ActionLine

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

Establishment Of Lost Wills And Trusts

Bad Boy Clauses And Charities That Use Them

Florida Uniform Title Standards Adds Chapter On Easements

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An Open Invitation to Our Members

By William T. Hennessey, III, Section Chair, 2020-2021

Dear Friends,

As the sun begins to set on my year as Chair of the RPPTL Section, I'd like to take a moment to thank you for making this year special. It has been one of my greatest honors to steer this Section over the course of this last year. It certainly wasn't the year we had in mind. However, it has been particularly rewarding to watch so many of you in the Section step up and lead during this crisis and volunteer your time, knowledge, and resources, whether through the dozens of contributions to the COVID-19 webpage on our website (www.rpptl.org), the articles submitted to *ActionLine*, or the hours volunteered as part of our Front Line Heroes and Florida Attorneys Counseling on Evictions (FACE) Projects. You have made a difference in people's lives and made the Section proud.

I would be completely remiss if I didn't give special thanks to our Section Administrator, Mary Ann Obos, and our Program Coordinator, Hilary Stephens. One of the things that I have truly come to appreciate in the role of Chair is the exceptional work and dedication of these two wonderful ladies and friends. I know that many of you know them through their smiling faces running the Registration Desk at our meetings. However, until you are standing in these shoes as Chair, you have no earthly idea the amount of time, thought, and careful planning they put into each of our meetings. With multiple receptions and dinners, combined with the organization of meeting space and lodging, each meeting is akin to planning multiple destination weddings - trust me!

When we were forced to make the tough decision to go virtual for our Convention and Breakers' Meetings last summer, Mary Ann sprang into action to coordinate fully virtual experiences for our attendees. As we morphed into the fall, I watched, firsthand, her vision play out as we took the lead to offer hybrid Executive Council and committee meetings throughout the remainder of the year. I am not aware of any other groups who have been able to pull off fully interactive, large-scale live and virtual meetings with the same degree of success that we have over the past year. Mary Ann also led us to adopt a new interactive virtual platform that coordinates our desktops with our mobile devices for our Section meetings and allows everyone to seamlessly and easily communicate and access our Section content and meeting information. From our April Hammock Beach meeting, to the Construction Law Institute in May, the Convention in June, the Breakers meeting in July, and the ATO Conference in August, Mary Ann, Hilary, and our volunteers will have put on five (yep 5!) large hybrid meetings with multiple receptions and events for each meeting in an incredibly condensed period of time. This is an absolutely amazing feat under any circumstance; doing it during a pandemic is simply mind numbing. While handling all of these new duties, Mary Ann and Hilary also helped

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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:

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 Jeff Baskies at jeff.baskies@katzbaskies.com. Deadlines for all submissions are as follows:

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

ADVERTISING: For information on advertising, please contact Jason Ellison at jellison@elattorneys.com.

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Janellen Green, 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.

knock it out of the park with our Section CLEs. Our CLE chairs, Sancha Brennan and Wilhelmina Kightlinger, along with dozens of volunteers, worked tirelessly to offer a huge catalog of virtual CLE programming, making this year the most successful ever in terms of CLE attendance and revenue. Mary Ann and Hilary have their hands in every one of the presentations from marketing through production.

It has been remarkable to see the growth in Section participation through the use of technology. Attendance at our committee meetings and CLEs has ballooned during the pandemic as our Section members have taken advantage of the ease of "Zooming" into our meetings and presentations. It will be interesting to see whether this level of participation continues as we transition out of crisis and into a "new" normal. We have clearly adapted to the change in circumstances with Mary Ann and Hilary tugging us along. The Section is unquestionably stronger for it.

So, what does the future hold? My guess is that Zoom is here to stay for the near-term but we will begin to see an increase or flip in our numbers from mostly virtual to mostly in-person as the year wears on. One of the things that has become abundantly clear to me is that, although virtual meetings may allow us to conduct work together, they are no replacement for what makes this Section truly special. The RPPTL Section is a family that shares successes together and mourns losses together. Our strength is in the bonds and friendship we have between us. It was so wonderful to see so many smiling faces, in person, at our meetings in April in Hammock Beach. Every single person I spoke with shared how great it was to be able to get back together again and laugh with old friends. Remote attendance has certainly made it easier for people to participate; but, my guess is that many us long for that comradery that we share together and that comes from spending the weekend together. My sincere hope is that we will all be back together soon and that the "new" normal will look an awful lot like the one that we have always had.

With warmest and kindest regards, I am

Sincerely yours,
Bill

J. BASKIES

M. BEDKE

Letter From The Co-Editors-In-Chief

We are optimists. After a year and a half of dealing with the pandemic, we believe we are, to quote Gloria Estefan, "coming out of the dark." And, we are certainly pleased to provide you with another great issue of *ActionLine*. After a year of content heavily focused on issues arising out of COVID-19, we are excited to present a more traditional issue. Like our Section Chair, Bill Hennessy, we look forward to getting back together soon and hope the "new" normal is a lot like the "old" normal...while always progressing as a publication. We also hope the incredible growth in Section engagement and participation, resulting from COVID-19, continues. The Section is only as strong as *you* make it and *ActionLine* is only as good as the content you provide.

Providing practical information drives this magazine. William Slicker's piece on how attorneys establish lost wills and lost trusts (and the differences in presumptions between the two) is something many practitioners have had to (or will) contend with. His admonition to stress to clients the importance of safe-guarding original estate planning documents is sage advice.

Angie VandenBerg and Matt Greetham rightly point out the complexities of construction projects, documentation and litigation. Their article analyzing the Broward County v. CH2M Hill, Inc. case should be read by anyone dealing with issues pertaining to the apportionment of liability between or among tortfeasors based on negligence versus the joint and several liability of those based on a breach of contract.

If you are looking to recover attorney's fees in a matter, be sure to read Rusty Nisbet's "Traps for the Unwary: Missing the Deadline on Seeking Attorney's Fees." If your client is dropped as a party to litigation as the result of an amended pleading, file your motion for attorney's fees within thirty days! In most instances, when a party voluntarily dismisses an action, the defendant is a prevailing party for purposes of the awarding of attorney's fees.

Many Section members are involved in pro bono work. The Section's Florida Attorneys Counseling on Evictions ("FACE") is ongoing, and there is still work to be done. Learn how you may help. Also, many Section members serve on charitable boards and advise non-profit organizations. The article on "Bad Boy Clauses" is straight out of today's headlines with references to Bill Cosby, Jeffrey Epstein, Roger Ailes and Bernie Madoff (among others.) Lisa Lipman provides very specific guidance on, and examples of, morals clauses that are overly harsh, overly gentle, and just right. We suspect the article will be circulated to boards and development teams by our readers.

Easements finally get the respect they are due! The new Chapter 22 of the Florida Uniform Title Standards is dedicated to easements and includes nine new title standards. You may get the details beginning on Page 20 of ActionLine.

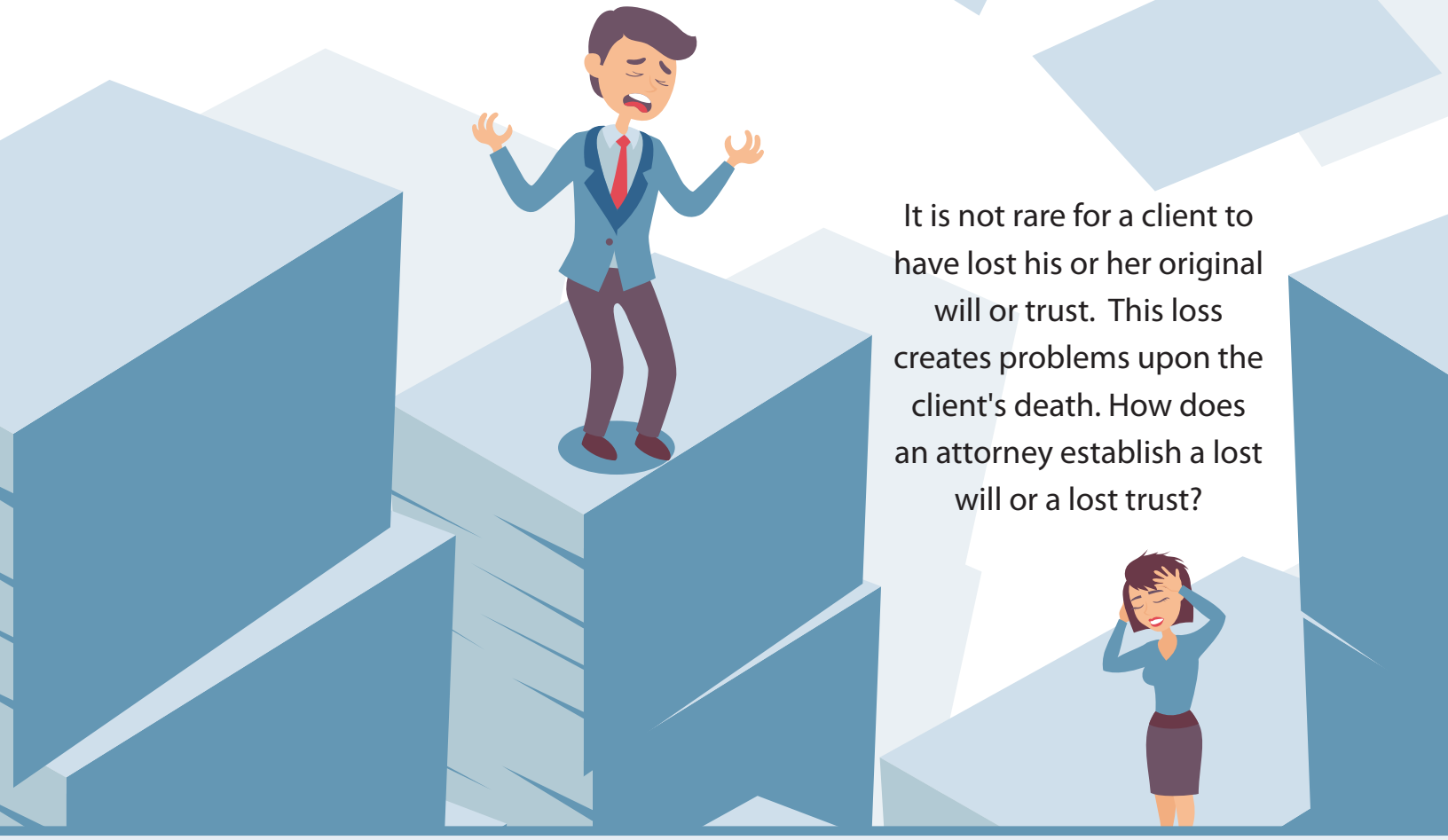
As is the case with so many issues of ActionLine, you will find words to live by within the covers hereof. Judge McEwen's advice to law students is to "be a good person, be highly confident, do your research, and be prepared when you are in court." Lilleth Bailey reminds us to "be patient and kind" and to "play nice – professionalism matters."

As always, you will find important case summaries, news as to what's happening within the Section, legislative updates and information about your fellow "Reptiles."

We look forward to returning to our offices, face-to-face/in-person meetings and that welcomed return to normalcy. In the meantime, enjoy the rest of your summer and consider writing an article or two for the benefit of your favorite Section magazine!

Establishment Of Lost Wills And Lost Trusts

By William D. Slicker, Esq., Slicker Law, P.A., St. Petersburg, Florida



It is not rare for a client to have lost his or her original will or trust. This loss creates problems upon the client's death. How does an attorney establish a lost will or a lost trust?

If the original will that was in the testator's possession is lost before his or her death, and the original will cannot be located after his or her death, there is a presumption that the testator destroyed the will with the intention of revoking it.[1] The proponent of the lost or destroyed will must

(1) establish the content of the will,

(2) show that the will was properly executed; and

(3) overcome the presumption that the will was intentionally destroyed.[2]

The content of the will can be established by the testimony of at least two disinterested witnesses, or by providing the court with a correct copy of the will together with the testimony of at least one disinterested witness.[3] The Probate Code defines "interested person" in part as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved."[4]

The Florida Supreme Court has authored an opinion that defines "a correct copy." In the case of *In Re Estate of Parker,* the Florida Supreme Court stated that "[t]he words "correct copy" means a copy conforming to an approved or conventional standard and this requires an identical copy such as a carbon or photostatic copy."[5]

The most common way of establishing the content of the lost or destroyed will is through the testimony of the attorney who prepared the will. In most cases, the attorney will have a copy of the will in his or her file that is introduced as evidence together with the testimony of the attorney that the copy is a correct copy of the original will.[6] However, submitting a copy of the lost or destroyed will without the testimony of at least one disinterested witness will result in the failure to establish the will.[7]

Proper execution of the will is most commonly proved through the attorney who prepared the will and witnessed its execution.[8] A will that is properly executed is one that is signed at the end by the testator in the presence of two attesting witnesses who sign the will in the presence of the testator and each other.[9]

The presumption that the testator intentionally revoked the lost or destroyed will can be rebutted in several ways based on competent substantial evidence. In *Lonergan v.*

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Estate of Budahazi, the Fifth DCA defined the term competent substantial evidence:

> The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charge.[10]

The most common way of overcoming the presumption that a lost or destroyed will was intentionally destroyed is by showing that someone with access to the will and an adverse pecuniary interest had the opportunity to destroy the will.[11] The presumption may also be overcome by showing accidental loss of the will,[12] or by showing that the testator did not have the testamentary capacity to revoke the will at the time that it disappeared.[13]

Although the most common way to establish a lost or destroyed will is by producing a copy of it (usually the attorney who prepared it), together with the testimony of at least one disinterested witness, it is possible to establish a will even if the original and all the copies are lost or destroyed through the testimony of two disinterested witnesses.[14]

The rules for establishing a lost trust have been held to be different than the rules for establishing a lost will. Most trust instruments contain language that provide how it may be amended or revoked. Such language usually requires an amendment or revocation be accomplished by a subsequent written instrument. If there is no written instrument revoking the trust, a copy of the trust establishes the content with no presumption of revocation.[15] Therefore, it has been held that the presumption that a lost will was intentionally destroyed does not apply to a lost trust.

If an original trust and all copies of it cannot be found, then the proponent of the trust will have to rely on the general jurisdiction of the court to determine the validity of a trust in order to attempt to establish the content of the lost trust.[16] This may be an issue when someone has deeded real property into a trust or otherwise transferred and changed titled to an asset to the trust, and then no one can find the original trust or a copy of it. In this case, the court must establish who the successor trustee is and who the beneficiaries are so that the trust property can be conveyed.

Do your clients a favor. Impress upon them the importance of safe-guarding original wills and trusts. Keep good files as a back-up in case a client loses them.

W. SLICKER

William D. Slicker, *Esq. is a solo practitioner at William D. Slicker, PA, St. Petersburg, Florida. He served as a law clerk at both Florida's Second DCA and Florida's Fifth DCA. He has received the Florida Bar President's Pro Bono Award for the Sixth Circuit, the Ms. JD Incredible Men Award, the St. Petersburg Bar Foundation's Heroes Among Us Award, the Community Law Program Volunteer of the Year Award, and the Florida Coalition Against Domestic Violence Lighting the Way Award.*

Endnotes

1 *In Re Estate of Carlton* (*Carlton v. Sims)*, 276 So. 2d 832 (Fla. 1973); *In Re Estate of Musil (Douglass v. Frazier)*, 965 So. 2d 1157 (Fla. 2d DCA 2007); *Walton v. the Estate of Walton*, 601 So. 2d 1266 (Fla. 3d DCA 1992).

2 *Id*.

3 Fla. Stat. § 733.207 (2020).

4 Fla. Stat. § 731.201(23) (2020); *see also*, *In Re Estate of Hatten*, 880 So. 2d 1271 at 1275 (Fla. 3d DCA 2004).

5 382 So. 2d 652 (Fla. 1980).

6 *Stewart v. Johnson*, 142 Fla. 425, 194 So. 869 (1940); *In Re Estate of Kero (Bury v. DiLegge)*, 591 So. 2d 675 (Fla. 4th DCA 1992); *In Re Estate of Maynard*, 253 So. 2d 925 (Fla. 2d DCA 1971).

7 *Brennan v. Brennan*, 40 So. 3d 894 (Fla. 5th DCA 2010); *In Re Estate of Musil (Douglas v. Frazier)*, supra. n.1.

8 *Stewart v. Johnson*, supra n. 6.

9 Fla. Stat. § 732.502 (2020).

10 669 So. 2d 1062 (Fla. 5th DCA 1996) (The testatrix had executed a will that left everything to her daughter and cut out her husband due to marital discord).

11 See *In Re Washington's Estate*, 56 So. 2d 545 (Fla. 1952) (The testatrix had three sons. One of her sons, Albert, took care of her and was named in the lost or destroyed will. Two of the other sons who were not named in the will came to see the testatrix shortly before her death and when they left, the jar containing the will that she kept at the head of her bed disappeared); *Pierre v. Estate of Pierre*, 928 So. 2d 1252 (Fla. 3d DCA 2006) (The testatrix had been living with her daughter who had been named in the lost or destroyed will. A short time after the mother's death, the son of the testatrix came into the house and took two folders of important papers and returned only one of the folders); *Walton v. Estate of Walton*, 601 So. 2d 1266 (Fla. 3d DCA 1992) (The testatrix prepared a Will that favored one of her four nieces and nephews as well as some other family members and friends. While the testatrix was in the hospital, she was visited by the wife of one of the nephews who was not named in the will. She testified that the testatrix asked her to bring all four of her wills to her and that the testatrix tore them up. However, the court stated that at that time, the testatrix could barely sign her name on her checks and it was unlikely that she had the strength to tear up four wills in order to die intestate).

