running on the latest date that *any* of the professional engineers, registered architects, or licensed contractors completed or terminated their contract with the owner.[20]

Because statutes of repose are disfavored defenses in Florida, courts look for any reasonable doubt to allow extensions of the repose period. In *Busch v. Lennar Homes, LLC*, a homeowner brought a construction defect lawsuit against his homebuilder, Lennar Homes, a little more than 10 years after closing on his home purchase.[21] Lennar successfully argued before the trial court that the parties' contract was completed at the closing, and thus the suit was barred by the statute of repose. On appeal, the homeowner argued that the home purchase contract contained an inspection provision that permitted the purchaser to conduct an inspection prior to closing. The contract allowed some repairs identified in the pre-closing inspection to be completed by Lennar, at Lennar's expense, within a reasonable time after the closing. The 5th DCA therefore

continued, page 20

reversed, holding that the question of whether Lennar performed any repairs after the closing created a dispute of material facts as to whether the closing completed the parties' contract.[22]

The issue eventually came to a head over the question of whether one party's non-payment can forestall completion of the contract. In *Cypress Fairway Condominium v. Bergeron Const. Co. Inc.*, the issue was whether an owner's final payment to the contractor could delay the running of the statute of repose.[23] Cypress Fairway Condominium Association filed its lawsuit on February 2, 2011 and alleged construction defects against various defendants involved in the construction of the condominium buildings. The trial court dismissed the claim, finding that the 10-year statute of repose began to run on January 31, 2001 — the date on which the contractor made the final application for payment. The Association contended that dismissal was improper because the contract was not complete, and thus the statute of repose did not begin to run, until it issued payment to the contractor on February 2, 2001.[24]

The *Cypress Fairway* court reversed the trial court's dismissal. It held that the plain language of the statute requires completion of the contract, and the contract was complete when *both* parties completed their obligations. The contract was therefore not complete until the owner paid the contractor for its work.[25]

The Fallout from Cypress Fairway

The *Cypress Fairway* decision drew heavy criticism from the construction industry due to the perceived ramifications. Contractors and designers (along with their insurers) feared that owners could withhold final payment for months, or even years, after they completed and delivered final certificates of occupancy. Manufactured disputes over punch list completion could also potentially serve to artificially extend the time for owners to bring claims. The ruling, though a correct reading of the statute, effectively permitted owners to extend their time for filing lawsuits by withholding payment to construction professionals, even if the withholding is improper under the operative contract.

Contractors and their lobbyists took the ruling to the Florida Legislature and demanded action. Their initial proposal for a change in the law tied the completion date of the contract to the last date the contractors or design professionals furnished labor, services, or materials to the project.[26] However, the Civil Justice & Claims Subcommittee amended this proposal before House approval.

The final version of the law defines completion of the contract as "the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made." The revised law, codified in Fla. Stat. § 95.11(3)(c), (2017), applies to all causes of action that accrue on or after July 1, 2017.

While this change prevents an owner from wrongfully withholding payment to his or her advantage, it still leaves the door open for a debate about when the final payment

continued, page 23

"becomes due." Much like the *Lennar* and *Sabal Chase* cases discussed above, when the parties actually completed the contract may vary based upon the terms of the contract and the testimony of the parties after the fact. Many construction contracts mandate that the punch list must be completed before final retainage is paid, and owners and contractors can therefore continue to debate when final payment "becomes due."

As a practical consideration, parties to construction contracts should consider specifying in the contract the last condition that must be satisfied before payment becomes due. For example, to avoid an owner indefinitely extending final payment through the use of punch lists, parties could agree that final payment becomes due under the contract after certification by the architect that the punch work has been substantially completed. Owners should consider editing construction agreements, particularly AIA documents,[27] to ensure that the claim period enunciated therein matches Florida's repose period.


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Endnotes

1 *See* Fla. Stat. §95.11(3)(c) (2017).

2 *Id.*

3 *See CTS Corp v. Waldburger*, 134 S.Ct. 2175, 2182 (2014).

4 *See id.* (internal citations omitted).

5 *See Sabal Chase Homeowners Ass'n, Inc. v Walt Disney World Co.*, 726 So. 2d 796, 798 (Fla. 3d DCA 1999), *quoting Bauld v J.A. Jones Constr. Co.*, 357 So. 2d 401, 402 (Fla. 1978).

6 *Id.*

7 *See Sabal Chase*, 726 So. 2d at 801.

8 *See id.* Statutes of repose have been applied in a variety of contexts. A statute of repose barred untimely claims by a general contractor for negligent design or construction of an improvement to real property. *See Bauld v, J.A. Jones Constr. Co.*, 357 So. 2d 401 (Fla. 1978). In *Universal Engineering Corp. v. Perez*, 451 So. 2d 463 (Fla. 1984), a statute of repose barred stale claims based on the negligent design of a product. In *Kush v. Lloyd*, 616 So. 2d 415, a statute of repose barred medical malpractice claims.

9 *See Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979).

10 *See* Fla. Stat. §95.11(3)(c) (1980).

11 *See Sabal Chase*, 726 So. 2d at 797.

12 Fla. Stat. §718.124, (2017) tolls the statute of limitations for construction actions involving a condominium association and provides that an action does not accrue until the unit owners have acquired control over the association.

13 *See Sabal Chase*, 726 So. 2d at 798.

14 *See Busch v. Lennar Homes, LLC*, 219 So. 3d 93, 96 (Fla. 5th DCA April 13, 2017), rehearing denied May 30, 2017.

15 *See Busch,* 219 So. 3d at 96 n.2. The court noted that the construction defect statute in Chapter 558 is structured differently than some pre-suit mandates. If a claimant under the construction defect statute brings suit prematurely, the lawsuit is not dismissed but is instead stayed pending service of the written notice.

16 *See Clearwater Housing Authority v. Future Capital Holding Corp.*, 126 So. 3d 410 (Fla. 2d DCA 2013).

17 *Id.* at 411.

18 *Id.* at 412-413.

19 *Allan and Conrad, Inc. v. University of Cent. Florida*, 961 So. 2d 1083, 1087 (Fla. 5th DCA 2007).

20 *See id.*

21 *See Busch*, 219 So. 3d at 94.

22 *Id.* at 95-96.

23 *Cypress Fairway Condominium v. Bergeron Const. Co. Inc.*, 164 So. 3d 706 (Fla. 5th DCA 2015).

24 *See id.* at 707-708.

25 *See id.*

26 *See* 20174 Florida House Bill No. 377, Florida One Hundred Nineteenth Regular Session, Jan. 23, 2017.

27 The AIA A201-2017 revisions require all claims to be brought no later than 10 years after substantial completion of the work and waives all claims not commenced in this timeframe. *See* AIA A201-2017 §15.1.2. The AIA says this is consistent with most states' statutes of repose. However, substantial completion does not necessarily complete the contract between owner and contractor under Florida law. Therefore, the 2017 AIA general conditions seemingly create a shorter claims period than would be available to the owner under Florida law. However, Fla. Stat. § 95.03 prohibits the shortening of a statutes of limitations by contract. Nevertheless, Florida owners utilizing the A201-2017 should consider revising this provision to state that claims must be brought within the applicable statute of repose rather than within 10 years after the date of substantial completion.

SECTION SPOTLIGHT

Winded: A Legal Career Is Not a Sprint

By Aislynn Thomas-McDonald, Esq., Hershoff Lupino & Yagel, LLP, Maimi, Florida

"When you run, your body will argue that there is no justifiable reason to continue. Your only recourse is to call on your spirit, which fortunately functions independently of logic."

—Tim Noakes

Sometimes, lawyers can be somewhat clueless about what, in the long run, is best for our bodies. We may, for instance, resist sleep when our body signals that we need rest or skip exercising by convincing ourselves that we are too busy. Not surprisingly, sleep deprivation or enslaving ourselves to billable hours doesn't usually produce positive results. Similarly, we can be tempted to spin a little cocoon around ourselves whenever we become stressed, anxious, or burned out from needy clients. Though it's good to examine the issues that are troubling us, we can't allow them to suck us into a spin cycle of self-concern.

That's why I started running. It began as an escape from a world of arguments (otherwise known some days as the practice of law) in order to participate in a sport where my spirit could breathe. Initially, there was pain. So I looked at the sport like a tough case, and persisted. Over time, the pain eased. The more I ran, the more my body produced endorphins as it became accustomed to the exertion. At this time, I started to enjoy it, and I became a runner. Now, as a concession to the brevity of life, I run more for others than I do for myself.

As is the case with many "Type–A" personalities, what started as a "me-time" release had, over the past decade, morphed into a goal-driven passion. Achievements such as faster times, longer races and qualifying for the Boston Marathon caused my zeal to overtake me.

Thankfully, many of my colleagues could relate. In the boutique firm where I've been privileged to practice for the past five years, there are seven attorneys, three of whom are runners. Well, unless you count our firm's patriarch, Jay, who claims that he runs every morning — straight to the bathroom and straight back to bed. Not a bad track record for a man, who has been practicing law longer than I have been alive, and he's still going strong in his fifth decade of practice. If we count him, (we) runners would have the majority in-house. Consider Jim: He just qualified for the 2018 Boston Marathon. Last year, he did his third or fourth Ironman Triathlon. I lost count. He's a guy who arrives at 6:30am to start his workday and doesn't stop until 10 hours later when he's out the door to train. I often wonder if he has human DNA. Brittany, my comrade in arms, is another working mom who runs to

continued, page 25

stay sane. She's been known to slip out and speed run on her lunch break to ensure she does her daily jog. How blessed am I to practice law with colleagues who similarly appreciate a work/life balance that often includes a healthy dose of running?

Last year, I had the good fortune of taking off work (with the proverbial blessing of my bosses) to run in the London Marathon. What was supposed to be a fun getaway and race to mark off my "to-do" list, turned out to be a game-changer. The race was held on April 23, 2016 (or, as they write in the Queen's English, "23 April, 2016"). When I crossed the starting line, I looked around and saw the full streets of London cheering on some of my fellow 40,000 runners, and I was breathless. Not because I was fatigued, and certainly not at the sight of the outlandish costumes along the race (clowns, superheroes, cartoon characters, even a barefoot Jesus pulling a cross). Rather, I was overwhelmed by the number of participants who were wearing shirts to show their support for many worthwhile and unique causes. Groups were combating everything from dirty water to irritable bowels. Everywhere were shirts supporting some form of not-for-profit organizations. Swaths of cheerleaders were present, supporting their runners from the sidelines. The day of the London Marathon is said to be the single largest fundraising day in the world, and apparently, every year the exposure and the event grows larger. The momentum was palpable and excitement contagious. Even though I was a runner, I felt more like a spectator than a participant because I wasn't championing a cause.

People were so happy to be moving — even those who were racing without legs. Motion was all around me. By sheer number, we were a force. A force for good: to ourselves, others, the earth, and animals. It made sense because we all need help, sometimes, in life. The same desire to help is what initially drew me (like many of us) to the legal profession. Who hasn't read *To Kill a Mockingbird* and wanted to champion a case like Atticus Finch? Being a lawyer means being a part of something bigger than ourselves. It is something that is kinetic, constantly evolving, and something that we each help to shape. Somewhere along the way, however, the detritus of the profession can overtake the altruism. Between the recording of every billable minute of your workday, to all-nighters to finish a brief, to losing your first trial (that should have gone your way), it is easy to lose sight of what matters. I decided in the first mile that I wanted to come back again next year. I wanted to champion a cause.

Then, around mile 22, my legs gave out. I felt like I was dragging fifty pounds of lead. In my eight preceding marathons, this had never happened. I'd heard the infamous stories of "hitting a wall" during a run. This, however, felt more like pulling chains. I was running, but pictures later showed it was more akin to a "vertical crawl." How could I give up when runners on prosthesis legs beside me were pushing on? While we all experience pain, *suffering* is a choice in a first world

country. When I shuffled over the finish line, I broke into a smile of pure relief. It was over. In that moment, I immediately knew the cause that I would champion next year, if I could muster up the strength to race again.

Smile Train is an international children's charity that provides free surgery to the poorest of the poor children suffering from cleft lips and cleft palates in undeveloped countries. It is a unique medical organization insofar as it promotes a sustainable method. U.S. surgeons travel to teach local doctors how to perform the procedure. While many of the children born with a cleft cannot eat or speak properly, the affliction is extremely harsh on those in remote places as some areas prevent sufferers from attending school or holding a job. They face suffering in the form of extremely difficult lives full of shame and isolation. Often, the poverty in which they live forces their clefts to remain untreated, whereas, to those of us in the developed world, the solution is relatively inexpensive — the surgery is a simple operation that takes as little as 45 minutes and costs as little as $250.00. My husband has been a pediatric reconstructive surgeon for over 20 years. He has dedicated much of his professional time teaching others to do this surgery so that more children can smile. It sickens me to think of my smile while crossing the finish line when some children are abandoned or killed solely as a result of the way they look from a misshaped mouth. It made me think I could help, too, by raising money and awareness for this nonprofit in the 2017 London Marathon.

