ActionLine

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



Unraveling the QTIP Knot: The Anenberg and McDougall Cases

Who May Serve as Personal Representative in Florida?

The One Big Beautiful Bill Act Through An Estate Planning Lens

Vol. XXXXVII, No. 1 www.rpptl.org Fall 2025

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Pass The Bucket

By Cary Wright, Carlton Fields, Tampa, Florida



If you are reading this article, you are most likely a member of the Real Property, Probate and Trust Law Section of the Florida Bar – over 13,000 members strong. If so, you are extremely blessed at a minimum with a four-year college degree, a Juris Doctor degree, perhaps an LL.M. or more, and passed the Florida Bar (not an easy task). As we close the 2025 holiday season and turn our attention to the year ahead, it is an appropriate time to reflect on how much we have to be thankful for, and to remember those who are less fortunate, not just during the holidays, but throughout the year.

The recent holiday season reminded us of the rich traditions that emphasize gratitude, generosity and community. Hanukkah is the celebration of the Maccabean Jews regaining control of Jerusalem from the Seleucid Empire in the second century B.C., and the subsequent rededication of the Second Temple. The celebration is for eight nights and days, starting the 25th day of Kislev, according to the Hebrew calendar, which may occur at any time from late November to late December in the Gregorian calendar. The festival is observed by lighting the candles of a nine-branched candelabrum, called a menorah, with eight branches representing the eight nights and a ninth branch, known as the shamash, used to light the others. Other Hanukkah festivities include celebrating with family, singing and eating oil-based foods, playing games and gift exchanges.

Christmas is the celebration of the birth of Christ. It was first formally celebrated in Ancient Rome on December 25, 336 AD (some scholars contend that Christmas was celebrated as early as the second century AD). Many celebrate the four weeks leading up to Christmas as the Advent Season. Advent means "coming" or "revival," where Christians celebrate Christ's coming to earth as a baby and Savior, but also to his Second Coming as a ruling King. The Advent Season culminates with church services and gift exchanges either on Christmas Eve or Christmas Day.

Across both traditions, it is a season of celebration, thankfulness and giving.

Personally, I was struck this past Christmas season, perhaps more than most, by my church's outreach to the community through gathering and distributing Christmas gifts to families in need. There were hundreds of postcards with descriptions of a child's age, gender, and Christmas gift request, on many bulletin boards. Everyone was encouraged to take a card and supply that gift, be it a bicycle, ball glove, doll, game board or whatever. There were also options to give gift cards to the parents. On the second Saturday in December, there was a celebration with those kids and families where they came to have lunch and receive their gifts. For many children, this was their first bicycle. In 2024, approximately 500 kids attended that celebration, where over 300 bicycles were given, mostly to children that had never had one before.

My firm has a similar toy drive, as many of you do as well. There is joy in giving.

The Section also gives back during the year through the Construction Law Committee's pro bono committee, the Fellows program and others, but we can give back more than just legal services; we can contribute to food banks to benefit those who are truly in a desperate time of need.

To that end, as we transition from the holiday season into the new year, the Section launched its inaugural "Pass the Bucket" campaign, starting with the Executive Council meeting that took place in December at the Four Seasons Orlando. At Section Committee meetings and the Executive Council meeting that took place, attendees were invited to contribute $20 (or whatever amount) by simply dropping their contribution into a bucket, which was gathered and donated to the Second Harvest Food Bank of Central Florida. This tradition will continue for each Executive Council in-state meeting, and the donations will be made to a food bank in the locale where the meeting is held.

"Passing the Bucket" is not an original idea. The ABA Forum on Construction Law instituted a similar program in 2014 at its three annual meetings, which rotate around the country. Since that time, the Forum has donated over $100,000 to food banks and homeless shelters across the nation – this equates to 400,000 meals. My vision for the future is that the Section will donate similar amounts across our state in the upcoming years!

Again, if you are reading this article, you, like me, are incredibly blessed to be in a great profession, with a great Section of colleagues, and the ability to make a difference in people's lives. By Passing the Bucket, we can truly help the least fortunate - one meal at a time.

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

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Silvia Rojas

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

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

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

Letter From The Co-Editors-In-Chief



E. FINLEN



M. HINDEN

Greetings, Fellow Readers,

We are pleased to present another exciting edition of Actionline! We hope you enjoy exploring the thought-provoking content that we have curated for this issue.

In his Chair's Column, Chair Cary Wright reflects on gratitude and the spirit of giving, while encouraging Section members to support the "Pass the Bucket" initiative as a meaningful way to help those in need.

Daniel L. Tullidge, on page 6, offers a thoughtful and informative analysis on two significant cases that shed light on the complexities of Qualified Terminable Interest Property (QTIP) trusts. On page 10, Dariel Abrahamy, explores whether the legislature should consider enacting legislation to clarify if a nuisance neighbor constitutes a material fact requiring disclosure in residential real estate transactions. Don't miss Robert H. Trudeau's insightful article on page 12, which provides a clear and practical overview of Florida's statutory framework governing personal representatives. On page 16, Andrew Foti provides helpful information addressing challenges associated with unlicensed contractors. Also, estate planners will find value in Robert T. Carroll's article on page 18, which highlights select provisions of the Big Beautiful Act that are relevant to your estate planning practice. This issue also continues our Amendments to the Rules of Civil Procedure series, with J. Richard Caskey and Peyton Brown found on page 24, which examines additional revisions to discovery rules, including the Florida Supreme Court's adoption of the federal proportionality standard. Lastly, Peter Dunbar provides a comprehensive and highly informative overview of the legislative changes from the 2025 Regular Legislative Session on page 28, addressing developments that affect the practice areas of our Section members.

Finally, be sure to visit the photo centerspread on pages 34 through 35, which captures highlights from the Section's Executive Council Meeting at The Breakers in Palm Beach, Florida.

Thank you to our authors for their valuable contributions and to our readers for their continued engagement. We hope you find this issue both informative and practical, and we look forward to sharing more valuable content with you in future editions.

Sincerely,
Michelle and Erin

UNRAVELING THE QTIP KNOT:
The Anenberg and McDougall Cases

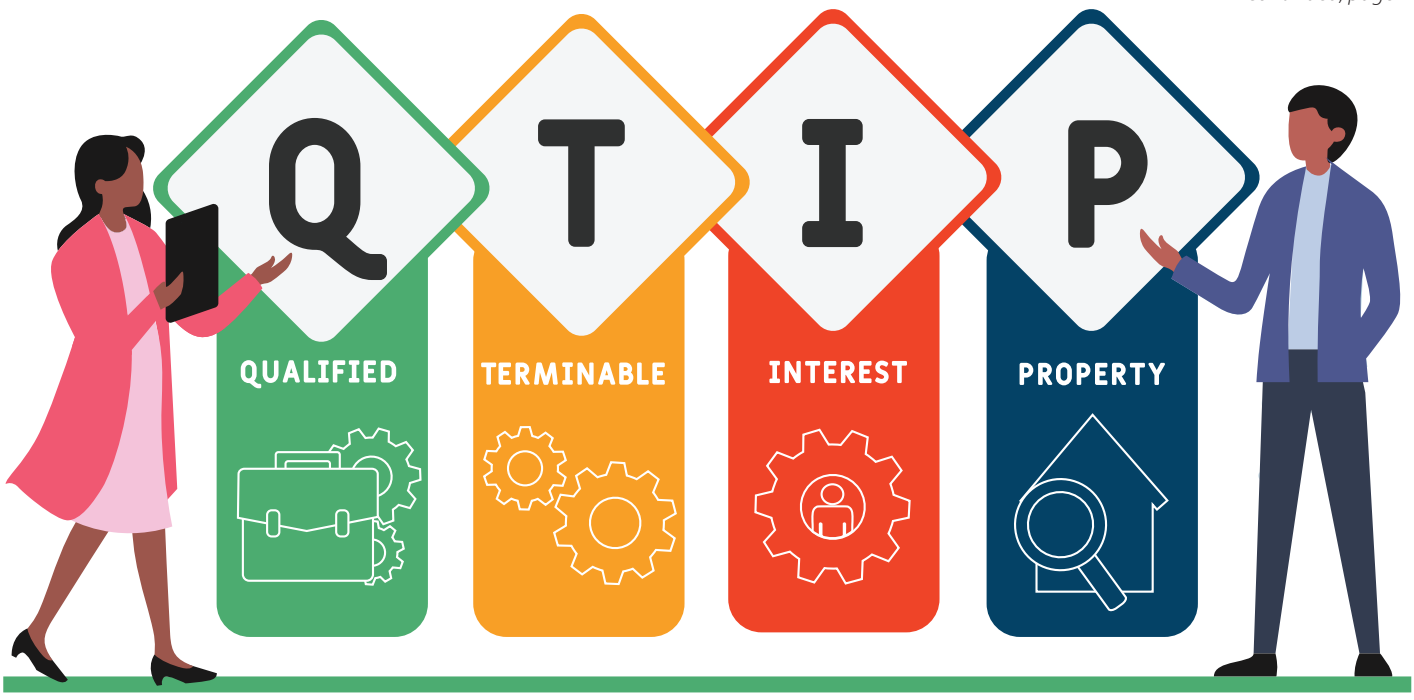
By Daniel L. Tullidge, Esq., Fergeson Skipper, P.A., Sarasota, Florida

Experts say you should never use a cotton swab to clean out your ears or a bad joke to catch your reader's attention. Nearly 70% of people[1] disregard the first bit of advice and I have disregarded the latter. Rather than cotton swabs, the focus here is on Qualified Terminable Interest Property (QTIP),[2] which is property passing from one spouse to the other in which the recipient spouse has received a qualifying income interest[3] for life and for which a QTIP election has been timely made.[4]

Ordinarily, the marital deduction is not available for partial or terminable interests such as a legal life estate.[5] The QTIP election is an exception where the assets remain specially allocable to the surviving spouse. The supporting and related Code Sections of 2044 and 2519 ensure the Martial Trust is either: (1) included in the surviving spouse's gross estate for federal estate tax purposes upon death; or (2) subject to federal gift tax if disposed of during life. The QTIP regime is designed to preserve and defer the transfer tax until the assets leave the marital unit.

As illustrated at the end of this article, outright access to the Marital Trust by the surviving spouse is often desirable for transfer tax planning. However, due to the special dispensation granted to QTIP style Marital Trusts (allowing a marital deduction where it would otherwise be denied) the rules triggering inclusion for transfer tax purposes – particularly Code Section 2519 – are harsh, inflexible, and may be inadvertently triggered. Two recent Tax Court cases, namely *Estate of Anenberg v. Commissioner*, 162 T.C. No. 9 (May 20, 2024) and *McDougall v. Commissioner*, 163 T.C. No. 5 (September 17, 2024) provide helpful guidance for unraveling the QTIP knot.

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This issue is not limited to the ultra-high net worth. The One Big Beautiful Bill Act (OB3) delivered a $15 million permanent exemption, free of the sunset provision that loomed over the Tax Cuts and Jobs Act; however, that permanency is still subject to future political cycles. While traditional estate planning using the A/B trust format may be less common due to an increased exemption, Marital Trusts continue to be used for asset protection planning and control of assets following the first spouse's death and they remain standard fare in the estate planning arena.

Before delving into the *Anenberg* and *McDougall* cases, a few housekeeping items as to terminology and shorthand being used in this article. First, the QTIP election is available for both *inter vivos* and testamentary transfers[6] between spouses; however, this article assumes the more common testamentary arrangement throughout. Second, the phrase "Marital Trust" may refer to different types of trusts that qualify for the federal estate or gift tax martial deduction and is broader than the more limited class of QTIP trusts. This article uses the phrase "Marital Trust" and QTIP Marital Trust interchangeably to mean a trust for the benefit of the surviving spouse for which a timely election has been made under Code Section 2056(b)(7). Finally, the phrase "transfer tax" is used in reference to the federal estate, gift, and generation-skipping transfer tax system and applicable state death tax regimes.

Estate of Anenberg v. Commissioner

The Tax Court issued the *Anenberg* decision on May 20, 2024. It represents a departure or at least clarification of more recent treatment of Code Section 2519. As is often the case, the facts are important and deserve careful review.

In 1971, Sally and Alvin Anenberg, California residents, formed Al-Sal Oil Company (Al-Sal"), which operated gas stations in the Los Angeles area. In 1987, Sally and Alvin formed the Anenberg Family Trust ("Trust"), a joint revocable trust which is typical in community property jurisdictions, even for high-net-worth clients. They transferred 100% of the Al-Sal shares to the Trust. In March 2008, Alvin died, and the Trust provided for the creation of two Marital Trusts (presumably one exempt and one non-exempt for GST purposes) for Sally's benefit. Their sons, Steven and Neil, and their sons' descendants, were the remainder beneficiaries of the Marital Trusts, which were funded in part with 49.75% of the Al-Sal shares.

In October 2011, Steven, as trustee of the Marital Trusts, with the consent of the beneficiaries, petitioned the local court to terminate the Marital Trusts and direct distribution of the trust assets to Sally, outright and free of trust. In March 2012, the court entered an order, and the assets were so distributed. In August of that same year, Sally gifted a portion of the Al-Sal shares to her two sons, and it was properly reported on a gift tax return for the 2012 tax year. In September of that same year, Sally sold her remaining Al-Sal shares to various irrevocable trusts for the benefit of her sons and grandchildren. The sale of Al-Sal shares was in exchange for nine-year promissory notes bearing interest at the applicable federal rate (AFR).[7] The notes were secured by the Al-Sal shares and partially guaranteed. The transaction was disclosed on Sally's Form 709 for the 2012 tax year as a sale for full and adequate consideration and not a gift.

Sally died in 2016, and on December 1, 2020, the Internal Revenue Service (the "Service") issued a Notice of Deficiency to Sally's Estate for $9 million in additional gift tax for the 2012 tax year, and an accuracy related penalty of $1.8 million.

The Service's argument focused on the application of Code Section 2519, which provides that, "any disposition of all or part of a qualifying income interest for life in any property to which this section applies shall be treated as a transfer of all interests in such property other than the qualifying income interest." The Service argued that a disposition and taxable gift occurred either when: (1) Sally agreed to terminate the Marital Trusts and the assets were transferred to her; or (2) when she subsequently sold the Al-Sal shares in exchange for promissory notes.

Sally's Estate disagreed with the Service's position, taking the view that the transaction was nothing more than a permissible conversion of Sally's qualified terminable interest into an equivalent interest in other property. The Estate argued that such a conversion is not a "disposition" within the meaning of Code Section 2519, and if it was, Sally did not make a gift as she received full and adequate consideration for the deemed transfer.

The court was not required to determine whether a "disposition" had occurred,[8] as it was not pivotal to its ultimate ruling. Instead, the court assumed a disposition and distinguished (1) the application of Code Section 2519 wherein a disposition of all or part of a QTIP interest results in a "deemed transfer," and (2) the subsequent application of the gift tax regime to that "deemed transfer."

The court noted that a transfer alone is not sufficient to result in a taxable gift. Code Section 2501 requires a transfer of property by gift during the calendar year. A gratuitous transfer, not just a transfer, is required to impose gift tax. Looking at the facts of the case, Sally had more property interests after the transaction than before. Her deemed transfer of the remainder interest under Code Section 2519 resulted in her actual receipt of all the Al-Sal shares, unencumbered by the terms of the Marital Trusts. It was, therefore, not a gratuitous transfer, deemed or otherwise.

In support of its conclusion, the court looked to Treas. Reg. Section 25.2511-2(b), which provides that a gift is complete "as

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to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in [her] no power to change its disposition." Retained powers may cause the gift to be incomplete, and in Sally's instance it is difficult to conclude that a taxable gift occurred when no value passed from her to another person or left her dominion and control.

Turning to Code Section 2512, the court noted that the valuation of taxable gifts is based on whether the property is transferred for less than full and adequate consideration. If so, the amount by which the property's value exceeds the value of the consideration is a gift, and, "[a] necessary corollary of this rule is that no taxable gift results to the extent the value of transferred property is equal to or less than the value of the consideration received."

The court also rejected the Service's second argument that Code Section 2519 was triggered upon the subsequent sale of Al-Sal shares in exchange for promissory notes. Based on the court's assumption that a "disposition" had already been triggered under Code Section 2519 when the Marital Trusts where terminated, it was not available to be triggered again on the subsequent sale of the Al-Sal shares. The court further clarified that even if a "disposition" was not triggered upon termination of the Marital Trusts, it still could not be triggered on the subsequent sale as the QTIP had ceased to exist at that point in time.

The Service's more dubious argument was that Code Section 2519 itself, when triggered, imposed the gift tax on the full value of the Marital Trust (less the qualifying income interest), "regardless of what happens with the [Marital Trust] or any consideration the surviving spouse receives as part of the transfer." The court rejected that argument noting that Code Section 2519 only deems a transfer to have occurred upon disposition of the QTIP interest. It is Code Section 2501 that imposes gift tax on that deemed transfer, but only if the requirements of that latter section are met.

The Service's argument relied in part on the Estate of Kite, T.C. Memo 2013-43. That case was similar in that a Marital Trust was terminated, and the spouse subsequently sold the Martial Trust assets to her descendants. However, the Kite case had bad facts – very bad facts. The assets were sold for private annuity agreements that were unsecured with the first payments coming due ten years after the date of the sale. The annuities were structured in such a way that if the spouse died prior to the commencement of the annuity payments – which she did – the value would not be included in her gross estate. That transaction was an attempt to avoid transfer taxes and circumvent Code Sections 2519 and 2044. For that reason, the tax court applied the substance over form doctrine (which the Service did not ask the court to apply in *Anenberg*)[9] to treat the transactions as an integrated whole to which Code Section 2519 was applicable.

As noted at the outset of this article, Code Sections 2519 and 2044 are designed to maintain the status quo for QTIP interests and prevent avoidance of transfer taxes on assets passing outside the marital unit. The court in *Anenberg* sided with the taxpayer and against the Service as the transaction did not violate this policy.

McDougall v. Commissioner

The *Anenberg* case is fairly viewed as a significant win for the taxpayer. It removed much of the fear and uncertainty surrounding Code Section 2519. One very important question left unanswered in *Anenberg* was whether the remainder beneficiaries had made a gift when they consented to the judicial termination of the Marital Trusts. On September 17, 2024, just several months later, the court answered that question in the affirmative in the *McDougall* case which had a very similar fact pattern to *Anenberg*.