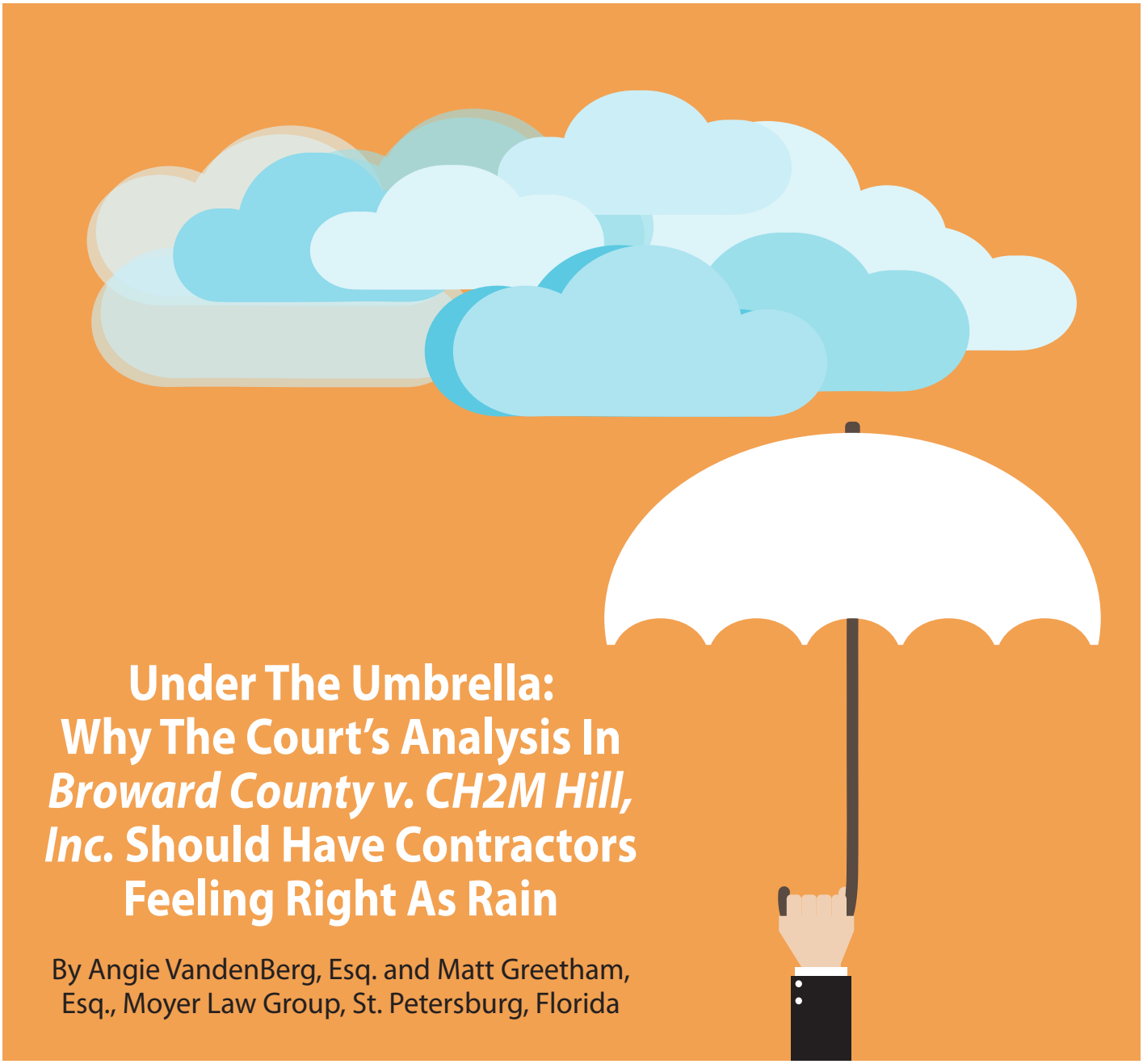
12 See *In re Estate of Carlton (Carlton v. Sims)*, supra n.1 (The testator had the will in his safe which was flooded and turned the papers in it to mush).

13 See *In re Estate of Evers (Potts v. Am. Legion Hosp.)*, 160 Fla. 225, 34 So. 2d 561 (1948); *In re Estate of Niernsee*, 147 Fla. 388, 2 So. 2d 737 (1941).

14 Sec. 733.207, Fla. Stat.; see *In Re Estate of Niernsee*, supra n.13, and see *In re Estate of Hatten*, supra. n.4 (where such attempts were offered but failed).

15 *In the matter of the Estate and Trust of Pilafas*, 172 Ariz. 207, 836 P. 2d 420 (1992).

16 See Fla. Stat. § 736.0201(4) (2020).



Under The Umbrella: Why The Court's Analysis In *Broward County v. CH2M Hill, Inc.* Should Have Contractors Feeling Right As Rain

By Angie VandenBerg, Esq. and Matt Greetham, Esq., Moyer Law Group, St. Petersburg, Florida

Took an oath,

I'ma stick it out 'til the end

Now that it's raining more than ever

You can stand under my umbrella…

—Rihanna, *Umbrella*

Construction projects are complex undertakings that involve a multitude of entities and a whirlwind of activity, ranging from initial design and engineering to the sequencing of the construction materials and trades. Undergirding the entire process is a bulwark of promises, of contracts: contracts between developers, design professionals, engineers, and the general contractor, along with a cascade of contracts by and between subcontractors, suppliers, and laborers. Naturally, with so many hands touching a project, questions arise as to who is to blame when something goes wrong. Is it the design professional who warranted the plans, the general contractor who oversaw the construction, the subcontractors who performed much of the work, or some other entity?

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As is often the case, the answer is: it depends. Of course, much depends on the facts of any given case, but perhaps more important than any fact is a plaintiff's chosen cause of action. In negligence, liability is apportioned between the tortfeasors;[1] in contract, liability is joint and several.[2] It follows that, when multiple defendants are sued for breach of contract, the possibility is that each could be held liable for the entire amount of damages without much prospect of apportioning liability among other entities. Keeping in mind that Florida plaintiffs have long been afforded their choice of remedy,[3] the forecast has loomed bleak for would be defendants faced with savvy opposing counsel looking to *make it rain*—that is, until the Fourth District's decision in *Broward County v. CH2M Hill, Inc.*[4] Now, at last, the winds of change have afforded contractors faced with joint and several liability under contract the prospect of "the umbrella of the 'negligence action,'"[5] courtesy of similarly situated architect and engineer defendants.[6]

Facts of the *CH2M* Case:

In *CH2M*, Broward County contracted with several entities for improvements to the Fort Lauderdale-Hollywood International Airport.[7] CH2M Hill, Inc. ("CH2M"), an engineering firm, was retained by the County to "'revise the technical specifications in accordance with the latest FAA design circular requirements' and 'add FAA technical specifications necessary for the Taxiway C extension.'"[8] Triple R, the general contractor, was contracted to "construct the project in 'reasonably close conformity' with CH2M's design plans and specifications."[9] Other entities included URS Corporation ("URS"), the Program Manager, and Bureau Veritas North America ("BV"), which provided quality assurance and materials testing.[10]

Problems arose seven months after Taxiway C was opened to air traffic.[11] After noticing indentations on the surface of the taxiway (called "rutting") the County launched an investigation and, after receiving the results, retained $600,000 from Triple R's final payment to effectuate repairs which the County attributed to Triple R.[12] A flurry of litigation ensued. Triple R filed suit against the County for breach of contract and against CH2M for professional negligence.[13] Expectedly, the County asserted a counterclaim against Triple R for breach of contract, alleging that it performed defective work, and a crossclaim against CH2M for breach of contract due to design errors and defects.[14] The County also brought claims for breach of contract against URS and BV, which settled for $600,000 and $125,000, respectively.[15]

Importantly, both Triple R and CH2M responded to the County's breach of contract claims with the affirmative defense that the damages were caused by others, including non-parties URS and BV, and should be apportioned pursuant to Florida's Comparative Fault Statute, Fla. Stat. § 768.81.[16] At trial, the court entered final judgment in favor of the County and tallied the damages at $5,998,303.[17] However, the court specifically found that URS was the main reason for the failure at Taxiway C and that "'URS was substantially in breach of its contract with the County and at fault for what occurred on Taxiway C.'"[18] The trial court then allocated the County's damages for breach of contract between URS (60%), Triple R (25%), and CH2M (15%). In doing so, over $3.5 million of the County's remaining damages were attributed to URS despite the County only receiving $600,000 in settlement. Unsurprisingly, the County appealed the trial court's apportionment of damages, especially where the County had sought recovery against CH2M and Triple R under two separate breach of contract claims, not negligence.

The Appeal:

On appeal, the County argued that comparative fault is inapplicable to breach of contract actions and that the defendants should have been held jointly and severally liable for the County's total damages.[19] The Fourth District affirmed the apportionment.[20] Central to the court's analysis was the expansive view adopted by the legislature when it enacted Fla. Stat. § 768 (2018) *et seq*., which transformed the County's contract claims against CH2M into a negligence action, and the corresponding "umbrella of the 'negligence action' against CH2M" under which fell the County's claims against Triple R.[21]

First, the court reasoned that the requirement to apportion damages in a "negligence action," as defined by Fla. Stat. § 768.81(3), encompassed the County's breach of contract action against CH2M—effectively transforming it from a breach of contract claim to a professional negligence or malpractice claim, which fell under the umbrella of a negligence action. Specifically, the court interwove the statutory definition of "negligence action" which includes claims for "professional malpractice whether couched in terms of contract or tort…"[22] along with an avalanche of case law establishing that CH2M's status as an engineer makes it a "professional."[23] From there, the court held that the "gravamen" of the County's claim against CH2M was that CH2M "failed to adhere to the contractual standard of care."[24] The court continued by explaining that "the essence of a professional malpractice action is the breach of a standard of care."[25] Accordingly, the court held, in part, that while the County's claims against CH2M were "couched in terms of contract" the claims actually "fell within the definition of a 'negligence action' in the statute."[26]

Second, the court's analysis continued with a question: "[i]f the action against CH2M is a subsection of 768.81(1)(c) 'negligence action,' where does that leave Triple R, which is a general contractor, not a professional under that subsection?"[27] The answer was a breeze: "[a]pplying a holistic approach to analyzing the complaint, we conclude that the contract action against Triple R fell under the umbrella of the 'negligence

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action' against CH2M, so that the circuit court's allocation of fault was appropriate."[28] However, for the County to prove its case against Triple R, the analysis pivoted to the determination that Triple R's breach of its contractual responsibilities was a *substantial factor* in the County's damages. To further reconcile the apportionment of fault, the court then offered that the County's requirement to prove that Triple R's breach of contract was a substantial factor in causing the damages "is compatible with the concept of 'fault' that is at the heart of subsection 768.81(3)."[29] It is unclear why the court clouded the analysis with a return to the substantial factor followed by a fleeting comparison to fault, only to conclude the analysis as to Triple R's apportionment of damages with the "circuit court properly allocated fault among all the actors whose conduct *substantially contributed* to the County's damages."[30]

Third, the court went on to reverse and remand the trial court's computation of damages because the trial court awarded damages based on the County's more robust and expensive redesign of Taxiway C. The court held that the proper measure of damages was "the cost of repair to bring Taxiway C to its bargained-for state."[31]

The Forecast and the Cone of Uncertainty:

The sun appears to be setting on joint and several liability; although, the future remains unclear. However, one thing appears certain: where a contractor and a professional (architect or engineer) are sued for breach of contract, the action against the professional will be transformed into a "negligence action" and the contractor will stand under the umbrella of negligence, thus affording both defendants the opportunity to apportion liability pursuant to Fla. Stat. § 768.81(3). No doubt, this is good news for contractors and will act as a springboard for contractors and subcontractors alike to argue that any judgment must be allocated.

Yet, despite the certainty offered by the *CH2M* decision, the likely result will be a chilling front of new uncertainty. For example, what will happen when a contractor proceeds under the umbrella throughout the course of litigation only to have the professional entity settle on the courthouse steps? Arguably, a settlement of the design professional would still afford the benefit of apportionment especially where here the trial court rejected Triple R's own negligence claim against CH2M and still apportioned damages.[32] And, the court determined that while URS was the "main participant" that caused the failure of Taxiway C, it was not necessary for the court to determine whether URS's liability was grounded in negligence or breach of contract.[33]

Is the umbrella big enough to cover a covered-contractor's third-party claims for breach of contract against its subcontractors? In other words, where a contractor is covered by the professional's umbrella, can the third-party defendants sued for breach of contract also claim to apportion damages? Here again, subcontractors should argue that the trial court should apply a holistic assessment of the operative complaint(s) to determine whether the protection of the umbrella would extend to those third-party claims.

Another interesting question concerns what happens when a plaintiff sues only a contractor for breach of contract, but discovery reveals that the defects complained of are design related – should the contractor be entitled to the negligence umbrella in that instance? The latitude to extend apportionment of fault could similarly be grounded, as it was in *CH2M*, in the trial court's apparent reliance on expert testimony to gauge responsibility and compliance with industry standards, project drawings, and specifications.[34] So, if a contractor can establish through discovery that the fault for a plaintiff's cause of action rests at the foot of the design professional, it remains possible that the professional's negligence will permit apportionment.

Perhaps most compelling is the question as to why professionals are treated more favorably under the law? Certainly, any professional defendant in a breach of contract action will look to *CH2M* for the proposition that the action against it actually falls within the definition of a "negligence action" under the statute; thus, entitling it to an apportionment of damages, whereas any other entity would be subject to joint and several liability.

In closing, the holding in *CH2M* further limits the applicability of joint and several liability in construction litigation. Now, thanks to the umbrella of the "negligence action," defendant contractors have an additional basis to argue in favor of apportionment of fault even where a plaintiff's causes of action are contractually based. This should leave every contractor feeling right as rain.

A. VANDENBERG

M. GREETHAM

Angie VandenBerg *is Board Certified in Construction Law and a Partner at Moyer Law Group. Ms. VandenBerg is also a Florida certified building contractor, LEED Accredited Professional, and OSHA 30-hour certified, and focuses her practice on the representation of Florida's contractors and subcontractors.*

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Under The Umbrella, from page 12

Endnotes

1 *See*, Fla. Stat. § 768.81 (2021) *et seq*.

2 *See, Tuttle/White Constructors, Inc. v. Montgomery Elevator Co.*, 385 So. 2d 98, 100 (1980) (citing 5 Corbin on Contracts Section 999 (1964)).

3 *Bre/Cocoa Beach Owner, L.L.C. v. Rolyn Companies, Inc.*, 2012 WL 12905849 at *5 (M.D. Fla. 2021) (citing *Miller v. Allstate Insurance Co.*, 573 So. 2d 24 (Fla. 3d DCA 1990)).

4 *Broward County v. CH2M Hill, Inc.*, 302 So. 3d 895 (Fla. 4th DCA 2020) *cert. denied*.

5 As the term is defined in Fla. Stat. § 768.81(1)(c).

6 *Id*. at 903.

7 *Id*. at 897.

8 *Id*. at 987.

9 *Id*. at 898.

10 *Id*.

11 *Id*.

12 *Id*. at 898–99.

13 *Id*. at 899.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*. at 901.

18 *Id*.

19 *Id*.

20 *Id*.

21 *Id*. at 901–02; *see,* Fla. Stat. § 768.71 (2018) which states: "(1) Except as otherwise specifically provided, this part applies to any action for damages, whether in tort or contract."

22 *CH2M Hill, Inc.*, 302 So. 3d at 902; Fla. Stat. § 768.81(1)(c).

23 *CH2M Hill, Inc.*, 302 So. 3d at 902; *Moransais v. Heathman*, 744 So. 2d 973, 976 (Fla. 1999) *receded from on other grounds by Tiara Condo. Ass'n, Inc. v. March & McLennan Cos.*, 110 So. 2d 399 (Fla. 2013); *Garden v. Frier*, 602 So. 2d 1273, 1275 (Fla. 1992); *Pierce v. AALL Ins., Inc.*, 531 So. 2d 84, 87 (Fla. 1988); *Pensacola Exec. House Condo. Ass'n, Inc. v. Baskerville-Donovan Engineers, Inc.*, 566 So. 2d 850, 851 (Fla. 1st DCA 1990).

24 *CH2M Hill, Inc.*, 302 So. 3d at 903.

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id.* (citing *Martinez v. Miami-Dade Cty.*, 975 F. Supp. 2d 1293, 1296 (S.D. Fla. 2013)).

29 *Id.* (emphasis added).

30 *Id*. (emphasis added).

31 *Id*. at 904–05.

32 *Id*. at 901.

33 *Id*.

34 *Id*. at 899-900.

