

Understanding Florida Ancillary Administrations

Presented by:
LEGAL EDUCATION DEPARTMENT
of
Attorneys' Title Fund Service, LLC

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Understanding Florida Ancillary Administrations

Bob RohanRegulatory Compliance Counsel, The Fund

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Setting the Scene

Importance of public records

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"Attorneys handling estate proceedings should always have as one objective leaving recorded evidence sufficient to enable future title examiners...to assure themselves the estate was completely and properly administered"

"Nonresident Testate Decedents and Florida Real Property – Conveying Insurable Title to a Purchaser for Value" 36 Fund Concept 63 (Jun. 2004)



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Common scenarios

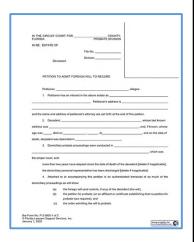
- 1. A will devising nonresident decedent's Florida real property is probated in another state
- 2. A mortgage in favor of a nonresident decedent encumbers Florida real property
- 3. No probate is opened in domiciliary jurisdiction of nonresident testate decedent who owned Florida real property
- 4. Nonresident decedent's cooperative apartment devised to niece



Forms

Florida Lawyers Support Services, Inc. (FLSSI)

- Petition to Admit Foreign Will to Record (P-2.0800)
- Petition for Ancillary Administration (Testate) (P-3.0140, P-3.0150, and P-3.0151)
- Petition for Ancillary Administration (Intestate) (P-3.0160, P-3.0170, and P-3.0171)



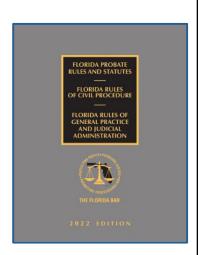


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Rules

https://www.floridabar.org/rules/ctproc/

- Download free pdf
- Purchase softbound book which includes Rules of Civil Procedure and Rules of General Practice and Judicial Administration





The Big Picture

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Ancillary administration – legal process

- Similarities
 - Proof of death
 - Will admitted to probate
 - Beneficiaries identified
 - Personal representative (PR)
 - Creditors' claims
 - Estate tax liens



Ancillary administration – legal process

- Differences
 - Never homestead
 - Authenticated copies
 - Personal property disposition
 - No elective share rights
 - Heightened concern for community property rights
 - Summary proceeding alternative



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Definition - authenticated

- Sec. 731.201(1), F.S.
- Certified copy or copy authenticated according to the Federal Rules of Civil Procedure
 - Rule 44 Proving an Official Record
 - (A) an official publication of the record; or
 - (B) a copy attested by the officer with legal custody of the record—or by the officer's deputy—and accompanied by a certificate that the officer has custody. The certificate must be made under seal



Venue

- Nonresident (Sec. 733.101(1), F.S.)
 - Any FL county where decedent's property located
 - Real property
 - Personal property
 - Commercial paper (e.g., promissory notes), investment paper, and other instruments if located in FL at death
 - If no property in FL, the county where any debtor of decedent resides



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Jurisdiction

- Circuit courts have exclusive original jurisdiction
 - Art. V, Sec. 20(c)(3), Fla. Const.
- In rem proceeding (Sec. 731.105, F.S.)
 - Court's power to adjudicate rights to a given piece of property, including the power to seize and hold it. (Black's Law Dictionary (11th ed. 2019))
- Ancillary administration shall be commenced as provided by the Florida Probate Rules (Sec. 734.102(2), F.S.)



Governing law

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Saunders v. Saunders, 796 So.2d 1253 (Fla. 1st DCA 2001)

- Pretermitted spouse petitioned for intestate share of nonresident decedent testator's FL real estate under Sec. 732.201, F.S.
- Trial court determined pretermitted spouse law of decedent's domicile, Colorado, controlled
- Ruling upheld on appeal as FL statute required testator to select FL law before it would apply to factual situation
 - In 2016, Sec. 731.1055, F.S., as to real property, legislatively overturned *Saunders v. Saunders*



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Governing law

- Sec. 731.1055, F.S. Disposition of real property
 - The validity and effect of a disposition, whether intestate or testate, of <u>real</u> <u>property</u> in this state shall be determined by FL law
- Sec. 731.106, F.S. Assets of nondomiciliaries
 - (2) When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of <u>tangible or</u> <u>intangible personal property</u> having a situs within this state shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by FL law



Governing law

- Walters v. Agency for Health Care Administration, 288 So.3d 1215 (Fla. 3d DCA 2019)
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- Co-op not exempt homestead for purposes of devise and descent as it was "not an interest in real property"
- Sec. 719.103(25), F.S. now defines "Unit" (effective 7/1/21)
 - "An interest in a unit is an interest in real property"
 - See revised TN 19.03.02
- "Cooperatives Resolving Title Issues" 50 Fund Concept 46 (May 2018)



Both personal property and real property interest



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Intestate succession

- Chapter 732, Probate Code: Intestate Succession and Wills
 - Sec. 732.102, F.S. Spouse's share of intestate estate
 - All or one-half (depends on descendants surviving decedent)
 - Sec. 732.103, F.S. Share of other heirs
- TN 2.05.01 Determination of Heirs by Foreign Jurisdiction
 - Relying on transcripts from other states to establish descent
 - Caution when FL real property descent is involved
- Title Standard 5.1 (Title Derived Through Intestate Decedent)



Testate succession

- When admitted to record, the foreign will shall be as valid and effectual to pass title to real property and any right, title, or interest therein as if the will had been admitted to probate in this state. (Sec. 734.104(4), F.S.)
- Foreign will duly admitted in FL permits valid conveyance of FL real estate by devisees named in will
 - Title Standard 5.16 (Foreign Will as Muniment of Title)



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Testate – validity

- Nonresident's will (other than a holographic or nuncupative will), executed in compliance with FL law, or laws of state or country in which executed, may be probated in FL
 - Sec. 732.502(2), F.S.
- If written in foreign language must be accompanied by true and complete English translation
 - Sec. 733.204(1), F.S. and Rule 5.216, Fla. Prob. R.
- Copy of notarial will may be admitted if original would qualify
 - Sec. 733.205, F.S.



Testate – validity

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Malleiro v. Mori, 182 So.3d 5 (Fla. 3d DCA 2015)

- NY will valid under FL law
- Subsequent "notarial will" made and admitted to probate in Argentina
 - Notarial wills must comply with Sec. 732.502(2), F.S. which prohibits holographic and nuncupative wills ("verbal declaration of testator")
- Held: NY will admitted to probate in FL
 - Notarial will was nuncupative since it was not signed or attested
 - Revocation by writing (Sec. 732.505, F.S.) governed by same formalities as required to make a will



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Testate – validity

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Trotter v. Van Pelt, 198 So. 215 (Fla. 1940)

- VA court admitted attested holographic will and unattested holographic codicils to probate together as the "holographic unattested will of the testator"
- FL court refused to accept VA court decision as "res judicata" and admitted will (without the codicils) to probate
 - Will in testator's handwriting executed in accordance with subsection (1) shall not be considered a holographic will (Sec. 732.502(2), F.S.)



Testate – validity

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In re Estate of Barteau, 736 So.2d 57 (Fla. 2d DCA 1999)

- Appellants sought to establish and admit a lost will executed in FL;
 later will, executed in Mexico, admitted to probate there
 - Appellants alleged it had been procured through fraud etc.
 - Trial judge ruled will contest must take place in Mexico
- Held: DCA disagreed; will subject to jurisdiction of FL courts for determination of validity when presented in FL for purpose of devising FL real property



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Testate – validity – case summary

- When lands in two or more states devised, each state will construe the will under each's own laws
 - Trotter v. Van Pelt, 198 So. 215 (Fla. 1940)
 - Mallerio v. Mori, 182 So.3d 5 (Fla. 3d DCA 2015)
- Can be contested in FL even if contested elsewhere
 - In re Estate of Barteau, 736 So.2d 57 (Fla. 2d DCA 1999)



Foreign PR

- May initiate a proceeding pursuant to Sec. 734.1025, F.S.
 - Probate estate not exceeding \$50K
 - Less than 2 years after death
 - Notice to creditors
 - If claim filed, FL PR must be appointed
- Maintain actions in FL if appointed in another state or US territory (Sec. 734.101(1), F.S.)
- Be sued concerning property in this state; defend actions or proceedings if duly appointed in another state or country (Sec. 734.101(2), F.S.)



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Foreign PR

- Receive payments, satisfy mortgages, and receive personal property, 90+ days following appointment provided no FL PR or FL curator has been appointed (Sec. 734.101(3)(4), F.S.)
- Similar rules for safe deposit box (Sec. 655.936, F.S.)
 - Discretion to deliver contents to foreign PR
 - 3 months following issuance of letters
 - No notice of FL PR appointment
 - Affidavit of foreign PR showing domicile of deceased, lack of creditors located in FL, together with certified copy of PR letters of authority



Surviving Spouse

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Spousal rights

- Elective share limited to surviving spouse of decedent domiciled in FL (Sec. 732.201, F.S.)
- One-half interest in FL real property (and in personal property wherever located) acquired in decedent's name with funds traceable in whole or in part to a "community property" transaction (Sec. 732.217, F.S.)
- Intestate share of surviving spouse (Sec. 732.102, F.S.)
 - Domiciliary estate's probate code may be different
- Marriage recognized here if valid where created
 - Goldman v. Dithrich, 179 So. 715 (Fla. 1938)





Community property

- Each automatically owns 50% of all property acquired during marriage regardless of source and manner titled
 - Nine states (Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin), Guam and Puerto Rico
 - Other countries ("jurisdiction")
 - Analogous to partnership
 - Step-up basis anomaly favors community property status
 - FL has a "common law" regime recognizing spouses individual rights to property ownership



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FUDCPRDA

- "Florida Uniform Disposition of Community Property Rights at Death Act" (Secs. 732.216 – .228, F.S.)
- Statutory protection for surviving spouse of rights emanating from community property protections provided elsewhere
 - Real property acquired in decedent's name in FL with funds traceable in whole or in part to a CP transaction
 - Many exceptions (e.g., survivorship and homestead properties)
- "A User's Guide to Prosecuting Claims under Florida's Uniform Disposition of Community Property Rights Act", Juan C. Antunez, Esq. (Aug. 2020)





FUDCPRDA

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

- Surviving spouse filed notice of administration, appointed PR, and received letters of administration
- Published notice to creditors in accordance with statute
- More than 2 years after death, surviving spouse filed petition under FUDCPRDA to confirm 50% community property interest
- Held: Order striking petition as an untimely filed claim upheld
 - "Common law trust exception" and "lien exception" arguments were also rejected



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Procedure

Formal administration

- Commenced pursuant to FL Probate Rules (Sec. 734.102, F.S.)
- Contents of petition (Rule 5.200, Fla. Prob. R.) same as for domiciliary petition and as required by Rule 5.470, Fla. Prob. R.
 - Authenticated copies of domiciliary proceedings
 - Testate: will, petition for probate, order admitting will, domiciliary personal representative (DPR) authority
 - Intestate: petition for administration and DPR authority
 - Statement of grounds for appointment of ancillary PR (APR) if someone other than DPR is to be appointed
 - Formal notice to others qualified who have not waived or joined petition; and to all DPRs who have not waived or joined



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Formal administration – APR

- If qualified to act in FL (Sec. 734.102(1), F.S.)
 - Testate:
 - PR designated in will to administer FL property; or
 - Foreign PR; or
 - · Alternate or successor named in will; or
 - One selected by majority interested in FL property
 - Intestate:
 - Foreign PR, if qualified; or
 - Apply preference in appointment rules of Sec. 733.301(1)(b), F.S.



Personal representatives – qualifications

- Sec. 733.303(1), F.S. Persons not qualified
 - Felony conviction
 - Mentally or physically unable to perform
 - Under 18 years of age
- Sec. 733.304, F.S. Nonresidents (cannot qualify unless...)
 - Legally adopted child or adoptive parent of decedent;
 - Related by lineal consanguinity to decedent;
 - Spouse or brother, sister, uncle, aunt, nephew, or niece of decedent, or someone related by lineal consanguinity to any such person; or
 - Spouse of a person otherwise qualified under this section



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Formal administration – APR

- Bond same rules as for DPR (Sec. 733.402, F.S.)
 - Required unless waived by the will or by the court
- Notice to creditors unless barred by Sec. 733.710, F.S.
- Court may order transfer of property held by APR to DPR, or distribution to beneficiaries, after administration expenses and claims are paid
 - No property may be sold, leased or mortgaged to pay debt/claim barred in FL
- Reference: Sec. 734.102(4)-(7), F.S.



Summary administration – Ch. 735, F.S.

- Resident and nonresident decedent's estates same rules
 - Will does not direct formal administration
 - More than 2 years after death; or
 - Value of probate estate not in excess of \$75K
- Contents of petition (Rule 5.530, Fla. Prob. R.)
- Notice to creditors authorized by 735.2063, F.S.



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Probate of will without administration

- Authenticated copy of nonresident's will devising FL real property, or any interest therein, may be admitted to record in any county where property located
 - More than 2 years after death; or
 - Any time after DPR has been discharged; provided
 - · Will executed pursuant to FL law; and
 - Properly admitted to probate in any other state, territory, or country
 - Petition supported by authenticated copies of domiciliary proceedings
- Reference: Sec. 734.104, F.S. and Rule 5.210, Fla. Prob. R.
- Not insurable until claims barred (TN 2.05.04)



Intestate without ancillary administration

Nonresident Intestate Decedent – Conveyance of Florida Real Property (TN 2.05.03)

- Conveyance after claims period record certified transcript
 - Petition for administration
 - Must establish intestacy and identify heirs
 - Letters of administration
 - Order closing estate and discharge of personal representative (TN 2.09.03)
- Civil action pursuant to Sec. 733.105(3), F.S.



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Case Studies

Domiciliary estate closed

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Susan White, resident of Georgia, owned real property in Florida. Estate probated in Georgia and property devised to her brother, George Green. Her estate was closed in 2002. Green now desires to sell.

If Green records an authenticated copy of White's will in the public records, may a Fund policy insuring a conveyance from Green to a purchaser for value be issued?

"2005 Title Teasers," 37 Fund Concept 111 (Sep. 2005)



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Domiciliary estate closed

- Georgian owned real property in FL
 - FL law controls validity of will; devise and descent
- Georgia probate estate closed 2002
 - Creditors period expired 2004 in FL
 - Federal estate tax lien expired 2012
- Property devised to sibling
 - Will admitted in Georgia probate
- Authenticated copy of will recorded in FL county
 - Will not effective until admitted in FL



Domiciliary estate closed

- Devisee now wishes to sell
 - Petition to Admit Foreign Will to Record (FLSSI Form P-2.0800)
 - Accompanied by authenticated copies of will, the petition for probate, and order admitting will to probate from Georgia court
 - If Georgia doesn't require petition for probate, affidavit may be substituted
 - Order Admitting Foreign Will to Record (FLSSI Form P-2.0810)
 - Record petition, will and order admitting in FL county



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Deceased mortgagee

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A private mortgage encumbers property located in Florida. The mortgagee is a New Jersey resident. The mortgagee dies, and the note cannot be found. The family begins probate in New Jersey. The mortgagor wants to pay off the mortgage.

"2007 Fund Assembly – Title Teasers part IV," 39 Fund Concept 162 (Dec. 2007)



Deceased mortgagee

- Private mortgage encumbers FL property
 - Mortgage secured by a personal property interest
- New Jersey mortgagee dies; note cannot be found
 - Lien follows note
- Probate commences in New Jersey
 - Domiciliary personal representative appointed
- Mortgagor wants to pay off mortgage
 - 90-day rule before mortgagor can pay DPR (Sec. 734.101(3), F.S.)
 - "Dealing With Lost Mortgage Notes," 37 Fund Concept 23 (Mar. 2005)





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Deceased mortgagee

- Mortgagor wants to pay off mortgage
 - 90-day rule before mortgagor can pay DPR (Sec. 734.101(3), F.S.)
 - Record satisfaction and authenticated copy of letters
- Mortgagor wants to continue making payments
 - 90-day rule before mortgagor can pay DPR (Sec. 734.101(4), F.S.)
 - Record assignment of mortgage and authenticated copy of letters
- Domiciliary estate closed
 - Record authenticated copies of domiciliary petition, or of will and order admitting will to probate, together with letters and order closing estate



No domiciliary proceeding

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Canadian citizen died testate in October 2011, owning real property in Florida. There are no assets located in Canada requiring probate. As a result, no domiciliary probate has been conducted.

Can an ancillary administration in Florida be conducted if there has never been a domiciliary administration?

"2013 Title Teasers – Part II," 124 Fund Concept 36 (Nov. 2013)



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No domiciliary proceeding

- Canadian died testate in October 2011 owning FL real property
 - Federal estate tax lien expired in 2021
 - Creditors' claim period in FL has ended
- No assets in Canada require probate; no domiciliary probate
 - Was will admitted to probate in Canada?
- Can ancillary administration be conducted in FL if there has never been a domiciliary administration?
 - Yes. Sec. 734.102, F.S. "Ancillary administration" has no such requirement



No domiciliary proceeding

- Testate nonresident decedent more than 2 years after death
 - Probate of Wills without Administration (Rule 5.210, Fla. Prob. R.)
 - Describes petition and contents (No FLSSI form)
 - Use for original or authenticated copy situations
 - Petition for Summary Administration (Rule 5.530, Fla. Prob. R.)
 - If personalty needs to be distributed (FLSSI forms P-2.0204, .0205)
 - Petition for Administration (Rule 5.200, Fla. Prob. R.)
 - If sale by personal representative desired (FLLSSI form P-3.0140, .0150, or .0151)



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Nonresident's co-op

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Mary dies a resident of Michigan. At the time of her death, she owned a co-op in Miami. Her estate was probated in Michigan and the co-op was devised to her niece.

For the purposes of issuing an owner's policy to a bona fide purchaser insuring the leasehold interest, may the Michigan personal representative execute the necessary documents for the transfer of the co-op?

"Title Q&As," 47 Fund Concept 36 (Apr. 2015)



Nonresident's co-op

- Decedent owned co-op in Miami
 - Ch. 719, F.S. recognizes co-op as interest in real property
- Probate estate opened in Michigan
 - Domiciliary estate pending
- Co-op devised to niece
 - Will admitted to probate in Michigan
- May the Michigan personal representative sell the co-op?
 - Neither Michigan court nor Michigan P.R. have authority over FL real property interests



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Nonresident's co-op

- May the Michigan personal representative sell the co-op?
 - Petition to open formal ancillary administration in Florida and admit authenticated copy of will
 - Obtain appointment of APR
 - Determine if will authorizes sale by appointed APR
 - Petition must demonstrate sale in best interest of estate and of those interested in it. (Sec. 733.613(1), F.S. and Rule 5.370, Fla. Prob. R.)
 - After claims period expiration, may not be sold to satisfy barred debts (Sec. 734.102(7), F.S.)



Takeaways

- Sometimes FL law applies; sometimes it does not
- Surviving spouse issues merit special attention
- 2-year rule of thumb
- Proof of death, creditors' rights, and the estate tax lien apply equally to resident and nonresident decedent estates
- Homestead determination for purposes of devise and descent restrictions may be ignored when dealing with nonresident decedents' estates



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Questions?

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Nonresident Testate Decedents and Florida Real Property – Conveying Insurable Title to a Purchaser for Value

by J. Edward Weber, Fund Claims Counsel

nonresident owning Florida real property dies testate. An estate administration took place in the state of the domicile. Assuming that title was insurable as vested in the decedent, what must be done to convey insurable title to the Florida property to a purchaser for value?

Because attorneys encounter this fact situation so frequently, and because the Florida Probate Code is both detailed and subject to frequent attention from the Legislature, THE FUND herein sets forth its view on the question.

In answering the principal question, the Fund Member Agent may find it helpful to keep in mind three smaller and separate issues: (1) The status of the title upon the decedent's death (remembering that Florida law primarily controls the disposition of real property located in Florida), (2) possible creditors' claims against the decedent, and (3) the impact of estate taxes and the necessity of clearing them.

Where is the Title? As attorneys will recall from law school, it is a maxim of real property law that title at all times vests somewhere, even though some steps may be necessary to determine where. In general, the Florida Probate Code provides two methods for the transfer of

title of decedents' real property situate in Florida: (1) Ancillary administration, either formal or summary; and (2) admission of the decedent's will and domiciliary estate administration proceedings to record in Florida. In addition to these, a procedure authorized under Sec. 734.1025, F.S., may apply in very limited circumstances.

Ancillary Administration. An estate administration occurring in Florida in a case where the decedent was not a Florida resident

(Continued on page 67)

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Nonresident Testate Decedent ...

(Continued from page 63)

and the decedent's estate has been administered in another, domiciliary, state is an ancillary administration. A will which is valid under the laws of the state where it was drafted and executed, qualifies for admission to probate in Florida, except for nuncupative or holographic wills, Sec. 732.501(2), F.S., but it does not follow that either the foreign domiciliary personal representative or the foreign probate court has any authority over the Florida property. To the contrary, neither a foreign court, nor a foreign personal representative has any authority over Florida real property, regardless of whether the will does or does not confer upon the foreign personal representative a power of sale and regardless of whether the foreign court enters an order purporting to authorize the sale of the Florida real property. This authority belongs exclusively to the Florida court and to the ancillary personal representative who is appointed by, and holds letters of administration from, the Florida court. The ancillary personal representative in some cases may be the same individual or corporation who is the domiciliary personal representative, but the ancillary personal representative has no authority unless and until he or she has been appointed by the Florida probate court and holds letters of administration issued by it. The personal representative then acts qua Florida, and not domiciliary, personal representative. Sec. 733.304, F.S., disqualifies as personal representative most non-Florida residents who are not related to the decedent by blood or marriage and this causes occasional heartburn for domiciliary personal representatives.

The authorization and particulars for ancillary administration are found in Sec. 734.102, F.S.

Requirements for conveyance by a duly appointed and acting Florida personal

representative in an ancillary administration are the same as in a Florida domiciliary estate administration. In fact, they are somewhat simplified because the concern about possible homestead status and a consequent lack of authority of the personal representative to convey homestead does not exist with a nonresident decedent. The questions, therefore, are: Does the decedent's will give a power of sale of real property to the personal representative? If a power of sale exists, does the proposed conveyance which is to be insured fall clearly within the scope of the power of sale and free from any limitation of or exceptions to such power of sale? Is the personal representative in the Florida administration a person or entity who was specifically nominated in the will either as the first choice or a named alternative to serve as the personal representative? If all three of these questions can be answered in the affirmative, THE FUND will rely upon a deed of conveyance from the Florida personal representative, but if any of the three questions has a negative answer, then the personal representative must obtain and record an order from the Florida court specifically authorizing the proposed conveyance. The more specific the order, the better. If the conveyance is made without a prior order, THE FUND will rely upon a recorded order from the court confirming the conveyance which has already been made.

Conveyance by a personal representative assumes that the ancillary administration is a formal administration. However, if the decedent's will does not direct formal administration, summary administration may be available in an ancillary proceeding, depending upon the value of the Florida assets and the decedent's date of death. For estates of decedents dying on and after Jan. 1, 2002, the maximum value of the estate subject to administration in a summary administration is \$75,000. Sec. 735.201, F.S. For estates of decedents dying before Jan. 1, 2002, the maximum value was \$25,000. The

summary administration limits are the same irrespective of whether the Florida administration is ancillary or domiciliary. They are jurisdictional if summary administration begins within two years following the decedent's death. If the decedent died more than two years before estate administration begins, Sec. 735.201, F.S., provides that summary administration is available without regard to the value of the estate, and this applies to ancillary administrations as well as domiciliary.

What should be recorded in an Ancillary Administration? Attorneys handling estate proceedings should always have as one objective leaving recorded evidence sufficient to enable future title examiners without direct knowledge to assure themselves that the estate was completely and properly administered. This objective has attained especial importance in recent years as some court clerks have begun to destroy probate files.

If a formal ancillary administration is required, the petition for administration, authenticated copy of the will, order admitting the nonresident's will to probate (often combined with an order appointing the ancillary personal representative) and letters of ancillary administration should be recorded, just as if the estate administration were a domiciliary proceeding. THE FUND strongly recommends but does not require recording a certified copy of the death certificate.

If ancillary summary administration is available, there will of course be no ancillary personal representative appointed, but the petition, death certificate, will, order of ancillary summary administration and order admitting the will to probate (if not contained within the order of ancillary summary administration) should be recorded.

Admission of Will from Foreign Probate to Record in Florida. Sec. 734.104, F.S., provides

that an authenticated copy of a will purporting to devise real property in Florida may be admitted to record under certain circumstances. The will must have been executed as provided by Ch. 732, F.S., and it must have been admitted to probate in the appropriate foreign jurisdiction. Sec. 734.104(a) and (b), F.S. Additionally, either the decedent must have been dead for more than two years, or the personal representative in the domiciliary jurisdiction must have been discharged. The statute provides the particulars of admitting the will to record. Admitting the will to record does not simply mean recording an authenticated copy in the public records. Rather, it means petitioning and obtaining an order from the Florida court specifically admitting the will to record in Florida. If this is done, the admission of the will to record shall be as valid and effectual to pass title to real property in Florida as if the will had been admitted to probate in Florida. The petition, will, death certificate, and order admitting to record should be recorded in all Florida counties wherein real property is located. There are no jurisdictional limits for this procedure. Since this is not an estate administration, there is no personal representative. Title is vested in those persons to whom the decedent has devised it by the will, and those devisees must personally convey their interests to a purchaser for value whose title is to be insured.

For title insurance purposes, THE FUND authorizes reliance upon the procedure set forth in Sec. 734.104, F.S., together with a warranty deed or special warranty deed from all devisees receiving an interest under the nonresident decedent's will to the proposed insured purchaser for value. For creditors' claims where the insured conveyance will occur within two years of the decedent's death, however, see below.

Sec. 734.1025, F.S. In its current version as amended by the 2001 Florida Legislature, Sec. 734.1025, F.S., permits a foreign (domiciliary)

personal representative to petition a Florida circuit court to admit a nonresident decedent's will to probate in Florida provided that all property subject to administration in Florida does not exceed \$50,000. The amount is jurisdictional. The petition must be submitted before the expiration of two years following the decedent's death. The petitioner shall file authenticated copies of "so much of the foreign as will show the proceedings will beneficiaries of the estate as provided in the Florida Probate Rules." Sec 734.1025(1), F.S. The statute also provides that the foreign personal representative may cause a notice to creditors to be published and served as provided in Ch. 733, F.S. However, if a claim is filed a Florida personal representative must be appointed. The statute confers no authority upon the foreign personal representative to convey Florida real property or, in fact, to exercise any other functions of an administrator in Florida.

The limited jurisdictional amount and the fact that the procedure is available only if the petition is filed within two years of the decedent's death mean that this provision will probably have marginal usefulness for Florida real property practitioners. Nevertheless, THE FUND will rely upon a warranty or special warranty conveyance by those devisees whom the will shows to be in title to the subject property, provided, however, that no creditors' claims have been filed and either that two years have elapsed since the decedent's death or that the creditors' claims period has expired following publication of the notice to creditors. THE FUND does not authorize a conveyance by the foreign personal representative, since the authority for such conveyance is not vouchsafed under the statute.

Creditors' Claims. Whenever the conveyance to be insured occurs within two years of the decedent's death, the member agent must be

concerned with creditors' claims. If the ancillary administration is a formal administration, THE FUND does not require that proceeds be held pending the determination of creditors. As to ancillary summary administration, for decedents dying after Dec. 31, 2001, Sec. 735.206(2), F.S., requires the petitioner for summary administration to make a diligent search and reasonable inquiry for decedent's creditors who are known or are reasonably ascertainable, and to serve a copy of the petition for summary administration upon them, and to make provision for payment of their claims to the extent that assets are available before an order of summary administration will be granted. If a recorded sworn statement exists, either contained within the petition for summary administration or in a separate recorded affidavit of the petitioner for summary administration which sworn statement recites either that (1) diligent search and inquiry have been made and no creditors have been ascertained, or in the alternative (2) all of the following: service has been made upon all interested persons including known and reasonably ascertainable potential creditors, and at least 30 days have elapsed following service and no claims have been filed, and the member agent has no knowledge of potential unasserted claims, then THE FUND authorizes reliance upon the recorded sworn statement. However, if the order of summary ancillary administration requires the payment of the sale proceeds into the registry of court or some other procedure other than payment of the proceeds to the persons vested with title by virtue of the will and order of summary administration, then the member agent must comply with the provisions of the order.

Sec. 734.710, F.S., bars creditors' claims where no claim is filed for two years following the decedent's death. Therefore, where the decedent's death occurred more than two years prior to the filing of a petition for ancillary administration (either formal or summary)

creditors' claims against the decedent need not be excepted on the title insurance policy of a purchaser for value.

The predecessor to Sec. 704.104, F.S., formerly contained a procedure to clear creditors' claims, but that procedure is no longer available. Therefore, where the member agent wishes to rely upon the admission of a foreign will to record in Florida, two years must have elapsed before the conveyance to be insured in order for creditors' claims to be ignored. Since it is unlikely that a purchaser or the purchaser's mortgage lender will accept an exception for creditors' claims in a title insurance policy, if the conveyance to be insured will occur within two years of the nonresident decedent's death, THE FUND recommends ancillary administration.

Federal and Florida Estate Taxes. A comprehensive discussion of the potential existence of federal or Florida estate tax liens is beyond the scope of this article and may be found in TNs 2.10.01 through 2.10.09. The following generalities may be helpful, however.

First, the Fund Member Agent should always assume that the property is or may be subject to estate tax liens unless the records clearly indicates the contrary. In many cases, it will be up to the agent to perfect the record by obtaining and recording proof rebutting the possibility of such liens.

Second, federal estate tax liability constitutes a lien of ten years from date of death and Florida estate tax liability has a lien of up to 20 years on the Florida real property of nonresident decedents.

Third, foreign fiduciaries sometimes mistakenly believe that Florida has no estate tax. Occasionally titles to Florida property will be encountered where a substantial federal estate tax was paid on a nonresident decedent's estate but no estate tax was paid to Florida attributable to the Florida asset. With the passage of time and the accrual of penalties and interest, the

Florida estate tax liability may be substantially greater than it would have been had the federal estate tax return been timely filed with the Florida Department of Revenue and the tax paid. Federal law limits the time in which a fiduciary may amend the federal estate tax return and recover sums paid to the United States, which should have been paid to the State of Florida, with the result that the estate pays twice exclusive of penalties and interest.