Clotilde McDougall died in 2011, survived by her husband Bruce and their children, Linda and Peter. The Marital Trust was funded with approximately $54 million and had grown to $118 million by 2016. Bruce, as the surviving spouse, sole trustee, sole current beneficiary, along with Linda and Peter as the remainder beneficiaries, entered into a nonjudicial settlement agreement to terminate or commute the trust.[10]

On the same day that the settlement agreement was finalized, Bruce transferred substantially all of the assets he received from the Marital Trust to irrevocable trusts for the benefit of Linda and Peter in exchange for secured promissory notes. Applying the same reasoning as in *Anenberg*, the court rejected the Service's position that gifts were made by Bruce to Linda and Peter under Code Section 2519. Regardless of whether a "disposition" had occurred, the result of the settlement agreement was Bruce's receipt of all of the assets.

Unlike in *Anenberg*, however, the Service also determined deficiencies against the remainder beneficiaries, and the court agreed with the Service's position. Linda and Peter had made gifts to Bruce by surrendering their remainder interests in the Marital Trust.[11]

Unraveling the QTIP Knot

Accessing a Marital Trust is necessary or at least desirable for effective transfer tax planning in a surprising number of scenarios. The strategy may involve a "freeze" transaction whereby the surviving spouse sells the assets in exchange for promissory notes. This prevents any further appreciation (apart from minimum interest associated with the note) from accruing to the survivor's estate tax bill. This was the strategy in *Anenberg* and *McDougall*.[12] Of course, not all estates have such high performing investments as the petitioners in *McDougall* that managed to go from $54 million to $118 million over a five-year period.

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A more typical example may be the middle-rich surviving spouse with a gross estate just below the exemption. Often, the desirable assets for transfer tax planning have a proclivity for being tied up in the QTIP knot. The surviving spouse's individual assets may be highly appreciated, and a gift to the children would result in a transferred basis and continuation of capital gain exposure. By contrast, the Marital Trust assets would have been stepped up at the first spouse's death potentially making them more attractive candidates for gifting. Perhaps the Marital Trust assets include the illiquid portion of family wealth (e.g., closely held business interests or real estate) most able to benefit from valuation discounts. At the same time, the surviving spouse may prefer to maintain the individual liquid assets for personal use. In these scenarios and others, there may be a temptation to "crack open the lid" of a Marital Trust.

In light of *Anenberg* and *McDougall*, how can one: (i) implement flexible provisions when drafting Marital Trusts that provide an escape hatch without triggering a gift by the remainder beneficiaries; and (ii) safely unwind existing Marital Trusts that do not have these mechanisms built into the trust agreement?

If one has the foresight, it is always easier to address these issues at the drafting stage. One option is granting an independent trustee (who may be appointed as needed) the ability to distribute assets to the spouse under an absolute discretion standard. This should avoid the implications of Code Section 2519 and gifts by the remainder beneficiaries. A related option, directly from the treasury regulations, is granting a third party the ability to appoint assets to the spouse, outright and free of trust.[13]

When modifying any irrevocable trust there is often a concern about unintended gift tax consequences. Therefore, distancing the beneficiaries from the transaction is well advised. In *Anenberg* and *McDougall*, the chosen methods of termination required consent of the beneficiaries. While there is no safe harbor, action taken by independent third parties (e.g., trust protector powers or the decanting process) is the preferred route. Although such actions may require notifying beneficiaries, they generally do not require their consent.[14]

Building these third-party mechanisms into the trust agreement from the outset is preferred. An alternative route if the Marital Trust in question lacks the appropriate procedure is to introduce these third-party mechanisms via judicial or nonjudicial means. However, introduction of these mechanisms typically requires consent of the beneficiaries, which "muddies the water." Often, the initial step alone would not likely run afoul of Code Section 2519 or result in unintended gifts. By shifting the trust situs, making use of state decanting statutes, or other discretion of the independent party the remainder of the transaction can be completed absent direct beneficiary involvement.[15] Although no transaction is free of risk, the *Anenberg* and *McDougall* cases provide some much-needed clarity in the common arena of QTIP Marital Trusts.


D. TULLIGE

Daniel L. Tullidge *is a shareholder with Fergeson Skipper, P.A. in Sarasota, Florida. He is board-certified in Wills, Trusts and Estates by The Florida Bar Board of Legal Specialization and received his JD and LL.M. in Taxation from University of Florida Levin College of Law. His practice focuses on estate planning, probate and trust administration, and related tax planning.*

Endnotes

1 Nagala, S., Singh, P., & Tostevin, P. (2011). Extent of cotton-bud use in ears. British Journal of General Practice, 61(584), 662–663.

2 Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(d)(3), 95 Stat. 172, 302 (codified at IRC § 2056(b)(7)).

3 A Qualifying Income Interest is one in which the surviving spouse is entitled to all the income annually or at more frequent intervals, and no person has a power to appoint any part of the property to any person other than the spouse. See IRC § 2056(b)(7)(b)(ii).

4 Treas. Reg. § 20.2056(b)7(b)(4)(i).

5 IRC § 2056(b)(1). An invalid devise of homestead resulting in a life estate for the surviving spouse is another terminable interest that fails to qualify for the marital deduction.

6 IRC §§ 2056(b)(7) and 2523(f).

7 At that time the AFR was only 0.84%.

8 The concurring opinion in *McDougall* by Judge Halpern took a different approach. His position is that the disposition under Code Section 2519 refers to the disposition of the qualifying income interest rather than the trust generally, which does not occur upon termination of a QTIP Marital Trust as the spouse receives the assets directly and thus still has a qualifying income interest.

9 The Service did raise the Step Transaction Doctrine in *McDougall* where the transaction occurred one day following execution of the non-judicial settlement agreement, but the court declined to apply the doctrine.

10 The settlement agreement is interesting in that the commutation explicitly takes the position that there was a disposition under Code Section 2519 and a gift from Bruce to the remainder beneficiaries equal to the value of the Marital Trust, less the value of the qualifying income interest. At the same time, the agreement acknowledges that there was a gift from the remainder interests to Bruce. The agreement took the position that these gifts were reciprocal and offset one another and the taxpayers file Form 709 Gift Tax Return taking that position.

11 Bruce held a testamentary power of appointment that was limited to the class of his wife's lineal descendants. His ability to entirely exclude one of the children or alter their interests, coupled with the discretionary principal distributions available to him make valuing the gifts by the remainder beneficiaries a complex task.

12 Freeze transactions can also be accomplished directly by the Marital Trust rather than via distribution to the surviving spouse.

13 Treas. Reg. § 25.2519-1(e).

14 Note CCA 202352018 discussing gifts by the remainder beneficiaries in the context of modifying a trust to introduce a grantor trust reimbursement clause – "[t]he result would be the same if the modification was pursuant to a state statute that provides beneficiaries with a right to notice and a right to object to the modification and a beneficiary fails to exercise their right to object."

15 The court in *McDougall* did not apply the step transaction doctrine with respect to the termination of the Marital Trust and subsequent gift by Bruce to recharacterize it as a disposition under Code Section 2519. However, the proposal here may very well be subject to the step transaction doctrine as it relates to gifts by the remainder beneficiaries. See also CCA 202352018 *supra*.

Disclosing Nuisance Neighbors: A Slippery Slope for Home Sellers

By Dariel Abrahamy, Esq., Greenspoon Marder LLP, Boca Raton, Florida

***"We are throwing a Robert De Niro party. It should be pretty loud."* — Teddy Sanders, Neighbors.**

Now imagine that guy lives next door and every month it is Taxi Driver Tuesday or Meet the Parents Friday at full volume. If you decide to sell your house, do you have to disclose your neighbor's party habits to potential buyers? The answer to that question is not simple.

In Florida, a seller of residential real property has a duty to disclose facts materially affecting the value of the property that are not readily observable and are not known to the buyer. Requiring sellers of residential real property to disclose unruly or nuisance neighbors is a slippery slope. One man's dream neighbor is another man's nightmare. The Florida legislature should codify that a nuisance neighbor is not a material fact that must be disclosed in a residential real property transaction.

Nondisclosure of Material Facts and *Johnson v. Davis*

The seminal case in Florida involving a seller's duty to disclose information about a residential property to the buyer in a transaction is *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1982).[1] In *Johnson*, the Florida Supreme Court determined that the doctrine of *caveat emptor*, or let the buyer beware, does not apply to residential real property transactions.[2] The Court approved the rule that, "[W]here the seller of a house knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer."[3] The duty to disclose material facts constitutes fraudulent concealment.[4]

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Nuisance Neighbors and the Duty to Disclose

In the 40 years since *Johnson v. Davis*, numerous Florida courts have applied the duty to disclose material facts concept to various situations, including the flood-prone nature of the property,[5] elevated radon levels,[6] cracks in the pool,[7] proximity to water treatment facilities,[8] and building code violations.[9] The duty to disclose is not limited to on-site conditions.[10]

In recent years, I have seen upset buyers attempt to extend *Johnson v. Davis* even further to nuisance neighbors. At present, the Florida district courts of appeal have not addressed the issue of whether an unruly or nuisance neighbor constitutes a material fact that triggers a seller's duty to disclose under *Johnson v. Davis*. Moreover, there is no exact rule or formula for deciding when a neighbor's noise rises to the level at which a court will grant relief on a nuisance claim.[11] Rather, courts evaluate nuisance actions by considering the reasonableness of the use, as such use affects the private rights of others as determined from the facts and circumstances of the particular cases.[12]

Expanding *Johnson v. Davis* to unruly or nuisance neighbors would be a slippery slope. An owner may not mind that his or her neighbor has wild friends over every Friday night for dinner until midnight, but that may bother a buyer. Another person may not have an issue with his neighbor's noisy pool equipment because the person is hard of hearing, but that may bother a buyer.

Compounding matters, the materiality of a fact is to be determined objectively by focusing on the relationship between the undisclosed fact and the value of the property.[13] Would a neighbor who has friends and family over on Sunday mornings who park in the street before going to church need to be disclosed? Would a neighbor who has a dog they leave in the back yard who occasionally barks need to be disclosed? Would a neighbor who throws a New Years Eve party once a year that lasts until 1 a.m. need to be disclosed? Would a neighbor who screams due to a perceived medical condition when he takes out the trash need to be disclosed? Would a neighbor who barbecues a few times a week where you can smell the barbecue need to be disclosed? The list is endless. Furthermore, disclosing issues with neighbors could lead to potential claims against the seller for defamation.

A person selling a home should not have to disclose issues with neighbors prior to selling their home. Sellers should feel comfortable that after they sell their home, they will not be subject to future litigation by a buyer who is unhappy with his neighbors.

The legislature should codify that a nuisance neighbor is not a material fact that must be disclosed in a residential real property transaction. The legislature has enacted statutes that address the duty to disclose requirements in *Johnson v. Davis* in other areas. For example, Fla. Stat. § 689.25 (2024), states that an occupant of real property who is infected or who has been infected with the HIV virus or who was diagnosed with acquired immune deficiency syndrome is not a material fact that must be disclosed in a residential real property transaction.[14] The statute also states that if a property was, or was at any time, suspected to have been, the site of a homicide, suicide, or death, such information is not a material fact that must be disclosed in a real estate transaction.[15] The legislature should enact a statute that adds nuisance neighbors to the exception list.

Conclusion

Selling one's home is a major undertaking. Sellers must factor in sales price, commissions, moving, stress, storage, and negotiating with prospective purchasers. A seller should not need to worry about whether to disclose every single issue concerning a neighbor that may or may not be a fact that materially affects the value of the property. A seller should not have to worry about whether a buyer may sue the seller because of issues that buyer has with his or her neighbor. The legislature should enact a law that states a nuisance neighbor is not a material fact that needs to be disclosed in a residential real estate transaction.



D. ABRAHAMY

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Endnotes

1 *Smith v. Lynch*, 403 So. 3d 433, 435 (Fla. 2d DCA 2025).

2 *Johnson*, 480 So. 2d at 627.

3 *Id.* at 629.

4 *Id.*

5 *Nelson v. Wiggs*, 699 So. 2d 258 (Fla. 3d DCA 1997) (seller had no duty to disclose flood prone nature of the property to purchasers where the regulations about flooding were available in the public records and information about flooding was within the diligent attention of the buyers).

6 *Diaz v. Kosch*, 250 So. 3d 156, 166 (Fla. 3d DCA 2018) (no duty to disclose elevated radon level which was readily observable and/or within the buyer's ability to know or easily discover).

7 *Slitor v. Elias*, 544 So. 2d 255 (Fla. 2d DCA 1989) (buyers did not provide evidence to support that sellers had knowledge of cracks in pool prior to selling the property).

8 *Ribak v. Centex Real Estate Corp.*, 702 So. 2d 1316, 1317 (Fla. 4th DCA 1997) (question of whether representation that facility was a water treatment plant as opposed to a statement that a facility was a water treatment and wastewater treatment plant constitutes a misrepresentation is a question for the jury).

9 *Revitz v. Terrell*, 572 So. 2d 996, 998 (Fla. 3d DCA 1990) (building code violations could constitute material facts triggering the duty to disclose and citing *Johnson v. Davis*' list of leaking roofs, flooding, insect infestations, cracks in walls and foundations).

10 *Ribak*, 702 So. 2d at 1317.

11 See *Roebuck v. Sills*, 306 So. 3d 374, 378 (Fla. 1st DCA 2020).

12 *Id.*

13 *Billian v. Mobil Corporation*, 710 So. 2d 984, 989 (Fla. 1998); *Dorton v. Jensen*, 676 So. 2d 437, 439 (Fla. 2d DCA 1996).

14 Fla. Stat. §689.25(1)(a) (2024).

15 Fla. Stat. §689.25(1)(b) (2024).



Who May Serve as Personal Representative in Florida?

A Visual Guide for Nonresident Family Members

By Robert H. Trudeau, Esq., Purcell, Flanagan & Hay, P.A., Ponte Vedra Beach, Florida

One of the most important estate planning decisions involves selecting a personal representative who will carry out the decedent's final wishes and administer the estate. In Florida, this decision can be more complex if a preferred family member is not domiciled within the state. Fla. Stat. §733.304 limits persons who may serve in this role if they reside outside Florida. While the statute is concise, its application can be nuanced, especially for families shaped by adoption, remarriage, and geographic dispersion. This article discusses the statutory framework and explores certain family relationships attorneys should consider carefully when advising clients. In addition, included with this article is a one-page graphical illustration that maps out which nonresident family members may qualify to serve as personal representative. The illustration is designed to help practitioners quickly assess eligibility based on relationship.

Statutory Framework

Fla. Stat. §733.304 provides that nonresidents may serve as personal representative only if they are:

- A legally adopted child or adoptive parent of the decedent;
- Related by lineal consanguinity to the decedent;
- A spouse, sibling, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or
- The spouse of someone who qualifies under one of the above categories.

These categories reflect the legislature's intent to restrict nonresident personal representative appointments to individuals with close family ties through blood, adoption, or marriage. However, the statutory language requires careful interpretation, particularly in modern family contexts.

Understanding Lineal Consanguinity

The word lineal means a direct line, and in this context a direct vertical line. Consanguinity refers to a blood relationship between individuals—meaning they share a common ancestor. Thus, lineal consanguinity refers to a direct bloodline relationship between individuals—either ascending (i.e., parent, grandparent, etc.) or descending (i.e., child, grandchild, etc.). In other words, it traces only vertical connections in the family tree, moving directly up and down through generations. It does not include lateral relationships. For example, siblings are related through lateral consanguinity but not lineal consanguinity—they share a common ancestor but are not in the direct vertical line. Similarly, a person is related to aunts, uncles, nieces, and nephews through lateral consanguinity—their relationships are horizontal in the family tree. Adopted family members are not related by consanguinity (lineal or lateral), as the term applies only to biological or blood relationships.

Nonresident Family Members

In most cases, Fla. Stat. §733.304 permits the appointment of nonresident family members who are most commonly considered by Florida testators. Spouses, parents, adult children, and biological siblings likely comprise the vast majority of both desired and appointed personal representatives. However, there are certain relationships that require close inspection before assuming a nonresident family member may serve. For some of these family members, it is clear they are not permitted to serve; for others, the answer is ambiguous. These relationships are explored below.

