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THE FLORIDA BAR
ELDER LAW SECTION

The Elder Law Section cultivates and promotes expertise and professionalism in the practice of law affecting people as they age and individuals with special needs.

EXECUTIVE COUNCIL MEETING AGENDA
Loews Portofino Hotel, Orlando | Venetian II
Thursday, January 17, 2019, 6:00 p.m. – 7:30 p.m.

Dial-In Number: 888-376-5050
Participant Code: 912-457-1035#
Chair Code: 59756#

- I. Call to Order and Welcome – Jason A. Waddell, Chair
- II. Approval of Minutes – Howard S. Krooks, Secretary (**Exhibit A**)
- III. Chair’s Report – Jason A. Waddell, Chair
- IV. Past Chair’s Report – Collett P. Small, Immediate Past Chair
- V. Chair-Elect’s Report – Randy C. Bryan, Chair-Elect
- VI. Treasurer’s Report – Victoria E. Heuler, Treasurer (**Exhibit B**)
- VII. Substantive Division – Carolyn Landon, Vice Chair (Committees):
 - a. Exploitation & Abuse Committee – David Weintraub & Ellen Cheek
 - b. Estate Planning & Probate Committee – Horacio Sosa & Amy Collins (**Exhibit C**)
 - c. Guardianship Committee – Debra Slater & Twyla Sketchley (**Exhibit D**)
 - d. Legislative Committee – William Johnson & Shannon Miller
 - e. Medicaid/Government Benefits Committee – John Clardy & Heidi Brown (**Exhibit E**)
 - f. Special Needs Trust Committee – Travis Finchum & Howard Krooks
 - g. Veterans Benefits Committee – Javier Centonzio & Jodi Murphy
- VIII. Administrative Division – Steven Hitchcock, Vice Chair
 - a. Budget Committee – Victoria Heuler
 - b. CLE Committee – Marjorie Wolasky & Danielle Faller
 - c. Membership Committee – Donna McMillan & Scott Selis
 - d. Mentoring Committee – Stephanie Villavicencio & Dayami Sans (**Exhibit F**)
 - e. The *Advocate* – Heather Samuels & Genny Bernstein

www.eldersection.org

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- IX. Special Committees
 - a. Certification Committee – Amy Fanzlaw & John Clardy III
 - b. Law School Liaison Committee – Enrique Zamora & Max Solomon
 - c. Sponsorship Committee – Jill Ginsberg
 - d. UPL Committee – John Frazier & Leonard Mondschein (Exhibit G)**
 - e. Technology Committee – Alison Hickman & Lawrence Levy
 - f. Strategic Planning Committee – David Hook & Jill Ginsberg
 - g. Litigation Committee – Ellen Morris (**Exhibit H**)
 - h. Disability Law Committee – Tamara Schweinsberg & Steve Hitchcock

- X. Board of Governors Report – Robin Bresky (18-19 Liaison)

- XI. Liaison Reports
 - a. AFELA Report – Twyla Sketchley
 - b. FSGA Report – Scott Greenberg
 - c. RPPTL Report – Charles F. Robinson & Marjorie Wolasky (**Exhibit I**)
 - d. NAELA Report – Howard Krooks
 - e. Task Force Update – Ellen Morris & Sam Boone

- XII. New Business

- XIII. Adjournment

Next Executive Council Meeting:
Boca Raton Resort and Club | The Florida Bar Annual Convention
Friday, June 28, 2019 (Date and Time to be Confirmed by The Florida Bar)



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EXECUTIVE COUNCIL MEETING MINUTES

Washington Marriott at Metro Center. – Jr. Ballroom Salon 1
Friday, October 5, 2018 | 12:30 p.m. – 2:00 p.m.

I. Call to Order and Welcome – Jason A. Waddell, Chair

Chair Jason Waddell called the meeting to order 12:33 p.m. and welcomed everyone to Washington, D.C.

II. Approval of Minutes – Howard S. Krooks, Secretary (Exhibit A)

Minutes from the June 15, 2018 meeting were approved unanimously.

III. Chair's Report – Jason A. Waddell, Chair

Chair Waddell reported that Elder Law Section legislative advisor Brian Jogerst's contract has been approved. The Medicaid and Guardianship Committees have been very active. The Elder Law Section Annual Update preparations are underway including sponsorship recruitment. The section has been in touch with Senator Nelson's Guardianship Committee in D.C. based on the Guardianship Committee's work. Chair Waddell announced that he had recently updated the Committee Chair's Handbook and urged committee chairs to use the handbook.

IV. Past Chair's Report – Collett P. Small, Immediate Past Chair

Immediate Past Chair Collett Small had no report to give.

V. Chair-Elect's Report – Randy C. Bryan, Chair-Elect

Chair-Elect Randy Bryan reported that the January Annual Update preparations are going well and that the program schedule and speaker line up have been solidified.

VI. Treasurer's Report – Victoria E. Heuler, Treasurer (Exhibit B)

Treasurer Victoria Heuler reported that the section budget is looking good but reminded everyone that this is still early in the fiscal year. It looks like the section will be under budget for this year's retreat. Budget drafting for FY 19-20 will be kicking off this month. CLE aftermarket sales are looking good and strong, so the section should continue marketing available webcasts in The Florida Bar catalog.

CHAIR

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VII. Substantive Division – Carolyn Landon, Vice Chair (Committees):

- a. **Exploitation & Abuse Committee – David Weintraub & Ellen Cheek (Exhibit C)**
Submitted written report.
- b. **Estate Planning & Probate Committee – Horacio Sosa & Amy Collins (Exhibit D)**
Submitted written report.
- c. **Guardianship Committee – Debra Slater & Twyla Sketchley (Exhibit E)**
Submitted Written report.
- d. **Legislative Committee – William Johnson & Shannon Miller**
Co-Chairs Bill Johnson and Shannon Miller reported that for this upcoming year, the committee will be meeting every other week via teleconference. The Guardianship and Special Needs Trust committees are actively working, especially on the E-wills issue. The Legislative Committee will be implementing strategic planning goals after mid-term elections and will be very busy after that. Legislative Session will begin in March next year. A few proposals they are monitoring include a *Slayer*-esque statute which would provide that an individual who exploits a family member cannot inherit from same person. There are also some Guardianship jurisdiction issues. Section members can contact Nick Curley with the RPPTL section for more information. The section has been liaising in different forms with RPPTL. There has also been positive outreach with Senator Passidomo. Co-Chair Shannon Miller emphasized that ELS does not yet have a robust reputation with legislators or the public. This is a shame since ELS members are more well-rounded practitioners than just Medicaid Planning. Chair Waddell reminded committee chairs that Substantive Committees must have at least one representative at every Legislative conference call.
- e. **Medicaid/Government Benefits Committee – John Clardy & Heidi Brown (Exhibit F)**
Submitted written report.
- f. **Special Needs Trust Committee – Travis Finchum & Howard Krooks**
There will be a Special Needs Trust CLE held in Tampa on March 22, 2019.
- g. **Veterans Benefits Committee – Javier Centonzio & Jodi Murphy**
This committee has been busy with the new VA Pension Rule changes. There will be a webcast CLE later this month on the rule changes.

VIII. Administrative Division – Steven Hitchcock, Vice Chair

- a. **Budget Committee – Victoria Heuler**
Victoria Heuler reiterated that the FY 19-20 budget process will kick off this month. There will be a Budget Committee conference call in the coming days to begin.
- b. **CLE Committee – Marjorie Wolasky & Danielle Faller**
The Co-Chairs reported that there will be an audio webcast CLE on November 2 regarding the new VA Rule Changes. The 3-hour webcast will satisfy VA accreditation. CLE Committee Rep Sam Boone reported that The Florida Bar CLE Committee is re-working its handbook.
- c. **Membership Committee – Donna McMillan & Scott Selis (Exhibit G)**
Submitted written report.
- d. **Mentoring Committee – Stephanie Villavicencio & Dayami Sans**
Co-Chair Villavicencio reported that the Mentoring Committee will host a *Tricks of the Trade* CLE call on October 11. Travis Finchum will present on Special Needs Trusts. The committee is still working to implement a “speed dating” model for mentoring at St. Thomas University, but the campus dates did not work for this October. The committee will wait until Spring with possible February dates for the pilot event. If it goes well, it may carry over to other campuses. An event like this would present good face to face time between the section and law students.

- IX. **The Advocate – Heather Samuels & Genny Bernstein (Exhibit H)**
Submitted written report.

THE FLORIDA BAR

X. Special Committees

- a. **Certification Committee – Amy Fanzlaw & John Clardy III**
Co-Chair Amy Fanzlaw reported that they are working on the certification exam and will be meeting again in a few weeks.
- b. **Law School Liaison Committee – Enrique Zamora & Max Solomon (Exhibit I)**
Submitted written report.
- c. **Sponsorship Committee – Jill Ginsberg**
Chair Jill Ginsberg reported that sponsorship recruitment is going well. The section offered a special to Annual Update sponsors which included exposure at the Annual Retreat if they committed to Annual Update sponsorship by September 30. It currently looks like the Annual Update sponsorships will sell out. Space limitations at the hotel will restrict any additional sponsorship slots.
- d. **UPL Committee – John Frazier & Leonard Mondschein (Exhibit J)**
Submitted written report.
- e. **Technology Committee – Alison Hickman & Lawrence Levy (Exhibit K)**
Submitted written report
- f. **Strategic Planning Committee – David Hook & Jill Ginsberg**
The Co-Chairs reported that the committee is reviewing a proposal from a strategic planning hosting group from St. Petersburg. The firm has excellent reviews but is very expensive. The committee is considering a half-day session.
- g. **Litigation Committee – Ellen Morris**
There was no report to give.
- h. **Disability Law Committee – Tamara Schweinsberg & Steve Hitchcock (Exhibit L)**
Submitted written report.

XI. Board of Governors Report – Robin Bresky (18-19 Liaison)

BOG Liaison Robin Bresky reported that the BOG will meet next week at Amelia Island, then at The Florida Bar Fall Meeting in Tampa. She encouraged everyone to watch the September 27 video message from The Florida Bar President Michell Suskauer which highlighted two important issues: 1. nominations for pro bono awards are due November 1. There will be a ceremony for these awards in Tallahassee on February 7 at 3:30 p.m.; 2. Legal Fuel Speakers Series. Jason Waddell expressed his appreciation for Ms. Bresky's involvement.

XII. Liaison Reports

- a. **AFELA Report – Twyla Sketchley**
There was no report to give.
- b. **FSGA Report – Scott Greenberg**
Bill Johnson reported that the July FSGA conference went well.
- c. **RPPTL Report – Charles F. Robinson & Marjorie Wolasky**
There was no report to give.
- d. **NAELA Report – Howard Krooks**
NAELA rep David Goldfarb provided updates during today's 3-hour annual retreat CLE.
- e. **Task Force Update – Ellen Morris & Sam Boone**
There was no report to give.

XIII. New Business

Collett Small reported that the section has gained many new student members from St. Thomas University. Stephanie Villavicencio has also recruited new members.

XIV. Adjournment

THE FLORIDA BAR

There being no further business, Chair Jason Waddell concluded the meeting at 1:10 p.m.