When I got back stateside, I went to see my orthopedist. An MRI was ordered for my knees. The results were not good. Acute arthritis riddled my knees. Bone on bone, no cartilage remained. I was told that my days of running were numbered. I was heartbroken as I had already committed to helping our next generation smile by pledging to raise $5000 for Smile Train and running the 2017 London Marathon.

His instructions were that if I wished to continue rigorous exercise but didn't want my knees to be replaced before I

continued, page 27

Must A Commercial Landlord Consent To A Lease Assignment?

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Many commercial leases include a provision concerning the tenant's right to assign the lease or sublet the leased premises. These provisions often require the tenant to get the landlord's consent to any assignment or sublease. This is for good reason – the landlord (or perhaps its predecessor-in-interest) had the opportunity to vet the tenant before signing the lease and generally wants similar protection before someone else takes over either the tenant's position or possession of the premises. An assignment provision may include a standard by which the landlord can decide whether to consent to a proposed assignment or sublease. But under even the most landlord-favorable standard, can a commercial landlord ever have an absolute right to reject a proposed assignment? Two Florida cases give some guidance, and one suggests that an absolute right exists only if the lease expressly says so.

At common law, a tenant had the right to freely assign its leasehold interest without getting the landlord's consent.[1] Historically, where a lease required a landlord's consent, many states allowed a landlord to arbitrarily and capriciously refuse to consent to a proposed assignment or sublease.[2] In its 1981 decision *Fernandez v. Vazquez*, Florida's Third District Court of Appeal (DCA) observed that the notion of American courts allowing a landlord to arbitrarily and capriciously reject a proposed assignment or sublease was in decline.[3] In that case, the court addressed the issue head on.

In *Fernandez*, a bakery lease required the landlord's written consent to an assignment or sublease. The tenant, who operated the bakery, contracted to sell the business and sought to assign the lease to the purchaser. The landlord refused to give consent, and then later offered to consent only if the bakery purchaser would pay an increased rental rate. The purchaser was unwilling to buy the bakery with the increased rent, so he rescinded his contract to purchase the business. The landlord then sued the tenant for unpaid rent and the tenant counterclaimed for breach of the lease for refusing to consent to the assignment.[4]

The trial court entered summary judgment for the landlord on the counterclaim. The Third DCA reversed, based on "the now well-accepted concept that a lease is a contract and, as such, should be governed by the general contract principles of good faith and commercial reasonableness."[5] The court disavowed the proposition that a commercial landlord can arbitrarily reject a proposed assignment, even where the lease has no minimum threshold or standard for consent.[6] Rather, a landlord breaches the lease where the landlord rejects a proposed assignment without good faith and commercial reasonableness.[7]

The determination of whether a landlord acted in good faith and in a commercially reasonable manner in declining to consent is a jury question and is case-specific.[8] The Third DCA identified several factors that a jury should consider in making that assessment: "(a) financial responsibility of the proposed subtenant[,] (b) the 'identity' or 'business character' of the subtenant, i.e., suitability for the particular building, (c) the need for alteration of the premises, (d) the legality of the proposed use, and (e) the nature of the occupancy, i.e., office, factory, clinic, etc."[9] Indeed, these are variables that many landlords would likely consider in evaluating a prospective lease assignee. The court further held that a landlord does not act in good faith or with reasonableness when it refuses to consent to an assignment "solely on the basis of personal taste, convenience or sensibility or in order that that the landlord may charge a higher rent than originally contracted for."[10]

The lease assignment provision in *Fernandez* had no standard by which to measure whether the landlord could deny consent. Therefore, implicit in the Third DCA's ruling is the concept that a lease assignment provision with no standard does not give the landlord an absolute right to deny consent to a proposed assignment.

In *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.*,[11] an appellate court gave a little more insight into whether a landlord can have an absolute right to deny consent. In that case, the tenant assigned the lease and the assignee took possession of the property.[12] The lease required the landlord's consent, but it provided no standard by which the landlord could withhold consent, and the tenant never requested or obtained consent.[13]

Relying on the Florida Supreme Court's decision in *Anderson v. Tower Amusement Co.*,[14] the trial court in *Speedway* ruled that a landlord could arbitrarily deny consent to a proposed assignment.[15] The Second DCA pointed out in *Speedway* that the Florida Supreme Court in *Tower Amusement*[16] confronted the issue of a sublease without the landlord's written consent, despite such consent being required by the lease.[17] The issue of whether a landlord has an implied obligation to not arbitrarily deny consent did not come up in *Tower Amusement,* and hence this issue was one of first impression in *Speedway*.

In reversing the trial court, the Second DCA, relying on *Fernandez*, noted the trial court's misunderstanding of the holding in *Tower Amusement*. Although the lease at issue

continued, page 27

lacked a standard for the landlord to apply in exercising its discretion to accept or reject an assignment, the court observed that the lease did not expressly give the landlord absolute discretion to withhold consent.[18] The court reversed the trial court's ruling that the lease, absent an expressly stated standard, gave the landlord "the unfettered right to deny consent to the assignment" of the lease.[19]

Like the Third DCA in *Fernandez*, the Second DCA in *Speedway* rejected the idea that a lease provision without a standard by which the landlord's acceptance or rejection of an assignment must be measured, means that the landlord has an absolute right of rejection. While neither court addressed whether a landlord can ever have such an absolute right, *Speedway* at least suggests that parties to a commercial lease could expressly agree to give the landlord that right. As the Second DCA stated, the implied covenant of good faith is a "gap-filling rule" that applies when a contract gives one party the right to make a discretionary decision without a defined standard.[20]

The court's observation that the lease did not give an absolute right, coupled with the court's application of the implied covenant, suggests that a provision expressly allowing the landlord to arbitrarily deny consent to an assignment could be enforceable. Absent a court explicitly ruling as much though, landlords should be mindful of *Fernandez, Speedway*, and the implied covenant of good faith in denying consent to a proposed assignment.

M. CHAIT

***Matthew R. Chait** is a partner in the business litigation practice group at Shutts & Bowen LLP in West Palm Beach. His practice focuses on commercial real estate litigation and complex business disputes. He is a co-founder and co-editor of Shutts & Bowen's Florida Commercial Real Estate Litigation Blog.*

Endnotes

1 *Frissell v. Nichols*, 94 Fla. 403 (Fla. 1927).
2 *Fernandez v. Vazquez*, 397 So. 2d 1171, 1172 (Fla. 3d DCA 1981).
3 *Id.* at 1173.
4 *Id.* at 1172.
5 *Id.* at 1173-74.
6 *Id.* at 1174.
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 966 So. 2d 1 (Fla. 2d DCA 2007).
12 *Id.* at 2.
13 *Id.*
14 163 So. 11 (Fla. 1935).
15 966 So. 2d at 2.
16 *Id.* at 3.
17 163 So. at 13
18 966 So. 2d at 4-5.
19 *Id.* at 5.
20 *Id.* at 3 (citation and quotation marks omitted).

reached 50 years old, I should take up swimming. "But, I just committed to run another marathon in a year-for a good cause," I quipped. "How do I train for a marathon in the pool?" I asked him. "Run in the water," he said. That is exactly what I did.

Determined to focus on this final goal, rather than wallow in the sorrow that I felt at giving up a sport I had come to love, I looked outward. I thought of all the people that I knew who had helped me get to where I was in my legal career. From Judge Maria Korvick, who swore me in and persuaded my young (and somewhat unruly) children to stand quietly beside me when I took my oath, to Tom Karr, who always answered my calls when I started practicing and was so unsure of my judgment. There is also Bruce Stone, who referred to me my first "originated" case, and I'll never forget when my law professor, Eloise Rodriguez, served me "probate on a proverbial dish" at the conclusion of her Estate Planning course. I'd met her for coffee when she told me, "Think of probate as the asparagus of law: looks sort of strange - so it's often overlooked, but it tastes good and you should try it."

Those gestures of kindness and guidance helped shape me and now it was my turn, outside the courtroom, to help in a way that matters. I proudly finished the 2017 London Marathon in April. It was, in all likelihood, my last. The money raised from the effort will bring twenty kids a life-changing surgery. Something good happens when we are able to get our eyes off our own pain and reach out to other people who are hurting around us. It requires strength and grace. Doing so releases the power of help and healing, which is a power that can bring peace even in the midst of the most difficult circumstances. It is as true in our personal lives as it is in our cases and with our clients.

RPPTL Section Executive Council Meeting
The Breakers, Palm Beach, Florida
July 27 – July 30, 2017

Fellows Meeting

Larry Miller, Jeff Bae, Jerry Wolf and Richard Newman

Sandra Krumbein, Donna Berger, Chris Davies, Jane Cornett, Bill Sklar, Ken Direktor (all are members of Condo /PD Committee).

Rob Freedman and Bill Sklar

RPPTL families at the Palm Beach Zoo

Photo credits: Jeff Baskies, Michael Gelfand, John Neukam, and Silvia Rojas. Photo selection and contact: Jeff Baskies

View Photo Albums at www.rpptl.org

Laura Sundberg, Gail Fagan, and Judges Trish Thomas, Mary Hatcher, and Margaret Hudson

RPPTL families meet a reptile at the Palm Beach Zoo.

Mary Ann Obos and Whitney Kirk

Rob Freedman, Drew O'Malley and Sheri Freedman (Photobomb: Mike Gelfand)

Roundtable

Highlights Of The Meeting Of The RPPTL Section

REAL PROPERTY DIVISION

Saturday, July 29, 2017 - 8:00-9:30 am

The Breakers – Palm Beach, Florida

Prepared by Colleen Coffield Sachs, Santa Rosa Beach, Florida

Thank you to the Roundtable Sponsor, Fidelity National Title Group

Meeting opened at 8:00 a.m. by Real Property Law Division Director, Rob Freedman.

SPONSOR RECOGNITION. The Division Director thanked the Roundtable Sponsor, Fidelity National Title Group and Pat Hancock gave the sponsor message.

RECOGNITION OF GUESTS, STUDENTS AND DIGNITARIES. The Division Director opened the floor for introductions of the law students, dignitaries, and other guests in attendance.

INTRODUCTION OF NEW COMMITTEES AND RP DIVISION MEMBERS OF THE EXECUTIVE COUNCIL. The Division Director then recognized the following: Richard DeBoest and Sandra Krumbein as new members of the Executive Council; Elizabeth Ferguson and Gregg Hutt as Co-Vice Chairs of the Construction Law Certification Review Course; Mike Hargett as a Co-Vice Chair of the Real Property Litigation Committee; Cynthia Riddell as a Co-Vice Chair of the Title Insurance and Title Insurance and Liaison Committee; Robert Stern as Chair and Kristopher Fernandez and Wilhelmina Kightlinger as the Co-Vice Chairs of the Attorney Loan Officer Conference; and Bridgett Friedman as a Co-Vice Chair of the Real Property Finance Committee.

EXECUTIVE COUNCIL ITEMS:

Action Items:

Unlawful Detainer. Mark Brown reported that the proposed legislation regarding unlawful detainer was set for approval at today's Executive Council Meeting. The proposed legislation would provide a cause of action for unlawful detainer, clarify the applicability of actions for forcible entry and unlawful detainer, clarify that no pre-suit notice is required in such actions, remove procedural jury verdict forms, and modernize archaic language. The Probate Division voiced a concern about the possibility of an individual, such as a 'significant other' or heir, residing in the property with the consent of the owner, but being required to vacate the premises immediately after the death of the owner. The specific concern was that the individual may need time to get out, but that the statute provides for damages in the amount of a reasonable rental value, and, potentially, double rental value if the individual does not immediately vacate. Mark explained that the damages provision has been in the statute for 100 years, and it was not added to the proposed legislation, but simply moved.

After meeting with the Probate Division during the Probate Division Roundtable, Mark reported that the Probate Division supported the proposed legislation as it was presented.

Lis Pendens. Susan Spurgeon reported. The proposed legislation would statutorily resolve the issue that was presented in *Ober vs. Town of Lauderdale-by-the-Sea.* The *lis pendens* statute would be revised so that, pursuant to 48.23(1)(d), F.S., a lis pendens would stay in effect through the recording of any instrument transferring title of the property pursuant to a judicial sale. This would resolve the gap in time between the entry of the final judgment and the recording of the instrument transferring title. Susan also advised the Division that the proposed legislation that would be voted on by the Executive Council included the proposed addition of "or lien" in two places in 48.23(1)(b)(2). This revision had been approved by the Division for Executive Council consideration two years ago. It was decided to handle both proposed revisions in one comprehensive bill.

There was a motion to accept the revisions to 48.23(1)(d), F.S. The motion passed unanimously. The proposed legislation, as amended and approved, will be an action item at the Executive Council meeting.

Informational Items:

Disposition of Excess Proceeds from Tax Deed Sales. Susan Spurgeon introduced Dale Bohner, counsel to the Clerk of the Circuit Court for Hillsborough County, to discuss legislation proposed by the Florida Association of Court Clerks, Inc. (d/b/a Florida Court Clerks & Comptrollers) concerning disposition of excess proceeds from tax deed sales. The purpose of the proposed legislation is to provide instruction for disbursing excess proceeds from tax deed sales. The legislation includes three key items:

continued, page 31

1. Requires additional notice. Currently, clerks search the official records and provide notice to a creditor as set forth in a recorded document. For example, notice to a lender would be sent pursuant to the face of the recorded mortgage. The clerks recognize that method is antiquated, so the requirement is updated such that the tax collector must also perform a "people search" to accurately locate interested parties. This is particularly helpful where a bank may be shown in the public records, but may no longer be in business or servicing the mortgage.