Trap For The Unwary: Missing The Deadline On Seeking Attorney's Fees

By Steven "Rusty" Nisbet, Esq., Zinzow Law, LLC, Trinity, Florida

Every Florida attorney knows the rule that any party seeking attorney's fees must serve a motion no later than thirty (30) days after the issuance of a judgment (including a judgment of dismissal), or the service of a motion of voluntary dismissal, which judgment or notice concludes the action as to that party.[1] But . . . what if your client, the owner of a construction project, is inappropriately named as a defendant in a lien foreclosure action? You explain to plaintiff's counsel that your client is an improper party defendant, but your argument falls on deaf ears, which forces you to file a motion to dismiss. At a hearing on another defendant's motion to dismiss, the court grants the motion with leave for plaintiff to file an amended complaint. Prior to your client's motion being heard, the plaintiff files an amended complaint dropping your client as a party defendant. Does the filing of the amended complaint trigger the 30-day time limit for you to file a motion for attorney's fees as a prevailing party?

You immediately reread the requirements set forth in Fla. R. Civ. P. 1.525. In most instances (with exceptions), when a plaintiff voluntarily dismisses an action, the defendant is a prevailing party for awarding attorney's fees.[2] In your case, however, the client was not dropped as a party defendant as the result of, either a judgment of dismissal or by the service of a motion of voluntary dismissal, which judgment or notice concluded the action as to your client. Instead, your client was dropped as a party defendant arising from the filing of an amended complaint. Under a strict construction of Fla. R. Civ. P. 1.525, the 30-day period would not be applicable to your client being dropped from the case as the result of the filing of the amended complaint. As set forth below, this strict construction interpretation is a trap for the unwary.

A further analysis is required concerning the methodology by which parties may be dropped in compliance with the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.250(b) governs "dropping parties." There are, in essence, three instances in which a party may be dropped by an adverse party in facts analogous to our hypothetical:

1. In the manner provided for voluntary dismissal in Fla. R. Civ. P. 1.420(a)(1);
2. By order of the court on its own initiative; or
3. On motion of any party at any stage of the action and on such terms as are just.

There is no provision contained in Fla. R. Civ. P. 1.250(b) authorizing a party be dropped by an adverse party as the result of the serving of an amended pleading pursuant to Fla. R. Civ. P. 1.190(a). Strangely, Fla. R. Civ. P. 1.250 only authorizes the adding of parties through the filing of an amended pleading.[3] Nevertheless, if a court grants a motion to dismiss with leave to amend, this authorizes the plaintiff to add or drop parties in the amended pleading. The rationale is as follows:

> Naturally, an amended affirmative pleading filed under Rule 1.190, which omits all claims that had previously been asserted against one of the parties in the prior pleading, would have the effect of dropping that party voluntarily from the action. However, because Rule 1.250 refers to Rule 1.190(a) only in connection with the adding of parties, under subdivision (c), and not in connection with the dropping of parties, under subdivision (b), a pleading amendment which does nothing more than drop a party would probably have to be deemed a voluntary dropping of that party under and subject to Rule 1.250(b).[4]

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In *Siboni v. Allen*,[5] the Fifth District Court of Appeal held that a party dropped from litigation under Fla. R. Civ. P. 1.250(b) is subject to the 30-day time limit contained in Fla. R. Civ. P. 1.525, governing service of a motion seeking a judgment for costs and attorney's fees. The court stated that in order to reach this holding, it had "read the applicable rules in *pari materia* to reach this result, mindful of the purposes sought to be accomplished."[6] In *Siboni*, the court applied the same logic to the recovery of attorneys' fees as espoused in *Bay View Inn v. Friedman*[7] to the recovery of costs. In *Bay View Inn*, the Third District Court of Appeal explained that Rule 1.250(b) provides, in part, that parties may be dropped in the manner provided under the voluntary dismissal Rule 1.420(a)(1).[8] The appellant in *Bay View Inn* argued that a dropped party may only apply for costs at the conclusion of the action. The court disagreed and it held that a party dropped via voluntary dismissal is entitled to utilize Rule 1.420(d) to recover costs.[9]

The court in *Siboni* reasoned that there is no analytical difference in construing the timing for a dropped party to apply for cost recovery under Rule 1.420(d) (as in *Bay View Inn*) to a dropped party's motion for attorney's fees under Rule 1.525.[10] Accordingly, even though Fla. R. Civ. P. 1.525 makes no reference to the dropping of parties pursuant to Rule 1.250(b) as a trigger to commence the 30-day deadline, the court in *Siboni* held that a party is required to file a motion for attorney's fees within thirty (30) days of being dropped from litigation under Fla. R. Civ. P. 1.250(b) or be barred from claiming attorney's fees. The *Siboni* case is the only Florida appellate case addressing this issue. Can an argument be made that the court in *Siboni* made an improper legislative decision and ignored the plain reading of Rule 1.525? Yes, but why take the risk?

Conclusion

Pursuant to Florida case law, a party dropped from litigation under Fla. R. Civ. P. 1.250(b) is subject to the 30-day time limit contained in Fla. R. Civ. P. 1.525, governing service of a motion seeking a judgment for costs and attorney's fees. Even though the filing of an amended pleading does not explicitly trigger the 30-day time period under Rule 1.525, if your client gets dropped as a party as the result of the filing of an amended pleading, file a motion for attorney's fees within thirty (30) days of your client getting dropped. Failure to adhere to this time period may result in the court denying your client's motion for attorney's fees.

S. NISBET

***Steven "Rusty" Nisbet**, Esq. is a Senior Trial Attorney at Zinzow Law, LLC, practicing in the areas of construction, business, and real estate.*

Endnotes

1 Fla. R. Civ. P. 1.525.

2 *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So.3d 1034, 1040 (Fla. 2d DCA 2013), *citing Thornber v. City of Fort Walton Beach*, 568 So.2d 914, 919 (Fla. 1990). There are exceptions to this general rule. A court may look behind a voluntary dismissal at the facts of the litigation to determine whether a party is a substantially prevailing party. *Tubbs, supra*. at 1041. *See also, Walter D. Padow, M.D., P.A. v. Knollwood Club Ass'n*, 839 So.2d 744, 745 (Fla. 4th DCA 2003) (no prevailing party when a party voluntarily dismisses case after receiving substantially all of the money claimed); *Tubbs*, *supra.* at 1042 (no prevailing party when a party dismissed a cause of action which had been rendered moot).

3 Fla. R. Civ. P. 1.250(c).

4 Trawick, Florida Practice and Procedure (2014 Edition), §4:10; *see also*, 4 Berman's Florida Civil Procedure §1.525:8, n.2.

5 *Siboni v. Allen*, 52 So.3d 779, 781 (Fla. 5th DCA 2010).

6 *Id.* at 780. "*Pari materia*" is latin for "upon the same subject." Statutes or rules in *pari materia* must be interpreted in light of each other since they have a common purpose for comparable items.

7 *Bay View Inn v. Friedman*, 545 So.2d 417 (Fla. 3d DCA 1989).

8 *Id*. at 419.

9 *Id*. In essence, the court deemed the action concluded as to the dropped party by virtue of the voluntary dismissal.

10 *Siboni*, *supra*. at 781.

Bad Boy Clauses And The Good Charities That Use Them

By Lisa H. Lipman, Esq., Roetzel & Andress LPA, Naples, Florida

Jeffrey Epstein. Bill Cosby. Harvey Weinstein. What do these three men have in common?

Many people would answer this question by saying that these men had similar personal proclivities. But what many people do not know is that all three men were also significant donors to various charities during their lifetimes.

Why don't people know this? Because their names have been removed from the various charitable gifts that each of them made. Bill Cosby's name was removed from a building at Central State University in Ohio and a community center in Maryland.[1] Jeffrey Epstein's name was removed from a gift he made to The Hewitt School, an all-girls K-12 school.[2] Harvey Weinstein's name was removed from a gift he made to the USC School of Cinematic Arts that was intended to benefit female directors.[3]

Often, charities do not have the right to remove a donor's name from a gift. Sometimes the donor will agree to voluntarily remove his or her name from a gift. However, there is one sure-fire way to guarantee that a charity has the right to deny naming rights to a donor: "bad boy" clauses, also known as morals clauses. (Whether "bad boy" clauses is a sexist term for these provisions is really not debatable, but the sad fact is that many more men have had their naming rights revoked as a result of these clauses than women.)[4]

Sometimes, however, a charity is reluctant to remove a donor's name from a charitable gift because the agreement between the donor and the charity does not contain provisions that address what should happen when the donor has done something wrong that has nothing to do with the donor's charitable activity. Seton Hall wanted to remove the name of Tyco's disgraced CEO Dennis Kozlowski from its business school, despite having received $3 million for the naming rights. The school negotiated with Kozlowski to end his naming rights, but there was no language that allowed Seton Hall unilaterally to remove his name. Had Kozlowski not agreed to have his name removed, Seton Hall might not have had the ability to do it.

Charities are not always so lucky. Some donors are adamant that their names stay attached to a gift – and the donor is willing to sue in order to enforce a pledge agreement. For example, in *Stock v. Augsburg College*,[5] the donor contributed $500,000 to Augsburg College. In return, the college named a wing of its communications building after the donor. When it was discovered that the donor had been sending anonymous letters denouncing mixed marriages to families containing members of different races and religions, the college removed the donor's name from the gift. The donor sued the college, alleging breach of contract. Although the court determined that the case was time-barred, it indicated that a different result might have been reached had the case been timely filed.

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The Importance of "Bad Boy" Clauses in Gift Acceptance Agreements

There are many other examples of similar cases. Virtually all of these cases arise when gift acceptance policies are silent regarding acts of moral turpitude. "Bad boy" clauses can cure this problem. So, what is a gift acceptance policy, and how do we include a "bad boy" clause (okay - we'll call it a morals clause) from this point onward in the policy?

A gift acceptance policy is a list of internal rules designed to ensure that the source and conditions of contributions are in the best interests of the institution. These policies should (but often do not) include a morals clause that ensures that the charity can disassociate itself from the donor or remove the name of a donor from any naming opportunity without refunding the donation.

Morals clauses matter because negative publicity about a donor can lead other donors to conclude that the charity did not do its research or is reckless or overly greedy about accepting gifts. Charities often do not include them, however, for fear of scaring off a significant donor. For example, the Metropolitan Museum of Art does not have a published "bad boy" clause in its gifting policies and restrictions on its website, choosing instead to have a "gift review committee."

The lack of a policy has caused some consternation among various supporters of the Met in recent years. The Met has been criticized for accepting donations from members of the Sackler family, presently associated with Purdue Pharma, the company that developed the very addictive drug OxyContin. After a spate of very bad publicity, the Met announced in 2019 that it would stop accepting gifts from the Sacklers. (It did not remove the family's name from the Sackler wing of the museum, reasoning that the Sackler Wing was founded in 1978 with money from Purdue Pharma co-founders, the last of whom died in 1987, eight years before OxyContin was developed.)

How to Draft the Perfect Morals Clause (and How to Get a Donor to Agree to It)

Now that we know we need one, what should our morals clause look like? For one thing, it should be short. A long clause can intimidate or discourage donors. Furthermore, the longer the language, the easier it is for a lawyer to parse the wording and find a way that at least a portion of the clause does not apply to the lawyer's client. Below are some examples of morals clauses.

Overly harsh version: "The charity may remove the donor's name promptly upon the first publication of a creditable allegation that the donor:

1. committed an act of moral turpitude;
2. committed a felony under state or federal law; or
3. failed to act with due regard to social conventions, public morals, and decency."

This version may scare away donors because the lack of specificity in section three could be applied to virtually any action with which a charity does not agree. There has to be a balance between protecting the interests of the charity and finding a way to get a morals clause signed without offending the donor from the outset. The above example does not strike that balance.

An overly gentle version is: "The charity reserves the right to determine whether a naming right shall continue in perpetuity if a donor engages in behavior that reflects poorly on the donor or the charity."

This version is not strong enough. Because the charity is merely reserving the right to act, and because there is no real standard to which the charity can apply the bad behavior, this clause really does not have any teeth. A donor would easily be able to argue that "reflects poorly" is too general a standard to use in a clause like this.

Just right version: "If at any time the donor fails to conduct himself or herself without due regard to public morals and decency, or if the donor commits any act or becomes involved in any situation or occurrence tending to degrade the donor in the community, or that brings the donor into public contempt or scandal, or that materially and adversely affects the reputation or business of the charity, whether or not information in regard thereto becomes public, the charity shall have the right to remove donor's recognition rights as required pursuant to this gift agreement." [6]

This version, though admittedly wordy, combines strength of language and a measurable standard that can be easily applied by the charity as well as clearly outlining to a donor what constitutes objectional behavior.

Now that we have the right language to add to our documents, how do we get donors to agree to this sort of agreement? The language can be included in a "naming rights policy," which is largely an internal document that can be incorporated by reference to a pledge agreement, or, even better, attached as an exhibit to a pledge agreement. This makes the language a standard, routine policy instead of something that is specific to that donor's pledge agreement.

Morals clauses are not enough to protect a charity completely, though. Charitable institutions need to do more. Among the steps a charity should take, in addition to including morals clauses in its documents, are as follows:

1. Perform due diligence on the donor if the charity is granting naming opportunities.
2. An Internet search of every major donor's name should be mandatory.

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3. Charities should check the police records of major donors.
4. Charities should perform due diligence on a contributed asset (i.e. provenance of artwork) before it is accepted.

Turning the Tables: Donors Can Require the Charity to Adhere to a Morals Clause

Due diligence is not exclusive to charities. Sometimes, a donor wants to remove his or her name from a donation because the *charity* has done something that causes the donor not only to sever the donor's name from a gift, but to request the return of the gift itself. Morals clauses can be made more palatable to both donors and charities by adding a reciprocal provision, which allows donor to ask for a partial refund if the charity acts badly. A reciprocal clause means that both parties to the agreement are held to the same standards, and therefore both the charity and the donor have a way out of the agreement if either commits immoral acts.

Charities behave badly less frequently than donors, but it does happen. For example, in 2015, the Federal Trade Commission filed an action against James T. Reynolds, Sr., who, along with his ex-wife and son, raised over $187 million through his four charities: The Cancer Fund of America in Knoxville, Tenn., and its affiliated Cancer Support Services; The Breast Cancer Society in Mesa, Ariz.; and the Children's Cancer Fund of America in Powell, Tenn. However, instead of using the funds raised through these entities for cancer treatment, Reynolds and his family spent the money on cars, gym memberships, luxury vacations, and six-figure salaries for family members. Had the donors to these entities signed a gifting agreement that included a morals clause, they could have recouped their donations (assuming there was money that could be recovered, which in this case, there was not).[7]

A donor may want to create a morals clause that not only allows the donor to rescind the gift if the charity's employees act inappropriately, but also permits rescission if the charity takes a position that is in opposition to the morals and values of the donor. In 2007, movie producer and environmentalist Steven Bing rescinded a $2.5 million donation to Stanford University after the university partnered with ExxonMobil on a research program.[8] Stanford did not attempt to fight the rescission. There is no public information regarding whether Bing's pledge included some sort of morals clause, but Bing's family had been significant donors to Stanford University for decades (his parents had donated $50 million in 2006 for a concert hall)[9], so the university certainly had motivation to cooperate with Bing regarding the return of the funds.

Charities will likely consent to gift agreements that contain a reciprocal morals clause, since that benefits the charity as well as the donor. Whereas the wording of the gift agreement and the charity's gift policy documents may be more closely scrutinized than a standard pledge agreement if reciprocal morals clauses are included, ultimately both the charity and the donor will save themselves some headaches by including these provisions in the documents. In an ideal world, donors are known solely for their success and philanthropy, and charities are known only for the good work that they do. In the real world, however, no one can predict when charities may need to rely on a morals clause in order to cut ties with "bad boys" who have been involved with a favored charitable organization.

L. LIPMAN

Lisa Lipman *is a trusts and estates attorney and a shareholder in the Naples office of the law firm of Roetzel & Andress. She has served on the board of several charitable institutions and has encouraged those institutions to use "bad boy clauses" in all charitable gift agreements.*

Endnotes

1 Associated Press, "Ohio's Central State University Removes Bill Cosby's Name from Its Communications Building," September 11, 2015, https://www.cleveland.com/entertainment/2015/09/ohios_central_state_university.html; Rentz, Catherine, "East Baltimore Community Center Removes Bill Cosby's Name From Facility After Conviction," The Baltimore Sun, April 27, 2018 (https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-cosby-st-frances-20180427-story.html).

2 Wile, Rob and Brezel, Aaron, "Jeffrey Epstein Doled Out Millions to Harvard and Others. Is That Money Tainted?" Miami Herald, July 22, 2019 (https://www.miamiherald.com/news/state/florida/article232966202.html).

3 Sun, Rebecca, "Hollywood's #MeToo Problem: When Alleged Predators Also Give Generously to Charity," The Hollywood Reporter, July 11, 2019 (https://www.hollywoodreporter.com/news/inside-hollywoods-philanthropic-me-too-dilemma-1223159).

4 For example: Dennis Kozlowski, the disgraced CEO of Tyco who was convicted of stealing hundreds of millions of dollars from the company; Les Moonves, the president of CBS, who was accused of sexual harassment and intimidation; Roger Ailes, the former head of Fox News, who was also accused of sexual harassment and intimidation; Bernie Madoff, the former hedge fund member who stole his investors' money; … the list goes on and on. All ten of Worth Magazine's "Top Ten Most Toxic Philanthropists" are men. (Celarier, Michelle, September 24, 2019). Oh, well. There's always Ghislaine Maxwell to kick around. She donated to a charity for sex trafficking victims. (Warren, Katie, "Ghislaine Maxwell, Jeffrey Epstein's Alleged Madam, Donated Money to a Charity for Sex Trafficking Victims in 2008," Business Insider, August 13, 2019. (https://www.businessinsider.com/ghislaine-maxwell-jeffrey-epstein-madam-donated-charity-sex-trafficking-victims-2019-8).