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In-Laws

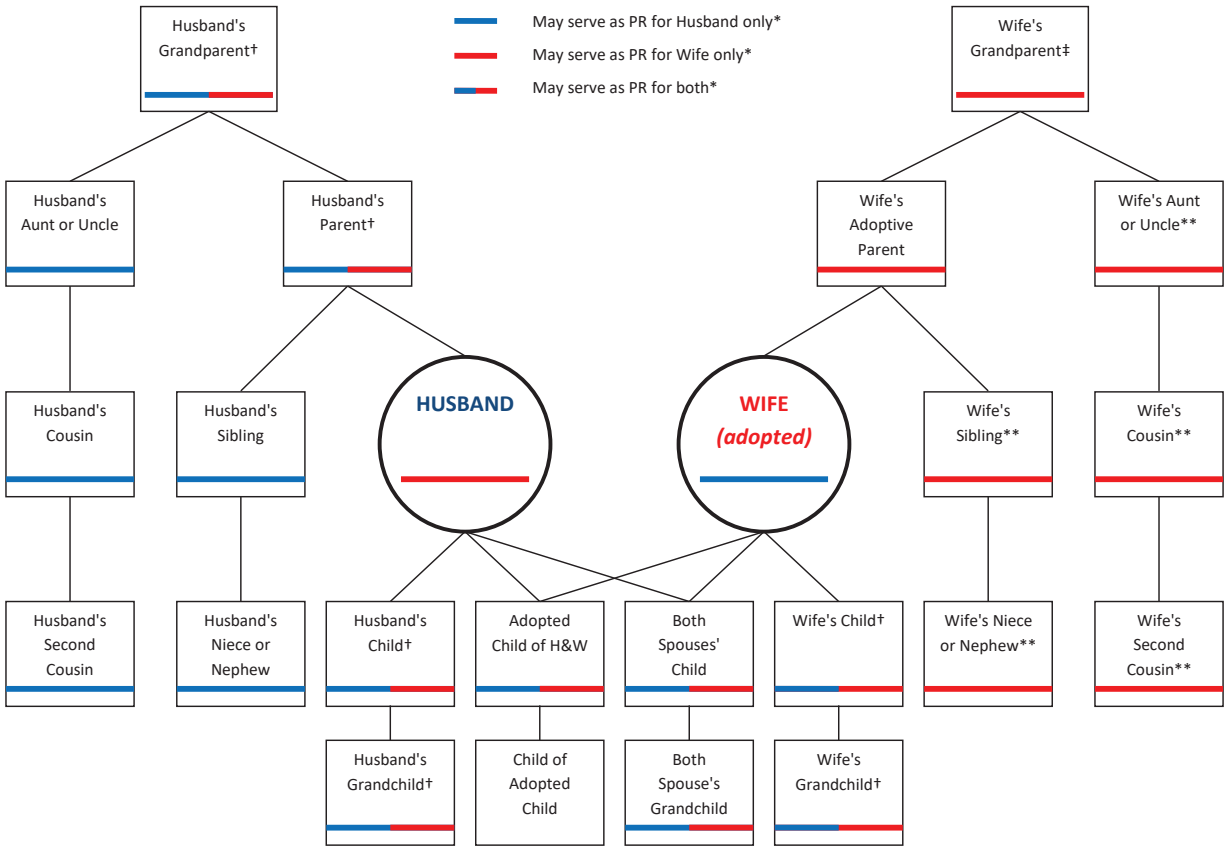
The decedent's nonresident in-law who is married to a person who is qualified to serve as a personal representative also qualifies to serve (e.g., a brother's spouse).[1] However, a nonresident who is an in-law because he or she is related to the testator's spouse (e.g., a spouse's brother) is not permitted to serve as personal representative. These latter individuals are usually in the same generation as the testator and are often viewed as ideal appointees, especially in close-knit families. However, in this context, these in-laws are "out-laws" and do not qualify to serve as a personal representative if they do not reside in Florida.[2]

Adoptive Siblings

Subsection (1) of the statute explicitly allows a legally adopted child or adoptive parent to serve. But what about siblings through adoption? Subsection (1) is notably narrow and does not specifically mention any relationships through adoption other than parent and child. This omission could be interpreted as intentionally excluding adoptive siblings from serving as personal representatives. Conversely, the term "sibling" in subsection (3) is not qualified by a requirement of "consanguinity." This could suggest the legislature intended to include both biological siblings and siblings formed through adoption as permissible personal representatives. This interpretation aligns with other provisions in the Florida Probate Code, such as Fla. Stat. §§732.108 and 732.608, which treat adopted children as full members of the adoptive family for intestate inheritance and class gift purposes. Further, it reflects the common understanding that adopted children and biological children of the same parents are siblings in every legal and social sense. In the author's opinion, the stronger construction of the statute is that nonresident siblings through adoption should qualify to serve for each other as personal representative. This logic should similarly apply to the other listed lateral relatives in subsection (3) (i.e., aunts, uncles, nieces, and nephews). Nonetheless, caution may be warranted in cases in which conflicts might arise.

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NONRESIDENTS WHO MAY SERVE AS PERSONAL REPRESENTATIVE IN FLORIDA



* If a family member may serve as PR for Husband or Wife, that family member's spouse may also serve as PR for Husband or Wife, as the case may be.
† If a spouse has predeceased the decedent, a person related by lineal consanguinity to the predeceased spouse might not be permitted to serve as PR for the decedent.
‡ In this illustration, if Wife and her adoptive parent both did not have siblings, then Wife's grandparent would likely not be permitted to serve as PR for wife, as there would be no lateral relative as to Wife to establish a chain of lineal consanguinity to the grandparent.
** There may be an argument that parent and child are the only permitted adoptive relations allowed to serve as PR for each other, which would exclude lateral relations such as siblings, aunts, uncles, etc. However, a stronger interpretation of the statute and social conventions weigh in favor of adoptive siblings and other adoptive lateral family members being permitted to serve.

Grandchild Through Adoption

One nuanced scenario involves the grandchild of the decedent through adoption. Can an adopted grandchild serve as personal representative for a deceased grandparent? Under subsection (1) of the statute, a legally adopted child or adoptive parent of the decedent may serve. However, this subsection does not extend eligibility to (a) adopted descendants of biological children or (b) descendants (biological or adopted) of adopted children. Unlike subsection (3), which allows certain relatives to qualify through lineal consanguinity to a spouse or listed lateral relative, adoptive relationships under subsection (1) are defined narrowly and do not extend through multiple generations of adoption beyond the direct parent-child connection. Thus, both (a) the nonresident biological child of an adopted child and (b) the nonresident adopted child of a biological child are likely not permitted to serve as personal representative for the adoptive grandparent.

Grandparent Through Adoption

Another nuanced scenario involves the converse of the preceding paragraph. Specifically, can a grandparent serve as personal representative for an adopted grandchild? Interestingly, both the analysis and conclusion for this question are different than for the preceding question. Again, under subsection (1) of the statute, eligibility to serve as personal representative does not extend beyond the direct parent-child connection. However, under subsection (3), someone related by lineal consanguinity to a qualifying lateral relative (e.g., sibling, aunt, or uncle) may serve. Therefore, if the adopted child has a sibling or the adoptive parent has a sibling (i.e., an aunt or uncle as to the adopted child), the grandparent would qualify by reason of being related by lineal consanguinity to a listed lateral relative.

However, what if the adopted child and adoptive parent are both only children? Again, the grandparent would not be related by blood to the adopted grandchild. Also, there would be no listed lateral relative to establish a chain of lineal consanguinity to the grandparent. As a result, the grandparent would likely be disqualified from serving as personal representative for the adopted grandchild in this circumstance.

Further, what if the adopted child or adoptive parent had a sibling, but that sibling is no longer living? Would that break the chain of lineal consanguinity from the now deceased sibling to the grandparent? In the opinion of the author, the answer should be "no." The status of a family member as a sibling or other listed lateral relative under subsection (3) should not depend on whether they are living. Rather, the family relationship should be fixed by birth or adoption and should not dissolve with death of the relative. This permanence should allow lineal consanguinity to be traced through deceased lateral relatives under subsection (3). Again, however, caution may be warranted in cases in which conflicts might arise.

Parents-In-Law and Stepchildren

A final nuanced scenario involves the parent-in-law or stepchild of the decedent. While neither is explicitly listed in Fla. Stat. §733.304, both may qualify under subsection (3) of the statute since they are related by lineal consanguinity to the decedent's spouse. However, unlike the other lateral relatives in subsection (3), this interpretation might hinge on the spouse being alive and maintaining the marital relationship. It is self-evident that a divorce during lifetime would eliminate both the ex-spouse and those related by lineal consanguinity to the ex-spouse as qualifying nonresident personal representatives. Similarly, if a spouse predeceases the decedent, those related by lineal consanguinity to the deceased spouse should perhaps no longer qualify since there is no longer a marital relationship. Unlike siblings and the other lateral relatives in subsection (3), the status of "spouse" is inherently conditional—it is created by marriage and can be dissolved by divorce or death. Once the marital bond ends, so too should the legal connection that links in-laws and stepchildren to the decedent.

That said, there is a plausible argument that a spouse's death should not terminate the statutory connection between the decedent and those related by lineal consanguinity to the predeceased spouse. Clearly, a remarriage by the surviving spouse would sever the statutory connection to those related by lineal consanguinity to the predeceased spouse. However, many widows and widowers still consider their marriage to be a promise that continues for both spouses' lifetimes (not one that ends at the first death). In fact, many widows continue to identify as "Mrs." long after their spouse's passing. These cultural conventions suggest that death alone may not dissolve recognition of the marital bond. Accordingly, there is a reasonable argument that a deceased spouse remains a "spouse" under the statute, and that those related by lineal consanguinity to the deceased spouse should still qualify under subsection (3).

This issue was present in *Hill v. Davis*, 70 So.3d 572 (Fla. 2011). After the decedent's nonresident stepson was appointed to serve as personal representative, the decedent's mother challenged the appointment, alleging the stepson was never qualified to serve. The decedent's mother argued the stepson was not a person related by lineal consanguinity to the decedent's spouse because the decedent's spouse had predeceased the decedent. However, the mother's objection was not filed until after the three-month period to object to the qualifications of a personal representative set forth in Fla. Stat. §733.212. The Florida Supreme Court upheld the decision of the First District Court of Appeal and rejected the challenge by

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the decedent's mother.[3] However, neither the First District nor the Florida Supreme Court opined on the substance of whether a nonresident stepchild is permitted to serve as personal representative if the decedent's spouse (and natural parent of the stepchild) predeceases the decedent.[4] Rather, the mother's challenge was barred because she failed to timely object to the stepson's qualifications.[5] Specifically, the Florida Supreme Court affirmed the decision of the First District and held that Fla. Stat. §733.212 bars an objection to the qualifications of a personal representative if not filed within three months, except in cases of fraud, misrepresentation, or misconduct.[6]

Practical Considerations

Although Florida law disqualifies certain nonresident family members from serving as personal representative, many of these disqualifications may go unnoticed in practice. For example, adopted children are often listed simply as "children" in estate planning and probate documents, without any indication of their adoptive status. As a result, a personal representative's lack of eligibility may never be identified or challenged, particularly in uncontested administrations. It would not be surprising if questionable appointments perhaps occur with some regularity. Also, even in administrations that are susceptible to challenge, it may not be entirely evident that a nonresident family member's eligibility to serve is ambiguous or prohibited. As evident in *Hill*, if a challenge is not made timely, a personal representative who is not an eligible nonresident family member would likely be permitted to continue serving, absent fraud, misrepresentation, or misconduct.[7] Granted, Fla. Stat. §733.3101 requires a personal representative to: (1) resign if the personal representative was not qualified to serve at the time of appointment; or (2) file a notice permitting removal if the personal representative was qualified initially but later became unqualified due to a change in circumstances. If the unqualified personal representative fails to do so, the personal representative will be liable for any attorney's fees and costs incurred in an action seeking removal of the personal representative.[8] However, many of the relationships discussed above do not present obvious indicators of disqualification, and may be unclear whether resignation or notice is required.

To avoid missteps and challenges, attorneys should incorporate targeted questions into their client intake process. In the experience of the author, most estate planning attorneys' intake forms request basic information regarding the spouse, children, and parents. For these close family members, intake forms should request details regarding adoption, remarriage, and step-relations. Intake forms should ask for the state of residence for these close family members (In fact, there are good reasons to request full contact information (addresses, phone numbers, and emails) for these family members.) The ambiguity regarding service by the more ancillary relationships discussed above suggests that it can be important to have information regarding geography, adoption, remarriage, and step-relations for these individuals as well. However, that could turn client intake into a burdensome process if the information is requested for all such ancillary family members. Instead, consider targeted questions about family members clients may wish to name in persons of responsibility, which can then prompt requests for the relevant qualification information needed for such family members. These details can be essential for evaluating eligibility and should be gathered early in the planning process.

Conclusion

Florida law governing nonresident personal representative eligibility is specific and structured. However, its application often requires thoughtful analysis to ensure clients are not naming someone who might be ineligible. Attorneys should not assume that trusted family members—especially in-laws, stepchildren, and adoptive relatives—automatically qualify. Rather, they should consult Fla. Stat. §733.304 carefully and ensure they are clear regarding legal relationships. If qualification is tenuous for a person seeking appointment as personal representative, the attorney should have candid discussion about the potential risks. In doing so, attorneys can help clients avoid unnecessary delays, disputes, and disqualification during probate administration.


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Endnotes

1 Fla. Stat. §733.304(4).

2 See *Angelus v. Pass*, App. 3 Dist., 868 So.2d 571 (2004); *In re Estate of Angeleri*, App. 4 Dist., 575 So.2d 794 (1991).

3 *Hill v. Davis*, 31 So.3d 921 (Fla. 1st DCA 2010).

4 *Id.* at 575.

5 *Id.* at 578.

6 *Id.*

7 See also, *In re Sherman's Estate*, 146 Fla. 643, 1 So.2d 727 (1941).

8 Fla. Stat. §733.3101(3).



The Unlicensed Contractor

Challengers Do Not Sleep On Your Rights Or They Can Be Waived

By Andrew Foti, Esq., Stearns Weaver Miller, Fort Lauderdale, Florida

Cases have been published and articles have been written warning that unlicensed contractors, even those who performed perfectly and have not been paid, cannot enforce their rights under contract law, lien law, or in equity pursuant to Fla. Stat. §489.128 (2024). This applies not only to the contractor but also to business entities.[1] However, the mechanics for bringing a licensure challenge after a contractor has initiated a lawsuit against the owner has not been the focus of much literature, and a belated discovery that a contractor is unlicensed may bar presentation of such evidence in court.

Why do we have this law? Fla. Stat. §489.128 (2024), a bright line rule, invalidates contracts[2] not executed by a licensed contractor as against public policy. The legislative history of the statute suggests protection was deemed necessary to address the problems consumers and the public face due to shoddy work caused by unlicensed, unqualified, and incompetent contractors.[3] Pursuant to the statute, damages for such activity are left to the trial court or the jury to determine. Some in the construction industry suggest the law is too broad because it unfairly penalizes the licensed contractor who is tardy in renewing his or her license and is, therefore, technically unlicensed at the time of entering into the contract.[4] This contractor does not have lien rights, bond rights or any rights under the purported "contract," and the infirmity cannot be fixed retroactively. Others say the law does not go far enough because an unlicensed contractor who gets "caught" should be subject to treble damages, regardless of whether the unlicensed contractor was negligent in performing the work,[5] or should be required to disgorge all fees.

Can anyone enforce the contract entered into by an unlicensed contractor? While the unlicensed contractor cannot enforce its rights under the contract, the opposing party is entitled to get the benefit of the contract and can enforce its rights against the unlicensed contractor.[6] Likewise, if the non-offending party makes a claim on the unlicensed contractor's bond, the surety is entitled to assert defenses to the opposing party's claims, but the surety cannot assert a defense that the bond contract is unenforceable because the contractor was not licensed.[7]

Seems like a slam-dunk for the non-offending party against the contractor, but how does that party inform the court of the licensure issue? The Fifth District Court of Appeals, in *Vacation Beach, Inc. v. Charles Boyd Const.*, Inc.[8] held that, "contracts transgressing public policy, including contracts sought to be enforced by an unlicensed contractor in violation of the [Fla. Stat. § 489.128] are considered to be illegal."[9] The courts in Florida, and other jurisdictions across the country, use the terms "illegal" and "unenforceable" interchangeably.[10] Accordingly, for a defendant to properly raise the licensure issue, the defendant must plead that the contract entered into is illegal or unenforceable as an affirmative defense.

Can the licensure issue be waived? Although the Florida Supreme Court and the courts of appeals have not ruled in the context of licensure, the Florida Supreme Court, in *Rotemi Realty, Inc. v. Act Realty Co., Inc.*[11], has recognized that the "defense of illegality must be pleaded" particularly when a "contract is valid on its face."[12] Florida courts of appeals have also squarely held that illegality or unenforceability of a contract is an affirmative defense which must be pled by a defending party; otherwise, the affirmative defense is waived as a matter of law.[13] Faced with a similar question of law, unenforceability of a broker's contract where a real estate license was required, jurisdictions such as Alabama, Maryland, Virginia, and the District of Columbia, all ruled that unenforceability or illegality of contract based on a licensure issue must be pled as an affirmative defense or the defense is waived.[14]

Are construction contracts valid on their face? For over a century, construction practitioners have considered construction contracts, especially those on AIA forms, to be the industry standard in documenting owner/contractor and contractor/subcontractor relationships.[15] In the last twenty years a newer set of forms, ConsensusDocs, have also gained common application.[16] There is even case law that refers to the AIA contracts as the industry standard.[17] Accordingly, a court may deem the form contract valid on its face and fail to raise a missed affirmative defense *sua sponte*.

Do the amendments to Florida Rules of Civil Procedure impact late discovery of a licensure issue? The right to challenge a contractor's status can be lost, especially in light of the new rules of civil procedure. Per the new rules, deadlines

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in a case management order ("CMO"), which include motions to amend, must be strictly enforced, unless changed by court order. Parties may submit an agreed order to extend a deadline if the extension does not affect the ability to comply with the remaining dates in the CMO. If extending a single deadline may affect a subsequent deadline in the CMO, the parties must seek an amendment of the CMO, rather than submit a motion for extension of an individual deadline.[18] Since licensing information about contractors and companies qualified by contractors is public information and readily available, a court may not be easily persuaded that delayed discovery of licensure information constitutes discovery of "new" information, but rather indicative of a lack of diligence by the non-offending party.

Where can licensing information be found? Licensing information is available online[19] and through the Department of Business and Professional Regulation ("DBPR"). One can verify a license, or lack thereof, by searching: (1) the name of the contractor, (2) the name of the entity or (3) the license number — as a check for validity or current status.

In short, construction litigators should have a bright neon blinking sign, or at the very least a sticky note taped to the side of the computer screen, reminding them to check the DBPR's website for licensure status at intake of any contract dispute matter. For those on the transactional side of the practice — they too should invest in this blinking sign. All the hard work of negotiating the arduous indemnity provision will be for naught if your client is not properly licensed.


A. FOTI

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His transactional practice entails the drafting and negotiation of contracts and project management agreements. His dispute resolution practice includes mediation, arbitration and litigation in federal and state courts, as well as before administrative agencies.

Endnotes

1 See Fla. Stat. §489.128(1)(a)(2024) ("A business organization is unlicensed if the business organization does not have a primary or secondary qualifying agent in accordance with this part concerning the scope of the work to be performed under the contract.").

2 Beyond the scope of this article is an analysis of whether portions of a contract pertaining to work that may be performed without a license can be severed (and therefore enforceable) from those portions that must be performed by a licensed contractor and are therefore unenforceable without a license. Based on the principles of severability, viable arguments exist to bifurcate certain portions of a contract that do not require a license and allow affirmative and defensive claims by the otherwise unlicensed contractor. See *Incident365 Florida, LLC v. Ocean Pointe V Condo. Ass'n, Inc.*, 3D22-2239, 2024 WL 4364213 (Fla. 3d DCA Oct. 2, 2024); see also *Full Circle Dairy, LLC v. McKinney*, 467 F. Supp. 2d 1343 (M.D. Fla. 2006) (where work can be attributable to licensed and unlicensed work, a court can order the trier-of-fact to separate unlicensed and licensed work to award damages).

3 See e.g. *Kvaerner Const., Inc. v. Am. Safety Cas. Ins. Co.*, 847 So. 2d 534, 536 (Fla. 5th DCA 2003); *Poole & Kent Co. v. Gusi Erickson Const. Co.*, 759 So. 2d 2, 5 (Fla. 2d DCA 1999).