2. Addresses the 30-day gap between the notice and the sale. This gap creates an opportunity for someone to obtain an interest in the property without receiving notice. The solution is to provide for the recording of a notice of tax deed application in the Official Records, which would act like a *lis pendens*, giving everyone notice of the tax deed sale.

3. Resolves the problems created when a lender does not file a claim. Currently, the first priority lien holder is entitled to the excess, regardless of whether it files a claim. So, if the first priority lien holder does not file a claim, there is no mechanism for the funds to go to the next junior lien holder(s). After one year, the clerk must send the excess to DFS as unclaimed funds. However, DFS won't take them if DFS does not know the exact amount of unclaimed funds, and the clerk cannot know the exact amount without a claim being filed. The proposed legislation creates a claim form and the requirement that the interested party file same within 90 days. If it is not filed within 90 days, the party would lose their rights to the excess. There would be an ability to object. If there is no objection, the claims will be paid as proposed by the county. If there is an objection, the county could interplead the funds.

Discussion was had regarding the concerns about some of the timing issues; however, the Division Director noted that the language is not final and that the purpose of this informational item was to gauge the support of the Section. A show of hands was called, and a majority of the Division supported this legislation.

DIVISION INFORMATIONAL ITEMS

Homestead Committee Report. Jeff Goethe reported on behalf of the committee regarding a proposed amendment to Chapter 732 on homestead as it pertains to probate. The amendment was precipitated by the case *Habeeb v. Linder*. While the opinion was withdrawn, it was concerning in that the court initially found that a spouse can waive homestead rights by executing a deed to the other spouse. Jeff pointed out that we have laws requiring homestead waiver disclosures in prenuptial agreements, antenuptial agreements, etc., so a similar disclosure should be required when waiving, by conveying, homestead rights to the other spouse. Jeff explained that the proposed statutory changes would be to require specific language in the deed and, when such waiver language was contained in the deed, the spouse signing the deed would be presumed to have waived the constitutional restrictions on the devise of homestead. This would supplement existing procedures in Fla. Stat. § 732.701, which provides for waiver of spousal rights by written agreement. There was additional discussion regarding the requirement for this disclosure to be bold and conspicuous, which is an idea Jeff will take back to the committee.

2018 Legislative Proposal on Marketable Record Title Act (MRTA). Doug Christy reported. Senator Passidomo is continuing her efforts to get legislation passed that would address issues that arise when a declaration of covenants, conditions, and restrictions is extinguished under MRTA. The current proposed legislation makes it easier to preserve and revive covenants and restrictions and extends the application of the preservation and revitalization provisions to non-residential communities and voluntary associations. The Section has been asked to provide comments to Senator Passidomo so that the bill can be filed with the Section's support. There was discussion on the constitutionality of the statute. The Division Director asked that anyone with comments contact Doug Christy right away so the information can be provided prior to the filing.

Report on Inaugural Attorney-Loan Officer Conference. Rob Stern presented. The event was very successful. There were over 100 attendees. The event broke even. There will be a wrap up session this week.

COMMITTEE REPORTS:

Commercial Real Estate. Adele Stone reported that their goal is to provide informative and, when possible, CLE programs at each meeting. In February, 2018, Gisela Munoz will be presenting a program on mindfulness.

Condominium and Planned Development. Bill Sklar reported that there is an upcoming webinar on estoppels presented by Steve Mezer and Melissa Murphy and the Ins and Outs Seminar will be held in April, 2018. Bill also announced that there likely will be a glitch bill for HB 1237 that passed this year and that the committee will be providing technical assistance for same.

Condominium and Planned Development Law Certification Review Course. Sandra Krumbein announced that the committee currently is working on the agenda and coordinating it with substantive exam materials, as well as identifying speakers. The exam will cover the entire practice area. Applications to sit for the exam are due at the end of August and the first exam will be in March, 2018. The review course will be held in conjunction with the Real Estate Certification Review Course in February 2018 in Orlando.

continued, page 32

Legislative Update Committee. Stacey Kalmanson thanked everyone who worked on the Legislative Update. They maxed out the capacity of 465 attendees, which does not include web attendees. They raised $113,000 by in-person attendance, had excellent sponsors, and expect more proceeds from later sales.

Construction Law Committee. Scott Pence reported that they have conference calls the second Monday of each month. During those calls, they offer a one-hour CLE program. Additionally, the committee will host a section-wide webinar on expert witnesses.

Michael Meyer reported on a federal case involving the fair labor standards act that broadens the definition of joint employer relationships, which could have the effect of including general contractors and subcontractors in this definition. This could have significant ramifications. The committee is considering an hour-long webinar to discuss joint employer issues.

Construction Law Certification Review Course. Deborah Mastin reported. The course will be concurrent with the Construction Law Institute. The committee is seeking new members.

Construction Law Institute. Sanjay Kurian reported. The Institute will be March 8-10, 2018. He thanked the committee for all the good work on the programs that were very successful.

Development & Land Use Planning. Vinette Godelia reported that the committee had an excellent presentation on current technology and its disruption of the real estate industry. The committee is working with the Real Estate Leasing Committee on a 3.5 hour CLE program, which will include three technology credits.

Insurance & Surety. Scott Pence reported that the committee has monthly conference calls. The newsletter will be on the tables at the Executive Council meeting. The committee is working on calls for Insurance 101 presentations that may become a half-day webinar.

Real Estate Certification Review Course. Manuel Farach reported. The course will be February 9-10, 2018. He thanked Jennifer Tobin for all of her work.

Real Estate Leasing. Richard Eckhard reported. He said there had been much enthusiasm for CLE presentations in this calendar year. The committee will be working with the Development and Land Use Committee on a 3.5 hour CLE on technology. Two other CLE webinars are being discussed.

Real Property Finance & Lending. David Brittain reported on a presentation during the committee meeting on current financing trends with swaps and participations. He also reported that the committee continues to work on the first supplement to the Legal Opinions Report of 2011 being prepared in connection with the Business Law Section. Jason Ellison reported on a CLE taking place on November 16, 2017, entitled Navigating the Foreclosure Title Commitment.

Real Property Litigation. Susan Spurgeon reported on a subcommittee headed by Mike Hargett analyzing the recent *Flinn v. Doty,* 4th DCA case, which also conducted a CLE providing advanced level credit supporting board certification. This is important because the committee found that CLEs offered at an advanced level were more profitable. Susan also reported that the 1st DCA has asked for an amicus brief on *Rigby vs Bank of New York Mellon*, which concerns the question "if standing is not proven at inception of the case, does a lender have to dismiss and refile, or can the lender cure the lack of standing mid-case?" The committee explored the difference in standing at the Federal level and State level, but has not reached a consensus for purposes of submitting an amicus brief. The committee is also planning a CLE on the new closing protection letters.

Real Property Problems Study. Art Menor reported that the committee discussed and approved moving forward with amending a portion of MRTA that deals with deeds. If, instead of using the phrase "subject to all matters of record," a practitioner replaces it with a list of instruments, there is an argument that such instruments are reimposed against the property. The proposed legislation would codify that if the deed contained the phrase "without the intention of re-imposing," then this would, in fact, not reimpose.

Residential Real Estate and Industry Liaison. Salome Zikakis reported on the committee creating a CLE on LLCs.

Title Insurance and Title Insurance Liaison. Raul Ballaga reported on counties destroying documents after a certain time, which directly impacts real estate transactions that may involve probate matters back in the chain. The committee discussed what documents should be recorded when a probate proceeding affects title. The committee is looking at changing that legislatively. The committee is holding CLEs on Florida title insurance policy endorsements and basic title examination and review.

Title Issues and Standards. Robert Graham reported that the committee meets monthly and has discussed webinars. The committee has finished Chapter 4 on LLCs and will have proposals for approval within the next two meetings.

The Division Director acknowledged the many discussions about remote notarization and the proposed "Electronic Wills Act" that did not pass in the 2017 session. However, he announced that discussions on remote notarizations would be held in the Executive Council meeting. He thanked the members who have been working on this proposal.

There was a motion to adjourn, and the meeting adjourned at 9:26 am.

Roundtable

Highlights Of The Meeting Of The RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, July 29, 2017

The Breakers, Palm Beach, Florida

Prepared by Eamonn Gunther, Esq., Boca Raton, Florida

Thank you to the Roundtable Sponsor:

Stout (formerly, Stout Risius Ross, Inc.)

The Director of the Probate and Trust Law Division of the Real Property, Probate and Trust Law Section ("RPPTL") of the Florida Bar, William T. Hennessey, called the meeting to order at 8:10 a.m.

Sponsor Announcement. The Division Director acknowledged the sponsor of the Roundtable meeting, Stout, a valuation company.

New Executive Council Members and Attendees. Director, Bill Hennessey, welcomed all new Executive Council members, judges, and newly appointed fellows to the council.

General Standing Committee Reports Relating to Probate & Trust

Information Items:

Homestead Issues Committee – Jeff Goethe and Michael Swaine, Co-Chairs. The committee has proposed an amendment to Chapter 732, Florida Statutes, to provide clarification and guidance regarding the waiver of constitutional homestead protection for surviving spouses. The statute would provide language which, when used within a deed, would create a presumption that the spouse signing the deed waived the constitutional restrictions on the devise of homestead. This would supplement the existing procedures in Fla. Stat. § 732.702, Florida Statutes, which provides for the waiver of spousal rights by written agreement.

Legislation – Cary Wright and Sarah Butters, Co-chairs. Governor Rick Scott vetoed HB 277 known as the Florida Electronic Wills Act. Because HB 277 also included the Section's proposed trust legislation, the various changes proposed to Chapter 736, Florida Statutes, were also vetoed, but it is expected to be resubmitted in this next legislative session. Governor Scott vetoed HB 277 because of his concerns relating to the provisions of the bill dealing with remote notarization and the non-resident venue provisions. The remote notarization provisions essentially provided for effective signing of a will by way of video conferencing where the notary and/or witnesses may be in a different physical location than the testator but would be present with each other via video conference. The non-resident venue requirements made Florida the venue for non-resident wills signed electronically based on the qualified custodian's location within the state of Florida. Although these provisions ostensibly allowed for increased access to legal services, the Governor felt the problems with the bill were twofold: there were insufficient safeguards to ensure proper authentication of the parties via remote video conferencing; and the non-resident venue provisions could unduly burden our courts without the necessary preparation to handle the possible increase in case volume. The Governor encouraged the parties supporting the legislation to address the concerns raised.

The Section's revisions to Florida's elective share statutes passed in the last legislative session. Among various tweaks to the elective share statutes were the following significant changes: the elective estate will now include homestead in the calculation and satisfaction of the elective share; the proposed changes also include the ability for any interested party to request an award of attorney's fees in the court's discretion (under the previous statutes, the spouse had no ability to recover fees where there was litigation concerning the elective share).

Ad Hoc Remote Notary Task Force – E. Burt Bruton, Chair. The committee is addressing the various concerns raised by the remote notary provisions of the Florida Electronic Wills Act.

Information Items:

Ad Hoc Study Committee on Due Process, Jurisdiction & Service – Barry F. Spivey, Chair. Chair Barry F. Spivey reported that the committee seeks to adopt a Section legislative position for a proposed amendment to Chapter 731, Florida Statutes, to provide that formal notice as provided in the Florida Probate Rules does not confer in personam jurisdiction over persons receiving formal notice. There are several reported court cases that hold that one can obtain in personam jurisdiction by serving formal notice on an interested party in a probate

continued, page 35

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action. This amendment seeks to clarify that formal notice only achieves in rem jurisdiction of a party as to their interest in the decedent's estate. Formal notice does not invoke the court's jurisdiction over a person's personal assets.

Probate Law and Procedure – John Moran, Chair. Chair John Moran reported that the committee seeks to adopt, as a Section legislative position, proposed legislation defining "tangible personal property" in the Florida Probate Code, which clarifies that tangible personal property includes precious metals in any tangible form, including bullion and coins.

Committee Reports:

Probate Law and Procedure – John Moran, Chair; Sarah Butters and Travis Hayes, Co-Vice Chairs. The committee is providing technical advice in connection with legislation involving dependent minor children. This effort relates to legislation that was proposed in the last legislative session by Representative Patricia Williams (HB 971), which did not pass, but which could be presented again in the next legislative session. The Section opposed the bill as drafted. The bill arose because one of Representative Williams' constituents, a single parent, passed away leaving insurance proceeds to her sister, with the intention that the sister use the proceeds to support the decedent's minor child, which allegedly did not happen.

Asset Protection - George Karibjanian, Chair; Rick Gans and Brian Malec, Co-Vice-Chairs. No Report.