5 *Stock v. Augsburg College,* 2002 Minn. App.C1-01-1673 (Unpublished).

6 Drafted by Adam Scott Goldberg, Chair of the Exempt Organizations Committee of the Tax Section of the Florida Bar.

7 "FTC: Family with Utah ties raised $187M for cancer, spent it on themselves," The Salt Lake Tribune, May 19, 2015 (https://archive.sltrib.com/article.php?id=2529738&itype=CMSID).

8 "Donor Rescinds $2.5 Million Gift to Stanford Over ExxonMobil Ads," Philanthropy News Digest, March 14, 2007, (https://philanthropynewsdigest.org/news/donor-rescinds-2.5-million-gift-to-stanford-over-exxonmobil-ads).

9 Masters, Kim "Behind Steve Bing's Sudden, Tragic End," The Hollywood Reporter, June 30, 2020 (https://www.hollywoodreporter.com/news/behind-steve-bing-s-sudden-tragic-end-1300992).

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Florida Uniform Title Standards Adds Chapter On Easements

By Gregory T. Hall, Esq., Senior Claims Counsel,
Stewart Title Guaranty Company, Tampa, Florida

Although easements are vitally important in conjunction with ownership of Florida real property, the Florida Uniform Title Standards has not previously included a chapter solely dedicated to a discussion of easements. That recently changed with inclusion of a new Chapter 22 containing nine new title standards on easements. Proposed by the Title Issues and Standards Committee, Executive Council members approved the new chapter at the December 5, 2020 Executive Council meeting.

Committee review of the easement title standards commenced in 2016 after the committee received initial drafts of several proposed easement standards prepared by Brian Leebrick. In the ensuing five years, through countless meetings, the committee and a related subcommittee drafted additional easement standards and extensively reviewed, debated, and redrafted until finally reaching a consensus. Committee members devoting considerable expertise and time included Brian Leebrick, Bob Graham, Alan Fields, Alan McCall, Jeff Dollinger, Michael Gelfand, Chris Smart, Karla Staker, Rebecca Wood, Gregory Hall, Amanda Hersem, Barry Scholnik, Deb Boyd, Joe Tschida, Jeremy Cranford, Len Prescott, John Neukamm, Peggy Williams, Patrick Newton, Marty Awerbach, Marty Solomon, Brian Hoffman, Melissa Scaletta, Sabine Seidel, Laura Licastro and Sanjiv Patel. The subcommittee that developed the easement standards was comprised of Gregory Hall, Chair, Jeff Dollinger, Robert Graham, and Amanda Hersem. The subcommittee delivered a CLE presentation on the new easement standards at the August 19, 2020 Title Issues and Standards Committee meeting. The presenters' notes and the standards are available in PDF format on the RPPTL website (after member login, click on Committees, Real Property, Title Issues and Standards, and click on the "Past Programs" tab). The new Chapter 22 Easement Standards are available under the "Uniform Title Standards" tab.

As with all title standards, the easement title standards are a distillation of settled law in Florida summarizing leading Florida reported cases and applicable Florida statutes. The following is a brief summary of some of the guidance that the new Chapter 22 has to offer.

The standards point out that easements may be created by express grant, by reservation, by implication from a plat, by necessity, or by prescription, and mention the importance of precise language when describing an easement as to location, size and purpose. "Subject to" or "except" to describe an easement in a deed may be insufficient to create an easement, but under the "modern approach," courts will consider surrounding facts and circumstances to determine intent. Plats identifying certain parcels as "easement," "park," or "access," without dedication language that is specific as to those parcels may be deemed dedicated to the public under Fla. Stat. Chapter 177. Property owners who take title to their lots by reference to the plat receive an implied easement over areas designated on the plat as rights-of-way, streets, canals, or other common areas such as parks and beach areas. However, such easements are not implied over areas that are not obviously designated for the common use and benefit of the platted subdivision, particularly where the plat expressly reserves title to such areas and omits any language reflecting an intent to dedicate such areas to lot owners or the public. Moreover, a conveyance without reference to a plat does not create an implied easement for matters reflected on the plat.

Subdividing land so that a resulting parcel is landlocked may result in an easement implied by necessity pursuant to Fla. Stat. § 704.01 (2020), despite the absence of an express easement. However, to establish an easement implied by necessity, the parcel owner must prove the existence of a common grantor and the remaining land must have access to a public road. The alternative, a statutory way of necessity, does not require a common source of title but requires compensation to the servient owner and the landlocked parcel must be used for dwelling, agricultural, timber raising or cutting, or stock raising purposes.

Prescriptive easements are not favored under Florida law. To establish a prescriptive easement, the burden is on the claimant to prove by clear and positive proof that the use is exclusive or inconsistent with the rights of the owner rather than permissive for the statutory period.

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An easement is presumed to be appurtenant and included in a conveyance of the dominant estate without any mention of the easement in the absence of express language to the contrary. An easement created by reservation or grant may not be terminated by non-use alone but may be terminated by non-use coupled with an action showing intent to abandon, adverse possession or operation of the Marketable Record Title Act ("MRTA"). MRTA will eliminate an easement that has not been used at least in part for a 30-year period after a root of title. A merger of the dominant and servient estates into the same owner may also extinguish an easement in the absence of contrary intent. Florida courts will not mechanically apply merger, but instead, may look to circumstances outside of the public record. A merger can only occur when there is unity of ownership between the servient estate and every dominant estate.

Commercial easements in gross, unlike noncommercial easements in gross, are freely assignable and may be enforced by the assignee against a subsequent owner of the burdened property if the easement is recorded and does not disclose the intention that it is to be personal or exclusive. This also holds true for public utility easements in gross. In contrast, an oral license, even when rendered irrevocable by the licensee's substantial monetary expenditure in reliance upon its continuation, is not an easement, although a subsequent purchaser who receives title with notice of such license may be burdened with it.

The Title Issues and Standards Committee's mission is to regularly update Florida's Uniform Title Standards, write new standards based on existing law and industry practice, supervise the reproduction and distribution of the standards, and promote the use of and voluntary adherence to the standards as a tool for title examination and real estate practice. The committee also monitors case law and provides input on proposed legislation affecting title to real estate in Florida. The committee is presently working on new and revised title standards covering plats, trusts, bankruptcy and MRTA, and always welcomes participation from new members. For information on upcoming meetings or to join the committee, please contact the chair or a co-vice chair. The committee Chair is Rebecca Wood (rwood@thefund.com), and the Co-Vice Chairs are Robert Graham (rgraham@gunster.com), Brian Hoffman (bhoffman@carverdarden.com), and Karla Staker (karla.staker@fnf.com).

G. HALL

***Gregory T. Hall** has been Florida Claims Counsel for Stewart Title Guaranty Company for nearly twenty years and has spoken on claims prevention issues throughout the state. Prior to joining Stewart Title, he was in private practice as a real estate attorney during which he lectured national mortgage lenders on Florida mortgage issues. He received a Bachelor of Science degree at Florida State University and a Juris Doctor at Stetson University College of Law. Greg is a member of the Florida Bar, the federal district courts, the Title Standards Committee of the Real Property, Probate and Trust Law Section and is "AV" rated in Martindale-Hubbell.*

SECTION SPOTLIGHT

Law Students Empowerment Summit: "A Day in the Life…"

By Yveline Dalmacy, MBA, M.A.,

Cooley Law School 3rd Year Law Student, President WMU Cooley RPPTL-SA

The Law Students Empowerment Summent was a joint collaboration among Johnathan Butler, the Florida Bar Real Property, Probate and Trust Law Section (RPPTL) Law School Mentoring & Programming Committee Chair; WMU Cooley's Real Property, Probate and Trust Law Students Association; Rebecca Bell, 6th Circuit Lead At Large Member and liaison with Stetson University Law School; and Nancy Lugo, Calli Burnett and Anne Whitacre of Bay Area Legal Services (BALS). It took place on January 27th and 28th, 2021 from 1-2 p.m.

Its purpose was to connect law students with RPPTL attorneys, federal and state judges to learn about what a day in their life is in furtherance of The Real Property, Probate, and Trust Law of WMU Cooley Law School's objective to

1. encourage students with an interest in real property, probate, or trust law to develop and maintain professional relationships with members of the Real Property, Probate and Trust Law (RPPTL) Section of the Florida Bar;
2. help students gain valuable insight, and knowledge in the field of real property, probate, and trust law; and,
3. be a liaison between the student body and the members of the Florida Bar's Section of the Real Property, Probate and Trust Law.

In attendance were Professor Carrier, Faculty Advisor for the WMU Cooley RPPTL-SA, WMU Cooley Professor Joseline Hardrick, Esq. (via video), Johnathan Butler and other knowledgeable panelists. Our main speaker, Johnathan Butler, RPPTL Law Student Mentoring & Programming Committee Chair, made the opening remarks.

Wednesday 1/27/21

Wednesday, January 27th was day one of the summit, from 1:00-2:00 p.m., which covered estate planning. The panelists were attorney Rachel Lunsford, an estate planner, and attorney Ricky Hearn, an estate and trust litigator. A special invited guest was Judge Catherine P. McEwen. Rachel Lunsford focused on a day in the life of estate planning, and Ricky Hearn discussed some of the challenges that can happen when a trustee/executor do not follow the rules.

Rachel Lunsford has been an attorney for about 20 years. She describes her role as being a problem solver. As an estate planner and Board Certified Attorney in Wills, Trusts and Estates at Barnett Kirkwood Koche Long & Foster in Tampa, the majority of Rachel's day is spent reading, reviewing and preparing legal documents such as wills, trusts, living wills, and powers of attorney to name a few. She does a great deal of research before she initiates any probate proceedings. Her advice to students is that as an attorney, one must be sure to check statutory laws, case laws and judges' preferences on every case that the attorney works on because the rules get updated constantly.

Ricky Hearn's day is spent at his computer, reading and writing legal documents, including pleadings. Most of his business, he says, comes from other lawyers, who refer clients to him. He does not do planning work; he limits his practice to litigation work. Ricky works with his father at Steven L. Hearn, P.A. in Tampa. He described what a day in his life looks like: after

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an intake call, he tries to determine the client's needs. Once the client's needs have been ascertained, Ricky tries to resolve the client's needs without having to go through litigation; when that does not work, he has no choice but to litigate.

Nancy Lugo, Calli Burnett, and Anne Whitacre from Bay Area Legal Services (BALS) talked about the types of cases that Florida Attorneys Counseling on Evictions (FACE) are involved in, and how students can get involved by shadowing a RPPTL FACE volunteer attorney, who is helping tenants that are facing evictions. The FACE project is statewide, and at least 23 cases in the Bay area have gotten help from FACE Project volunteers, thus far.

Next, we had WMU Cooley Professor Joseline Hardrick introduced Judge McEwen. Judge McEwen offered unique perspectives on the kind of things that she handles on a typical day. She starts her morning by doing some inspirational reading, or crossword puzzles to ease into the morning, and she preps for the day's hearing. Hearings are held Monday to Friday. During the noon hour, she either has court meetings, or she does lunch with a friend or mentee. She explained that Bankruptcy courts have the broadest civil jurisdiction of any trial courts in the system; however, they do not hear ERISA claims, divorce proceedings, juvenile, dependency or traffic claims. Bankruptcy court judges handle real complex issues on the real estate side, and they hear trust issues on the kinds of trusts that are eligible for bankruptcy relief.

Judge McEwen advises attorneys to pay attention to their drafting, because a misplaced comma can make or break a case. Bankruptcy judges touch on real property and trust issues; they apply the Federal Rules of Evidence. Their courthouse try cases live or by Zoom. She gave students a roadmap for becoming a topnotch lawyer: students can start by getting an application to become a judge, to look at the requirements, and start by incorporating those requirements within their practice.

Judge McEwen talked about how judges get appointed. She said that the appointing bodies look for well-rounded professional lawyers, the things that they have done for the improvement of justice, and the kind of cases that lawyers have tried among others. Attorneys were encouraged to keep track of all the cases that they have tried. Judge McEwen said, young lawyers, should try to find their place in the law first; they should be open to where their practice will take them. Their goal should be to find a great place in the law where they will be happy and succeed. Attorneys should use the application to become a judge as a roadmap to becoming a great lawyer even if they are not interested in becoming a judge. The application can be a great tool to becoming a great lawyer. Judge McEwen's advice to students is to: "be a good person, be highly confident, do your research, and be prepared when you are in court."

In attendance were RPPTL attorneys Adriannette Williams, Sandy Boisrond, Joseph Garrido, VP of WMU RPPTL-SA. Also in attendance were attorney Rebecca Bell, liaison with Stetson University Law School, and Stetson students.

Thursday 1/28/21

Thursday, January 28th was day two of the summit, Real Property, from 1:00 – 2:00 p.m. The panelists were attorneys Amber Ashton and Michelle Hinden, and they discussed A Day In the Life of a Real Property Lawyer, some issues each lawyers have experienced, the paths their careers have followed, some experiences from their days in law school, and how they got their start in practicing real property. The special invited guest was Kings County Supreme Court Justice Evelyn J. Laporte.

WMU RRRTL-Sa welcomed our main speaker, Johnathan Butler, RPPTL Law School Mentoring & Programming Committee Chair.

We had the pleasure of hearing attorney Michelle Hinden talk about how she started as a Real Property attorney. She is currently the managing attorney at her law firm, Nishad Khan, P.L. in Orlando, FL. Students learned how she participated in networking events at her school; the contacts she developed over the years led to her being hired upon graduation. She is a practicing transactional attorney in Real Property Law and now a Board Certified Real Estate attorney.

Michelle started her career as an in-house counsel for a developer for a number of years. The majority of her work has to do with real estate transactions, business contracts, drafting contracts, or spearheading transactions to closings. She is the lead researcher in her firm. A typical day for Michelle involves checking hundreds of emails daily; talking to her clients to offer her assistance in drafting documents tailored to the particular transaction; working with the FHA, realtors, or brokerage firms; and communicating regularly with the FHA to enter into settlement, or negotiation agreements. In her line of work, every day is different; new things come up that provide her with new experiences, making her a better attorney as a result.

Interestingly, attorney Amber Ashton had a different experience on her journey to becoming an attorney. Amber is currently underwriting counsel and in Attorney Education of the Florida Legal Department at Old Republic Title Company in Tampa. She had always wanted to be a transactional attorney. While in law school, Amber clerked with a law firm during her 2L and 3L years; she was supposed to work for them after graduation; but, during finals she got a call from them to let her know that the job that had been offered to her had been rescinded. It was around the time when the market had experienced a downturn.

Upon graduation, she was jobless, and because she had not participated in any on-campus interviews at her school, it took

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her about a year to secure a position. Her strategy to secure employment was to meet with all the attorneys that she knew and that her family had known to learn from them how they got their first job, hoping that they would get to know her, and offer her a job. One such lunch meeting landed her first job as a real estate litigator, and she stayed a litigator for 13 years.

She did not set out to be a litigator; but, she loved it! She spent a good part of her career litigating against home owners' associations and local governments regarding their lien rights. She also worked as a local magistrate for the city of Saint Petersburg for a couple of years, and she advocated for changes in code enforcement. As a member of the RPPTL, she learned about the legislative process. Now she works as an underwriting attorney for the oldest title insurance company in the country. Her advice to students is to network. She was able to secure her current job through networking activities through the Florida Bar's RPPTL Section, and she loves her current job.

Justice Evelyn J. Laporte shared her interesting story. She went through a good deal of hardship on her journey to becoming an attorney. She faced many difficulties to get through law school because of the language barrier. She speaks Spanish, and she found it hard to learn the English language. It took her about ten years to graduate from college because of the language barrier. When she made the decision to attend law school, everyone laughed at her, including members of her own family because they did not think that she could ever become an attorney. She persisted! She went to law school and graduated, even though she was still having trouble with the English language.