Fourth, both federal and Florida law provide that in certain circumstances, property included in the decedent's gross estate of tax purposes wherein the decedent owned something less than a full fee simple estate may be sold free and clear of estate tax liens. However, these exceptions do not apply to nonresident decedents insofar as Florida estate tax is concerned.

Finally, the possibility of estate tax liability and attendant liens may be rebutted in three First, evidence may be recorded establishing that the estate was insufficient large to require a federal estate tax return filing requirement or incur an estate tax liability. For decedents dying prior to Jan. 1, 2000, evidence generally was a Florida Non-Taxable Certificate, and for decedents dying thereafter, the Affidavit of No Florida Estate Tax Due. For estates which did have a federal estate tax return filing requirement, proof that the amount of the liability was reached with the Internal Revenue Service and the Florida Department of Revenue and the full amount paid should be recorded. The proof generally consists of a federal estate tax liability form, and a Final Certificate and Receipt for Estate Tax (DR-304). These items are required in the estate administration file, where there is a formal administration before the personal representative is discharged. As noted above the current practice of some court clerks to destroy files thus destroying this important evidence makes it increasingly important to record. Finally, when conveyances occur before estate tax liability is determined and paid, transaction-specific releases may be available from the Internal Revenue Service and from the Department of Revenue. If they are obtained and recorded, then title may be insured without reference to the possibility of estate tax liens. If this cannot be done, Fund Member Agents may obtain permission from THE FUND's underwriting department on an ad hoc basis to enter into escrow arrangements and to insure title with an exception for the possibility of estate tax liens but including affirmative coverage against loss incurred thereby.

Cases ...

(Continued from page 65)

period had expired. The court noted that although case law excuses the failure to file a contractor's affidavit before the complaint is filed the affidavit could not be filed after the 60-day limitation period had expired.

THE FUND Closed for Independence Day

THE FUND will be closed Monday, July 5, in observance of Independence Day.



More FUND-Trained Paralegals Available for Placement

by Susan Hosier, Fund Paralegal Certification and Placement Manager

For the past three years, THE FUND has partnered with community colleges across the state to offer a special Paralegal Certification and Placement Program (PCAP), providing additional training for paralegal students to help make the transition to the real estate attorney's office a smooth one.

PCAP came out of a need, expressed by Fund Member Agents, for qualified, well-trained support staff for their real estate practices.

PCAP consists of a 16-week training course for students completing their paralegal studies. The course is intended to expand their real estate knowledge and marketability. Most important of all, THE FUND has designed the curriculum to focus on "real world" situations geared to a real estate attorney's office. For example, students learn how to complete all aspects of a closing outside of the controlled environment of the classroom.

The course is led by a Fund-certified Trainer and a professor holding a Juris Doctor from the hosting college. Using real-life examples, attendees learn how to use THE FUND's Automated Title Information Data System (Web ATIDS), ProPel®, and DoubleTime® in various closing scenarios. Training includes basic title examination, policy rating, preparation of commitments, HUD, closing documents and final policies, and skills relating to a number of Fund procedures.

Upon successful completion of the course with a grade of "C" or above, attendees are eligible to take THE FUND's Certification Exam. Those passing the Certification Exam with a grade of

(continued on page 74)



796 So.2d 1253
District Court of Appeal of Florida,
First District.

Denise R. SAUNDERS, Appellant,

V.

Richard J. SAUNDERS, Ancillary Personal Representative, Appellee.

No. 1D00–4867.

Synopsis

Wife of nondomiciliary testator petitioned for her share as a pretermitted spouse of testator's Florida real estate. The Circuit Court, Escambia County, Joseph Q. Tarbuck, J., denied petition. Wife appealed. The District Court of Appeal, Browning, J., held that law of testator's domicile, and not Florida's pretermitted spouse statute, governed disposition of testator's real property in Florida.

Affirmed.

West Headnotes (7)

[1] Statutes 🐎 Intent

Statutes ← Plain language; plain, ordinary, common, or literal meaning

When a court construes a statute, its goal is to ascertain legislative intent, and if the language of the statute under scrutiny is clear and unambiguous, there is no reason for construction beyond giving effect to the plain meaning of the statutory words.

1 Cases that cite this headnote

[2] Wills \leftarrow What law governs

The legislature intended that Florida law apply only to distribute a nondomiciliary testator's property situated in Florida when such testator's last will and testament provides that Florida law shall apply to his or her Florida property. West's F.S.A. § 731.106(2).

[3] Wills 🐎 Taking Against Will

Law of testator's domicile, and not Florida's pretermitted spouse statute, governed disposition of testator's real property in Florida, where nondomiciliary testator did not provide in his will that Florida law should be applied to distribute his Florida real property. West's F.S.A. §§ 731.106(2), 732.301.

[4] Statutes Plain, literal, or clear meaning of statute; ambiguity

The common law is changed where a statute clearly, unequivocally, and specifically prescribes a different rule of law from a common law rule.

[5] Constitutional Law Pature and scope in general

Public policy is determined by the legislature through its statutory enactments.

1 Cases that cite this headnote

[6] Wills 🗁 Taking Against Will

Statutory provision that specifically addressed when Florida law should be applied to dispose of the assets of nondomiciliary testators controlled over the general statute relating to the rights of a pretermitted spouse of a Florida domiciliary, and it superceded common law and any contrary public policy considerations. West's F.S.A. §§ 731.106(2), 732.301.

1 Cases that cite this headnote

[7] Wills 🧽 Taking Against Will

Unless a nondomiciliary testator expressly chooses Florida law to dispose of his or her Florida property, Florida's pretermitted spouse statute is inapplicable. West's F.S.A. §§ 731.106(2), 732.301.

Attorneys and Law Firms

*1254 Gary W. Huston and Donald H. Partington of Clark, Partington, Hart, Larry, Bond & Stackhouse, Pensacola, for Appellant.

David E. Hightower of Beggs & Lane, Pensacola, for Appellee.

Opinion

BROWNING, J.

Appellant appeals an order denying her petition for an allocation of her share as a pretermitted spouse under section 732.301, Florida Statutes (1999). The trial court denied Appellant's petition on grounds that Florida law is inapplicable because the nondomiciliary testator did not provide in his will that Florida law would regulate the disposition of his Florida real property, as required by section 731.106(2), Florida Statutes (1999). The trial court concluded the law of the decedent's domicile, Colorado, including its pretermitted spouse statute, regulates the disposition of the decedent's Florida realty. Appellant argues the trial court's construction of section 731.106(2) impermissibly supersedes Florida's common law rule concerning disposition of in-state realty, disregards Florida's strong public policy to protect pretermitted spouses, and misconstrues the proper effect of this section and section 732.301. Appellee, the personal representative of the decedent's estate, argues Florida law is inapplicable based upon the plain wording of section 731.106(2), which controls the disposition of this case. We agree with Appellee and affirm.

Section 731.106(2), Florida Statutes (1999), in pertinent part provides:

(2) When a nonresident decedent who is a citizen of the United States or a citizen or subject of a foreign country provides in her or his will that the testamentary disposition of her or his tangible or intangible personal property having a situs within this state, or of her or his real property in this state, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law.

- Because such section has never been [1] [2] construed, we are compelled to do so. When a court construes a statute, its goal is to ascertain legislative intent, and if the language of the statute under scrutiny is clear and unambiguous, there is no reason for construction beyond giving effect to the plain meaning of the statutory words. Aetna Casualty & Surety Co. v. Huntington Nat'l Bank, 609 So.2d 1315, 1317 (Fla.1992); Holly v. Auld, 450 So.2d 217, 219 (Fla.1984). Applying that standard here, we find section 732.106(2) to be clear and unambiguous. It is clear the legislature intended that Florida law apply only to distribute a nondomiciliary testator's property situated in Florida when such testator's last will and testament provides that Florida law shall apply to his or her Florida property. Here, Appellant's decedent did not so provide, and the trial court correctly applied Colorado law to the decedent's Florida property.
- [4] [5] Appellant's arguments for reversal that the trial court's determination violated the common law and public policy are without merit. This case does not hinge on an application of the common law or public policy considerations as advanced by Appellant. The common law is changed where a statute clearly, unequivocally, and specifically prescribes a different rule of law from a common law rule, as does section 731,106(2). See McGhee v. Volusia County, 679 So.2d 729, 731 (Fla.1996); Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12, 17 (Fla. 1st DCA 1996). Public policy is determined by the legislature through its statutory enactments. See University of Miami v. Echarte, 618 So.2d 189, 196 (Fla.1993) ("The *1255 Legislature has the final word in declarations of public policy ..."); Collier v. Brooks, 632 So.2d 149, 157 (Fla. 1st DCA 1994) (it is the proper function of the Legislature not the district court of appeal, to announce public policy change). The legislature, by enacting section 731.106(2), determined the public policy on the issue before this court, contrary to Appellant's position.
- [6] [7] Lastly, Appellant's argument that section 731.106(2) conflicts with, and is subordinate to, section 732.301, is also without merit. Because section 731.106(2) specifically addresses when Florida law should be applied to dispose of the assets of nondomiciliary testators, it controls over the general statute relating to the rights of a pretermitted spouse of a Florida domiciliary, as well as supercedes common law and public policy considerations. *See McKendry v. State*, 641 So.2d 45, 46 (Fla.1994) (a specific statute covering a particular subject area always controls over a statute covering the same or other subjects more generally);

Barnett Banks, Inc. v. Dep't of Revenue, 738 So.2d 502, 505 (Fla. 1st DCA 1999). Thus, unless a nondomiciliary testator expressly chooses Florida law to dispose of his or her Florida property, section 732.301 is inapplicable.

In summary, the decedent, a Colorado domiciliary, did not provide in his will that Florida law should be applied to distribute his Florida property. Accordingly, the trial court properly denied Appellant's petition for an allocation of her share of the decedent's property under section 732.301,

because section 731.106(2) dictates that Colorado law applies.

AFFIRMED.

WEBSTER and POLSTON, JJ., concur.

All Citations

796 So.2d 1253, 26 Fla. L. Weekly D2516

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288 So.3d 1215 District Court of Appeal of Florida, Third District.

Pauline WALTERS, as the personal representative of the Estate of Enid May Townsend, Appellant,

AGENCY FOR HEALTH CARE ADMINISTRATION, Appellee.

No. 3D18-1505

| Opinion filed December 4, 2019

| Rehearing Denied December 3, 2019

| Rehearing Denied December 4, 2019

Synopsis

Background: Sole heir petitioned probate court for summary administration of her mother's estate, the sole asset of which was her mother's interest in a cooperative apartment. Heir sought distribution of this asset as a protected homestead despite the existence of one creditor, the Agency for Health Care Administration (AHCA), which filed a statement of claim and objected to heir's petition for homestead protection. The Circuit Court, 11th Judicial Circuit, Miami-Dade County, Maria M. Korvick, J., denied heir's petition to declare the cooperative apartment a homestead property. Heir appealed.

[Holding:] On denial of motion for rehearing and rehearing en banc, the District Court of Appeal, Emas, C.J., held that cooperative apartment could not qualify as exempt homestead property for the purposes of devise and descent.

Affirmed; question certified; direct conflict certified.

West Headnotes (3)

[1] Homestead 🕪 Review

Appellate court reviews a trial court order denying homestead protection de novo.

[2] Homestead • Nature and extent of right created

Homestead ← Power to transfer or incumber in general

Taxation Property of individuals in general

Florida constitution protects homesteads in three distinct ways; by providing homesteads with an exemption from taxes, by protecting the homestead from forced sale by creditors, and by delineating the restrictions a homestead owner faces when attempting to alienate or devise the homestead property. Fla.Const. art. 10 § 4(a).

[3] Homestead 🕪 Leaseholds

Homestead \leftarrow Devise or other testamentary disposition

In probate proceeding, estate's sole asset, interest in a cooperative apartment could not be considered exempt homestead property; case fell into the category of devise and descent rather than a forced sale.

*1216 An Appeal from the Circuit Court for Miami-Dade County, Maria M. Korvick, Judge. Lower Tribunal No. 18-591

Attorneys and Law Firms

Law Office of Dexter F. George, and Dexter F. George (Plantation), for appellant.

Alexander R. Boler (Tallahassee), for appellee.

Before EMAS, C.J., and SALTER and LOBREE, JJ.

ON MOTION FOR REHEARING, REHEARING EN BANC AND CERTIFICATION

EMAS, C.J.

We deny appellant's motion for rehearing and rehearing en banc, withdraw our previously-issued opinion and substitute the following in its stead:

Enid Townsend ("Decedent") died on August 29, 2017. She left behind, as her sole heir, her adult daughter Pauline Walters ("Walters"). In February 2018, Walters petitioned the probate court for summary administration of the Decedent's intestate estate, the sole asset of which was the Decedent's interest in a cooperative apartment in North Miami Beach. The petition for summary administration listed this asset as "Cooperative Stock, 16900 NW 14th Avenue, Apt. 203, North Miami Beach, FL 33162" and described it as being "PROTECTED HOMESTEAD." Walters sought distribution of this asset to her, despite the existence of at least one creditor.

Walters also petitioned the probate court to determine the homestead status of the cooperative stock and alleged that "the Property constituted the homestead of the decedent within the meaning of the Constitution of the State of Florida." Walters requested that the court enter an order determining that "the Property" constituted exempt homestead of the Decedent, that title descended to Walters upon Decedent's death, and that the constitutional exemption from claims inured to Walters' benefit at that time.

Following notice to creditors (which included appellee, the Agency for Health Care Administration ("AHCA")), AHCA filed a statement of claim against the estate in the amount of \$81,276.76, and objected to Walters' petition for homestead protection as to "the Property," asserting *1217 that the cooperative stock was not entitled to homestead protection because it was not a fee simple interest in land as required by law. See Art. X, § 4, Fla. Const.; § 732.401, Fla. Stat. (2017).

[1] Following a hearing, the trial court denied Walters' petition to declare the cooperative stock homestead property, relying upon In re Wartels' Estate, 357 So. 2d 708 (Fla. 1978) and Phillips v. Hirshon, 958 So. 2d 425 (Fla. 3d DCA 2007). This appeal followed, and we review the court's order denying homestead protection de novo. Spector v. Spector, 226 So. 3d 256 (Fla. 4th DCA 2017).

[2] As the Florida Supreme Court has previously explained:

Our constitution protects Florida homesteads in three distinct ways. First, a clause, separate and apart from the homestead provision applicable in this case, provides homesteads with an exemption from taxes. Second, the homestead provision protects the homestead from forced

sale by creditors. Third, the homestead provision delineates the restrictions a homestead owner faces when attempting to alienate or devise the homestead property.

Snyder v. Davis, 699 So. 2d 999, 1001-02 (Fla. 1997).

Walters asserts that the instant case involves a forced sale, while AHCA contends it falls into the category of devise and descent. Such a distinction is significant because the Florida Supreme Court (in Wartels), and this court (in Hirshon), held that a cooperative apartment cannot be considered homestead property for the purpose of descent and devise because it does not constitute "an interest in realty." See Wartels, 357 So. 2d at 711 (holding "a cooperative apartment may not be considered homestead property for the purpose of subjecting it to Florida Statutes regulating the descent of homestead property"); Hirshon, 958 So. 2d at 430 (adhering to Wartels while questioning its continued vitality in light of statutory changes to the law of cooperative apartments). See also § 196.041(1), Fla. Stat. (2017) (providing that "a tenant-stockholder or member of a cooperative apartment corporation who is entitled solely by reason of ownership of stock or membership in the corporation to occupy for dwelling purposes an apartment in a building owned by the corporation, for the purpose of homestead exemption from ad valorem taxes and for no other purpose, is deemed to have beneficial title in equity to said apartment and a proportionate share of the land on which the building is situated") (emphasis added).

Notably, this court in <u>Hirshon</u> observed that "following the date of the operative factual scenario under which <u>Wartels</u> was decided, the Florida legislature adopted a new Cooperative Act, Chapter 719, Florida Statutes ... which places co-ops on equal footing with all other 'interest[s] in realty', as defined by <u>Wartels</u>, which have long been eligible to be impressed with the character of homestead for the purposes of devise and descent...." <u>Hirshon</u>, 958 So. 2d at 428.

And though our opinion in <u>Hirshon</u> questioned the continued vitality of the Florida Supreme Court's decision in <u>Wartels</u>, we nevertheless concluded in that case that "our proper institutional role obligates us to adhere to <u>Wartels</u>" and that "[t]he better course is to affirm and certify." <u>Id.</u> at 429-30. We therefore affirmed the trial court's order in <u>Hirshon</u> and held that the decedent's cooperative apartment could not be considered homestead property for the purpose of devise and descent. And in light of the post-<u>Wartels</u> statutory changes, we also certified the following question to the Florida Supreme Court, as one of great public importance:

DOES THE FLORIDA SUPREME COURT'S DECISION *1218 IN IN RE ESTATE OF WARTELS V. WARTELS, 357 So.2d 708 (Fla. 1978), HAVE CONTINUING VITALITY IN LIGHT OF THE ADOPTION BY THE FLORIDA LEGISLATURE OF THE COOPERATIVE ACT, CHAPTER 76-222, LAWS OF FLORIDA?

<u>Id.</u> at 430. After initially accepting jurisdiction, the Florida Supreme Court exercised its discretion and discharged jurisdiction of the cause. <u>See Levine v. Hirshon</u>, 980 So. 2d 1053 (Fla. 2008).

[3] We affirm the order below, and conclude that the instant case is not a forced sale but, as in <u>Wartels</u> and <u>Hirshon</u>, instead falls within the devise and descent category. We continue to adhere to the Florida Supreme Court's decision in <u>Wartels</u>, and to our own decision in <u>Hirshon</u>, and affirm the trial court's denial of Walters' petition to declare the cooperative stock to be homestead property. We recognize that, under circumstances similar to the instant case, the Second District,

in Geraci v. Sunstar EMS, 93 So. 3d 384 (Fla. 2d DCA 2012), held that the homestead protection at issue was a forced sale rather than a devise and descent, and held that the decedent's condominium was homestead property for purposes of the exemption from forced sale even though it did not constitute a fee simple interest in land.² We therefore certify conflict with our sister court's decision in Geraci. We also certify, as a question of great public importance, the same question certified by this court in Hirshon:

DOES THE FLORIDA SUPREME COURT'S DECISION IN IN RE ESTATE OF WARTELS V. WARTELS, 357 So.2d 708 (Fla. 1978), HAVE CONTINUING VITALITY IN LIGHT OF THE ADOPTION BY THE FLORIDA LEGISLATURE OF THE COOPERATIVE ACT, CHAPTER 76-222, LAWS OF FLORIDA?

All Citations

288 So.3d 1215, 44 Fla. L. Weekly D2898

Footnotes

- Conversely, the Fifth District has held that the <u>owner</u> of a cooperative apartment is exempt from forced sale by a creditor under Florida's homestead protections. <u>See Southern Walls, Inc. v. Stilwell Corp.</u>, 810 So. 2d 566 (Fla. 5th DCA 2002).
- The Florida Supreme Court after initially accepting jurisdiction based on an asserted conflict with <u>Hirshon</u>, later exercised its discretion and discharged jurisdiction. <u>See Sunstar EMS v. Geraci</u>, 129 So. 3d 1069 (Fla. 2013) (Table).

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COOPERATIVES - RESOLVING TITLE ISSUES

BY R. LYNN LOVEJOY, FUND SR. UN-DERWRITING COUNSEL

Occasionally, Fund Members hear about New Yorkers selling their "apartments." As Floridians, this can sometimes seem odd because, in Florida, apartments are generally considered rental units.

Often, the use of the term "apartment" is actually referring to a residential cooperative, or "co-op" for short. In New York City, San Francisco, and Chicago, cooperative ownership became a common form of residential ownership in the late 1800s and early 1900s to house booming populations. People from those cities wanting to retire in the south or move to a warmer climate brought the concept of cooperative living to Florida. Southeast Florida counties, namely Broward, Miami-Dade, and Palm Beach, have the most cooperatives. Cooperatives in Florida were developed starting in the early 1920s and reached a peak in the 1970s. Part of the decline in interest was due to the rise in development of a different kind of real property ownership - condominiums, which is ownership in fee simple. Today, almost every county in Florida has at least a small number of condominium properties, but not every county has cooperatives. Ironically, both the Cooperative Act, Ch. 719, F.S., and the Condominium Act, Ch. 718, F.S., became effective Jan. 1, 1977, although both types of ownership had been in existence in Florida for some time before that.

A cooperative should not be confused with a condominium built on leasehold property. The cooperative form of ownership has two parts. First, legal title is held in a corporation or some other entity which acts as the cooperative association. The apartment unit owner receives shares in this entity which signify the ownership interest in the cooperative entity. Second, the unit owner has a lease with the association which signifies possession of the apartment unit. The lease can be long- or short-term depending on the association and the unit owner.

Many similarities between cooperatives and leasehold condominiums exist. The Cooperative Act has similar provisions

to the Condominium Act. Cooperative documents include covenants and restrictions, bylaws, articles of incorporation, and perhaps a ground lease. All those documents regulate the use, ownership, and possession of the cooperative property. The cooperative association is governed by a board of directors and all apartment unit owners are members of the cooperative association much like in a condominium association. However, cooperatives have some unique title issues that condominiums do not. Given the differences, this article is designed to provide assistance with resolving title issues observed with cooperative units.

Sec. 719.103(22), F.S., states that a cooperative can be homestead. However, a Florida Supreme Court case, *In re Wartels' Estate*, 357 So. 2d 708, (Fla. 1978), determined that a cooperative was not an interest in real property and therefore was not subject to the laws regulating the descent of homestead. It is important to note that *Wartels'* was decided before the enactment of the Cooperative Act. *Phillips v. Hirshon*, 958 So. 2d 425 (Fla. 3d DCA 2007), certified as a question of great public importance whether the *Wartels'* decision still had validity in light of the enactment of the Cooperative Act. Unfortunately, the Court dismissed further review of the case and the question remains.

Therefore, for insuring purposes, a cooperative unit, resided in by the owner, is treated as both a homestead real property interest and a personal property interest. Counties routinely give homestead tax exemptions on cooperatives. A cooperative unit is also generally treated as constitutional homestead for the purposes of the exemption from forced sale. Spousal joinder is required to transfer or encumber, as in any other homestead conveyance. If the owner is deceased, the property, for title insurance purposes, should be viewed as homestead. Thus, any person entitled to homestead under Secs. 732.401 and 732.4015, F.S., is required to transfer their interest. So, if a decedent is survived by a spouse or minor children, conveyances from them (or their guardians, as needed) are necessary. If not survived by a spouse or minor child, in a testate estate, devisees who are those included in the definition of heirs under Sec. 732.103, F.S., are required to transfer their interest. In an intestate estate, the heirs of the decedent are required to transfer. Likewise, those entitled to the apartment unit as personal property are required to transfer their interest for a sale. For more information concerning cooperatives as homestead, see TN 19.03.02.

When insuring a cooperative, it is important to note that a cooperative is not fee simple ownership. Thus, the examination of title and transfer of property is different. Ownership in the cooperative is represented by a certificate of stock or shares, which is considered personal property, and is not

insured under the title policy. Title insurance only insures the leasehold because that is the real property interest. Therefore, even though standard owner's and loan policies may be issued, both must have endorsements reflecting the leasehold interest. When insuring cooperative units, Fund Members must issue a Leasehold-Owner's Endorsement (ALTA 13-06) for an owner's policy and a Leasehold-Loan Endorsement (ALTA 13.1-06) for a loan policy. In addition, Schedule A of both the owner's and loan policies must reflect that a leasehold interest is being insured.

Since a cooperative is a leasehold, the underlying fee simple property must be examined for anything affecting the cooperative, including any encumbrances. An exception must be made on commitments and policies for the interest of the fee simple owner and encumbrances on the fee simple property. Unless recorded cooperative documents show an actual survey of the cooperative property in the public records, the standard survey exception should not be deleted.

A warranty deed is not the proper instrument for the transfer of a cooperative apartment unit. Depending on the requirements of the cooperative documents, the master lease, and the specific lease involved in the transaction, either a new proprietary lease from the association or an assignment of lease from the present tenant is required. A deed previously recorded in the chain of title in lieu of an assignment of lease may generally be relied upon for insuring a subsequent transaction. If a new lease is issued, the prior lease must be cancelled. In addition. the present apartment unit owner must assign his shares as well, even though title insurance does not insure those shares.

Depending on the cooperative, real estate taxes may be assessed differently. Taxes on the underlying land may be involved. Check with the county tax assessor to verify how the cooperative unit is taxed and inform the new buyer.

Cooperative associations often have not made certain that the two parts of the cooperative ownership for any one apartment unit transfer have consistently taken place. Particularly, in less expensive cooperatives, the association directors are often absent or there are unfilled vacancies. Thus, record-keeping may be sporadic and inaccurate. Since both a transfer of shares and a lease must take place in each title transaction, sometimes there are gaps in the ownership in the cooperative association that must be resolved before title can be insured.

Often there are only proprietary leases in existence and perhaps only a fraction of them are recorded in the public records. Sometimes, there are share certificates that have been assigned, but no trace of a lease in the public records that should accompany it to evidence the real property interest. These are typical of the title problems with Florida cooperatives. Sometimes, the record keeping of the association has been so poor that it is difficult to fill in the gaps properly.

Dealing with Cooperative Title Issues

If the preliminary search reveals gaps, allot sufficient time to resolve the issues. This may mean postponing closing. To get started, talk to the unit owner, or the owner's attorney, and get as much information as possible concerning the ownership interest. such as copies of the lease and shares and phone numbers and other information concerning the association management company or board of directors. Neighboring apartment unit owners may have information about who lived in a certain apartment unit at various times. They may also know how to contact past and present board members. It is important to find out how and where the association keeps its records and who is responsible for them. Cooperative associations should be keeping track of the shares of the association because the shares define the unit owner's ownership of the cooperative association itself. If an association has sufficient records of shares given to each apartment unit owner, this information may lead to the identity of the off-record tenant in an unrecorded lease situation.

There may be instances where the leases or assignments thereof are not recorded. In those instances, The Fund is generally willing to accept an affidavit from the cooperative association to be recorded in the public records attesting to the transfer of past leasehold and share interests sufficient to close the gap. This affidavit must be both sufficient and reliable so other examiners for future transfers and refinances can rely on that same information. If an affidavit cannot be obtained, and there is other evidence that might help with the gap, contact Fund Underwriting Counsel so the alternative evidence can be evaluated for sufficiency.

TN 19.03.01 explains what should be involved in an examination of title and issuance of commitments and policies for a cooperative apartment unit. Any questions can be directed to Fund Underwriting Counsel.

182 So.3d 5
District Court of Appeal of Florida,
Third District.

Manuel Angel MALLEIRO, Appellant,

v.

Axel MORI, Martin Mori, and Patricia Corallo, Appellees.

No. 3D14–95.

Rehearing Denied Jan. 12, 2016.

Synopsis

Background: Representative of beneficiaries of testator's New York will filed petition for administration of the New York will in Florida. Representative of beneficiaries of testator's Argentine will objected, and filed competing petition for administration of testator's notarial Argentine will. The Circuit Court, Miami–Dade County, Celeste Hardee Muir, J., admitted the Argentine will to probate. New York beneficiaries appealed.

Holdings: The District Court of Appeal, Logue, J., held that:

- [1] testator's Argentine will was a nuncupative will, and thus could not be admitted to probate, and
- [2] statutory prohibition of nuncupative wills did not bar all notarial wills, but barred notarial wills that were unsigned by the testator.

Reversed and remanded.

Wells, J., filed specially concurring opinion.

West Headnotes (3)

[1] Wills ← Public actWills ← Making and effect in general

Testator's unsigned, notarial will that was executed in Argentina was a "nuncupative will" that could not be admitted to probate under Florida law, and thus did not operate to revoke the New York will, which was executed prior to testator's Argentine will; although the Argentine will was made before a notary in the presence of three witnesses, was read back to the testator and orally approved by her in the presence of the witnesses, and was apparently admitted to probate in Argentina, the Argentine will failed to comply with Florida law because it lacked the signatures of the testator and witnesses. West's F.S.A. §§ 732.502(1, 2), 733.205.

2 Cases that cite this headnote

[2] Wills 🕪 Public act

A "notarial will" is a will dictated to and taken down by a notary.

[3] Wills - Public act

Statutory prohibition of nuncupative wills does not bar all notarial wills, but does bar notarial wills that are unsigned by the testator. West's F.S.A. § 732.502(2).

1 Cases that cite this headnote

Attorneys and Law Firms

*6 Therrel Baisden, P.A.; Law Offices of Terrence S. Schwartz, and Terrence S. Schwartz, for appellant.

Law Offices Mendez & Mendez, P.A., and Sergio L. Mendez and Daniel J. Mendez, for appellees.

Before WELLS, SALTER, and LOGUE, JJ.

Opinion

LOGUE, J.

This is a dispute over whether the distribution of a testator's real and personal property in the United States is governed by an earlier will executed in New York or a subsequent unsigned, notarial will executed in Argentina. The trial court

admitted the Argentine will to probate and held that it revoked the New York will. We reverse. We hold that the Argentine will, although a notarial will, is a nuncupative will prohibited by the Florida Probate Code because it is unsigned.

FACTS AND PROCEDURAL HISTORY

Elena Isleno, the Testator, was born in Argentina. She died in Florida at the age of seventy-nine, without a spouse or child. At the time of her death, she owned property in both the United States and Argentina.

Approximately five years before her death, the Testator executed a will in New York with the usual formalities of American wills, including her signature at the end, with attestations by three witnesses who subscribed in the presence of each other and the Testator. It is undisputed that the New York will complies with the formalities of Florida law. *See* § 732.502(1), Fla. Stat. (2013). The New York will was limited to distributing the Testator's real and personal property located in the United States. The beneficiaries of the New York will were nieces and other family and friends who lived in the United States or Argentina.