Attorney/Trust Officer Liaison Conference - Laura Sundberg, Chair; Stacey Cole, Co-Vice Chair (Corporate Fiduciary), Tattiana Brenes-Stahl and Patrick Emans, Co-Vice Chairs. Laura Sundberg reported that the conference will take place at The Breakers, in Palm Beach, August 24th through the 27th. After many successful years leading the conference, Laura Sundberg has completed her tenure and Tattiana Brenes-Stahl is the Incoming Chair.

Digital Assets and Information Study Committee - Eric Virgil, Chair; Travis Hayes and Dresden Brunner, Co-Vice Chairs. No Report.

Elective Share Review Committee - Lauren Detzel and Charlie Nash, Co-Chairs; Jenna Rubin, Vice Chair. No Report.

Estate and Trust Tax Planning - David Akins, Chair; Tasha Pepper-Dickinson and Rob Lancaster, Co-Vice Chairs. No Report.

Guardianship, Powers of Attorney and Advance Directives - Nick Curley, Chair; Darby Jones and Brandon Bellew, Co-Vice Chairs. No Report.

IRA, Insurance and Employee Benefits - Howard Payne and Rich Amari, Co-Chairs; Al Stashis and Chad Callahan, Co-Vice Chairs. No Report.

Principal and Income - Ed Koren, Chair; Pam Price, Vice-Chair: No Report.

CLE – Shane Kelley, Chair. No Report.

Probate and Trust Litigation - Jon Scuderi, Chair; Jim George, Rich Caskey and Lee McElroy, Co-Vice Chairs. No Report.

Trust Law - Angela Adams, Chair; Tami Connetta and Mary Karr, Co-Vice Chairs. No Report.

Liaison to Elder Law Section - Charles Robinson and Marjorie Wolasky, Liaisons. No Report.

Liaison to Tax Section - Harris Larue Bonnette; Lauren Detzel; William Roy Lane, Jr.; David Pratt; Brian Sparks; Don Tescher, Liaisons. No report.

Liaison To ACTEC - Elaine Bucher, Liaison. No Report.

Ad Hoc Committee Reports:

Ad Hoc Guardianship Law Revision Committee – David Brennan, Chair; Sancha Brennan Whynot, Sean Kelley and Charlie Robinson, Co-Vice Chairs. The committee is drafting a whole new set of revisions to Chapter 744, Florida Statutes. The revised Chapter 744 is expected to be completed for a 2018 enactment date.

Ad Hoc Study Committee on Estate Planning Conflict of Interest - Bill Hennessey, Chair; Paul Roman, Vice Chair. No Report.

Ad Hoc Study Committee on Jurisdiction and Service of Process - Barry Spivey, Chair; Sean Kelley and Christopher Wintter, Co-Vice Chairs. No Report.

Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST). The Section's proposed 2017 POLST statute was submitted for legislative enactment in 2017 but did not pass.

Adjournment. The meeting adjourned at approximately 9:30 a.m.

Why Not Become Board Certified?

By R. Lynn Lovejoy, Esq., Attorneys' Title Fund Services, LLC, Pensacola, Florida

I have been board certified almost 25 years. I know it is well worth the time and effort to become a board certified attorney and encourage other members of the Bar to consider applying for board certification. It was one afternoon in July 1992 after a very busy day that I found a large brown envelope on my desk, unopened. My thoughts were jumbled. I said to myself, "Now what?" I opened it rather nervously and pulled out my first Florida Bar Certified in Real Estate Law certificate. Not only was I extremely happy at that moment, I was actually on a high for a month. It was one of the most memorable moments of my legal career.

What a privilege and honor it is now for me to serve on the Real Estate Certification Committee. I know from my own personal experience the dedication and skill it takes to be on that Committee. All Committee members review initial applications, examining carefully the qualifications of each applicant for taking the exam and becoming board certified. Since board certified attorneys must renew their board certified status every five years, all committee members also review applications for those that seek re-certification.

For initial certification, each applicant must pass an exam in his or her field of desired certification. Certification committee members are responsible for drafting exam questions that are fair, and adequately cover the subject area to be tested. There is a lot of work in drafting and revising questions that will be on the exam.

Consumers and lenders are becoming more and more sophisticated about who they want to handle their legal matters. Board certification demonstrates that the attorney handling their affairs has the highest level of expertise. Yes, any law firm or attorney can tout expertise or experience in any given field of law. But only Florida board certified lawyers can stand behind The Florida Bar's motto on board certification: "Evaluated for professionalism and tested for expertise."

Since I believe strongly in the professionalism and expertise of board certification myself, I have had an opportunity to put it to the test in my own personal life as a consumer. My fiancé died unexpectedly in June of this year. Thankfully, he had a will, and most of his real and personal property is located in Tallahassee. I live and work in Pensacola, Florida. Although I knew some attorneys in Tallahassee, I didn't know of any that practiced in the area of wills, trusts, and estates. I hesitated to just pick any attorney at random or even pick one based on another person's recommendation. I needed someone that could get the job done promptly over the long distance and would keep me adequately informed. I went to the list of board certified attorneys in wills, trusts, and estates on the Bar's website and found an attorney in Tallahassee. I hired him sight unseen, having never worked with him before. I have not been disappointed. Even though the estate was a fairly simple estate, I needed someone that could handle the little problems that arise in any estate administration. He handled the administration with the expertise I expect of someone who is board certified.

I also know from my personal experience that being board certified can be an advantage in your career. A few years after I became board certified, a potential client called asking whether I was board certified in real estate. I was happy to tell him I was, and he hired me for a project immediately. He remained a client of mine for several years after that.

It is not just consumers and lenders who are interested in board certification. Various companies, law firms, and organizations want attorneys with the qualifications that a board certified attorney can bring to their firm or organization. There are many legal organizations that want board certified attorneys to speak at conventions. Law firms want to show to the public that they have board certified attorneys who can handle various legal issues competently and that their attorneys practice law at a high level of professionalism. Board certified attorneys have a tendency to refer business to other board certified attorneys, especially in another area of expertise. They want to make sure that the person they refer to their clients will be able to handle the task with professionalism and expertise.

Only board certified attorneys can state they are board certified in a certain area on their letterhead, email, and business cards. They can also use a board certification logo with their areas of certification and can use "B.C.S.," which stands for Board Certified Specialist, in their signature block. Some professional liability insurers give a discount for board certified attorneys. (Florida Lawyers Mutual Insurance Company is one such insurance company.)

So far in 2017, 255 Florida attorneys became board certified. Seven attorneys became board certified in Wills, Trusts, and

continued, page 37

***Why Not Become Board Certified,* from page 36**

Estates. Another 12 became board certified in Real Estate. In total, there are about 5,000 board certified attorneys in all areas of certification. Did you know that Florida has about 118,000 attorneys? Almost 95% of Florida's attorneys are not board certified. The Florida Bar now has 26 areas of certification. Surely, there is certainly an area of specialization for most every attorney. In fact, Florida has the most areas of any state that offers board certification for attorneys. Some members of the Bar are even board certified in more than one certification area.

Even if your practice consists of a small part of real estate practice, or wills, trusts, and estates practice, there may be another field that your practice is leaning toward that complements real estate or wills, trust, and estates. Such practice certifications could be family law, business litigation, construction law, condominium law, tax law, or civil trial litigation or any one of the 26 specialties.

I must warn you, though, that proper completion of the certification application and preparation for the examination are absolutely imperative. Your chances of passing the examination are much higher if you take a few hours a week over several weeks to study, especially those areas in which you are not as comfortable or familiar. The exams are difficult to ensure the applicant has the special knowledge, skill and proficiency in the specific area of certification. The application must be completed with care because the information inquired is extensive, and the references given will be contacted to determine the level of professionalism that board certification requires.

The initial deadline for submitting applications for real estate or wills, trusts, and estate certification is October 31 for the exam the following year, in May. The exam is administered once a year, in May. Even if you don't apply this year, use this next year to prepare for the application and exam in 2019. It will be to your advantage. Go to the Florida Bar website under Board Certification where you can review all the information you need to complete your application. The Board Certification website pages for wills, trusts, and estates, and real estate have a wealth of information to help you prepare. They have sample questions to give you an idea of what to expect and what to study. Laptops are allowed for the exam but they must comply with The Florida Bar's rules.

I cannot stress enough the careful study required in order to pass the exam. If you do not pass the examination the first time, you can take it again the following year. All applications are kept in strict confidence. Additionally, each applicant is assigned a specific test number for the exam to maintain anonymity.

So, what is preventing you from becoming board certified? Maybe you are saying to yourself that you know you are qualified, and those close to you and your present clients know you are qualified. So why bother? It is true that not all qualified lawyers are certified, but those who are board certified have taken extra steps to have their competence and experience evaluated. Are you ready to take those extra steps?

POLITICAL ROUNDUP

State Politics Heat Up In Preparation For The 2018 Elections

By Cari L. Roth, Dean, Mead & Dunbar, P.A., Tallahassee, Florida

In preparation for the January start of session, committee meetings have begun in earnest this Fall and so has the 2018 political season. It promises to be a busy (and expensive!) election year. In the 2018 off-presidential year elections, we in Florida will have all four Cabinet posts to fill, with the three elected incumbents, Governor Scott, Attorney General Bondi and Commissioner of Agriculture Putnam all leaving their posts due to term limits. The elected Chief Financial Officer (CFO), Jeff Atwater resigned his post earlier this year before his last term ended, and that statewide office is also on the 2018 ballot. With all state elected offices subject to the 8-year term limit, these top posts have garnered a lot of interest by current office holders.

Traditionally, voter interest in non-presidential election years is lower. However, in addition to all the important Cabinet offices up for election, we will have several constitutional amendments on the ballot in 2018, some of which may drive voter interest in going to the polls. The 2017 legislative session included approval for the placement on the 2018 ballot of an additional homestead property tax exemption. And, the Constitution Revision Commission is just starting to vet its potential proposals. Several proposals would modify who can participate in partisan primary elections, including one by former Bar President Bill Schifino to allow voters with no party affiliation to vote in a party primary. Another is a controversial modification to the Right to Privacy promoted by anti-abortion groups. There is likely also to be a citizen's constitutional amendment ballot initiative from a private group called Voters in Charge, requiring referendums for any gambling expansion. That effort has big backing from the theme park industry as well as the Seminole Tribe and has collected over half of the signatures needed to place the measure on the ballot. Looking toward the primary and general elections in 2018, all eyes are on an expected influx of voters coming from Puerto Rico as a result of the destruction there caused by Hurricane Maria. Whether these refugees register, let alone vote, on election day remains to be seen.

The race for **Governor** is expected to have competitive primaries for both parties. On the GOP side of the aisle, Commissioner Putnam has been running for the post the longest and has amassed the most funds, over $20 million combining the funds in both his campaign and his supporting political committee. Senator Latvala, 16, a veteran legislator, had announced for Governor, but his campaign has been sidelined by accusations of misconduct which have caused him to recently resign from the Senate and will, presumably, put an end to his gubernatorial bid. He was second in fundraising. The current Speaker of the House, Richard Corcoran, 37, is raising money for his political committee and is expected to announce his run for the Republican primary for Governor after the legislative session is over. His political committee had a strong financial report in late summer and as of this publication, he is third in fundraising. While early polling indicates that Commissioner Putnam leads in name recognition amongst the Florida electorate, fundraising is the thing to watch as a well-funded and run campaign can overcome early lack of public name ID. Congressman Ron DeSantis, 6, is also expected to jump into the Governor's race. His name recognition is a little higher, having run statewide for the US Senate position held by Marco Rubio (R-FL) while Rubio ran for President, but he still lags well behind Putnam in early polling. If three well-financed candidates make it to the August 2018 primary, the vote splits in a crowded race could make it very interesting.

For the Democratic Party nomination, former congresswoman Gwen Graham, 2, daughter of former Governor Bob Graham, has announced her run for Governor along with Tallahassee Mayor Andrew Gillum and Orlando businessman Chris King. Miami Beach Mayor Phillip Levine officially entered the race in early November. He starts the race with over $5.5 million in his political committee putting him first in fundraising amongst the Democratic candidates. Graham is second with a combined total of over $4 million. King, who started his fundraising with $1 million of his own money, has raised over

continued, page 39

$2.7 million, but has been more frugal with his expenditures. Gillum's fundraising lags behind the other candidates and he only has a little over $530,000 left in the bank. Personal injury lawyer and prominent proponent of Florida's medical marijuana constitutional amendments, John Morgan, has been publicly toying with running for Governor as a Democrat. However, over the Thanksgiving weekend he announced that he couldn't muster any enthusiasm to run for either party and was planning to register as an independent. He has left the door open to running as an independent. His prominence in the public eye, Trump-like candor in public speeches, not to mention his ability to bankroll a campaign would make him an instant heavyweight in the race, even as an independent.