**Next Executive Council Meeting:
Thursday, January 17, 2019
Loews Portofino Bay Hotel, Orlando**

Attendees:

1. Jason Waddell, Chair
2. Randy Bryan, Chair-Elect
3. Victoria Heuler, Treasurer
4. Collett P. Small, Immediate Past Chair
5. William Johnson
6. Joan Hook
7. David Hook
8. Jill Ginsberg
9. Shannon Miller
10. Stephanie Villavicencio
11. Leslie Reithmiller, Program Administrator

Attendees by Phone:

12. Dayami Sans
13. Danielle Faller
14. Genny Bernstein
15. Heather Samuels
16. Sam Boone
17. Amy Fanzlaw
18. Donna McMillan
19. Robin Bresky
20. John Frazier
21. Heidi Brown
22. Alison Hickman

EXHIBIT B

THE FLORIDA BAR
Elder Law Section
For the Five Months Ending Friday, November 30, 2018

ROLL UP

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3001-Annual Fees	\$400	\$83,800	\$82,750	101.27%
3002-Affiliate Fees		\$400	\$500	80.00%
Total Fee Revenue	\$400	\$84,200	\$83,250	101.14%
3301-Registration-Live		\$2,875	\$5,000	57.50%
Total Registration Revenue	\$	\$2,875	\$5,000	57.50%
3351-Sponsorships			\$12,000	0.00%
3391 Section Profit Split	\$27,302	\$43,108	\$27,000	159.66%
3392-Section Differential	\$600	\$1,250	\$5,000	25.00%
Other Event Revenue	\$27,902	\$44,358	\$44,000	100.81%
3411-Sales-Published Materials	\$450	\$2,550	\$3,000	85.00%
Sales, Rents & Royalties Revenue	\$450	\$2,550	\$3,000	85.00%
3561-Advertising		\$2,100	\$1,000	210.00%
Advertising & Subscription Revenue	\$	\$2,100	\$1,000	210.00%
3899-Investment Allocation	\$2,181	(\$7,012)	\$12,818	(54.70%)
Non-Operating Income	\$2,181	(\$7,012)	\$12,818	(54.70%)
Total Revenue	\$30,933	\$129,072	\$149,068	86.59%
4131-Telephone Expense	\$57	\$225	\$400	56.28%
4133-Internet Service			\$3,000	0.00%
4134-Web Services	\$135	\$531	\$7,000	7.59%
4301-Photocopying			\$50	0.00%
4311-Office Supplies			\$500	0.00%
Total Staff & Office Expense	\$192	\$756	\$10,950	6.91%
5031-A/V Services		\$763	\$1,000	76.25%
5051-Credit Card Fees	\$16	\$519	\$1,050	49.43%
5121-Printing-Outside		\$3,462	\$12,000	28.85%
5199-Other Contract Services			\$4,000	0.00%
Total Contract Services	\$16	\$4,743	\$18,050	26.28%
5501-Employee Travel	(\$1,187)	\$70	\$4,291	1.63%
5531-Board/Off/Memb Travel		\$	\$3,986	0.00%
5571-Speaker Travel			\$500	0.00%
5599-Other Travel			\$4,000	0.00%
Total Travel	(\$1,187)	\$70	\$12,777	0.55%
6001-Post 1st Class/Bulk	\$2	\$611	\$300	203.65%

THE FLORIDA BAR
Elder Law Section
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
6311-Mtgs General Meeting	\$679	\$1,313	\$8,000	16.42%
6319-Mtgs Other Functions			\$2,000	0.00%
6321-Mtgs Meals		\$5,036	\$8,000	62.96%
6325-Mtgs Hospitality		\$2,734	\$15,500	17.64%
6399-Mtgs Other			\$6,000	0.00%
6401-Speaker Expense			\$1,200	0.00%
6451-Committee Expense	\$613	\$1,154	\$3,000	38.47%
6531-Brd/Off Special Project		\$	\$2,000	0.00%
7001-Grant/Award/Donation			\$2,500	0.00%
7999-Other Operating Exp			\$10,000	0.00%
Total Other Expense	\$1,294	\$10,848	\$62,000	17.50%
8021-Section Admin Fee	\$144	\$29,844	\$29,970	99.58%
8101-Printing In-House		\$4	\$650	0.68%
Total Admin & Internal Expense	\$144	\$29,848	\$30,620	97.48%
9692-Transfer Out-Council of Sections	\$300	\$300	\$300	100.00%
Total InterFund Transfers Out	\$300	\$300	\$300	100.00%
Total Expense	\$758	\$46,566	\$134,697	34.57%
Net Income	\$30,175	\$82,506	\$14,371	574.11%
2001-Fund Balance, Beginning		\$297,431		0.00%
Fund Balance, Ending	\$	\$379,937	\$	0.00%

THE FLORIDA BAR
Elder Law General
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3001-Annual Fees	\$400	\$83,800	\$82,750	101.27%
3002-Affiliate Fees		\$400	\$500	80.00%
Total Fee Revenue	\$400	\$84,200	\$83,250	101.14%
3351-Sponsorships			\$10,000	0.00%
3391 Section Profit Split	\$27,302	\$43,108	\$27,000	159.66%
3392-Section Differential	\$600	\$1,250	\$5,000	25.00%
Other Event Revenue	\$27,902	\$44,358	\$42,000	105.61%
3411-Sales-Published Materials	\$450	\$2,550	\$3,000	85.00%
Sales, Rents & Royalties Revenue	\$450	\$2,550	\$3,000	85.00%
3561-Advertising		\$2,100	\$1,000	210.00%
Advertising & Subscription Revenue	\$	\$2,100	\$1,000	210.00%
3899-Investment Allocation	\$2,181	(\$7,012)	\$12,818	(54.70%)
Non-Operating Income	\$2,181	(\$7,012)	\$12,818	(54.70%)
Total Revenue	\$30,933	\$126,197	\$142,068	88.83%
4131-Telephone Expense	\$57	\$225	\$400	56.28%
4133-Internet Service			\$3,000	0.00%
4134-Web Services	\$135	\$531	\$7,000	7.59%
4301-Photocopying			\$50	0.00%
4311-Office Supplies			\$250	0.00%
Total Staff & Office Expense	\$192	\$756	\$10,700	7.07%
5051-Credit Card Fees	\$16	\$465	\$1,000	46.46%
5121-Printing-Outside		\$3,462	\$12,000	28.85%
5199-Other Contract Services			\$4,000	0.00%
Total Contract Services	\$16	\$3,926	\$17,000	23.10%
5501-Employee Travel			\$2,131	0.00%
5531-Board/Off/Memb Travel		\$	\$3,986	0.00%
5599-Other Travel			\$4,000	0.00%
Total Travel	\$	\$	\$10,117	0.00%
6001-Post 1st Class/Bulk	\$2	\$6	\$300	2.14%
6301-Mtgs TFB Annual Meeting			\$3,500	0.00%
6311-Mtgs General Meeting	\$150	\$200	\$3,000	6.67%
6319-Mtgs Other Functions			\$2,000	0.00%
6325-Mtgs Hospitality			\$6,000	0.00%
6399-Mtgs Other			\$6,000	0.00%

THE FLORIDA BAR
Elder Law General
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
6451-Committee Expense	\$613	\$1,154	\$3,000	38.47%
6531-Brd/Off Special Project		\$	\$2,000	0.00%
7001-Grant/Award/Donation			\$2,500	0.00%
7999-Other Operating Exp			\$10,000	0.00%
Total Other Expense	\$764	\$1,361	\$38,700	3.52%
8021-Section Admin Fee	\$144	\$29,844	\$29,970	99.58%
8101-Printing In-House		\$4	\$400	1.10%
Total Admin & Internal Expense	\$144	\$29,848	\$30,370	98.28%
9692-Transfer Out-Council of Sections	\$300	\$300	\$300	100.00%
Total InterFund Transfers Out	\$300	\$300	\$300	100.00%
Total Expense	\$1,416	\$36,192	\$107,187	33.76%
Net Income	\$29,517	\$90,005	\$34,881	258.03%

THE FLORIDA BAR
Elder Law Annual Retreat
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3301-Registration-Live		\$2,875	\$5,000	57.50%
Total Registration Revenue	\$	\$2,875	\$5,000	57.50%
3351-Sponsorships			\$2,000	0.00%
Other Event Revenue	\$	\$	\$2,000	0.00%
Total Revenue	\$	\$2,875	\$7,000	41.07%
4311-Office Supplies			\$250	0.00%
Total Staff & Office Expense	\$	\$	\$250	0.00%
5031-A/V Services		\$763	\$1,000	76.25%
5051-Credit Card Fees		\$54	\$50	108.74%
Total Contract Services	\$	\$817	\$1,050	77.80%
5501-Employee Travel	(\$1,187)	\$70	\$2,160	3.23%
Total Travel	(\$1,187)	\$70	\$2,160	3.23%
6001-Post 1st Class/Bulk		\$605		0.00%
6311-Mtgs General Meeting	\$529	\$1,113	\$5,000	22.26%
6321-Mtgs Meals		\$5,036	\$8,000	62.96%
6325-Mtgs Hospitality		\$2,734	\$9,500	28.77%
6401-Speaker Expense			\$300	0.00%
Total Other Expense	\$529	\$9,488	\$22,800	41.61%
8101-Printing In-House			\$250	0.00%
Total Admin & Internal Expense	\$	\$	\$250	0.00%
Total Expense	(\$658)	\$10,374	\$26,510	39.13%
Net Income	\$658	(\$7,499)	(\$19,510)	38.44%

THE FLORIDA BAR
Elder Law Joint CLE
For the Five Months Ending Friday, November 30, 2018

ROLL UP

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3301-Registration-Live	\$27,195	\$27,195		0.00%
3321-Registration-Webcast	\$2,368	\$12,370		0.00%
Total Registration Revenue	\$29,563	\$39,565	\$	0.00%
3351-Sponsorships	\$4,000	\$4,000		0.00%
3392-Section Differential	(\$600)	(\$1,250)		0.00%
Other Event Revenue	\$3,400	\$2,750	\$	0.00%
3401-Sales-CD/DVD	\$2,290	\$14,940		0.00%
3411-Sales-Published Materials	\$480	\$1,020		0.00%
Sales, Rents & Royalties Revenue	\$2,770	\$15,960	\$	0.00%
Total Revenue	\$35,733	\$58,275	\$	0.00%
5051-Credit Card Fees	\$778	\$977		0.00%
Total Contract Services	\$778	\$977	\$	0.00%
6001-Post 1st Class/Bulk		\$4		0.00%
6021-Post Express Mail	\$25	\$123		0.00%
6401-Speaker Expense		\$208		0.00%
Total Other Expense	\$25	\$335	\$	0.00%
8011-Administration CLE		\$1,050		0.00%
8101-Printing In-House	\$104	\$806		0.00%
8131-A/V Services	\$272	\$559		0.00%
8141-Journal/News Service	\$425	\$425		0.00%
8171-Course Approval Fee		\$450		0.00%
Total Admin & Internal Expense	\$801	\$3,290	\$	0.00%
Total Expense	\$1,605	\$4,603	\$	0.00%
Income Before Split	\$34,128	\$53,672	\$	0.00%
Section Profit Split	(\$27,302)	(\$43,108)		0.00%
Net Income to TFB	\$6,826	\$10,564	\$	0.00%

THE FLORIDA BAR
Elder Law Joint Misc.
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3321-Registration-Webcast	\$520	\$4,747		0.00%
Total Registration Revenue	\$520	\$4,747	\$	0.00%
3392-Section Differential		(\$100)		0.00%
Other Event Revenue	\$	(\$100)	\$	0.00%
3401-Sales-CD/DVD		\$1,775		0.00%
3411-Sales-Published Materials		\$60		0.00%
Sales, Rents & Royalties Revenue	\$	\$1,835	\$	0.00%
Total Revenue	\$520	\$6,482	\$	0.00%
5051-Credit Card Fees		\$31		0.00%
Total Contract Services	\$	\$31	\$	0.00%
6021-Post Express Mail	\$2	\$24		0.00%
Total Other Expense	\$2	\$24	\$	0.00%
8011-Administration CLE		\$1,050		0.00%
8101-Printing In-House		\$2		0.00%
8131-A/V Services	\$230	\$272		0.00%
8171-Course Approval Fee		\$150		0.00%
Total Admin & Internal Expense	\$230	\$1,474	\$	0.00%
Total Expense	\$232	\$1,529	\$	0.00%
Income Before Split	\$288	\$4,953	\$	0.00%
Section Profit Split	(\$230)	(\$3,962)		0.00%
Net Income to TFB	\$58	\$991	\$	0.00%

THE FLORIDA BAR
03173 VA Pension Rule Changes: A New Planning Landscape
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3321-Registration-Webcast	\$520	\$4,366		0.00%
Total Registration Revenue	\$520	\$4,366	\$	0.00%
3401-Sales-CD/DVD		\$135		0.00%
Sales, Rents & Royalties Revenue	\$	\$135	\$	0.00%
Total Revenue	\$520	\$4,501	\$	0.00%
5051-Credit Card Fees		\$2		0.00%
Total Contract Services	\$	\$2	\$	0.00%
8011-Administration CLE		\$1,050		0.00%
8101-Printing In-House		\$2		0.00%
8131-A/V Services	\$230	\$230		0.00%
8171-Course Approval Fee		\$150		0.00%
Total Admin & Internal Expense	\$230	\$1,432	\$	0.00%
Total Expense	\$230	\$1,434	\$	0.00%
Income Before Split	\$290	\$3,067	\$	0.00%
Section Profit Split	(\$232)	(\$2,454)		0.00%
Net Income to TFB	\$58	\$613	\$	0.00%

THE FLORIDA BAR
Elder Law Essentials
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3301-Registration-Live	\$9,295	\$9,295		0.00%
3321-Registration-Webcast	\$1,324	\$4,505		0.00%
Total Registration Revenue	\$10,619	\$13,800	\$	0.00%
3392-Section Differential	(\$300)	(\$650)		0.00%
Other Event Revenue	(\$300)	(\$650)	\$	0.00%
3401-Sales-CD/DVD	\$735	\$6,070		0.00%
3411-Sales-Published Materials	\$60	\$360		0.00%
Sales, Rents & Royalties Revenue	\$795	\$6,430	\$	0.00%
Total Revenue	\$11,114	\$19,580	\$	0.00%
5051-Credit Card Fees	\$218	\$296		0.00%
Total Contract Services	\$218	\$296	\$	0.00%
6001-Post 1st Class/Bulk		\$2		0.00%
6021-Post Express Mail	\$12	\$43		0.00%
Total Other Expense	\$12	\$45	\$	0.00%
8101-Printing In-House	\$104	\$104		0.00%
8131-A/V Services	\$21	\$98		0.00%
8141-Journal/News Service	\$213	\$213		0.00%
8171-Course Approval Fee		\$150		0.00%
Total Admin & Internal Expense	\$338	\$565	\$	0.00%
Total Expense	\$567	\$906	\$	0.00%
Income Before Split	\$10,547	\$18,674	\$	0.00%
Section Profit Split	(\$8,438)	(\$14,940)		0.00%
Net Income to TFB	\$2,109	\$3,733	\$	0.00%