Four months later, the Testator executed a second will in Argentina. At the time, she apparently was a citizen of Argentina holding an Argentine national identity card with an Argentine address. The Testator orally pronounced her testamentary wishes to a notary who transcribed them. The Argentine will sets forth that the Testator made her attestations before the notary in the presence of three witnesses who were identified by name, address, and national identity card number. The Argentine will explains that the notary typed up the testamentary wishes and presented the typed document to the Testator, who declined to read it. The document was then read back to the Testator, who orally approved *7 it in the presence of the witnesses. The notary signed and stamped the will, but the Testator and the witnesses did not sign it. The Argentine will, which distributed all of the Testators' assets, was apparently admitted to probate in Argentina. It revoked "any other testament that is contrary to the present [one]." The beneficiaries of the Argentine will were a nephew, family members, and friends who lived in Argentina. None of the beneficiaries of the Argentine will were named as beneficiaries of the New York will, and none of the beneficiaries of the New York will were named as beneficiaries of the Argentine will. The notary and witnesses were not beneficiaries of the Argentine will.

Manuel Angel Malleiro, on behalf of the beneficiaries of the New York will, filed a petition for administration of the New York will in Florida. However, Axel Mori, Martin Mori, and Patricia Corallo, on behalf of the beneficiaries of the Argentine will, objected and filed a competing petition for administration of the subsequent Argentine will. After a hearing, the court admitted the Argentine will to probate. The court concluded that both wills complied with Florida law, but that the Argentine will revoked the New York will. This appeal followed.

ANALYSIS

A. Whether the Argentine Will is a Prohibited Nuncupative Will.

[1] The first and dispositive issue on appeal is whether the unsigned, notarial Argentine will can be admitted to probate under Florida law. Three provisions of the Probate Code bear on this issue.

First, the creation of a will in Florida requires compliance with certain formalities, the first and foremost being the witnessed signature of the testator. § 732.502(1). In this regard, the Probate Code reads:

- (a) Testator's signature.—
 - 1. The testator must sign the will at the end; or
 - 2. The testator's name must be subscribed at the end of the will by some other person in the testator's presence and by the testator's direction.
- (b) Witnesses.—The testator's:
 - 1. Signing, or
 - 2. Acknowledgment:
 - a. That he or she has previously signed the will, or
 - b. That another person has subscribed the testator's name to it, must be in the presence of at least two attesting witnesses.
- (c) Witnesses' signatures.—The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.
- § 732.502(1); see also Allen v. Dalk, 826 So.2d 245, 247 (Fla.2002) ("A testator must strictly comply with these

statutory requirements in order to create a valid will."). The signatures of the testator and witnesses limit fraud and mistake. *See generally* Restatement (Third) of Property: Wills & Other Donative Transfers § 3.3 cmt. a (1999).

Second, the Probate Code relaxes its strict formalities for the wills of nonresidents. Without defining the term "nonresident," *8 the Probate Code recognizes as valid a foreign will that does not comply with all of the formalities required of a resident's will, if the nonresident's will is valid under the laws of the state or country where executed. § 732.502(2). Even if executed by a nonresident, however, two types of wills are never recognized by the Probate Code. The two types of wills that are never valid in Florida are holographic wills² and nuncupative wills. *Id.* Regarding the wills of nonresidents, the Probate Code reads:

(2) Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the will was executed. A will in the testator's handwriting that has been executed in accordance with subsection (1) shall not be considered a holographic will.

§ 732.502(2) (emphasis added).

The Probate Code does not define the term "nuncupative." As a Florida court lamented in 1964, and as is still true today, "[t]here is a dearth of authority in this jurisdiction as to nuncupative wills." In re Vaughn's Estate, 165 So.2d 241, 243 (Fla. 1st DCA 1964). Black's Law Dictionary, noting the name derives from the Latin word meaning to declare publicly and solemnly, defines a "nuncupative will" as a "will made by the verbal declaration of the testator, and usually dependent merely on oral testament for proof." Black's Law Dictionary 965 (5th ed.1979). The classic nuncupative will is declared by the testator to friends and family on his or her deathbed. See, e.g., In re Carlton's Estate, 221 So.2d 184, 185 (Fla. 4th DCA 1969) ("At the time of his last sickness, Testator called four members of the family to his bedside and spoke a nuncupative will..."). While Florida once admitted nuncupative wills to probate, it no longer does, even if executed by a nonresident. See Henry P. Trawick, Jr., Redfearn Wills & Administration in Florida § 3:2 (2014); see also § 732.502(2).

Third, the Probate Code recognizes nonresidents' "notarial wills" by providing that a copy may be admitted to probate if the original is required to be retained in the foreign country

and "if the original could have been admitted to probate in this state." § 733.205, Fla. Stat. (2013). This statute reads:

- (1) When a copy of a notarial will in the possession of a notary entitled to its custody in a foreign state or country, the laws of which state or country require that the will remain in the custody of the notary, duly authenticated by the notary, whose official position, signature, and seal of office are further authenticated by an American consul, vice consul, or other American consular officer within whose jurisdiction the notary is a resident, or whose official position, signature, and seal of office have been authenticated according to the requirements of the Hague Convention of 1961, is presented to the court, it may be admitted to probate if the original could have been admitted to probate in this state.
- (2) The duly authenticated copy shall be prima facie evidence of its purported execution and of the facts stated in the certificate in compliance with subsection (1).
- (3) Any interested person may oppose the probate of such a notarial will or may petition for revocation of probate of such a notarial will, as in the original probate of a will in this state.
- § 733.205 (emphasis added).

[2] The Probate Code does not define the term "notarial will." A creature of *9 civil law sometimes referred to as an "authentic" will or "will by public act," a notarial will is a will dictated to and taken down by a notary. The main characteristic of a notarial will is the central role played by the civil law notary in supervising the creation of the will and permanently storing the will. When performing this task, the civil law notary is acting in a quasi-judicial capacity in a manner that has no counterpart in common law jurisdictions and which should not be confused with the ministerial functions of a common law notary public. See Thomas A. Thomas & David T. Smith, Florida Estates Practice Guide, § 7.04(5) (2015).

A treatise that surveyed the practices of different countries concerning notarial wills noted four stages commonly involved in the creation of a notarial will:

First, the testator makes an oral declaration of the will to the notary and two witnesses. Second, the notary (or an assistant) reduces the will to written form. Third, after being read aloud by the notary, the will is signed by testator, notary, and witnesses, with the notary adding information

about the execution, including, usually, its date and place and the names of witnesses. Finally, the will is retained by the notary and, in some countries, registered in a central register.

1 Kenneth G.C. Reid, Marius J. de Wall & R. Zimmerman, Comparative Succession Law, Testamentary Formalities 449 (2011). Significantly, according to this treatise, the required third step in the creation of a notarial will is the signing of the will by the testator. Indeed, the treatise does not mention or acknowledge any type of notarial will that is not signed in some manner by the testator. *Id.*

Turning to the will at issue, the Argentine will obviously fails to comply with the formalities of Florida law because it lacks the signatures of the Testator and witnesses. § 732.502(1). Similarly, the parties do not dispute that the Argentine will is a notarial will. But is the will nuncupative?

In one sense, every notarial will is nuncupative: it is orally pronounced by the testator to the notary. There is some authority for this sweeping classification. The record contains a document signed by a judge of the Argentine 94th Civil Court of the First Instance, which, in the translation provided by the Argentine beneficiaries, refers to the Argentine will as "nuncupative." Moreover, Louisiana, which retains the civil law practice of notarial wills, once referred to a notarial will as "a nuncupative testament by public act." 2 William J. Bowe & Douglas H. Parker, Page on Wills § 20.31, 20.32 & 20.36 (3d ed. 1960). It has since, however, dropped that terminology. La. Civ.Code Ann. art. 1574 cmt. a (2015) (noting that the 1997 revisions changed "the law by suppressing the 'public and private nuncupative' and 'mystic' testaments found in the Civil Code of 1870. The so-called statutory testament is revised and retained by this Article, to be called the notarial testament.").

[3] Nevertheless, there would be no point to recognize foreign notarial wills in section 733.205 if they were all barred by the prohibition of nuncupative wills in section 732.502(2). We decline to interpret these provisions in a manner that renders one of them a nullity. *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So.2d 14, 16 (Fla.1977) ("Where possible, it is the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act."). Instead, we hold that section 732.502(2)'s prohibition of nuncupative wills does not bar all notarial wills, but does bar notarial wills that are *10 unsigned by the testator. We reach this conclusion based upon the near universal emphasis in both

foreign and domestic probate laws on the importance of the testator's signature. This reading of the statute honors the policy of comity reflected in section 733.205 by recognizing the validity of most notarial wills, almost all of which are apparently signed by the testator according to the authorities disclosed by our research. It also honors the policy of limiting fraud and mistake reflected in section 732.502(1)'s strict formalities for wills in general and 732.502(2)'s exclusion of nuncupative wills from acceptable foreign wills.

Applying this determination to the facts of this case, we conclude that the Argentine will is a notarial will, but it is a type of notarial will that is nuncupative because it is unsigned by the testator. Even if the Testator was a nonresident of Florida at the time she executed the Argentine will, the claim of the beneficiaries of the Argentine will cannot prevail.³ Because it is a nuncupative will, the unsigned Argentine will cannot be admitted to probate in Florida and, therefore, does not operate to revoke the New York will.

B. Benefit of Clarifying Legislation.

We cannot close this decision, however, without noting that this area of the law would benefit from clarifying legislation. When it comes to the recognition of wills executed by nonresidents or recent residents, the Probate Code lacks definitions of important terms, including "notarial," "nuncupative," "holographic," and "nonresident." The definition of these terms implicates important rights and policy choices.⁴

Florida is already a global community and global marketplace. The people of Florida benefit from the way many citizens of distant states and countries visit, invest, and often stay to live out their golden years in Florida. Some are drawn by the *11 comfort of Florida's sunshine and coastlines. Others come for the security provided by our low tax economy in which the personal income tax is barred by our traditions and expressly by our Florida Constitution. We owe it to them to ensure that their testamentary intentions are strictly honored regarding the disposition of their Florida property. This goal would be advanced by legislation providing definitions of some of the Probate Code's essential terms.

Reversed and remanded.

SALTER, J., concurs.

WELLS, J. (specially concurring).

I agree that the order on appeal admitting to probate a nuncupative will should be reversed. I do so because Florida, while recognizing the validity of notarial wills of non-residents if valid where made, does not recognize a nuncupative will under any circumstance. *See* § 733.205, Fla. Stat. (2013) (recognizing the validity of notarial wills executed by non-residents); § 732.502(2), Fla. Stat. (2013) (settling that wills executed by non-residents will be recognized in Florida if valid where made even if non-compliant with Florida's statutory mandates for executing

a valid will⁵, but confirming holographic and nuncupative wills are not valid in Florida irrespective of by whom or where executed: "[a]ny will, other than a holographic or nuncupative will, executed by a nonresident of Florida, ... is valid as a will in this state if valid under the laws of the state or country where the will was executed." (Emphasis added.)).

All Citations

182 So.3d 5, 40 Fla. L. Weekly D2226

Footnotes

- The Argentine will is translated as naming and identifying the three witnesses and then reading "and who in witness thereof sign along with the testatrix," although no such signatures appear on the will. Documents in the record indicate the Argentine will was admitted to probate in Argentina. For purposes of this appeal, we assume, without deciding, that the Argentine will complied with the formalities of Argentine law.
- 2 A holographic will is a handwritten will.
- The parties dispute whether the Testator was a nonresident under section 732.502(2). The trial court did not make a fact finding on this point. For the reasons explained, we are able to resolve this dispute without such a fact finding. In cases turning on section 732.502, however, the trial court should make a factual determination whether the testator was a nonresident.
- To give one example, as discussed above, the Probate Code provides that the will executed by a nonresident of Florida 4 is "valid as a will in this state if valid under the laws of the state or country where the will was executed." § 732.502(2). The Probate Code, however, leaves undefined the term "nonresident." If "nonresident" means "nonresident at the time of death," then a person moving to Florida must be careful to remake existing wills to conform to the required formalities of Florida law because only wills that conform to Florida law will be recognized as valid for any person who dies a resident of Florida. In contrast, if "nonresident" means "nonresident at the time the will was executed," a person moving to Florida would not need to remake existing wills because Florida would recognize the wills as valid because they were valid where executed when the person was a nonresident of Florida. Under the latter definition, however, a person, having become a resident of Florida, cannot return temporarily to his or her previous state or country for the purposes of creating a will in that state or country and expect to have that will recognized in Florida unless that will fully conforms to the formalities required by Florida law. We note that the model Uniform Probate Code advocates a very expansive definition. See Unif. Probate Code § 2–506 (amended 2010) ("A written will is valid if executed in compliance with Section 2–502 or 2–503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national."). The policy choice involves balancing comity with the need to limit fraud and mistake regarding the testator's true intentions.
- 5 See generally § 732.502(1), Fla. Stat. (2013) (requiring that wills be signed by the testator/testatrix in the presence of two witnesses who must also sign the will in the presence of the testator/testatrix and each other).

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144 Fla. 517 Supreme Court of Florida, Division A.

TROTTER et al.

v.

VAN PELT et al.

Oct. 1, 1940.

Rehearing Denied Nov. 9, 1940.

Synopsis

Suit by William T. Van Pelt and others against Herbert Trotter, as executor of the estate of J. I. Triplett, deceased, and others for partition and other relief. From a judgment for plaintiffs, the defendants appeal.

Reversed.

West Headnotes (16)

[1] Wills 🌦 Foreign probate or judgment

The decree in Virginia probate proceeding that will including codicils was holographic and unattested did not have any application beyond limits of Virginia, and to apply such decree to testator's realty located in Florida would abrogate "lex rei sitÆ doctrine" or place a limitation on it that was unwarranted.

4 Cases that cite this headnote

[2] Wills - Nature and purpose of probate

A proceeding to probate a will is a "proceeding in rem", but judgments entered therein do not affect title to realty in another state.

[3] Wills Foreign probate or judgment

The decree in Virginia probate proceeding determining that will was holographic and unattested was not "res judicata" as to status of will in proceeding to probate will in Florida, where realty of testator was located.

2 Cases that cite this headnote

[4] Wills & Foreign probate or judgment

Proceedings to probate a will do not fall within "full faith and credit clause" of Federal Constitution. U.S.C.A.Const. art. 4, § 1.

1 Cases that cite this headnote

[5] Wills Foreign probate or judgment

A proceeding to probate will of a Virginia testator in Florida, where realty of testator was located, was not a "collateral attack" on Virginia probate proceeding.

[6] Wills - Foreign probate or judgment

The right to contest a will of realty is not local but is incidental to the parties, the realty, and the jurisdiction where realty is situated.

1 Cases that cite this headnote

[7] Wills 🍑 Foreign probate or judgment

Where a testator executes a will devising lands in two or more states, the courts in each state will construe will as to lands located therein as if devised by separate wills.

3 Cases that cite this headnote

[8] Wills • What law governs

A will executed by Virginia testator in presence of two subscribing witnesses who, at testator's request, in his presence and in presence of each other, signed as subscribing witnesses, was in full compliance with law of Florida, and was effectual to pass title to realty in Florida.

2 Cases that cite this headnote

[9] Wills 🐎 Intention of Testator

The purpose of testator is the lead for all courts when they construe a will.

[10] Equitable Conversion • In general; nature and grounds of doctrine

The "equitable conversion doctrine" is a creature of equity, unknown to the law, and is an application of the maxim that equity treats that as done which ought to be done.

2 Cases that cite this headnote

[11] Equitable Conversion \leftarrow Realty into personalty in general

Equitable Conversion \leftarrow Personalty into realty

Under "equitable conversion doctrine," land which is directed to be converted into money is treated as money and money which is directed to be invested in land is treated as land.

[12] Equitable Conversion 🐎 Directions in Will

In determining whether will effected an equitable conversion, the object is to ascertain intention of testator, and whether such intention was a conversion out and out for all purposes, or merely for a particular purpose, is to be gathered from construction of will as a whole.

[13] Equitable Conversion \leftarrow Intention of testator

That executor was vested with some discretion as to time, terms, and manner of sale of realty devised by testator to trustees for purpose of founding an educational institution did not militate against "equitable conversion doctrine."

[14] Equitable Conversion • In general; nature and grounds of doctrine

The "equitable conversion doctrine" obtains in Florida.

3 Cases that cite this headnote

[15] Equitable Conversion Discretion as to time and manner of sale

The provision in will directing executor to dispose of testator's Florida realty as conditions were favorable for realizing full market value had effect of converting Florida realty into personalty on death of testator.

[16] Wills 🐎 Partial revocation

Wills Prequisites and validity of codicil

Where holographic will devising Florida realty was executed in presence of two subscribing witnesses who, at testator's request, in his presence and in presence of each other, signed as subscribing witnesses, subsequent interlineations and erasures and codicils which were not executed as required by statute did not have effect of revoking attested will, in so far as attested will related to Florida realty. Laws Nov. 20, 1828, § 52.

4 Cases that cite this headnote

*518 **216 Appeal from Circuit Court, Duval County; DeWitt T. Gray, judge.

Attorneys and Law Firms

Fleming, Hamilton, Diver & Jones, of Jacksonville, for appellants.

Henry P. Adair, Cyril C. Copp, and Victor Blue, all of Jacksonville, for appellees.

Opinion

TERRELL, Chief Justice.

Dr. J. I. Triplett of Mt. Jackson, Virginia, died testate in March, 1930. His will was dated October 26, 1927, and to it three codicils were attached dated, respectively, November 6, 1927, August 6, 1929, and September 17, 1929. The will devised the bulk of the estate to Herbert Trotter, J. I. Triplett, Jr., F. S. Tavenner, Jr., and W. L. Vehrencamp, in trust for the purpose of founding an educational institution to be known as Triplett Business College. Herbert Trotter was named as executor of the estate in the will.

In due course, the executor offered the will including the three codicils for probate in Shenandoah County, Virginia. An order

was entered probating the will as the holographic, attested last will of the testator and the three codicils as his holographic unattested will. Certain heirs and distributees of the testator then brought a proceeding against the executor, trustees and others having claims against the estate contesting the probate of the will. This proceeding resulted in a decree denying probate as an attested will but admitting it including the three codicils to probate as the holographic unattested will of the testator. This decree was on appeal affirmed by the Supreme Court of Appeals of Virginia January 11, 1934. Triplett's Ex'r v. Triplett, 161 Va. 906, 172 S.E. 162.

In July, 1930, the plaintiffs in this suit filed caveat in the probate court of Duval County praying that they be notified if the will as probated in Virginia be offered for probate in the latter county. In June, 1934, the executor offered the will for probate in Duval County as the attested will of J. I. Triplett. In July, 1934, the caveators filed their petition resisting probate as the attested will of the testator at the same time challenging the jurisdiction of the court to admit the will to probate in Florida. A demurrer to this petition was filed and further proceedings in the probate *520 court were suspended pending disposition of the cause in the Circuit Court.

The present suit was instituted in the Circuit Court of Duval County in August, 1930, by bill for partition and other relief on behalf of complainants, appellees here. The trustees and other heirs who did not join in the partition suit were named as defendants. The bill of complaint was several times amended, answers were filed, testimony was taken, and in August, 1939, final decree was entered holding that all parties to the cause were estopped to assert that the will was the attested last will of the testator since that question was concluded by the Virginia courts and that J. I. Triplett died intestate as to his Florida real estate. This appeal is from the final decree.

Nothing but the Florida real estate owned by J. I. Triplett at the time of his death is affected by this litigation so the primary question is what was the effect of the Virginia probate in Florida and whether or not the will was properly executed and sufficient to pass title to the Florida real estate to the trustees for the purposes stated. If it was insufficient for that purpose, then it must be admitted that said real estate passed to the heirs at law of the testator under the Florida statute of descents.

Appellants and appellees agree that the law of the situs governs the title, devolution, and distribution of real estate but their deductions from this rule are at variance. **217 Appellees contend that the will (including codicils), being

holographic and unattested, is ineffective under the Florida statutes to pass title to real estate in Florida while appellants contend that the will (not including codicils) was executed in compliance with every requirement of the law of Florida and is ample to dispose of real estate in this state. Appellants, in other words, say that the testator dies testate as to *521 his Florida real estate while appellees contend that he died intestate as to said real estate.

Appellants also contend that the Virginia decrees affecting the will are not binding on them as to Florida real estate, that they were in fact in error on that point and that they are entitled to have the effect of the will as to Florida real estate adjudicated by the courts of Florida. Appellees contend on the other hand that the litigation in Virginia to determine the status of the will was a proceeding in rem, that while the Florida real estate was not before the courts, the will was before them, that the Virginia courts had jurisdiction to determine the status of the will, and that, when determined, such determination was conclusive as to status but that it had no effect nor by it did the Virginia courts purport to determine, nor could they determine, what rights were conveyed by the will to real estate located outside the State of Virginia. This contention presents a contradiction that seems to create a right for appellees and destroys a remedy for appellants.

Appellees also contend that appellants having presented the issue of attestation to the Virginia courts and it having been decided adversely to them, they are now precluded from relitigating that question in this State. They rely on (1) the nature of the litigation, (2) the doctrine of res judicata and estoppel, (3) full faith and credit (4) collateral attack, and (5) the doctrine of lex loci rei sitae, to support their contention.

[4] This contention as to attestation is sound in so far as it affects litigation in the State of Virginia but we do not think it has any application beyond the limits of that State. To apply that rule in this case would as to real estate in Florida abrogate the doctrine of lex rei sitae or place a limitation on it that is unwarranted. Appellees' contention as to the *522 litigation in Virginia being a proceeding in rem is correct but the judgments entered did not affect the title to real estate in another state. In answer to the contention as to res judicata, it is sufficient to say that the elements essential to constitute it as stated in Gray v. Gray, 91 Fla. 103, 107 So. 261, are not present. As to full faith and credit, it is sufficient to say that proceedings to probate a will do not fall within Section one, Article Four of the Federal Constitution, making that requirement. Such proceedings are conclusive within the State, but they establish nothing beyond the limit of the State

where the probate took place. Nelson v. Potter, 50 N.J.L. 324, 15 A. 375; Dibble v. Winter, 247 Ill. 243, 93 N.E. 145.

- [5] Neither was this a collateral attack on the Virginia probate proceedings. As to appellants, the sole issue was whether the testator died testate or intestate as to Florida real estate. To settle that issue, they relied on and offered the will of October 26, 1927. They discard the codicils on the theory that the original will was properly attested under the laws of Florida, that the codicils were not so attested and if they had been, they had no effect on the general purpose of the will and in no way affected the Florida real estate.
- [6] [7] If the courts of Florida are precluded from determining the status of the Triplett will as to real estate in Florida, then the lex loci rei sitae is controlled by the Virginia decisions. The right to contest a will of real estate is not local but is incidental to the parties, the realty, and the jurisdiction where the latter is situated. It follows that when a testator executes a will devising lands in two or more states, the courts in each state will construe it as to the lands located therein as if devised by separate wills. McNamara v. McNamara, 293 Ill. 54, 127 N.E. 130; *523 Kirkland v. Calhoun, 147 Tenn. 388, 248 S.W. 302; Nelson v. Potter, 50 N.J.L. 324, 15 A. 375.
- [8] [9] The evidence shows that the will of October 26, 1927, (not including the codicils) was executed in the presence of two subscribing witnesses who at the testator's request, in his presence and in the presence of each other signed as subscribing witnesses. This was in full compliance with the law of Florida, and, being so, was effectual to pass title to real estate in Florida. This interpretation gives full force and effect to the purpose of the testator and that is the lead for all courts when they construe a will. The chancellor was in error in holding that the testator died intestate as to his Florida real estate.
- **218 The Virginia court decreed the will including the codicils to be holographic and unattested. Appellees contend that the will came to Florida fixed with that status because of the Virginia decree, not because it was in fact unattested. The chancellor adopted this view and held the will ineffectual as to real estate in Florida. In our view, this status did not follow the will out of Virginia but was limited to its effect in that state. There are cases which hold that one state may be required to recognize a status fixed by the courts of another state but it is not required to attach to it the same legal consequences. Neither do the rights incident to the status so fixed in one state follow it into another state. 3 Freeman on Judgments, 5th

Edition, Volume 3, 2391. We understand the doctrine of lex loci rei sitae to be absolute but that would not be the case if the status attached to a will of realty in one state followed it into other states.

The next question is whether or not the will of J. I. Triplett had the effect of converting all real estate held by the testator at the time of his death into personal property under the doctrine of equitable conversion.

- *524 The pertinent provision of the will controlling this point is as follows:
- 'All other real estate will be disposed of as conditions are favorable for realizing full market value. The Executor will have the disposing of the realty that located in Florida through my nephew J. I. Triplett, Jr.'
- [10] [11] [12] The doctrine of equitable conversion is a creature of equity, unknown to the law, and is an application of the maxim that equity treats that as done which ought to be done. Under it, land which is directed to be converted into money is treated as money and money which is directed to be invested in land is treated as land. As applied to wills, the object is to ascertain the intention of the testator and whether that intention was a conversion out and out for all purposes, or merely for a particular purpose, is to be gathered from the construction of the will as a whole. Moore v. Kernachan, 133 Va. 206, 211, 112 S.E. 632, 633.
- [13] It is true that the pertinent part of the Triplett will as quoted vests discretion in the executor as to time the sale of the real estate in Florida may be made but as to the fact of selling it is mandatory. The fact that trustees are vested with some discretion as to time, terms, and manner of sale does not militate against the doctrine of equitable conversion. Carr v. Branch, 85 Va. 597, 8 S.E. 476; Tait v. Dante, 4 Cir., 78 F.2d 303; Whalley v. Lawrence's Estate, 93 Vt. 424, 108 A. 387.
- [14] [15] The doctrine of equitable conversion obtains in Florida, Christopher v. Munger, 61 Fla. 513, 55 So. 273. The language of the will was clear and definite on the point and had the effect of converting the Florida real estate into personalty on the death of the testator. No subsequent action on the part of the heirs, trustees, or anyone else was necessary to affect this purpose. Any other holding subjects *525 the Florida real estate to the decree of the Virginia courts and relieves it from the jurisdiction of the courts of this State. The lower court was therefore in error in holding that the appellants were estopped by the Virginia decrees from contesting the status of the will as to Florida realty.

[16] The law of Florida, Section 5461, Compiled General Laws of 1927, provides that no devise of lands shall be revocable by any other will or codicil unless the same be in writing and attested in the same manner as the will in the first instance. The will of October 26, 1927, was executed with all the requirements of Florida law. The Virginia courts denied probate of the will (including the codicils) as an attested will because of some changes and interlineations made after the execution of the will and that such changes had the effect of revoking the attested will but not being made as required by law they had no such effect in this State. Brown v. Avery, 63 Fla. 376, 58 So. 34, Ann.Cas.1914A, 90.

The interlineations and erasures in no way affect the material parts of the executed will and in fact so much of the will as affects the Florida real estate is unchanged. So much may also be said of the codicils but none of them is executed as required by statute so we are not concerned with them. We find nothing in the record showing an intention to revoke the will. There is a showing of an intention to re-execute his will, but until done, we must assume that he intended it to remain as written October 26, 1927.

It is therefore our conclusion that the will of October 26, 1927, was executed in compliance with the laws of Florida, that it was in full force and effect as to Florida real estate at the death of the testator, that the probate in Virginia established nothing **219 beyond that State, and being so the bill of complaint fails to allege a ground for petition.

*526 The judgment of the chancellor is accordingly reversed.

Reversed.

BUFORD and THOMAS, JJ., concur. WHITFIELD, J., concurs in opinion and judgment.

BROWN and CHAPMAN, JJ., not participating as authorized by Section 4687, Compiled General Laws of 1927, and Rule 21–A of the Rules of this Court.

All Citations

144 Fla. 517, 198 So. 215, 131 A.L.R. 1018

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736 So.2d 57
District Court of Appeal of Florida,
Second District.

In re ESTATE OF Azalea
Lawson BARTEAU, Deceased,
John S. Biederman, John S. Biederman, Jr.,
Sadie T. Wilcox, Linda S. Gilbert, Colin E.
Brett, Nan L. Sundano, Ellen Biederman
a/k/a Jane Ellene Biederman Creamer,
and Mercedes Biederman, Appellants,

Jesus Rene Guzman Ramos, Petitioner for Personal Representative of the Estate of Azalea Lawson Barteau, Under Mexican Will dated November 24, 1997, Appellee.

> No. 98–03795. l May 28, 1999.

Synopsis

In consolidated probate actions, the Circuit Court, Pinellas County, Patrick K. Caddell, Acting Circuit Judge, required any contest as to validity of subsequent Mexican will to be held in Mexico. Beneficiaries under earlier Florida will appealed. The District Court of Appeal, Campbell, Acting Chief Judge, held that Mexican will was subject to jurisdiction of Florida courts for determination of validity of that will.

Reversed and remanded.

West Headnotes (1)

[1] Wills Particular Courts, Judges, or Other Officers

A will executed in another country by a domiciliary of the other country, and probated in the other country, is subject to the jurisdiction of Florida courts for the determination of the validity of that will when it is presented in

Florida for the purpose of devising real property in Florida.

Attorneys and Law Firms

*57 Mark R. Lewis, Sr., St. Petersburg, for Appellants.

Martin Errol Rice, P.A., St. Petersburg, for Appellee.

Opinion

CAMPBELL, Acting Chief Judge.

Appellants, beneficiaries under Decedent's earlier will, challenge the trial court's order that required any contest as to the validity of Decedent's subsequent will dated November 24, 1997, be held in Mexico and not in Florida. We reverse.

This appeal is from two consolidated probate actions filed in Pinellas County after the January 29, 1998 death in Mexico of Azalea Lawson Barteau (Decedent). In a petition for probate, the first action below, Appellants sought to establish and admit to probate a lost Last Will and Testament of the Decedent executed in Florida on August 12, 1993 (the "Florida Will"). The second action, filed by Appellee, was for Ancillary Administration of a Spanish language Will (the "Mexican Will") that Decedent executed in Mexico *58 on November 24, 1997. The two actions were consolidated at trial. In response to Appellee's petition for ancillary administration of the Mexican Will, Appellants filed a declaration of adversary proceedings and an objection. (The Decedent's domicile at the time of her death has not been established in the Florida proceedings.)