The other Cabinet posts traditionally garner less public attention, but all will be competitive races. The opening for **Attorney General** now has four announced Republican candidates. Former 13th Circuit Court judge and U.S. Attorney Ashley Moody announced early and has collected a good war chest and a lot of endorsements, notably from law enforcement and Attorney General Bondi. State Representative Jay Fant, 15, from Jacksonville also announced earlier in the year. The other two announced GOP candidates are Representative Frank White, 2, from Pensacola and most recently, RPPTL Section Member and Representative Ross Spano, 59, from eastern Hillsborough County. White starts the race with a lead in fundraising, with $1.7 million in contributions, almost entirely his own money and family contributions. Moody is second in fundraising but has not relied on personal or family funds. Fant's campaign led fundraising until White entered the race with almost a million so far, $750,000 of which is his own money. As of this publication, only one Democrat has filed, 32 year old Ryan Torrens from Odessa, near Tampa.The latest campaign report indicates that he has spent most of the almost $50,000 that he has raised. Long serving Miami-Dade State Attorney Katherine Fernandez Rundle is reported to be looking at the post. Look for more candidates to enter the Democratic primary for this race.

The **Commissioner of Agriculture** spot has two sitting Republican legislators running for the office, Senator Denise Grimsley, 26, from Wauchula and Representative Matt Caldwell, 79, from Lee County. Both are working hard and while Grimsley has raised more funds, her spending has been greater, and Caldwell currently has more available funds. Former state Representative Baxter Troutman, 66, was the most recent Republican to enter the race and he immediately went to the top of the fundraising tallies with a pledge of $2.5 million of his own money. Until Governor Rick Scott rewrote the books on self-funded candidacies, one might have dismissed Troutman, but if he's willing to keep putting large amounts of his own cash into the race, he can be a contender. Running for any of these statewide offices will be an expensive undertaking. Keep in mind that all the sitting legislators are prohibited from fundraising during Session, so the weeks leading up to the January 9th session start date will be of prime importance for those candidates who wish to distinguish themselves through fundraising.

The **CFO** race is also forming up. Former Senator Jeremy Ring, 29, was the first and is still the only Democrat to announce for the race. His almost $700,000 in fundraising so far is dominated by a $100,000 contribution of his own funds. As a legislator, he reported considerable personal wealth, so he is likely capable of putting more of his own funds into the race. Sitting Senator Tom Lee, 20, from the Tampa area has announced he will run for the Republican nomination for the seat and with more than $3.2 million in his political committee which can support such a run, he leads the money race. Additionally, Jimmy Patronis, currently CFO by virtue of Governor Scott's appointment following the Atwater early exit, has now formally announced he is running to retain the seat and has made a good start on fundraising. Scott had previously appointed Patronis to the Public Service Commission after Patronis was termed out of his post as state Representative for the Panama City area.

Meanwhile, 2018 marks Governor Scott's last year as Governor due to term limits. While he isn't openly talking about his plans after he leaves the Governor's mansion, he is raising money in his political committee and is expected to challenge longtime US Senator Bill Nelson (D-FL) who must run for re-election in 2018. Recent polling shows Nelson and Scott virtually even. This promises to be another high-profile race for next November.

In the meantime, there have been several special elections and several more to come. Democrat Annette Taddeo bested Republican Jose Felix Diaz to fill the Miami area Senate seat which was open due to the resignation of Republican Frank Artiles. This narrowed the Republican majority to 24-16, which makes the upper chamber slightly more of a leadership challenge for President Negron, 25, and Senate leadership, as the Republicans no longer have the super-majority required for many procedural and rule maneuvers, including executive veto override. However, on October 27, incoming Minority Leader Senator Jeff Clemens, 31, resigned his post effective immediately following public disclosure of an extra-marital affair with a lobbyist. The Governor has set the primary for the special election to fill this Senate seat for January 30, 2018, and the general election on April 10, so the Senate seat will be empty during the regular legislative session. RPPTL Section Member Representative Lori Berman, 90, who is leaving her House seat in 2018 due to term limits, has filed to run for the Senate seat, and will continue to serve in her House seat through the Session.

Probably even more impactful to the upcoming Session are the lingering feelings over last Session. Recall that the 2017 regular legislative session ended in a budget stalemate

continued, page 40

The Fourth Annual Miami-Dade County Public School Legal Initiative

By Kymberlee Curry Smith, Esq., Kymberlee Curry Smith, P.A., Pembroke Pines, Florida

The 4th Annual Miami-Dade County Public School Legal Initiative was held on Wednesday, May 17, 2017. It was organized by Kymberlee C. Smith, hosted by St. Thomas University School of Law, and sponsored by The Florida Bar's Diversity Grant Program, the Office of Joshua J. Hertz, P.A., The Dominican Bar Association, The Muslim Bar Association, The Gwen S. Cherry Black Women Lawyers Association, the Real Property Probate Trust Law Section of The Florida Bar ("RPPTL"), and Kymberlee Curry Smith, P.A.

The two-part program provided a truly hands-on legal experience for approximately 60 middle and high school students from Carol City Senior High School and Madison Middle School.

First, students were treated to a meet and greet opportunity to network and explore various practice areas in law and careers in law enforcement.

Meet and greet participants were the U.S. Attorney's Office, the State Attorney's Office, the Office of the Public Defender, Miami-Dade County Attorney Abigail Price-Williams and members of her office, the Miami Gardens City Attorney's Office, the U.S. Marshals, the St. Thomas University School of Law Admissions Department, the Miami-Dade County Department of Corrections, Legal Services of Greater Miami Inc., the Miami-Dade Police Department ("MDPD") Crime Scene Investigative Support Section, the MDPD Special Patrol (K-9), Marlon Hill, Esq. of Hamilton, Miller & Birthisel, LLP, personal injury attorney Joshua Hertz, Esq. of The Hertz Law Firm, Florida Bar Board of Governors member Jay Kim, Esq., of Kim Vaughan Learner LLP, family law attorney Nexcy De La Rosa, Esq., of The De La Rosa-Monroe Law Firm, PLLC, RPPTL member and probate tax litigation attorney Sean Lebowitz, Esq., of Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A., intellectual property attorney Neda Lajevardi, Esq., of Lott & Fischer PL, immigration attorney Fritznie Jarbath of JP Law Group, who represented the Haitian Lawyers Association, civil litigation attorney Yasir Billoo of International Law Partners LLP and Saman Movassaghi Gonzalez of Florida Immigration Law Counsel, who both represented the Florida Muslim Bar Association, Loreal Arscott, president of Gwen S. Cherry Black Women Lawyers Association, and Sandy Boisrond, Esq. on behalf of her own firm and the Haitian Lawyers Association. I represented my firm and RPPTL.

Alfredo Garcia, Dean and Professor of Law at St. Thomas University School of Law, gave an inspirational welcome to the students to open the second phase of the program, wherein the Law Related Education Committee of The Florida Bar provided information on its "Just Adulting" App and the First Amendment case, *Morse v. Frederick*, 551 U.S. 393 (2007), for the students to dissect. The students divided into teams with team leaders selected based on the relevancy of their career focus to the case study. Afterwards, the presenting teams discussed their analysis with fellow students and team leaders.

The fantastic afternoon ended with lunch, two raffled Hewlett Packard computers, and a campus tour of St. Thomas University. Students and teachers had an amazing experience and next year's date is already tentatively scheduled.

Thank you for your continuous support!

***State Politics Heat up in Preparation for the 2018 Elections*, from page 39**

necessitating a special session which included other controversial bills, with the most notable being on education reform. Many Senators, including some of the Republican majority, were quite unhappy with the outcome and the procedures that put them in a position of voting favorably on bills they disagreed with, in order to timely pass a budget. They have vowed not to let that happen again. Continued friction between the two houses of the Legislature seems inevitable.

Adding to the political soup this Session is the revenue picture for the State's 2018-19 budget, the one item that the Legislature must pass during its annual Session. Revenue forecasts have been adjusted significantly downward due to hurricanes and there are increased demands to fund additional disaster response, Medicaid, the state pension plan and to respond to the statewide opioid crisis. Speaker Corcoran has already taken a position of not touching the State's reserve fund to deal with decreased revenues. On a side note, the House Appropriations Chairman, Rep. Carlos Trujillo,105, has recently been appointed to be the ambassador to the Organization of American States, and his departure from the House depends on the timing of confirmation by the U.S. Senate, reportedly not until after the regular Session.

Mix together the bleak budget picture with the legislative friction between the House and Senate, and up to 10 candidates for statewide office who are involved to varying degrees in the conduct of the legislative session, and we have a recipe for a fractious (but interesting)Session!

Hazards Of Heir Property

By Jami Coleman, Esq., Williams & Coleman, P.A., Tallahassee, Florida

Heirs or heirs at law are defined as persons who are entitled to the property of the decedent under the intestacy statutes. See Fla. Stat. § 731.201(20). When property of the decedent is not probated, the property is owned by the heirs at law as tenants in common. Each heir owns a percentage or an interest in the property regardless of whether they maintain the property, pay real estate taxes, or live on the property. "Heir Property" is property that is titled in the decedent's name but owned by multiple heirs. Practicing in Tallahassee, many families or heirs prefer to leave the property in the decedent's name, for a few reasons. The most common reason is the time and money it will cost them to probate the estate. In Florida, you must generally hire an attorney to probate an estate, so many families prefer not to bear the expense of hiring a lawyer and spending years trying to acquire clear title on a decedent's property. They believe it is easier to pay the property taxes and keep up with the maintenance than to retain and pay an attorney. Another reason is because it provides them with "asset protection." In other words, creditors do not typically collect from the heirs because the property is still titled in the name of the decedent.

A problem with heir property is that you cannot sell or borrow against it if the property is left in the name of the decedent. In order to sell or borrow against it, first, the property must go through the probate process so that the title of the property is no longer in the decedent's name, second, all the heirs have to be known and found, and third, they have to all agree to the transaction. In some cases, it may be difficult to ascertain who and where the heirs-at-law are. If you are lucky, your client may have a "family historian," someone in the family who knows the names of all the children or heirs of the decedent and how to reach them. Identifying this person early on helps in beginning the probate process. In other cases, the heirs at law are deceased and their heirs are unknown. What do you do now? After conducting a diligent inquiry or search for the unknown or undiscovered heirs, a practitioner should provide notice of the proceedings under Florida Probate Rule 5.040, and then petition the court to appoint an Attorney ad litem to represent the deceased heirs or the unknown or undiscovered heirs. Florida Probate Rule 5.120 allows for an appointment of an "administrator ad litem" in probate proceedings. Appointing an "administration ad litem" or an attorney ad litem will resolve notice issues because the administrator stands in the place of that heir, ensuring that the missing or undiscovered heir's best interests are being looked after. Attorneys ad litem are entitled to reasonable compensation for services, thus the probate process can be expensive for the heirs.

However, practitioners can prevent the hazards of heir property by suggesting a "lady bird deed" or an enhanced life estate deed. A lady bird deed will avoid the need to probate the decedent's property by allowing the owner in title to convey the property to the remainderman or named beneficiaries at death, all while reserving the power to sell, mortgage, or do business with the property during the owner's lifetime. Conveying property to heirs using a lady bird deed can avoid the need to probate the property. Conveying the property to the remainderman with rights of survivorship should also be considered to avoid the need to probate the remainderman's interest in the property. It is an inexpensive solution to convey real property and avoid probate.

Another practical solution to avoid the hazards of heir property is to create an LLC, taxed as a partnership, have the LLC own the real property, and the heirs own the LLC and become members. Under the Florida Uniform Transfer-On-Death Security Registration Act, members of an LLC can adopt and agree to pay on death or transfer on death instructions on their respective membership interest, thereby creating another avenue to convey real property to the owner's beneficiaries without going through probate. The members would own the LLC, and in their operating agreement will include a schedule A that adds pay on death instructions for their respective membership interests in the LLC. See Chapter 711, Florida Statutes. Then, by resolution, the members would approve and adopt the pay on death instructions and then amend their schedule A to include the pay on death instructions. Each member can make pay on death beneficiary designations. The designation has no effect on the member's ownership. The member or all the surviving members can change or cancel the beneficiary designation at any time without the consent of the beneficiary. See Fla. Stat. § 711.506, Florida Statutes. If the property is encumbered by debt, the members should consider and weigh the issue of doc stamps, but transferring property by creating an LLC and adopting pay on death instructions is a practical and inexpensive way of preventing the hazards of heir property and minimizing the need for probate.

Powers of Attorney: Knowledge Is Power

By Lian de la Riva, Esq., Palmer, Palmer and Mangiero, Miami, Florida

In the digital age, while we have the ability to execute real estate documents or transfer large sums of money with a few clicks and e-signatures on our electronic devices, the ceremonious signings to effectuate the final step in a transfer of real property seem cumbersome and dated to many of our clients. Real property practitioners can accommodate an absent client by utilizing a common estate planning document. The Power of Attorney (POA) is a powerful and intricately designed document, which, when drafted and implemented correctly, allows a closing to occur despite an absent client.

If your client is unwilling or unable to attend the closing of a real estate transaction, then proper planning must occur to ensure the closing is successful. Practitioners can utilize the revisions made to Chapter 709, Florida Statutes in October of 2011 to accommodate their client's desires. The Florida Power of Attorney Act (FPOAA) was purposefully enacted to bring Florida's POA laws more in line with the Uniform Power of Attorney Act (UPOAA). The UPOAA, which has been enacted in twenty-six (26) states, was drafted by the Uniform Law Commissioners to provide a simpler way for people to deal with their property and promote flexibility between states.