4 See Fla. Stat. §489.128 (1)(c)(2024) ("For purposes of this section, a contractor shall be considered unlicensed only if the contractor was unlicensed on the effective date of the original contract for the work, if stated therein, or, if not stated, the date the last party to the contract executed it, if stated therein. If the contract does not establish such a date, the contractor shall be considered unlicensed only if the contractor was unlicensed on the first date upon which the contractor provided labor, services, or materials under the contract.").

5 Currently, the law requires proof of negligence in order to recover treble damages. See Fla. Stat. §768.0425(2)(2024) ("In any action against a contractor for injuries sustained resulting from the contractor's negligence, malfeasance, or misfeasance, the consumer shall be entitled to three times the actual compensatory damages sustained in addition to costs and attorney's fees if the contractor is neither certified as a contractor by the state nor licensed as a contractor pursuant to the laws of the municipality or county within which she or he is conducting business.").

6 See Fla. Stat. § 489.128 (3) (2024) ("This section shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies. This section shall not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor. It shall not be a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed for purposes of this section".)

7 See endnote 5.

8 *Vacation Beach, Inc. v. Charles Boyd Const.*, Inc., 906 So. 2d 374 (Fla. 5th DCA 2005).

9 *Id.* at 377.

10 See 11 Fla. Jur 2d Contracts § 119 (noting that courts consider unenforceable contracts under § 489.128, Florida Statutes, "to be illegal"); *Promontory Enters., Inc. v. S. Eng'g & Contracting, Inc.*, 864 So. 2d 479, 485 (Fla. 5th DCA 2004) (same)).

11 *Rotemi Realty, Inc. v. Act Realty Co., Inc.*, 911 So. 2d 1181 (Fla. 2005).

12 *Id.* at 1185 n.1.

13 See *Rauch, Weaver, Norfleet, Kurtz & Co., Inc. v. AJP Pine Island Warehouses, Inc.*, 313 So. 3d 625, 629 (Fla. 4th DCA 2021) (noting that "illegality of an agreement is an affirmative defense" which is waived unless pleaded); *Miami Elecs. Ctr., Inc. v. Saporta*, 597 So. 2d 903, 904 (Fla. 3d DCA 1992) ("[D]efendants did not plead illegality as an affirmative defense, and the issue was not tried below by consent; accordingly, the defendants have waived this defense.")

14 *Gen. S. Indus., Inc. v. Shub*, 300 F. App'x 723, 726 (11th Cir. 2008) (citing *Smithy Braedon Co. v. Hadid*, 825 F.2d 787, 788 (4th Cir.1987) (discussing similar real estate broker licensure requirements from Virginia, Maryland, and the District of Columbia in terms of "affirmative defense[s] of illegality.")).

15 For 120 years, the AIA has defined the relationships and terms in design and construction projects through its AIA Contract Documents. With nearly 200 forms and contracts that have been prepared by owners, contractors, attorneys, architects, and engineers from around the United States, these documents have been finely tuned and embraced by the industry, to the point that they are now widely recognized as the industry standard. See http://aiapv.org/AIA_Contract_Documents_-_The_Industry_Standard.

16 See 8 Fla. Prac., Constr. Law Manual § 7:1 (2023-2024 ed.) (stating that some of the widely used published form contract documents are AIA forms and ConsensusDocs).

17 See e.g. *Gables Constr., Inc. v. Red Coats, Inc.*, 468 Md. 632, 652, 228 A.3d 736, 748 (2020); *LDF Constr., Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 726 (Tex. App. 2015); *Elwyn v. DeLuca*, 2012 PA Super 136, 48 A.3d 457, 459 (2012).

18 See Fla. R. Civ. P. 1.300 (d)(3).

19 DBPR's website can be accessed through http://www.myfloridalicense.com.

THE ONE BIG, BEAUTIFUL BILL ACT

Through An Estate Planning Lens

By Robert T. Carroll, Esq., Galbraith Weatherbie Law, Naples, Florida

The One Big Beautiful Bill Act (the "Act") was signed into law by President Trump on July 4, 2025.[1] The Act has been a widespread topic of discussion in the estate planning community, both as it was being developed and after its passage. The Act covers a wide variety of topics, but, even with respect to the tax items, a full discussion of its terms would go beyond the space available for this article.[2] Instead, this article will highlight select provisions that estate planners may find more relevant to their practice. This article will discuss the permanently increased unified credit against the federal estate and gift tax, reforms to the charitable deduction, an increase in the limit for the State and Local Tax (SALT) deduction, increased utility for 529 plans with respect to paying for K-12 and higher education expenses, as well as certain features of 529 plans and ABLE accounts being made permanent, and the creation of a new gifting vehicle: Trump Accounts.

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Permanent Extension of the Unified Credit: Estate Tax Savings for Some, Income Tax Savings for More

In 2017, the estate and gift tax exemption (the "Basic Exclusion Amount") was doubled,[3] which has resulted in a $13.99 million exclusion for 2025.[4] However, this increase was designed to be temporary, and would automatically revert back to the earlier levels on January 1, 2026, cutting the Basic Exclusion Amount in half.[5] This would not only increase the amount of estate tax due from taxable estates, but would also result in more taxpayers owing an estate tax liability.

The Act removed the threat of this automatic decrease, setting the Basic Exclusion Amount at $15 million for 2026.[6] This amount will continue to be indexed to inflation, so it will be adjusted by the IRS each year.[7]

While this is welcoming news to some taxpayers, providing them with estate tax savings, not many taxpayers owe estate tax in the first place.[8] A more widespread effect is the income tax savings for taxpayers, including those who are below the Basic Exclusion Amount, due to the stepped-up basis.[9] At a taxpayer's death, the general rule is that any unrealized capital gains on a taxpayer's assets that accrued prior to the taxpayer's death are eliminated, and the decedent's beneficiaries only pay income taxes on the gains accrued after death.[10]

This creates two objectives that advisors can use to reduce a client's income tax liability; first, by maximizing the Basic Exclusion Amount available to the client's assets, and, second, by increasing the number of times an asset receives a basis step-up.

Married clients have a unique opportunity to maximize their Basic Exclusion Amount through portability. Portability allows a surviving spouse to use their last deceased spouse's remaining Basic Exclusion Amount, potentially doubling the amount of Basic Exclusion Amount available to the surviving spouse.[11] This allows more assets to be in the surviving spouse's estate at death without increasing the estate tax, where they can receive a stepped-up basis at the surviving spouse's death.

There are several ways that a taxpayer can increase the number of times an asset's basis can be stepped up, including upstream planning, filing a QTIP election, and undoing prior estate planning strategies that may no longer benefit the client.

Upstream planning refers to gifting assets to older generations in the hope that the older generation will die with the asset, allowing it to return to the donor with a stepped up basis. If a client has a large amount of accrued, but unrealized, capital gains, but has parents who are elderly and not facing an estate tax, the client can gift assets to his or her parents. At the parents' deaths, these assets can pass back to the client with a stepped-up basis.[12] By taking this approach, clients can receive a stepped-up basis on assets during their lifetime, rather than waiting until death to benefit their beneficiaries, and can have the basis of the assets stepped up multiple times.[13]

A second approach that is limited to a married couple is by arranging an estate plan so that there is a stepped up basis at each spouse's death. This can be accomplished by leaving assets outright to the surviving spouse or to a QTIP trust. Any such assets held by a QTIP trust (or outright by the surviving spouse) will be included in the surviving spouse's gross estate, qualifying them for an additional stepped up basis at that time.[14] In such a case, those assets will receive a stepped-up basis twice; first, upon the death of the client and, again, on the death of the surviving spouse.

The third approach is for clients who engaged in previous estate tax planning. A client may have engaged in estate tax planning in the past, but does not face an estate tax problem today because of the permanent higher Basic Exclusion Amount. Where a client will have excess estate and gift tax exemption, it is important to maximize the stepped-up basis because, while the client may no longer be facing an estate tax, the client (or the client's beneficiaries) will still face an income tax. By pulling the assets back into the client's gross estate, capital gains liabilities that would have otherwise passed to the client's beneficiaries can be wiped out through the stepped-up basis.[15]

Impact on the Charitable Deduction

The Act's revisions to the rules surrounding charitable deductions opened up doors for certain clients while making the deduction less effective for others. It is important to be aware of these rules and how they might affect each particular client. These changes included allowing non-itemizing taxpayers to still deduct limited charitable contributions and limiting the effectiveness of the charitable deduction for itemizing and high-income taxpayers.

The Act restored a rule from the Coronavirus Aid, Relief, and Economic Security (CARES) Act that was effective for 2020 and 2021, which allowed a non-itemizing taxpayer to take a limited charitable deduction.[16] Beginning January 1, 2026, a non-itemizing individual taxpayer will be allowed to deduct up to $1,000 of charitable contributions and a married couple filing jointly will be allowed to deduct up to $2,000.[17] This rule will only apply to cash contributions to public charities that are neither donor-advised funds nor supporting organizations.[18]

The Act also limited the effectiveness of the charitable deduction for itemizing and high-income taxpayers in two ways, both beginning January 1, 2026.[19] First, the charitable deductions for itemizing taxpayers will be subject to a 0.5% floor, reducing the total deduction by 0.5% of the taxpayer's Modified Adjusted Gross Income.[20] Second, the charitable deduction for taxpayers in the top tax bracket will be reduced

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by 2/37 alongside other itemized deductions.[21] Because the top tax rate is 37%, it has the effect of reducing the effective tax benefit of the deduction from 37% to 35%.

This opens up planning opportunities for certain clients, while encouraging accelerating some charitable planning for others. With respect to non-itemizing taxpayers, this creates an immediate tax benefit for any charitable gifts that the taxpayer is already making, as they can take advantage of the limited deduction alongside the standard deduction. For itemizing taxpayers, the Act's effects will be more complicated with the new limitations being introduced. While itemizing clients can be encouraged to consolidate charitable gifts as much as possible (minimizing the reduction from the new charitable deduction floor and allowing the client to still take the standard deduction in the other years), charitably inclined clients should continue making some gifts each year to take full advantage of the limited charitable deduction in their non- itemizing years.

Charitably inclined clients who made gifts in 2025 before the provisions took effect, avoid the new limitations. Any large planned charitable gifts made in 2025 would not be subject to the new floor, and will not be subject to the reduction for taxpayers in the top income tax bracket. Even if the charitable deduction cannot be entirely used in 2025, the unused deduction can still carry forward into future years.[22]

Once these rules take effect in 2026, advisors will need to re-evaluate whether certain strategies make the most sense for clients. For example, if a client has a large realization event and wants to offset some of that income through a charitable split-interest trust, the charitable split-interest trust will not provide as much benefit as it would in 2025 because of these limitations. Advisors will need to compare this approach with alternative techniques to determine which approach is most beneficial to the client. Non-charitable strategies that allow for the capital gains to be excluded from income (or at the very least deferred) may warrant further consideration in this new dynamic, such as by investing the gains in a Qualified Opportunity Zone[23] or by having structured the client's affairs so that another income exclusion rule (such as a 1031 exchange[24] or Qualified Small Business Stock[25]) can apply.

State and Local Tax (SALT) Deduction

The SALT deduction limit has been greatly discussed over the past several years since its introduction. With the deduction capped at $10,000,[26] many taxpayers lost the benefit of being able to fully deduct their state and local taxes (such as income or real estate taxes).[27] While the Act left a cap in place, it expanded the limit, allowing more taxpayers to make greater use of the deduction.

The Act has raised this limit from $10,000 to $40,000 for 2025.[28] This cap is subject to a phase-out for higher income taxpayers. If a taxpayer has more than $500,000 of Modified Adjusted Gross Income, the cap on the taxpayer's SALT deduction will be reduced by 30% of the excess.[29] However, regardless of the taxpayer's income, the cap on the SALT deduction will not fall below $10,000.[30] Both the $40,000 limit and the $500,000 phaseout limit are scheduled to increase annually for the next few years,[31] but this increase is set to reset to $10,000 in 2030.[32]

While this is useful for many taxpayers, what can a taxpayer with unused SALT deductions do to maximize their deduction? One approach has been for a taxpayer to establish one or more non-grantor trusts to divide the deductible expenses or income.[33] This will allow each trust to act as its own taxpayer, each with its own separate SALT limit. By taking certain investments that generate SALT deductions and transferring them to non-grantor trusts, taxpayers can multiply the number of separate SALT deductions available to them to offset income generated by other assets inside these trusts. In addition, by dividing income among multiple non-grantor trusts, each taxpayer's income can fall below the phaseout threshold, allowing the full deduction to be taken.[34] This non-grantor trust can be established as an incomplete gift if the taxpayer does not wish to move the assets outside his or her gross estate, preserving the estate and gift tax exemption on funding the trust and allowing the assets to receive a stepped-up basis at the taxpayer's death.

Expensing of Business Property

Another feature of the Act is the ability to expense certain business property immediately, rather than depreciating the property over time.[35] This provides an immediate income tax deduction and, upon the taxpayer's death, the basis will be restored and the depreciation restarted, providing a double benefit.[36]

This immediate expensing applies to qualified property (as defined under IRC §168(k), subject to some limitations, generally including property with a depreciation life of twenty years or less) that is purchased and put into use after January 19, 2025,[37] as well as a new class - qualified production property, which is defined under IRC §168(n) and is also eligible for an immediate 100% depreciation.[38]

Therefore, not only could a taxpayer receive an income tax deduction by immediately expensing a qualified asset purchased and put into use after January 19, 2025, but, upon the taxpayer's death, that asset will receive a stepped-up basis and will restart its depreciation period, allowing the taxpayer to receive a double benefit against the income tax.[39]

Revisions to Gifting Vehicles – 529 Plans, ABLE Accounts, and the New Trump Accounts

The Act also revised certain vehicles that can be used to transfer assets to beneficiaries, 529 plans and ABLE

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Accounts, and created a new gifting vehicle referred to as a Trump Account. These changes will provide more flexibility to beneficiaries of 529 plans, a better ability to fund ABLE Accounts, and an additional means to pass assets to beneficiaries in Trump Accounts.

With respect to the 529 plans, the Act expanded the purposes for which the funds can be used. It opened the door for 529 plan funds to be used on additional K-12 expenses beyond just tuition, including, to pay for items such as curriculum materials, books, fees for nationally standardized tests, dual enrollment fees for college courses taken in high school, online educational materials, tutoring or educational classes outside the home, and specialized strategies designed to help students with disabilities.[40] The Act also increased the annual limit on funds that can be used from a 529 plan on K-12 expenses, from $10,000 per year to $20,000 per year.[41]

The Act also permits 529 plan funds to be used on qualified postsecondary credentialing expenses, including tuition, fees, books, supplies, and equipment required for enrollment or attendance in a recognized postsecondary credential program, and any other expense associated with a recognized postsecondary credential program if it would be permitted in connection with attendance at an eligible educational institution.[42]

Additionally, the Act preserved a rule that allows flexibility between 529 accounts and ABLE accounts. Currently, taxpayers are allowed to do a tax-free rollover from a 529 account to an ABLE account,[43] but this ability was set to expire at the end of 2025.[44] The Act has made this permanent, so unused funds in a 529 account can be rolled over into an ABLE account moving forward.[45]

The Act also made permanent two additional tools with respect to funding an ABLE account – the ABLE to Work contribution limit[46] and the Saver's Credit.[47] With the ABLE to Work contribution limit, beneficiaries of ABLE accounts will be able to contribute funds to their own ABLE accounts from their employment.[48] This amount will be capped at the lesser of the prior year's federal poverty level or the beneficiary's yearly compensation.[49] The Saver's Credit will also provide a tax credit to beneficiaries who contribute to their own ABLE accounts,[50] and the credit amount will be increased from $2,000 to $2,100.[51]

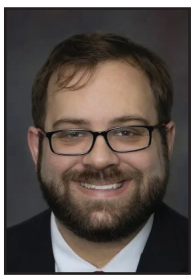


An entirely new tool introduced by the Act are Trump Accounts, which may be opened for any child under 18 years old with a valid Social Security Number;[52] however, they cannot be funded until July 4, 2026.[53] These accounts will operate similar to a traditional IRA, but with some exceptions.[54] First, they will be subject to an annual contribution limit of $5,000, which is indexed to inflation.[55] In addition, an employer can contribute up to $2,500 annually to a Trump Account for an employee or a dependent of an employee.[56] Second, unlike IRAs, contributions are made after-tax and not deductible.[57] Finally, distributions are not permitted from Trump Accounts until the calendar year in which the account holder reaches age 18 (with some limited exceptions, such as the ability to roll funds over into an ABLE account or withdraw excess contributions).[58] At that point, distributions are permitted, but distributed earnings that exceed the basis in the account are taxed at ordinary income rates and subject to an early distribution penalty.[59]

Under the Act, the government is set to launch a pilot program with respect to funding Trump Accounts.[60] Each Trump Account that is opened for a child born between 2025 and 2028 will receive a one-time credit of $1,000.[61]

Conclusion

The Act has opened a number of opportunities for advisors to continue to assist clients. From removing the threatened sunset of the Basic Exclusion Amount to providing various income tax planning opportunities and broadening the scope of gifting vehicles, advisors can provide clients with a number of options to fit their intended goals. As these provisions become effective, certain approaches may need to be re-evaluated in order to ensure that clients are being put in the best position moving forward.



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Endnotes

1 H.R. 1 – One Big Beautiful Bill Act, Congress.gov, available at https://www.congress.gov/bill/119th-congress/house-bill/1/all-actions (last accessed September 12, 2025).

2 While this article will not go into detail to discuss all of the tax provisions of the Act, it is still important to call attention to some of these provisions, including the extension of the decreased tax rates from the TCJA (One Big Beautiful Bill Act, Pub. L. No. 119-21, § 70101 (2025)), an increased standard deduction for taxpayers (Id. at § 70102), the creation of a new senior exemption (Id. at § 70103), an increase in the Child Tax Credit (Id. at § 70104), the permanent elimination of miscellaneous itemized deductions (Id. at § 70110), the expansion of Qualified Opportunity Zones (Id. at § 70421), an expansion of the gain limitation on the sale of Qualified Small Business Stock (Id. at § 70431), a 2/37 reduction on itemized deductions for top earners (reducing the effective rate of the deduction from 37% to 35%) (Id. at § 70111), limitations on the deduction on home loan interest (Id. at § 70108), casualty loss limitations (Id. at § 70109), the termination of miscellaneous itemized deductions (other than for educator expenses) (Id. at § 70110), and an expansion of 199A deductions (Id. at § 70105).