Appellee then moved to dismiss Appellants' petition for probate of the Florida Will, alleging the existence of later wills executed by Decedent in Mexico. Appellee attached copies of those alleged later wills to his motion to dismiss and further alleged that the last dated Will (the Mexican Will) had been admitted to probate in Mexico so that any contest to the validity of or ancillary probate of that will must be in Mexico.

Appellants alleged that Decedent was domiciled in Pinellas County and owned real property there as well as in Mexico. Appellants further alleged that the Mexican Will was procured through fraud, undue influence and overreaching, and that Decedent lacked testamentary capacity at the time of execution of the Mexican Will. The trial judge agreed

with Appellee and ordered that all proceedings related to the wills, including the petition for ancillary administration of the Mexican Will, be conducted in Mexico. In doing so, the trial judge rejected the applicability of *In re Swanson's Estate*, 397 So.2d 465 (Fla. 2d DCA 1981), *In re Roberg's Estate*, 396 So.2d 235 (Fla. 2d DCA 1981), and *In re Estate of Hatcher*, 439 So.2d 977 (Fla. 3d DCA 1983), instead, apparently relying upon a theory utilizing forum non conveniens. This was error. While we have found no cases, and none have been cited to us, applicable to proper probate jurisdiction proceedings between Florida and foreign countries, we believe *Swanson*, *Roberg* and *Hatcher*, involving that same question albeit between different states, properly apply here. As was held in those cases, a will executed in another state by a domiciliary of the other state,

and probated in the other state, is subject to the jurisdiction of Florida courts for the determination of the validity of that will when it is presented in Florida for the purpose of devising real property in Florida.

We, therefore, reverse and remand for further proceedings on the substantial validity of Decedent's wills. In doing so, the place of Decedent's domicile at the time of her death is a valid subject for determination.

WHATLEY and STRINGER, JJ., Concur.

All Citations

736 So.2d 57, 24 Fla. L. Weekly D1283

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131 Fla. 408 Supreme Court of Florida, Division A.

GOLDMAN

v.

DITHRICH.

Feb. 9, 1938.

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Rehearing Denied April 1, 1938.

Synopsis

Suit by W. Heber Dithrich, individually, and as representative of the heirs, devisees, and legatees of Edward G. Dithrich, deceased, against Mary May Goldman, sometimes known as Mary May Dithrich, to annual the latter's marriage to decedent. From a decree annulling the marriage and an order denying defendant's petition for a rehearing, defendant appeals.

Reversed.

BROWN, J., dissenting.

West Headnotes (5)

[1] Marriage and Cohabitation > What Law Governs

Generally, legality of marriage between parties sui juris will be determined by law of state wherein consummated.

[2] Marriage and Cohabitation Consanguinity or affinity

Under West Virginia law, marriage between a woman and her son-in-law is void only from time it is so declared by decree of divorce or nullity in competent court. Code W.Va.1916, c. 63, § 10; c. 64, § 1.

1 Cases that cite this headnote

[3] Marriage and Cohabitation • Licenses, certificates, recording, and registration

A marriage between decedent's surviving common-law wife and her daughter's husband, who was living with his wife and impersonated decedent in procuring license and going through marriage ceremony, was nullity in inception and without binding force and effect, where parties never lived or cohabited together nor intended to.

1 Cases that cite this headnote

[4] Marriage and Cohabitation Common-law marriage in general

To constitute valid marriage, marital contract must be voluntarily entered into in good faith for purposes actuating such contracts, parties must be legally eligible to make contract, and their status must be such that union will not be contrary to public policy or obnoxious to prevailing social mores.

1 Cases that cite this headnote

[5] Marriage and Cohabitation Prior existing marriage; bigamy and polygamy

A successful marriage, entered into in good faith and in regular form by decedent's surviving common-law wife and another after her invalid marriage to her son-in-law impersonating decedent, was valid, so as to entitle her to interest in her last husband's estate after his death.

3 Cases that cite this headnote

*409 **715 Appeal from Circuit Court, Pinellas County; T. Frank Hobson, judge.

Attorneys and Law Firms

Moreland E. Maddox and B. M. Skelton, both of St. Petersburg, for appellant.

Bussey, Mann & Barton, of St. Petersburg, for appellee.

Opinion

TERRELL, Justice.

William A. Goldman died October 13, 1931, leaving appellant as his surviving wife with whom he had years before contracted a common-law marriage. On October 21, 1931, eight days after her husband's death, appellant went through a marriage ceremony with her son-in-law E. J. Ganz in Brook county, W. Va. She later moved to St. Petersburg, Fla., and on November 22, 1932, was married to Edward C. Dithrich who died testate June 19, 1933, possessed of considerable real and personal property.

In due course, appellant dissented from the terms of Dithrich's will which was filed for probate in Pinellas county and exercised her election to take under the law rather than under the will. This suit was instituted by appellee individually and as representative of the heirs of the testator for the purpose of annulling the marriage between appellant and Edward C. Dithrich on the ground that at the time said marriage was contracted, appellant had previously entered into the marital relation with E. J. Ganz in West Virginia, that the said E. J. Ganz was still living, and that appellant's marriage with him had not been dissolved at the time she was married to the testator.

As defense to the suit to annul, appellant contends that her West Virginia marriage with E. J. Ganz was void ab initio by reason of the fact that said Ganz was a married man at the time of said marriage and was thereby incapacitated to contract a valid marriage. Appellee contends on the other hand that under the law of West Virginia, such a marriage was voidable only and not void, and hence *410 good until annulled by decree of a court of competent jurisdiction.

The chancellor found for appellee and entered his decree annulling the marriage. A petition for rehearing was filed wherein it was alleged that a decree annulling the West Virginia marriage between appellant and Ganz had been entered several days after the entry of the final decree annulling the marriage between appellant and Dithrich **716 and contending that such annullment related back to the date of the Ganz marriage, thus making appellant an unmarried woman at the time of her marriage to Edward C. Dithrich and legalizing the said marriage. The petition for rehearing was denied, the court again holding that the West Virginia marriage between appellant and Ganz was voidable only and hence valid until set aside by the court, but that the decree annulling said marriage was not retroactive so as to

validate her marriage with Dithrich. This appeal is from the final decree and the order denying the petition for rehearing.

The vital question to be adjudicated is the legal status of the marriage in West Virginia between appellant and E. J. Ganz. [1] The general rule is that marriage between parties sui juris is to be concluded by the law of the place where consummated. Story, Conflict of Laws, 1st Ed., 103; Loughran v. Loughran, 292 U.S. 216, 54 S.Ct. 684, 78 L.Ed. 1219; Henderson v. Henderson, 265 Mo. 718, 178 S.W. 175. If there was a marriage between appellant and E. J. Ganz, its legality will be determined by the law of West Virginia as will the legality of her marriage with Edward C. Dithrich be determined by the law of Florida.

[2] The West Virginia Code of 1916, page 916, chapter 63, § 10, contains the following:

'No woman shall marry her father, grand-father, step *411 - father, brother, son, grand-son, half-brother, uncle, *daughter's husband*, husband's son, or his grand-son, or step-son, brother's son, sister's son, or husband of her brother's or sister's daughter. (Acts 1872, c. 89; 1872–3, c. 161)'

At page 920, chapter 64, § 1, the same Code contains the following:

'All marriages between a white person and a negro; all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living; all marriages which are prohibited by law on account of the consanguinity or affinity between the parties; all marriages solemnized when either of the parties was insane, or incapable from physical causes of entering into the marriage state, or under the age of consent, shall, if solemnized within this State, be void from the time they are so declared by a decree of divorce or nullity. (Code Va.1860, p. 529.)'

From a reading of the foregoing, we must conclude that if there was in fact a valid marriage between appellant and E. J. Ganz in West Virginia, it was void only from the time it was so declared by decree of divorce or nullity in a competent court.

[3] In our view, the pretended marriage between appellant and E. J. Ganz was a nullity in its inception and was without binding force and effect. There is no dispute with reference to the facts of the transaction. It is shown that the marriage license was issued in the name of William A. Goldman, the deceased husband of appellant, and in the name of Mary M. Stayer, who is in fact the appellant. E. J. Ganz, the son-in-law of appellant whose wife was living and from whom he was

not separated, went with her (appellant) to procure the license and went through the marriage ceremony with her which was regularly performed, *412 though he (Ganz) impersonated William A. Goldman.

Appellant contends that she went through this pretended marriage with Ganz because her former marriage with Goldman was a common-law marriage, that common-law marriages were not recognized by law in West Virginia, and that she wanted the record to show that she had a ceremonial marriage with Goldman to remove the stigma of bastardy from her daughter, the wife of E. J. Ganz, who was a child of her marriage with Goldman. Appellee contends on the other hand that her marriage with Ganz was a ruse to clear the record and enable her to secure a portion of the estate of W. A. Goldman, which she could not do as his common-law wife. The fact that the date of the certificate was changed so as to read October 21, 1930, one year previous to its actual date and presented to the representatives of Goldman's estate for the purpose of securing a share therein gives support to the latter contention.

For the purpose of this case, it matters not which of these contentions is true. It is shown that Ganz and his wife were living together at the time, that he and appellant never lived or cohabited together nor ever intended to, that their pretended ceremonial marriage was in no sense actuated of love, affection, the purpose to establish a home and family, or any other fact essential to constitute the marital state. By the admission of the parties, the whole transaction was foreign to the vital purpose of marriage and we fail to find a single element of a valid marriage in it.

**717 [4] To constitute a valid marriage, the marital contract must be voluntarily entered into in good faith for the purposes actuating such contracts, the parties must be legally eligible to make the contract, and their status must be such that the union will not be contrary to public policy or obnoxious to *413 the prevailing social mores. The marriage in question offends against these requirements.

It is conclusively shown that there was no intention on the part of either party to enter into a life relation or to assume the responsibility imposed by law on those becoming parties to the banns. In fact, it may be reasonably inferred the neither party had any intention of giving effect to the marriage. Furthermore, in view of the traditional gulf of infelicity that is said to separate the affections of mother-in-law and son-in-law, to contemplate the one in good faith, taking the other 'for

better or for worse' is a societal phenomenon that we are not ready to accept and the facts in this record are too skimpy to make it register in our sanctum of concepts. It was nothing more than a jest or mock marriage which is of no effect and there was no possibility of ratification by cohabitation or change in the status of the parties. McClurg v. Terry, 21 N.J.Eq. 225.

[5] So far as the record discloses, the marriage between appellant and Edward C. Dithrich was entered into in good faith and was successful. It was regular in form and the parties lived together happily until the death of the latter. The commonlaw marriage was no impediment to it. This assault was precipitated by heirs of the deceased to defeat the claim of appellant to an interest in his estate.

We are not convinced that proper showing has been made to invalidate said marriage so the decree below is reversed.

Reversed.

ELLIS, C. J., and BUFORD, J., concur.

WHITFIELD, P. J., and CHAPMAN, J., concur in the opinion and judgment.

BROWN, Justice (dissenting).

It is admitted by the appellant that on October 21, 1931, she procured a marriage license in Brooke county, W. Va., to unite herself and William A. Goldman in marriage; that William A. Goldman, whom she had lived with in a common-law relationship, had died prior thereto on October 13, 1931; that the person who appeared with her to procure the marriage license and went through the marriage ceremony with her before a minister of the gospel was her son-in-law E. J Ganz, who was married at that time, but that there was no cohabitation on the part of defendant and Ganz. Than without having that marriage annulled, the defendant moved to Florida, and on November 22, 1932, married Edward C. Dithrich, who died June 19, 1933. The Ganz marriage was not annulled until after the death of Dithrich, and four days after the final decree in the case now before us was rendered.

The general rule is that the validity of a marriage is governed by the law of the place of its celebration. Loughran v. Loughran, 292 U.S. 216, 54 S.Ct. 684, 78 L. Ed. 1219; Hopkins County Coal Co. v. Williams, 219 Ky. 156, 292 S.W. 1088; Henderson v. Henderson, 265 Mo. 718, 178 S.W. 175; Welch v. All Persons, 78 Mont. 370, 254 P. 179; Sturm v.

Sturm, 111 N.J.Eq. 579, 163 A. 5; Matter of Burke's Estate, 143 Misc. 268, 256 N.Y.S. 862; Peefer v. State, 42 Ohio App. 276, 182 N.E. 117; Dodds v. Pittsburgh, M. & B. Rys. Co., 107 Pa. Super. 20, 162 A. 486.

'Between persons sui juris, marriage is to be decided by the law of the place where it is celebrated.' Story, Conflicts of Laws, 1st Ed., 103.

Thus the law of West Virginia governed the alleged marriage between the defendant and William A. Goldman and *415 the marriage between the defendant and E. J. Ganz, while the law of Florida governed the marriage between the defendant and Edward C. Dithrich. Whittington v. McCaskill, 65 Fla. 162, 61 So. 236, 44 L.R.A., N.S., 630, Ann.Cas.1915B, 1001.

Chapter 63, § 10, Code of West Virginia, 4th Ed., 1899, which was the codification of chapter 89, Acts of 1872, and chapter 161, Acts of 1872–73, provides that 'no woman shall marry her * * * daughter's husband.'

Chapter 64, § 1, of the Code of West Virginia, 4th Ed., 1899, which was page 529 c. 109 of the Code of Virginia, 1860, contains this rather unusual provision:

'All marriages which are prohibited by law on account of either of the parties having a former wife or husband then living; all marriages which are prohibited by law on account of consanguinity or affinity between the parties, * * * shall, if solemnized within this State, be void *from the **718 time they are so declared by a decree of divorce or nullity.*' (Italics supplied.)

The Supreme Court of Appeals of West Virginia in interpreting this last-quoted statute in the recent case of Sledd v. State Compensation Commissioner, 111 W. Va. 509, 163 S.E. 12, 80 A.L.R. 1424, said:

'Our statute, incorporated in the Code of 1868, c. 64, radically changed the common law and the law of Virginia, and made such bigamous marriages 'void from the time they are so declared by a decree of divorce or nullity.' Section 1. This is carried into the Code of 1931, 48-2-1, except that the proceeding is there denominated 'decree of nullity' and not 'decree of divorce or nullity' as formerly. Under our statute, therefore such marriages are not void ab initio, but become void only by judicial determination.

'The general rule is that a voidable marriage is regarded *416 as practically valid until its nullity is declared by

a court of competent jurisdiction within the lifetime of the parties. 18 Ruling Case Law, p. 690.'

This construction of the West Virginia statute by the Supreme Court of that state is binding upon this court. See Meister v. Bissell, 96 U.S. 76, 24 L.Ed. 826. Other West Virginia cases holding this kind of marriage voidable are: Martin v. Martin, 54 W.Va. 301, 46 S.E. 120, 1 Ann.Cas. 612; Perkey v. Perkey, 87 W.Va. 656, 106 S.E. 40; Hall v. Baylous, 109 W.Va. 1, 153 S.E. 293, 69 A.L.R. 527. See, also, in this general connection 18 R.C.L. 439, 440; 38 C.J. 1576, 1307, 1327, 1346, 1360; Note in 51 A.L.R. 1412.

There are cases holding that where marriages between certain persons are incestuous or polygamous, or otherwise prohibited by the public policy and law of the forum, they will not be deemed valid therein though they are held valid in the state or place where they were celebrated and though the parties to the marriage were there domiciled at the time. See 5 R.C.L. 995 and Schouler on Domestic Relations, 5th Ed., 37; Beale on the Conflict of Laws, Vol. 2, p. 687. At page 691 of Prof. Beale's work just cited, it is said:

'The marriage between white and black persons in the southern states, if forbidden by their domicil, has always been declared void, as so subversive of the social order and strongly against the public policy of the state that it cannot be permitted. If parties domiciled in a southern state leave the state and go to another which permits such a union, and are there married, the marriage is nevertheless void by reason of this overwhelming policy of the domicil. If, on the other hand, parties to such a marriage are domiciled in a northern state the marriage will be held good in spite of a prohibition at the domicil. The difference *417 lies in the differing effect on the public mind in the two sections of the country. In the south miscegenation is socially odious; in the north it is merely unwise.'

But in the case of State v. Ross, 76 N.C. 242, 22 Am.Rep. 678, it was said:

'However revolting to us and to all persons, who by reason of living in States where the two races are nearly equal in numbers have an experience of the consequences of matrimonial connections between them, such a marriage may appear, such cannot be said to be the common sentiment of the civilized and Christian world. When Massachusetts held such a number of negroes as to make the validity of such marriages a question of practical importance her sentiments and her legislation were such as ours are to-day. Medway v. Needham, 16 Mass. 157 [8 Am.Dec. 131]. Now since she

has got rid of her negroes the question is of no practical importance to her. And as far as may be gathered from her statute book she considers such marriages unobjectionable. Most of the States of the Union and of the nations of Europe with whom the question is merely speculative take a similar view of it. It is impossible to identify this case with that of an incestuous or polygamous marriage admitted to be such jure gentium. The law of nations is a part of the law of North Carolina. We are under obligations of comity to our sister States. We are compelled to say that this marriage being valid in the State where the parties were bona fide domiciled at the time of the contract must be regarded as subsisting after their immigration here. The inconveniences which may arise from this view of the law are less than those which result from a different one.'

This court is committed to a like view. In the case of Whittington v. McCaskill, 65 Fla. 162, 61 So. 236, 44 L.R.A., N.S., 630, Ann. Cas. 1915B, 1001, this court held that:

*418 'Although marriages between white persons and negro persons are prohibited in this state both by the Constitution and statutes, where such a marriage takes place in another state between such persons, who are bona fide residents of such state, and who continue **719 to reside there until the death of the wife, and such marriage is valid in the State where consummated, the husband is entitled to and takes, under the provisions of Section 2295 of the General Statutes of 1906, all the property of the wife situated in this state, where she dies intestate without leaving any children or their descendants surviving her.'

In addition to our constitutional prohibition of marriages between white persons and colored persons, sections 5857, 5860, C. G.L., not only prohibit such marriages buy declare them utterly null and void. Yet, this court, in the case of Whittington v. McCaskill, supra, held that where, as in that case, the parties were married in the State of Kansas, where the marriage was entirely valid, the validity of such marriage would not be questioned in this state and the husband would be entitled to inherit all the property of the wife situated in this state, she having died intestate and without children. If in the circumstances set out in the Whittington Case the marriage was recognized as valid in this state, we must likewise hold that a bigamous marriage, recognized as valid in West Virginia until annulled by a court decree, is valid here until so annulled, unless we are willing to assert that bigamy is more against the public policy of this state than miscegenation. And this too in spite of the fact that our Constitution denounces miscegenation but does not refer to

bigamy and our civil statutes make all marriages between white persons and negroes absolutely void, yet omitting from such statutes any reference to bigamous marriages. It is true, however, that both *419 bigamy and miscegenation are crimes by our criminal statutes. See sections 7559, 7562, C.G.L.

The federal statutes have no bearing on this question except in the District of Columbia and the territories of the United States. The federal Supreme Court has held that the Constitution of the United States confers no power whatever upon the general government to regulate marriage, or its dissolution, in the states, nor the duties and obligations which marriage creates, nor its effect upon property right. Andrews v. Andrews, 188 U.S. 14, 23 S.Ct. 237, 240, 47 L.Ed. 366. But Congress saw fit to make bigamy a crime in the territories. Reynolds v. U. S., 98 U.S. 145, 25 L.Ed. 244.

An exhaustive review of the many and somewhat conflicting authorities upon this general subject will be found in the note to Hills v. State of Nebraska, 57 L.R.A. 155, and also in the note to the case of In re Chace, 26 R.I. 351, 58 A. 978, 69 L.R.A. 493, 3 Ann.Cas 1051, 1054. See, also. State v. Fenn, 47 Wash. 561, 92 P. 417, 17 L.R.A., N.S., 800, 802, and Lanham v. Lanham, 136 Wis. 360, 117 N.W. 787, 17 L.R.A., N.S., 804, 128 Am.St.Rep. 1085. See, also, note in 51 A.L.R. page 1412, and 5 R.C.L. 995.

There seems to be no statute in our state expressly denouncing a bigamous marriage as void. Thus we have no *statutory* public policy to that effect. Indeed, one of the grounds for divorce provided by our statute is: 'That either party had a husband or wife living at the time of the marriage sought to be annulled.' Section 4983, C.G. L. This would seem to imply that a bigamous marriage, consummated in another state where it is recognized as voidable but not void, and where one of the parties thereto to removes to this state, should be deemed valid in this state until annulled either by decree of divorce or a decree in annulment proceedings. This would necessarily result from *420 the doctrine laid down by this court in Whittington v. McCaskill, supra.

Under the law of West Virginia, therefore, the marriage of the defendant and E. J. Ganz was in legal effect *voidable*, and was regarded as valid until its nullity was declared by a court of competent jurisdiction. Voidable marriages, as distinguished from those that are absolutely void, are generally regarded as valid until annulled by court decree. Tyson v. State, 83 Fla. 7, 90 So. 622. It follows that under the applicable West Virginia law, the defendant was married to E. J. Ganz, under a

voidable marriage, until the annulment of the marriage by the final decree of the circuit court of Pinellas county on October 30, 1935.

While still married to E. J. Ganz, under the law of West Virginia, which West Virginia marriage must be recognized as valid in this state until annulled by court decree (see Whittington v. McCaskill, supra), the defendant, on November 22, 1932, attempted to marry Edward C. Dithrich in Florida by going through a marriage ceremony in this state and later cohabiting with him, which relationship continued until the death of Dithrich on June 19, 1933. Not until after the final decree of October 30, 1935, annulling the Ganz marriage, was the defendant, under the doctrine enunciated by this court in a recent case, able to contract another marriage in this state. While we have **720 no express statute on the subject, yet in the recent case of Jones v. Jones, 119 Fla. 824, 161 So. 836, 839, 104 A.L.R. 1, it was held that, as to a bigamous marriage consummated in this state, the following doctrine was applicable:

'The marriage of a man and woman, where one of them has a hasband or wife by a prior marriage, who is then living and undivorced, is generally held to be absolutely *421 void, and not merely voidable, and, being a nullity, no judicial decree is ordinarily necessary to avoid same.'

Thus the intended marriage between the defendant and Edward C. Dithrich in this state was void, and was so decreed by the chancellor below, and could not have been made valid unless she had continued to live with him as his wife after the final decree had been entered annulling the marriage of the defendant and E. J. Ganz, if indeed by that manner of conduct it could have been validated. Since this became impossible, due to the prior death of Edward C. Dithrich, the defendant never became the wife of Edward C. Dithrich.

It is contended that there was not sufficient proof that the defendant and E. J. Ganz had been married in West Virginia.

The evidence showed that the defendant had lived in a common-law marital relation with William Albert Goldman in West Virginia until the latter's death. Common-law marriages made in West Virginia not being recognized as valid in that state, Beverlin v. Beverlin, 29 W.Va. 732, 3 S.E. 36; Chapter 63, § 6, Code of West Virginia, 4th Ed., 1899, the defendant, after the death of Goldman, procured a marriage license for William A. Goldman, and herself, in order that the common-law marriage between the deceased and herself might be recognized as legal, for the purpose, so she claims, of keeping her daughter from learning that she was Goldman's

common-law wife, only, but appellees allege that it was done so that she might claim part of his estate as his widow, a common-law marriage not being recognized in West Virginia. An attempt was made to alter the date on the marriage license to show a date prior to the death of William Albert Goldman. To accomplish this purpose, E. J. Ganz, the defendant's son-*422 in-law, went with her to procure the marriage license, and went through the marriage ceremony with her before a minister of the gospel.

The record shows that this marriage was consummated under a license issued to William A. Goldman and Mary M. Stayer, the defendant, empowering any person authorized to celebrate marriages in West Virginia to unite them in matrimony according to the ceremonies of that authorized person's church or religious denomination and the laws of West Virginia. H. L. Wiggins, as minister of the Christian church, made a return on the license stating that he married the parties under authority of that license. The defendant admitted going through the ceremony with E. J. Ganz.

The law of West Virginia controls as to what is necessary to constitute a valid marriage in that state. Since common-law marriages are not recognized there, all marriages to be valid must consequently be ceremonial. In the absence of a showing as to what the law of West Virginia required to be done to properly celebrate a marriage, the law of West Virginia is presumed to be the same as that of Florida. See 18 R.C.L. 427, § 55. No showing was made that the law of West Virginia required more to be done than was done by the parties in order to become married. We think the evidence was sufficient to prove that the parties were properly married in ceremonial fashion, under the Florida law, sections 5848–5860, C.G.L., which in this case is presumed to be the same as the law of West Virginia.

The fact that E. J. Ganz represented himself to be William Albert Goldman at the time he assisted the defendant in procuring the marriage license and at the time he went through the marriage ceremony with the defendant *423 before a minister of the gospel will not vitiate the marriage of the parties, because in so doing no fraud was practiced upon the defendant. See 38 C.J. 1300, 1307.

It is contended by appellees that the defendant entered into the marital relation with E. J. Ganz in order to procure for herself benefits from the Goldman estate, and she is now seeking to deny that the marriage with Ganz was effectively consummated in order to procure for herself benefits from the Dithrich estate. The defendant testified, however, that she

went through the marriage with Ganz in this manner so that her daughter would not know that she had been the common-law wife of Goldman, and that at the time of **721 the marriage with Ganz she never intended to live with him or become his wife.

'As a general rule the law will not look behind the appearance of a consent which was clearly manifested to determine its reality. Secret mental reservations of a party will not be inquired into, nor will the motives inducing the appearant consent ordinarily be examined.' 38 C.J. 1300.

The parties went through a merriage ceremony in West Virginia with every apparent outward intention of becoming lawfully wedded to each other. Whatever mental reservations the defendant may have had at the time were not evidenced by her conduct when the ceremony was performed, and they cannot be considered now.

I think the final decree should be affirmed.

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A User's Guide to Prosecuting Claims under Florida's Uniform Disposition of Community Property Rights at Death Act¹

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I. Introduction.

Black letter Florida law tells us that "[a]dministration of an estate is governed by the law of the decedent's domicile." In fact, the Florida Probate Rules require disclosure of a decedent's domicile in seven separate rules. But what about *marital* domicile (i.e., the "domicile that a

¹ <u>Disclaimer</u>: The opinions and views expressed in this presentation are mine only and are not necessarily the opinions, views, policies or procedures of my law firm. I do not suggest, nor do I contend, that this presentation, or the authorities cited herein, are minimum standards of care or required standards of practice. The goal of this presentation is to bring awareness to issues that may arise and sharpen the tools you can use to evaluate situations unique to your practice. All information contained in this presentation is for informational purposes only and should not be considered as legal advice. This presentation contains general information and may not reflect current law or legal developments. Any person viewing or receiving information from this presentation should not act or refrain from acting on the basis of any such information, but instead should perform their own research or seek appropriate legal advice from a qualified professional.

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³ Nahar v. Nahar, 656 So.2d 225, 229-230 (Fla. 3d DCA 1995) (citing *Biederman v. Cheatham*, 161 So.2d 538 (Fla. 2d DCA), *cert. denied*, 168 So.2d 146 (Fla.1964).

⁴ See Florida Probate Rule 5.122(a)(2) ("The petition for appointment of a curator shall be verified and shall contain ... the decedent's ... state and county of domicile.") (emphasis added); Rule 5.171(c) ("A person who is absent from the place of that person's last known domicile for a continuous period of 5 years ... is presumed dead.") (emphasis added); Rule 5.200(b) ("The petition for administration shall be verified by the petitioner and shall contain ... the ... state and county of the decedent's domicile." (emphasis added); Rule 5.210(a)(2) ("A petition to admit a decedent's will to probate without administration shall be verified by the petitioner and shall contain ... the ... state and county of the decedent's domicile." (emphasis added); Rule 5.3425(a)(1) ("The petition for an order authorizing the search of a safe deposit box leased or co-leased by a decedent must be verified and must contain ... The decedent's ... state and county of domicile.") (emphasis added); Rule 5.405(b)(2) ("The petition [to determine protected

husband and wife, as a married couple, have established as their home.")?⁵ This distinct species of domicile is never even mentioned in Florida's probate rules. So it shouldn't come as a surprise to anyone that Florida attorneys may be inclined to focus primarily (perhaps exclusively) on a decedent's domicile at death. This is a trap for the unwary. Why? Because a decedent's marital domicile – which in today's highly mobile society often changes multiple times over the course of a lifetime – can



dramatically reshape the ultimate disposition of a Florida estate if at any time in the past the decedent's marital domicile was located in a "community property" jurisdiction.

The choice-of-law rules underlying community-property claims in Florida probate proceedings were codified in the Uniform Disposition of Community Property Rights at Death Act (the "Uniform Act"). To date, the Uniform Act's been adopted in 17 common-law states. Florida adopted its version of the Uniform Act in 1992 ("Florida CP Act"). The purpose of the [Uniform Act] is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their 'community' rights. It thus follows the typical pattern of

homestead real property owned by the decedent] shall be verified by the petitioner and shall state ... the county of the decedent's *domicile* at the time of death." (emphasis added); Rule 5.530(a)(2) ("The petition [for summary administration] must be verified as required by law and must contain ... the ... state and county of the decedent's *domicile*.") (emphasis added).

⁵ See Black's Law Dictionary (11th ed. 2019) (defining "matrimonial domicile"). See also Farrell v Farrell, 710 So.2d 151, 152 (Fla. 3d DCA 1998) ("[Appellee] argues, and we agree, that the *only place* where the parties had established a matrimonial domicile is in Florida, as this is the *only state* where the "parties lived together as husband and wife either actually or constructively." (quoting Black's Law Dictionary definition of matrimonial domicile) (emphasis in original); Gould v. Gould, 194 N.Y.S. 745, 747-748 (N.Y. App. Div. 1922) ("While it is true that a man can have but one domicile, it does not necessarily follow that the husband and wife may not establish a matrimonial domicile different from that of the husband. ... [T]here can be a personal domicile distinct from the matrimonial domicile. The matrimonial domicile ... may be defined to be the place where a husband and wife have established a home, in which they reside in the relation of husband and wife. It is the place where the marital contract is being performed; and although one party or the other may abandon the relation and leave the jurisdiction, nevertheless the res remains in the place where the contract was last being performed.")