The following are some instances involving the use of a POA in real estate transactions and practical advice to ensure that the use of a POA does not postpone the closing or completely unravel the contract.

New is always better!

Due to the great potential for fraud in real estate transactions, title companies are often cautious of POAs, and rightfully so. Drafting a new, limited POA, with specific terms detailing the pending real estate transaction, is the best practice. Furthermore, the client should be advised to name a proper attorney-in-fact (AIF). A client may want to grant authority under the limited POA to their realtor. However, under Florida law, the AIF may not be any person with a financial interest in the transaction. Title companies often permit limited POAs if they are approved by the lender and they meet the underwriting guidelines. When planning to use a limited POA at closing, the practitioner should consult with the title company about the particular requirements needed for the pending transaction as soon as possible to ensure a smooth closing. Many times, a title company will request to speak to the client to ensure the POA was indeed signed by them and has not been revoked since.

Incapacity is not a deal-breaker.

In the event that the client has already become incapacitated, therefore making the execution of a new limited POA impossible, you must utilize the old POA. First, you must review the POA to ensure it conforms to the FPOAA and grants the AIF the authority to convey real property. The title company may require verification from the client's treating physician, by way of an affidavit, that the client was competent at the time the POA was signed and verification that the client is still alive. Title companies will need to ascertain whether the AIF's authority has been suspended or challenged through judicial proceedings. The AIF will also need to execute an affidavit declaring no such proceedings have occurred. If the old POA does not conform to the FPOAA and grant the AIF the authority to convey real property, then a petition for determination of incapacity and appointment of a guardian must be brought before the court. The best practice is to establish the client's incapacity and have a guardian appointed prior to entering into any contract (for listing or sale), since court approval is necessary. If you are not familiar with the guardianship court requirements, you should consult a practitioner experienced in that area to avoid any delays or mishaps. In both situations, consultation with the title company and other parties is critical to ensure a successful transaction.

Out-of-state, but not out of luck!

In Florida, out-of-state POAs are commonly used by seasonal residents. Practitioners must evaluate an out-of-state POA in two respects: validity and permission. An out-of-state POA will be deemed valid under the FPOAA so long as it satisfies certain requirements under the Act. A practitioner should immediately determine if the out-of-state POA is valid by carefully reviewing the signatures of the client, witnesses and notary to ensure the execution complies with the requirements under Florida law. If the execution does not comply with Florida law requirements, the practitioner must check if the execution complies with the laws of the state in which the execution took place. Once the validity of the out-of-state POA is established, the practitioner must determine if the AIF

continued, page 43

Eleventh Annual Construction Law Institute Set for March 8-10, 2018

On March 8-10, 2018, the Eleventh Annual Construction Law Institute will be held at the JW Marriott, Orlando, Florida. In addition to advanced level seminars, the event will include a golf tournament on Thursday, March 8th, and evening receptions on March 8th and March 9th. Over 400 Construction Lawyers and Industry Professionals attended the 2017 Institute and we expect more in 2018. This year's Construction Law Institute is sure to be an interesting event you will not want to miss!

Thank the sponsors listed below for their commitment to the Eleventh Annual Construction Law Institute.

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For more information regarding sponsorship opportunities or attendance, please contact Mary Ann Obos at the Florida Bar at (850) 561-5626.

Practice Corner: Powers Of Attorney: Knowledge Is Power, *from page 42*

is permitted to engage in real property transactions. Specific language allowing the conveyance of real property must be explicitly stated. If this language is not present, a new POA or guardianship may be necessary. Lastly, when recording an out-of-state POA, a practitioner should reverse the recordation order of the deed and POA pursuant to Standard 16.4 of the Uniform Title Standards for the Real Property, Probate and Trust Law Section. The deed should be recorded first, followed by the out-of-state POA.

Trust your Trustee.

If a property is owned by a trust, under Florida law, trustees cannot typically use a POA since they cannot delegate their fiduciary duty under a POA. However, if the trust agreement grants to the trustee the special authority to delegate his/her power to sell property, a POA is permitted. A practitioner should be prepared to make the trust agreement available for review by the title company.

Probate And Trust Case Summaries

Prepared by Daniel L. McDermott – Adrian Philip Thomas, P.A., Fort Lauderdale, Florida

The Supreme Court of Florida held that where a Ward's right to contract has been removed under Fla. Stat. § 744.3215(2)(a), the ward is not required to obtain court approval prior to exercising the right to marry; however, court approval is necessary before such a marriage can be given legal effect.

Smith v. Smith, 42 Fla. L. Weekly S773a (Fla. 2017)

In April of 2010, J. Alan Smith (the "Ward") was determined to be partially incapacitated after sustaining head trauma in an automobile accident. Consequently, the Ward's right to contract and his right to manage property were removed and delegated to John Cramer (the "Limited Guardian"), who was appointed limited guardian of property of the Ward. The court specifically found there was "no incapacity on the part of [the Ward] that would warrant a guardian of a person."

It is undisputed that the Ward met and became engaged to Glenda Martinez Smith ("Glenda") before the Ward was deemed incapacitated. In December of 2011, and subsequent to the Ward having his right to contract and his right to manage property removed, Glenda and the Ward were married, but court approval was not obtained prior to the marriage ceremony. Pursuant to Fla. Stat. § 744.3215(2)(a), if a ward's right to contract is delegated to a guardian, then the ward must seek court approval of a marriage for that marriage to be legally valid. Here, Glenda requested that the Limited Guardian seek court approval, but the Limited Guardian refused.

In early 2013, the Ward's court-appointed counsel ("CAC") filed a petition for annulment based solely on the assertion that the marriage was void because court approval had not been obtained prior to the act of marriage. Glenda then moved to ratify the marriage and the Ward's CAC moved for summary judgment. After a hearing, the court denied Glenda's motion to ratify the marriage and granted the motion for summary judgment filed by the Ward's CAC. The trial court reasoned that Fla. Stat.§ 744.3215(2)(a) requires prior court approval because the "statute does not contemplate the right to ratify or somehow prove an existing marriage," and because neither the Ward nor Glenda obtained court approval before marrying, their marriage was void and incapable of ratification.

Glenda appealed the final judgment of annulment, arguing that neither the statute nor the order that removed the Ward's right to contract explicitly required *prior* court approval, and as such, the marriage could be ratified by obtaining approval after the marriage was solemnized. Glenda also argued that such approval had been obtained during a December 2012 hearing. The Fourth District Court of Appeal ultimately agreed with the trial court's rationale and rejected Glenda's assertions before affirming the trial court's decision. The Fourth DCA explained that, because a "marriage entered into by a person with no right to marry is void ... it follows that in order to enter into a valid marriage, an incapacitated person who has had his or her right to contract removed must first ask the court to approve his or her right to marry," before holding that "the trial court correctly determined that the marriage was void." Moreover, the district court concluded that because the marriage was void from the inception, Glenda's argument that "the court 'ratified' the marriage by acknowledging it at the December 18, 2012 hearing is without merit." The court explained its rationale that "[a] void marriage, in legal contemplation, has never existed and, therefore, cannot be ratified."

After the Fourth DCA issued its decision, Glenda filed a motion to certify a question of great public importance, which the Supreme Court of Florida granted. The certified question asked whether the failure to obtain court approval pursuant to Fla. Stat. § 744.3215(2)(a) renders a ward's marriage "void" or "voidable." The Supreme Court of Florida effectively answered "neither" to the foregoing question, holding that a ward "is not required to obtain court approval prior to exercising the right to marry, but court approval is necessary before such a marriage can be given legal effect." To resolve the certified question, the court undertook a deep analysis of the meaning of the terms "void" and "voidable" as traditionally defined by Florida precedent in the context of marriage. As a result, the Court concluded that the "plain language of section 744.3215(2)(a) reflects that the Legislature did not intend for the type of invalid marriage at issue in this case to be classified as either void or voidable according to how these terms have been defined under Florida precedent." The Court explained the rationale it used in reaching the forgoing conclusion as follows: "[t]he disputed provision does not use the terms 'void' or 'voidable,' nor does it use language that embodies the traditional definitions of these terms." In light of the forgoing, the Supreme Court of Florida determined that the issue presented was not actually whether the marriage of a ward who failed to obtain court approval of such marriage is "void" or "voidable," but rather whether an invalid marriage of a ward can become valid subsequent to the marriage ceremony.

The Court explained that Fla. Stat. § 744.3215(2)(a) makes a ward's "right to marry" contingent on court approval if the right to contract has been removed. Thus, the ability of a ward who has lost the right to contract to enter into a valid marriage

continued, page 45

depends on court approval, and if the right to marry is not approved, any attempt by the ward to marry would result in an invalid marriage. However, as used in the context of Fla. Stat. § 744.3215(2)(a), "the right to marry is subject to court approval" means that the ward's right to marry is contingent on court approval, but that approval may come later in time, such as after the marriage ceremony. After interpreting the plain language of the statute, the Court noted that "[a]lthough the validity of the marriage itself depends on court approval, nowhere in the statute does it provide that court approval must be obtained prior to marrying." In other words, while court approval is required for a "valid marriage," court approval is not a condition precedent and such approval may be obtained subsequent to the marriage.

The Court also explained that an "invalid marriage" is distinct from a "void marriage" because an "invalid marriage" may be subject to ratification, thus making the marriage valid, whereas a "void marriage" cannot be ratified. Similarly, the Court explained that "the plain language of section 744.3215(2)(a) is likewise inconsistent with the traditional meaning of a "voidable marriage," which is "good for every purpose" until it is challenged, and "good ab initio" if it is not challenged within the parties' lifetimes. The statute at issue, however, makes a ward's "right to marry" contingent on court approval if the right to contract has been removed, so the ward's ability to enter into a "valid marriage" depends on court approval and "if the right to marry is not approved, any attempt by the ward to marry would result in an invalid marriage." Thus, the Court explained that unlike the traditional meaning of a "voidable marriage," which is "good for every purpose" until it is challenged, if ever, if court approval is never obtained in the context of section 744.3215(2)(a) "the invalidity of the marriage cannot be cured, and the marriage can be given no effect."

After undertaking the forgoing analysis, the Court concluded that that the Legislature did not intend for the concept of a "void" or "voidable" marriage to apply to the disputed provision of section 744.3215. Thus, the Court held that "section 744.3215(2)(a) does not preclude the possibility of ratification of a marriage if the court subsequently gives its approval, but an unapproved marriage is invalid and can be given legal effect only if court approval is obtained." In short, while an unapproved marriage obtained in the context of section 744.3215(2)(a) can be of no legal effect until court approval is obtained, it is also neither "void" nor "voidable" as those terms are traditionally used in the context of marriage.

The Court concluded its analysis, noting that the interpretation of Fla. Stat. § 744.3215(2)(a) that "the Legislature likely intended—that, absent court approval, a marriage entered into by a ward whose right to contract has been removed is invalid, but ratifiable—advances both objectives of the Florida Guardianship Laws." The Court articulated these dual objectives as follows: (1) to protect the ward and the ward's estate "by allowing a court to assess the risk of abuse and exploitation before the alleged spouse acquires any rights as a result of the marriage"; and (2) upholding "the ward's fundamental right to marry to the greatest extent possible by allowing for the possibility of ratification."

While the Court ultimately disagreed with Glenda's argument that the marriage had, in fact, been ratified, it also found that the parties are not foreclosed from seeking court approval based on its decision. Therefore, the Court quashed the decision of the Fourth DCA and remanded to the circuit court.

Having filed a notice and request for copies under probate rule 5.060 and being an active participant in guardianship proceedings does not necessarily entitle him to participate in the proceedings involving requests for attorney's fees by the ward's attorney, as the court must still consider the nature of the proceedings, which the probate court properly did.

Hernandez v. Hernandez, 42 Fla. L. Weekly D1969b (Fla. 3d DCA 2017)

Antonio Hernandez, a son of Elena Hernandez (the "Ward"), appealed a trial court order determining he was not an interested person with standing to contest attorney's fees and costs in the guardianship of his mother. A plenary guardianship was established for the Ward after her other son, Eusebio, filed a petition to determine incapacity. The court determined the Ward completely incapacitated, and the court appointed Eusbeio as plenary guardian. Following the appointment, Eusebio sought and obtained court authority to file an ejectment action against Antonio, Antonio's wife and Antonio's son, and also to file suit against them for undue influence, among other causes of action. The undue influence case included an allegation that Antonio and his family transferred $240,000 of the Ward's assets to Antonio's son, most of which was then used to purchase real property in Antonio's wife's name.

Once the guardianship was established, Eusebio moved the Ward to an Assisted Living Facility (ALF) and petitioned the court to sell the Ward's homestead. Antonio objected and wanted the Ward moved back into her home, despite the improvement in her medical condition once living at the ALF. Eusebio also sought court approval on numerous occasions for the payment of attorney's fees for the attorneys handling the litigation, which the court approved without notice to Antonio. Antonio moved to set aside the fee orders, but the trial court denied the relief, holding that Antonio was not an "interested person" within the definition of Fla. Stat. § 731.201(23).