THE FLORIDA BAR
02589 2018 Elder Hot Topics
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3321-Registration-Webcast	\$693	\$3,873		0.00%
Total Registration Revenue	\$693	\$3,873	\$	0.00%
3392-Section Differential	(\$50)	(\$400)		0.00%
Other Event Revenue	(\$50)	(\$400)	\$	0.00%
3401-Sales-CD/DVD	\$400	\$5,735		0.00%
3411-Sales-Published Materials	\$60	\$360		0.00%
Sales, Rents & Royalties Revenue	\$460	\$6,095	\$	0.00%
Total Revenue	\$1,103	\$9,568	\$	0.00%
5051-Credit Card Fees	\$18	\$97		0.00%
Total Contract Services	\$18	\$97	\$	0.00%
6021-Post Express Mail	\$12	\$43		0.00%
Total Other Expense	\$12	\$43	\$	0.00%
8101-Printing In-House	\$104	\$104		0.00%
8131-A/V Services	\$21	\$98		0.00%
Total Admin & Internal Expense	\$125	\$202	\$	0.00%
Total Expense	\$155	\$342	\$	0.00%
Income Before Split	\$948	\$9,226	\$	0.00%
Section Profit Split	(\$758)	(\$7,381)		0.00%
Net Income to TFB	\$190	\$1,845	\$	0.00%

THE FLORIDA BAR
02941 2019 Essentials of Elder Law
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3301-Registration-Live	\$9,295	\$9,295		0.00%
3321-Registration-Webcast	\$631	\$631		0.00%
Total Registration Revenue	\$9,926	\$9,926	\$	0.00%
3392-Section Differential	(\$250)	(\$250)		0.00%
Other Event Revenue	(\$250)	(\$250)	\$	0.00%
3401-Sales-CD/DVD	\$335	\$335		0.00%
Sales, Rents & Royalties Revenue	\$335	\$335	\$	0.00%
Total Revenue	\$10,011	\$10,011	\$	0.00%
5051-Credit Card Fees	\$200	\$200		0.00%
Total Contract Services	\$200	\$200	\$	0.00%
8141-Journal/News Service	\$213	\$213		0.00%
8171-Course Approval Fee		\$150		0.00%
Total Admin & Internal Expense	\$213	\$363	\$	0.00%
Total Expense	\$412	\$562	\$	0.00%
Income Before Split	\$9,599	\$9,449	\$	0.00%
Section Profit Split	(\$7,679)	(\$7,559)		0.00%
Net Income to TFB	\$1,920	\$1,890	\$	0.00%

THE FLORIDA BAR
Elder Law Update
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3301-Registration-Live	\$17,900	\$17,900		0.00%
3321-Registration-Webcast	\$524	\$2,541		0.00%
Total Registration Revenue	\$18,424	\$20,441	\$	0.00%
3351-Sponsorships	\$4,000	\$4,000		0.00%
3392-Section Differential	(\$300)	(\$500)		0.00%
Other Event Revenue	\$3,700	\$3,500	\$	0.00%
3401-Sales-CD/DVD	\$1,555	\$6,720		0.00%
3411-Sales-Published Materials	\$420	\$600		0.00%
Sales, Rents & Royalties Revenue	\$1,975	\$7,320	\$	0.00%
Total Revenue	\$24,099	\$31,261	\$	0.00%
5051-Credit Card Fees	\$560	\$642		0.00%
Total Contract Services	\$560	\$642	\$	0.00%
6001-Post 1st Class/Bulk		\$3		0.00%
6021-Post Express Mail	\$12	\$32		0.00%
6401-Speaker Expense		\$208		0.00%
Total Other Expense	\$12	\$243	\$	0.00%
8101-Printing In-House		\$700		0.00%
8131-A/V Services	\$21	\$84		0.00%
8141-Journal/News Service	\$213	\$213		0.00%
8171-Course Approval Fee		\$150		0.00%
Total Admin & Internal Expense	\$234	\$1,147	\$	0.00%
Total Expense	\$806	\$2,031	\$	0.00%
Income Before Split	\$23,293	\$29,230	\$	0.00%
Section Profit Split	(\$18,634)	(\$23,553)		0.00%
Net Income to TFB	\$4,659	\$5,677	\$	0.00%

THE FLORIDA BAR
02591 2018 Elder Law Update
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3321-Registration-Webcast	\$31	\$2,048		0.00%
Total Registration Revenue	\$31	\$2,048	\$	0.00%
3392-Section Differential		(\$150)		0.00%
Other Event Revenue	\$	(\$150)	\$	0.00%
3401-Sales-CD/DVD	\$965	\$5,485		0.00%
3411-Sales-Published Materials	\$180	\$360		0.00%
Sales, Rents & Royalties Revenue	\$1,145	\$5,845	\$	0.00%
Total Revenue	\$1,176	\$7,743	\$	0.00%
5051-Credit Card Fees	\$22	\$89		0.00%
Total Contract Services	\$22	\$89	\$	0.00%
6021-Post Express Mail	\$12	\$30		0.00%
Total Other Expense	\$12	\$30	\$	0.00%
8101-Printing In-House		\$700		0.00%
8131-A/V Services	\$21	\$77		0.00%
Total Admin & Internal Expense	\$21	\$777	\$	0.00%
Total Expense	\$54	\$896	\$	0.00%
Income Before Split	\$1,122	\$6,847	\$	0.00%
Section Profit Split	(\$897)	(\$5,478)		0.00%
Net Income to TFB	\$224	\$1,369	\$	0.00%

THE FLORIDA BAR
02939 Elder Law Annual Update & Hot Topics
For the Five Months Ending Friday, November 30, 2018

	November	YTD 2019	FY 18-19 Budget	Budget % Utilized
3301-Registration-Live	\$17,900	\$17,900		0.00%
3321-Registration-Webcast	\$493	\$493		0.00%
Total Registration Revenue	\$18,393	\$18,393	\$	0.00%
3351-Sponsorships	\$4,000	\$4,000		0.00%
3392-Section Differential	(\$300)	(\$300)		0.00%
Other Event Revenue	\$3,700	\$3,700	\$	0.00%
3401-Sales-CD/DVD	\$590	\$590		0.00%
3411-Sales-Published Materials	\$240	\$240		0.00%
Sales, Rents & Royalties Revenue	\$830	\$830	\$	0.00%
Total Revenue	\$22,923	\$22,923	\$	0.00%
5051-Credit Card Fees	\$539	\$539		0.00%
Total Contract Services	\$539	\$539	\$	0.00%
8141-Journal/News Service	\$213	\$213		0.00%
8171-Course Approval Fee		\$150		0.00%
Total Admin & Internal Expense	\$213	\$363	\$	0.00%
Total Expense	\$751	\$901	\$	0.00%
Income Before Split	\$22,171	\$22,021	\$	0.00%
Section Profit Split	(\$17,737)	(\$17,617)		0.00%
Net Income to TFB	\$4,434	\$4,404	\$	0.00%

FLORIDA BAR – ELDER LAW SECTION

REPORT OF THE ESTATE PLANNING AND ADVANCE DIRECTIVE COMMITTEE

January 2019

The Estate Planning and Advance Directive Committee continues to hold bi-weekly meetings on the 2nd and 4th Thursdays every month at noon (on an as needed basis). Primary focuses continue to be reviewing potential/proposed legislation for the Legislative Committee and discussing current issues in estate planning and probate for member development. Primary legislative issue for the committee has been the Banker's proposed legislation regarding disposition of small bank accounts, which the committee opposes in its current form.

On October 25, 2018, Randy Bryan gave an incredible presentation to our committee about IRAs. We have tentatively scheduled a speaker to discuss medical marijuana for February 28, 2019.

The committee still plans on working on developing a template to collect information on each county's local probate rules and procedures. We are hopeful to find volunteers to input information about each county to assist members of our section in quickly locating information about local probate procedures.

The co-chairs are actively seeking suggestions for additional discussion topics for the upcoming year's (or next year's) meetings and volunteers for ongoing projects.

GUARDIANSHIP COMMITTEE REPORT:

The Guardianship Committee is co-chaired by Debra J Slater and Twyla Sketchley. We meet twice per month on the second and fourth Tuesday of each month. This year we tackled a myriad of issues related to rules, statutes, reforms, etc. concerning guardianships. These included proposed legislation for elder care coordination, we helped draft a modified version of the uniform adult guardianship and protective proceedings jurisdiction act that will be addressed in the 2019 session, as well as a reviewed and commented on a proposed fix to c. 744.331.

We created a hot topics CLE that will be presented in June, 2019 as well as provided speakers for the upcoming Update in January where one of our members will speak on guardianships v guardian advocacy. Our committee has also contributes articles to the Elder Law Advocate on a periodic basis.

Our committee has contributed to the legislative and administrative advocacy by the Task Force for the Elderly and Disabled in preparation for the 2019 Florida Legislative Session.

Our meetings included spirited debates on various issues that affect our members and our practice. Our committee worked closely and cohesively and we welcome any member of the Elder Law Section to our meetings.

To: Elder Law Section Executive Council

From: Medicaid Committee

Date: 1/10/19

RE: Medicaid Committee Report

Our committee met by telephone conference call every first and third Tuesday of the month at 12:00 noon EST with our first meeting being held on July 17, 2018. Our Co-Chairs are John Clardy and Heidi M. Brown.

Our biggest activity has been waiting to see if CMS will approve AHCA's new rules for Medicaid, through an 1115 Waiver Amendment, that would eliminate the retroactive coverage. Currently, the Medicaid applicant can request up to 90 days of retroactive coverage, if the applicant would have been eligible during that time. During the review of legislative bills, it was brought to our attention that the 2018/19 Appropriations Bill had a line item requesting that AHCA obtain a federal waiver from CMS to eliminate the 90-day retroactive coverage. AHCA then proposed an Amendment to their MMA Waiver. Our committee researched the Amendment and how to object to Waivers and their Amendments. When AHCA held their public notice comment period, we drafted a letter objecting to the elimination of the retroactive coverage, which was signed by the Chair of the ELS. Also, when the federal CMS held their public notice comment period, we drafted a letter objecting to the elimination of the retroactive coverage. We also encouraged our committee members and members of the AFELA listserv to do the same. On November 30, 2018 CMS approved the waiver to eliminate retroactive Medicaid eligibility. There was confusion as to whether the effective date would be December 1, 2018 or February 1, 2019. Later, AHCA issued an email blast to Medicaid providers and stakeholders indicating that the effective date would be February 1, 2019. AHCA has been ordered to notify the Medicaid providers and stakeholders of this change. We will monitor AHCA and DCF to see. Also, there is confusion about whether the Florida Administrative Code needs to be amended to reflect the elimination of the retroactive Medicaid coverage. We are also looking for cases where clients have been hurt by this change.

Although we are separate than the Veterans Benefits Committee, we did discuss the new rules regulating pensions and unreimbursed medical expenses as many of our members also practice in that area.

One of our members, Nancy E. Wright, has an idea for a new project for the Medicaid Committee. The project would involve informing the public about the SMMC-LTC program and how to get on the Waitlist for it.

Our Co-Chair, John Clardy is representing Florida on a national level committee monitoring Medicaid Waivers.

We discussed many different issues and possible practical solutions affecting Medicaid at our conference calls. We also discuss various issues that our members are having with DCF, for example, annual renewals being denied for spurious reasons, personal service contracts, whether

DCF counts Aid and Attendance payments as income, trigger trusts for beneficiaries who later need public benefits, deficient 3008 forms and how to solve the problem, DCF asset searches and verifying financial accounts, QDROs and effect on patient responsibility, disability determinations, problems uploading documents to ACCESS website, etc. We have also discussed whether a Community Spouse can receive court-ordered spousal support if the Medicaid Spouse is at home or in an ALF, i.e. in the community. One member noted that ACA allowed this, but is sunseting on December 31, 2018, unless Congress passes new legislation.

Finally, we are still monitoring new rules and changes to the existing rules in the Florida Administrative Code that affect DCF, AHCA, or DOEA.

Mentoring Committee Report – January 2019

Stephanie Villavicencio
Dayami Sans

The Mentoring Committee has continues to host its “Tricks of the Trade” telephonic CLE every other month (even-numbered months). We are looking for speakers for our February 2018 call. The following “Tricks of the Trade” telephonic CLEs have been conducted since the last ELS Executive Council meeting:

- December 13, 2018 – Jodi E. Murphy presented on Joint Planning for VA and Medicaid

We will be hosting a “speed-mentoring” event on February 6, 2019 at 5:30pm at St. Thomas University School of Law. We are looking for mentors to participate in this event. The event will allow for the attorney new to the practice of elder law, the opportunity to access the knowledge of more experienced attorneys. The event will consist of an informal Happy Hour setting wherein new lawyers (whether in age or experience to Elder Law) will have the opportunity to have limited but poignant conversations in intervals, wherein the mentees have the opportunity to ask the mentor, within a matter of minutes, one or two questions about what it is to be an elder law practitioner.