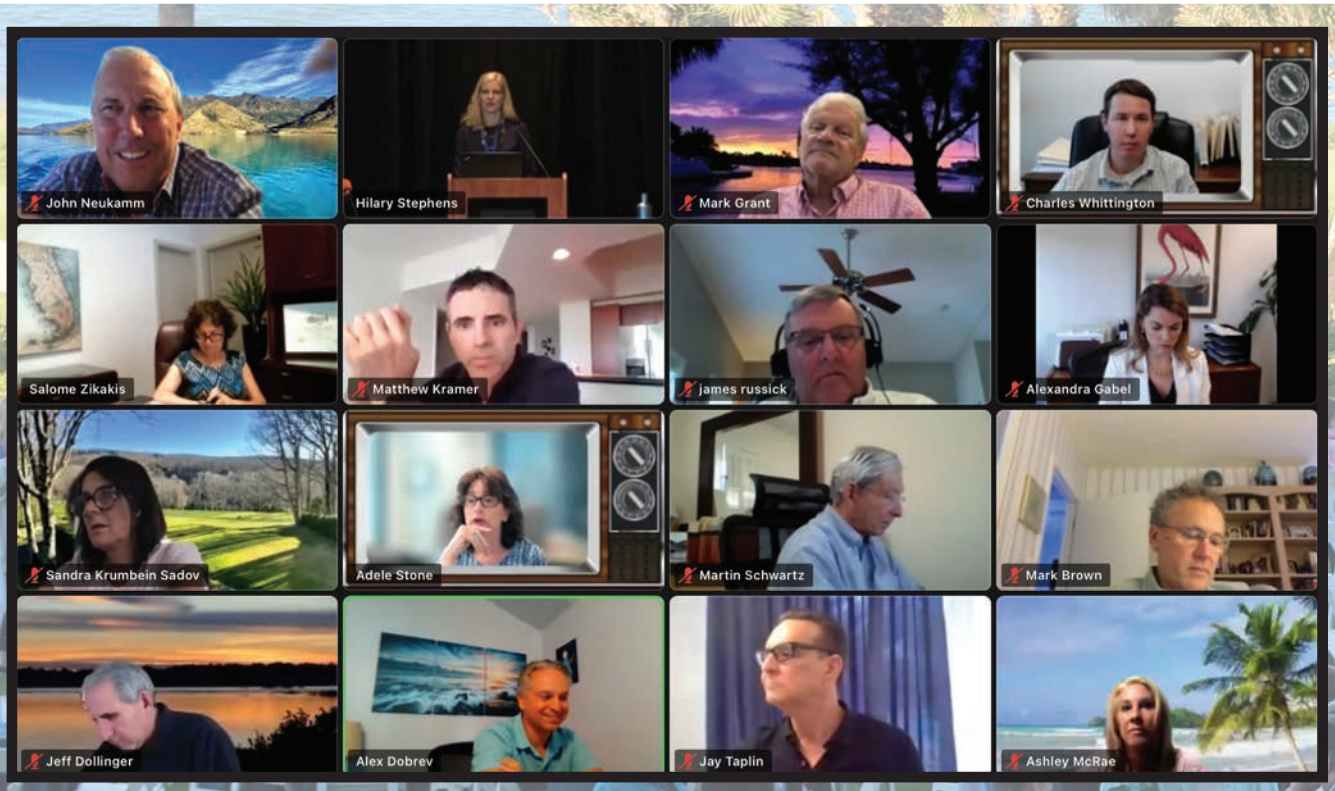
Upon graduation, she started out as a Family Court attorney. She practiced Patent Law, Social Security, Housing and Landlord Tenant until she got a job as an Assistant District Attorney, and she worked in that capacity for 12 years. In 2004, three seats were available in Kings County for a judgeship. Being a judge was never one of her priorities. She ran anyway, and she was not expected to win; but, she did. In order to become a judge in New York, one must be in good standing for 10 years, and then must be appointed by the governor or the Mayor, or be elected. After winning reelection 10 years later, she applied for a seat on the Supreme Court and won becoming the first Puerto Rican elected to the Supreme Court in Kings County.

Currently, she handles drug and fraud cases on trials with multiple defendants, requiring one jury. Her advice to students is to get some experience working for the government. That kind of experience is priceless. Justice Laporte is currently helping with family court cases, in addition to handling criminal cases. She is passionate about her work, is a great motivational speaker, and mentors several students including myself. Her advice to law students is that everything is possible, do not let anything hold you back. You must be the determinant factor as to what you want to do in life. She has offered to bring law students as interns in her chambers when it is feasible to do so.

Also in attendance on both Wednesday and Thursday, were attorney Rebecca Bell of Stetson University Law School, and Stetson students; Calli Burnett and Anne Whitacre of Bay Area Legal Services again talked about the FACE Project, and how law students can get involved to help tenants facing evictions under the supervision of RPPTL Real Property attorneys. They shared again that FACE training was to be held virtually for Cooley and Stetson students hosted by Bay Area Legal Services (BALS) on February 24 and 25, 2021.

The summit was a great success! Students were able to network with attorneys and judges, and to find out what a day in their life entails. Students learned about internship opportunities with the two judges that were on the panel. The RPPTL members have offered their time to answer questions that students had. Following the Summit, at least one attorney and twenty-four students signed up to take the training and to volunteer for the FACE Project. The students enjoyed the Summit, and they convey their profound thanks to the Chair of the Law Student Division, attorney Johnathan Butler for making the Summit possible, and to each and every panelist and to all attendees.

RPPTL Section
Executive Council & Committee Hybrid Meetings
Hammock Beach Resort • Palm Coast, Florida
April 22-25, 2021



RPPTL members join the meetings by Zoom

RPPTL section chair, Bill Hennessey, Nick Curley and Jamison Evert and family.

Recognizing and thanking the Friends of the Section

View Photo Albums at www.rpptl.org

Judge Celeste Muir and Chip Waller (former RPPTL section chair)

Theo Kypreos, Jennie Menzie, Kim Bond, section sponsor, Cumberland Trust, and Shane Kelley

Photos by John Neukamm, Michael Gelfand and Silvia Rojas. Photo editor, Jeff Baskies.

POLITICAL ROUNDUP

2021 Session Summary

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

Every Legislative Session is unique. Most Sessions present their own set of distinct opportunities and challenges. One of the largest challenges in most years is completing the sole constitutional requirement of the Legislature, to pass a balanced state budget. There are numerous reasons why the development and passage of the state budget could result in contentious issues. However, this year the budget process surprisingly ended up being an opportunity for the Legislature to excel by timely passing a balanced budget that significantly invests in the State. Instead of budget related issues, pandemic-specific challenges, such as access to the elected officials, defined the tone of the 2021 Legislative Session.

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Limited Access to the Capitol

Each day during a "traditional" Session, the Capitol is a constant buzz of activity. In addition to the 160 elected Legislative members and dozens of lobbyists working the halls, on any given day you will normally see hundreds of school children attending field trips to see government in action; members of business groups and local Chambers from around the State advocating for their priorities; a county or two showcasing the uniqueness of their areas; alumni celebrating the accomplishments of Florida's universities and colleges; and perhaps even the Florida National Guard displaying armored vehicles and helicopters in the Capitol courtyard. Each day is different. Each day is something new.

Contrast that with the 2021 Regular Session. Access to the Capitol was substantially limited due to the pandemic. There were no field trips. No students. There was a fraction of the public advocates from around the state. There were no county, university, or college "days." There were no grand displays or celebrations in the Capitol courtyard. Some lobbyists, despite working hard on behalf of their cleints, may not have even entered the building during the sixty-day Session.

In addition, the policies and procedures designed to protect the elected officials provided by the two Legislative Chambers varied significantly. The Florida Senate prohibited public access to their portion of the Capitol. Senators and staff could not take any in-person meetings in the building. This meant that lobbying the Senate generally occurred via online video conferences, phone calls, or in-person meetings outside of the Capitol. For its public committee hearings, the Senate allowed remote testimony from the large meeting rooms in the basement of the Civic Center located a few blocks west of the Capitol. From there, the public was able to comfortably social distance and watch the large projected screen of the committee proceedings.

If a member of the public wished to testify on a piece of legislation in the Senate, they would submit the traditional form at the Civic Center before the start of the committee meeting. Those paper forms would then be physically run up the hill to the Capitol by Senate staff. Once it was time to testify, the member of the public would approach a podium and the live testimony would be streamed to the Capitol. Sometimes there was a delay between the video and audio; sometimes there were more significant technical issues. Ultimately, many adapted to the changes and the new challenges that it created. The main challenges were that it was impossible for lobbyists or members of the public to read the tone of the committee room, and many times it was difficult to hear the individual votes on legislation unless all Senators turned on their microphones.

In the Florida House of Representatives, there was a completely different process. House members and staff could meet with lobbyists and members of the public in the Capitol as long as the person was escorted throughout the building. Roaming the House halls was prohibited. This procedure resulted in many House meetings in the Capitol, but far fewer than during a normal Legislative Session.

Additionally, the Florida House allowed lobbyists and the public to testify from Capitol committee rooms on a limited basis. The Florida House ensured social distancing by limiting attendance. The House did this by requiring individuals submit an online form to testify either in support or opposition of a piece of legislation at least three-hours before the committee meeting was scheduled to start. After arriving at the Capitol, the individual would present identification to be verified as a speaker at that meeting before entering the building. The individual would then need to present a copy of the online form in order to obtain a pass to enter the committee meeting. Finally, the individual and pass would be checked one last time before entering the committee room to testify. Once you understood the House's procedure, it was relatively easy to attend meetings, assuming your online form was submitted more than three hours before the start of the meeting.

Both members of the Florida House and Senate were tested regularly for the virus. While there were limited cases, swift actions by the Senate President and Speaker of the House made sure that there were not significant outbreaks that could jeopardize the legislative process. Ultimately, Legislative leaders did a tremendous job organizing a safe and successful Session without unduly limiting public participation in the process.

2021 Session Overview

Many entered the 2021 Regular Session expecting the elected officials to be solely focused on the pandemic. In addition to passing significant legislation in response to COVID-19, the Legislature passed a substantial number of priorities of the Governor, Senate President, and House Speaker this year. In all, nearly 3,100 pieces of legislation were filed during the 2021 Regular Session. Of that amount, only 275 bills were approved by both Chambers. While this may appear to be a significantly small percentage of bills, the number of bills passed this year was considerably larger than the 200 bills passed in 2018, the 197 bills passed in 2019, and the 210 bills passed in 2020.

The first bill passed and approved by the Governor created new liability protections for businesses related to COVID-19 claims. The second and third bills approved included the Governor's priority to combat public disorder, and the Legislature's priority to update Florida's sales tax provisions in order to better enforce the collection and remittance of the sales tax on online sales. Furthermore, the Legislature decided to use those enhanced revenue collections in order to stave off

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Megan Proulx Dempsey, Florida Attorneys Counseling on Evictions (FACE) First Pro Bono Attorney In The 13th Judicial Circuit

By Nancy M. Lugo, FACE Regional Coordinating Attorney, Bay Area Legal Services, Tampa, Florida and Johnathan Butler, Lead At Large Member (ALM) of the Real Property Probate & Trust Law (RPPTL) Section of the Florida Bar, 13th Circuit, Tampa, Florida

In response to the growing number of evictions in 2020, the Florida Bar RPPTL Section, in partnership with The Florida Bar Foundation and legal aid organizations, initiated a statewide pro bono project to assist tenants facing evictions. Florida Attorneys Counseling on Evictions, or "FACE" as it is most commonly called, mobilized attorneys throughout the state to join forces with legal aid organizations to conduct intake interviews, provide counsel and advice on evictions or pre-eviction matters, assist with the preparation of pro se pleadings and, if the attorney wished to get more involved, to represent the tenant by attempting to negotiate a settlement or provide representation in court.

In Hillsborough County, the number of eviction filings more than tripled from April 2020 to September 2020. In April 2020 when COVID-19 was in its early stages, 161 evictions were filed per the court clerk's records. In August 2020, 519 evictions were filed. In September, over 700 evictions were filed. High numbers of eviction filings in Hillsborough County have continued into the new year, numbering 829 in February and 699 in March 2021.[1]

The 13th Circuit RPPTL At Large Members (ALMs), led by attorney Johnathan Butler, worked with Bay Area Legal Services (BALS) to promote FACE and recruit volunteer attorneys. The Hillsborough County Bar Association (HCBA) also collaborated with recruitment of pro bono attorneys. Megan Proulx Dempsey, a partner at Shumaker Law in Tampa, read an article about FACE and contacted Jena Hudson, the Managing Attorney for the Volunteer Lawyers Program at BALS. Ms. Dempsey was the first pro bono attorney in the 13th Judicial Circuit to answer the call to assist tenants facing evictions. BALS's FACE team provided her with training materials and videos, and a mentor attorney from BALS's housing team and scheduled her first FACE case.

Megan Dempsey's client was a disabled Hillsborough resident under 60. He had received a five-day notice posted on his door. He called BALS three days before his filing deadline and scheduled an appointment with Ms. Dempsey for the morning his answer was due, September 18th, 2020. This was an unusually tight timeline due to a lack of attorneys available to take his case. Ms. Dempsey completed the intake, reviewed his documents during her appointment with the client, discussed strategy with the assigned BALS mentor attorney, and prepared the pro se pleadings in response to the complaint for eviction using the resources provided to her. Concerned about the tight deadline for filing a responsive pleading, Ms. Dempsey reached out to opposing counsel to request that they not file a default immediately. Fortunately, opposing counsel agreed to allow the client a short additional time to respond, in which he did respond. Ms. Dempsey worked quickly and professionally and was instrumental in the client receiving advice and pro se pleadings on this case.

Ms. Dempsey accepted three additional FACE clients in the subsequent months. By providing approximately 22 hours of pro bono service, Ms. Dempsey was able to assist four families with eviction and/or pre-eviction defense. When asked about her decision to volunteer for FACE, Ms. Dempsey stated:

> I wanted my pro bono work to be meaningful and impact the lives that I was serving, especially in this time of crisis. Assisting Bay Area Legal Services was a perfect fit and one that allowed me to work on things that were impacting our community most intensely during this difficult time.

Tom DiFiore, Team Leader for BALS's Advocates for Basic Legal Equality (Team ABLE), commented:

> It was an absolute pleasure working as a mentor with Megan. She jumped right into several cases that, like many landlord tenant cases, demanded quick action. She had thorough knowledge of the training materials, appraised her client's options quickly, and provided excellent assistance. We are so thankful for her service to these clients and to our community in this difficult time.

BALS is grateful for Ms. Dempsey's work on the FACE project and for the work of the pro bono attorneys who assisted on BALS's 18 remaining FACE cases from September to December 2020.

The number of eviction filings continues to mount. Since March 15th, 2020, approximately 12,092 eviction cases were

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Megan Proulx Dempsey, First Florida Attorneys Cousneling on Evictions, from page 30

filed in Hillsborough and Pinellas Counties through April 11th, 2021, with approximately 160 filed the week of April 4 through April 11th, 2021.[2]

A total of 5,057 eviction cases, excluding unlawful detainer and non-residential evictions, were filed in Hillsborough from October 1st through March 31st.[3]

On March 28th, 2021, the Director for the Centers for Disease Control and Prevention extended the moratorium on evictions to June 30th, 2021, for purposes of preventing the further spread of COVID-19.[4] Despite the moratorium that is in place, the eviction filings continue. We need your help. BALS has partnered with the Community Law Program (CLP) in Pinellas County and Legal Aid of Manasota (LAMS), covering Manatee and Sarasota Counties, to provide FACE pro bono services throughout the Tampa Bay region (Hillsborough, Pasco, Pinellas, Manatee and Sarasota Counties). Attorneys interested in volunteering for FACE may contact Mercy Roberg, CLP, at mroberg@lawprogram.org, Pamela Fields, LAMS, at pamelaf@legalaidmanasota.org, or BALS at bals.org/volunteer. Questions? Please contact ableface@bals.org. For more information on the FACE program, please visit https://bals.org/volunteer/face.

Endnotes

1 Source: Hillsborough Online Viewing of Electronic Records (HOVER), Hillsborough County Clerk of Circuit Court, 13th Judicial Circuit, https://hover.hillsclerk.com/html/home.html, last accessed 4/12/2021.

2 Eviction Tracking: Tampa, Florida, Eviction Lab, https://evictionlab.org/eviction-tracking/tampa-fl, last accessed 4/14/2021.

3 HOVER, supra note 1.

4 CDC Eviction Moratorium-03392021, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-03292021.pdf, last accessed 4/15/2021.

Political Roundup: 2021 Session Preview, from page 29

an automatic reemployment tax rate increase that would have cost Florida's employers nearly $3.5B over the next four years. Other significant bills passed this Session include:

A bill holding large technology companies accountable by driving transparency and safeguarding Floridians' ability to access and participate in online platforms, a priority of the Governor.

- A bill providing liability protections for the healthcare industry related to COVID-19 claims.
- A bill substantially expanding and revising the voucher scholarship programs.
- A bill amending Florida's elections provisions.
- A bill protecting the right to farm and repair certain equipment, a priority of the Senate President.
- Bills and funds providing for enhanced resiliency from sea level rise, a priority of the House Speaker.

When the final gavel fell, the Governor, Senate President, and House Speaker all came away from the Regular Session with major wins.

2021 Budget

In addition to some of the policy wins discussed above, the Legislature finished the Session on time and passed a record-breaking, balanced State budget. This was an incredible win, since last fall, and the state economists projected the State was facing a $5.4B general revenue shortfall for the two-year period July 2020 – June 2022 due to the pandemic. That estimated budget shortfall initially had Legislative budget writers examining various areas to potentially cut state expenditures and public services.

Thankfully however, updated general revenue estimates in April resulted in a much brighter economic picture. Thanks to significantly better-than-anticipated tax revenue collections in late 2020 and early 2021 and cost savings strategies put in place by the Executive Branch, the estimated $5.4B revenue reduction was slashed to only $1.3B for the same two-year period. This shrunken potential deficit was more easily absorbed due to those same Executive cost saving strategies implemented in the current state budget and the fiscally conservative policies put in place by previous Legislatures.

In addition to State revenues rebounding from the pandemic more quickly than anticipated, federal pandemic relief funds made it possible for Florida to pass a 2021-2022 budget ultimately totaling more than $101.5B. That budget is $9.2B more than the State current year's budget, and the State's first budget to exceed one-hundred billion dollars. The federal relief funds include $5.8B provided as part of the CARES Act and $9.8B provided as part of the American Rescue Plan. Of these federal amounts, $6.7B of the American Rescue Plan funds were appropriated by the Legislature to be spent during the next State fiscal year. In addition to a record-setting budget amount, the Legislature also reserved a record amount of funds, totaling approximately $6B.