3 An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, § 11061 (2017).

4 IRS Releases Tax Inflation Adjustments for Tax Year 2025, IR-2024-273 (October 22, 2024), available at https://www.irs.gov/newsroom/irs-releases-tax-inflation-adjustments-for-tax-year-2025 (last accessed September 12, 2025).

5 An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, *supra* note 3, at § 11061.

6 One Big Beautiful Bill Act, *supra* note 2, at § 70106.

7 26 U.S.C. § 2010(c)(3)(B) (2025).

8 For example, only 6,158 estate tax returns were filed in 2021 and 8,130 such returns were filed in 2022, including returns that were filed although no estate tax was due. Estate Tax Returns Filed for Wealthy Decedents, Filing Years 2013 – 2022, IRS.gov, available at https://www.irs.gov/pub/irs-pdf/p5332.pdf (last accessed September 12, 2025).

9 26 U.S.C. § 1014 (2025).

10 *Id.*

11 26 U.S.C. § 2010(c)(4) (2025).

12 If the client is facing an estate tax, the parents can pass these assets back to the client in a properly constructed irrevocable trust to avoid the estate tax but still provide the stepped up basis. However, when engaging in this strategy, it is important to be aware of the risk of IRC § 1014(e). If the assets are gifted and pass back to the original donor within a year of the gift, the stepped-up basis is disallowed. 26 U.S.C. §1014(e).

13 As an example, if a taxpayer (T) were to gift assets to his father (F), who died and left the assets to T's mother (M), who died and left the assets to T, who died and left the assets to T's wife (W), who died and left the assets to T's and W's children, the assets would have received a stepped up basis at four different points before they reached the children.

14 26 U.S.C. § 1014(b)(10) (2025).

15 As far as how to accomplish an unwinding of previous estate planning, that can be a more complicated question, which can differ based on the details of each plan being unwound, whether it be through an outright distribution of assets, an asset swap, or otherwise. However, in attempting to unwind previous estate planning to maximize the stepped up basis, it is important to keep in mind where the IRS has claimed that such moves created unintended consequences. See CCM 202118008 (February 1, 2021) (holding that the commutation of a QTIP trust where all of the assets passed to the surviving spouse resulted in a taxable gift by the surviving spouse to the remainder beneficiaries and a taxable gift by the remainder beneficiaries to the surviving spouse) and CCA 202352018 (November 28, 2023) (holding that modifying an irrevocable grantor trust to add a discretionary power to reimburse the Grantor for income taxes resulted in a taxable gift).

16 One Big Beautiful Bill Act, *supra* note 2, at § 70424.

17 *Id.*

18 *Id.*

19 *Id.* at § 70111; *Id.* at §70425.

20 *Id.* at § 70425.

21 *Id.* at § 70111.

22 26 U.S.C. § 170(b)(1) (2025).

23 See 26 U.S.C. § 1400Z-1, et. seq. (2025).

24 See 26 U.S.C. § 1031 (2025).

25 See 26 U.S.C. § 1202 (2025).

26 An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, *supra* note 3, at § 11042.

27 See How Did the TCJA Change the Standard Deduction and Itemized Deductions?, Tax Policy Center, (last updated January 2024), available at https://taxpolicycenter.org/briefing-book/how-did-tcja-change-standard-deduction-and-itemized-deductions (last accessed September 13, 2025).

28 One Big Beautiful Bill Act, *supra* note 2, at § 70120.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 Blattmachr, Jonathan G., Martin M. Shenkman and Mitchell M. Gans, *Use Trusts to Bypass Limit on State and Local Tax Deduction*, Estate Planning, pp. 3-15 (April 2018), available at https://shenkmanlaw.com/uploads/2022/03/ETPL-18-04-BLATTMACHR.pdf (last accessed September 13, 2025).

34 However, some advisors have warned that the IRS could attack this use of multiple non-grantor trusts, particularly if the trusts have the same grantor and same beneficiaries. See Shenkman, Martin M., House Planning Post-TCJA, Shenkman Law, at Slides 14-20, available at https://shenkmanlaw.com/uploads/2018/10/House-Planning-Post-TCJA-Sept-30-2018-ONE-SLIDE-PER-PAGE.pdf (last accessed September 13, 2025).

35 One Big Beautiful Bill Act, *supra* note 2, at § 70301.

36 Xu, Jim, *Mastering Asset Depreciation in Step-Up Scenarios: Community vs. Separate Property States*, Paxel Financial Consulting, https://www.paxelfinance.com/blog/planning-your-estate-as-a-married-couple-under-the-estate-exemption-limit (April 15, 2024).

37 One Big Beautiful Bill Act, *supra* note 2, at § 70301.

38 One Big Beautiful Bill Act, *supra* note 2, at § 70307.

39 *Id.*

40 One Big Beautiful Bill Act, *supra* note 2, at § 70413.

41 *Id.*

42 One Big Beautiful Bill Act, *supra* note 2, at § 70414.

43 One Big Beautiful Bill Act, *supra* note 2, at § 70117.

44 *Id.*

45 *Id.*

46 One Big Beautiful Bill Act, *supra* note 2, at § 70115.

47 *Id.* at § 70116.

48 26 U.S.C. § 529A(b)(2)(B) (2025).

49 *Id.*

50 26 U.S.C. § 25B (2025).

51 One Big Beautiful Bill Act, *supra* note 2, at § 70116.

52 *Id.* at § 70204.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

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Amendments To The Rules Of Civil Procedure:

A SERIES - PART 2 OF 4 - DISCOVERY

By J. Richard Caskey, Esq., Co-Chair Ad Hoc Rules Revisions Committee, J. Richard Caskey, P.A., Tampa, Florida and Peyton Brown, Esq., Gunster, West Palm Beach, Florida



As the Section remains at the forefront of continuing education regarding amendment of the Florida Rules of Civil Procedure (the "Civil Rules"), the Section's ad hoc Rules Revisions Committee is presenting a series of articles to explore and explain those amendments. The first article of the series, which appeared in the Spring/Summer 2025 issue of ActionLine, addressed the amended Rule 1.200 case management procedures and the new Rule 1.280(a) initial discovery disclosure requirements. That article also analyzed specific exceptions that exempt most probate, guardianship, and trust-related cases from application of Rules 1.200 and 1.280(a).

This second article in the series addresses additional revisions to discovery rules, including the Florida Supreme Court's adoption of the federal proportionality standard.

Rule 1.280(c) Proportionality in Discovery and Florida's Alignment with the Federal Standard

One of the biggest changes arising from amendment of the Civil Rules is the adoption of the federal proportionality standard for discovery in Rule 1.280. Consistent with the goal of promoting fair and timely resolution of civil cases, the Florida Supreme Court adopted almost all the text of federal rule 26(b)(1).

In place of the former standard that discovery was subject to a "reasonably calculated" formulation, amended Rule 1.280(c) now conditions discovery not only on relevance but also on proportionality to the needs of the case. The Court expressly signaled that Florida's rule will be construed in accordance with federal standards and informed by federal practice. Accordingly, we cite in this article to federal law and the Advisory Committee note[1] to federal rule 26(b) in interpreting and applying this new proportionality standard.

Under new Rule 1.280(c), discovery must be both relevant and proportional to the needs of the case, which is assessed by considering six interrelated factors discussed below. If the information is relevant but not proportional to the needs of the case, it is beyond the scope of discovery. When determining whether discovery is proportional to the needs of a case, a court considers:

i. The importance of the issues at stake in the action;
ii. The amount in controversy;
iii. The parties' relative access to relevant information;
iv. The parties' resources;
v. The importance of the discovery in resolving the issues; and
vi. Whether the burden or expense of the proposed discovery outweighs its likely benefit.[2]

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Accordingly, the determination of whether the discovery is both relevant and meets the proportionality requirements is a fact specific analysis.[3] However, these factors are to be applied in a common sense, and practical manner.[4]

Proportionality is not a rote checklist. It is a practical inquiry that weighs substance, scope, and cost against what is genuinely necessary to advance the merits. Florida courts, taking cues from federal practice, will expect parties to justify their positions with specifics. That means quantifying burdens where possible, articulating why particular information is central to claims or defenses, and tailoring discovery to the core issues. Explanations of the six factors follow.

- **Importance of Issues at Stake in the Action.** The first proportionality factor focuses on whether the issues in a case are in "public policy spheres, such as employment practices, free speech, and other matters, [that] may have importance far beyond the monetary amount involved."[5] The 2015 Committee Note provides that, "[m]any other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values."[6] Accordingly, this factor recognizes that "cases concerning constitutional or statutorily created rights may warrant discovery that otherwise might not be indicated based on the amount in controversy which could be relatively minimal."[7] When arguing for proportionality of discovery, Section practitioners should think about their cases which are in public policy spheres like eminent domain and guardianships. The more an action touches on public policy issues, the more likely this factor will weigh in favor of the discovery being proportional even in cases where the monetary amount is relatively small.
- **Amount in Controversy.** When a court is considering the second factor, it compares the cost of discovery to the amount in controversy to determine its proportionality.[8] Accordingly, the higher the potential recovery, the more likely this factor weighs in favor of allowing the discovery being sought. This factor follows common sense. Consider the example of a trust dispute where the estimated cost to respond to a particular request for production is $50,000 in processing and performing data analytics and review, taking into consideration the anticipated rate of review and reviewer costs. In considering proportionality, a court will compare the amount in controversy to the cost of the discovery. If the stakes in the case are relatively low, say only $100,000, a court would likely find the $50,000 cost of the request to be disproportional. On the other hand, if the amount at issue in the case is relatively high, say $10 million, a court may weigh *this factor* as being proportional. Practitioners should be prepared to have quantitative metrics to support or oppose the cost and time of discovery if making a proportionality argument.
- **Parties' Relative Access to the Relevant Information.** The third factor, the parties' relative access to relevant information, focuses on whether there is "information asymmetry" where one party has access to relevant information that the other party does not.[9] In such a case, "the burden of responding to discovery lies heavier on the party who has more information, and properly so."[10] In a lawsuit involving HOA disputes relating to a special assessment to fund balcony and concrete repairs, it is likely the HOA will have exclusive access to relevant information like structural reports, vendor bids, board records, or communications essential to the claims that the homeowners would only be able to get through discovery to the HOA. If a court finds the discovery is relevant and tailored to the claims, then it would likely weigh this third factor in favor of being proportional, and the burden on the discovery will lie heavier on the HOA, which has exclusive access to the information.
- **Parties' Resources.** Courts will look at a party's ability to fulfill the request, especially financially.[11] However, the parties' resources do not foreclose discovery to an impoverished party, nor do they warrant unlimited discovery to a wealthy party. The 1983 Committee Note cautioned that, "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."[12] The court will still consider what is reasonable in light of the parties' capabilities and the case's demands and can encourage practical solutions like phased discovery and negotiated search terms, among others.
- **Importance of the Discovery in Resolving the Issues.** This fifth factor requires courts to determine whether the discovery goes to the core issues in the lawsuit and the heart of the litigation.[13] Discovery that is crucial to proving a claim or defense is more likely to be deemed proportional. On the other hand, discovery that is relevant but not sufficiently important to resolving the issues in the litigation is more likely to be limited by a court. Further, a court can prevent or limit discovery that is overbroad when considering the importance of discovery in resolving the issues where the discovery being sought is not narrowly tailored or proportional to the claims in the litigation.[14] Thus when drafting discovery, determine whether the requests for production, interrogatories, and requests for admissions seek information which goes to the core issues in the lawsuit or to proving a claim or a defense.

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- **Whether the Burden or Expense of the Proposed Discovery Outweighs its Likely Benefit.** The final factor often combines all the previous factors into a final analysis of burdens versus benefits.[15] This factor generally requires a party claiming a burden or expense to specifically demonstrate it, while the party seeking the request should show the benefit coming from the request.[16] A party must do more than just assert that the burden will be expensive; it should, "provide sufficient detail in terms of time, money[,] and procedure required to produce the requested documents."[17] Courts are "well aware that responding to discovery requests requires the expenditure of time, money, resources, and efforts. Courts must consider, however, *the extent* of these expenditures."[18] The Advisory Committee emphasizes that courts should assess discovery burden and cost realistically, including, for electronically stored information. As reliable, computer-based search methods evolve, especially for large ESI volumes, courts and parties should be open to using them to reduce discovery burden and expense.[19]

Practical Guidance for Counsel. Proportionality is still a relatively new concept for many practitioners who have spent their careers in state court under the prior discovery framework, and it will take time for both attorneys and state judges to internalize and operationalize it. That said, with the amended Civil Rules now in effect for almost a year, the adjustment period is likely coming to an end. Now is the time to develop a working command of the proportionality factors and to understand how courts are likely to apply them to the facts of a particular case. By approaching the six factors with a practical, evidence-based plan, parties can secure discovery that is thoughtfully scaled to the controversy and consistent with Florida's modernized rules, while positioning themselves to educate the court on why the requested scope is, or is not, proportional in the specific context of their case.

Other Significant Amendments to Discovery Rules

In addition to the Rule 1.280(a) initial disclosure requirements (addressed in part 1 of this series) and the Rule 1.280(c) adoption of proportionality (discussed above), the Civil Rules contain other significant changes relating to discovery as the result of the 2025 amendments. Practitioners must adapt to ensure compliance with additional new discovery requirements, further summarized below.

Duty to Supplement. The Civil Rules now impose an obligation to supplement discovery. Before the 2025 amendments, the Civil Rules expressly provided that a party who gave a complete response to a discovery request was not under any ongoing duty to supplement the response with subsequently acquired information. However, Rule 1.280(g) now requires parties to timely supplement or correct their discovery responses if they learn a response is incomplete or incorrect "in some material respect" and additional or corrective information has not otherwise been made known.[20] The obligation to supplement or correct arises for all responses to interrogatories, requests for production, and requests for admission, as well as initial disclosures.

Signature Requirement. Rule 1.280(k) now requires that an attorney or litigant (if self-represented) must sign every initial disclosure and discovery request, response, and objection. Moreover, if a discovery disclosure, request, response, or objection is not signed, there is no duty for a party to act upon it until it is signed. The signature carries with it certain inherent certifications listed in the Rule (for example, that the discovery is not unreasonable or interposed for purposes of harassment). Violation of the listed certifications without "substantial justification" requires the mandatory imposition of sanctions on the signer, the party, or both.

Objections to Interrogatories and Requests for Production. Amended Rules 1.340 and 1.350 require parties to state with specificity the grounds "including the reasons" for objecting to interrogatories[21] and requests for production[22] respectively. Any objection not timely stated to an interrogatory is expressly deemed as waived unless a court allows it for good cause.[23] With respect to requests for production, parties must state whether they are withholding any responsive materials on the basis of each objection.[24] If a party objects to only part of a request for production, the party must specify the objectionable part and allow inspection of the rest.[25]

Discovery Sanctions. Rule 1.380 contains significant amendments to address compelling discovery and seeking sanctions for discovery violations. If a party fails to make an initial disclosure as required by Rule 1.280(a), any other party may move to compel the disclosure and request appropriate sanctions. Likewise, a party may move to compel inspection, production, answer, or response to other types of discovery. Depending on who prevails, the court "must require" payment of the reasonable expenses ("that may include attorneys' fees") incurred in obtaining relief or opposing the motion, unless the making of the motion or the opposition to it "was substantially justified or that other circumstances make an award of expenses unjust."[26] The court may apportion the expenses if it grants or denies a motion in part.[27] As was the case before amendment of the Civil Rules, the court may impose additional sanctions for violation of its discovery orders. Moreover, the court may impose additional sanctions if a party fails to provide information or identify a witness under the party's Rule 1.280(a) initial disclosure obligations or Rule 1.280(g) obligations to

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supplement.[28] The sanctions may include disallowing the violating party's use of the information or witness.[29]

Part 3 of this Series Will Summarize Additional Changes throughout the Civil Rules

The first two articles in this series have summarized what are likely the most impactful areas of the amended Civil Rules: the new case management rules; and the new discovery rules. The third article will address other significant changes throughout the remaining parts of the Civil Rules (including the Rules regarding meet-and-confer requirements, summary judgments, and continuances). Following that, there will be a fourth article to summarize amendments to the Florida Rules of General Practice and Judicial Administration and their interaction with the Civil Rules. However, the Florida Supreme Court considers rule amendments on an ongoing basis. To the extent the Court adopts additional changes, they will likewise be addressed in a future article.


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Endnotes

1 "The Court may also give weight to, and consider as persuasive authority, the construction of a rule offered by the Advisory Committee in its notes." *UWorld LLC v. USMLE Galaxy LLC*, 349 F.R.D. 258, 264 (N.D. Tex. 2025).

2 See Fla. R. Civ. Pro. 1.280(c)(1). For a discussion of each of the six factors determining whether the Plaintiffs' or Defendants' proposed search terms were more proportional to the needs of the case see *Edwards v. McDermott Int'l, Inc.*, No. 4:18-CV-04330, 2022 WL 1568279 (S.D. Tex. May 18, 2022).

3 *Avila v. Ford Motor Co.*, 680 F. Supp. 3d 1125, 1129 (N.D. Cal. 2023).

4 *Mehner v. Furniture Design Studios, Inc.*, 143 F.4th 941, 953 (8th Cir. 2025).

5 Fed. R. Civ. P. 26, Advisory Committee Notes, 1983 Amend.

6 Fed. R. Civ. P. 26, Advisory Committee Note, 2015 Amend; see also *VoteAmerica v. Schwab*, No. 21-2253-KHV-GEB, 2022 WL 1801059, at *4 (D. Kan. June 2, 2022) (finding "the importance of determining the First and Fourteenth Amendment Rights of Plaintiff as weighed against the right of the State to ensure its elections are honest and orderly, from a proportionality standpoint, far outweighs the limited fiscal amount in controversy.").

7 The Sedona Conference, The Sedona Conference Commentary on Proportionality in Electronic Discovery A Project of the Sedona Conference Working Group on Electronic Document Retention and Production (Wg1), 18 Sedona Conf. J. 141, 142 (2017). The Sedona Conference provides materials on federal discovery, including influential Principles, Proclamations, Commentaries, and Primers, which address key aspects of federal discovery such as eDiscovery requests, privilege logs, proportionality, and cooperation between counsel.

8 *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, No. 5:15-CV-37-FL, 2017 WL 876266, at *4 (E.D.N.C. Mar. 3, 2017).

9 *Id.*

10 *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 8 (D.D.C. 2017).

11 *Arrow*, 2017 WL 876266, at *5.