We have matched four mentors/mentees since November 2018 and continue to welcome new members to sign up.

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January 9, 2019

RE: Unlicensed Practice of Law (UPL) Committee Report

Dear Executive Council:

Following is a summary of activities of the UPL committee, and requested information regarding the committee:

- 1.) Name of committee:
Elder Law Section Unlicensed Practice of Law Committee.
- 2.) Co-Chairs: John R. Frazier
 10225 Ulmerton Rd., #11
 Largo, FL 33771

 Leonard Mondschein
 10691 North Kendall Drive, #205
 Miami, FL 33176
- 3.) Number of committee members: Ten.
- 4.) Number of meetings since last report: Our committee holds a monthly tele-conference on the third Tuesday of every month, at 4:00 PM.
- 5.) How frequently the committee is scheduled to meet: See above.
- 6.) Summary of accomplishments since last report: By way of important updates, a Florida attorney was suspended in December 2018 for Florida Bar rule violations regarding his business relationship with a non-attorney elder planning company. Medicaid Done Right (MDR) headquartered in Clearwater Florida, has been sued by a Texas law firm, regarding the business practices of MDR in Texas. Non-attorney company Senior Planning Services (SPS), which does elder care planning in New Jersey, is facing a class action lawsuit filed by a Philadelphia law firm. Our 2018 book on Medicaid planning UPL has been distributed to various nursing homes throughout Florida. If you know anyone who would like a free copy of the book, please contact John Frazier.
- 7.) A list of UPL committee goals going forward: The UPL Committee will continue to write publications to increase awareness of the UPL problem in Florida and the committee will continue to encourage and facilitate the filing of UPL complaints with the Florida Bar. We are also looking into ways to get the word out to nursing home and assisted living employees regarding the dangers of Medicaid planning UPL.
- 8.) A list of any legislation the UPL committee is following, analyzing or developing: None.
- 9.) Any action needed by the council or other committees: No current action is needed.

If you need further information, please contact me at the office at (727) 586-3306 extension 104, or on my cell phone at (727) 748-5374.

Sincerely,


 JOHN R. FRAZIER, J.D., LL. M.

JRF:acb

Elder Law Section Litigation Committee Report

Thursday, January 17, 2019

The litigation committee is working on exploiter disinheritance statutes for a proposed bill in the 2020 session. Our members are:

Shannon Miller
Ellen Cheek
Twyla Sketchley
Amy Collins
Kathryn Perrin
Bill Johnson

We welcome new members. Our meetings are by conference call and are usually over lunch time.

Here are highlights of what transpired at the RPPTL Winter Meeting, Orlando, 12/6/18-12/8/18, of interest to the Elder Law Section. Disclaimer - this is not intended to be comprehensive.

1. Probate Law and Procedure Committee.

- a. Notice of Administration Form. There is a proposal to provide formal notice to a surviving spouse of the availability of an extension of time to make an elective share election. This would amend Florida Statute §733.212(2)(e).
- b. Notice of Administration Form. There is a proposal to require additional language in a Notice of Administration which will notify a party they may be waiving the right to contest a Trust (normally 6 months), when they waive the right to contest a Will (normally 3 months) Florida Statute §733.212.
- c. Disposition of Decedent's Remains Legislation. This would clarify current law. Even after remedial legislation following the Anna Nicole Smith case, it is still unclear whether a person's instructions regarding disposition of remains must be followed, and whether a court must honor those instructions. The proposed legislation is very comprehensive, but has been resisted by the funeral industry.
- d. Small Account Legislation- Payments of Bank Accounts to Surviving Successor Without Court Proceeding. This is a proposal by the Florida Bankers Association to enact Florida Statute §655.795, to permit financial institutions to release accounts which are not in excess of \$10,000, and without a POD designation, to surviving successors without a probate. This proposal was introduced last year. It is opposed by the committee for numerous reasons, including the fact that there is no aggregate limit of what could be transferred. There is a great risk of fraud, and this would by-pass the creditor's claims process.
- e. There is a subcommittee looking into whether a Personal Representative should include a copy of a Will in the Notice of Administration of a testate estate.

2. Homestead Issue Study Committee

- a. Homestead in Trusts. The issue is how homestead real property should be treated when transferred to a Revocable Trust, and/or used as a Will substitute upon the death of the settlor. This proposed legislation has not gone forward.
- b. Homestead in Continuing Trusts. Jeff Goeth had a case involving homestead placed in a continuing trust where a creditor invoked a claim against the homestead property on the basis that it lost its homestead creditor protected character, inasmuch as it was not left outright in the Trust to the protected heir. His client appealed the decision, and the decision was per curium Affirmed. In the trial court, the creditor relied on the case

Elder Law Section Liaison to RPPTL Committee Report
December 6, 2018-December 8, 2018
Charlie Robinson, Chair Marjorie Wolasky, Vice Chair
December 12, 2018

Elmowitz vs. Estate of Zimmerman, 647 So.2d 1064. This is troublesome. We often leave homestead property in continuing Trusts for disabled beneficiaries.

3. **Guardianship Committee.**

- a. Guardianship Revision Update. Expected to be released in March, 2019.
- b. *James S. Cook v. John Cook and Robert Cook, No. 4D17-1636.* This case is regarding the extent of the physical examination which is to be undertaken by the examining committee. The decision was meant to clarify an earlier opinion. It appears (at least to me) that none of the members of the examining committee have to do a physical examination of an Alleged Incapacitated Person as long as there are existing medical records to rely on, or they indicate why a physical examination is not needed. There is some discussion about allowing physician's assistants and LPN's on the examining committee.
- c. Fiduciary Licensing. The lobbyists say this it is highly unlikely for this proposal to pass.
- d. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. This proposal was presented.
- e. Proposed Amendments to Florida Statute §§744.301, 744.3025, 744.342 and 744.387. The proposal is to increase the amount under which a minor's claim can be settled without a guardianship. If the proposed settlement is less than \$25,000, no guardianship would be needed. If the amount is between \$25,000-\$50,000 it would be up to the judge as to whether a guardianship is required.
- f. Elder Care Coordinators. Steve Hitchcock reported on this.
- g. Judicial Management Council Guardianship Workgroup.
- h. Supreme Court Guardianship Workgroup. Some suggestions were discussed. Eight subcommittees were formed.

4. **Professionalism and Ethics Committee.** This Committee is considering recommending that the RPPTL Executive Council approve a request to the Board of Governors of the Florida Bar to replace Rules Regulating the Florida Bar 4-1.14, (Representing a Client Under a Disability), with ABA Model Rule of Professional Conduct 1.13 (Client with Diminished Capacity). **Note: I have been asked to bring this to the Elder Law Section for our input. Copies of the Existing Florida Rule, ABA Model Rule and summary of proposed changes are attached.** There is concern about potential liability if an attorney decides not to take any action.

5. Trust Law Committee.

Elder Law Section Liaison to RPPTL Committee Report
December 6, 2018-December 8, 2018
Charlie Robinson, Chair Marjorie Wolasky, Vice Chair
December 12, 2018

- a. Florida Uniform Directed Trust Act. This legislation adopted the Uniform Directed Trust act into Chapter 736 with some modification. The Act gives statutory provisions relating to directed trusts whose terms grant a person other than a trustee a power over some aspect of the Trust's administration.
Note: I am attaching the white paper, and the proposed legislation. The estate planning committee may want to review this proposed legislation, as well as the SNT committee, to make sure it would not negatively affect trust protectors.
 - b. Subcommittee regarding Differences in Trust Code and Probate Code. The Committee decided not to go forward with statutory separate writing for personal property provision since it could be troublesome for trustees.
6. Round Table and Executive Council meeting.
- a. Homestead Studies Issue Committee. The Executive Council approved the amendment to 719(25), which makes leasehold cooperative units eligible for exemption from creditor's claims.
 - b. Probate and Litigation Committee. The Executive Council reviewed, as an information item, proposed legislation suggested by the Probate and Trust Litigation Committee to clarify that a Personal Representative has exclusive authority to pursue causes of action on behalf of an estate.
 - c. Trust Law Committee. The Executive Council reviewed, as an information item, the proposed legislation to enact the Florida Directed Trust Act.
 - d. Probate Law and Procedure Committee. The Executive Council reviewed, as an information item, the proposed legislation to revise the Notice of Administration.



**TITLE ISSUES & STANDARDS COMMITTEE
AGENDA**

December Meeting
9:00 a.m. – 11:00 a.m.
Friday, December 7, 2017
Palm Ballroom II

Christopher Smart, Chair
Robert Graham, Co-Vice Chair
Brian Hoffman, Co-Vice Chair
Karla Staker, Co-Vice Chair
Melissa Scaletta, Co-Vice Chair

Phone: 888.839.7356
Passcode: 813.229.4142

- I. Introduction –
 - A. Attendance
 - B. Approve November minutes

- II. Updates –
 - A. Law Student Program – Sanjiv Patel, Jeff Dollinger
 - B. Proposed Section 95.2311 – Barry Scholnik, Chris Smart

- III. Standards –
 - A. Proposed Standards 6.10, 6.11, & 6.12 – Chris Smart
 - B. Chapter 22 Easements – Greg Hall, Rob Graham, Chris Smart
 - C. Chapter 13 Revisions – Rebecca Wood
 - D. Chapter 2 Revisions – Jeff Dollinger
 - E. Other Chapters that need revision?

CLE – Rebecca Wood.

Publications – Melissa Scaletta.

Technology – Amanda Hersem.

Legislation – Bob Graham (Chris Smart, secondary).



TITLE ISSUES & STANDARDS COMMITTEE
MINUTES

November Meeting
2:00 p.m. – 4:00 p.m.
Tuesday, 11/20/2018
Via phone and GoToMeeting

Christopher Smart, Chair
Robert Graham, Co-Vice Chair
Brian Hoffman, Co-Vice Chair
Karla Staker, Co-Vice Chair
Melissa Scaletta, Co-Vice Chair

I. Introduction –

A. Attendance

Larry Davis

Amanda Hersem

Sanjiv Patel

Sung Mi Shin

Marty Solomon

Bob Graham

Alan McCall

Sabine Seidel

Chris Smart

Karla Staker

Greg Hall

Lee Offir

Barry Scholnik

Rebecca Wood

Joe Tschida

B. October minutes were unanimously approved without discussion

II. Discussion of the feedback from leadership/the Probate side on the Enhanced Life Estate Deed Standards

- A. There was discussion about the committee's authority to prepare standards on issues on which there is not a lot of authority – everyone agreed with there is authority/ability to develop such standards on prevalent practices on which there is not the weight of binding authority, with the intent to provide guidance to practitioners
- B. There was discussion about the committee's support of a proposed statute on this issue – everyone agreed that we would support such a statute but that we felt there were good reasons for preparing the standards proposed legislation.
- C. There was discussion about what type of interest the remainder actually is. There was a vote, and it was unanimously decided that the committee position is that the remainder interest created by a lady-bird deed is a vested remainder subject to divestment; **not a contingent remainder.**

III. Standards

A. Enhanced Life Estate Deed Standards 6.10, 6.11 & 6.12



Those standards were revisited in light of the feedback received since the last committee meeting

Lee Offir agreed to write a problem or comment about the life tenant's ability to deed the property back to herself.

Alan McCall agreed to write a comment that describes the life tenant's power of sale as a limitation on the remainderman's estate

Karla Staker further edited the redlined version of the standards with the changes proposed by Rohan Kelley; his suggestions related to the remainder being a contingent interest were rejected.

IV. Winding up: Karla suggested that we should earn CLE credit for these efforts; she agreed to pursue approval for that.

V. Adjournment

Next meeting: December 6, 2018, 9:00-11:00am

Adjourned: 3:20pm

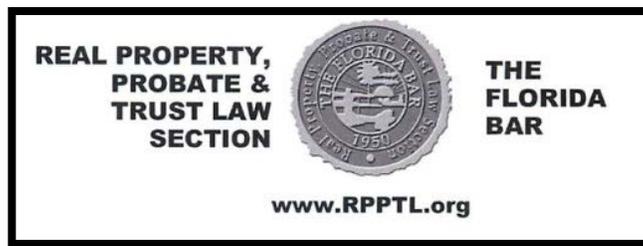
LIASONS

CLE – Rebecca Wood.

Publications – Melissa Scaletta.

Technology – Amanda Hersem.

Legislation – Bob Graham (Chris Smart, secondary).



Join the Title Issues & Standards Committee and become a Member of The Real Property, Probate & Trust Law Section of the Florida Bar!

(Open to all law students – Affiliate Membership Required \$20)

Benefits

- Network with the leading real estate attorneys in Florida;
- Enhance your knowledge of Florida real estate law; and
- Help draft and maintain Florida's Uniform Title Standards.

Responsibilities

- Assist in reviewing the Standards for citation verification, error correction, and format consistency; and
- Monitor the law affecting title to real estate in Florida.