This combination of federal relief funds, enhanced state revenue collections, Executive Branch savings, and the Legislature's history of fiscally conservative policies were all necessary to set the stage for the significant budget successes achieved during the 2021 Regular Legislative Session.


F. BROWN

***French Brown** has a dozen years of experience specializing in Florida's state and local taxation. He was former leadership at the Department of Revenue.*

Roundtable

Highlights of the Meeting of the RPPTL Section

PROBATE AND TRUST DIVISION

Saturday, April 24, 2021

Hammock Beach Resort , Palm Coast, Florida

Prepared by Antonio P. Romano, Palm Beach Gardens, Florida and Joseph M. Percopo, Orlando, Florida

Thank you to the Roundtable Sponsors: Guardian Trust and Stout

The Director of the Probate and Trust Division, Sarah Butters, called the meeting to order at 8:30 a.m.

Welcome — Sarah Butters, Division Director

Word from our Sponsors — Guardian Trust – Travis Fincham; Stout — Garry Marshall

Legislation Committee Report — John Moran, Co-Chair

Senate Bill 1070, which is the RPPTL's "omnibus" estate and trust bill, passed the Florida Senate and is awaiting a vote in the Florida House of Representatives. This bill includes six of the Section's Probate Division initiatives, including the Uniform Directed Trust Act, Community Property Trust Act, Trustee Employment Liability, Restricted Depositories (Goodstein fix), Devises to Former Spouses (Gordon fix) and Homestead in Trusts. [Update: Senate Bill 1070 subsequently passed the Legislature and is pending action by the Governor.] Additionally, House Bill 483, which includes a series of technical changes to Chapter 117, F.S. relating to remote online notarizations, passed the Legislature and is pending action by the Governor. Finally, House Bill 625, which deals with the presumption of reasonable compensation for attorneys in formal estate and trust administrations, passed the Legislature and is pending action by the Governor.

CLE Report — Sancha Brennan, Co-Chair

Date of Presentation	Crs. #	Title	Location
4/9/21	4073	Real Property Cert Review	Video Webcast (pre-recorded)
4/9/21	4074	Wills, Trusts and Estates Cert Review	Video Webcast (pre-recorded)
4/15/21	4023	(Condo Series 2) RPPTL Audio Webcast: Covid-19 and Community Associations: A Pandemic Enters its Terrible Twos Addressing burgeoning pandemic related issues & ethical obligations for attorneys	Audio Webcast
5/7/21	4363	Trust & Estate Symposium	Video Webcast (pre-recorded)
5/12/21	4030	RPPTL Audio Webcast - Harassment, slander, defamation and cyber-stalking in real estate transactions and litigation: Everything you say can and will be used against you.	Audio Webcast
5/19/21	4447	Construction Law Institute	Audio Webcast
5/20/21	4025	RPPTL Audio Webcast – Condo Webcast Series (3)	Audio Webcast
6/4/21	4707	Convention CLE: The Virtual Law Office	JW Marriott, Marco Island
6/17/21	4026	RPPTL Audio Webcast – Condo Webcast Series (4)	Audio Webcast
6/30/21	4031	RPPTL Audio Webcast - New Summary Judgment Standard, Pt. 2	Audio Webcast

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Action Items: None.

Information Items: None.

General Discussion

Ad Hoc ART Committee — Alyse Comiter, Chair; Sean Lebowitz and Jack Falk, Co-Vice Chairs

Sean Lebowitz reported that the ART Committee decided to move forward on working on proposed legislation. The Committee is going to have a carveout for homestead property, and will keep the marital deduction as an open issue.

Ad Hoc Guardianship Law Revision Committee — David Brennan, Nicklaus Curley, and Stacy Rubel, Co-Chairs - David Brennan reported that the bill has gone through bill drafting, and is finalizing proposed changes, corrections, updates, and edits, and will continue to move forward in finalizing the bill for the 2021-2022 legislative session.

Ad Hoc Electronic Wills Committee — Angela Adams, Chair; Jenna Rubin and Rick Hearn, Co-Vice-Chair - Angela Adams reported that the Glitch Bill passed, which will become effective when it becomes law – as soon as the Governor signs off on it. It appears that some electronic notaries are being designated as qualified custodian to hold the electronic will. There is a concern as to whether they are complying with the bonding and insurance requirement. Palm Beach County also had the first electronic will filed in April, but the electronic will was not accompanied by an affidavit that the custodian is to submit, so the document was not self-proving. Sarah Butters also discussed whether the Petition for Administration may have to be modified and electronic forms updated to deal with the probate of electronic wills. The Committee is vigilant of monitoring the process as it continues to unfold and is prepared to be responsive to further legislative adjustments as needed.

Ad Hoc Study Professional Fiduciary Licensing Committee — Angela Adams, Chair - The Committee has been in discussions with regard to some entities that should be exempt and how to describe such entities. A draft is in the works, and the Committee will be reaching out to ensure that nothing in the draft will conflict with the Guardianship law rewrite.

Ad Hoc Study Due Process, Jurisdiction & Service of Process Committee — Barry Spivey, Chair; Sean Kelley and Christopher Wintter, Co-Vice Chairs

No report.

Asset Protection — Brian Malec, Chair; Richard Gans and Michael Sneeringer, Co-Vice-Chairs - Brian Malec reported that the proposed bill to clarify Florida law, Chapter 222, to address the fix to Kearney v. Kearney, 129 So. 2d 381 (Fla. 1st DCA 2014) to prevent general blanket asset pledges from including certain otherwise exempt assets (like a 401(k) or IRA), died in the Insurance and Banking Committee in the House. Some legislators wanted the bill to go further and apply retroactively. The intent is to try again next session. Also, the Committee is working on legislation concerning tenants by the entirety joint trusts including a white paper and proposed statutory language, which will be further discussed at the Marco Island meeting.

Attorney/Trust Officer Liaison Conference — Tattiana Brenes-Stahl and Cady Huss, Co-Chairs; Tae Kelley Bronner, Stacey Cole (Corporate Fiduciary), Gail Fagan, Mitchell Hipsman, and Eamonn Gunther, Co-Vice Chairs - Cady Huss reported that the Conference will be a hybrid conference this year at The Breakers, Palm Beach, on August 19-21, 2021. The sponsor link is live, and there is a great line-up of speakers, sponsors, exhibitors, and attendees.

Charitable Planning and Exempt Organizations Committee — Seth Kaplan, Chair; Jason Havens and Denise Cazobon, Co-Vice-Chairs - Seth Kaplan reported that this year the Committee is going to change the symposium to be a four-part series as opposed to one full day, which will start with more basic items and will progressively become more complex. The symposium will be in a hybrid format. Please reach out to Seth Kaplan if you wish to be speaker or if you have any interesting topics that could be addressed at the symposium.

Elective Share Review Committee — Lauren Detzel, Chair; Cristina Papanikos and Jenna Rubin, Co-Vice-Chairs -
Jenna Rubin reported that the Committee (1) is looking at whether a consent between interested parties is sufficient to have an asset excluded from the elective share, or whether the parties have to follow post-nuptial formalities; (2) re-opened the discussions on interest imposed on the elective share in cases where the elective share is not funded; and (3) is discussing valuation discounting for business interests, and valuation of non-elective share trusts. The Committee is also monitoring what is going on in other committees, including revocable transfer on death deeds, and the pretermitted spouse issue in Trust Law.

Estate and Trust Tax Planning — Robert Lancaster, Chair; Richard Sherrill and Yoshimi Smith, Co-Vice Chairs - Robert Lancaster reported that the IRS released proposed rules creating a $67 user fee for Estate tax closing letters, and intends to implement a one-step procedure on the web. Separately, Robert asked that members please review the White Paper and materials on transfer of interests at death through TOD designations or agreements, and advise whether there are any issues or discussion points in connection with the preceding. The Committee is also dealing with Fla. Stat. § 711.501 and 711.504, adding clarification that a party can make transfers

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within governing documents or TOD Designations for all entities, not just corporations. The 2nd DCA also issued a ruling in Finlaw v. Finlaw involving an Ohio partnership agreement, and indicated that both in Ohio and Florida, if the contracting parties expressly agree on the disposition of property, the agreement controls over the disposition of property. There is also a subcommittee that is evaluating the document stamp tax on transfers to Trusts, and what needs to be done to fix the Department of Revenue's strict interpretation of the Code.

Guardianship, Power of Attorney and Advanced Directives — Nicklaus Curley, Chair; Brandon Bellew, Stacy Rubel, and Elizabeth Hughes, Co-Vice Chairs

Nicklaus Curley reported on the presentation by Darby Jones about the professional fiduciary council of Florida. He also reported on three legislative updates: (1) the supportive decision making bill, (2) elder care and coordination (mediation can be court mandated for anything predeath), and (3) exploitation slayer statute (anticipated to pass this year).

IRA, Insurance and Employee Benefits — L. Howard Payne and Alfred Stashis, Co-Chairs; Charles Callahan and Rachel Oliver, Co-Vice Chairs

Al Stashis discussed Joan Crain's presentation on retirement benefits in divorce and the difficult issues associated with same, including some potential solutions. Also addressed was the recent IRS Publication 590B, believed to provide an erroneous example of the 10-year rule under the SECURE Act, and need for a correction of that. Briefly mentioned were other pending subcommittee projects and recent developments.

Liaisons with ACTEC — Elaine Bucher, Shane Kelley, Charles Nash, Bruce Stone, Diana Zeydel and Tami Conetta

No report.

Liaisons with Elder Law Section — Travis Finchum and Marjorie Wolasky

Travis Finchum reported that a DCF publication advised of an intent to start penalizing transfers for people over 64 putting funds in a pooled special needs trust. The Committee is trying to determine what the intent is. The Committee is anticipating a lot of changes on how DCF views all of the Medicaid planning strategies.

Liaisons with Tax Section — Lauren Detzel, William Lane, and Brian Sparks

No report.

Liaison with Professional Fiduciary Council — Darby Jones

The Council is growing quickly under the guidance of Nick Curley and Sarah Butters. The second annual conference was a success with an array of great speakers, and the next conference is February of 2022. There is a webinar the last Friday of each month, and the website contains a directory of members that are reviewed and approved by the Committee, as well as those who serve as vendors for fiduciaries.

Principal and Income — Edward Koren and Pamela Price, Co-Chairs; Joloyon Acosta and Keith Braun, Co-Vice Chairs - Edward Koren reported that the Committee is about half way through the review of the revised drafts for a Florida version of the Uniform Fiduciary Income and Principal Act ("UFIPA"). The Committee anticipates another year before it will be in a more final form.

Probate and Trust Litigation — Rich Caskey, Chair; Angela Adams, James George and Lee McElroy, Co-Vice Chairs - Richard Caskey reported that they anticipate an information item for next meeting regarding trust distributions. The later discovered wills subcommittee should also have proposed legislation to vote on for the next committee meeting. The Florida Bar website has a published best practice guides for electronic will procedures, many of which were adopted from a subcommittee that was put together to provide comments on the best practices. Also, an ad-hoc committee explored whether there should be commentary as to agreeing or disagreeing on the new summary judgment standard addressed by the Florida Supreme Court, as effective May 1, 2021, the Florida courts will transition to a new summary judgment standard meant to align Florida's summary judgment standard with that of the federal courts and of the supermajority of states that have already adopted the federal summary judgment standard. In re Amends. to Fla. Rule of Civ. Pro. 1.510, 309 So. 3d 192, 192 (Fla. 2020), as articulated by the United States Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The court made the effective date May 1, 2021, to allow for comments from the public (the subcommittee ultimately determined that comments were not necessary).

Probate Law and Procedure — Travis Hayes, Chair; Ben Diamond, Christina Papanikos, Theodore Kypreos, and Lee McElroy, Co-Vice Chairs - Travis Hayes reported that they are monitoring the estate and trust bill and looking at attorney compensation questions. Jeff Goethe also provided an update on recent probate rules changes, and there is a Florida Bar Journal article on same. The Department of Revenue has also issued new forms DR 312 and DR 313, and although they are called affidavits, the Department has removed the notary block. Travis also discussed pending items, including (1) whether removal of the notary block while calling it an affidavit may cause any recording issues; (2) the definition of a

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Probate and Trust Division Roundtable, from page 34

foreign personal representative, and the possibility of looking into ambiguities; (3) the ongoing work from the Johnson v. Townsend committee; and (4) Florida's strict will execution compliance versus harmless error, with the majority advising of a preference toward the strict execution requirements. Lastly, Jeff Goethe and Laird Lile gave a presentation on electronic filings.

Trust Law — Matthew Triggs, Chair; Jennifer Robinson, David Akins, Jenna Rubin, and Mary Karr, Co-Vice Chairs

No report.

Wills, Trusts and Estates Certification Review Course — Jeffrey Goethe, Chair; Allison Archbold, Rachel Lunsford, and Jerome Wolf, Co-Vice Chairs

The CLE course has been released, and can be ordered online. It is an on-demand course.

Adjournment. The meeting adjourned at 9:45 a.m. The next Probate and Trust Division Roundtable meeting will be held at in a similar hybrid virtual/in-person format at the JW Marriott Marco Island Beach Resort, Marco, Florida on June 5, 2021.

RPPTL GENERAL SPONSORS

The Florida Bar's Real Property, Probate and Trust Law Section (aka RPPTL) is grateful to all of its sponsors who faithfully support the good work of the Section. In addition to recognizing them in each issue of ActionLine as we do, we want to offer information to you in the event you wish to speak with a sponsor about the services it provides. Below are the names of the sponsors and their contact information. Again, thank you, sponsors, for supporting RPPTL!

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Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION

Saturday, April 24, 2021

Hammock Beach Resort • Palm Coast, Florida

Prepared by Colleen Sachs Esq., Santa Rosa Beach, Florida, Michelle Hinden, Esq., Orlando, Florida, and Jin Liu, Esq., Tampa, Florida

Thank you to the Roundtable Sponsors:

Fidelity National Title Group

The Director of the Real Property Law Division S. Katherine Frazier, called the meeting to order in person and on Zoom conferencing at 8:30 a.m., and welcoming remarks were provided to members, law students, fellows, and guests.

Welcome — S. Katherine Frazier, Division Director

Sponsor Recognition

The director recognized Karla Staker of sponsor Fidelity National Title Group, who presented a brief video.

Highlights of Hybrid Disney Yacht Club Meeting on December 5, 2020

The highlights of the Hybrid Disney Yacht Club meeting held on December 5, 2020 were approved.

Action Item:

Real Estate Leasing Committee — Brenda B. Ezell, Chair

Kristen King Jaiven and Michelle Hinden presented on the proposed updates to the (A) Residential Lease for Apartment or Unit in Multi-Family Rental Housing (Other than a Duplex) including a Mobile Home, Condominium, or Cooperative; and (B) Residential Lease for Single Family Home or Duplex. The changes were recommended for uniformity and ease of reference. The leases are very similar unless there is a statute in place that requires differences. Default provisions were added to the places with check boxes in case they are left blank. The following major changes were made to the proposed leases: addressed personal property items leased, clearer payment terms, tenant's access to association records, keys and cards, joint and several liability, maintenance obligations, risk of loss, process for major storms, process for reasonable accommodation, process for casualty damage incidents, revised for ease and uniformity, and addressed what fees are defined as rent under the lease. They also discussed Optional Invenstory Addendum, Lead Warning Statement Addendum, and Early Termination Fee/Liquidated Damages Addendum.

There were no comments or questions.

A motion to approve the proposed updates to the following Supreme Court of Florida approved forms: (A) Residential Lease for Apartment or Unit in Multi-Family Rental Housing (Other than a Duplex) including a Mobile Home, Condominium, or Cooperative; and (B) Residential Lease for Single Family Home or Duplex passed.

Information Items:

Condominium and Planned Development Committee — William P. Sklar and Joseph E. Adams, Co-Chairs

Bill Sklar and Joe Adams reported on proposed legislation amending Section 718.113 and Section 718.115 to clarify and enhance the ability of condominium associations and condominium unit owners to use hurricane shutters and other types of hurricane protection to protect condominium property, association property, and the personal property of unit owners, and to reduce insurance costs for condominium association and unit owners. They provided the background on why this amendment is currently under consideration. Bill Sklar reported that prior to Hurricane Andrew, a condominium board could avoid the installation of hurricane shutters for aesthetic reasons; however, after Hurricane Andrew, it was understood that changes were necessary. The proposed amendment applies to condominiums and mixed use condominiums regardless of the date of the declaration. Any declaration recorded after the effective date of the proposed amendment, would require the declaration to state which party would be responsible for replacement of windows, doors, hurricane protection, etc. The proposed amendment would be amended so that the majority of interest of unit owners' vote would be required to approve hurricane proofing of the building of a condominium and requires a certificate of recording in the county where condominium is located so that the public has notice of the obligations. For unit owners who have already installed code compliant shutters, such unit owners would be

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given a credit when the special assessment is assessed against the unit owners for the installation of hurricane shutters/ proofing to the condominium. Bill Sklar further commented this has been an area of confusion for the better part of 28 years because no one knows who bears the burden of hurricane shutters and impact glass, and this clarifies, in detail, how to address this, specifically, if a unit owner has already installed the shutters themselves. Bill Sklar concluded this is a reasoned legislative proposal to address these issues

Joe Adams added, in closing, that they did try to identify other Sections of the Bar, which would have interest in the proposed amendment, and those Sections were provided courtesy copies for comments; however, no comments were received.