12 Fed. R. Civ. P. 26, Advisory Committee Note, 2015 Amend.

13 *Oxbow*, 322 F.R.D. at 8; see also *Stringer v. Cascos*, No. SA-16-CA-257-OG, 2016 WL 8914448, at *2 (W.D. Tex. Dec. 14, 2016).

14 *Novanta Corp., v. Iradion Laser, Inc.*, No. CV 15-1033-SLR-SRF, 2016 WL 4987110 (D. Del. Sept. 16, 2016).

15 *Arrow*, 2017 WL 876266, at *5; see also Fed. R. Civ. P. 26, Advisory Committee Notes, 2015 Amend.

16 Arrow, 2017 WL 876266, at *5.

17 *Id.* at *6.

18 *Santa Rosa Dev., LLC v. Santa Rosa Cnty.*, No. 3:22-CV-660-MCR/MJF, 2022 WL 19333304, at *5 (N.D. Fla. Oct. 31, 2022).

19 Fed. R. Civ. P. 26, Advisory Committee Note, 2015 Amend.

20 Fla. R. Civ. P. 1.280(g)(1).

21 Fla. R. Civ. P. 1.340(a)(8).

22 Fla. R. Civ. P. 1.350(b)(4) and (5).

23 See Fla. R. Civ. P. 1.340(a)(8). There is no similar expressly stated waiver for objections to requests for production, but the requirement of stating the objection with specificity is also mandatory in Rue 1.350.

24 Fla. R. Civ. P. 1.350(b)(6).

25 *Id.*

26 Fla. R. Civ. P. 1.380(a)(4)(A) and (B).

27 Fla. R. Civ. P. 1.380(a)(4)(C).

28 Fla. R. Civ. P. 1.380(b).

29 Fla. R. Civ. P. 1.380(d).

CHANGES FROM THE 2025 Regular Legislative Session

By Peter M. Dunbar, Esq., Jones Walker, Tallahassee, Florida



The 2025 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of Section members. The Section is particularly appreciative of the Members of the House and Senate that sponsored initiatives this past Session, and these Members are acknowledged below with the legislation that passed during this Session.

In a quick overview of the legislation considered in the 2025 Regular Session, there were more than 1900 individual pieces of sponsored legislation; there were 45 formal floor sessions; and in the end, 289 bills made it all the way through the Legislature this year. Of those measures that made it to the Governor's desk, only 11 were vetoed.

All of the measures monitored by the Section from this past Session appear in chronological order by bill number, and each is followed with a brief summary of the bill text along with the applicable Chapter Law citation for each initiative. The effective date for each of the changes varies, and at the end of each summary, the date that the new law took effect is also noted. The final status and full text of each enrolled bill, including the legislative staff reports and Chapter Law citation, are available on the legislative web sites (www.leg.state.fl.us; www.flsenate.gov; www.myfloridahouse.com).

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I. SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Service of Process: CS/HB 157 by Representative Redondo revises the provisions of Fla. Stat. § 48.091 to expand the hours during which registered agents must be available for service and a registered agent may be served. Among its provisions, the legislation also revises the service on dissolved business entities, entities in receivership, and service where an individual conceals his or her whereabouts. The Section was asked to provide technical assistance on edits to the legislation, which were adopted. CS/HB 157 was approved by the Governor and took effect on April 29, 2025. **(Chapter 2025-13, *Laws of Florida*.)**

Trusts: CS/CS/SB 262 by Senator Berman and Representative Oliver is the Section initiative to revise how a trustee may exercise the power to invade principal as an authorized trustee administering a trust. The legislation provides that property devised to or from a revocable trust, which is devised, given, or distributed by a settlor during the settlor's lifetime is treated as a satisfaction of devise under certain conditions, and it provides that homestead property transferred by one or both settlor spouses to community property will not be treated as a change of ownership for purposes of reassessing the property**.** CS/CS/SB 262 was approved by the Governor and took effect on June 20, 2025. **(Chapter 2025-159, *Laws of Florida*.)**

Unlawful Action Concerning Real Property: CS/CS/SB 322 by Senator Rodriguez will permit a commercial property owner to request the sheriff to immediately remove persons unlawfully occupying the owner's property, and it provides the form for a verified complaint by the property owner. The legislation was amended to include the Section's recommendation that cures an incorrect cross reference to the statutory form of a warranty deed in Fla. Stat. Chapter 689. CS/CS/SB 322 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-112, *Laws of Florida*.)**

Community Associations: CS/CS/HB 913 by Representative V. Lopez and Senator Bradley is a follow-up to the legislation that addresses the building collapse in Surfside and related operational issues. The legislation authorizes the board to levy special assessments for loans and lines-of-credit for structural repairs subject to a vote of unit owners, and it clarifies options for master policy insurance coverage. Among its provisions, the legislation also requires associations to create online accounts with the Division by October 1, 2025; it clarifies the use of "pooled reserves;" it establishes conflict-of-interest standards for persons performing Milestone and SIRS inspections; it authorizes video conferencing of membership and board meetings; and it directs the Division to promulgate rules for the criteria of the remaining useful life of building components. The legislation also clarifies the association's obligation to maintain the required budget and annual financial statement documents; it clarifies the delinquency date for past due assessments and member participation at board meetings; it expands the options for electronic voting; it includes the Section initiatives that separate operational provisions in the Act applicable to non-residential condominiums; it conforms hurricane protection procedures to the Section's position; it revises the 2024 changes for vertical subdivisions and makes them prospective only; and it corrects the phrasing of criminal penalties. The legislation also modifies the regulation of community association managers by expanding conflict of interest standards; requires inclusion of professional standard provisions in management agreements; and requires managers to maintain an online licensure account at DBPR. CS/CS/HB 913 was approved by the Governor, and except as otherwise provided in the legislation, took effect on July 1, 2025. **(Chapter 2025-175, *Laws of Florida*.)**

Specie Legal Tender: CS/HB 999 by Representative Bankson specifies gold and silver specie as legal tender and also defines bullion and certain electronic currency as legal tender. The Section was asked to provide technical assistance on the legislation, and the Section's suggested revisions were included in the final bill. CS/HB 999 was approved by the Governor, and except as otherwise provided in the legislation, it will take effect on July 1, 2026. **(Chapter 2025-100, *Laws of Florida*.)**

Charitable Trusts: CS/CS/HB 1173 by Representative Duggan and Senator Yarborough amends the Florida Trust Code to give the Florida Attorney General exclusive standing to assert the rights of a qualified beneficiary in judicial proceedings relating to the administration of a charitable trust, including without limitation, contract and trust law claims relating to the charitable distributions and the exercise of trustee powers. The Section provided requested technical assistance on the legislation, and the suggested revisions were included in the final bill. CS/CS/HB 1173 was approved by the Governor and took effect on April 29, 2025. **(Chapter 2025-18, *Laws of Florida*.)**

II. INITIATIVES OF INTEREST

Exploitation of Vulnerable Adults: CS/SB 106 by Senator Martin was an Elder Law Section initiative that attempts to provide substitute service of process on "unascertainable respondents" who are internet scammers attempting to appropriate funds from vulnerable adults. CS/SB 106 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-158, *Laws of Florida*.)**

Administrative Procedures: CS/SB 108 by Senator Grall amends Fla. Stat. Chapter 120, and will require an agency to publish notice within 90 days of a legislative enacted rule-making requirement; it will not permit incorporated materials to be included by reference; it will require materials to be incorporated by rule to be made available; and it provides new

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criteria for the renewal of an agency emergency rule**.** CS/CS/HB 433 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-189, *Laws of Florida*.)**

Emergencies: CS/CS/SB 180 by Senator DiCeglie revises state and local policies when dealing with natural emergencies. Among its provisions, the legislation modifies Fla. Stat. § 83.63 and permits a tenant access to a premises rendered unusable by a casualty; it prohibits a local government from requiring substantial improvements to, or levying an impact fee for, repairs to an existing structure after a casualty; it provides new guidelines for the Division of Emergency Management in preparing for, and dealing with, declared states of emergency; and it authorizes each local government to designate and maintain at least one debris management site. CS/CS/SB 180/913 was approved by the Governor, and except as otherwise provided in the legislation, took effect on June 26, 2025. **(Chapter 2025-190, *Laws of Florida*.)**

State Land Management: CS/CS/SB 209 by Representative Snyder imposes new restrictions on the permitted installations and improvements allowed in a Florida state park. It prioritizes conservation-based recreational uses and associated facilities, and it prohibits the construction of sporting facilities within an existing state park. CS/CS/HB 209 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-76, *Laws of Florida*.)**

Public Records Exemptions: CS/CS/SB 268 by Senator Jones extends the exemption from public records for home addresses and telephone numbers for public officials, including, members of the U.S. Congress, members of the Florida Legislature, the Governor and members of the Florida Cabinet, local elected officials; and to the spouses and adult children of these designated officials. CS/CS/SB 268 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-195, *Laws of Florida*.)**

Limited Liability Companies: CS/SB 316 by Senator Berman amends the Florida Revised Limited Liability Act (Ch. 605) to provide for the creation of a protected series limited liability company modeled after the Delaware statutory structure and the framework from the Uniform Law Commission. The legislation specifies the definitions, operations and governance, powers and duties, and liabilities of a protected series limited liability company. The legislation also provides that a foreign LLC that does business in Florida is subject to the jurisdiction of Florida courts; and it requires the disclosure of parties in a foreign LLC when the LLC is a party in judicial or administrative proceedings in Florida. CS/SB 316 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-162, *Laws of Florida*.)**

My Safe Condominium Pilot Program: CS/CS/HB 393 by Representative V. Lopez revises the definition for participating condominium properties in the program and modifies the approval requirements for receipt of mitigation grants under the My Safe Florida Condominium Pilot Program. CS/CS/HB 393 was approved by the Governor and took effect on June 23, 2025. **(Chapter 2025-173, *Laws of Florida*.)**

Mitigation Banks: CS/CS/SB 492 by Senator McClain revises the schedule for credit releases from a mitigation bank. The legislation authorizes one-time use of mitigation credits outside the service area of a mitigation bank, and it requires each mitigation bank to provide an accounting of the number and types of credits that the mitigation bank has available. CS/CS/SB 492 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-191, *Laws of Florida*.)**

Electronic Transmittal of Court Orders: HB 513 by Representative Gentry provides that the Clerk shall electronically transmit a court order to the sheriff requiring an examination under the Baker Act, the issuance of a summons on a respondent under the Marchman Act, and service of a risk protection order on a designated respondent. The service must be transmitted within 6 hours after the court issues the order, and the sheriff must serve the order as soon thereafter as possible. HB 513 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-10, *Laws of Florida*.)**

Uniform Commercial Code: CS/CS/HB 515 by Representative Gentry creates a new Part 1 to Chapter 669, F.S., that incorporates newly promulgated Article 12 of the Model Uniform Commercial Code into the Florida Code. The legislation provides updated rules for commercial transactions involving virtual currencies, distributed ledger technologies, artificial intelligence, and other technological developments; and it establishes a baseline framework allowing creditors to secure liens against digital assets owned by debtors. CS/CS/HB 515 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-92, *Laws of Florida*.)**

Availability of Judges: CS/SB 538 by Senator Bradley requires each circuit to have at least one available judge for hearings with limited notice; it permits a certificate of proof to be authenticated by a judge; and it transfers certain responsibilities of the Office of State Court Administrator to the Justice Administration Commission. CS/SB 388 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-163, *Laws of Florida*.)**

Fire Protection: CS/CS/HB 551 by Representative Borrero will accelerate permitting by local governments for fire alarm and fire sprinkler projects, and it prohibits a local government agency from requiring additional plan reviews or documentation outside the scope of the permitted work. CS/CS/HB 551 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-115, *Laws of Florida*.)**

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Dangerous Dogs: CS/HB 593 by Representative Sapp revises the liability of "dangerous dog" owners and requires the owner to maintain at least $100,000 of liability coverage to cover any damages caused by the "dangerous dog." The legislation also requires that a "dangerous dog" must be securely confined indoors or in an enclosed pen or structure on the owner's property. CS/HB 593 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-61, *Laws of Florida*.)**

Public Lodging Establishments: SB 606 by Senator Leek revises the definitions in Fla. Stat. Chapter 509, and among its provisions, the legislation expands the term "transient occupancy" to include the occupancy of a unit at a hotel, motel, inn, vacation rental, or timeshare project unless there is a written rental agreement that expressly states that the unit is the sole residence of the guest. SB 606 was approved by the Governor, and except as otherwise provided in the legislation, took effect on July 1, 2025. **(Chapter 2025-113, *Laws of Florida*.)**

Electronic Delivery of Notices Between Landlord and Tenants: CS/CS/CS/HB 615 by Representative Esposito authorizes a landlord or a tenant to electronically deliver notices under certain conditions; it provides for an addendum to the rental agreement for authorization of the electronic delivery of notices; and it provides the methodology for update of the parties' email addresses and the revocation of the electronic delivery process. CS/CS/CS/HB 615 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-16, *Laws of Florida*.)**

Construction Regulations: CS/CS/CS/HB 683 by Representative Griffitts makes a variety of miscellaneous changes to construction regulations, and among its provisions, Section 4 of the legislation requires that at least one support rail of specific dimensions be installed in the interior of each elevator car serving the building. CS/CS/CS/HB 683 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-140, *Laws of Florida*.)**

Agricultural Housing and Electric Vehicle Charging: CS/CS/CS/SB 700 by Senator Truenow is the annual Department of Agriculture legislative package. Among its provision, Section 2 of the bill provides a partial preemption of local regulation of the construction of housing for agricultural workers; Section 7 of the bill preempts the local regulation of the installation of electric vehicle charging stations; and Sections 31 and 32 of the bill impose new restrictions on water quality additives to potable water systems. CS/CS/CS/SB 700 was approved by the Governor, and except as otherwise provided in the legislation, took effect on July 1, 2025. **(Chapter 2025-22, *Laws of Florida*.)**

Platting: CS/CS/CS/SB 784 by Representative Ingoglia revises the provisions in Chapter 177 to streamline the approval of plats and replats subdividing parcels of real property. CS/CS/CS/SB 784 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-164, *Laws of Florida*.)**

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Timeshare Management Firms: CS/HB 897 by Representative Berfield revises the conflict-of-interest standard for managers who are employed by a timeshare management firm and it permits a CAM to provide supplemental goods and services. It requires an annual disclosure as to the goods and services provided, and it revises the board meeting requirements for timeshare condominiums to require only one meeting per year. CS/HB 897 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-142, *Laws of Florida*.)**

Notary Public Fraud: CS/HB 915 by Representative J. Lopez will prohibit the literal translation of "notary public" into a language other than English, and it prohibits a person from advertising in a manner that conveys or implies that he or she possesses professional legal skill in immigration law. The legislation further provides for civil actions and the recovery of monetary losses resulting from a person engaged in a violation of the statutory prohibition. CS/HB 915 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-82, *Laws of Florida*.)**

Real Property and Condominium Disclosures: CS/CS/SB 948 by Senator Bradley requires a landlord of residential property to provide disclosure of flood risks to prospective tenants. The legislation also requires condominium developers and non-developer unit owners to expand the disclosures at the time of sale to include flooding-related disclosures. CS/CS/SB 948 was approved by the Governor and took effect on October 1, 2025. **(Chapter 2025-166, *Laws of Florida*.)**

Tampering With, Harassing or Retaliating Against Court Officials: CS/HB 1049 by Representative Persons-Mulicka provides new protections for court officials, and it provides penalties for persons who threaten, harass, or retaliate against court officials. CS/HB 1049 was approved by the Governor and took effect on October 1, 2025. **(Chapter 2025-126, *Laws of Florida*.)**

Local Government Land Regulation: CS/SB 1080 by Senator McClain imposes new requirements on a local government for the minimum information that must be submitted for zoning, rezoning, subdivision, and variance approvals. The legislation also imposes new restrictions on impact fees and limitations on the requests for additional information from an applicant. CS/SB 1080 was approved by the Governor, and except as otherwise provided in the legislation, it took effect on October 1, 2025. **(Chapter 2025-177, *Laws of Florida*.)**

Customary Use of Beaches: CS/SB 1622 by Senator Trumbull repeals the current statutory establishment of the recreational customary use of Florida beaches found in Fla. Stat. § 163.035. The legislation also requires the Board of Trustees of the Internal Improvement Trust Fund to adopt coastal erosion control lines by resolution in certain counties. CS/SB 1622 was approved by the Governor and took effect on June 24, 2025. **(Chapter 2025-178, *Laws of Florida*.)**

Affordable Housing: CS/CS/SB 1730 by Senator Calatayud expands the options for the construction of affordable housing on adjacent parcels in multifamily developments; it revises the definition of "commercial use," "industrial use," and "mixed use;" and it restricts the ability of a local government to impose a building moratorium. It also creates a new housing priority for employees of hospitals, health care facilities, and governmental entities. CS/CS/SB 1730 was approved by the Governor and took effect on July 1, 2025. **(Chapter 2025-172, *Laws of Florida*.)**

Annual Florida Tax Package: HB 7031 by the House Ways and Means Committee is the annual tax package. Among its provisions, the bill eliminates the business rent sales tax effective on October 1, 2025; it provides a permanent sales tax exemption for fire extinguishers, certain portable generators, tarps, ground anchor systems, carbon monoxide detectors, and certain batteries; it exempts charitable trusts for the state corporate income tax; it repeals the aviation fuel tax; it creates a permanent back-to-school sales tax holiday in the month of August; and it creates a sales tax exemption for bullion with a value of less than $500 (over $500 is currently exempt). HB 7031 was approved by the Governor, and except as otherwise provided in the legislation, it took effect on June 3, 2025. **(Chapter 2025-208, *Laws of Florida*.)**


P. DUNBAR

Peter M. Dunbar's *practice focuses on administrative, real property, and governmental law, and he currently serves as legislative counsel for the Real Property, Probate and Trust Law Section of the Florida Bar and as the General Counsel to the Florida Conference of Circuit Court Judges. Mr. Dunbar began his long career in Florida government as a distinguished member of the Florida House representing Pinellas and Pasco counties in the Florida Legislature. Upon leaving the Legislature, he held the posts of General Counsel and Director of Legislative Affairs under Governor Bob Martinez and as General Counsel at the Department of Financial Services. He also served as Chief of Staff during the transition from the Martinez administration to the administration of Governor Lawton Chiles. Mr. Dunbar is a graduate of The Florida State University; an honors graduate from The Florida State University College of Law; and was admitted to the Florida Bar in 1972. He served for 14 years as an adjunct professor at the FSU College of Law and is currently special counsel in the Tallahassee office of Jones Walker. Mr. Dunbar is a member of the American College of Real Estate Lawyers; he is a board-certified specialist in Condominium and Planned Development Law; and he was selected by his peers as a member of Florida Trend's Legal Elite Hall of Fame.*

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Photos by Silvia Rojas













PRACTICE CORNER

Probate And Trust Division

Navigating the Merge: A Practical Guide for Combining Irrevocable Trusts

By Jennifer Bost Thomas, Esq., Thomas Estate Law, PLLC, Ponte Vedra Beach, Florida

This article is a practical guide for combining irrevocable trusts under Fla. Stat. § 736.0417. Maintaining multiple trusts for the same beneficiary can be inefficient and costly. Combining multiple trusts into a single trust can be an effective strategy to simplify administration and reduce costs. The following twelve steps can help a practitioner design a successful merger.