Start Date: Winter Semester, 2019

Please contact the Chair of the Student Member Subcommittee Sanjiv G. Patel (Tel.: (407) 373-7126, or e-mail: spatel@catic.com) and the Associate Dean for Academic Affairs Jason P. Nance (Tel.: (352) 273-0992, or e-mail: nance@law.ufl.edu). If you are not already an Affiliate Member of the RPPTL Section, please complete the attached application and follow the instructions therein for submission.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Christopher Smart, Esq., Chair, Title Issues and Standards Committee of the Real Property Probate and Trust Law Section (RPPTL Approval December _____, 2018)

Address 4221 W. Boy Scout Blvd., Tampa, Florida 33607
Telephone: (813) 229-4142

Position Type Title Issues and Standards Committee, RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

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Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999 4100, Email: pdunbar@deanmead.com

Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999 4100, Email: medenfield@deanmead.com

Appearances

Before Legislators (SAME)

(List name and phone # of those having face to face contact with Legislators)

Meetings with

Legislators/staff (SAME)

(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable,

List The Following N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support _____ Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

Supports proposed legislation to create Section 95.2311, which would establish a method of correcting obvious typographical errors in legal descriptions contained in real property deeds.

Reasons For Proposed Advocacy:

Real estate transactions are delayed because of obvious typographical error in legal descriptions. This statute when applicable would make it unnecessary to obtain a corrective deed or to bring a judicial action to reform deeds containing obvious typographical erroneous.

WHITE PAPER

PROPOSED CREATION OF SECTION 95.2311 FLORIDA STATUTES

Prepared by the Real Property, Probate and Trust Law Section of the Florida Bar

Title Issues and Standards Committee

I. SUMMARY

This bill would create a new section in the Florida Statutes, Section 95.2311. It is intended to cure obvious typographical errors in legal descriptions and thereby eliminate the need to bring law suits to quiet title when obvious errors are found in the legal descriptions of recorded deeds. The idea behind the statute is that the grantor intended to convey title to real property to which she held an interest at the time of the deed. The statute excludes situations in which the grantor owned other property in the same subdivision, condominium, or cooperative within the past five years immediately prior to executing the deed containing the erroneous legal description. This exclusion safeguards against the statute being misapplied in situations where the grantor's intent could have been to convey another property.

The bill provides that a curative notice which identifies the intended and correct legal description must be recorded.

The proposed bill has a narrow focus in that it applies only to obvious errors in deeds and does not apply to transfers of title by judicial order or to quit claim deeds. It also does not apply to deeds that contain metes and bounds legal descriptions. Finally, the bill states that the deed containing the legal description may have only one error or omission, which will further help to ensure that the bill addresses only the most obvious typographical errors.

There are already several laws on the books in Florida which provide curative periods for correcting errors in recorded instruments. Florida also already has an adverse possession law. At least five states (Georgia, North Carolina, Ohio, Texas and Virginia) have similar laws which in some cases are significantly more forgiving than this proposal. This bill would make such titles that fall within the parameters of the bill marketable without a costly and time-consuming lawsuit to quiet title. It will expedite the real estate transfers and benefit the parties involved in the transaction. Finally, it gives effect to the intent of the original parties to the deed.

II. SECTION-BY-SECTION ANALYSIS

A. Sub-Section 95.2311 (1) states the definitions that are used in the proposed statute. The three terms defined are erroneous deed, intended real property, and scrivener's error. Quit claim deeds are excluded from the definition of erroneous deed and are therefore not covered by this bill. The definition of scrivener's error lists the limited number of legal description errors and omissions covered by the proposed statute.

(1) Definitions:

(a) "Erroneous deed" means any containing a scrivener's error, except quit claim deeds prepared by the grantee which on their face show that only minimum documentary stamps were paid.

(b) "Intended real property" means the real property vested in the grantor and intended to be conveyed by the grantor in the erroneous deed.

(c) "Scrivener's error" means not more than one of the following errors or omissions in the legal description of the intended real property:

(1) An error or omission in no more than one of the lot or block identifications of a recorded platted lot, or two errors if the lot and block identifications are transposed; or

(2) An error or omission in no more than one of the unit, building, or phase identifications of a condominium or cooperative unit; or

(3) An error or omission in no more than one of the name or recording information of the plat, condominium declaration, or cooperative covenants; or

(4) An erroneous identification of the county in which the intended real property is located; or

(5) An error or omission in no more than one of a directional designation or numerical fraction of a tract of land that is described as a fractional portion of a Section, Township or Range. An error or omission in the directional description and numerical fraction of the same call shall be considered one error.

B. Sub-Section 95.2311 (2) establishes that an erroneous deed will be held to convey title to the intended real property as if there had been no scrivener's error.

(2) Subject to subsections (3) and (4) of this section, the erroneous deed will be held to convey title to the intended real property as if there had been no scrivener's error; and each subsequent deed containing the identical scrivener's error will be held to convey title to the intended real property as if there had been no such identical scrivener's error.

C. Sub-Section 95.2311 (3) states the criteria for the statute to have effect.

(3) Subsection (2) only applies if:

(a) The intended real property was owned by the grantor of the first erroneous deed at the time the first erroneous deed was executed.

(b) The grantor did not own any property other than the intended real property in the subdivision, condominium, or cooperative described in the erroneous deed at any time within five years prior to the date that the erroneous deed was executed.

(c) The intended real property is not described by a metes and bounds legal description.

(d) A curative notice in substantially the same form as set forth in subsection (6) is recorded in the Official Records of the county in which the intended real property is located, evidencing the intended real property to be conveyed by the grantor.

D. Sub-Section 95.2311 (5) establishes the form of the Curative Notice. The scrivener's affidavit identifies the recording information, and legal description of both the erroneous described property and the intended real property to be conveyed. It also includes an assertion by the scrivener as to the legal description of the real property that was intended to be conveyed.

(4) *Curative Notice. The Curative Notice must be in substantially the following form:*

*Curative Notice, Per Sec. 95.2311, F.S.
Scrivener's Error in Legal Description*

The undersigned does hereby swear and affirm:

1. *The deed which transferred title from _____, to _____, dated _____, and recorded _____ in O.R. _____, Page _____, and/or Instrument No. _____, Official Records of _____ County, Florida (herein after referred to as "original erroneous deed"), and contained the following erroneous legal description:*

*[insert erroneous legal description]
[if required]*

2. *The deed transferring title from _____ to _____ and recorded _____ in O.R. _____, Page _____, and/or Instrument No. _____, Official Records of _____ County, Florida, contained the same erroneous legal description described in the original erroneous deed.*

[insert the erroneous legal description] [repeat paragraph 2 for each subsequent deed as necessary]

3. *This notice is made to establish that the real property described as: [insert legal description of the intended real property] (hereinafter referred to as the "intended real property") was the real property that was to have been conveyed in the original erroneous deed.*

4. *I have examined the Official Records of the county in which the intended real property is located for the requisite period of time and have determined the following:*

(a) *The Deed dated _____, and recorded on _____ in O.R. Book _____, Page _____ and/or Instrument Number _____, Official Records of _____ County, Florida, establishes that the intended real property was owned by the grantor of the original erroneous deed at the time the original erroneous deed was executed.*

(b) *The property described in the original erroneous deed was not owned by the grantor named in the original erroneous deed on the date of the original erroneous deed nor within the five (5) years immediately preceding the date when the original erroneous deed was executed, and accordingly, grantor named in the original erroneous deed did not have the authority to convey the property described in the original erroneous deed.*

5. Pursuant to the provisions of Sec. 95.2311, it shall be deemed the original erroneous deed conveyed the intended real property to the grantee named in the original erroneous deed.

Signature: _____
Printed Name: _____

STATE OF _____
COUNTY OF _____

Sworn to under oath, subscribed and acknowledged before me this ____ day of _____, 20 ____ by _____, who is/are personally known to me or who has/have produced _____ as identification.

[affix seal with Notary name and
Commission number/expiration date]

Notary Signature: _____

F. Sub-Section 95.2311(5) states that the corrective notice shall be recorded in the county in which the intended real property is located.

(5) The Recording Office of the County where the intended real property is located will record the corrective notice evidencing the intent of the grantor in the erroneous deed to convey the intended real property to the grantee in the erroneous deed and a likewise intent for each subsequent deed.

G. Sub-Section 95.2311 (6) states that the corrective notice operates as the correction of the erroneous deed and relates back to the date of the recordation of the erroneous deed.

(6) The corrective notice recorded pursuant to this section operates as a correction of the erroneous deed, and the correction relates back to the date of recordation of the erroneous deed as if the erroneous deed and all subsequent deeds containing the identical scrivener's error contained the legal description for the intended real property when recorded.

H. Sub-Section 95.2311 (7) states that the remedies under this section are not exclusive.

(7) The remedies under this section are not exclusive and do not abrogate any right or remedy under the laws of Florida other than this section.

1 A bill to be entitled

2 An act relating Chapter 95; providing for curative procedures to correct certain
3 errors in legal descriptions in deeds; amending Chapter 95, F.S.; and providing for an
4 effective date.

5
6 Be It Enacted by the Legislature of the State of Florida

7
8 Section 1. Section 95.2311, Florida Statutes, is created to read:

9 **95.2311 – Description Errors in Deeds; Curative Procedures**

10 (1) Definitions:

11 (a) “Erroneous deed” means any deed containing a scrivener’s error, except quit
12 claim deeds prepared by the grantee which on their face show that only minimum
13 documentary stamps were paid.

14 (b) “Intended real property” means the real property vested in the grantor and
15 intended to be conveyed by the grantor in the erroneous deed.

16 (c) “Scrivener’s error” means not more than one of the following errors or omissions
17 in the legal description of the intended real property:

18 (1) An error or omission in no more than one of the lot or block identifications of
19 a recorded platted lot, or two errors if the lot and block identifications are
20 transposed; or

21 (2) An error or omission in no more than one of the unit, building, or phase
22 identifications of a condominium or cooperative unit; or

23 (3) An error or omission in no more than one of the name or recording
24 information of the plat, condominium declaration, or cooperative covenants; or

25 (4) An erroneous identification of the county in which the intended real property
26 is located; or

27 (5) An error or omission in no more than one of a directional designation or
28 numerical fraction of a tract of land that is described as a fractional portion of a
29 Section, Township or Range. An error or omission in the directional description
30 and numerical fraction of the same call shall be considered one error.

31 (2) Subject to subsections (3) and (4) of this section, the erroneous deed will be held to
32 convey title to the intended real property as if there had been no scrivener’s error; and each
33 subsequent deed containing the identical scrivener’s error will be held to convey title to the
34 intended real property as if there had been no such identical scrivener’s error.

35 (3) Subsection (2) applies only if:

36 (a) The intended real property was owned by the grantor of the first erroneous deed at
37 the time the first erroneous deed was executed.

38 (b) The grantor did not own any property other than the intended real property in the
39 subdivision, condominium, or cooperative described in the erroneous deed at any time
40 within five years prior to the date that the erroneous deed was executed.

41 (c) The intended real property is not described by a metes and bounds legal
42 description.

43 (d) A curative notice in substantially the same form as set forth in subsection (6) is
44 recorded in the Official Records of the county in which the intended real property is
45 located, evidencing the intended real property to be conveyed by the grantor.

46 (4) Curative Notice. A curative notice must be in substantially the following form:

Curative Notice, Per Sec. 95.2311, F.S.
Scrivener's Error in Legal Description

The undersigned does hereby swear and affirm:

1. The deed which transferred title from _____, to _____, dated _____, and recorded _____ in O.R. _____, Page _____, and/or Instrument No. _____, Official Records of _____ County, Florida (herein after referred to as "original erroneous deed"), and contained the following erroneous legal description:

[insert erroneous legal description]

[if required]

2. The deed transferring title from _____ to _____ and recorded _____ in O.R. _____, Page _____, and/or Instrument No. _____, Official Records of _____ County, Florida, contained the same erroneous legal description described in the original erroneous deed.

[insert the erroneous legal description][repeat paragraph 2 for each subsequent deed as necessary]

3. This notice is made to establish that the real property described as:

[insert legal description of the intended real property]

(hereinafter referred to as the "intended real property") was the real property that was to have been conveyed in the original erroneous deed.

4. I have examined the Official Records of the county in which the intended real property is located for the requisite period of time and have determined the following:

(a) The Deed dated _____, and recorded on _____ in O.R. Book _____, Page _____ and/or Instrument Number _____, Official Records of _____ County, Florida, establishes that the intended real property was owned by the grantor of the original erroneous deed at the time the original erroneous deed was executed.

(b) The property described in the original erroneous deed was not owned by the grantor named in the original erroneous deed on the date of the original erroneous deed nor within the five (5) years immediately preceding the date when the original erroneous deed was executed, and accordingly, grantor named in the original erroneous deed did not have the authority to convey the property described in the original erroneous deed.

5. Pursuant to the provisions of Sec. 95.2311, it shall be deemed the original erroneous deed conveyed the intended real property to the grantee named in the original erroneous deed.

Signature: _____

Printed Name:

STATE OF _____

COUNTY OF _____

Sworn to under oath, subscribed and acknowledged before me this ____ day of _____, 20 ____ by _____, who is/are personally known to me or who has/have produced _____ as identification.