The proposed amendment received 100% approval from the Condominium and Planned Development Committee.

The Florida Bar Florida Realtor — Attorney Joint Committee – Fred Jones

Fred Jones provided an update on the proposed revisions to the FR/BAR Contract. He commended the Florida Realtors - Florida Bar Joint Committee and the FR/Bar Subcommittee for their hard work. The group is going on 3 years with making these revisions to the contract. Fred thanked the various attorney and realtor members who helped with the effort.

Fred Jones reported that the majority of changes were made to the "As Is" contract form since this is the most widely used form. He reported that the following items are being addressed: inclusion of additional personal property items, such as smart home features; changes needed due to statutory changes; paragraph 4 and title revised to "closing and closing date" to account for remote closings and to address the release of keys for closings where closing funds have been received in escrow but Seller has not yet received Seller's proceeds; revision of paragraph 5 so that the CFPB 10 day guideline is no longer abused; revision of paragraph 6b so that it also applies to third party pre- or post-occupancy agreements, so that Seller is obligated to disclose the existence of same to Buyers and to provide estoppel letters; addition of a default to the assignment provision, so that if none selected, the Contract is not assignable; major revisions are proposed to the financing and cash closing sections of the Contract; paragraph 9c was revised so that it is clear that Buyer shall designate the closing; agent; revised so that survey is due 5 days before closing; clarifies the parties' financial responsibilities with respect to public body special assessments; addresses proration of special taxes imposed by a special taxing district under taxes and proration of any special assessments imposed by CBD; made revisions to the permit section; added paragraph 13 under escrow; clarified in Standard F that the deadline is until 11:59 p.m.; revision of force majeure provisions; addressing FinCen – closing documents – disclosure and delivery of essential documents, which may be required or produced by the buyer; clarification that Notice under paragraph O must be in writing, and may be made by mail, fax, personal delivery or email, and not text. Fred further reported that 5 or 6 riders are being revised, including Rider B, Rider E, the addition of a Mold Rider to the Standard Contract, and Rider W, Riders T and U addressing pre-closing and post-closing occupancy language.

There is proposed language from FLTA on section 9(c). The Director asked that the parties work together to determine whether that language should be added prior to the next meeting and the Breakers meeting.

As for the timeline, Fred Jones said if there is full Executive Council approval in July the form could be submitted to the Florida Realtors for an approval by both bodies by September 2021.

Update regarding Florida Remote Online Notarization Legislation — FLTA - Melissa Murphy, Liaisons with FLTA, Co-Chair

Melissa Murphy reported the RON bill has passed both houses and is in the stack of bills to be sent to the governor for approval.

Update on Public Record Redactions Legislation — Brian W. Hoffman, Title Insurance and Title Insurance Liaison, Chair

Brian Hoffman reported that there was much discussion on the proposed public records redaction legislation. He reported that Len Prescott gave a great presentation of it at the Problems Studies committee meeting. The redaction legislation that was passed in 2019 has created problems. The proposed bill did get approved, and it is waiting to be signed by the Governor. It restores the grantor-grantee index, and gives limited access to the records. The clerk will be under the obligation to let the protected person know the record has been accessed. There is still a constructive notice problem for things such as construction liens. Also, the statute doesn't actually protect the person since voting records are still available. The Committee will keep the Section updated as it proceeds.

CLE Report — Wilhelmina F. Kightlinger, CLE, Co-Chair

Nothing to report.

Legislation Committee Report — William Cary Wright, Legislation Committee, Co-Chair

Nothing to report.

Attorney Banker Conference — E. Ashley McRae, Chair; Kristopher E. Fernandez, R. James Robbins, Jr. and Salome J. Zikakis, Co-Vice Chairs

Kristopher E. Fernandez reported the fourth annual Attorney Banker Conference will be held on February 25, 2022 at Nova Southeastern University Law School in Fort Lauderdale, Florida.

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Commercial Real Estate — Jennifer J. Bloodworth, Chair; E. Ashley McRae, Eleanor W. Taft and Martin A. Schwartz, Co-Vice Chairs

Jennifer Bloodworth recapped that the Committee had a great presentation on conflicts of interest. She further reported that the Committee created a subcommittee to take a look at conditional payoffs, and that if anyone was interested to contact her or Ashley McRae. She further reported that the Committee was also starting a task force on blockchain and cryptocurrency to be led by Alex Dobrev. At the Marco Island meeting the Committee will have a presentation on Receivership Law.

Condominium and Planned Development — William P. Sklar and Joseph E. Adams, Co-Chairs; Shawn G. Brown and Sandra E. Krumbein, Co-Vice Chairs

Bill Sklar reported on the statutory changes to SB 630 and HB 67. He reported that the Committee has been working on this major initiative for 3 years. He further reported that the final vote at the House was upcoming, and the Senate has passed unanimously. He further reported that the Committee's webinar series has done well, and that there are two more to go. He gave thanks to Steve Mezer for leading this this year. Lastly, he reported that the Committee's two volume green book is in the works.

Condominium and Planned Development Law Certification Review Course — Jane L. Cornett, Chair; Christene M. Ertl, Vice Chair

Nothing to report.

Construction Law — Reese J. Henderson, Jr., Chair; Sanjay Kurian and Bruce D. Partington, Co-Vice Chairs

Nothing to report.

Construction Law Certification Review Course — Melinda S. Gentile and Elizabeth B. Ferguson, Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs

Nothing to report.

Construction Law Institute — Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs

Jason Quintero reported that the Construction Law Institute is scheduled for May 20-22, if anyone wants to sign up. The room block will close on May 3rd. Among the topics to be covered are safety inspections, best practices for liens, best practices for mediation. The event will be held at the JW Marriot in Orlando, Florida.

Development & Land Use Planning — Julia L. Jennison and Colleen C. Sachs, Co-Chairs; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs

Colleen Sachs reported that the committee had an informative legislative and case law update. At the last meeting Anne Pollack gave an excellent presentation on Flood Insurance and Risk Rating 2.0. That has now been expanded and will be a virtual CLE on July 14th.

Insurance & Surety — Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs

Nothing to report.

Liaisons with FLTA — Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs

Nothing to report.

Real Estate Certification Review Course — Manuel Farach, Chair; Martin S. Awerbach, Lloyd Granet, Brian W. Hoffman and Laura M. Licastro, Co-Vice Chairs

Manny Farach reported that there will be a follow up presentation on Thursday in which speakers will make themselves available to answer any questions.

Real Estate Leasing — Brenda B. Ezell, Chair; Christopher A. Sajdera and Kristen K. Jaiven, Co-Vice Chairs

Brenda Ezell thanked Fellow Terrance Harvey for his help with the leases, the FACE project, and the unlawful detainer subcommittee. She reported that the Committee had a great

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presentation on the COVID-19 moratorium throughout the country. She further reported that the Committee is planning its first full day advanced leasing symposium. Language for a new Sec. 49.072, F.S. was presented to the Leasing Committee. The proposed legislation authorizes clerks to issue summons to unknown parties, directs process servers to inquire as to the name of the party being served, with the name being returned with service. If unsuccessful after two attempts to serve, service could be made by posting it on the premises. A copy of the summons and complaint would be provided to the Court and the clerk would mail it to the unknown party. This process would allow judgment to be rendered if no responsive pleading is filed in summary eviction under Sec. 51.011, F.S. Also authorizes the final judgment and writ of possession, which directs the Sherriff to execute the writ of possession, whether names are known or unknown.

Real Property Finance & Lending — Richard S. McIver, Chair; Jason M. Ellison and Deborah B. Boyd, Co-Vice Chairs

Richard S. McIver reported that the committee had an interesting presentation at the committee meeting. Jason Ellison is working and will possibly bring up a UCRERA glitch bill. The committee approved comments on the assignment of rents statutes.

Real Property Litigation — Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs

Chris Smart presented on the new summary judgment standard. Michael Hargett discussed the expansion of collaborative law to all areas of practice.

Real Property Problems Study — Lee A. Weintraub, Chair; Adele I. Stone, Susan K. Spurgeon and Anne Q. Pollack, Co-Vice Chairs

Nothing to report.

Residential Real Estate and Industry Liaison — Nicole M. Villarroel, Chair; Louis E. "Trey" Goldman and James A. Marx, Co-Vice Chairs

Nothing to report.

Title Insurance and Title Insurance Liaison — Brian W. Hoffman, Chair; Mark A. Brown, Leonard F. Prescott, IV, Cynthia A. Riddell and Jeremy T. Cranford, Co-Vice Chairs

Nothing to report.

Title Issues and Standards — Rebecca L.A. Wood, Chair, Robert M. Graham, Brian W. Hoffman and Karla J. Staker, Co-Vice Chairs

Rebecca Wood reported that materials from a committee CLE will be posted. She also indicated that the committee has opportunities for those looking to become more active.

How To Navigate Residential Evictions During COVID-19 Era And The Centers For Disease Control's Temporary Halt

By Terrence L. Harvey, Esq., The Harvey Firm, PLLC, Jacksonville, Florida

The Centers for Disease Control and Prevention Department of Health and Human Services Order[1] ("CDC Order") that went into effect back in September 2020 and lasted through December 2020 has been extended for the second time through June 30, 2021. The order bans a landlord from evicting tenants for non-payments of rent as long as the tenant meets certain requirements. Those requirements include:

1. the individual must use their best efforts to obtain all available government assistance for rent and housing;
2. the individual
   a. a. expects their annual income to be less than $99,000.00 (or less than $198,000.00 if filing jointly) for calendar year 2021
   b. was not required to report any income in 2020 to the IRS, or
   c. received an Economic Impact Payment during the pandemic;
3. the individual is unable to pay rent due to substantial loss of income, loss of compensable hours of work or wages, a lay-off, or extraordinary out of pocket medical expenses;
4. individual is using best efforts to make timely partial payments, if possible; and
5. the individual would become homeless if evicted or, if forced, the individual would move into and live in close quarters.[2]

Whether representing landlords or tenants in residential eviction cases, practitioners have undoubtedly been faced with issues regarding the CDC moratorium. This single order has caused hesitancy of courts to order evictions and sheriffs to issue writs of possession. While the CDC moratorium prevents evictions for non-payment of rent, the CDC Order does not forgive tenant's obligation to pay rent and does not preclude the landlord from evicting a tenant for reasons other than non-payment. Practitioners should be aware of their client's rights, obligations and remedies available under the CDC Order.

Who can be evicted and under what circumstances?

According to the CDC Order, the moratorium on evictions applies to residential leases and does not apply to commercial leases. During the moratorium a tenant cannot be evicted for non-payment of rent, however, the CDC Order does state that a tenant may be evicted for any other reason, to include damaging or posing an immediate and significant risk of damage to property, violating any applicable building code, health ordinance, or similar regulation relating to health and safety, or violating any other contractual obligation.

Obligations of Tenant

The CDC Order does not automatically stop an eviction from being filed or a final judgment from being entered. Tenants who meet the requirements above must complete the CDC Declaration Form[3] and deliver it to the landlord. The CDC Order requires that the tenant declare that their income has decreased substantially, that the tenant has been laid off from work, their hours have been cut, or have incurred extraordinary out of pocket medical expenses. The tenant will still be responsible for any unpaid rent, fees and penalties under the lease and is required to follow the terms of the lease.

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Obligations of the Landlord

It is important to note that landlords also have rights concerning the implementation of the CDC Order. If an eviction proceeding has commenced and the tenant has presented the landlord with the CDC Declaration Form, the CDC Order does not preclude the landlord from seeking a hearing to challenge the veracity of the declaration. A tenant's ability to qualify under the CDC Order will not automatically stop an eviction. The hearing allows the landlord to produce evidence that the tenant does not qualify for the moratorium, and if any of the requirements are not met, it allows the court to determine the inapplicability of the moratorium and proceed with the eviction. The CDC Order does not eliminate or release the tenant from his/her obligations under the lease, including accrual of past rents, fees, interest and penalties for failure to make the rental payments.

While it is uncertain if the moratorium will be extended beyond June 30, 2021, practitioners should make sure to inform their clients, whether landlords or tenants, of their rights and obligations under the CDC Order.

T. HARVEY

***Terrance Harvey**, Esq. is an attorney with The Harvey Firm, PLLC. Terrence focuses his practice in the areas of real estate, civil litigation and bankruptcy. Terrence earned his B.S. in Business Administration from the Warrington College of Business at the University of Florida and his law degree from the University of Tennessee College of Law. While at Tennessee Terrence served as a member of the executive board for The Tennessee Law Review and Transactions: Tennessee Business Journal.*

Endnotes

1 Centers for Disease Control and Prevention Department of Health and Human Services Order Under Section 361 of the Public Health Service Act (42 U.S.X. 264) And 42 Code of Federal Regulations 70.2, available at: https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html.

2 Id.

3 Centers for Disease Control and Prevention Declaration Form, OMB Control No. 1920-1303, available at: https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html.

PRACTICE CORNER

Probate And Trust Division

Playing To Win: Helpful Tips For Successfully Navigating Probate And Guardianship Court

By Lilleth Bailey, Esq., Probate Division, Broward County Courthouse, Fort Lauderdale, Florida

After working as a Probate Staff Attorney for five years, I have observed many pitfalls that attorneys have when navigating their cases through Probate and Guardianship Court. Implementing these tips will ensure an easier time and a better outcome in your administration of probate and guardianship cases. Most of these tips are well known but still worth mentioning, especially for new attorneys and those new to the area.

Know the Playbook:

Probate Rules and Florida Statutes:

Reviewing the applicable rules and statutes seems to be an obvious tip, but unfortunately, this is not always done. Making sure your motion, petition, or argument at hearing cites the correct rule or statute is crucial. Additionally, being aware of changes to the rules or statutes keeps your arguments relevant.

Local Rules and Probate and Guardianship Administrative Orders:

- Be aware of Local Rules and Administrative Orders. Each Circuit is different, and you must familiarize yourself with each Circuit's rules to ensure you are complying with local procedures.

Look at the Circuit Court Website:

- Some Circuits have forms on their website that they require you to submit when you file certain petitions. Being aware of these forms will save you time and effort.

Know the Players:

Review the Division Procedures for Each Judge:

- Each judge has division procedures available on their website that detail everything from when they hold their motion calendar or special set hearings to how to submit hard copies of motions and supporting documents. These procedures are a guidepost for each division and give you the information to put your best foot forward.

Judicial Assistants:

- Judicial Assistants are the judge's gatekeepers and are instrumental in ensuring your hearing is scheduled, and that the judge receives your paperwork. Please remember when interacting with them to be patient and kind. This will always reflect well on you when you get before the Judge.

The Clerk of the Court:

- Be familiar with the Clerk of the Court's office procedures regarding Probate, Guardianship, and Mental Health files. Following those procedures will ensure a quicker processing time for your petitions and prevent unnecessary delays.
- The Clerk of Court website has helpful information regarding filing fees, e-filing, and the procedure for obtaining certified copies. Additionally, in some circuits, the Clerk of the Court website has links to valuable forms in PDF and Word format.
- Get to know the in-court Clerks for the judges you appear in front of regularly. They can be very helpful when you face a minor crisis in court, such as helping you retrieve the e-filing reference number when the petition you e-filed the night before the hearing does not appear on the court's online docket. (We have all been there!)

Know the right person to contact when you run into problems. Here are some examples:

- The Clerk of the Court is the right person to contact regarding e-filing issues; Judicial Assistants will not be able to help you with this issue because they are part of a separate office and are not connected to the Florida Courts E-filing Portal in any way.
- Similarly, Judicial Assistants are the best persons to help you with scheduling special set or motion calendar

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hearings. The Clerk of the Court is not involved in this process. However, in some Circuits, the Clerk of the Court sets ex-parte hearings or hearings for pro-se litigants.

Bring your "A" Game:

- Consistently provide support for your petitions and motions. As a staff attorney, I review countless petitions and motions filed with the court. To my surprise, some petitions and motions are filed without any statutory support or supportive case law. This forces the court to do additional research to determine if the request is permissible. Thus, including the support in motions and petitions (or attaching it) aids the court in helping it make its decision expeditiously.
- Make sure you are filing the right petitions for the relief you are seeking. As mentioned before, the Probate Rules and Florida Statutes are excellent guides in this area.
- Check your spelling in the titles and body of your petitions and orders!
- Make sure you have the correct case number when you submit a proposed order. I often come across orders that have the incorrect case number and are therefore misfiled in the wrong case.
- Do you have the right judge? I have observed that attorneys frequently set hearings before the wrong judge. Triple check the court docket to make sure you are scheduling your hearing before the correct judge before you contact the Judicial Assistant to schedule your hearing.

Play Nice - Professionalism Matters:

- Professionalism in oral and written communication is important. Judges witness and note unprofessional behavior.
- Always remember unprofessional behavior reflects poorly on you, not your opponent.
- Pack your patience. Remember that your case is not the only case the judge has in their division. So, remember to be patient while waiting for your orders.

L. BAILEY

Lilleth F. Bailey *received her J.D. from Florida Coastal School of Law. She works as a Judicial Staff Attorney at the 17th Circuit advising Judge Kenneth L. Gillespie, presiding in the Probate and Guardianship Division. Her duties include researching probate and guardianship issues, drafting orders and memoranda of law, and peer training. Before her current position, she worked as an associate attorney at Findlay Stokes Law Firm, where she practiced real estate, estate planning, probate and guardianship administration and litigation, mortgage foreclosure defense, landlord-tenant, and family law. Lilleth is passionate about probate and guardianship law and is actively involved in projects that educate her community about the importance of estate planning.*

Probate Case Summaries

Prepared by Nicole Bell Cleland, Esq.,
Legacy Protection Lawyers, LLP, St. Petersburg, Florida

Where proceedings are adversarial or for purposes of discovery, Florida Rules of Civil Procedure are applicable in probate administration cases.