1. Identify eligible trusts. Confirm that the trusts under consideration for merger are irrevocable and share substantially similar terms and beneficiaries, as required by Fla. Stat. § 736.0417(1).
2. Evaluate the merger rationale. Assess whether the rationale for the merger (for example, streamlined administration, cost savings, and unified purpose) advances the interests of all trust beneficiaries.
3. Review trust agreements. Review the trust agreements for merger clauses. If the trusts have specific merger requirements, determine whether those conditions are met and ensure any procedural requirements are followed.
4. Confirm governing law and statutory authority. Fla. Stat. § 736.0417 governs the merger of Florida trusts. If one of the trusts under consideration is governed by the laws of a different state, consider changing the situs of the out-of-state trust to Florida.
5. Identify any substantive differences among trusts. If the trusts have different beneficiaries, distribution terms, appointments, or tax attributes, those differences must be resolved before the merger. This may involve amending one trust or decanting into a new trust with similar terms before the merger.
6. Confirm Truste authority. Ensure the same trustee serves as trustee for all trusts, or coordinate trustee resignations and appointments so that a single trustee will administer the merged trust.
7. Evaluate tax characteristics of the trusts. Determine if the tax characteristics of all trusts align closely enough to allow for a merger without adverse tax consequences.
8. Provide notice to qualified beneficiaries. Fla. Stat. § 736.0417(1) requires that notice of a trust merger be provided to all qualified beneficiaries. Consider circulating a draft of the merger agreement with the notice so beneficiaries can see the exact terms. Ensure evidence of the notice is kept in the file (e.g., written acknowledgments or certified mail receipts).
9. Draft the merger agreement. Draft a formal merger agreement. Make sure to include the rationale for the merger, merger authority (trust provisions and statutory citations), names of the trusts being merged, and the fact that notice was given to all qualified beneficiaries. The agreement should explicitly state that the merger will not impair any beneficiary's rights or interests. The trust agreement that will be the governing document should be attached as an exhibit.
10. Secure beneficiary consents. It is often prudent to obtain the beneficiaries' consent. A unanimous consent by the beneficiaries can add an extra layer of protection against future disputes.
11. Transfer trust assets. After executing the merger agreement, transfer assets to the surviving trust.
12. Conduct post-merger administrative tasks. Inform beneficiaries that the merger has been completed and file final tax returns for terminated trusts. Beneficiaries should be provided with a copy of the final merger agreement for their records.



J. THOMAS

Jennifer B. Thomas *is the founder of Thomas Estate Law, PLLC, in Ponte Vedra Beach, FL, focusing on estate planning, business planning, charitable planning, and probate and trust administration. She earned her B.A. from Florida State University and her J.D. from Emory University School of Law. She is licensed to practice in both Florida and Georgia.*

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PRACTICE CORNER

Real Property Division

New FinCEN Residential Transaction Reporting Requirements

By Lisa M. Super, Esq., Zimmerman Kiser & Sutcliffe, P.A., Orlando, Florida

In an effort to deter and combat money laundering in the U.S. residential real estate sector, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) announced in August 2024 a final rule (the "Final Rule") known as the Anti-Money Laundering Regulations for Residential Real Estate Transfer Rule. The Final Rule requires certain persons involved in real estate closings and settlements to report information to FinCEN about specified transfers of residential real estate that are viewed as at a high risk for illicit finance by virtue of filing a Real Estate Report. The Final Rule was originally scheduled to take effect on Dec. 1, 2025; however, all reporting persons are now exempt from the requirements of the Final Rule until March 1, 2026, pursuant to an Exemptive Relief Order issued by the administration.



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What is a Reportable Transfer?

According to FinCEN, a transfer of residential real property is defined as "any transfer of an ownership interest in residential real property that is demonstrated through a deed or, for an interest in a cooperative housing corporation, through stock, shares, membership, a certificate, or other contractual agreement evidencing ownership," including transfers of ownership for which no consideration is exchanged. A transfer constitutes a "reportable transfer" when: 1) the property transferred is residential real property located in the U.S., 2) the transfer is non-financed, 3) the property is transferred to a transferee entity or trust, and 4) an exemption does not apply.

Note that a transfer does not constitute a reportable transfer if it is a transfer that is: (i) a grant, transfer, or revocation of an easement; (ii) resulting from the death of an individual, whether pursuant to the terms of a will, the terms of a trust, the operation of law, or by contractual provision; (iii) incident to divorce or dissolution of a marriage or civil union; (iii) made to a bankruptcy estate; (iv) supervised by a court in the United States; (v) for no consideration made by an individual, either alone or with their spouse, to a trust of which that individual, that individual's spouse, or both, are the settlors or grantors; (vi) to a qualified intermediary for the purposes of a like-kind exchange for purposes of Section 1031 of the Internal Revenue Code; or (vii) a transfer for which there is no reporting person.

What constitutes Residential Real Property?

The definition for Residential Real Property is real property located in the U.S. that includes a structure designated principally for occupancy by one to four families. It can also be: (i) land upon which a transferee intends to build a structure designed principally for occupancy by one to four families; (ii) a unit designated principally for occupancy by one to four families within a structure on land; or (iii) a share in a co-op.

What is a Non-Financed Transfer?

A transfer is non-financed if it does not involve an extension of credit that is both secured by the transferred property and extended by a financial institution subject to anti-money laundering ("AML") and suspicious activity report ("SAR") obligations.

What is a Transferee Entity? What is a Transferee Trust?

A transferee entity is any person other than a transferee trust or an individual. This can include a corporation, partnership, estate, association, or limited liability company. A transferee trust is a trust where a grantor or settlor places assets under the control of a trustee for the benefit of one or more beneficiaries or for a specified purpose. Certain entities and trusts are exempt, including banks, credit unions, insurance companies and state licensed insurance producers, governmental



authority, securities reporting issuers, securities brokers, public utilities, entities registered under the Commodity Exchange Act, and statutory trusts, among others.

What type of information goes into the Real Estate Report?

The reporting person must submit on the Real Estate Report information necessary to identify: (i) themselves; (ii) the residential real property being transferred; (iii) the transferor; (iv) the transferee entity or transferee trust; (v) the individuals representing the transferee entity or transferee trust in the transfer; (vi) the beneficial owners of the transferee entity or transferee trust; and (vii) the total consideration paid for the property.

When is the Real Estate Report due?

The Real Estate Report must be filed by the later of (i) the last day of the month following the month in which the date of closing occurred, or (ii) 30 calendar days after the date of closing.

This article provides a general summary of the new FinCEN Residential Transaction Reporting Requirements. A more detailed article reagarding FinCEN wil appear in an upcoming issue.


L. SUPER

Lisa M. Super *practices with the law firm of Zimmerman, Kiser & Sutcliffe, P.A. in Orlando, Florida, and focuses primarily on residential and commercial real estate transactions, and lender representation. Ms. Super completed her undergraduate studies at Eastern Michigan University and earned her juris doctor from Ave Maria School of Law. She is currently serving as the President of the Central Florida Real Estate Attorney's Council.*

Probate Case Summaries

By Mellissa D. Stubbs, Esq., Wilson & Johnson, P.A., Naples, Florida

In re: Amendments to Florida Probate Rules – 2024 Legislation (02/27/25):

Rule 5.240(b)(7) and Rule 5.241(b)(2) – amended to clarify that a written demand to the personal representative or curator regarding whether property held by the decedent or surviving spouse at the time of the decedent's death is property to which the Florida Uniform Disposition of Community Property Rights at Death Act applies must be filed with the clerk.

In re: Amendments to Florida Probate Rules – 2025 Legislation (03/20/25):

Rule 5.040 – amended to require that formal notice be served electronically on a lawyer who has appeared in a matter for an interested person in accordance with Florida Rule of General Practice and Judicial Administration 2.516 (service of pleadings and documents). For unrepresented persons, formal notice must continue to be served in one of the manners listed in rule 5.040.

Rule 5.499(e) – amended to "at the time of filing [the objection] or promptly thereafter."

In re: Amendments to Florida Probate Rules – 2025 Legislation (08/28/25):

Rule 5.405(b)(4) – added to require that a petition to determine the protected homestead status of real property owned by a decedent or trustee of a trust of a deceased settlor must state "whether the decedent died testate or intestate."

Rule 5.405(b)(5) – amended to require the petition to include the method by which the surviving spouse waived homestead rights, if applicable.

Rule 5.405(d) – amended to remove references to "of the decedent" when referring to homestead. That language is not included in the definition of "protected homestead" in Fla. Stat. § 731.201(33).

When a challenger in a probate matter is not an interested person, said challenger lacks standing to object to personal representative's admission of the Last Will and Testament.

Griffin v. Pearson, 2025 WL 2088700 (Fla. 6th DCA July 25, 2025).

In September 2012, Martha Harwell Tiller died testate. Her 2012 Last Will and Testament named Christina Pearson as her personal representative. The Will named Ms. Pearson and Bette Kasch as beneficiaries.

Eleven years after Ms. Tiller's death, Dathan A. Griffin moved into Ms. Tiller's empty home. He paid property taxes and cleaned and repaired the home in an effort to establish adverse possession. During this cleanup, Mr. Griffin searched Ms. Tillers belongings. Among her papers, he found a 1979 Will.

Using the 1979 Will, Mr. Griffin sought to attack the validity of the 2012 Will. The court found that Mr. Griffin was not a personal representative or a beneficiary or identified in the 2012 Will in any way. Similarly, the court found that Mr. Griffin was not identified in the 1979 Will in any way.

Hoping to establish himself as an interested party, Mr. Griffin argued that he could reasonably be affected by the outcome of the particular proceeding involved. He stated that without the ability to participate in the probate proceeding, he could be homeless and lose all of the time and money already invested in the home.

The estate argued that Mr. Griffin is a "stranger to the estate," and, as a stranger, he is not an interested person.

The trial court ruled in favor of the estate.

After reviewing the matter de novo, the appellate court agreed with the trial court. It found that Mr. Griffin's only claim in the matter was work he performed after Ms. Tiller died. He is not a personal representative or a beneficiary under either Will. He is not a creditor. The court opined that, "[w]hile the statute does not offer strict guidelines over who might claim interested person status in a probate proceeding, it in no way contemplates someone like [Mr. Griffin]." Given that Mr. Griffin is not an interested person, the appellate court lacked jurisdiction over the appeal, and the appeal was dismissed.

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Where removal of a personal representative is ordered without notice or an evidentiary hearing, such removal does not comply with the requirements of due process.

Maestrales v. Maestrales, 417 So. 3d (Fla. 4th DCA 2025).

Following the death of her father, Sophia Maestrales ("Sophia") was named as personal representative of the estate. Letters of Administration were issued. Several years later, Sophia's sister and brother independently filed petitions. Sophia's sister sought for partial revocation of the Will. Sophia's brother sought to have Sophia removed as personal representative. Two separate hearings were scheduled for the petitions.

Sophia's sister voluntarily dismissed her petition for partial revocation of the Will the night before the hearing. Sophia and Sophia's sister did not attend the hearing. Neither of the attorneys representing them attended on their behalf. Despite dismissal, the court held the hearing on the sister's petition for partial revocation. The brother's attorney attended the hearing. Despite the hearing being set for the sister's petition, the court proceeded to hear arguments on the brother's petition to have Sophia removed. Without any opposition against the removal petition, the court removed Sophia, revoked her letters of administration, and canceled the brother's upcoming hearing on his motion as moot.

After reviewing the matter de novo, the appellate court reaffirmed its position that when a personal representative is removed without notice and without an evidentiary hearing, the removal is without proper due process. It noted that the sister's petition to revoke a portion of the Will and the brother's petition to remove the personal representative, addressed two distinct issues. Further, these two distinct issues were set and noticed for hearings on two separate dates. When the trial court allowed the brother's issue to be heard during the hearing set aside for the sister's issue, without notice to Sophia and without giving Sophia an opportunity to be heard, the trial court committed a fundamental error.

A party asserting that a court denied it due process must "offer pertinent evidence to support its position," and when a decedent dies without a surviving spouse or children, the homestead is not constrained by restrictions on devise.

Property Solutions Powerhouse, LLC v. Jonathon Nelson, 413 So. 3d 915 (Fla. 2d DCA 2025).

When Margaret O. Templeton died in July of 2020, her friend, Jonathon Nelson, filed a petition to establish her lost will and for the summary administration of her estate. The Will devised the residuary of the estate to Mr. Nelson. After notice and hearing, the trial court admitted the Will and awarded the residuary, including Ms. Templeton's homestead, to Mr. Nelson.

Later, Property Solutions Powerhouse LLC ("Property Solutions") claimed it was entitled to Ms. Templeton's homestead. Their claim was based on the argument that the residence was not probate property subject to administration. Further, they asserted that some of the intestate heirs assigned their rights in the homestead to Property Solutions, making them an interested party in the administration of the estate. They argued that the hearing was held without notice, and, therefore, the order admitting the will to probate was void.

The trial court denied rehearing on the matter.

On appeal, Property Solutions asserted that the corporation was denied due process. It claimed that, because it was an interested party, it should have been noticed for the hearing to establish the lost will and for summary administration. Unfortunately for Property Solutions, the appellate court held that the company failed to establish that Ms. Templeton actually had intestate heirs and failed to establish that Mr. Nelson did not give notice to the interested parties.

Property Solutions also argued that the homestead was not a probate asset and should have passed outside of Ms. Templeton's estate to Ms. Templeton's heirs. The appellate court agreed with Mr. Nelson that, because Ms. Templeton was unmarried and without minor children, her homestead was an estate asset, and she could devise her homestead as she pleased.

Unsurprisingly, the appellate court affirmed the lower court's order admitting Ms. Templeton's will and order of summary administration awarding the residuary to Mr. Nelson.

When a devise under the testamentary documents of a decedent exceeds the obligations under the decedent's premarital agreement, the decedent has generally complied with the marital agreement.

Adelson v. Kalter, 410 So. 3d 715 (Fla. 3d DCA 2025).

Jacquelyn Adelson and her husband executed a premarital agreement. The agreement provided that upon the death of her husband, Ms. Adelson would receive the greater of $250,000 or an amount equal to ten percent of the estate.

When her husband passed away, his net estate was worth $4,943,475.59. Pursuant to the terms of her husband's trust, Ms. Adelson received $1,000,000. In addition to this devise, Ms. Adelson sought the amount promised in the premarital agreement, the greater of $250,000 or ten percent of the estate. The estate objected. The trial court held in favor of the estate.

The appellate court agreed. It held that a will or trust that bequests a greater amount than required by a marital agreement generally complies with the marital agreement. The decedent "not only complied with his obligation under the prenuptial agreement—he exceeded it."

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Real Property Case Summaries

Prepared by Camille T. Bailey, Esq., Sajdera, P.A., Boca Raton, Florida

The court affirmed the trial court's decision, finding that an amendment to the Master Declaration unlawfully removed condominium unit owners' collective rights to the common elements under the Condominium Act.

*De Soleil S. Beach Ass'n, Inc. v. Perrin, No. 3D24-0707, 2025 WL 1888449, at *1 (Fla. Dist. Ct. App. July 9, 2025), reh'g denied (Sept. 22, 2025).*

Appellees, Amber Perrin and Susan Rainone, as Trustee of the Susan Rainone Revocable Trust, are unit owners in De Soleil South Beach, a condominium located in Miami Beach. The appellant, De Soleil South Beach Association, Inc. (the "Master Association"), is the governing master association.

In 2006, the developer recorded two governing instruments: (1) the Declaration of Condominium ("Condo Declaration") governing the residential units under the Residential Association, and (2) the Master Declaration, which divided the property into three parcels, the residential units, garage, and commercial space.

In 2016, the Master Association adopted the Second Amendment to the Master Declaration (the "Proposed Amendment"), which expanded the Master Association's control at the expense of the Residential Association's unit owners. Among other things, it restricted their access to common elements and granted the Master Association the right to impose fines and liens directly.

The Master Association sought declaratory relief affirming its authority under the Proposed Amendment. The unit owners opposed and counterclaimed, arguing that the amendment violated the Condominium Act. The trial court agreed, finding that the amendment improperly divested the unit owners of rights to the common elements.

The appellate court affirmed, holding that the amendment contravened Fla. Stat. § 718.107, by attempting to separate, convey, or encumber common elements appurtenant to the condominium units without also conveying title to the units. The court relied on *IconBrickell Condo. No. Three Ass'n, Inc. v. New Media Consulting, LLC*, 310 So. 3d 477 (Fla. 3d DCA 2020), which held that a declaration of condominium cannot supplant rights conferred by the Condominium Act.

The court reiterated that condominium unit owners hold an undivided share and collective control over the common elements appurtenant to their units and that such rights cannot be abrogated by amendment absent conveyance of title. Accordingly, the appellate court affirmed the trial court's ruling.

Trial court erred in granting Association's motion for summary judgment and finding that appellant's unjust enrichment claim was not barred by the Florida's Construction Lien Law

Hernandez v. Burleigh House Condo., Inc., No. 3D25-0109, 2025 WL 2326177 (Fla. Dist. Ct. App. Aug. 13, 2025).

The Appellee, Burleigh House Condominium, Inc. ("Association"), hired First Response Restoration Team, LLC ("First Response") to repair fire damage to the condominium property. After completing the work, First Response invoiced the Association for $155,147, which the Association refused to pay. Jorge Hernandez, president of First Response, recorded a construction lien against the property.