Despite Antonio's participation in the proceeding, the Third District Court of Appeals affirmed the trial court's finding that Antonio was not an interested person. The Third District Court of Appeal relied on *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006), in which the Supreme Court of Florida

continued, page 46

concluded that a determination of who is an interested person in a given proceeding will "vary from time to time and must be determined according to the particular purpose of, and the matter involved in, any proceedings." Antonio argued that he was an interested person, as he was an active participant in the proceedings, and filed a notice and request for copies under Florida Probate Rule 5.060. However, the Third District Court of Appeal found that Antonio's involvement was necessitated by his alleged mistreatment of the Ward and misappropriation of her funds, and he therefore was not an interested person in the attorney's fees proceeding. The court noted that, as the Florida Supreme Court held in *Hayes*, there must be a balance between carefully scrutinizing fee petitions and ensuring they are not subject to endless challenge by those only seeking to protect their future inheritance. Here, the court found the balance was met and there was no error by the trial court judge in finding that Antonio lacked standing.

The Court held that the probate court's "inherent jurisdiction" extends to trust matters. Thus, where trustee's conceded failure to file timely and accurate accountings with the beneficiaries was a breach of duty to the beneficiaries, and the beneficiary's pleadings clearly apprised him of the claims against him and relief sought, freezing of the trust assets was a proper remedy.

Landau v. Landau, 42 Fla. L. Weekly D2026A (Fla. 3d DCA 2017)

David Landau ("David") appealed a trial court order freezing the assets of the trust of his late-wife, Flois Landau ("Flois"), under which he was serving as trustee. He was also serving as personal representative of Flois's estate. Susan Landau ("Susan"), one of Flois's daughters and a residuary trust beneficiary, moved to freeze the trust assets upon receipt of an unsigned trust accounting that raised concerns regarding David's actions as trustee and the status of the estate and trust assets.

Susan first filed a complaint to compel trust accountings, which led to David providing the unsigned trust accounting. The accounting was apparently missing assets valued at approximately $1,000,000, so Susan amended her complaint to include breach actions, removal as trustee and a temporary injunction. The court noted that in February 2017, a hearing was held and the trial court judge deferred on an injunction or removal, graciously giving David time to comply with Florida Statutes. Nonetheless, at a continued hearing in May 2017, David still had not served a 2016 accounting, fixed the 2015 accounting, or filed tax returns for 2015 or 2016. The trial court therefore ordered the trust assets frozen until David completed and filed the 2016 accounting. David appealed.

The Third District Court of Appeal affirmed the trial court decision freezing assets, indicating that the "probate court's inherent jurisdiction to protect the assets under its supervision is well established." *See In re Estate of Barsanti*, 773 So. 2d 1206, 1208 (Fla. 3d DCA 2000); *Estate of Conger v. Conger*, 414 So. 2d 230 (Fla. 3d DCA 1982). The Third District Court of Appeal specifically rejected David's arguments that freezing trust assets violated due process and applicable rules, and extended the holdings in *Barsanti* and *Conger* to trust matters.

Testamentary aspects of a revocable trust are invalid unless the trust document is executed by the settlor with the same formalities as are required for execution of a will, and reformation is unavailable to remedy error in execution of a revocable trust amendment lacking the requisite formalities. Moreover, the imposition of constructive trust is not appropriate where there was an error in execution of the revocable trust at issue.

Falkenthal v. Mors-Kotrba, 42 Fla. L. Weekly D1133a (Fla. 2d DCA 2017)

Ralph Falkenthal ("Falkenthal") created a revocable trust while residing in Illinois. He later moved to Florida and, while residing in Florida, separately executed two amendments to the trust, prepared by his Illinois attorney. Both amendments were executed in the presence of two witnesses but were only signed by one of the witnesses. The second amendment devised real property to Donna Lindenau ("Lindenau"). Falkenthal died and his daughter, Judy Mors-Kotrba, as successor trustee of the trust, filed a declaratory action seeking to determine the validity of the amendments. Lindenau filed a counterclaim, which she later amended, seeking to reform the trust to correct a mistake, arguing that the error in not having two witnesses sign the second amendment was a mistake of law.

Falkenthal's other children filed a motion for summary judgment, taking the position that the amendments were invalid, as they were not executed in compliance with Florida law. The trial court denied the motion for summary judgment, held a trial, and ultimately granted the reformation action. Falkenthal's other children appealed.

The Second District Court of appeal reversed, holding that reformation is not an appropriate remedy despite the parties agreement that the decedent's clear intention was to leave the real property to Lindenau. Specifically, the court found that Fla. Stat. § 736.0415 provides that a trust can be reformed "to conform . . . to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." However, Lindenau was not seeking reformation of the terms of the trust, but instead seeking to remedy an error in execution, and therefore the relief did not fall under Fla. Stat. § 736.0415. Lindenau also sought the imposition of a constructive trust under the Tipsy Coachman doctrine, but the court held that a constructive trust is not available where there is an error in the execution of the document.

Real Property Case Summaries

Prepared by Jacqueline J. Peregrin, Esq., Peregrin Law Firm, PA, Naples, Florida

Where loan documents state that Florida law shall apply to a foreclosure, the claim for deficiency on the underlying note is also controlled by Florida law as a continuation of the foreclosure, even when loan documents state the subject note is governed by the laws of another state.

Bonita Real Estate Partners, LLC v. SLF IV Lending, L.P., Case No. 2D15-5492 (Fla. 2d DCA 2017)

In 2011, Appellants Bonita Real Estate Partners, LLC and Alico Retail Holdings, LLC (the "Borrowers") executed a promissory note and a mortgage for $6,100,000.00 from SLF IV Lending, LP, a Texas-based firm (the "Lender"), to develop property in Lee County. The loan documents stated that they would be controlled by Texas law, but "the laws of the state where the property is located (if different from the state of Texas) shall govern the creation, perfection, priority, and foreclosure of the liens created by the mortgage on the property or any interest therein." The Borrowers defaulted, and the Lender filed a foreclosure action in Florida circuit court against the Borrowers.

The trial court granted the foreclosure and sale of the property, which the Lender purchased for $91,000. The Lender later commenced a claim for deficiency on the note, asserting that Texas law applied under the language of the loan documents. The loan documents also included the Borrowers' waiver of their right under Texas law to offset the fair market value of the property against the indebtedness to the Lender in the deficiency determination. The trial court ruled that Texas law applied to the deficiency proceeding and decreed a final judgment in favor of the Lender in excess of $8,000,000.

The Borrowers appealed, asserting that a claim for deficiency is a continuation of a claim for foreclosure such that the Borrowers should be permitted to produce evidence of fair market value to offset the deficiency under the note as provided under Florida law.

In the opinion, the Second District Court of Appeal noted Section 702.06, Fla. Stat., with respect to the Lender's motion for deficiency in the case. The statute authorizes the trial court to enter a decree of deficiency in "all suits for the foreclosure of mortgages." Citing to *L.A.D. Prop. Ventures, Inc v. First Bank*, 19 So. 3d 1126, 1127 (Fla. 2d DCA 2009), the court stated that while a judgment of foreclosure is a final order, "the law contemplates the continuance of the proceedings for entry of a deficiency judgment." The Lender obtained a determination of deficiency in the same underlying foreclosure suit, thus, it was clear that "[t]he motion for deficiency was a continuance of the foreclosure proceedings," and "part in parcel to the foreclosure." Id. The Second District Court of Appeal overturned the trial court's ruling stating that if the loan documents state that Florida law governs the foreclosure, it must also govern the Lender's claim for deficiency.

The Doctrine of Caveat Emptor or "buyer beware" stands in commercial transactions where a Seller/Lender does not have a fiduciary duty to a Buyer, employs an artifice or trick, prevents the Buyer from learning facts, or undertakes to disclose facts but fails to disclose all facts.

Transcapital Bank v. Shadowbrook at Vero, LLC, Case No. 4D14-4650 (Fla. 4th DCA 2017)

Appellee, Shawdowbrook at Vero, LLC (the "Buyer") purchased 123 of 164 condominium units in a project from Apellant Transcapital Bank (the "Seller") for $10,934,700. As part of the transaction, the Buyer, represented by its principal John Naimi, agreed to assume the prior owner's loans on the units secured by a mortgage held by the Seller. Naimi gave the Seller a personal guaranty as a part of the deal. In addition to the mortgage, the Buyer borrowed an additional $700,000 line of credit from the Seller with an intention to renovate the units and pay back the loan. After closing, the Buyer began to renovate the units and ran out of money. Naimi borrowed an additional $400,000 from the Seller.

The Buyer and Naimi both defaulted on the loans and sued the Seller for fraud and breach of fiduciary duty due to the seller/lender relationship with the Buyer, amongst other claims. The Buyer's fraud claim stated that the Buyer was deceived about the value of the property and misled about the existence of an appraisal purportedly overvaluing the units. The Seller counterclaimed to foreclose the mortgages and collect against the personal guaranty.

At trial, Naimi testified that he had been in the real estate business for some years and had previously taken out loans from the Seller. He stated that the Seller made him aware of this condominium investment project. Naimi testified that he had an opportunity to inspect all the Seller's units prior to closing and consult with professionals regarding the purchase. He inspected only a few units and described some as "okay" and stated others were in "horrible condition" and uninhabitable.

Naimi testified that on the day before the closing, the Lender's representative pointed to a document and stated that the property had appraised for $14.8 million. Though

continued, page 48

represented by counsel for the closing, Naimi was never given a copy of an appraisal, never ordered an appraisal, and closed the transaction. Naimi admitted that he was provided with a copy of notes for the prior owner's purchase of all 164 condominium units totaling $14.8 million. The notes were attached to the purchase agreement Naimi signed at closing when purchasing 123 units.

The jury found that the Seller did not owe the Buyer a fiduciary duty, and returned a mixed verdict related to the fraud claim—the Seller committed fraud, but the Buyer released the claim.

The Seller renewed its motion for a directed verdict on the fraud claim arguing that the representations of property value are considered "opinion" and thus are not representations of material fact necessary to support a fraud claim. The Seller further argued that absent evidence that the Seller prevented the Buyer from examining the property, the fraud claim could not stand under the Doctrine of Caveat Emptor or "buyer beware" rule. The trial court denied the motion.

On appeal, the Fourth District Court of Appeal reversed the trial court's decision and found in favor of the Seller. The court reasoned that as a commercial transaction, this purchase falls under the common law "buyer beware" principle. Citing to *Turnberry Corp. v. Bellini*, 962 So. 2d 1006, 1007 (Fla. 3rd DCA 2007), the Caveat Emptor Doctrine "places the duty to examine and judge the value and condition of the property solely on the buyer and protects the seller from liability for any defects." The Buyer testified that he had every opportunity to retain professionals and inspect the property to make his own determination of value, but he performed only a limited inspection. He did not receive an appraisal, nor did he order one.

The court noted exceptions to the Caveat Emptor Doctrine: "1) where some artifice or trick has been employed to prevent the purchaser from making an independent inquiry; 2) where the other party does not have equal opportunity to become apprised of the fact; and, 3) where a party undertakes to disclose facts and fails to disclose the whole truth." *Green Acres, Inc. v. First Union Nat'l Bank of Fla.*, 637 So. 2d 363, 364 (Fla. 4th DCA 1994), and a fourth exception, when a seller has a fiduciary duty to a buyer and breaches that duty, *Glass v. Craig*, 83 Fla. 408, 91 So. 332, 335 (1922).

The court stated that the facts presented at trial regarding the Buyer's ability to further inspect the property and failure to seek appraisals did not evidence a trick, lack of an opportunity to discover facts, or the Seller's failure to disclose the whole truth. The court further stated that attachment of the notes for the original loan of $14.8 million on the 164 units did not amount to a misrepresentation of the value of the 123 units purchased in that agreement by the Buyer. As the jury found that there was no fiduciary relationship between the Buyer and Seller, the court did not find an applicable exception under the Caveat Emptor Doctrine and ruled in favor of the Appellant Seller.

A subsequent purchaser is on constructive notice of and bound by an unrecorded agreement when there is a recorded memorandum of agreement in the title record that refers to an unrecorded agreement which states that the unrecorded agreement is binding on subsequent owners of the subject property.

AHF-Bay Fund, LLC v. City of Largo, Florida, Case No. 2D14-408 (Fla. 2d DCA 2017)

Appellant AHF Bay Fund, LLC, ("AHF") a non-profit affordable housing provider, acquired a property in the City of Largo from RHF-Brittany Bay ("RHF"), also a non-profit affordable housing provider. RHF had acquired the property 5 years prior, and, in order to fund the affordable housing project, negotiated the City of Largo's issuance of low-interest, tax exempt bonds in exchange for a "PILOT" agreement. A PILOT agreement requires an otherwise tax-exempt entity to make "payments in lieu of taxes" to a local government. The PILOT agreement between RHF and the City of Largo stated that it was binding on subsequent owners of the property, but was not recorded in the public records.