[affix seal with Notary name and

Commission number/expiration date] Notary Signature: _____

(4) The Recording Office of the County where the intended real property is located will record the corrective notice evidencing the intent of the grantor in the erroneous deed to convey the intended real property to the grantee in the erroneous deed and a likewise intent for each subsequent deed.

(5) The corrective notice recorded pursuant to this section operates as a correction of the erroneous deed, and the correction relates back to the date of recordation of the erroneous deed as if the erroneous deed and all subsequent deeds containing the identical scrivener's error contained the legal description for the intended real property when recorded.

(6) The remedies under this section are not exclusive and do not abrogate any right or remedy under the laws of Florida other than this section.

Section 2. This act shall take effect upon becoming a law.

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STANDARD 6.10

ENHANCED LIFE ESTATE DEED FOR NON-HOMESTEAD PROPERTY

STANDARD: **THE HOLDER OF A LIFE ESTATE IN NON-HOMESTEAD PROPERTY, COUPLED WITH THE POWER TO SELL, CONVEY, MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, CAN CONVEY OR ENCUMBER THE FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER WITHOUT THE REMAINDERMAN.**

Problem 1: John Doe conveyed Blackacre to Jane Smith, reserving for himself a life estate with enhanced powers. The deed specifically stated, “Grantor reserves the power to sell, convey, mortgage or otherwise manage and dispose of the property without joinder of the remainderman. The grantor has no liability for waste; may divest the remainderman by subsequent deed, may transfer the property for less than full consideration, and may retain any and all proceeds generated by any transaction, without consent of the remainderman.” John Doe died. Is the conveyance to Jane Smith valid?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except that John Doe, during his lifetime and for his own benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 3: Same facts as in Problem 1, except that John Doe, during his lifetime and for his own benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. At the time of the conveyance Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith and Creditor?

Answer: Yes.

Problem 4: Same facts as in Problem 1, except that Creditor has a judgment lien against John Doe. However, Creditor does not levy and execute on his judgment. John Doe dies without conveying the property. Did Jane Smith acquire title to Blackacre free of the judgment lien of Creditor?

Answer: Yes.

Authorities: F.S. 733.706 (2018), F.S. 733.702(4)(a) (2018), *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); *Aetna Ins. Co, v. La Gasse*, 223 So.2d 727 (Fla. 1969); 19 Fla. Jur. 2d *Deeds*, § 170 (2018).

Secondary Authority: Stephanie Emrick, *Transfer on Death Deeds: Is It Time to Establish the Rules of the Game*, 70 Fla. L. Rev. 469 (2018).

Comment:

This type of enhanced life estate conveyance is commonly referred to as a “Lady Bird Deed”. It is used for various purposes among which is the avoidance of probate by the holder of the life estate. Attempts by the life tenant with enhanced powers during their lifetime to divest the remainderman of their remainder interest may create questions as to who holds fee simple title after the death of the life tenant. For the record to be clear, the prudent practitioner should have the life tenant retain the power to divest the remainderman in the vesting deed creating the enhanced life estate and any conveyance attempting to divest the remainderman should clearly state the life tenant’s intent to do so. In *Oglesby*, the court held that a deed from a father to his daughter, reserving in himself the power to sell the property and give her the proceeds, was a gift, and that after the father’s subsequent conveyance as authorized by the terms of the deed, the daughter had no interest in the title. A remainderman as to an enhanced life estate during the lifetime of the life tenant holds a vested remainder interest which is subject to divestment by the life tenant and, therefore, any judgment against the remainderman may be similarly divested. However, upon the death of the life tenant, the lien of judgment against the remainderman would attach to the property.

A judgment against a decedent is not enforceable against real property owned by the decedent at the time of death, but shall be filed in the same manner as other claims against estates of decedent. See F.S. 733.706 (2018). If a creditor does not levy and execute on its judgment lien, it is just a general lien on all of the property of the debtor. F.S. 733.702(4)(a) (2018) permits enforcement of the lien of mortgages, security instruments or other liens on specific property without the necessity of filing a claim.

STANDARD 6.11

ENHANCED LIFE ESTATE: LIFE TENANT AND HOMESTEAD PROPERTY

STANDARD: A LIFE TENANT WITH AN INTEREST IN HOMESTEAD PROPERTY, COUPLED WITH THE POWER TO SELL, CONVEY, MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, CAN CONVEY OR ENCUMBER THE FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER WITHOUT THE REMAINDERMAN.

Problem 1: John Doe conveyed Blackacre to Jane Smith, reserving for himself a life estate with enhanced powers. The deed specifically stated, “Grantor reserves the power to sell, convey, mortgage or otherwise manage and dispose of the property without joinder of the remainderman. The grantor has no liability for waste; may divest the remainderman by subsequent deed, may transfer the property for less than full consideration, and may retain any and all proceeds generated by any transaction, without consent of the remainderman.” During his lifetime and for his own benefit, John Doe by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. John Doe was a single man at the time of the conveyance to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except at the time of the conveyance to Jeffrey Williams, John Doe was married and his spouse joined in that conveyance. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 3: Same facts as in Problem 1, except that at the time of the conveyance Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith and Creditor?

Answer: Yes.

Authorities: Art. X, § 4(c), Fla. Const. (2018); F.S. 732.401 (2018), and F.S. 732.4017 (2018); *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); 19 Fla. Jur. 2d *Deeds* § 170 (2018).

Comment: This type of conveyance is commonly referred to as a “Lady Bird Deed.” It is used for various purposes, among which is the avoidance of probate by the holder of the life estate. Attempts by the life tenant with enhanced powers to divest the remainderman may create questions as to who holds fee simple title after the death of the life tenant. For the record to be clear, the life tenant must have retained the power to divest the remainderman in the vesting deed creating the enhanced life estate and any conveyance attempting to divest the remainderman should clearly state the life tenant’s intent to do so.

A conveyance of a homestead residence by the life tenant is subject to the spousal joinder requirements of Art. X, Section 4(c), of the Florida Constitution. The restriction on the

devise of homestead contained in Art. X, Sec. 4(c) must be considered after the death of the life tenant if survived by a spouse or minor child. Conveyances from all of the heirs of the deceased life tenant, including the surviving spouse, may be required to convey fee simple title to the remainderman named in the vesting deed that created the enhanced life estate.

In *Oglesby*, the court held that a deed from a father to his daughter, reserving in himself the power to sell the property and give her the proceeds, was a gift, and that after the father's subsequent conveyance as authorized by the terms of the deed, the daughter had no interest in the title. A remainderman as to an enhanced life estate during the lifetime of the life tenant holds a vested remainder interest which is subject to divestment by the life tenant and, therefore, any judgment against the remainderman may be similarly divested. However, upon the death of the life tenant, the lien of judgment against the remainderman would attach to the property.

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STANDARD 6.12

ENHANCED LIFE ESTATE: REMAINDERMAN AND HOMESTEAD PROPERTY

STANDARD: **THE REMAINDERMAN IN HOMESTEAD PROPERTY, WHEREIN THE LIFE TENANT RESERVED THE POWER TO SELL, CONVEY MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, ACQUIRES FEE SIMPLE TITLE UPON THE DEATH OF THE LIFE TENANT ONLY WHEN NOT IN VIOLATION OF CONSTITUTIONAL RESTRICTION ON DEVISE OF HOMESTEAD.**

Problem 1: John Doe, a single man, conveyed Blackacre to Jane Smith, reserving for himself a life estate with enhanced powers. The deed specifically stated, “Grantor reserves the power to sell, convey, mortgage or otherwise manage and dispose of the property without joinder of the remainderman. The grantor has no liability for waste; may divest the remainderman by subsequent deed, may transfer the property for less than full consideration, and may retain any and all proceeds generated by any transaction, without consent of the remainderman.” John Doe died without a spouse or a minor child. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except that John Doe died while married to Sally Brown. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: No.

Problem 3: Same facts as in Problem 2, except that the deed is executed on or after July 1, 2018, and John Doe’s spouse Sally Brown, joined in John Doe’s deed to Jane Smith and the deed contained the following statement: “By executing or joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me.” John Doe had no minor child at the time of his death. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: Yes.

Problem 4: Same facts as in Problem 1, except that at the time of the conveyance and when John Doe died Jane Smith was his spouse. John Doe had no minor children at the time of his death. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: Yes.

Authorities: Art. X, § 4(c), Fla. Const.(2018); F.S. 732.401 (2018); F.S. 732.4017 (2018); F.S. 732.7025 (2018); F.S. 733.706 (2018); F.S. 689.11 (2018); *Oglesby v. Lee*, 73 Fla.

39, 73 So. 840 (1917); 19 Fla. Jur. 2d *Deeds* § 170 (2018).

Comment:

A spouse on or after July 1, 2018 may waive his or her rights as spouse with respect to restrictions on the devise of homestead under Art. X, § 4 (c), of the Florida Constitution when language providing for waiver of the right related to devise as set forth in F.S. 732.7025 (2018) is included in the deed. A judgment against a decedent is not enforceable against real property owned by the decedent at the time of death, but shall be filed in the same manner as other claims against estates of decedents. See F.S. 733.706 (2018).

CHAPTER 22

EASEMENTS

STANDARD 22.1

EASEMENTS APPURTENANT

STANDARD: AN APPURTENANT EASEMENT ~~APPURTENANT IS INCLUDED-TRANSFERRED WITH IN A CONVEYANCE OF~~ THE DOMINANT ESTATE IN THE ABSENCE OF EXPRESS LANGUAGE TO THE CONTRARY IN THE INSTRUMENT OF TRANSFER

Problem: ~~The Richard Roe owns~~~~owner of~~ Blackacre and Greenacre. Roe conveyed Blackacre to Joan Doe together with an easement to use the east 12 feet of Greenacre as a driveway for access to Blackacre. Later, Doe conveyed Blackacre to Simon Grant. The deed to Grant did not refer to the easement. Did Grant acquire an easement to use the driveway?

Answer: Yes.

Authorities: *Behm v. Saeli*, 560 So. 2d 431, 432 (Fla. 5th DCA 1990); *see Burdine v. Sewell*, ~~92 Fla. 375, 384~~, 109 So. 648, 652 (1926); *see also* Powell on Real Property § 34.15 (Michael Allan Wolf, ed., Matthew Bender); 4-110 Florida Real Estate Transactions § 110.15.

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STANDARD 22.2

ENFORCEABILITY OF EASEMENTS IN GROSS

STANDARD: AN EASEMENT IN GROSS IS ASSIGNABLE AND MAY BE ENFORCED AGAINST A SUBSEQUENT OWNER OF THE BURDENED REAL PROPERTY, IF IT IS RECORDED AND DOES NOT SHOW ON ITS FACE THAT IT IS INTENDED TO BE PERSONAL OR EXCLUSIVE.

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Problem 1: John Doe, the owner of Blackacre, conveyed an easement for a bicycle path across Blackacre to Jane Smith, who had no interest in any adjacent property. Smith recorded the bicycle easement and later assigned it to Richard Roe. Doe conveyed the underlying property to Simon Grant. Is Grant's property still burdened by the easement?

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Answer: Yes, unless the easement stated ~~the intent to make the easement~~ on its face that it was personal or exclusive to Jane Smith.

Authorities: *Dunes of Seagrove Owners Ass'n v. Dunes of Seagrove Dev., Inc.*, 180 So. 3d 1209 (Fla. 1st DCA 2015); *Central and Southern Fla. Flood Control Dist. v. Dupuis*, 123 So. 2d 34 (Fla. App 3d DCA 1960), *cert. denied*, 127 So. 2d 679 (Fla. 1961); *Albury v. Central and Southern Fla. Flood Control Dist.*, 99 So. 2d 248, 252 (Fla. 3d DCA 1957); *see also Wiggins v. Lykes Brothers, Inc.*, 97 So. 2d 273 (Fla. 1957) (assignment of private easement in gross); Powell on Real Property § 34.16 (Michael Allan Wolf, ed., Matthew Bender).

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Comment: Easements in gross are mere personal interests in land that are not supported by a dominant estate. *Platt v. Pietras*, 382 So. 2d 414, 417 (Fla. 5th DCA 1980) (defining an easement in gross as "an easement unconnected with nor for the benefit of any dominant estate").

Easements in gross have typically been recognized in situations involving utilities. *See, City of Orlando v. MSD-Mattie, L.L.C.*, 895 So. 2d 1127, 1128 (Fla. 5th DCA 2005) (easement in gross for overhead electric transmission lines); *Div. of Admin., Dep't of Transp. v. Ely*, 351 So. 2d 66 (Fla. 3d DCA 1977) (easement in gross to supply liquefied petroleum gas); *N. Dade Water Co. v. Florida State Tpk. Auth.*, 114 So. 2d 458, at 459 (easement in gross to furnish water and sewer services).

Florida law has long recognized assignments of easements in gross. The view in Florida represents a departure from the traditional view that easements in gross are considered tantamount to licenses and therefore not assignable. Florida has long recognized the assignability of public utility easements and other like easements. *See, Dupuis, Albury, supra.*

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Courts have held that the personal nature of easements in gross make them unavailable for compensation under eminent domain. *See, e.g., Palm Beach County v. Cove Club Invs.*, 734 So. 2d 379, 388-90 (Fla. 1999); *Division of Administration, Dep't of Transp. v. Ely*, 351 So. 2d 66, 68-69 (Fla. 3d DCA 1977).