In re Estate of Brown v. Heuston, 310 So.3d 1131 (Fla. 2d DCA 2021)

The Personal Representative of the Estate of Brown appealed an order of cancellation of nonjury trial/evidentiary hearing. Appellees filed a notice of voluntary dismissal and notice of compliance regarding their attorney's fees being paid by the Estate. The Personal Representative argued that Appellees never represented her and disputed their attorney's fees claim. The Second DCA affirmed the trial court's Order of Cancellation because Appellees resolved the matters to be presented at the nonjury trial/evidentiary hearing.

The Personal Representative argued that Florida Probate Rule 5.010 provides that the Probate Rules govern probate/guardianships proceedings and Florida Rules of Civil Procedure only apply as specifically provided in the Probate Rules. The notice of voluntary dismissal was not properly filed pursuant to Florida Rule of Civil Procedure 1.420(a). This case was not declared an adversarial proceeding and the Second DCA agreed with the Personal Representative's argument that that Rule 1.420(a) was inapplicable. However, the court recognized that Appellees' claim is undisputed and their claim for attorney's fees was terminated with prejudice.

The Second DCA agreed with the trial court that the specific matters to be heard at the nonjury trial/evidentiary hearing were moot by Appellees terminating their claim for fees from the Estate, and the Second DCA affirmed.

A probate court's nonfinal order cannot be appealed if the order failed to "terminate judicial labor" or provide finality as to an issue in the case. "Appeals of orders rendered in probate and guardianship cases shall be limited to orders that finally determine the right or obligation of an interested person as defined in the Florida Probate Code."

N. Tr. Co. v. Abbott, 313 So.3d 792 (Fla. 2d DCA 2021)

The Northern Trust Company ("Northern Trust") was serving as Trustee of the Elizabeth Walker Trust FBO Charles Walker. Charles Walker died and his wife, Rebecca, became Personal Representative of his Estate and Trustee of the Charles P. Walker Trust. Rebecca published a Notice to Creditors on August 31, 2018. In November 2018, Northern Trust offset $1.4Million of assets held in the Charles P. Walker Trust to satisfy a secured pledge. In December, Rebecca resigned as Personal Representative and the successor Personal Representative served Rebecca with an amended Notice to Creditors. On December 12, 2018, Rebecca filed a claim against the Decedent's Estate claiming that the Decedent intended to satisfy a mortgage on Rebecca's homestead property from assets held in the Elizabeth Walker Trust FBO Charles Walker and not from the Charles P. Walker Trust. Northern Trust filed a motion to strike Rebecca's claim, and Rebecca countered with her own motion to strike Northern Trust's motion to strike.

There was a hearing on the competing motions where Northern Trust challenged the timeliness of Rebecca's claim for three reasons:

1. untimely filing because it was after the three-month creditor period;
2. claim failed to state any facts alleging a valid claim against the Estate; and
3. Rebecca was not a creditor under Fla. Stat. § 733.707 (2012).

Rebecca argued that she had filed an independent action in response to Northern Trust's objection, which rendered any issues pertaining to her claim to the new independent filing and not under the probate court's jurisdiction. Rebecca also argued that she filed her claim as soon as she had become aware of it, and within 30 days of her receipt of the Amended Notice to Creditors. The probate court denied Northern Trust's motion to strike finding that further discovery to find any basis for Rebecca's claim against the Decedent.

Northern Trust appealed, and the appellate court issued an order instructing Northern Trust to show cause why this appeal should not be dismissed as a nonfinal, nonappealable order. Florida Rule of Appellate Procedure 9.170(b) provides that "appeals of orders rendered in probate and guardianship cases shall be limited to orders that finally determine the right or obligation of an interest person as defined in the Florida Probate Code." The probate court's order here fails to "finally determine a right or obligation of an interested person." Instead, the probate court's order denies all requested relief and instead requests further discovery to determine if there is any basis in Rebecca's claim against the Estate. No final determination was made by the probate court, and the Second

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DCA cannot speculate as to which issues the probate court requested additional discovery to make its final determination.

The Second DCA did address the parties' arguments related to both issues, which is under the probate court's jurisdiction when presented issues on both an objection, which has resulted in an independent action being filed, and a motion to strike, both of which are permissible under the probate rules and Chapter 733. "A motion to strike tests the facial sufficiency of the statement of claim, whereas the objection […] relates to the validity or the merits of a facially sufficient claim." Rebecca had argued that when she filed her independent action, the probate court's jurisdiction ended. However, the Second DCA noted that if a claim is not facially sufficient or is time barred, then there is no reason to participate in the independent action to determine the merits.

The Second DCA concluded that the order denying Northern Trust's motion to strike was not final and it was not subject to the appellate court's review. The appeal was dismissed without prejudice to Northern Trust filing a second motion to strike after additional discovery of Rebecca's claim is conducted.

Where the trial court weighs the evidence in an undue influence case and determines the wrongdoer has met their burden of proof that a Will was not procured by undue influence, the appellate court will affirm and not reweigh the evidence presented at trial.

Hannibal v. Navarro, 46 Fla. L. Weekly D286 (Fla. 3d DCA Feb. 3, 2021)

Following her mother's death, Navarro filed a petition for formal administration and deposited a 2003 Will of the Decedent, which was objected by her sister, Marvalene. The 2003 Will directed the sale proceeds of Decedent's Key West home be distributed to her five children: Navarro, Marvalene, Charles, William, and Roland. Under the 2003 Will, Marvalene was only bequeathed 4% of the Key West sale proceeds while the other four children received an equal 24%. Also, the 2003 Will bequeathed a Key West lot and the residue of her Estate to the four children excluding Marvalene.

Marvalene (later joined by the other three beneficiaries of the Estate) objected to Navarro's petition and asserted that the 2003 Will was the product of undue influence from Navarro. Eventually, all of the beneficiaries stipulated to the presumption of undue influence and agreed that Navarro then had the burden to prove that the 2003 Will was not the product of undue influence by a preponderance of the evidence. The case went to trial and the trial court concluded that Navarro had proven by a preponderance of the evidence that the 2003 Will was not the product of undue influence and the Court admitted it to probate. Marvalene appealed stating that the trial court incorrectly applied the presumption of undue influence and misconstrued the evidence at trial.

Generally, the opponents to a will have the burden to establish the grounds upon which the will is being opposed. The Third DCA cited the Carpenter Case, which held that a reputable presumption of undue influence arises when there is a beneficiary under a will that is active in procuring the will and has a confidential relationship with the testator. But, that presumption of undue influence can "vanish" if the beneficiary provides evidence for his/her active role, not requiring the beneficiary to prove the absence of undue influence. However, Fla. Stat. § 733.701 (2018), was amended to state that the wrongdoer does bear the burden of proving there was no undue influence.

Here, the parties stipulated to the burden of proof and the trial court determined that Navarro met her burden of proof by a preponderance of the evidence that the 2003 Will was not procured by undue influence. The Third DCA stated it will not reweigh the evidence and affirmed.


N. BELL CLELAND

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Real Property Case Summaries

Prepared by Erin Miller-Meyers, Esq.
Grant Cottrell Miller-Meyers, PLLC, Naples, Florida

A defective acknowledgment in recorded restrictive covenant is still deemed constructive notice thereof.

The Pantry, Inc. and Circle K Stores, Inc. v. Mijax Manager, LLC, 46 Fla. L. Weekly D52a (Fla. 5th DCA 2020)

The owner of a parcel of land ("Parcel 6A") in Seminole County requested to terminate its lease with The Pantry, Inc. ("Pantry") and Circle K Stores, Inc. ("Circle K") in order to sell the parcel to Primerica Developments, Inc. ("Primerica"). The Lease Termination Agreement included a restrictive covenant regarding the future use of Parcel 6A, specifically prohibiting its use for businesses which would compete with Pantry and Circle K, including a convenience store, fast food hamburger restaurant, tobacco/beverage store, gasoline sales, or for parking or stormwater retention. Upon the sale of Parcel 6A by Area Properties, LLC/Ferris to Orange Commons, LLC/Trzcinski (as assignee of Primerica's contract), a Termination of Lease Affidavit with a copy of the Lease Termination Agreement and its two Amendments was executed by Richard Trzcinski ("Trzcinski") and recorded in the Public Records in Seminole County in sequence with the deed for the sale. Orange Commons, LLC subsequently sold the property to Eagle FL I SPE, LLC, who later sold the property to Appellee Mijax Manager, LLC ("Mijax"). Old Republic Title Insurance Company ("Old Republic") insured the latter transaction, and no exception from coverage mentioned the restrictive covenant.

When Mijax attempted to sell the property to Racetrac, Racetrac learned of the use restriction and reduced its offer price. Mijax filed a title claim with Old Republic, who subsequently filed a complaint seeking to quiet title and obtain a declaratory judgment.

Mijax claimed that because the notary block for Trzcinski's signature on the Termination of Lease Affidavit used the words "sworn to and subscribed" instead of "acknowledged," the document was not entitled to be recorded. If it was not entitled to be recorded, then it would not have provided constructive notice to future purchasers (including Mijax) regarding the restrictive covenant. Relying upon Summa Investing Corp. v. McClure, the trial court entered a summary judgment in favor of Mijax declaring the restrictive covenant unenforceable.

"In order to create a valid, enforceable restrictive covenant that runs with the land, there must be '(1) the existence of a covenant that touches and involves the land, (2) an intent that the covenant run with the land, and (3) notice of the restriction on the part of the party against whom enforcement is sought.'"

The Fifth DCA set out the elements for creating a restrictive covenant: "In order to create a valid, enforceable restrictive covenant that runs with the land, there must be '(1) the existence of a covenant that touches and involves the land, (2) an intent that the covenant run with the land, and (3) notice of the restriction on the part of the party against whom enforcement is sought.'" Appellees Pantry and Circle K and Mijax did not dispute the first or second elements, but rather whether Mijax received constructive notice of the restrictive covenant.

The Fifth DCA reviewed Fla. Stat. § 695.03(4) and § 695.26(4), which preserve constructive notice where the documents do not strictly comply with the notarial requirements, distinguished Summa Investing, and relied on Edenfield v. Wingard to address whether, based on a review of the entire document, the notary public's statement adequately confirmed the signature was affixed by the person purporting to execute the document.

The appellate court held that although Trzcinski's notary block in the recorded Lease Termination Affidavit was in the format of a jurat instead of an acknowledgment, it merely failed to strictly comply with the statutory requirements, but such failure did not affect the validity of the recording of the restrictive covenants included in the Lease Termination Agreement. The Fifth DCA reversed and remanded for entry of summary judgment in favor of Pantry and Circle K, concluding that the restrictive covenant was properly executed, notarized,

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and recorded in the public records, and therefore binding on subsequent purchasers.

Force-placed insurance policy for benefit of Lender does not include third-party beneficiary, and thus third-party beneficiary lacked standing.

Reconco v. Integon National Insurance Company, No. 4D20-887 (Fla. 4th DCA 2021)

Ethel Reconco ("Reconco") failed to maintain hazard insurance on her property, and mortgage holder Bank of America (the "Bank") purchased an insurance policy (the "Policy") from Integon National Insurance Company (the "Insurer"), with the Bank as the only named insured. The Policy specifically excluded the Borrower, who was the father of Reconco's two minor children, and the Policy did not mention Reconco as a beneficiary.

After Hurricane Irma caused damage to the property in 2017, the Insurer issued payment to the Bank for loss covered by the Policy, but Reconco was unsatisfied with the amount paid. After the Borrower assigned his rights under the Policy to Reconco, and Reconco filed a complaint for declaratory relief against the Insurer for failure to demand an appraisal or pursue full recovery.

Reconco argued that she: "(1) had standing to enforce the Policy's appraisal provision; (2) had standing to compel payment of an additional $60,000.00 allegedly still owed to the Bank; and (3) properly invoked the Policy's appraisal clause." Reconco asserted that her standing arose under Fla. Stat. § 627.405 (2018).

The Insurer moved to dismiss, indicating that Reconco was not a named insured, additional insured, or an intended third-party beneficiary under the Policy, and Reconco's loss did not exceed the unpaid principal balance under the Policy's loss payment provision. The trial court issued a written Order Granting Defendant's Motion to Dismiss, Dismissing the Complaint and Entering Final Judgment for the Defendant ("Order"), indicating that the Policy contained a clear intent not to primarily and directly benefit the third-party beneficiary, and that Reconco was not a loss payee under the Policy since the claim was less than the unpaid principal amount.

The Fourth District Court of Appeals cited *Mendez v. Hampton Ct. Nursing Ctr., LLC, Goins v. Praetorian Insurance Co.* and *Veloz v. Integon National Insurance Co.* in determining that Reconco was not a third-party beneficiary, since the Policy in the instant case, as in the aforementioned cases, demonstrated a clear intent to contract with the NAMED INSURED only.

The court affirmed the trial court's final judgment, holding that Reconco lacked standing as a third-party beneficiary under the contract, and the court distinguished from Ran Investments in that Ran Investments "did not involve a contract that expressed an intent in clear and unambiguous language not to benefit a third party."

Man-made canals as of date of Florida Statehood are not navigable waterways/sovereign lands.

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Waterfront ICW Properties, LLC, 46 Fla. L. Weekly D207e (Fla. 4th DCA 2021)

This case involves a dispute over the ownership of certain submerged lands under Spanish Creek. The trial court entered a judgment in favor of Waterfront ICW Properties, LLC ("Waterfront"), determining that no water existed on the disputed property as of March 3, 1845, the date of Florida Statehood. The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida ("Board of Trustees") appealed, and after review of the trial court's findings, and mindful that their role is not to re-weigh conflicting evidence or re-try the case, the Fourth District Court of Appeals concluded "that the trial court's judgment is supported by competent substantial evidence" and therefore affirmed.


E. MILLER-MEYERS

Erin Miller-Meyers practices real estate law and presents educational events for real estate agents in Southwest Florida. She is currently the Chair of the Real Estate Section of the Collier County Bar Association, a member of the NABOR Legal Resources Committee, and a 2020-2021 RPPTL Section Fellow.

Erin graduated summa cum laude and Phi Beta Kappa from the University of Florida with a Bachelor of Arts in Spanish, and earned a Juris Doctor, cum laude, from Florida International University College of Law, where she was an articles editor for the FIU Law Review and earned a Master of Arts in Latin American and Caribbean Studies.

Endnotes

1 *Summa Investing Corp. v. McClure*, 569 So. 2d 500 (Fla. 3d DCA 1990) (Where an interested person served as a notary public in violation of Florida law, the mortgage was treated as though it had not been acknowledged. A defectively notarized document is not entitled to recordation and therefore does not provide constructive notice to subsequent purchasers).

2 *The Pantry, Inc. and Circle K Stores, Inc. v. Mijax Manager, LLC*, 46 Fla. L. Weekly D52a (Fla. 5th DCA 2020), citing Winn-Dixie Stores, Inc. v. Goldencorp, Inc., 964 So. 2d 261, 265 (Fla. 4th DCA 2007).

3 *Edenfield v. Wingard*, 89 So. 2d 776 (Fla. 1956).

4 *Reconco v. Integon Nat'l Ins. Co.*, 46 Fla. L. Weekly D243a (Fla. 4th DCA 2021).

5 627.405(1), Florida Statutes (2018). No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss.

6 *Mendez v. Hampton Ct. Nursing Ctr., LLC*, 203 So. 3d 146 (Fla. 2016), Goins v. Praetorian Insurance Co., 302 So. 3d 478 (Fla. 5th DCA 2020), and Veloz v. Integon National Insurance Co., 304 So. 3d 22 (Fla. 4th DCA 2020).

7 *Ran Investments*, 379 So 2d at 993.

8 *Reconco v. Integon Nat'l Ins. Co.*, 46 Fla. L. Weekly D243a (Fla. 4th DCA 2021).

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 (see page 52), 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.

Executive Council Meeting & Legislative Update

July 21 – July 25, 2021
The Breakers • Palm Beach, Florida

Executive Council Meeting

November 3 – November 7, 2021
Luminary Hotel & Co. • Fort Myers, FL

Out of State Executive Council Meeting

March 2 – March 6, 2022**
Hotel Bennett • Charleston, South Carolina

Executive Council Meeting

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C Hotel by Marriott Tallahassee (Contract Pending) • Tallahassee, Florida

Executive Council Meeting & Annual Convention

June 1 – June 5, 2022
Hawks Cay Resort • Duck Key, Florida

** Note change of date from previous Executive Council agendas

For the most up-to-date information on Section activities, visit the Section website (www.rpptl.org) or The Florida Bar's website (www.floridabar.org).

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8/25/20121	Charitable Planning Series (1): Charitable Trusts
9/15/2021	Charitable Planning Series (2): Exempt Organizations
9/29/2021	Charitable Planning Series (3): Compliance
10/1/2021	Guardianship CLE
10/13/2021	Charitable Planning Series (4): International Charitable Planning

Mark Your Calendar for the 2022 Out-of-State Executive Council Meeting

March 2 - March 6, 2022**

Hotel Bennett
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