At the time of execution of the PILOT agreement, RHF and the City of Largo executed a memorandum of agreement stating that the PILOT agreement imposed covenants running with the land and was available for review at the City clerk's office. The memorandum was properly recorded in the official public records and included a legal description of the property.

After purchasing the property, AHF never made a payment in accordance with the PILOT agreement. AHF denied knowledge of the PILOT agreement and the memorandum of agreement, as it did not appear in the title search of the property. The City of Largo filed suit for the payments and was awarded $685,158.23.

AHF appealed arguing that 1) the PILOT agreement was not a covenant running with the land, and 2) the agreement between the City of Largo and a non-profit was void on the grounds of being "clearly injurious to the public good" as matter of public policy concerning non-profit entity tax exemptions.

In March 2017, the Florida Supreme Court addressed the second question of whether the PILOT agreement offended public policy by requiring payments from a non-profit entity to the City. The Court found that RHF made a voluntary decision to subject itself to payments despite its tax-exempt status in order to fund the project. Under this agreement, the City provided low interest bonds for the project, thus this agreement was not an abuse of the City's taxation power. The PILOT agreement was ruled valid and enforceable, and the matter was remanded to the Second District for further determination on the question

continued, page 49

of whether the PILOT agreement was a covenant running with the land.

The Second District Court found that AHF was bound by the PILOT agreement whether or not the agreement was a covenant running with the land. AHF had constructive notice of the PILOT agreement due to a specific reference to the PILOT agreement in the properly recorded memorandum of agreement. Quoting case law, the court noted "constructive notice is a legal reference, and it is imputed to . . . subsequent purchasers by virtue of any document filed in the public records" *Dunn v. Stack*, 418 So. 2d 345, 341 (Fla. 2d DCA 1982).

An unobstructed lake view is a common law littoral right of a property owner.

HagertySmith, LLC v. Gerlander, Case No. 5D16-3655 (Fla. 5th DCA 2017)

Appellant HagertySmith, LLC owned lakefront property on Lake Tibet Butler in Orange County. Appellees Timothy and Christine Gerlander owned the adjacent property and constructed a walkway and dock that encroached upon the view of the lake from the HagertySmith property. When HagertySmith sold its lakefront property, the sales price was lower than anticipated, due to the obstructed lake view. Appellant sued the Gerlanders for the difference between the sales price of the lakefront property with the obstructed view and the fair market value of the property without the extended walkway and dock.

The Fifth District Court of Appeal ruled in favor of HagertySmith stating that waterfront owners have "several special common law littoral rights, including the right to an unobstructed view of the lake." The court referenced *Walton Cty. v. Stop the Beach Renourishment, Inc.,* 998 So. 2d 1102, 1111 (Fla. 2008), which refers to littoral rights as common law negative easements. While private property littoral rights may be regulated by law, they cannot be taken without just compensation or due process of law.

State Tax Case Summaries

Prepared by Barbara Landau, Esq. Associate Professor of Taxation at Nova Southeastern University, Ft. Lauderdale, Florida

Third DCA holds that sublessee is not the "equitable owner" and is not subject to the County ad valorem taxes on underlying property owned by County where 90-year master lease is not perpetually renewable on the same terms and conditions.

Garcia v. Dadeland Station Associates, Ltd., 218 So. 3d 474 (Fla. 3d DCA 2017)

Dadeland Station Associates, Ltd. (Dadeland) leased real estate from Miami-Dade County (which was Dade County at the start of the lease) (the "County") under a 90-year lease. Dadeland made improvements to the property and the improvements were taxed by the County. The County taxed Dadeland not only on the improvements, but on the underlying real estate by claiming that Dadeland was the "equitable owner" under the 90-year lease. Dadeland contested the assessment as "equitable owner," and the trial court found for the County, holding that Dadeland was responsible for the ad valorem taxes. Dadeland appealed.

The Third District Court of Appeal noted that the ability of the County to impose the tax would require a conclusion that Dadeland was the "equitable owner" of the underlying land within the meaning of *Accardo v. Brown*, 139 So. 3d 848 (Fla. 2014). In *Accardo*, the Florida Supreme Court held that a lessee's interest under a lease that is "perpetually renewable" subject to like terms and conditions is the equivalent of a lessee's interest under a lease that is for a term of years with an option to purchase for a nominal amount upon lease termination. Under these circumstances, the leasehold interest constitutes equitable ownership.

Applying *Accardo*, the 3rd DCA reversed the trial court and determined that the lease of land in question "lack[ed] the indicia of ownership required by *Accardo* and *Island Resorts Investment, Inc. v. Jones*, 189 So. 3d 917 (Fla. 1st DCA 2016) (*Island Resorts* was a case that was discussed in the Fall 2017 ActionLine State Tax Case Summaries). Specifically, the 3rd DCA held that there was no equitable ownership since Dadeland did not have the right to perpetually renew the lease or the right to buy the property for a nominal amount at the end of the lease.

Sublessee condominium unit owners are not the "equitable owners" and are not subject to the ad valorem taxes assessed by County on underlying property owned by County where 99-year master lease from County is not perpetually renewable on the same terms and conditions.

Beach Club Towers Homeowner's Association, Inc. v. Jones, 2017 WL 4526773 (Fla. 1st DCA 2017)

Beach Club Towers is a condominium located on Santa Rosa Island, constructed on real estate leased from Escambia County by way of several subleases to Beach Club Towers Development, Inc. The main lease from Escambia County is for a term of 99 years (the master lease). Each condominium owner is a sublessee subject to the master lease. The master lease could be renewed "for an additional ninety-nine (99) years, terms and conditions to be renegotiated at such time."

The Escambia County Property Appraiser and the Tax Collector sought to assess and collect ad valorem taxes from each condominium unit owner based on each condominium owner's subleasehold interest, claiming that each unit owner was the equitable owner of the underlying leased real estate. The basis for the claims against the unit owners was the *Accardo* decision discussed above. The claims were upheld by the trial court on cross-motions for summary judgment.

The First District Court of Appeals reversed the trial court. In rejecting reliance upon the *Accardo* decision, the 1st DCA reasoned that the basis for the Florida Supreme Court's decision in *Accardo* was that the lessee could automatically renew its 99-year lease. In this case, the 99-year lease could not be renewed automatically. As a result, the 1st DCA held that *Accardo* did not apply and therefore there was no real estate equitably owned by the unit owners. As in *Islands Resorts*, the lease was not perpetually renewable and ad valorem tax could not be imposed on the sublessees with respect to the underlying land. The 1st DCA concluded, as did the 3rd DCA in *Garcia*, that the County's interpretation of *Accardo* "overreached."

Note: On the strength of its decision in this case, the 1st DCA, in a brief per curiam decision, reversed and remanded *Portofino Tower One Association at Pensacola v. Jones,* 2017 WL 4526770.

Stormwater utility user fee was properly assessed where property owners contributed to the need for, and benefitted from, the utility, and the user fee bore a reasonable relationship to the benefits conferred upon the property owner.

City of Key West v. Key West Golf Club Homeowners' Association, Inc., 2017 WL 235019 (Fla. 3d DCA 2017)

The City of Key West (the City) assessed stormwater utility fees against Key West Golf Club, LLC, Key West Golf Club Homeowners' Association, and Key West HMA, LLC

continued, page 51

(collectively, the Homeowners' Association). The assessment was challenged and the trial court, after a bench trial, ruled in favor of Homeowners' Association, thereby exempting them from future stormwater utility fees. The trial court's ruling was based on a finding that Homeowners' Association was either a "non-user or minimal user of the stormwater utility."

The 3rd DCA reversed the trial court, noting first that a stormwater utility fee is a user fee that is voluntary on the part of property owners. Citing *City of Gainesville v. State,* 863 So. 2d 138, 146 (Fla. 2003), the 3rd DCA pointed out that the fee can be avoided by a property owner refraining from developing its property or by creating a system to keep stormwater on the particular site. Neither option was present in this particular case.

The 3rd DCA raised two questions that, if answered in the affirmative, would require the conclusion that the stormwater utility fee was properly assessed. The first question was whether the properties in issue could be subject to any stormwater utility fee. The second question was whether the "fee bear[s] a reasonable relationship to the benefits conferred" upon the property owner.

In answering the first question, the 3rd DCA noted that, in order to be subject to the utility fee, a property owner must have contributed to the need for the utility and benefitted from the utility. In answering "yes" to the first question, the 3rd DCA cited undisputed testimony that without Key West's stormwater infrastructure, stormwater discharged from Homeowners' Association's properties would back up and flood the property. As to the second question, the 3rd DCA observed that the city "was well within its discretion to calculate stormwater utility fees as done here."

continued, page 52

Special Assessment ordinance withstands challenge to the fairness and method of apportionment of the assessment where affected property owners failed to challenge the ordinance within the time period set forth in the ordinance.

City of Cooper City v. Joliff, 2017 WL 4280600 (Fla. 4th DCA 2017)

Cooper City passed a special assessment ordinance. The ordinance contained a 20-day challenge clause. Certain affected property owners challenged the special assessment long after the 20-day challenge period expired. The trial court held that the special assessment was void.

On appeal, the Fourth District Court of Appeal carefully explained the difference between a tax and a special assessment. The 4th DCA found that the Cooper City ordinance was an assessment. If the assessment was void, the 20-day period in which to challenge the ordinance would not apply, nor would any other statute of limitations be a defense to the challenge. However, if the assessment was merely voidable, the challenge would have been too late. The 4th DCA concluded that the assessment was voidable, not void, as it was a challenge to the method and fairness of apportionment, not a challenge to the assessment's validity. (The property owners had withdrawn their challenge as to the validity of the assessment itself). Therefore, the property owners were barred by failing to institute suit within the 20-day challenge period contained in the ordinance. In reversing the decision of the trial court, the 4th DCA quoted from *Hackney v. McKenney*, 151 So. 524, 528 (Fla. 1933) where the Florida Supreme Court "held that an assessment that is lawfully issued, but that is irregular or unfair, is merely voidable," and "the taxpayer must move in due time."

In a case involving federal low income tax credit funding and a bid protest by another applicant, the 1st DCA concluded that construction company applicant could keep its place on the eligibility list.

Brownsville Manor, LLC v. Redding Development Partners, LLC, 2017 WL 3584751 (Fla. 1st DCA 2017)

This case is centered on a construction company's initial qualification for federal low income tax credit funding involving points awarded and a lottery by the Florida Housing Finance Corporation (Florida Housing). Brownsville Manor, LLC (Brownsville) appeared to qualify for low-income tax credit funding. However, Brownsville's position was challenged by Redding Development Partners, LLC (Redding). If Redding could disqualify Brownsville, Redding would take Brownsville's place higher up on the funding list.

At a hearing conducted under the auspices of the Florida Housing Finance Corporation, the administrative law judge determined that Brownsville was not qualified. Florida Housing adopted the recommended order of the administrative law judge, and Brownsville appealed the final order entered by Florida Housing. The 1st DCA's review of this final agency action arising from a bid protest is "controlled by Fla. Stat. §120.68(7)." The statute allows the reviewing tribunal to remand or set aside agency action if the action is not supported by competent, substantial evidence, or based on the agency's incorrect interpretation of the law. Under the statute, *de novo* review of agency legal conclusions and findings of fact is conducted.

The 1st DCA reversed the agency, finding that the administrative law judge had imposed a qualification requirement on Brownsville contrary to the terms of Florida Housing's request for applications for the particular funding.

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What's Happening Within The Section...

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

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

2018 EXECUTIVE COUNCIL MEETINGS

FEBRUARY 21 - 24, 2018

Executive Council Meeting

Casa Monica Hotel, St. Augustine, FL
Room Rate: $225/ Deluxe King

MAY 31 – JUNE 3, 2018

Executive Council Meeting & Convention

Tradewinds Island Resort on St. Pete Beach, St. Pete Beach, Florida
Room Rate: $249; Tropical View Hotel Room Rate: $269*; Tropical View One Bedroom Suite: $319*

JULY 25 – 28, 2018

Executive Council Meeting & Legislative Update

The Breakers, Palm Beach, Florida
Room Rate: $225/ Deluxe King

SEPTEMBER 26 – 30, 2018

Out of State Executive Council Meeting

The Westin Excelsior, Rome, Rome, Italy (with pre-event in Florence, Italy – TBA)
Standard Room: Euro 325 Euro (single) Euro 335 (double) - includes Breakfast

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** To be added to the waitlist for this event, please email Whitney Kirk at wkirk@floridabar.org*
Be sure to include in the email the nights for which reservations are needed and your full contact information.

2018 CLE SCHEDULE:

Check the RPPTL Section website www.rpptl.org under the CLE tab's dropdown menu for topics, dates and locations for upcoming CLE seminars. Check The Florida Bar website www.floridabar.org/CLE for detailed information as it becomes available.

For the most up-to-date information on Section activities,
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PRACTICE CORNER:

Don't miss these short tips to assist in your practice. See page 41-43.

SAVE the DATE

For the **11th Annual Construction Law Institute March 8-10, 2018** at the JW Marriott Orlando Grande Lakes.

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has expanded its GTOs. For more information Go to www.rpptl.com.

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JUNE 1, 2018
Tradewinds Island Resort, St. Pete Beach

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