⁶ See Disposition of Community Property Rights at Death Act (1971), list of adopting jurisdictions. Available at: https://www.uniformlaws.org/committees/community-home?communitykey=cc060023-d743-4d32-b7e5-35b12cba4fb8&tab=groupdetails

⁷ See Fla. Stat. § 732.216 (Sections 732.216-732.228 may be cited as the "Florida Uniform Disposition of Community Property Rights at Death Act."). Laws 1992, c. 92-200, § 4.

community property which permits the deceased spouse to dispose of 'his half' of the community property, while confirming the title of the surviving spouse in 'her half.'"⁸

There are three must-read cases any Florida probate attorney tasked with evaluating a community-property claim should analyze. The first is Quintana v. Ordono, 195 So.2d 577 (Fla. 3d DCA 1967), a pre-Uniform Act opinion applying the "partial mutability" choice-of-law rule to community-property claims that has since been codified in the Uniform Act and Florida's CP Act. It's also one of only two Florida appellate decisions in the last 50 years directly addressing community property claims in a Florida probate proceeding. The second is *Estate of Bach*, 548 N.Y.S.2d 871 (Sur. Ct. 1989), a New York Surrogate's Court judgment providing a detailed roadmap for how asset tracing works in these cases and also the proper procedure for spouses seeking to prosecute community-property claims in jurisdictions that have adopted the Uniform Act (New York adopted its version of the Uniform Act in 1981). Finally, there's Johnson v. Townsend, 259 So. 3d 851 (Fla. 4th DCA 2018), the first and only appellate decision to examine Florida's CP Act and to apply Florida's probate creditor filing deadlines to these claims (in this case the claim was filed late, and thus forfeited). Johnson is especially important because it underscores the very narrow window of opportunity afforded to surviving spouses seeking to prosecute claims under Florida's CP Act. All three of these cases are discussed in depth below under the "Case Studies" subheading of these materials.

A. Community-property states and spousal property rights:

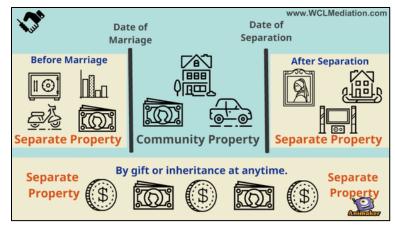
There are two distinct property systems in the United States: common law and community property. "Common law is the dominant property system in the United States and has been adopted by 41 states [including Florida]. The theory underlying common law is that each spouse is a separate individual with separate legal and property rights."

"The community property system has been adopted by nine states: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin. The U.S. Territories of Guam and Puerto Rico are also community property jurisdictions." According to census data, U.S. community property states include our two most populous states (California at #1 and Texas at #2), and collectively represent over 30% of the entire U.S. population. 11 "The theory underlying

⁸ Uniform Act, Prefatory Note. Available at: https://www.uniformlaws.org/viewdocument/final-act-with-comments-26?CommunityKey=cc060023-d743-4d32-b7e5-35b12cba4fb8&tab=librarydocuments

¹¹ See US States - Ranked by Population 2020. Available at: http://worldpopulationreview.com/states. See also U.S. Census, NST-EST2019-01: Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019. Available at: https://www2.census.gov/programs-surveys/popest/tables/2010-2019/state/totals/nst-est2019-01.xlsx?#

community property is analogous to that of a partnership. Each spouse contributes labor (and in some states, capital) for the benefit of the community, and shares equally in the profits and income earned by the community. Thus, each spouse owns an automatic 50% interest in all community property, regardless of which spouse acquired the community property."¹²



Source: https://www.youtube.com/watch?v=9c4C-VeeXUk.

A married couple's community property "estate" is terminated in one of only two ways: by divorce or death. By statue, ¹³ as well as case law, ¹⁴ Florida has categorically rejected all forms of community property rights in divorce proceedings. That being said, previously acquired community property rights are in practice largely preserved in these proceedings because Florida law suggests "that equal or 50/50 is the proper starting point in making an equitable distribution of marital assets," ¹⁵ regardless of whose name the asset is titled in. ¹⁶ With regard to testamentary community property rights Florida's approach is distinctly different. In this context, community property rights are explicitly preserved by Florida's CP Act, if only to a limited degree.

B. Marital Property Choice-of-Law Rule: Partial Mutability:

While not expressly using the term, in its *Quintana* opinion (discussed below) the 3d DCA, in accordance with broadly accepted U.S. choice-of-law principles, adopted the partial mutability

¹² IRM § 25.18.1.2.2 (03-04-2011).

¹³ "Title to disputed assets shall vest only by the judgment of a court. This section does not require the joinder of spouses in the conveyance, transfer, or hypothecation of a spouse's individual property; affect the laws of descent and distribution; *or establish community property in this state*." Fla. Stat. § 61.075(8) (emphasis added).

¹⁴ See Estabrook v. Wise, 348 So.2d 355 (Fla. 1st DCA), cert. denied, 354 So.2d 980 (Fla. 1977), cert. denied, 435 U.S. 971, 98 S.Ct. 1612, 56 L.Ed.2d 63 (1978) ("Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state's community property law. The establishment of non-record title interests arising out of marital claims should be settled in the forum state."); Green v. Green, 442 So.2d 354, 355 (Fla. 1st DCA 1983) ("Florida is not a community property state ...); Herrera v. Herrera, 673 So.2d 143, 144 (Fla. 5th DCA 1996) ("Florida is not a community property state.")

¹⁵ Herrera, 673 So.2d at 144. See also Fla. Stat. § 61.075(1) ("In a proceeding for dissolution of marriage ... the court shall set apart to each spouse that spouse's nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors ...") (Emphasis added.)

¹⁶ See Fla. Stat. § 61.075(6)(a)1.a. ("Marital assets and liabilities" include: Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.) (Emphasis added.)

choice-of-law rule for testamentary property rights of couples whose prior marital domicile was located in a community property jurisdiction.

Under this conflict-of-laws rule, the right of a spouse in a movable asset acquired during marriage is determined by the law of the state in which the spouses had their marital domicile at the time of the acquisition of the asset. Thus, if the spouses change their marital domicile during the marriage, it is entirely possible that different movable assets will be governed by different laws. This conflict-of-laws rule is widely known as "partial mutability" because the law of the original marital domicile does not remain the governing law as to assets acquired after a change in marital domicile has taken place. In other words, there is "mutability." However, it is only "partial" because with respect to rights acquired at a particular marital domicile, they are not mutable and are not lost simply by moving to a new marital domicile that does not recognize those spousal rights.¹⁷

This choice-of-law rule has deep historical roots in the U.S., ¹⁸ is "emphasized explicitly by the Restatement (First) of Conflict of Laws § 290 and in actual application by the Restatement (Second) of Conflict of Laws § 259," ¹⁹ and was codified in the Uniform Act.

C. Florida's CP Act:

Florida's CP Act is a powerful tool that can be used from the "outside in" by surviving spouses seeking recover estate assets rightfully belonging to them, and also from the "inside out" by personal representatives seeking to bring new assets into an estate for the benefit of beneficiaries or probate creditors.

But there's a catch. Florida's CP Act is not self-executing; community property rights are forfeited if not claimed during the course of a probate proceeding. And with respect to surviving spouses, the filing deadline is the same exceedingly small – and often unforgiving – set of deadlines generally applicable to probate creditors, as recently established in *Johnson v. Townsend*, 259 So. 3d 851 (Fla. 4th DCA 2018). The *Johnson* case is a cautionary tale underscoring Florida's public policy favoring the "speedy" and final determination of probate proceedings. ²⁰ And while

¹⁷ Schoenblum, Jeffrey, U.S. Conflict of Laws Involving International Estates and Marital Property: A Critical Analysis of Estate of Charania v. Shulman, 103 Iowa L. Rev. 2119, 2121 (2018). See also Newman v. Newman, 558 So.2d 821 (Miss. 1990) ("[T]he ... prevailing rule in American jurisdictions [is]: The law of the domicile at the time of acquisition of movable property determines the spouse's interests. ... This rule is characterized as one of partial mutability, as distinguished from full mutability (the rights to marital property vary with the actual domicile) and immutability (the rights to marital property are governed by the law of the marital domicile). See H. Marsh, Marital Property in Conflict of Laws 103–10 (1952).") (Emphasis added.)

¹⁸ "For nearly 200 years, the prevailing doctrine in the United States has been 'partial mutability.'" *See* Schoenblum, *supra* note 17, at 2121.

¹⁹ *Id.* at FN 54.

²⁰ See Estate of Brown, 117 So.2d 478 (Fla. 1960) ("Public policy requires that estates of decedents be speedily and finally determined."); In re Estate of Gay, 294 So.2d 668 (Fla. 4th DCA 1974) (The "announced public

personal representatives are as a general rule statutorily exempt from liability for missing these filing deadlines, their attorneys are not.²¹ A chilling statutory omission when coupled with Florida's third-party beneficiary rule for standing in legal malpractice actions, which opens the door to malpractice claims by non-client third party beneficiaries, such as claims asserted against a guardian's attorney by the non-client beneficiaries of the deceased ward's estate,²² claims asserted by a successor personal representative against a predecessor personal representative's counsel,²³ and claims asserted by a former ward against the attorney for his former court-appointed guardian.²⁴

D. The number of migrants to Florida from community property jurisdictions (both domestic and foreign) is too large to ignore.

In most common law jurisdictions probate practitioners can take comfort in the fact that they are unlikely to ever encounter the kind of multi-jurisdictional choice-of-law/marital property

policy of this state ... requires that estates of decedents be speedily and finally determined.") (citing *Estate of Brown*, 117 So.2d 478 (Fla. 1960)).

²¹ See Fla. Stat. § 732.221 ("The personal representative has no duty to discover whether any property held by the surviving spouse is property to which ss. 732.216-732.228 apply, unless a written demand is made by a beneficiary within 3 months after service of a copy of the notice of administration on the beneficiary or by a creditor within 3 months after the first publication of the notice to creditors.") (Emphasis added); Fla. Stat. § 732.223 ("The personal representative has no duty to discover whether property held by the decedent is property to which ss. 732.216-732.228 apply unless a written demand is made by the surviving spouse or the spouse's successor in interest within 3 months after service of a copy of the notice of administration on the surviving spouse or the spouse's successor in interest.") (Emphasis added.) See also Uniform Act, Perfection of Title of Surviving Spouse, cmt. ("This section is designed to eliminate any liability of the personal representative for a breach of his fiduciary duty by failing to search for or to discover whether property held by the decedent is property defined in [Fla. Stat. § 732.217], unless a written demand is made by the surviving spouse or the spouse's successor in interest.") (Emphasis added.)

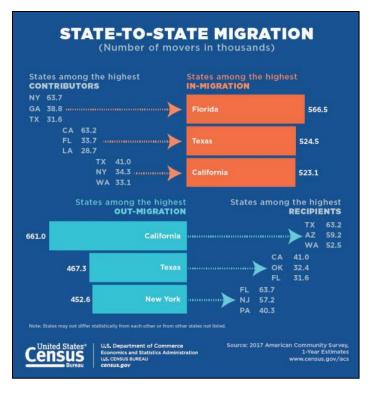
²² See Hodge v. Cichon, 78 So.3d 719 (Fla. 5th DCA), review denied, 99 So.3d 942 (Fla. 2012) (The third-party intended beneficiary exception to the rule requiring the plaintiff in a legal malpractice action to be in privity with the attorney is not limited to will drafting cases.).

²³ See Bookman v. Davidson, 136 So.3d 1276, 1280 (Fla. 1st DCA 2014), (Successor personal representative of estate had standing and duty, pursuant to statute governing power and rights of successor representatives, to bring legal malpractice suit against attorney who had been retained by estate's original personal representative alleging that the original representative, through attorney's guidance, improperly disclaimed or transferred estate's assets; original representative had power to engage attorney and to pay attorney from estate funds and duty to pursue assets of the estate, and successor representative stepped into the shoes of original representative.)

²⁴ Saadeh v. Connors, 166 So.3d 959 (Fla. 4th DCA 2015) (Ward was an intended third-party beneficiary of the services provided by attorney for court-appointed emergency temporary guardian, and thus attorney owed ward a duty of care sufficient to support assertion by ward of a legal malpractice claim against attorney after the guardianship terminated.)

issue the Uniform Act is designed to address. Not so in Florida, a longtime magnet for migrants, both domestic and international. In this state, the numbers are simply too large to ignore.

Florida is the first choice for relocating retirees within the U.S.²⁵ And according to census data, the largest overall of state-to-state migration in the U.S.,²⁶ as well as the single largest recipient of all migrants from Puerto Rico (a U.S. territory and community property jurisdiction).²⁷ To the extent any of these domestic migrants are married couples coming from any of domestic community jurisdictions, they bring with them their testamentary community property rights. But it doesn't end there.



The inflow of community-property couples to Florida also includes international migrants. "Under the law of most countries in continental Europe and virtually all countries in Latin America, spouses own property 'in community' unless they have expressly adopted another marital property regime such as separation of property."²⁸ Florida is the number one destination for South American migration to the U.S., ²⁹ and according to census data, the single largest

²⁵ See Silva, Derek CEPF, Where Retirees Are Moving – 2019 Edition, SmartAsset (April 25, 2019) (According to the study's press release, this ranking is based on net migration data form the U.S. Census Bureau and reflects the number of people age 60 and older moving into Florida minus the number moving out of Florida). Available at: https://smartasset.com/financial-advisor/where-are-retirees-moving-2019.

²⁶ See Kerns, Kristin and Locklear, L. Slagan, *Three New Census Bureau Products Show Domestic Migration at Regional, State, and County Levels*, U.S. Census Bureau, April 29, 2019. Available at: https://www.census.gov/library/stories/2019/04/moves-from-south-west-dominate-recent-migration-flows.html.

²⁷ See Glassman, Brian, A Third of Movers From Puerto Rico to the Mainland United States Relocated to Florida in 2018, U.S. Census Bureau, Sept. 26, 2019. Available at: https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html

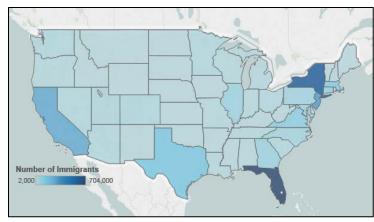
²⁸ See Galligan, Michael W., International Estate Planning for U.S. Citizens: An Integrated Approach, Estate Planning, a Thomson Reuters publication (October 2009). See also Willey, Charles W., Effect in Montana of Community-Source Property Acquired in Another State (And Its Impact on a Montana Marriage Dissolution, Estate Planning, Property Transfers, and Probate), 69 Mont. L. Rev. 313, 365 (2008) ("At present, Cuba and all of the major countries of Latin America, excluding Honduras, utilize the community property system. ... Argentina, Bolivia, Brazil and Chile speak in terms of 'marriage partnership.' El Salvador and Mexico have an optional community property system, and Paraguay and Uruguay have an 'opt-out' community property system.")

²⁹ See Zong, Jie and Batalova, Jeanne, South American Immigrants in the United States, Migration Policy Institute (Nov. 7, 2018). "In the 2012–16 period, most immigrants from South America lived in Florida (25 percent),

recipient of all international migration to the U.S.³⁰ To the extent any of these international migrants are married and come from community property jurisdictions, they too bringing their testamentary community property rights with them.

II. A deep dive into Florida's CP Act:

The first three sections of Florida's CP Act "form the heart of the Act; the succeeding sections might almost be described as precatory and



Top States of Residence for South Americans in the United States, 2012–16. Source: Zong, Jie and Batalova, Jeanne, *South American Immigrants in the United States*, Migration Policy Institute (Nov. 7, 2018).

have been added to clarify situations which would probably follow from the first three sections but which might raise questions." Fla. Stat. § 732.217 defines the scope of Florida's CP Act, Fla. Stat. § 732.218 gives rise to a series of rebuttable presumptions intended to aid in the identification and tracing of community-property assets, and Fla. Stat. § 732.219 defines a surviving spouse's dispositive rights with regard to any such assets.

New York (20 percent), or New Jersey (11 percent). The five counties with the most South Americans were Miami-Dade County in Florida, Queens County in New York, Broward County in Florida, Los Angeles County in California, and Kings County in New York. Together, these counties accounted for nearly 30 percent of the South American immigrant population in the United States. ... In 2017, the five largest countries of origin were Colombia (783,000, or 24 percent of all South American immigrants), Peru (459,000, 14 percent), Ecuador (454,000, 14 percent), Brazil (451,000, 14 percent), and Venezuela (351,000, 11 percent). Together, they accounted for 78 percent of the total South American immigrant population in the United States." *Id.* Available at: https://www.migrationpolicy.org/article/south-american-immigrants-united-states#DistributionStateCity.

³⁰ See Knapp, Anthony, Net Migration between the U.S. and Abroad Added 595,000 to National Population Between 2018 and 2019, U.S. Census Bureau, Dec. 30, 2019. "Florida, California, Texas, New York and Massachusetts typically gain the most migrants from abroad and comprise about half of net international migration for the nation most years. ... Between the last census in 2010 and July 1, 2019, international migration added 1,107,000 people to Florida; 1,022,000 to California; 819,000 to Texas; 698,000 to New York; and 362,000 to Massachusetts." Id. Available at: https://www.census.gov/library/stories/2019/12/net-international-migration-projected-to-fall-lowest-levels-this-decade.html.

³¹ Uniform Act, Prefatory Note.

A. Fla. Stat. § 732.217 defines the scope of Florida's CP Act:

1. Personal Property:

Fla. Stat. § 732.217(1) Subsection (1): Personal Property	Uniform Act (Commentary)		
"[Florida's CP Act applies] to the disposition at death of the following property acquired by a married person: <i>Personal property</i> , wherever located, which: (a) Was acquired as, or became and remained, community property under the laws of another jurisdiction; (b) Was acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, community property; or (c) Is <i>traceable</i> to that community property." (Emphasis added.)	"Subsection (1) is designed to cover all personal property which was acquired while the spouses were domiciled in a community property state, to the extent that it would have been treated as community property by that state at the time of acquisition and that no further action terminated the community character of the property. It also includes any property which was not originally community property but became such by agreement and, further, <i>brings within the Act any personal property which can be traced back to a community source</i> . Again, the Act only applies if there was no severance of the community interests [per Fla. Stat. § 732.225]." ³² (Emphasis added.)		

<u>Uniform Act, § 1, Example 1</u>. "H and W, while domiciled in California, purchased 100 shares each of A Co., B Co., and C Co. stock with community property (earnings of H). H and W were transferred to [Georgia,] a common law state which [has] not enacted this Act; while domiciled there, H sold the 100 shares of A stock and with the proceeds purchased 100 shares of D stock. Subsequently H and W became domiciled in [Florida] which had enacted this Act; H sold the B stock and 50 shares of D Co. stock and purchased 150 shares of E stock. H died domiciled in [Florida] with 100 shares of C Co., 50 shares of D Co. and 150 shares of E Co. stock; all of the stock had always been registered in H's name. All of the shares, traceable to community property or the proceeds therefrom, constitute property subject to this Act."³³

UNIFORM ACT, EXAMPLE 1: ASSET TRACING: PERSONAL PROPERTY

Marital	A Co.	B Co.	C Co.	D Co.	E Co.	Community
Domicile						Property
California	\$100	\$100	\$100			\$300
Georgia	(\$100)	\$100	\$100	\$100		\$300
Florida				(\$50)		
		(\$100)	\$100	\$50	\$150	\$300
Community						
Property			\$100	\$50	\$150	\$300

³² Uniform Act, Subsection (1): Personal Property, *cmt*.

³³ Uniform Act, Subsection (1): Personal Property, *Example 1*.

2. Real Property:

Fla. Stat. § 732.217(2)	Uniform Act
Subsection (2): Real Property	(Commentary)
"[Florida's CP Act applies] to the disposition at death of the following property acquired by a married person: Real property, except real property held as tenants by the entirety, which is located in this state, and which: (a) Was acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property acquired as, or which became and remained, community property under the laws of another jurisdiction; or (b) Is traceable to that community property." (Emphasis added.)	"Subsection (2) deals with real property and is confined to real property located within [Florida] (since presumably the law of the situs of the property will govern dispositive rights). The policy and operation of this subsection are intended to be the same as those set forth in subsection (1)." ³⁴

<u>Uniform Act, § 1, Example 2</u>. "H and W, while domiciled in California, purchased a residence in California. They retained the residence in California when they were transferred to Wisconsin. After becoming domiciled in Wisconsin, they used community funds, drawn from a bank account in California, to purchase a Wisconsin cottage. H and W subsequently became domiciled in [Florida]; they then purchased a condominium in [Florida] for \$20,000 using \$15,000 of community property funds drawn from their bank account in California and \$5,000 earned by H after the move to [Florida]. H died domiciled in [Florida]; title to all of the real property was in H's name. Assuming [Florida] had enacted this Act, three-fourths of the [Florida] condominium would be property subject to this Act; the [Florida] statute would not, however, apply to either the Wisconsin or California real estate. If Wisconsin had enacted this Act, the Wisconsin statute would apply to the Wisconsin cottage." 35

UNIFORM ACT, EXAMPLE 2: ASSET TRACING: REAL PROPERTY

Marital Domicile	California Residence	Wisconsin Cottage	Florida Condominium	Community Property
			(Non-	
			Homestead)	
California	Titled in			100%
	H's Name			
	Alone			
Wisconsin		Titled in		0%
		H's Name		(Wisconsin has not adopted
		Alone		the Uniform Act)
Florida			Titled in	75%
			H's Name Alone	(Purchased using \$15,000 of
				community property funds

³⁴ Uniform Act, Subsection (2): Real Property, *cmt*.

³⁵ Uniform Act, Subsection (2): Real Property, *Example 2*.

Marital Domicile	California Residence	Wisconsin Cottage	Florida Condominium	Community Property
Donnene	Residence	Collage	(Non-	
			Homestead)	
				drawn from their bank
				account in California and
				\$5,000 earned by H after the
				move to Florida)

3. Marriage Requirement:

Section 732.217 limits the scope of Florida's CP Act exclusively to property acquired by a "married" person. However, the possible universe of couples with community property rights moving to Florida is not limited to married persons. For example, California, ³⁶ Washington, ³⁷ and Nevada³⁸ all extend community property rights to non-married, registered domestic partners. These non-married couples are by definition excluded from the scope of Florida's CP Act. (Registered domestic partners aren't married for federal tax purposes either.)³⁹

In the international context, the basic principle is that a valid marriage according to the law of a foreign nation will be recognized as such in Florida. ⁴⁰ This recognition is not extended to non-married couples who nevertheless have property rights under some form of marriage substitute. For example, "reputed spouses" under Israeli law, ⁴¹ and couples in a "union in fact" under

³⁶ See Cal. Fam. Code § 297.5(a) (West 2006) ("Registered domestic partners shall have the same rights ... as are granted to and imposed upon spouses."); Cal. Fam. Code § 760 (West 2006) ("[A]ll property, real or personal, wherever situated, acquired by a married person [or registered domestic partner] during the marriage [or registered domestic partnership] while domiciled in this state is community property.").

³⁷ See Wash. Rev. Code Ann. §26.16.030 (West 2011) ("Property... acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property.").

³⁸ See Nev. Rev. Stat. Ann. §122A.200 (LexisNexis 2010) ("Domestic partners have the same rights ... as are granted to and imposed upon spouses.").

³⁹ IRS Publication 555 (01/2019), *Community Property* ("For federal tax purposes, marriages of couples of the same sex are treated the same as marriages of couples of the opposite sex. The term 'spouse' includes an individual married to a person of the same sex. However, individuals who have entered into a registered domestic partnership, civil union, or other similar relationship, that isn't considered a marriage under state law, aren't considered married for federal tax purposes.") Available at: https://www.irs.gov/publications/p555

⁴⁰ See generally Montano v. Montano, 520 So.2d 52 (Fla. 3d DCA 1988).

⁴¹ See Cohen v. Shushan, 212 So.3d 1113, 1116 (Fla. 2d DCA 2017) (While Israel has . . . established the reputed spouse relationship as something of an alternative to marriage, and indeed, has conferred a broad array of rights to reputed spouse couples that . . . are 'equal' to marriage, Israeli law has purposely kept the status of these two relationships separate. Reputed spouses are not married spouses under Israeli law.")

Colombian law, ⁴² have both been rejected as marriage substitutes by Florida courts. It's reasonable to assume the same result would apply in the context of Florida's CP Act.

And then there's "common law" marriage. Texas is the only community property state that permits residents to enter into a common law marriage. But there are a total of nine states and the District of Columbia that still permit couples to enter into common law marriage. ⁴³ Although Florida law no longer recognizes the validity of common law marriages contracted in this state after 1968, it will respect a common law marriage validly created in a jurisdiction recognizing such marriages, ⁴⁴ including presumably for purposes of Florida's CP Act.

B. Rebuttable presumptions applicable under Florida's CP Act:

"The purposes of the rebuttable presumptions are simply to assist a court in applying the definitions in Section 1, through a process of tracing the property to a community property origin." ⁴⁵

1. What "Comes In": Florida property that is presumed to be community property:

Fla. Stat. § 732.218(1) Florida property that <i>is</i> presumably community property	Uniform Act (Commentary)
"Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property <i>is presumed</i> to have been acquired as, or to have become and remained, <i>property to which these sections apply</i> ." (Emphasis added.)	"Subsection (1) of Section 2 deals with property acquired by the spouses while domiciled in a community property state. It thus provides that if one of the spouses acquired property while so domiciled, such property is 'presumed' (a rebuttable presumption) to have been and remained community. It may be shown, of course, that such property was the separate property of the spouse and the law of the state of domicile may furnish the rule. For example the law of community domicile may provide the rule that property acquired in the name of the wife shall be deemed to be her separate property or that a particular subsequent act effectively severed the community property interests." (Emphasis added.)

⁴² See American Airlines v. Mejia, 766 So.2d 305 (Fla. 4th DCA 2000) ("Unión Marital de Hecho" under Colombian law was not the equivalent of common law marriage in the United States, and thus, partner to unión could not be a surviving spouse under state law for purposes of Wrongful Death Act.)

⁴³ See Goffe, Wendy, Yours, Mine and Ours: An Introduction to the Laws of the U.S. Community Property States, Remarks at Estate Planning Essentials: Marital Deductions Post-DOMA and Community Property (July 9, 2014). Available at: http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/VCWB0709_chapter_02_thumb.pdf.

⁴⁴ See Fla. Stat. § 741.211 (Common-law marriages void); and Anderson v. Anderson, 577 So.2d 658, 660 (Fla. 1st DCA 1991) ("The law in Florida on this point is consistent with the general rule recognized in other jurisdictions that the validity of a marriage is to be determined by the law of the jurisdiction where the marriage was entered into.")

⁴⁵ Uniform Act, Rebuttable Presumptions, *cmt*.

⁴⁶ Uniform Act, Rebuttable Presumptions, Subsection (1) of Section 2, cmt.

<u>Uniform Act, § 2, Example 1.</u> "H, married to W and domiciled in California, acquired stock; later H and W became domiciled in [Florida]. Such property, if retained, is presumed to be property subject to this Act. By operation of Section 1 the proceeds of sale or exchange of such stock, and property acquired with the proceeds or income of such stock, would be deemed subject to the Act. If, however, upon the death of H, H's personal representative rebutted the presumption by evidence that the stock was acquired by H with his separate property (or by inheritance) neither the stock nor property acquired with that property or the income therefrom (unless the income itself would be subject to the Act because, under the applicable law, income from separate property is deemed to be community property), would be subject to this Act. Similarly, the presumption may be rebutted by showing that such property, though originally community property, was effectively severed by an act of the spouses. It should be emphasized that the presumption is simply one of procedural convenience and neither changes the nature of the property interests nor prevents an interested person from showing the separate nature of the property."⁴⁷

REBUTABLE PRESUMPTION: EXAMPLE 1

Marital Domicile	Stock	Proceeds of Sale/Exchange	Rebuttable Presumption
California	\$100		The CA stock, if retained, is
Florida		\$100	presumed to be property subject to Florida's CP Act. By operation of Fla. Stat. § 732.217 the proceeds of a sale or exchange of such stock, and property acquired in FL with the proceeds or income of such stock, would be deemed subject to
			Florida's CP Act.

2. What "Stays Out": Florida property that is presumed **NOT** to be community property:

Fla. Stat. § 732.218(2) Florida property that <i>is</i> presumably NOT community property	Uniform Act (Commentary)
"Real property located in this state, other than homestead and real property held as tenants by the entirety, and personal property wherever located acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property and title to which was taken in a form which created rights of survivorship are presumed to be property to which these sections do <i>not</i> apply." (Emphasis added.)	"Subsection (2) sets up a rebuttable presumption that where a domiciliary of a common law state acquired property in such form as to indicate that title was in joint tenancy, tenancy by the entireties, or some other form of joint ownership with right of survivorship, it will be presumed that the property is not subject to the Act. This presumption was deemed appropriate as expressing the normal expectations of the spouses and to facilitate ascertainment of title to real property

⁴⁷ Uniform Act, Rebuttable Presumptions, Subsection (1) of Section 2, *Example 1*.

Fla. Stat. § 732.218(2)	Uniform Act
Florida property that <i>is</i> presumably NOT community property	(Commentary)
	located in the enacting state, as well as personal property wherever located." ⁴⁸ (Emphasis added.)

<u>Uniform Act, § 2, Example 2</u>. "John and Mary Jones, formerly domiciled in California, became domiciled in [Florida] and purchased a residence, taking title in the names of "John and Mary Jones as joint tenants, and not as tenants in common, with right of survivorship." Regardless of the source of the funds, the [Florida] residence would be presumed to be held in joint tenancy and not subject to this Act."⁴⁹

REBUTABLE PRESUMPTION: EXAMPLE 2

Marital Domicile	Income	Purchase of FL real property	Rebuttable Presumption
California	\$100		Regardless of the CA source
Florida		\$100	of the funds, FL real property
			owned with rights of
			survivorship is presumed to
			be excluded from Florida's
			CP Act.