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STANDARD 22.3

TERMINATION OF EASEMENT CREATED BY RESERVATION OR GRANT

STANDARD: AN EASEMENT CREATED BY RESERVATION OR GRANT MAY NOT BE TERMINATED BY NON-USE ALONE; IT MAY, HOWEVER, BE TERMINATED EITHER BY (I) NON-USE COUPLED WITH ACTION SHOWING AN INTENT TO ABANDON, OR (II) ADVERSE POSSESSION

Problem 1: In 1939, the City received a sidewalk easement, and constructed a sidewalk. In 1948, the city removed the sidewalk as part of a construction project but never replaced it, even after many years. Was the non-use of the easement area terminate the sidewalk easement?

Answer: No.

Problem 2: In 1975, ABC Land Company conveyed Blackacre to Simon Grant but reserved an easement for grazing rights for its cattle. Despite having the easement, ABC Land Company leased the same grazing rights from subsequent fee owners of Blackacre until 2000. Was the lease of the easement area terminate the grazing rights easement?

Answer: No.

Problem 3: In 2000, John Doe granted Steve Smith an access easement. However, in 2005, Doe blocked the access easement so that Smith was unable to use it for 7 consecutive years. Was the access easement area and terminate the access easement after 7 years?

Answer: Yes.

Problem 4: In 1975, John Doe built a house that encroached 18 feet into an existing 100 foot wide power easement held by XYZ Power Co., but the house did not interfere with XYZ Power Co.'s present or anticipated future use of the easement. Was the portion of the easement where the house is located terminated after 7 years?

Answer: No.

Authorities & References: *Wiggins v. Lykes Brothers, Inc.*, 97 So. 2d 273, 276 (Fla. 1957); *Leibowitz v. City of Miami Beach*, 592 So. 2d 1213, 1214 (Fla. 3d DCA 1992); *Martin County v. Johnson*, 570 So. 2d 1378 (Fla. 4th DCA 1990); *Kitzinger v. Gulf Power Co.*, 432 So. 2d 188, 194 (Fla. 1st DCA 1983); *Mumaw v. Roberson*, 60 So. 2d 741, 743-44 (Fla. 1952); *Bentz v. McDaniel*, 872 So. 2d 978, 981 (Fla. 5th DCA 2004).

Comment: Abandonment of an easement is a question of intent and the burden of proof is on the person asserting abandonment. The person asserting abandonment must demonstrate that there was a "clear affirmative intent to abandon" the easement. See, *Leibowitz, supra*.

Fences or other such minor encroachments into power or utility easements are unlikely to result in a well-founded adverse possession claim. See, e.g., *Bentz, supra* (servient owner must show he or she continuously excluded or prevented the easement's use for 7 years).

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STANDARD 22.4

EXTINGUISHMENT OF EASEMENT BY MERGER OF DOMINANT AND SERVICENT ~~EASEMENTS~~ESTATES

STANDARD: AN EASEMENT IS EXTINGUISHED BY MERGER WHEN TITLE TO BOTH THE DOMINANT AND SERVICENT ESTATES BECOME VESTED IN THE SAME OWNER

Problem 1: John Doe owns Blackacre and Greenacre. Subsequently, John Doe conveys Greenacre to Ronald Roe, reserving an easement over the west 20 feet for the benefit of Blackacre. Later, Ronald Roe acquires Blackacre. Does the easement continue to exist?

Answer: No.

Problem 2: John Doe owns Blackacre and Blueacre. Subsequently, John Doe conveys Blackacre to Ronald Rowe, and John Doe reserves an access easement over a portion of Blackacre for the benefit of Blueacre. Blueacre is then subdivided into 8 lots, and Ronald Rowe acquires 7 of the 8 lots. Is the easement terminated with respect to the 7 lots held by Ronald Rowe?

Answer: No.

Authority: *Tyler v. Price*, 821 So.₂d 1121, 1125 (Fla. 4th DCA 2002). There must be unity of ownership between the servient estate and every dominant estate. *See Lacy v. Seegers*, 445 So.₂d 400, 401 (Fla. 5th DCA 1984).

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STANDARD 22.5

EASEMENT BY IMPLICATION

STANDARD: AN EASEMENT MAY BE IMPLIED FROM A DULY EXECUTED WRITING

Problem 1: Julie Developer recorded a plat for a residential subdivision which included an area labeled “Sunnyside Park”. The dedication stated that Sunnyside Park was dedicated for the use of property owners of the plat. Julie Developer conveyed lots in the subdivision to new lot owners by reference to the plat. Did the lot owners acquire an implied easement for the use of Sunnyside Park?

Answer: Yes.

Problem 2: Alfred Developer recorded a plat for a residential subdivision which included open spaces marked “Reserved – See Margin.” The marginal notation stated “The owner contemplates that the blocks, marked ‘Reserved-see Margin’ may become a part of the golf course, but the owner expressly reserves the absolute right to prescribe the term of any dedication hereafter made or to subdivide or dispose of the same in such manner as it may determine.” In advertising materials for the lots, the developer drew attention to the assets of the subdivision, including the golf course. Do the lot owners have an implied easement over the golf course property?

Answer: No.

Problem 3: Alfred Developer’s promotional materials and a large map in his sales office both disclosed “Entrance Road” as the main access into the subdivision. However, the subdivision plat disclosed a less attractive alternate access road into the subdivision. Did the lot owners acquire an implied easement for the use of “Entrance Road”?

Answer: No.

Authorities & References: *McCorquodale v. Keyton*, 63 So. 2d 906, 910 (Fla. 1953); *Boothby v. Gulf Properties of Alabama, Inc.*, 40 So. 2d 117, 119 (Fla. 1948); *Powers v. Scobie*, 60 So. 2d 738, 740 (Fla. 1952); *Estate of Johnson v. TPE Hotels*, 719 So. 2d 22, 27 (Fla. 5th DCA 1998); *Jonita, Inc. v. Lewis*, 368 So. 2d 114, 115 (Fla. 1st DCA 1979); *Servando Bldg Co. v. Zimmerman*, 91 So. 2d 289, 294-95 (Fla. 1956); *Flowers v. Seagrove Beach, Inc.*, 479 So. 2d 841, 843 (Fla. 1st DCA 1985); *Miami-Dade County v. Torbert*, 69 So. 3d 970, 973 (Fla. 3d DCA 2011); *Tallahassee Inv. Corp. v. Andrews*, 185 So. 2d 705, 707 (Fla. 1st DCA 1966).

Comment: Property owners receiving title to subdivision lots by reference to a recorded plat acquire an implied easement over any areas designated on the plat for the lot owners’ use or as common areas, such as streets, alleys, parks or beach areas. See, e.g., *McCorquodale*, 63 So. 2d at 910; *Powers*, 60 So. 2d at 740; *Boothby*, 40 So. 2d at 119. However, the lot owners do not receive an implied easement over areas on the plat reserved by the developer or not designated for the lot owners’ use. *Burnham v. Davis Islands, Inc.*, 87 So. 2d 97, 99 (Fla. 1956) (developer reserved the right to subdivide open area on the plat). See also, *Bishop v. Courtney*, 22 So. 3d 117, 119 (Fla. 2d DCA 2009) (lot owners hold no easement over areas on a plat marked “Parking Area” and “Boat Slips” without any indication of an intention to dedicate such areas to the lot owners or the public).

This doctrine creating an implied easement over designated areas applies to roads shown on the recorded plat. *Wilson v. Dunlap*, 101 So. 2d 801, 804-05 (Fla. 1958). The implied easement is a private property right, separate and distinct from the public’s right to use platted roads arising from acceptance of a

dedication of such roads by the county. Florida applies an “intermediate” or “beneficial” rule for implied easements over roads, holding that lot owners only have such implied easement rights to the extent they are reasonably and materially beneficial to the lot owner and loss of such rights would reduce the lot’s value. *Scobie*, 60 So. 2d at 740. *See also*, *White Sands v. Sea Club V Condo.*, 581 So. 2d 589, 590 (Fla. 2d DCA 1990) (intermediate rule does not apply to express easement grants).

An implied easement cannot be impressed solely by a developer’s unrecorded advertising materials or by representations made in conversations. *Jonita, Inc.*, 368 So. 2d at 115.

A conveyance without reference to a recorded plat does not create an implied easement for matters reflected on the plat. *Andrews*, 185 So. 2d at 707; *Torbert*, 69 So. 3d at 973. *See also*, *Flowers*, 470 So. 2d at 843 (deed referenced a new plat, not the older plat that included a park).

STANDARD 22.6

EASEMENT CREATED BY RESERVATION

STANDARD: AN EASEMENT MAY BE CREATED BY RESERVATION.

Problem 1: Blackacre, owned by Simon Grant, lies west of a public road. Grant conveyed the east half of Blackacre to John Doe. The deed stated “reserving an easement for ingress to and egress from the west half of Blackacre across the south 20 feet of the east half of Blackacre.” Did Grant retain an easement across the south 20 feet of the east half of Blackacre?

Answer: Yes.

Problem 2: Simon Grant conveyed the east half of Whiteacre to John Doe, “subject to an easement over the south 20 feet.” There was no existing easement over the south 20 feet. Simon later conveyed the west half of Whiteacre to Richard Roe “together with an easement over the south 20 feet of the east half of Whiteacre.” Does Roe have marketable title to the easement?

Answer: No, unless the existence of the easement has been judicially determined. However, the “subject to” easement language on the deed creates a cloud on the title to east ½ of Whiteacre.

Problem 3: The plat of Lakeshore Subdivision included a reservation of a “private parkway” for access to the lake for all purchasers of lots in the subdivision. Did the reservation create an easement for all subdivision lot owners?

Answer: Yes.

Problem 4: Simon Grant conveyed beachfront property to John Doe but reserved a 5 foot pedestrian easement to the beach. The deed stated the easement was reserved solely for the benefit of the owner or owners of the dominant parcels. At the time, no commercial use was being made of any of the parcels, nor was such use allowed in any recorded document. A subsequent owner developed a campground on one of the dominant parcels. May campground patrons use the walkway easement to the beach?

Answer: No since commercial use of the dominant parcels was not contemplated at the time the easement was granted.

Problem 5: The City of Good Hope conveyed Greenacre to Janet Jones. The deed reserved to the State of Florida an easement for a state road right-of-way over a portion of Greenacre. Did the reservation create an easement for the State of Florida?

Answer: Yes.

Authorities: *Procacci v. Zacco*, 324 So.2d 180 (Fla. 4th DCA 1975); *Merriam v. First Nat'l Bank*, 587 So.2d 584 (Fla. 1st DCA 1991); *Behm v. Saeli*, 560 So.2d 431 (Fla. 5th DCA 1990); *Walters v. McCall*, 450 So. 2d 1139 (Fla. 1st DCA 1984); *Cartish v. Soper*, 157 So. 2d 150 (Fla. 2d DCA 1963); *Leffler v. Smith*, 388 So.2d 261 (Fla. 5th DCA 1980); *Dade County v. Little*, 115 So.2d 19 (Fla. 3rd DCA 1959); *Furlong v. Fuller & Johnson, PA*, 492 So.2d 421 (Fla. 1st DCA 1986); *Estate of Johnson v. Tpe Hotels*, 719 So. 2d 22 (Fla. 5th DCA 1998)

Comment: In drafting an easement reservation, the language used should be precise, expressing the type of easement, its extent, location and any other pertinent terms as clearly as possible. Terms such as "subject to" or "except" are insufficient in and of themselves to reserve an easement. Such ambiguous terms require recourse to surrounding facts and circumstances to determine whether the parties intended to create an easement, so instruments containing such language should not be relied upon without a judicial determination. *See, Procacci v. Zacco, supra; Merriam v. First Nat'l Bank, supra; Behm v. Saeli, supra.*; TN 03.02.03 of The Fund Title Notes.

Where an instrument states the purposes for which the easement reservation was created, the easement's use must be confined strictly to those purposes and cannot be enlarged by a change in the use or character of the dominant estate. *See, Walters v. McCall, infra.*

While common law held that a reservation to a stranger to the title was invalid, the modern approach is to use estoppel by deed to overcome the common law prohibition. *Dade County v. Little, infra; Leffler v. Smith, infra; Furlong v. Fuller & Johnson, PA, infra.*

An easement created by a reservation in a deed may be extinguished by the act of platting both the dominant and servient parcels without reserving or showing the easement on the plat. *Estate of Johnson v. Tpe Hotels*, 719 So. 2d 22 (Fla. 5th DCA 1998).

STANDARD 22.7

EASEMENTS IMPLIED BY NECESSITY

STANDARD: IF A PARCEL OF LAND IS DIVIDED SO THAT ONE OF THE RESULTING PARCELS IS LANDLOCKED EXCEPT FOR ACCESS ACROSS THE REMAINDER, AN EASEMENT BY NECESSITY MAY BE IMPLIED.