The Association later filed a notice of contest of lien, and because First Response took no further action, the lien was extinguished by operation of law. Hernandez subsequently filed suit for unjust enrichment to recover payment for the work performed. The Association moved for summary judgment, arguing that the claim was barred by Fla. Stat. § 713.22(2), and the trial court agreed.

The appellate court reversed, holding that extinguishment of a construction lien does not preclude a separate cause of action at law for unjust enrichment. Relying on Fla. Stat. § 713.30, the court noted that the Construction Lien Law is not an exclusive remedy and expressly allows lienors to maintain other actions to collect unpaid debts.

The trial court's reliance on *Doral Collision Ctr., Inc. v. Daimler Tr.*, 341 So. 3d 424 (Fla. 3d DCA 2022), was misplaced. The appellate court found that the *Doral Collision Center* case was distinguished from the present case in that the Doral case "considered whether Florida's Motor Vehicle Repair Act" precluded a vehicle repair shop's unjust enrichment claim, not whether a construction contractor's unjust enrichment claim is precluded by Florida's Construction Lien Law. *Hernandez v. Burleigh House Condo., Inc.*, No. 3D25-0109, 2025 WL 2326177, at *3 (Fla. Dist. Ct. App. Aug. 13, 2025). Accordingly, the appellate court reversed and remanded for further proceedings.

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Real Property Case Summaries, from page 42

Trial court erred by not ordering a commercial tenant to pay rent into the court registry pursuant to Fla. Stat. § 83.232 prior to entering a final judgment of possession

Cross v. Edgewood Grande, LLC, 412 So. 3d 199 (Fla. 5th DCA 2025).

The landlord, Edgewood Grande, LLC ("Edgewood"), and the appellant tenant entered into a ten-year commercial lease beginning March 1, 2022, with monthly rent of $5,885. In June 2023, the landlord served a notice of nonpayment and subsequently filed an eviction action.

Edgewood moved the court to order the tenant to deposit $29,540 in unpaid rent into the court registry and to hold a hearing to determine the proper amount due. Without conducting a hearing, the trial court entered a default against the tenant for failure to deposit rent. The tenant later moved to set aside the default, arguing that she had filed an answer as required under Fla. Stat. § 83.232(1) and that the court had not entered an order requiring rent to be deposited, as mandated by subsection (2).

The appellate court agreed, holding that in nonresidential tenancy cases, a trial court must first order the tenant to pay rent into the court registry before entering a default for nonpayment. Given that no such order was entered, the default judgment was improper.

Accordingly, the Fifth District reversed the final judgment and remanded for further proceedings.


C. BAILEY

Camille Bailey *practices with the law firm of Sajdera, P.A. in Boca Raton, Florida, where she focuses on condominium and homeowners' association law, as well as business litigation. Ms. Bailey represents associations and individual owners in property disputes, enforcement actions, and trial matters. She completed her undergraduate studies at the University of South Florida and earned her Juris Doctor from Florida Coastal School of Law.*

Probate Case Summaries, from page 41

Where a personal representative has vested discretion in administering an estate, the court will not control or interfere, so long as the discretion is honestly and reasonably exercised.

Hinson v. Hinson, No. 3D24-2121, 2025 LZ 471431 (3d DCA Oct. 15, 2025).

When John A. Hinson died, his residuary estate was divided as follows: 95% to his surviving spouse, Jeanine Hinson; 3% to his secretary, Monica Pellela; and 2% to his friend, James Baker. His wife was appointed personal representative.

Mr. Hinson's estate included partnership interests in a closely held Georgia limited liability partnership and shares of stock in six closely held Florida corporations. The personal representative sought to divide those interests on a pro-rata basis to the remainder beneficiaries. Both Ms. Pellela and Mr. Baker objected. The trial court, considering Ms. Pellela's age and infirmity, ruled that the assets should be distributed in cash and not in kind.

Upon appeal, the court addressed the question on whether the trial court was "permitted to override the Personal Representative's decision to distribute the remaining assets. . . in kind." To answer this question, the appellate court looked to the terms of Mr. Hinson's Will, which gave the personal representative broad discretionary powers to administer the estate. It also looked to the Probate Code, specifically Fla. Stat. § 733.801, which states that "assets shall be distributed in kind."

The court acknowledged that Fla. Stat. § 733.801 provides some exceptions to the preference to in-kind distribution. One exception, in particular, caught the court's attention: where there is a contrary intention indicated in the will or trust. On appeal, Mr. Baker argued that the general power of sale in the Will qualifies as contrary intent to in-kind distribution. The court considered the argument but did not agree. It stated that the power, at most, grants the personal representative permission to sell assets, if they choose. It does not "serve to alter the discretion" given to the personal representative. In the end, the beneficiaries were forced to accept their minority interests in the entities.


M. STUBBS

Melissa D. Stubbs *practices in the areas of estate planning, estate and trust administration, business planning, charitable planning, and guardianship. Ms. Stubbs earned her J.D. from Ave Maria School of law, where she was on the Dean's List all six semesters and graduated magna cum laude, ranked third in her class. While in law school, she was a member of the Ave Maria Moot Court and served on the board as Vice President of Publications during her final year. She received the top grades in the class in Legal Research and Writing I; Legal Research and Writing II; Wills Trusts, and Estates; and Jurisprudence. Ms. Stubbs is a member of the Collier County Bar Association, including Women's Bar Association and a member of the Real Property, Probate and Trust Law section of the Florida Bar.*

Probate and Trust Division Roundtable



Highlights of the Meeting of the Section

PROBATE AND TRUST DIVISION

SATURDAY, AUGUST 23, 2025

The Breakers • Palm Beach, Florida

Prepared by Lyudmyla Kolyesnik, Esq., Jacksonville, Florida

Thank you to the Probate Roundtable Sponsors: Stout Risius Ross, Inc. and Guardian Trust Foundation, Inc.

Director of the Probate and Trust Law Division, Sancha K. Brennan, called the meeting to order at 8:07 a.m.

Division Director Announcements. The Division Director reminded members that committee chair reports are due in the near term. All committee updates and project reports must be submitted prior to the December Executive Council meeting to allow sufficient time for inclusion in the Executive Council agenda, as needed. Members were also reminded of attendance requirements: each member of the Section's Executive Council must attend at least two Executive Council meetings in person per year. Failure to meet this requirement will result in the member being deemed to have resigned. Sancha congratulated Joe Percopo on achieving Board Certification in Wills, Trusts, and Estates, recognizing this significant professional accomplishment.

Sponsor Announcements. Sancha K. Brennan recognized the Probate Roundtable sponsors, Stout Risius Ross, LLC ("Stout") and Guardian Trust Foundation, Inc. ("Guardian Trust"). Garry Marshall was present on behalf of Stout. Travis D. Finchum, Esq., was present on behalf of Guardian Trust.

FLEA Announcement. Sarah Butters shared an announcement regarding the FLEA conference scheduled for October 17 – 18, 2025. The event, The Probate Team 2025, will be held at the Caribe Royale, Orlando, Florida.

Action Items: None.

Information Items: None.

Committee Reports:

Trust Law. M. Travis Hayes, Chair; Jolyon D. Acosta, Frederick "Ricky" Hearn, and Jennifer J. Robinson, Co-Vice Chairs. Jeff Goethe presented on the revisions to the pretermitted child legislation, which should be ready as an action item for the December 2025 Executive Council meeting. The Committee had over 200 comments and is finalizing the draft legislation. At this time, the draft legislation does not include inheritance via revocable trusts, it only includes inheritance via probate.

Travis Hayes also presented proposed legislation to amend Fla. Stat. § 736.0502, by adding a new subsection clarifying that a spendthrift provision remains valid even when the beneficiary also serves as trustee, provided the beneficiary's discretion to make distributions to himself or herself is limited by an ascertainable standard. The proposed changes to the statute are intended to eliminate the risk of a writ of garnishment in such circumstances where the beneficiary serves as trustee and ensures that spendthrift protections continue to apply when a beneficiary serves as trustee.

Consumer Protection Pamphlet Subcommittee re: Rights of Beneficiaries of Irrevocable Trusts. Frederick "Ricky" Hearn presented the subcommittee's work on preparing a Florida Bar consumer protection pamphlet addressing the rights of beneficiaries of irrevocable trusts. The subcommittee has drafted the pamphlet, which is currently under review by the Florida Bar Consumer Protection Department for approval.

Probate Law and Procedure. Theo Kypreos, Chair; Ben Diamond, Stacey Prince-Troutman and J. Grier Pressley III, Co-Vice Chairs. Travis Hayes presented a proposed amendment to Fla. Stat. § 731.1065, to clarify that gold and silver coins treated as legal tender are exempt from classification as tangible personal property.

Estate and Trust Tax Planning. Andrew H. Thompson, Chair; Denise Cazobon and Joseph Percopo, Co-Vice Chairs. Andrew Thompson reported on the upcoming FinCEN reporting requirements for non-commercially financed real

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estate transactions, effective December 1, 2025. Under the rule, certain non-financed transfers to trusts, LLCs, corporations, and other legal entities must be reported to FinCEN, including information about the property and the parties involved. Exemptions include transfers incident to death, divorce, court-approved settlements, or transfers to a revocable trust or a trust for the benefit of a spouse. Transfers incident to death include testamentary trusts under a revocable trust, or Will, that get funded at death. The Section is working on putting together a CLE on the subject.

Marve Ann Alaimo presented on the civil and criminal penalties for failure to report. Reports must include the beneficial ownership information (BOI) of trustees, officers, substantial owners, and other legal entities, including names, dates of birth, and identification, and are filed by the professionals involved in the transfer. No filing fee applies.

Key Reporting Requirements:

Reportable Properties: Residential real estate, including multi-residential of more than units and vacant lots zoned for residential use.

Reportable Transfers: Non-commercially financed transfers only, including purchase money mortgages, third-party financing, gifts, and similar transactions.

Reportable Recipients: Transfers to trusts, LLCs, corporations, or other legal entities. Transfers to individuals are exempt.

Exemptions: Transfers incident to death or divorce, including testamentary trusts created at death.

Court-approved settlements. Transfers for no consideration to a revocable trust created by the grantor or to a trust for the benefit of a spouse.

Ad Hoc Rules Revisions Committee. J. Richard "Rich" Caskey, Michael Hargett and Thomas Karr, Co-Chairs. Rich Caskey presented regarding the new civil rules, effective January 2025. He reported that the committee is preparing four articles for ActionLine and associated CLE programs relating to the new rules and their effect. Proposed amendments to the civil rules are currently pending review in the Civil Rules Committee.

Wills, Trusts and Estates Certification Review Course. J. Allison Archbold, Chair; Eric Virgil and Alyse Reiser, Co-Vice Chairs. Allison Archbold shared that The Florida Bar is dissatisfied with the current pass rate of 18% for the Wills, Trusts, and Estates Board Certification, and is looking for a passing rate closer to 70%. Allison proposed breaking the topics into separate certifications, but the committee expressed reservations about this approach. The committee is reviewing the test specifications to identify topics unnecessary for Trust and Estates professionals, such as business valuation, and exploring the possibility of allowing candidates to choose among essay topics or alternative essays, if permitted by the Bar. Brett Henson, Vice Chair of the Construction Law Committee and Certification Committee, noted that committees across practice areas are under pressure to improve pass rates, which currently vary widely, with some as low as 10%. Brett will present at the December Executive Council meeting regarding suggested improvements that may be considered. Committee discussion included whether a minimum pass rate is appropriate and whether the exam questions yield definitive answers or allow for multiple acceptable responses.

Adjournment. Meeting was adjourned at 8:59 a.m.

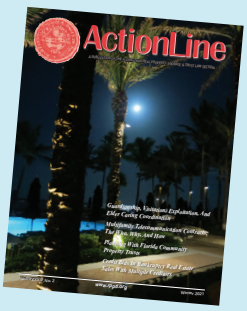
ActionLine Call for Articles

ActionLine is seeking articles that:

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

Forward any proposed article overview or news of note to Erin Farrington Finlen at erin@estatelaw.com and Michelle Hinden at mhinden@nishadkhanlaw.com.

Deadlines for all submissions are as follows:





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



Roundtable

Highlights of the Meeting of the Section

REAL PROPERTY DIVISION ROUNDTABLE

SATURDAY, AUGUST 23, 2025

The Breakers • Palm Beach, Florida

Prepared by Colleen Coffield Sachs, Esq., Santa Rosa Beach, Florida and Rebecca L.A. Wood, Esq., Gainesville, Florida

Thank you to the Roundtable Sponsors: The FNF Family of Companies

The Director of the Real Property Law Division, Steve Mezer, called the meeting to order at 8:03 a.m.

Sponsor Announcement. The FNF Family of Companies was thanked for sponsoring the meeting.

Recognition and Introductions. The hard work and success of the Legislative Update program were recognized. Several law students were in attendance and were introduced.

Presentation. Adele Stone continued the History of Florida Real Estate Series, presenting A Tale of Two Henrys: Henry Platt on the west coast and Henry Flagler on the east coast. The program discussed how their railroads helped develop a state that was then empty.

Update: Melissa Murphy provided an update on fraudulent transactions, the Real Estate Reporting Rule, and FIRPTA.

Fraud is rampant, and politicians have taken notice, but some efforts are ill-informed; one of which is Lee County's pilot project requiring identification for grantors and grantees before recording deeds. The ALTA board directed consideration of endorsements that will give coverage for fraud – the 49 (issued simultaneously with an owner's policy) and the 49.1 are intended for people who already have an owner's policy. The FLTA has received both, and discussions are open to consider the language of those endorsements and a rate for them. Questions should be directed to Jim Russick.

The Real Estate Reporting Rule, issued and approved by FinCEN, requires that all transfers into an entity or trust, regardless of price, be reported to FinCEN, including information about the transferor, transferee, and the source of funds. Most underwriters are providing a lot of support because reporting is the closing agent's responsibility. Penalties are very specific.

For closing agents who facilitate the buyer's obligation to remit the FIRPTA withholding, there is a recent presidential executive order stating that the government won't pay by check or accept payments by check. This has raised the question of how the closing agent can continue to assist the buyer with their FIRPTA withholding.

Florida Realtor-Attorney Joint Committee: Fred Jones reported that the Florida Bar annually appoints 6 to 7 members to the Florida Realtor-Attorney Joint Committee to serve a two-year term. He noted that the work of this committee, including the drafting of the form contracts for the purchase and sale of residential real estate, is very important to the industry. He encouraged attendees to get the word out that applications for appointment to the committee are due October 26, 2025. The more applications received, the more resources are available to draw from. Those interested in applying can contact Fred Jones or Colleen Sachs.

Action Item. Florida Realtor-Attorney Joint Committee, Lori Ward and Colleen Sachs.

Lori and Colleen presented three proposals to amend the residential contracts, effective in 2025.

Because the FinCEN GTO is being replaced with the real estate reporting rule, it is proposed that paragraph 18 (i) be modified to match ALTA's language with modifications for Florida.

In response to recent case law that severely limited recovery of attorney's fees, there is a proposal to modify paragraphs 16 and 17 to provide that prevailing party fees are available and to limit the mediation requirement to deposit disputes only. The thought process was to clarify that the contract never intended to make prevailing party fees unavailable if they

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did not mediate first, but mediation should be required for deposit disputes.

The final proposal is to change the way time is calculated. The proposed language is designed to make it easier for non-lawyers to calculate time where required throughout the contract correctly.

If approved at the Real Property Division, it would then be sent to the Executive Committee for interim action so it would be ready December 1, when the real estate reporting rule is expected to become effective. Melissa Murphy moved approval, Maggie Thumberg seconded, and the vote was largely unanimous, with one no vote indicated by a raised hand and no comment.

Certification – Bruce Partington and Brett Henson of the Construction Law committee reported that there will be a meeting at the December meeting for all certification areas of the Section to discuss the definition of "minimally qualified candidate." They would like to have a position as the Section as a whole. Those on certification committees are required to attend, and all others are welcome.

TODI – Jason Ellison, Susan Spurgeon, and Chris Smart reported that a committee has been approved to discuss the potential hole between Fla. Stat. § 55.10, and the probate statutes. Some take the position that a perfected money judgment lien drops off the land; others disagree. Susan Spurgeon noted that one can only deed out what they own, so if they deed out land encumbered by a lien, it goes to the grantee with a lien. Chris Smart points out that we are not talking about mortgages or any other consensual liens. There is recourse for those creditors that is personal against the transferees. The lien is off the land if the creditor had not taken action to levy during the debtor's lifetime. Homer Duvall points out that the period a person must file a claim against the estate is apparently unrelated to the creditor's lien period. A question was raised about the impact this has on other liens that don't attach to specific properties, such as municipal liens. Mike Hargett said the current state of the law is based on a Second DCA decision that the lien against the land expires on death. Chip Waller pointed out that whether insuring title is possible or not is the key.

Civil Rules of Procedure – Chris Smart and Shawn Brown discussed two rules: serving unknown parties and derivative actions. Chris Smart serves on the Florida Bar Civil Rules of Procedure Committee.

99-Year Leases. There is an issue with 99-year leases that are now near the end of their terms, making the property unsaleable. It is necessary to figure out a way out of the problem. This is particularly troublesome in Miami Beach, where many leases are in their 70th year. ACREL is looking at this. Michael Gelfand says that England and Hawaii have examples. There was a Wall Street Journal article discussing this issue nationwide. Alex Dobrev, Brenda Ezell, and Michael Gelfand indicated interest in working on this. Michael points out that a problem with creating a cure is addressing the interests of the owner of the remainder. This is because the value of that property has skyrocketed, and divesting them of their rights can be problematic. A motivation for the heirs to accept less than market value is that they currently get tiny rent payments.

Redaction. There is a fraud issue because individuals' names are not included in the records. The breadth of the class of protected parties increases the prevalence of fraud. All areas of real estate are affected by redaction.

CLE Liaison. There is a CLE on criminal penalties involving condominiums. It will be held on November 19th. The co-chairs of the Real Property certification review course are looking for ideas to revamp the course. It is scheduled for March 20-22, 2026.

FLTA Liaison. There has been continuing discussion about attorney opinion letters. Ray Winger from DFS will participate in a conversation panel discussion about unlawful inducements and Butler Rebates.

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

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Advanced Condominium and Planned Development Certification Review Course January 22-23, 2026	**In-Person - Miami Tower or via Webcast**
Advanced Real Estate Law and Certification Review Course March 20-21, 2026	**Orlando Airport Hyatt**

Executive Council Meeting & Annual Convention

DATE
LOCATION
REGISTER AT URL