3. TBE and Homestead Property Excluded from Florida's CP Act:

There are two forms of marital property Florida's CP Act excludes from a spouse's preexisting community property rights: real property owned as tenants by the entireties ("TBE")⁵⁰ and "homestead property."⁵¹ Real property owned as TBE is by definition excluded from the scope of Florida's CP Act in Fla. Stat. § 732.217(2), which provides in relevant part as follows:

Sections 732.216-732.228 apply to the disposition at death of the following property acquired by a married person: ... (2) Real property, *except real property held as tenants by the entirety*, which is located in this state ... (Emphasis added.)

⁴⁸ Uniform Act, Rebuttable Presumptions, Subsection (2) of Section 2, *cmt*.

⁴⁹ Uniform Act, Rebuttable Presumptions, Subsection (2) of Section 2, *Example 2*.

⁵⁰ "Property held as a tenancy by the entireties possesses six characteristics: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the account must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names)." *Beal Bank, SSB v. Almand & Assocs.*, 780 So.2d 45, 52 (Fla.2001) (footnote omitted).

⁵¹ See Fla. Stat. § 732.227: "For purposes of ss. 732.216-732.228, the term 'homestead' refers only to property the descent and devise of which is restricted by s. 4(c), Art. X of the State Constitution."

And homestead property is excluded by Fla. Stat. § 732.225, which creates a "conclusive presumption" establishing that community-property spouses moving to Florida and purchasing homestead property in this state intended to "sever" any community-property interests in such property. Fla. Stat. § 732.225 provides in relevant part as follows:

The reinvestment of any property to which these sections apply in real property located in this state which is or becomes homestead property *creates a conclusive presumption* that the spouses have agreed to *terminate* the community property attribute of the property reinvested. (Emphasis added.)

TBE and homestead property are also carved out of Florida's CP Act in Fla. Stat. § 732.218(2), a poorly drafted and logically confusing amendment to the Uniform Act which states that certain real property is presumed <u>not</u> to be community property, but <u>not</u> homestead and TBE property. Sa one critic (Richard Warner) has noted, this "is a blatant double negative and hence ... cannot be used for the support of anything." In fact, according to Mr. Warner Florida's CP Act's entire treatment of homestead and TBE property is of dubious efficacy.

C. Descent and distribution of property subject to Florida's CP Act:

Fla. Stat. § 732.219 Disposition upon death	Uniform Act (Commentary)
"Upon the death of a married person, one-half of the property to which ss. 732.216-732.228 apply is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under	"This section deals with the dispositive rights, at death, of (1) a married person domiciled in the enacting state as to personal property and (2) of any married person, including a nondomiciliary of the enacting state, as to real property located in the enacting state; it also sets forth rules for intestate succession to property subject to this Act
the laws of succession of this state. The decedent's one-half of that property is not in the elective estate." (Emphasis added.)	While [this section] applies to the dispositive rights of persons domiciled in [Florida], the Act, as a practical matter, may be effective as to property located outside the state only to the extent that the state of the situs of the property is willing to recognize the policy of the domiciliary state Dower and curtesy do not exist in community property and have been abolished in many common law states; policy considerations suggest that no such interest

⁵² Fla. Stat. § 732.218(2) provides in relevant part as follows: "Real property located in this state, *other than* homestead and property held as tenants by the entirety, ... [is] presumed to be property to which these sections *do not* apply." (Emphasis added.)

⁵³ See Warner, Richard M., Florida Community Property Rights Simplified, at 3.17, Aug. 23, 2019, 38th Annual Attorney Trust Officer Conference, The Florida Bar, Course No. 3241R. Available at: https://www.rpptl.org/uploads/VOLUME1revised.pdf

⁵⁴ See id. generally.

Fla. Stat. § 732.219 Disposition upon death	Uniform Act (Commentary)
	should exist in property subject to this Act, since the surviving spouse already has a one-half interest in such property. Similar reasons suggest a denial of any right in the surviving spouse to elect a statutory share in the one-half of the property over which the decedent had a power of disposition."55

1. Testate Disposition:

"The dispositive pattern is the usual one encountered in the community property states; the deceased spouse may dispose of his one-half of the community property, subject to the provisions of [Fla. Stat. § 732.226]."⁵⁶

Uniform Act, Testate Disposition, *Example*. "H and W were formerly domiciled in California and are now domiciled in [Florida]. All of their property was community property prior to the move from California to [Florida]. At H's death he held title to a home in [Florida] which had been purchased with the proceeds of the sale of a home in California which had been community property. Stock acquired as community property in California was held in his name in safety deposit boxes located in Illinois and [Florida]. H and W had acquired a cottage in California as community property, held in H's name, and it was so held at the time of his death. H and W acquired a [Florida] resort condominium, taking title as tenants by the entireties. H acquired bonds issued by his employer with earnings in [Florida] and held title in his own name. The [Florida] residence and the stock would be deemed property subject to this Act and H would have the right under Section 3 to dispose of half of that property by his will. The remaining property would not be deemed subject to this Act." 57

UNIFORM ACT, TESTATE DISPOSITION: *EXAMPLE*

	Title			
Asset	H	W	Joint	Subject to
				Florida CP Act?
Florida RE (Home)	X			Yes
Stock	X			Yes
California RE (Cottage)	X			NO
Florida RE (Resort			TBE	NO
Condominium)				
Florida Bonds	X			NO

⁵⁵ Uniform Act, Disposition upon Death, *cmt*.

⁵⁶ Uniform Act, Disposition upon Death, *cmt. See also* Fla. Stat. § 732.226: "Sections 732.216-732.228 do not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person."

⁵⁷ Uniform Act, Testate Disposition, *Example*.

2. Intestate Succession:

"If the property subject to this Act passes by intestate succession, [Florida] law ... applies to the decedent's one-half, again subject to [Fla. Stat. § 732.226]."58

<u>Uniform Act, Intestate Succession, Example</u>. "[If under Fla. Stat. § 732.102] a surviving spouse is entitled to [on-half] of the decedent's property by intestate succession, the result of the Act is to give to her [75%] of the property subject to the Act. For example, if the spouses had recently moved to a common law state and owned [\$100,000] of property (all being personal property held in the husband's name and acquired as community property), the wife would be entitled to one-half of the property [\$50,000] and would receive [one-half] of the husband's half [\$25,000] for a total of [\$75,000]."⁵⁹

UNIFORM ACT, INTESTATE SUCCESSION: EXAMPLE

	Spouse	Children of	Total
		Prior	
		Marriage	
CP Claim	\$50,000	\$50,000	
Succeeds	\$25,000	(\$25,000)	
	\$75,000	\$25,000	\$100,000
% of Total	75%	25%	100%
CP Claim			
Fails	\$50,000	\$50,000	\$100,000
% of Total	50%	50%	100%

D. Potential Claimants under Florida's CP Act:

1. Surviving Spouse:

Florida's CP Act can be used from the "outside in" by a *surviving spouse* seeking to extract community property from an estate.

Fla. Stat. § 732.223	Uniform Act	
Perfection of Title of Surviving Spouse	(Commentary)	
"If the title to any property to which [Florida's CP Act] apply was held by the decedent at the time of the decedent's death, title of the surviving spouse may be perfected by an order of the probate court or by execution of an instrument by the personal	"This section simply provides for perfection of title interests of the surviving spouse (e.g. where title was in the name of the deceased spouse) by orders of the court of appropriate jurisdiction (e.g. the probate court) in [Florida]."	

⁵⁸ Uniform Act, Disposition upon Death, *cmt. See also* Fla. Stat. § 732.226: "Sections 732.216-732.228 do not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person."

⁵⁹ Uniform Act, Intestate Succession, *Example*.

⁶⁰ Uniform Act, Perfection of Title of Surviving Spouse, cmt.

Fla. Stat. § 732.223	Uniform Act
Perfection of Title of Surviving Spouse	(Commentary)
representative or the beneficiaries of the decedent with	
the approval of the probate court"	

2. Personal Representative and/or Beneficiary:

Florida's CP Act can also be used from the "inside out" by a *personal representative/beneficiary* seeking to bring new assets into an estate by recovering community property titled in the name of a surviving spouse. This second line of recovery benefits surviving heirs and/or creditors of an otherwise insolvent estate.

For example, assume that a wife with community-property rights predeceases her husband, and that the subject community property is titled solely in her husband's name. If the beneficiaries of the wife's estate are expected to be different from the beneficiaries of her husband's estate (e.g., it's a second marriage and both spouses had children from prior marriages), the beneficiaries of wife's estate may have an interest in bringing more assets into wife's estate by claiming a one-half interest in the community property titled solely in surviving husband's name. Section 732.221 of Florida's Act provides an avenue of recourse in such cases. Assume the same facts as above, but that wife's estate is insolvent and thus unable to satisfy validly pending creditor claims. Section 732.221 of Florida's Act can also aid the creditors of wife's estate in such cases by brining new assets into the estate to satisfy their claims. In both cases the Act is used to marshal new assets into the estate of a pre-deceased spouse.

Fla. Stat. § 732.221 Perfection of Title of Personal Representative or Beneficiary	Uniform Act (Commentary)
"If the title to any property to which [Florida's CP Act] apply is held by the surviving spouse at the time of the decedent's death, the <i>personal representative or a beneficiary</i> of the decedent may institute an action to perfect title to the property The personal representative has no duty to discover whether any property held by the surviving spouse is property to which ss. 732.216-732.228 apply, unless a written demand <i>is made by a beneficiary</i> within 3 months after service of a copy of the notice of administration on the beneficiary or <i>by a creditor</i> within 3 months after the first publication of the notice to creditors." (Emphasis added.)	"This section is a corollary to [Fla. Stat. § 732.223]. Since title is apparently in the surviving spouse, the section simply provides for an action by the personal representative, heirs, or devisees" ⁶¹

⁶¹ Uniform Act, Perfection of Title of Personal Representative, Heir or Devisee, *cmt*.

III. Case Studies

A. Quintana v. Ordono, 195 So.2d 577 (Fla. 3d DCA 1967)

Quintana involved conflicting claims by a surviving spouse and children from a prior marriage to stock of a Florida corporation purchased in the 1950s by the decedent for \$100,000, at a time when his marital domicile was located in Cuba, a community-property jurisdiction. The decedent and his wife migrated to Florida in 1960, establishing a new marital domicile in this state. In 1963 the decedent sold his Florida stock in exchange for a promissory note having a face amount of \$810,000 plus a contract "for additional monies." Shortly thereafter he died intestate, survived by his wife and three children form a prior marriage.

The following chart provides a rough estimate of the value of wife's community property claim, adjusted for inflation. In 1963, Florida intestate estates were divided among a decedent's heirs in equal shares, with a spouse receiving the same amount as each child. Thus, assuming the three named plaintiffs in this case represented all of the decedent's surviving children, the surviving spouse's intestate share would have been one-fourth (3 children + 1 spouse = 4 heirs). Also, for purposes of the following chart it is assumed that the 1963 date-of-death value of the promissory note and contract is equivalent to the purchase price of the stock, which was \$100,000. Adjusted for inflation, the value of \$100,000 in 1963 is equivalent to \$835,480 in 2019,64 which is the figure used below.

VALUE OF WIFE'S CLAIM COMMUNITY PROPERTY UNDER INTESTATE SUCCESSION

	Wife	3 Children	Total
		from Prior	
		Marriage	
	\$417,740	\$417,740	
Wife's CP Claim	+ \$104,435	(\$104,435)	
Succeeds	\$522,175	\$313,305	\$835,480
% of Total	62.5%	37.5%	100%
Wife's CP Claim			
Fails	\$208,870	\$626,610	\$835,480
% of Total	25%	75%	100%
Value of Wife's	\$522,175		
CP Claim	(\$208,870)		
(Inflation	\$313,305		
Adjusted)			

⁶² Quintana, 195 So.2d at 578.

⁶³ See Fla. State. § 731.23 (1963).

⁶⁴ See US Inflation Calculator. Available at: https://www.usinflationcalculator.com.

1. Question 1: Did the decedent and the surviving spouse ever share a marital domicile in a community property jurisdiction (either domestic or foreign)? YES

Answering this one simple question is likely the most important step in the entire process. Once Florida probate counsel are attuned to the issue of *marital domicile*, what was once an "unknown unknown"⁶⁵ becomes just another issue to be worked through; no more nor less complicated than any of the other varied property-law issues that can (and often do) arise in any Florida probate proceeding. *Quintana* provides in relevant part as follows:

"The defendant and the deceased were married on September 10, 1936, in Oriente Province in Cuba. Both parties were Cuban Nationals. Under the then existing laws of Cuba the marriage was under the regime of 'Sociedad de Gananciales', a form of community property marriage. The deceased had no assets at the time of his marriage. The husband and wife were domiciled in Cuba until 1960. A Florida domicile was established when the couple moved here in 1960. They remained in Florida up to the time of the husband's death on September 1, 1963."66

2. Question 2: Has the applicable filing deadline passed? NO

Florida has a strong public policy favoring the "speedy" and final determination of probate proceedings. ⁶⁷ Which means most filing deadlines in probate proceedings are, by design, exceedingly short (think months, not years). These small windows of opportunity apply with equal force to our most cherished spousal protections, such as the right to claim an elective share, ⁶⁸ or a

⁶⁵ This phrase was made famous by U.S. Secretary of Defense Donald Rumsfeld. See DoD News Briefing – Secretary Rumsfeld and Gen. Myers, United States Department of Defense, United States Department of Defense (Feb. 12, 2002). ("Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.") (Emphasis added.) Available at: https://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636

⁶⁶ Quintana, 195 So.2d at 578.

⁶⁷ See Estate of Brown, 117 So.2d 478 (Fla. 1960) ("Public policy requires that estates of decedents be speedily and finally determined."); *In re Estate of Gay*, 294 So.2d 668 (Fla. 4th DCA 1974) (The "announced public policy of this state ... requires that estates of decedents be speedily and finally determined.") (citing Estate of Brown, 117 So.2d 478 (Fla. 1960)).

⁶⁸ See Fla. Stat. § 732.2135(1) ("Except as provided in subsection (2), the election must be filed on or before the earlier of the date that is 6 months after the date of service of a copy of the notice of administration on the surviving spouse, or an attorney in fact or guardian of the property of the surviving spouse, or the date that is 2 years after the date of the decedent's death.") (Emphasis added.)

one-half interest in the homestead as a tenant in common,⁶⁹ or exempt property.⁷⁰ Florida's Probate Code is silent with regard to any explicit deadlines to file community-property claims. In *Quintana*, the 3d DCA addressed this statutory gap in a way that favored surviving spouses. As will be seen in the discussion of the 4th DCA's decision in *Johnson v. Townsend*, the pendulum has since swung decisively the other way.

In *Quintana* we're told the decedent died on September 1, 1963. The appellate opinion wasn't published until almost four years later on February 14, 1967. We're not told exactly when surviving spouse first asserted her community property claims, but we are told she failed to do so "within the six months provided for in s 733.16 Fla. Stat., F.S.A., the non-claim statute." Fla. Stat. § 733.16 was a creditor-claim filing deadline statute. (This statute "was repealed in 1974 as part of the Probate Code's adoption in 1976."). Nowhere in the *Quintana* opinion is any mention made of anyone contesting the framing of wife's community property claim as a form of creditor claim.

It's natural to expect that probate counsel in common law jurisdictions, like Florida, are <u>not</u> focused on possible community property claims, perhaps until it's too late. Fortunately for the surviving spouse in this case, her failure to file a timely claim was excused by the then-applicable "trust exception" to filing deadlines. *Quintana* provides in relevant part as follows:

⁶⁹ See Fla. Stat. § 732.401(2)(b) ("The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in paragraph (c).") (Emphasis added.)

⁷⁰ See Fla. Stat. § 732.402(6) ("Persons entitled to exempt property shall be deemed to have waived their rights under this section unless a petition for determination of exempt property is filed by or on behalf of the persons entitled to the exempt property on or before the later of the date that is 4 months after the date of service of the notice of administration or the date that is 40 days after the date of termination of any proceeding involving the construction, admission to probate, or validity of the will or involving any other matter affecting any part of the estate subject to this section.") (Emphasis added.)

⁷¹ *Quintana*, 195 So.2d at 579.

⁷² See Fla. Stat. § 733.16(1) (1963) ("No claim or demand, whether due or not, direct or contingent, liquidated or unliquidated, or claim for personal property in the possession of the personal representative or for damages, including but not limited to actions founded upon fraud or other wrongful act or commission of the decedent, shall be valid or binding upon an estate, or upon the personal representative thereof, or upon any heir, legatee or devisee of the decedent unless the same shall be in writing and contain the place of residence and post-office address of the claimant, and shall be sworn to by the claimant, his agent or attorney, and be filed in the office of the county judge granting letters. Any such claim or demand not so filed within six months from the time of the first publication of the notice to creditors shall be void even though the personal representative has recognized such claim or demand by paying a portion thereof or interest thereon or otherwise; and no cause of action, at law or in equity, heretofore or hereafter accruing, including but not limited to actions founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom such claim may be made, whether suit be pending at the time of the death of such person or not, unless such claim be filed in the manner and within the said six months as aforesaid.") (Emphasis added.)

⁷³ Johnson v. Townsend, 259 So. 3d 851, 858 (Fla. 4th DCA 2018).

"A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name. ... It is well settled that the Florida nonclaim statute, s 733.16, supra, does not apply so as to require the cestui to file a claim against the estate of the trustee."

3. <u>Question 3</u>: When first acquired, was the contested asset community property under the laws of the couple's marital domicile? YES

The *Quintana* court determined that when first acquired the contested assets were community property under Cuban law. This question is now codified in section 732.217 of Florida's CP Act.⁷⁵ *Quintana* provides in relevant part as follows:

"On or about June 12, 1952, the husband purchased for \$50,000.00, five thousand shares of Okeelanta Sugar Refinery, Inc. stock, a Florida corporation. An additional five thousand shares was acquired for \$50,000.00 on October 30, 1958. ...

Whether the source of the purchase price of the stock was from enterprises within Cuba or Florida is not material. What is material and not in conflict is that the husband and wife were domiciled in Cuba at the time of the acquisition of the stock. ... Therefore, under the laws of Cuba the stock did not vest in the husband but in the 'Sociedad de Gananciales'. Thus the wife had a vested interest in the stock equal to that of her husband.

The interest which vested in the wife was not affected by the subsequent change of domicile from Cuba to Florida in 1960."⁷⁶

4. Question 4: Can the current assets of the probate estate be traced back to community property? YES

For over a century prior to the *Quintana* decision, U.S. courts in common-law states had developed a "resulting trust" theory as an asset-tracing tool. Under this theory, common law courts fashioned ownership interests under their property laws that approximated the community-property rights that existed under the laws of a couple's community-property marital domicile.⁷⁷

⁷⁴ *Quintana*, 195 So.2d at 578.

⁷⁵ See Fla. Stat. § 732.217(1) ("[Florida's CP Act applies] to the disposition at death of the following property acquired by a married person: (1) Personal property, wherever located, which: (a) Was acquired as, or became and remained, community property under the laws of another jurisdiction; [or] (b) Was acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, community property")

⁷⁶ *Quintana*, 195 So.2d at 578-80 (internal citations omitted).

⁷⁷ See Oldham, J. Thomas, What if the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses when They Divorce in the United States, 42 Fam. L.Q. 263, 266 (2008).

Thus, assets acquired in a common-law state titled solely in one spouse's name that could be traced back to community property were deemed to be held one-half in trust for the non-title holding spouse.⁷⁸ And this is exactly what the *Quintana* court did. This asset-tracing step is now codified in section 732.217 of Florida's CP Act.⁷⁹ *Quintana* provides in relevant part as follows:

"Since the promissory note and contract were acquired while the husband and wife were domiciled in Florida, this transaction is controlled by our law. ... A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name. Therefore, while the husband held legal title to the note and contract, he held a one-half interest in trust for his wife." ⁸⁰

The asset tracing table for this case would be as follows (using inflation adjusted figures):

Marital Domicile	Stock	Promissory Note & Contract	Community Property
Cuba	\$835,480		\$835,480
Florida	(\$835,480)	\$835,480	\$835,480
Community Property		\$835,480	\$835,480

5. Question 5: Was evidence presented rebutting the presumption that the contested property (or assets traceable to such property) is community property? NO

The *Quintana* court determined that under the law of the marital domicile at the time the contested property was acquired, all property acquired during the marriage was presumed to be

⁷⁸ See Rozan v. Rozan, 129 N.W.2d 694 (N.D. 1964) (Use of community property funds of husband and wife, by husband, with wife's consent, to acquire in his own name realty in North Dakota (a common law state), gave rise to an implied trust whereby one-half of the realty was held in trust for the wife.); Stone v. Sample, 62 So.2d 307 (Miss. 1953) (Where husband purchased mineral rights in Mississippi (a common law state) with community property funds, taking legal title in his own name, a trust resulted in favor of wife, the husband holding title to wife's one-half interest in trust for her, and the mineral rights and the income therefrom were the joint property of husband and wife.); Depas v. Mayo, 11 Mo. 314, 49 Am.Dec. 88 (1848) (A husband and wife, residing in Louisiana (a community property state), and having, during the marriage, acquired a large amount of property, temporarily removed to Missouri (a common law state). While in Missouri, a part of the money belonging to the community was by the husband invested in real estate, and the title taken in his own name. They subsequently returned to Louisiana, and there the wife obtained a divorce from him. In a suit in equity by the wife in Missouri to recover her interest in the land, it was held that the land would be considered in equity as held by the husband in a resulting trust for the wife, to the extent of her interest in the money invested in the purchase; there being no evidence of any assent on the part of the wife to a change in the property by the investment.)

⁷⁹ See Fla. Stat. § 732.217(1) ("[Florida's CP Act applies] to the disposition at death of the following property acquired by a married person: (1) Personal property, wherever located, which: ... (c) *Is traceable to* ... community property.") (Emphasis added.)

⁸⁰ Quintana, 195 So.2d at 580 (internal citations omitted).

community property. This rebuttable presumption is now codified in section 732.218 of Florida's CP Act. 81 *Quintana* provides in relevant part as follows:

"Section 1407 of the Civil Code of Cuba, the place of the domicile at the time of the acquisition of the stock, provides that all property of the marriage shall be considered as community property until proven to be separate property of the husband or wife. The plaintiffs presented no evidence which would tend to prove that the stock was the separate property of the husband or purchased from proceeds of his separate property. The uncontradicted evidence does show that the husband brought no assets to the marriage." 82

6. Question 6: What is the proper disposition of the community-property assets held by the probate estate? Answer: 50% to wife, remaining 50% distributed to wife and remaining heirs per intestacy statute.

In *Quintana* the trial court had originally ruled against the surviving spouse's community-property claim, declaring that the contested property "was solely owned by the deceased at the time of his death [and thus] the estate of the deceased [was] the owner of the property." The appellate court reversed this decree, and "remanded with directions to enter a decree in accordance with [its] opinion." Based on the forgoing, this direction presumably resulted in the surviving spouse receiving "her half" of the community property "off the top," and also receiving a one-fourth share of husband's remaining half of the property in accordance with Florida's then applicable intestate statue (see above chart, *VALUE OF WIFE'S CLAIM: INTESTATE SUCCESSION*). While not expressly using the term, in so holding the 3d DCA adopted the partial mutability choice-of-law rule (defined above) for testamentary property rights of couples whose prior marital domicile was located in a community property jurisdiction.

B. Estate of Bach, 548 N.Y.S.2d 871 (Sur. Ct. 1989)

The power of asset tracing in cases involving married couples moving from community property jurisdictions to common law jurisdictions cannot be overstated. A dramatic example is the *Estate of Bach*, a post-Uniform Act case out of New York applying the same rules that would apply under Florida's CP Act. New York adopted its version of the Uniform Act in 1981 ("NY's CP Act"). This case is also instructive as a procedural guide for prosecuting claims under Florida's CP Act, because, as observed by the New York court, it "is a classic example of the operation of

⁸¹ See Fla. Stat. § 732.218(1) ("In determining whether [Florida's CP Act applies] to specific property, the following rebuttable presumptions apply: (1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as, or to have become and remained, property to which these sections apply.")

⁸² *Quintana*, 195 So.2d at 580.

⁸³ *Quintana*, 195 So.2d at 579.

⁸⁴ *Quintana*, 195 So.2d at 581.

the Uniform Act."⁸⁵ According to the "legislative memorandum" for NY CP Act, the purpose of the statute was to "recognize and define the rights of married persons in property acquired while they ... resided in a community property state, after they have moved to a non-community property ('common law') state."⁸⁶

In this case testator "Arthur Bach (Arthur) died on April 4, 1987, survived by his wife Franca. Under his will dated June 17, 1985, Arthur gave Franca her elective share ⁸⁷ in trust with remainder to his brother Kurt. The balance of his estate is disposed of 75% to Kurt and 25% among named charities." We are not told the value of the estate. However, based on what we are told, if wife succeeds in her community-property claim, we can estimate that her share of the estate *doubles from one third to two thirds*. For purposes of simplicity, it is assumed that wife's elective share goes to her outright, and that the share going to the decedent's brother is limited to his outright distribution.

VALUE OF WIFE'S CLAIM COMMUNITY PROPERTY UNDER TESTATE SUCCESSION

	Wife	Decedent's Brother	Charities	Total
Wife's CP Claim	50.00%			
Succeeds	+ 16.65%			
	66.65%	25.00%	8.35%	100.00%
Wife's CP Claim				
Fails	33.30%	50.00%	16.70%	100.00%
Value of Wife's	66.65%			
CP Claim	(33.30%)			
	33.35%			

⁸⁵ Estate of Bach, 548 N.Y.S.2d 871, 874 (Sur. Ct. 1989)

 $^{^{86}}$ Estate of Bach, 548 N.Y.S.2d at 874-875 (quoting Memorandum in Support of S.1151, 1981 N.Y. Legis. Ann., at 111).

 $^{^{87}}$ Under EPTL § 5-1.1-A, New York spouses are entitled to an elective share equal to one-third (1/3) of the deceased spouse's net estate.

⁸⁸ Estate of Bach, 548 N.Y.S.2d at 873.

1. Question 1: Did the decedent and the surviving spouse ever share a marital domicile in a community property jurisdiction (either domestic or foreign)? YES

The answer to this question is yes. *Bach* provides in relevant part as follows:

"Arthur and Franca were married in Bolivia about fifty years ago. ... Furthermore, it is undisputed that Bolivia is a community property country." 89

2. Question 2: Has the applicable filing deadline passed? NO

We are not told what the applicable post-death filing deadline is for this kind of claim in New York, but we are told surviving spouse filed her claim the month after her husband died. Presumably this satisfied the applicable filing deadline. The decedent died on April 4, 1987, and on "May 20, 1987, [wife] commenced a proceeding to discover that part of her husband's estate which constitutes 'community property.'"⁹⁰

In terms of procedure, under NY's CP Act "the surviving spouse is required to make a written demand upon the court or the personal representative of the deceased spouse. If the fiduciary or the beneficiaries do not acquiesce, the surviving spouse must bring a proceeding to discover community property in the possession of the personal representative." This is the same procedure a Florida surviving spouse would be required to follow under section 732.223 of the Florida's CP Act. Surviving spouse complied with these requirements.

3. <u>Question 3</u>: When first acquired, was the contested asset community property under the laws of the couple's marital domicile? YES

The decedent and his wife moved to New York from Bolivia <u>30 years prior</u> to his death. However, while in Bolivia and while married to his surviving spouse, the decedent owned a textile business with his brother. This business was sold after the couple had moved to New York.

4. Question 4: Can the current assets of the probate estate be traced back to community property? YES

In this case the surviving spouse traced her contested community-property rights <u>back 30</u> <u>years!</u> *Bach* provides in relevant part as follows:

"Arthur and Franca were married in Bolivia about fifty years ago. During the couple's marriage, Arthur and his brother Kurt owned a textile business. The business was initially funded during the marriage by a gift or a loan of \$10,000 from their father. Around 1957, Arthur and Franca left Bolivia to establish

⁸⁹ Estate of Bach, 548 N.Y.S.2d at 873.

⁹⁰ Estate of Bach, 548 N.Y.S.2d at 873.

⁹¹ Estate of Bach, 548 N.Y.S.2d at 874 (citing EPTL § 6-6.4).

permanent residence in New York following Kurt's move a year earlier. All three eventually became U.S. citizens. While all were living in New York, the business in Bolivia was sold and the proceeds divided between Arthur and Kurt. Thereafter, Arthur never had any other source of income and he and his wife lived on the income from the proceeds of the sale of the business. Thus, there is apparently no dispute that decedent's estate is traceable to the Bolivian assets."⁹²

The asset tracing table for this case would be as follows:

Marital Domicile	Community Property	Community Property	
Bolivia	100%		
New York	(100%)	100%	

5. Question 5: Was evidence presented rebutting the presumption that the contested property (or assets traceable to such property) is community property? NO

Under NY's CP Act "the surviving spouse is aided by a rebuttable presumption: property acquired by the deceased spouse while domiciled in a jurisdiction which recognizes the right of a surviving spouse to community property is presumed to have been acquired as or have become, and remained, community property to which [the Act] applies." This is the same rebuttable presumption that would apply in a similar Florida proceeding under section 732.218 of Florida's CP Act.

Wife's contention that her husband's entire estate consisted of assets traceable to community property they first acquired while domiciled in Bolivia was uncontested. Based on this concession, the court had no trouble concluding the statutory presumption had not been rebutted. *Bach* provides in relevant part as follows:

"As discussed previously, under EPTL 6–6.4, Franca would now be entitled to pursue her discovery proceeding in order to identify personal property in her husband's estate from which she is entitled to her one-half share. However, the executor has not disputed Franca's contention that all of Arthur's estate consists of the proceeds of the Bolivian property. Therefore, there is nothing for Franca to discover. She has established that Bolivia is a community property country and her claim that her husband's estate consists solely of community property assets is uncontroverted. In addition to being uncontested, her latter contention is aided by EPTL 6–6.2 which, as mentioned earlier, provides that property acquired by the deceased spouse, while domiciled in a community property jurisdiction, is

⁹² Estate of Bach, 548 N.Y.S.2d at 873.

⁹³ Estate of Bach, 548 N.Y.S.2d at 874 (citing EPTL § 6-6.2).

presumed to have been acquired and to have become and remained community property."94

6. Question 6: What is the proper disposition of the community-property assets held by the probate estate? Answer: 50% to wife, remaining 50% distributed to wife and remaining beneficiaries per husband's will.