Problem 1: Jane Smith owned a 20-acre parcel of land abutting a public road. Smith conveyed 10 landlocked acres of the parcel to Richard Brown. May a grant of an easement by necessity be implied across Smith's land for access to Brown's landlocked parcel?

Answer: Yes.

Problem 2: John Black owned 40 acres of land abutting a public road. Black conveyed 30 acres to Jane Green, including the entire road frontage, retaining 10 landlocked acres. May a reservation of an easement by necessity be implied across Green's land for access to Black's retained parcel?

Answer: Yes.

Problem 3: John Black owned 20 acres of land abutting a public road. Jane Green owned 20 acres abutting the east side of Black's land but did not abut a public road. Green conveyed east half of her land to Joe Brown. May a reservation of an easement by necessity for Brown's land be implied across Green's land and Black's land for access to the public road?

Answer: Yes.

Authorities: F.S. 704.01 (1), 20 Fla. Jur. 2d Easements, Sections. 26, 27, 32 and 33, Palm Beach Polo Holdings, Inc., Equestrian Club Estates Property Owners Association, Inc., 949 So.2d 347 (Fla 4th DCA 2007), PGA North II of Florida, LLC v Division of Admin., State of Florida Dept. of Transp., 126 So.3d 1150 (Fla 4th DCA 2012).

Comment: There are two statutory ways of necessity in the State of Florida. F.S. 704.01 (1) states that in Florida "the common-law rule of an implied grant of way of necessity is hereby recognized, specifically adopted, and clarified." Such an easement comes about only where there is a unity of title from a common source other than the original grant by Florida or the United States. F.S. 704.01 (2) creates a statutory way of necessity for landowners who do not qualify for the common-law way of necessity created in F.S. 704.01 (1). There are certain conditions which must exist for the statutory way of necessity under 704.01 (2) to be created, but there is no requirement for a unity of title from a common source.

STANDARD 22.8

EASEMENT BY PRESCRIPTION

STANDARD: EASEMENTS BY PRESCRIPTION MAY BE CREATED BY ACTUAL, CONTINUOUS, AND UNINTERRUPTED USE, ADVERSE TO THE CLAIM OF THE OWNER OR UNDER A CLAIM OF RIGHT FOR A PERIOD OF 20 YEARS

Problem 1: John Doe rides his bike to and from work across the same path on Blackacre every day for 20 years. Jane Smith, the owner of Blackacre, sits on her porch shaking her fist at Doe and yelling at him to get off of her property. Has Doe perfected an easement by prescription?

Answer: Yes.

Problem 2: John Doe rides his bike to and from work across Blackacre every day for 20 years. Jane Smith, the owner of Blackacre, sits on her porch waving at Doe. Has Doe perfected an easement by prescription?

Answer: No, Doe's use must be adverse to the owner and the law presumes his use is by permission of the owner.

Authorities: *Burdine v. Sewell*, 109 So. 648 (Fla. 1926); *J.C. Vereen & Sons, Inc. v. Houser*, 167 So. 45 (Fla. 1936); *Downing v. Bird*, 100 So. 2d 57 (Fla. 1958); *Hunt Land Holding Co. v. Schramm*, 121 So. 2d 697 (Fla. 2d DCA 1960); *Florida Power Corp. v. McNeely*, 125 So. 2d 311 (Fla. 2d DCA 1961); *Florida Power Corp. v. Scudder*, 350 So. 2d 106 (Fla. 2d DCA 1977); *Gibson v. Buice*, 394 So. 2d 451 (Fla. 5th DCA 1981); *Crigger v. Florida Power Corp.*, 436 So. 2d 937 (Fla. 5th DCA 1983); *Phelps v. Griffith*, 629 So. 2d 304 (Fla. 2d DCA 1993); *Dan v. BSJ Realty*, 953 So. 2d 640 (Fla. 3d DCA 2007).

Comment: Prescriptive easements are creations of common law. Florida law does not favor acquisition of prescriptive rights and another's use of property is presumed to be permissive rather than adverse, unless the use is exclusive or inconsistent with the rights of the owner. *Dan v. BSJ Realty*, 953 So. 2d 640 (Fla. 3d DCA 2007). The burden is on the claimant to prove the elements of prescription by clear and positive proof. *Id.*

The ~~careful-prudent~~ practitioner will not rely on an easement by prescription for access or other purposes absent a court order establishing the easement. The ~~careful-prudent~~ practitioner will also obtain a survey, that includes an inspection of easements, rights or claims of parties not ~~shown-recorded in~~ by the ~~official-public-records~~, and ask appropriate follow up questions ~~when conducting due diligence on a property~~ in order to ~~avoid-determine whether there are any~~ claims of prescriptive easements ~~that might burdening~~ the property.



TITLE ISSUES & STANDARDS COMMITTEE
MINUTES

Christopher Smart, Chair
Robert Graham, Co-Vice Chair
Brian Hoffman, Co-Vice Chair
Karla Staker, Co-Vice Chair
Melissa Scaletta, Co-Vice Chair

CH. 13 SUBCOMMITTEE MEETING

2:00 p.m. – 3:00 p.m.
Tuesday, October 9, 2018
Via phone and WebEx

Rebecca L.A. Wood: Subcommittee Chair
Members: Barry Scholnik: 561-962-6752
Joe Tschida: 407-708-0408
Pat Newton: 239-330-3328

I. Attendance: all committee members were present by phone

II. Proposed Standard 13.4 (Joe Tschida)

A. Change “survivor” to “surviving trustee

B. Updated the statutory citation to § 736.0703(2), F.S. (2018)

C. Joe is asked to contact someone with The Florida Bar to ask for help updating the citation to the 9th edition that was published in 2017.

D. Modify the problem to clarify that they took deed as trustees and that there was a certificate of trust recorded:

John Doe and Richard Roe acquired title as trustees. Richard Roe died. In a current transaction, a certification of trust is executed and recorded establishing that the trust agreement does not require appointment of a successor trustee to Richard Roe. Attached to said certification of trust were excerpts from the trust agreement and Richard Roe’s death certificate. John Doe, individually and as trustee, executed a deed to Simon Grant. Is Simon Grant’s title marketable?

C. Modify the standard to delete reference to power of sale:

STANDARD: A DEED EXECUTED BY THE SURVIVING TRUSTEE OR TRUSTEES IS VALID, UNLESS THE TRUST PROVIDES OTHERWISE.

D. The committee unanimously approves the redline draft of UTS 13.4 attached hereto.

III. Next meeting: 11/6/2018 at 2pm via WebEx and phone conference.

IV. Adjournment: 3:04pm



STANDARD 13.4

DEED EXECUTED BY THE SURVIVOR
OF TWO OR MORE TRUSTEES

STANDARD: A DEED EXECUTED BY THE SURVIVING TRUSTEE OR TRUSTEES ~~OR OR SURVIVORS OF TRUSTEES WHO HAD THE POWER OF SALE IN THE TRUST~~ IS VALID, UNLESS THE TRUST PROVIDES OTHERWISE.

Problem: John Doe and Richard Roe ~~acquired title as were named as~~ trustees. ~~Richard Roe died. In a current transaction, a certification of trust is executed and recorded establishing that .~~ The trust agreement does not require appointment of a successor trustee to Richard Roe. ~~Attached to said certification of trust were excerpts from the trust agreement and Richard Roe's death certificate.~~ John Doe, ~~individually and~~ as trustee, executed a deed ~~as surviving trustee~~ to Simon Grant. ~~Attached to the deed is the death certificate of Richard Roe.~~ Is Simon Grant's title marketable?

Answer: Yes.

Authorities & References: § 73~~76.404~~~~0703~~(2), Fla. ~~S. tat.~~ (2005~~18~~); see FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.32 (Fla. Bar. CLE 4~~9~~~~th~~ ed. 2004~~17~~).

Comment: With respect to the number of trustees, or survivors, who must act, see Title Standard 13.3 (Execution of Deed by Trustees).

When an asset that affects eligibility is transferred, you must determine if the individual received fair compensation for it. If the individual received fair compensation, there is no need to apply transfer policy. If the individual did not receive fair compensation, you must:

1. presume the transfer was for the purpose of becoming Medicaid eligible, and
2. determine the amount of the uncompensated value.

Explain to the individual the presumption that the transfer was for purposes of becoming Medicaid eligible and may result in a period of ineligibility. Notify the individual in writing (via the system generated transfer notice or by using CF-ES 2264, Notice of Determination of Asset (or Income) Transfer, offering the opportunity to rebut the presumption of transfer or claim an undue hardship (refer to 1640.0616 and 1640.0617 for additional information on rebuttal of presumption and undue hardship).

The Notice of Determination of Asset or Income Transfer tells the individual to contact the eligibility specialist within 15 days to discuss the transfer. If contacted by the individual, designated representative, or legal representative, use form CF-ES 2264A, Rebuttal/Undue Hardship Questionnaire, as a guide to interview the individual and record the individual's statement on the form.

Request from the individual any additional documentation (such as legal documents, financial statements, realtor agreements, relevant correspondence, statements from other individuals) needed to substantiate the individual's statements during the interview.

Evaluate the questionnaire and any supporting documentation presented for rebuttal and if necessary, undue hardship, using form CF ES 2357, Rebuttal/Undue Hardship Evaluation, and form instructions. Complete Part I (Rebuttal Evaluation) in coordination with the supervisor. If rebuttal is successful, complete the application and do not apply a penalty period.

If rebuttal is not successful, complete Part II (Undue Hardship Evaluation) and forward the evaluation form and documentary evidence to the Region or Circuit Program Office for review and signature approving or denying hardship. All undue hardship claim evaluations must be reviewed by the Region or Circuit Program Office.

The evaluation must be completed within 10 calendar days following the interview date, not considering client delay days. The Region or Circuit Program Office will communicate the decision to the eligibility specialist and return all documents. The eligibility specialist will complete the case on FLORIDA based on the outcome of the evaluation.

A period of ineligibility is not imposed if the individual successfully demonstrates the following:

1. the asset was transferred solely for reasons other than to become Medicaid eligible; or
2. the individual intended to dispose of the assets either at fair market value or in exchange for other valuable compensation; or
3. the transfers are considered allowable per policies in 1640.0609.04 and .05, 1640.0610, 1640.0611 and 1640.0612; or
4. all transferred assets were returned to the individual (see 1640.0620); or
5. imposing the period of ineligibility would place an undue hardship on the individual.

1640.0613.01 Property Transferred and Life Estate Retained (MSSI)

If an individual transfers ownership in property but retains a life estate interest, the uncompensated value depends on the **type** of life estate the individual retains.

If an individual retains regular life estate, determine the transferred amount by multiplying the fair market value of the property at the time of the transfer by the remainder interest factor in the life

estate/remainder interest table (Appendix A-17) using the individual's age at the time of the transfer. The result is the amount of the transfer.

If an individual retains life estate using a lady bird deed or life estate with powers, no transfer has occurred. The individual retains full ownership powers in the property and it is only upon their death that the property transfers ownership to the remainderman.

1640.0613.02 Purchase of Life Estate (MSSI)

If an individual purchases regular life estate in property they have not resided in for at least a year prior to nursing home admission, a transfer has occurred equal to the full amount paid for the life estate.

If an individual purchases regular life estate and lives in the property for at least a year prior to entering a nursing home, a transfer has occurred, but the transfer amount is reduced by the value of the life estate interest. Determine the value of the life estate by multiplying the fair market value of the property as the date of the purchase by the life estate factor (based on the age of the individual as of the date of purchase) from the life estate/remainder interest table in Appendix A-17. Deduct the value of the life estate from the amount the individual paid for it. The remainder is the amount of the transfer.

If an individual purchases a lady bird life estate or life estate with powers, this gives them full rights to the property, including the right to sell. The compensation received is equal to the fair market value of the property less any indebtedness or restrictions that may reduce the actual value.

1640.0614.01 Value of Compensation Received (MSSI)

A determination of the value of compensation received must be made based on the agreement and expectation of the parties at the time of transfer or sale, if earlier. The value of compensation is the gross amount paid or agreed to be paid by the purchaser. Expenses attributed to the sale do not reduce the value. Compensation may be received in one or more forms as described in passages 1640.0614.02-1640.0614.04.

1640.0614.02 Compensation in Cash (MSSI)

Compensation in the form of cash is the total amount paid or agreed to be paid, if greater, in exchange for the asset. The eligibility specialist must obtain documentary evidence when available (for example, bill of sale, contract, receipts, and the like) or statements from the eligible individual and the person(s) to whom the property was transferred to establish the amount of cash compensation received.

1640.0614.04 Compensation in Support or Services (MSSI)

Compensation in the form of support and/or maintenance or services is based on:

1. the FMV,
2. the support or services at the time of asset transfer, and
3. the frequency/duration of the support or service.

In order for compensation to be considered, a statement and any related documentation must be obtained from the person(s) to whom the property was transferred to establish the FMV of the support and/or maintenance provided if:

1. the intent is for a specified period, the actual length of time the support or service is provided is used;
2. services are to be performed on an "as needed" basis, or for an interim period, the statement must include the individual's expectation as to the frequency of the services and the basis for that expectation; and