The court entered summary judgment granting surviving spouse's community property claim. Based on this ruling and a Bolivian martial domicile established 50 years prior, the decedent's entire New York probate estate was distributed in "the typical pattern of community property which permits the deceased spouse to dispose of 'his half' of the community property, while confirming the title of the surviving spouse in 'her half." The end result was that surviving spouse's share of the estate was effectively doubled (see chart above). *Bach* provides in relevant part as follows:

"Based upon all the foregoing, Franca's cross motion for summary judgment must be granted as a matter of law. Under the provisions of [New York's CP Act], she is entitled to one-half of her husband's estate outright. With respect to the other half of decedent's estate, the provisions of his will remain in force and effect." ⁹⁶

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

The *Johnson* case is important for two reasons. First, it is the only appellate decision to examine Florida's CP Act. Second, it is the first time a Florida appellate court has applied Florida's probate creditor filing deadlines to a surviving spouse's community-property claim (in this case the claim was filed late, and thus forfeited). Against this backdrop, the need for public awareness of these claims and the consequences of failing to act promptly has never been greater.

In *Johnson* the decedent had previously been divorced in California (a community property state). ⁹⁷ In that same year, 1983, decedent married again in Georgia (a common law state), he and his wife then moved to Texas (a community property state), then ultimately they retired to Florida (a common law state). ⁹⁸ The decedent passed away 15 years later in 2015 at the age of 83, survived by his wife and four daughters from his prior marriage. ⁹⁹

⁹⁴ Estate of Bach, 548 N.Y.S.2d at 875.

⁹⁵ Uniform Act, Prefatory Note.

⁹⁶ Estate of Bach, 548 N.Y.S.2d at 875.

⁹⁷ See Petition for the Establishment and Probate of Lost Will of Clark A. Johnson Pursuant to Fla. Statute 733.207 (2014), *In re Estate of Clark A. Johnson, Deceased*, Case No. 50-2015-CP-001096-XXXX-NB (Fla. 15th Cir. Ct. March 4, 2015, Docket No. 7) ("Lost Will Petition").

⁹⁸ See Petition to Determine and Perfect Surviving Spouse's Community Property Interest in Estate Assets, In re Estate of Clark A. Johnson, Deceased, Case No. 50-2015-CP-001096-XXXX-NB (Fla. 15th Cir. Ct. Sept. 6, 2017, Docket No. 110) ("Community Property Petition").

⁹⁹ See Lost Will Petition, supra note 97.

At the time of his death the decedent owned a \$3 million investment account he had acquired when his marital domicile was in Texas, which was titled in his name alone. Surviving spouse claimed she owned half of that account as community property. Surviving spouse's community-property petition also originally included a reference to the sale of their Texas residence for \$1.4 million, the proceeds of which they re-invested in their Florida homestead property. This homestead property was later sold, and a substantial portion of the net proceeds of that sale were titled in ventures or investments in the decedent's name alone. In total then, surviving spouse could trace \$4.4 million in community-property assets to the couple's marital domicile in Texas. However, section 732.225 of Florida's CP Act contains a "conclusive presumption" establishing that community-property spouses moving to Florida and purchasing homestead property intended to "sever" any community-property interests in such property. Based on this statutory carve out surviving spouse appears to have abandoned her claim to the \$1.4 million of community property that passed through the Florida homestead (it's not mentioned in the appellate opinion), and instead focused exclusively on the \$3 million investment account.

The decedent's estate planning documents were complex, but essentially boiled down to a 50/50 split between his surviving spouse and children from his prior marriage. ¹⁰¹ For purposes of simplicity, the damages calculation chart for this case assumes all parties received their respective shares of the estate outright and free of trust.

VALUE OF WIFE'S CLAIM COMMUNITY PROPERTY UNDER TESTATE SUCCESSION

	Spouse	Children of	Total
		Prior	
		Marriage	
Wife's CP Claim	\$1,500,000	\$1,500,000	
Succeeds	\$750,000	(\$750,000)	
	\$2,250,000	\$750,000	\$3,000,000
% of Total	75%	25%	100%
Wife's CP Claim			
Fails	\$1,500,000	\$1,500,000	\$3,000,000
% of Total	50%	50%	100%
	\$2,250,000		
Value of Wife's	(\$1,500,000)		
CP Claim	\$750,000		

¹⁰⁰ See Community Property Petition, supra note 98.

¹⁰¹ See Lost Will Petition, supra note 97.

1. <u>Question 1</u>: Did the decedent and the surviving spouse ever share a marital domicile in a community property jurisdiction (either domestic or foreign)? YES

The issue of marital domicile was not adjudicated because, as explained below, both the probate court judge and the 4th DCA concluded that wife's claim was filed late, and thus forfeited. However, based on the allegations contained in her Community Property Petition, she claimed that the couple's marital domicile was located in Texas prior to moving to Florida. ¹⁰² For purposes of our discussion we will assume wife would have prevailed on this point.

2. Question 2: Has the applicable filing deadline passed? YES: CLAIM FORFEITED

Wife filed her Community Property Petition "two years eight-and-a-half months after the decedent's death." She argued that since her community-property claim wasn't a probate creditor claim, it didn't matter how long she waited. This argument failed both at the trial court level and on appeal. First, the 4th DCA held that a surviving spouse's claim under Florida's CP Act is in fact "a liability of the decedent," and thus a form of probate creditor claim, as that term is defined in our Probate Code. ¹⁰⁴

"The wife's community property interest is 'a liability of the decedent.' Although the decedent's possession of the community property in his name may have created a resulting trust, *see Quintana*, 195 So.2d at 580 ('A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name.'), upon the decedent's death, his estate became liable to the wife for her community property interest. Thus, upon the decedent's death, the wife's community property interest was a claim which the wife had to pursue."

Once surviving spouse lost the definitional argument, her claim (filed over two years after her husband's death) was doomed. As a creditor claim, it was clearly untimely and consequently forfeited.

"Second, to the extent the decedent possessed the community property in his name at the time of his death, the wife's failure to make a claim upon her community property interest within section 733.702(1)'s three-month claim period barred her later-filed untimely claim (in the form of her petition). See § 733.702(1), Fla. Stat. (2015) ("If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent ...[and] *no claim for personal*

¹⁰² See Community Property Petition, supra note 98.

¹⁰³ Johnson, 259 So.3d at 854.

¹⁰⁴ See Fla. Stat. § 731.201(4): "Claim" means a *liability of the decedent*, whether arising in contract, tort, or otherwise, and funeral expense. (Emphasis added.)

¹⁰⁵ Johnson, 259 So.3d at 857.

property in the possession of the personal representative ... is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor") (emphasis added).

Third, to the extent the wife's petition is not only a "claim" under section 731.201(4) but also a cause of action, the wife's failure to make a claim upon her community property interest within section 733.710(1)'s two-year claim period barred her later-filed untimely claim (in the form of the petition). See § 733.710(1), Fla. Stat. (2015) ("Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.") (emphasis added)." 106

But what about the "trust exception" to Florida's probate-creditor deadlines? It worked in *Quintana*, why not now? Because the 3d DCA decided *Quintana* in 1967, almost a decade prior to Florida's adoption of its new Probate Code in 1976. Under our current statutory framework, the trust exception no longer applies to the kind of "implied" trust relationship common-law courts had developed over time to account for community property titled solely in one spouse's name (discussed above). According to the 4th DCA, under current Florida law a late-filed community property claim does not qualify for the trust exception in the absence of "an express trust or any other clearly defined means by which the decedent held the community property interest on her behalf." Surviving spouse made no such allegations in this case, thus her late-filed community property claim was forfeited.

"Fourth, the wife's reliance upon the common law trust exception is unavailing. The primary case upon which the wife relies, *Quintana*, construed section 733.16, Florida Statutes, which was repealed in 1974 as part of the Probate Code's adoption in 1976. Thus, Quintana's viability is questionable. See [Scott v. Reyes, 913 So.2d 13, 17 (Fla. 2d DCA 2005)] ("[T]he repeal of the former Florida Probate Law and the adoption of the Code call into question the continued viability of some of the earlier decisions that have applied the trust exception to exclude certain types of claims from the operation of the statute."). Upon the Probate Code's adoption, "[t]he 'trust exception' ... to the requirements of the nonclaim statute, as those exceptions pertain to recovery of property from an estate, have effectively been limited [by the Probate Code] to those situations where the decedent clearly held the property on behalf of the actual owner either by way of an express trust or some other clearly defined means." Id. at 18 (citation omitted). In Scott, our sister court, applying that limitation, concluded that the trust exception was inapplicable in that case because the wife there "did not allege the existence of an express trust or any other clearly defined means by which the Decedent held the accounts on her

¹⁰⁶ Johnson, 259 So.3d at 857-858.

behalf." *Id.* Similarly here, the wife did not allege the existence of an express trust or any other clearly defined means by which the decedent held the community property interest on her behalf." ¹⁰⁷

This is the key holding of *Johnson*. And while reasonable people might disagree with the 4th DCA's reasoning and ultimate conclusions, ¹⁰⁸ no one wants to be the test case. Play it safe: frame your community-property petition as a creditor claim and file it in accordance with all applicable probate-creditor deadlines. That's the primary take-away from this case. You've been warned ...

* * * * *

¹⁰⁷ Johnson, 259 So.3d at 858.

¹⁰⁸ See Warner, Richard M., Florida Community Property Rights Simplified, at 3.23, Aug. 23, 2019, 38th Annual Attorney Trust Officer Conference, The Florida Bar, Course No. 3241R. Available at: https://www.rpptl.org/uploads/VOLUME1revised.pdf

259 So.3d 851 District Court of Appeal of Florida, Fourth District.

Joan JOHNSON, Appellant,

v.

Lee TOWNSEND, Leslie Lynch, Elizabeth Denecke and Lisa Einhorn, Appellees.

No. 4D18-432 | |October 24, 2018]

Synopsis

Background: More than two years after husband's death, wife filed petition under the Uniform Disposition of Community Property Rights at Death Act to determine and perfect surviving spouse's community property interest in estate assets, and husband's daughters moved to strike the petition. The Circuit Court, Palm Beach County, Karen M. Miller, J., granted daughters' motion. Wife appealed.

Holdings: The District Court of Appeal, Gerber, C.J., held that:

- [1] wife's petition was a claim;
- [2] common law trust exception did not apply to petition; and
- [3] lien exception did not apply to petition.

Affirmed, motion for rehearing denied, and question certified.

West Headnotes (7)

[1] Executors and Administrators - Appeal and error

To the extent the District Court of Appeal's review involves interpretation of deadlines in statutes governing limitations on claims against estates, or an examination of whether a party qualifies for an exception to those deadlines, the Court's review is de novo. Fla. Stat. Ann. §§ 733.702(1), 733.710(1).

[2] Marriage and Cohabitation Proceedings

Petition filed by decedent's wife under the Uniform Disposition of Community Property Rights at Death Act to determine and perfect surviving spouse's community property interest in estate assets was a claim in administration of decedent's estate and, thus, was subject to statutory filing deadlines for filing creditor claims against the estate; although decedent's possession of community property in his name may have created a resulting trust, upon decedent's death wife's community property interest became a liability of decedent's estate. Fla. Stat. Ann. §§ 731.201(4), 732.223, 733.702(1), 733.710(1).

2 Cases that cite this headnote

[3] Marriage and Cohabitation Proceedings

To the extent decedent possessed community property in his name at the time of his death, petition filed by decedent's wife under the Uniform Disposition of Community Property Rights at Death Act to determine and perfect surviving spouse's community property interest in estate assets was subject to three-month claim period for making creditor claims against the estate. Fla. Stat. Ann. § 733.702(1).

[4] Marriage and Cohabitation Proceedings

To the extent that wife's petition under the Uniform Disposition of Community Property Rights at Death Act to determine and perfect surviving spouse's community property interest in estate assets was a cause of action, it was subject to two-year claim period for making claims upon community property interests. Fla. Stat. Ann. §§ 731.201(4), 733.710(1).

[5] Marriage and Cohabitation - Proceedings

Common law trust exception to statutory deadlines for making claims against estate did not apply to wife's petition under the Uniform Disposition of Community Property Rights at

Death Act to determine and perfect surviving spouse's community property interest in estate assets, where wife did not allege the existence of an express trust or any other clearly defined means by which decedent held community property interest on her behalf. Fla. Stat. Ann. §§ 731.201(4), 733.710(1).

1 Cases that cite this headnote

[6] Marriage and Cohabitation - Proceedings

Lien exceptions in statutes governing limitations on claims against estates did not apply to wife's petition under the Uniform Disposition of Community Property Rights at Death Act to determine and perfect surviving spouse's community property interest in estate assets; even if vesting of wife's community property interest had given rise to an equitable lien, it was not a "duly recorded mortgage or security interest," and wife, in her personal capacity, was not in possession of deceased husband's personal property. Fla. Stat. Ann. §§ 733.702(4) (a), 733.710(3).

[7] Marriage and Cohabitation - Proceedings

Language in statute governing limitations on claims against estates that "notwithstanding any other provision" of the probate code, estate would not be liable for claims brought more than two years after decedent's death created a two-year deadline for decedent's wife to file petition under the Uniform Disposition of Community Property Rights at Death Act to determine and perfect surviving spouse's community property interest in estate assets, even though statute did not contain an explicit deadline for filing petitions. Fla. Stat. Ann. §§ 732.216-228, 733.710(1).

*853 Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Karen M. Miller, Judge; L.T. Case No. 502015CP001096XXXNB.

Attorneys and Law Firms

Edward Downey of Downey | McElroy, P.A., Palm Beach Gardens, for appellant.

William E. Boyes of Boyes, Farina & Matwiczyk, P.A., Palm Beach Gardens, for appellees.

Gerber, C.J.

The decedent's wife appeals from the circuit court's final order granting the decedent's daughters' motion to strike the wife's "Petition to Determine and Perfect Surviving Spouse's Community Property Interest in Estate Assets." The circuit court struck the wife's petition, which the wife filed more than two years after the decedent's death, for three reasons: (1) pursuant to section 733.702(1), Florida Statutes (2015), the petition was an untimely claim against the estate; (2) the petition was further barred by the two-year statute of repose contained in section 733.710(1), Florida Statutes (2015); and (3) no exception to those statutory deadlines allowed the wife to file the petition more than two years after the decedent's death.

The wife argues that her petition to determine her community property interest was not a claim, and thus not subject to any statutory deadlines. The wife further argues that if her petition was a claim, then her petition fell within the "trust exception" and "lien exception" to the statutory deadlines.

We agree with the circuit court's conclusions and, therefore, we affirm the circuit court's order. We will present this opinion in the following sections:

- 1. The estate administration's timeline;
- 2. The petition's procedural history;
- 3. The circuit court's order; and
- 4. This appeal and our review.

1. The Estate Administration's Timeline

On January 21, 2015, the decedent died.

On March 17, 2015, the wife, as the decedent's nominated personal representative under his will, filed a notice of administration of the estate.

On March 19, 2015, the circuit court admitted the decedent's will to probate and, pursuant to the will, appointed the wife as the estate's personal representative. The circuit court also issued letters of administration to the wife.

On March 31, 2015, the wife published a notice to creditors. The notice, pursuant to section 733.702(1), stated in pertinent part:

All creditors of the decedent and other persons having claims or demands against decedent's estate, on whom a copy of this notice is required to be served, must file their claims with this court ON OR BEFORE THE LATER OF 3 MONTHS AFTER THE TIME OF THE FIRST PUBLICATION OF THIS NOTICE OR 30 DAYS AFTER *854 THE DATE OF SERVICE OF A COPY OF THIS NOTICE ON THEM.

All other creditors of the decedent and other persons having claims or demands against decedent's estate must file their claims with this court WITHIN 3 MONTHS AFTER THE DATE OF THE FIRST PUBLICATION OF THIS NOTICE.

ALL CLAIMS NOT FILED WITHIN THE TIME PERIODS SET FORTH IN FLORIDA STATUTES SECTION 733.702 WILL BE FOREVER BARRED.

See § 733.702(1), Fla. Stat. (2015) ("If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent ... [and] no claim for personal property in the possession of the personal representative ... is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor") (emphasis added).

The notice further stated, pursuant to section 733.710(1)'s two-year repose deadline:

NOTWITHSTANDING THE TIME PERIOD SET FORTH ABOVE, ANY CLAIM FILED TWO (2) YEARS OR MORE AFTER THE DECEDENT'S DATE OF DEATH IS BARRED.

See § 733.710(1), Fla. Stat. (2015) ("Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or

cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.").

On June 30, 2015, the three-month claims period under section 733.702(1) expired. By that time, the wife had not filed a claim or other pleading against the estate to determine her alleged community property interest.

On January 21, 2017, the two-year repose period under section 733.710(1) expired. By that time, the wife still had not filed a claim or other pleading against the estate to determine her alleged community property interest.

2. The Petition's Procedural History

On September 6, 2017 (two years eight-and-a-half months after the decedent's death), the wife filed her "Petition to Determine and Perfect Surviving Spouse's Community Property Interest in Estate Assets." The wife's petition, filed pursuant to sections 732.216-.228, Florida Statutes (2015) (known as the "Florida Uniform Disposition of Community Property Rights at Death Act") sought to confirm and effectuate her vested 50% community property interest in an investment asset acquired and titled in the decedent's name while the decedent and the wife were domiciled in Texas, a community property state. See § 732.219, Fla. Stat. (2015) ("Upon the death of a married person, one-half of the property to which ss. 732.216-732.228 apply is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state.").

The decedent's daughters filed a motion to strike the wife's petition. The daughters' motion and supplemental memorandum argued that the wife's petition was untimely under sections 733.702(1), 733.710(1), and 732.223. Section 732.223 states:

If the title to any property to which ss. 732.216-732.228 apply was held by *855 the decedent at the time of the decedent's death, title of the surviving spouse may be perfected by an order of the probate court or by execution of an instrument by the personal representative or the beneficiaries of the decedent with the approval of the probate court. The probate court in which the decedent's estate is being administered has no duty to discover whether property held by the decedent is property to which

ss. 732.216-732.228 apply. The personal representative has no duty to discover whether property held by the decedent is property to which ss. 732.216-732.228 apply unless a written demand is made by the surviving spouse or the spouse's successor in interest within 3 months after service of a copy of the notice of administration on the surviving spouse or the spouse's successor in interest.

The wife filed her own memorandum, raising three arguments that her petition to determine her community property interest was not a claim against the estate subject to the statutory deadlines.

First, the wife argued that section 732.223 shows on its face that a spouse's community property interest is not a creditor claim. According to the wife, section 732.223 does not establish a date or timeframe when a surviving spouse must file a petition to perfect a community property interest, and does not refer to the creditor claim statutes in any way. Instead, the wife argued, section 732.223 is designed solely to limit a personal representative's duty to search for community property.

Second, the wife cited section 731.201(4), Florida Statutes (2015), which defines a "claim" as

a liability of the decedent, whether arising in contract, tort, or otherwise, and funeral expense. The term does not include an expense of administration or estate, inheritance, succession, or other death taxes.

Relying on that definition, the wife argued that her community property interest was not a liability of the decedent, and therefore was not a "claim" under section 731.201(4).

Third, the wife argued that if her petition was a claim, then her community property interest fell within the common law "trust exception" and the statutory "lien exception" to section 733.702(1)'s and section 733.710(1)'s deadlines. We discuss the wife's arguments for each of these exceptions in more detail below.

a. The Common Law "Trust Exception"

In support of the common law "trust exception" to the statutory deadlines, the wife cited the pre-Probate Code case of *Quintana v. Ordono*, 195 So.2d 577 (Fla. 3d DCA 1967), and the post-Probate Code case of *Scott v. Reyes*, 913 So.2d 13 (Fla. 2d DCA 2005), for an explanation of the exception.

In *Quintana*, the Third District held:

Under Florida law, if a portion of the consideration belongs to the wife and title is taken in the husband's name alone, a resulting trust arises in her favor by implication of law to the extent that consideration furnished by her is used. A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name. Therefore, while the husband held legal title to the [property], he held a one-half interest in trust for his wife.

It is well settled that the Florida nonclaim statute, s 733.16, ... does not apply so as to require the [wife] to file a claim against the estate of the trustee.

*856 ... Such procedure does not estop the wife from obtaining her interest. The administrators of the husband's estate are trustees as to the wife's equitable interest.

195 So.2d at 580 (footnotes omitted).

In *Scott*, the Second District held:

The "trust exception" ... to the requirements of the nonclaim statute, as those exceptions pertain to recovery of property from an estate, have effectively been limited [by the Probate Code] to those situations where the decedent clearly held the property on behalf of the actual owner either by way of an express trust or some other clearly defined means.... If [] the decedent was merely in possession of the property but made no such assertion of ownership prior to his or her death, the assertion of ownership being made by the personal representative or heirs for the first time after the decedent's death would not require the filing of a claim.

913 So.2d at 18 (citation omitted).

The wife, applying *Quintana*'s and *Scott*'s explanation of the "trust exception," argued that her community property interest qualified for the exception. According to the wife, under Texas law, "a trust relationship exists between husband and wife regarding the community property controlled by each spouse[.]" *Madrigal v. Madrigal*, 115 S.W.3d 32, 35 (Tex. App. San Antonio 2003). Thus, the wife argued, because her community property interest remained titled in the decedent's name upon his death, the decedent held the wife's community property interest as a trustee, and the community property interest was exempt from the statutory deadlines.

b. The Statutory "Lien Exception"

As a second exception to the statutory deadlines, the wife relied upon the lien exceptions contained in sections 733.702(4)(a) and 733.710(3), Florida Statutes (2015).

Section 733.702(4)(a) states: "Nothing in this section affects or prevents ... [a] proceeding to enforce any mortgage, security interest, or other lien on property of the decedent."

Section 733.710(3) states: "This section shall not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien."

The wife, applying sections 733.702(4)(a) and 733.710(3), argued that even if her community property interest was considered as a claim, then the vesting of community property interest gave rise to an equitable lien which should be excepted from sections 733.702(1) and 733.710(1).

3. The Circuit Court's Order

The circuit court ultimately entered the order, now on appeal, granting the decedent's daughters' motion to strike the wife's petition. The order's conclusions of law state, in pertinent part:

The Petition is an untimely claim against the estate pursuant to section 733.702(1), Fla. Stat., as it is a claim or demand against Decedent's estate for personal property in the possession of the personal representative, which claim was filed more than 3 months after the notice to creditors was first published.

The Petition is further barred by section 733.710(1), Fla. Stat. [which bars any claim filed more than two years after the decedent's death].

There is no "trust exception" or any other exception which allows [the wife] to file the Petition more than two years after Decedent's death.

(paragraph numerals omitted).

4. This Appeal and Our Review

[1] This appeal followed. To the extent our review involves interpretation of *857 sections 733.702's and 733.710's deadlines, or an examination of whether the wife qualifies for

an exception to those deadlines, our review is de novo. *See Headley v. City of Miami*, 215 So.3d 1, 5 (Fla. 2017) ("Issues of statutory interpretation are subject to de novo review."); *Inmon v. Air Tractor, Inc.*, 74 So.3d 534, 537 (Fla. 4th DCA 2011) ("This court has *de novo* review of a circuit court's application of a statute of repose ... because it involves an issue of law.").

The wife, mirroring her contentions in the circuit court, argues that her petition to determine her community property interest, filed pursuant to the "Florida Uniform Disposition of Community Property Rights at Death Act," was not in the nature of a claim, and thus not subject to any statutory deadlines. The wife further argues that if her petition was a claim, then her community property interest fell within the common law "trust exception" and the statutory "lien exception" to section 733.702(1)'s and section 733.710(1)'s deadlines.

The daughters argue that the circuit court properly struck the wife's petition as untimely pursuant to both section 733.702(1) and section 733.710(1) because the wife's petition is a claim. The daughters further argue that the petition is not excepted from either of the above statutes, because her claim does not constitute a lien, nor does her claim fall within the common law trust exception.

Applying de novo review, we agree with the daughters' arguments in six respects.

[2] First, we agree with the daughters' argument that the wife's petition to determine her community property interest is a "claim" as that term is defined in section 731.201(4). Section 731.201(4) defines a "claim" as

a liability of the decedent, whether arising in contract, tort, or otherwise, and funeral expense. The term does not include an expense of administration or estate, inheritance, succession, or other death taxes.

(emphasis added). The wife's community property interest is "a liability of the decedent." Although the decedent's possession of the community property in his name may have created a resulting trust, *see Quintana*, 195 So.2d at 580 ("A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name."), upon the decedent's death, his estate became liable to the wife for her community property interest. Thus, upon the decedent's death, the wife's community property interest was a claim which the wife had to pursue.

[3] Second, to the extent the decedent possessed the community property in his name at the time of his death, the wife's failure to make a claim upon her community property interest within section 733.702(1)'s three-month claim period barred her later-filed untimely claim (in the form of her petition). See § 733.702(1), Fla. Stat. (2015) ("If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent ...[and] no claim for personal property in the possession of the personal representative ... is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor") (emphasis added).

[4] Third, to the extent the wife's petition is not only a "claim" under section 731.201(4) but also a cause of action, the wife's failure to make a claim upon her *858 community property interest within section 733.710(1)'s two-year claim period barred her later-filed untimely claim (in the form of the petition). See § 733.710(1), Fla. Stat. (2015) ("Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.") (emphasis added).

[5] Fourth, the wife's reliance upon the common law trust exception is unavailing. The primary case upon which the wife relies, Quintana, construed section 733.16, Florida Statutes, which was repealed in 1974 as part of the Probate Code's adoption in 1976. Thus, *Quintana*'s viability is questionable. See Scott, 913 So.2d at 17 ("[T]he repeal of the former Florida Probate Law and the adoption of the Code call into question the continued viability of some of the earlier decisions that have applied the trust exception to exclude certain types of claims from the operation of the statute."). Upon the Probate Code's adoption, "[t]he 'trust exception' ... to the requirements of the nonclaim statute, as those exceptions pertain to recovery of property from an estate, have effectively been limited [by the Probate Code] to those situations where the decedent clearly held the property on behalf of the actual owner either by way of an express trust or some other clearly defined means." Id. at 18 (citation omitted). In *Scott*, our sister court, applying that limitation,

concluded that the trust exception was inapplicable in that case because the wife there "did not allege the existence of an express trust or any other clearly defined means by which the Decedent held the accounts on her behalf." *Id.* Similarly here, the wife did not allege the existence of an express trust or any other clearly defined means by which the decedent held the community property interest on her behalf.

[6] Fifth, the wife's reliance upon the lien exceptions contained in sections 733.702(4)(a) and 733.710(3) is similarly unavailing. To begin with, the wife cites no authority for her argument that the vesting of her community property interest gave rise to an equitable lien falling under either exception. Even if we were to consider that the vesting of her community property interest gave rise to an equitable lien falling under section 733.702(4)(a)'s exception ("Nothing in this section affects or prevents ... [a] proceeding to enforce any mortgage, security interest, or other lien on property of the decedent."), we could not reach the same conclusion under the plain language of section 733.710(3)'s narrower exclusion. Section 733.710(3) states: "This section shall not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien." The wife's "lien" is not a "duly recorded mortgage or security interest," nor is she, in her individual capacity, "in possession of [the subject] personal property." The wife also has not provided any argument that she has a "right to foreclose and enforce the ... lien."

[7] Sixth, while we agree with the wife that section 732.223 is designed solely to limit a personal representative's duty to search for community property, we disagree with the wife's argument that sections 732.216–.228's failure to establish a deadline when a surviving spouse must file a petition to perfect a community property interest means no such deadline exists. Rather, as the daughters argue, a two-year deadline exists based on section 733.710(1)'s plain language: "Notwithstanding any other provision of the code, 2 years after the death of a person, neither *859 the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section." (emphasis added).

Conclusion

Upon the decedent's death, the wife had the ability to perfect her community property interest by seeking an order of the probate court pursuant to section 732.223. Because the wife's community property interest was a "claim" as defined in section 731.201(4), the wife had three months after the time she published the notice to creditors to file her claim according to section 733.702(1), and in any event had two years after the decedent's death to file her claim according to section 733.710(1). The wife did neither. As a result, the circuit court properly found that the wife's untimely claim (in the form of her petition) was barred, and that no exception to the statutory deadlines existed. Ruling otherwise would have left no deadline by which the wife had to file a petition to perfect her community property interest, contrary to section 733.710(1).

Affirmed.

Levine and Klingensmith, JJ., concur.

ON APPELLANT'S MOTION FOR REHEARING AND/ OR REHEARING EN BANC OR TO CERTIFY QUESTION TO THE FLORIDA SUPREME COURT AS A MATTER OF GREAT PUBLIC IMPORTANCE

Gerber, C.J.

We deny appellant's motion for rehearing and/or rehearing en banc. However, we grant appellant's motion to certify to the Florida Supreme Court the following question of great public importance:

Whether a surviving spouse's vested community property rights are part of the deceased spouse's probate estate making them subject to the estate's claims procedures, or are fully owned by the surviving spouse and therefore not subject to the estate's claims procedures.

All Citations

259 So.3d 851, 43 Fla. L. Weekly D2383, 44 Fla. L. Weekly D48

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2005 Title Teasers

by Mindy Schlosberg, Fund Senior Underwriting Counsel – Commercial Services; Leonard Lincoln, Fund Underwriting Counsel; Kathleen Murphy, Fund Underwriting Counsel; Nancy Stuparich, Fund Underwriting Counsel

Below are the answers to the second set of multiple-choice questions presented during the Title Teasers game at the 2005 Fund Assembly held in May.

11. Foreign Guardian

John Drake owns a parcel of property in Broward County. A year ago John was declared incompetent in Illinois and a plenary guardian of his property was appointed in Illinois. The guardian has obtained a court order from Illinois where he now resides authorizing the sale of the property. For issuing a Fund policy:

- A. Title coming from the guardian is insurable. The agent must review the court file and record pertinent certified copies of the transcript, including but not limited to the order authorizing the sale.
- B. Title coming from the guardian is insurable without an order authorizing the sale as long as Illinois law authorizes a sale without court order.
- C. Title coming from the guardian is not insurable. Even though the ward resides in Illinois, another guardianship case needs to be opened in Florida for selling the property.

Answer: C. Since the property is in Florida, and matters pertaining to the disposition of real property are local matters governed by the law of the state where the property is situated, the court in Illinois would have no jurisdiction with respect to a sale of the property. Pursuant to Sec. 744.202(2)(b), F.S., the venue in proceedings for the appointment of a guardian, if the incapacitated person is not a resident of this state, is in any county in this state where

property of the incapacitated person is located.

12. Rerecorded Judgments

In Jul. 1994, Laura obtained a judgment against Alex for \$40,000. A certified copy of the judgment, along with a simultaneous affidavit containing her address, is recorded in Aug., 1994. In Feb. 2005, Laura rerecords her judgment and affidavit against Alex. Alex now wants to sell his property. To issue a Fund policy without exception for this judgment, should the Fund Member Agent require a release or satisfaction of this judgment?

- A. No. The judgment was not rerecorded prior to the 10-year expiration period, and the lien expired.
- B. Yes. The judgment would be considered a new lien.
- C. No. The creditor did not update her address affidavit when she rerecorded.

Answer: B. The judgment was rerecorded within the 20 year lifespan of the judgment (Sec. 55.081, F.S.), though it will have lost any priority it may have had because of the gap.

13. Judgment Against One Entirety's Spouse

Title is taken in the name of Tom Thumb, Mary Thumb and Julia Thumb. Tom and Mary are married to each other. The property is nonhomestead. A circuit court judgment lien appears on record against Tom Thumb for \$8,000. For issuing a Fund policy:

A. The judgment must be paid off since the

property is non-homestead.

- B. The judgment does not need to be paid off since title is deemed to have been taken as an estate by the entirety between spouses as long as a continuous marriage affidavit is recorded.
- C. The judgment must be paid off since title may be deemed to have been taken as a tenancy in common because the words "his wife" are missing.

Answer: B. A judgment against one spouse is not enforceable against property held by the entirety. See TN 18.03.05. If it can be determined factually by affidavit that the parties were continuously married, the judgment would not need to be paid prior to closing. Answer A is a true statement, but under the facts payment of the judgment is not required. TN 20.01.15 provides that even though a deed does not specify that the grantees take by the entirety and even though they are not referred to as husband and wife in the deed, an estate by the entirety is created if the grantees are in fact husband and wife in the absence of a contrary expression of intent in the deed. The recording of an affidavit of marital status in such cases would be sufficient to establish the type of tenancy created.

14. Federal Tax Lien SOL

Jane Drew is the owner of homestead property. She has a federal tax lien against her which was recorded for the first time in Mar. 2004. The assessment date is Jun. 5, 1994. For issuing a Fund policy:

- A. You can ignore the FTL since it is more than 10 years and 30 days since the date of the assessment.
- B. You can ignore the FTL since the property is Jane's homestead and Jane is willing to give a detailed homestead affidavit.

C. You cannot ignore the FTL since it will not expire until 10 years and 30 days from the date it was recorded.

Answer: A. 26 U.S.C., Sec. 6323(g)(3) provides that the last date for refiling a federal tax lien is 10 years and 30 days after the date of assessment of the tax. Therefore, if the period for refiling has expired without the tax lien being refiled, the lien may be ignored. See TN 30.02.04 B.

15. Mutual Indemnification Treaty

In Feb. 2005, Barry bought his home from Allen and received an owner's policy issued by another underwriter. Barry's policy made no exception for Allen's \$350,000 mortgage which was executed and recorded in Jan. 2004. In May 2005, a Fund Member Agent is insuring Barry's sale to Charlie. May a Fund policy be issued without requiring a satisfaction of Allen's mortgage?

- A. No. For insuring, the mortgage must be satisfied because it is a cloud on the title.
- B. Yes. Provided that the underwriter which issued Barry's owner's policy is a signatory to the Revised Mutual Indemnification Agreement, a policy may be issued making exception for the mortgage and providing affirmative coverage over the matter.
- C. Yes. Upon receipt and approval by THE FUND of an acceptable indemnification letter from the underwriter which issued Barry's policy, a Fund policy may be issued making exception for the mortgage and providing affirmative coverage over the matter.

Answer: C. The referenced mortgage and Barry's owner's policy fall outside of the indemnification treaty because Barry's existing owner's policy is less than one year old and the outstanding mortgage exceeds \$250,000.

16. Short Form Residential Loan Policy

Alice represents a developer of luxury homes in the \$1 million dollar price range. She will be closing the home sales and issuing Fund owner's and mortgagee policies. Alice would like to issue the policies as quickly as possible. Which of the following statements is most accurate?

- A. A short form residential mortgagee policy and an owner's policy residential may be issued at closing based upon a limited residential search.
- B. A short form residential mortgagee policy and an owner's policy residential may not be issued.
- C. A short form residential mortgagee policy and an owner's policy residential may be issued at closing based upon a complete title search.

Answer: C. There is no monetary limitation on the amount of coverage provided by a MPP or OPR. Fund Member Agents are authorized to issue these policy forms at closing. The LRS is permissibly used in issuing the MPP and OPR on policies up to \$400,000. See TN 25.01.04.

17. Exempt Property under Bankruptcy

Hurricane Xavier hit Florida and John's homestead in Flagler County was flattened. John was forced to move into an apartment while awaiting repairs to his house. Because of the widespread damage throughout Florida, the general contractor told John it could be as long as six years before his house is rebuilt. Three years after the hurricane, John had to file for bankruptcy. He wanted to claim his flattened home as exempt property, but his creditors objected, saying that he was no longer living on the property and was in fact living in an apartment, so it was no longer exempt. What is the most likely outcome based upon recent case law?

- A. The creditors should prevail, because John was not living on the property at the time of the bankruptcy.
- B. The creditors should prevail, because John has been absent from his homestead for more than three years.
- C. John should prevail, because he has not abandoned his homestead and intends to return.

Answer: C. John has shown an intent to return to his homestead (the contract with the contractor), even though it may take several years before he gets back to it. So it would not be considered abandoned. See *In re Herr*, 197 B.R. 939 (Bkrtcy S.D. Fla. 1996) (homestead was not abandoned despite absence from the home for three years due to destruction of the home by a hurricane).

18. Public Use of Beach on Property

Gill Greenlake is buying vacant lakefront property. The subject property has a 10-foot wide sandy beach area between the water line and upland property. Years ago the property was frequently used by nearby land owners as a place to picnic and swim. The property has since lost its local appeal and is no longer used for such recreational purposes. In addition, the property has been fenced in and is no longer accessible to the public from the road abutting the property. For issuing a Fund policy, must exception be made in the policy for the rights of nearby landowners to use the beachfront property?

- A. No. The public no longer has access to the beachfront area of the property.
- B. No. The public discontinued use of the beach as a picnic and swimming area years ago.
 - C. Yes. The nearby land owners may have

acquired a right to use the beachfront property as a result of the property owner's acquiescence to the recreational use of the beachfront property over a period of years.

D. Both A and B.

Answer: C. Fund Member Agents insuring waterfront parcels that include areas which are currently, or have been used for recreational purposes by the public, should include the following exception in Schedule B of the policy: "The rights, if any, of the public to use as a public beach or recreation area any part of the land lying between the body of water abutting the subject property and the natural line of vegetation, bluff, extreme high water line or other apparent boundary line separating the publicly used area from the upland private area." See TN 32.02.02 A. A and B are incorrect because access to the subject beachfront may still be available to the public from the water. Furthermore, a right to use the beachfront property may have vested in the public as a result of the owner's acquiescence to such use by the public over a period of years.

19. Lady Bird Deeds

Title to homestead property is conveyed by Umberto Rodriquez and Delia Rodriquez, husband and wife, to Delia Rodriquez, in a life estate, without any liability for waste, with full power and authority to sell, convey, mortgage, lease or otherwise dispose of the property described in fee simple, with or without joinder of the remaindermen, Ruth Johnson and Mary Smith, as joint tenants with rights of survivorship. Umberto dies and Delia conveys the property to George Jackson. May a Fund policy be issued insuring title into George Jackson?

A. Yes. Delia had a fee simple interest in the property since it was her homestead.

- B. Yes. Delia had a life estate with full powers to sell and convey to George Jackson without joinder of the remaindermen.
- C. No. The remaindermen must join in the conveyance of homestead property, regardless of the language in the deed, since they have a vested interest.

Answer: B. The language in the deed clearly establishes Umberto and Delia's intent to create an enhanced life estate or "Lady Bird Deed" in favor of Delia. A bona fide arms-length sale for value from the holder of an enhanced life estate does not require the joinder of the remaindermen.

20. Conveyance of Estate by the Entirety

The sellers are married, but legally separated. The husband resides in California and the wife resides in Florida. May a Fund policy be issued insuring the sale of their home held as an estate by the entirety based upon two deeds executed by each spouse separately?

- A. No. Separate deeds from the husband and wife should not be insured.
- B. Yes. Provided each deed is properly executed and witnessed with an appropriate certificate of acknowledgement.
- C. Yes. Separate deeds will be effective because the couple is legally separated.

Answer: A. No interest in land held as an estate by the entirety can be conveyed or encumbered to a third party by either spouse acting alone. See TN 20.01.16 and Uniform Title Standard 6.3.

21. Non-Resident Decedent

Susan White, a resident of Georgia, died



owning real property located in Florida. White's estate was probated in Georgia and the property devised to her brother, George Green. Her estate was closed in 2002. Green now desires to sell the property. If Green records an authenticated copy of White's will in the public records, may a Fund policy insuring a conveyance from Green to a purchaser for value be issued?

- A. Yes. White's estate was probated in Georgia, the Georgia probate is now closed and White's will, which was admitted to probate in Georgia, is valid and effectual to pass title in Florida.
- B. Yes. The personal representative in the Georgia probate estate has been discharged.
- C. No. Green must first file a petition with the proper Florida court to admit White's will to record and obtain an order specifically admitting the will to record in Florida.

Answer: C: While Sec. 734.104, F.S., provides in part that an authenticated copy of a foreign will purporting to devise Florida real property may be admitted to record, a petition to admit such foreign will must first be filed and an order specifically admitting such will to record in Florida must be obtained. In addition, the foreign will must have been executed as provided by Ch. 732, F.S., and it must have been admitted to probate in the appropriate foreign jurisdiction. Furthermore, either (1) the decedent must have been dead for more than two years, or (2) the personal representative in the domiciliary jurisdiction must have been discharged. A petition to admit a foreign will must be accompanied by authenticated copies of the foreign will, the petition for probate and the order admitting the will to probate. Once the requirements of Sec. 734.104, F.S., are complied with, admission of the will to record shall be as valid and effectual to pass title as if the will had been admitted to probate in

Florida. The petition, will and order admitting to record should be recorded in the Florida county wherein the property is located. Title would be vested in those persons to whom the decedent has devised it in the will, and those devisees must personally convey their interests to a purchaser for value whose title is to be insured. The Fund will not rely upon this procedure where the decedent's death has occurred within two years of the proposed sale to be insured. As a result, ancillary administration is recommended for these cases. See TN 2.05.04 B.

22. Property Transfer in Dissolution of Marriage

Brad and Jen took title to Blueacre as husband and wife and later divorced. The final judgment of dissolution awarded the marital residence to Jen and incorporated by reference the terms of an unrecorded property settlement agreement. Jen is now selling the marital residence. May a Fund policy insuring a sale of the marital residence by Jen be issued?

- A. No. The property settlement agreement was not recorded.
- B. Yes. The final judgment of dissolution awarded the property to Jen and it is not necessary to examine the property settlement agreement.
- C. Yes. A policy may be issued after review of the property settlement agreement to determine that Brad has no equitable interest in the subject property.

Answer: C: Property settlement agreements are not usually recorded in the official record books. Therefore, in order to insure that the provisions of a property settlement agreement have been complied with, the court files should be examined. If the agreement itself awards the

property to one spouse, the final judgment operates as the document of conveyance and title may be insured to that spouse's grantee or mortgagee. Therefore, A is incorrect. Conversely, if the agreement requires that deeds be exchanged between the parties, then title is not insurable until a deed between the former spouses had been executed and recorded. In addition, if the property settlement agreement awards the property to one spouse but gives the other spouse a percentage of the proceeds when the property is sold, then a release must be obtained from the spouse who is awarded a percentage of the proceeds, before insuring a subsequent purchaser or mortgagee. Likewise, when title is awarded by judgment and there is something of value given in exchange for the award, then an equitable lien is created which must be released before issuing a policy. Therefore, B is incorrect and C is the correct answer. See TN 14.03.03.

23. Endorsement to Mortgagee Policy

Your lender-client's mortgage is insured by a Fund mortgagee policy that was issued by another member agent. Lender and Developer are modifying the mortgage to include a new future advance clause, increase the interest rate and extend the maturity date of the mortgage. Lender has asked you to endorse the existing policy to insure the mortgage modification. Your title exam reveals a N.O.C. recorded subsequent to the insured mortgage. May you endorse the existing Fund mortgagee policy?

A. No. Only the Fund Member Agent who issued the original mortgagee policy may endorse the policy.

B. Yes. Any Fund Member Agent may endorse any Fund policy. The endorsement will reflect a loss of priority and require substitution loan rates, as well as future advance rates. C. Yes. Any Fund Member Agent may endorse any Fund policy. Any new title matters may be shown as subordinate to the lien of the mortgage insured.

Answer: B. Since a new future advance clause is being added, exceptions should be included within the endorsement for any loss of priority to intervening matters affecting title to the property, such as any construction lien claimants performing under the notice of commencement. This is because any parties taking and claiming a lien on the property in reliance on the record of the original mortgage would be prejudiced to the extent of any newly advanced funds under the added future advance clause. Also, pursuant to Rule 690-186.005(13), F.A.C., governing title insurance rates, provides that the "substitution loan rate provided in subsection (5) of Rule 600-186.003, F.A.C., shall apply to any endorsement that insures a modification of a mortgage which was insured by an outstanding policy where the modification agreement effects any change in the terms, conditions, priority, or security, other than: (a) an extension of time for payment of the secured obligation...(c) any increase in the interest rate of the insured mortgage, provided endorsement contains an exception for the loss of priority occasioned by the increase...." While there are six other exceptions to the requirement for charging the substitution loan rate, none would apply in the case where a mortgage is modified to add a future advance clause.

24. General Partnership

ABC General Partnership, a Florida General Partnership, took title to real property in January of 1998. ABC never registered with the Florida Department of State. The property is now being sold to your client. In order to issue a Fund policy to your client, what must you require with respect

to registering with the Department of State?

- A. Require the registration pursuant to Sec.. 620.8303, F.S.
- B. Require the registration pursuant to Sec. 620.8303, F.S., and the payment of delinquent registration fees.
 - C. No requirement need be made for registration.

Answer: C. Registration of Florida general partnerships under Sec. 620.8303, F.S., is voluntary. The statute provides that the partnership *may* register with the Florida Department of State. See also TN 23.01.01.

25. Acknowledgment Taken in Iran

Your client is selling property that she owns as joint tenants with right of survivorship with her brother who lives in Iran. The client's signature is witnessed and properly acknowledged before a Florida notary public. The brother's signature is properly witnessed, but the acknowledgment is before an official of the Swiss Embassy in Iran. For issuing a Fund policy, is this a properly executed deed?

- A. Yes. The U.S. is represented by the Swiss in Iran and a Swiss embassy official qualifies as a "consular agent" of the U.S. as required by Sec. 695.03(3), F.S.
- B. No. The Swiss embassy has no jurisdiction over U.S. property.
- C. No. The U.S. has no authorized personnel stationed in Iran to acknowledge documents.

Answer: A. The United States is, in fact, represented by the Swiss in Iran. For issuing a Fund policy, a Swiss embassy official qualifies as a "consular agent" of the United States as

required by Sec. 695.03(3), F.S. See also TN 1.04.02.

26. Federal Tax Liens Not Recorded in Local Records

Prior to the closing on property located in Marion County, the seller tells the closing agent that there is a federal tax lien against him and his wife, but it is recorded in Putnam County. For issuing a Fund policy, does the federal tax lien encumber title to the property in Marion county?

- A) No. A purchaser of Florida real property, with actual notice of a federal tax lien filed against the property's seller, takes title subject to such lien only if the lien has been recorded in the county where the property is located.
- B) Yes. A federal tax lien attaches to all property owned by the tax payor.
- C) Yes. A federal tax lien attaches to property held as an estate by the entirety and the federal tax lien is against both husband and wife.
 - D) No. The property is homestead.

Answer: A. According to the express and exclusive provisions contained in 26 U.S.C., Sec. 6323(a) and (f), a federal tax lien is effective against secured parties and purchasers only when the lien has been filed in accordance with the statute's explicit provisions. Where the federal tax lien must be filed is determined by state law and the character of the assets attempting to be liened. With respect to real property, the place for recording the tax lien in Florida is in the office of the clerk of the circuit court of the county in which the real property is situated. If a notice of federal tax lien is either unrecorded or recorded in a county or state other than where the real property is located, a purchaser, for adequate and full consideration, takes title to the subject real property free of the federal tax lien even if said purchaser has actual knowledge of the existence of the federal tax lien.

27. Reversionary Interest in Vacated Streets

DevelopAll, Inc. is purchasing all the lots in a subdivision in order to build townhouses. It is the intent of DevelopAll to have vacated the streets which its lots abut. The plat of the subdivision was filed in 1939 and contains the following language:

All the streets shall be dedicated to the perpetual use of the property owners of this subdivision, reserving to the grantor, its successors or assigns, the reversion or reversions thereof whenever discontinued by law.

Both DevelopAll and the Lender request that reference to this reversionary interest be deleted from their respective Fund policies. In order to do so we must require:

- A. Deeds from the grantor, its successors or assigns.
- B. Deeds from all the lot owners in the subdivision and the grantor, its successors or assigns.
- C. Proof that no action was commenced by the grantor to enforce its right of reversion.

Answer: C. Sec. 177.085, F.S., which became law Jul. 1, 1972, specifically addresses this issue. The statute provides that unless the reservation of the reversionary interest is clearly set out on the deed out of the developer, the conveyance will carry with it the reversionary interest in the abutting street. Subsection (2) of the statute provides that for plats recorded prior to its effective date, the holder of any reversionary rights in streets in such plats, other than the

lot owners, shall have one year from Jul. 1, 1972, to institute an action to establish or enforce the right, and that failure to do so bars such right and all rights of reversion cease and become unenforceable. See also TN 24.01.03.

28. MRTA and Easement by Necessity

John owns 40 acres of land in rural Madison County. In 1965 his neighbor Fred sought and obtained a judicial determination that he had an easement by necessity to access his landlocked parcel, which he continues to own and desires to use for agricultural purposes. The easement has not been used since John acquired title to his 40 acres in 1970. May a Fund policy be issued to John's buyer without exception for the easement by necessity?

- A. Yes. Provided the 1970 root of title fails to disclose the easement and nothing has been recorded since then claiming an interest in the easement.
- B. No. Easements by necessity survive MRTA and continue in existence so long as the necessity exists and there is compliance with the provisions of Sec. 704.01(2), F.S.
 - C. Yes. The easement has been abandoned.

Answer: B. The 2004 Florida Supreme Court decision in *Blanton v. City of Pinellas Park*, 854 So.2d 729 (Fla. 2d DCA 2003), *rev'd*, 887 So.2d 1224 (Fla. 2004), held that statutory easements by necessity may not be extinguished by MRTA as long as the necessity exists.

29. Lessee's Notice of Commencement

Your client, Lance Landlord, leases space in a commercial building to Thomas Tenant. Tenant has recorded a notice of commencement in connection with improvements to be made to the



leased premises and authorized under the lease. The lease provides that "the interest of the lessor shall not be subject to liens for improvements made by the lessee." Neither the lease, nor a memorandum of lease has been recorded in the public records. Mr. Landlord now desires to obtain a first mortgage on the subject property. May a Fund mortgagee policy be issued without exception for Tenant's notice of commencement?

- A. Yes. Because the lease specifically provides that the interest of the lessor shall not be subject to liens for improvements made by the lessee.
- B. Yes. Because the mortgagee policy will contain an exception for Tenant's rights, title and interests which would include rights of parties arising under the notice of commencement.
- C. No. Because neither the lease nor a memorandum of lease stating that the interest of the lessor shall not be subject to liens for improvements made by the lessee was recorded in the public records.

Answer: C. Both Answers A and B are incorrect answers because Sec. 713.10, F.S., provides that when an improvement is made by a lessee in accordance with an agreement between the lessee and the lessor, a related claim of lien shall also extend to the interest of such lessor. Sec. 713.10, F.S., may provide protection of the interest of the lessor from liens for improvements made by a lessee if one of the following requirements are met: (1) the lease or a short form thereof is recorded in the clerk's office and the terms of the lease expressly prohibit such liability; or (2) all of the leases entered into by a lessor for the rental of the premises prohibit such liability and notice is recorded in the clerk's office setting forth the name of the lessor, the legal description of the subject property, the specific language in the various leases prohibiting such liability and a statement that all leases entered into on the subject property contain such language. Therefore, Answer C is correct. Sec. 713.10, F.S., may protect the interest of a lessor from such liability.

30. Contiguity Endorsement

John owns Big Tract Acres, a commercial property in Orange County. The property abuts Orange Blossom Trail. John is obtaining a commercial loan with Big Bank. A survey indicating that the property is adjacent to Orange Blossom Trail has been provided to Big Bank's attorneys, and your office has provided a Fund commitment to the attorneys. The attorneys have requested a Contiguity Endorsement insuring that the property abuts Orange Blossom Trail. You should respond as follows:

- A. You provide the endorsement, but advise the attorneys that there is an additional \$100 charge for the endorsement because the property is commercial.
- B. You cannot provide the endorsement because it is only used to insure that parcels consisting of more than one legal description constitute one contiguous parcel of land.
- C. You can provide the endorsement if the surveyor provides an affidavit that the insured property is contiguous to Orange Blossom Trail.

Answer: **B.** The Contiguity Endorsement provides affirmative coverage that a parcel of land consisting of more than one legal description constitutes one contiguous parcel of land, and this endorsement may not be issued on an automatic basis. The endorsement reflects the boundary lines along which the parcels are contiguous to each other. Access Endorsements are specifically prohibited in Florida by Rule 4-186.005 (15)(a)3, F.A.C.

2007 Fund Assembly - Title Teasers part IV

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Below are the answers to the fourth set of multiple-choice questions presented during the Title Teasers game at the 2007 Fund Assembly held in May:

34) Unrecorded Power of Attorney

Mary, a single woman, gave her son, Mark a properly witnessed and acknowledged power of attorney authorizing Mark to convey her homestead property. Mark properly conveys the property to Bill, and the deed is recorded. The power of attorney is not recorded, and Mark does not tell Mary that the property has been sold. The next week Mary conveys the same property to David who has recently arrived in town. David pays fair market value, the deed is properly witnessed and acknowledged and recorded. After discovering that Bill is residing on the property, David consults you as to his rights in the property. You advise him that:

- A. Unfortunately he has no rights in the property since Bill's deed was recorded first.
- B. Once Mary gave Mark the power of attorney she has no further rights in the property, and her deed was ineffective to pass title.
- C. He may very well have good and valid title against Bill.

The correct answer is C. Sec. 689.111, E.S., authorizes conveyance of homestead property by an attorney-in-fact under a written power of attorney which power is executed with the formalities of a deed. However, Sec. 695.01, E.S., provides that no conveyance of a real property interest greater than a leasehold of one year which is executed pursuant to a power of attorney shall be good against subsequent purchasers for value without notice

unless a written power of attorney is recorded prior to the accruing of the rights of the subsequent purchaser.

35) Florida Uniform Transfers to Minors Act

Property was devised to "Custodian, for Baby Minor under the Florida Uniform Transfers to Minors Act" ten years ago. Baby Minor, who is now 18 years old, resides on the property and wishes to sell it. For insuring purposes, from whom must you obtain deeds in order to insure good title in the grantee?

- A. Baby Minor, joined by spouse, if any.
- B. Baby Minor and the Custodian.
- C. Baby Minor, joined by spouse, if any, and the Custodian.

The correct answer is C. Under the Act where the custodial property was conveyed by devise, the custodianship ends when the minor attains the age of 21. Since Baby Minor resides on the property, her spouse, if any, must join in the conveyance to relinquish any homestead interest. This Act is found in Ch. 710, F.S.

36) Code Enforcement Liens on All Violator's Property

The City of Sunshine is located in Hurricane County, Florida. The City of Sunshine files a municipal lien under Ch. 162, F.S., against John Doe for violations located on Blackacre which is within the city limits. Mr. Doe now wants to sell Greenacre, a property he owns in the south part of Hurricane County that is not

within the City of Sunshine. As far as the municipal lien is concerned:

- A. It is not necessary to obtain a release, since the property being sold is not located within the municipality.
- B. It is necessary to obtain a release because it is a lien on all real property John Doe owns in the county.
- C. It is necessary to obtain a release only if the municipal ordinance specifically grants the lien the power to apply to all property owned by the violator in the county.
- D. It is necessary to obtain a release only if county ordinances specifically grant municipal liens the authority to create a lien on all property owned by the violator in the county.

The correct answer is B. Under Sec. 162.09(3), F.S., a certified copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the land upon which the violation exists *and* upon any other real property owned by the violator.

37) Military Acknowledgments

Husband and Wife want to sell their property. After the contract is made but before closing, Husband, a Marine Officer, is called to active duty in Iraq and stationed in the Green Zone. You send a deed for him to sign in Iraq, which he does, but it is not acknowledged by a notary but by his commanding officer, who is a captain in the Marines. Is the acknowledgment acceptable?

- A. No. The proper party to notarize in these situations is a Judge Advocate General, under the provisions of Sec. 695.03, F.S., and Article 136 of the Uniform Code of Military Justice.
- B. No. The proper party to notarize in these situations is a notary at the US

- Embassy in Baghdad, pursuant to Sec. 695.03, F.S.
- C. Yes. THE FUND will insure title based upon deeds executed by military personnel in a combat zone no matter who serves as its the notary.
- D. Yes. The notary is proper under Sec. 695.03, F.S., and Article 136 of the Uniform Code of Military Justice.

The correct answer is **D**. Sec. 695.03(3), F.S., and Article 136 of the Uniform Code of Military Justice authorize certain military and naval officers, including Judge Advocates General, to notarize deeds which are executed in foreign countries. In addition, if the signatory is a member of the armed forces or the spouse of a member of the armed services, the acknowledgment may be taken by an officer in active service with the rank of second lieutenant, ensign, or higher. Sec. 695.031(a), F.S.

38) Deed Executed by Attorney-in-fact

Greenacres was conveyed by a power of attorney. The execution reads "Anne Black by Bruce Blue, as her attorney-in-fact." Anne Black's name is typed, and Bruce Blue signed his own name on the signature line. The properly prepared power of attorney was recorded with the deed. Did the grantee obtain insurable title?

- A. No. The attorney in fact must actually sign the name of the principal.
- B. Yes. The name of the principal may be written, printed, or typed.
- C. No. The deed execution must read "Bruce Blue as attorney-in-fact for Anne Black."

The correct answer is B. When property is conveyed by an attorney-in-fact, it is well settled that it must be clear from examining the instrument that it is the act of the principal and not the agent. The principal should be listed

as the grantor in the identifying block at the top of the deed, and the preferred method for execution of the deed is for the attorney to sign the principal's name and identify himself as agent. However, Title Standard 1.2 provides that the name of the principal may be written, printed, or typed. See TN 4.02.02.

39) Bankruptcy and Homestead Held in Trust

Jane Doe acquired her homestead in Orlando, Florida, in 1990, and later that year transferred it to Jane Doe, as trustee for the Jane Doe Trust dated Feb. 1, 1990. She has continuously resided in that property through the present date, and it is the only property that she owns. In April 2007, Jane filed bankruptcy and claimed the property transferred to the trust as exempt homestead. Which of the following is correct?

- A. She may claim the entire value of the property as exempt homestead.
- B. She may claim a \$125,000 homestead exemption.
- C. She may not claim the property as homestead because title is not held by a "natural person."
- D. None of the above, the law is not clear on this issue.

The correct answer is D. Although the Bankruptcy Court for the Middle District of Florida, Jacksonville Division found, Bosonetto, 271 B.R. 403 (Bkrtcy. M.D. Fla. 2001), that homestead held by a trustee of a revocable trust is not exempt because it is not owned by a "natural person" as required under Article X, Section 4(a)(1) of the Florida Constitution; the Bankruptcy Court for the Middle District of Florida, Orlando Division disagreed and held, re Edwards, 356 B.R. 807 (Bkrtcy. M.D. Fla. 2006), that the homestead exemption should be liberally construed and that homestead held by a trustee of a revocable trust is exempt.

40) OGM Reservations and Florida Form 9 Coverage

While searching the title to insure the sale of Blackacre, Alice Agent discovers a prior deed in the chain that contained a reservation of oil and gas rights to Sam Smith. Florida Form 9 (3)(b) provides for affirmative coverage for any damage sustained to existing improvements resulting from the enforcement of mineral rights. It does not make any mention of oil and gas rights. Based on this, Alice has made an exception for the oil and gas reservations in Schedule B-II of the commitment and is planning to issue an un-modified Florida Form 9 Endorsement. May Alice issue the FF9 endorsement without concern for the oil and gas reservations?

- A. Yes. Alice may issue a FF9 endorsement because the affirmative coverage offered by that endorsement only applies to mineral rights, and therefore issuing this endorsement does not provide any such coverage for the oil and gas reservations.
- B. Yes. Alice may issue a FF9 endorsement, but only if she adds a note to the exception for oil and gas rights in Schedule B that the FF9 will provide no coverage
- C. Yes. Alice may issue a FF9 because she has also made an exception for the oil and gas reservations in Schedule B-II of the commitment and is therefore protected.

The correct answer is B. Sec. 689.20, F.S., provides a definition of the word "minerals," and by negative implication it includes oil and gas. The statute provides, in pertinent part, that "[w]henever the word 'minerals' is . . . used in any deed, lease, or other contract in writing, [it] shall not include any of the following: topsoil, muck, peat, humus, sand and common clay, unless expressly provided in for in said deed, lease or other contract in writing" (emphasis added). Because oil and gas are not expressly excluded, THE FUND's position is that oil and gas are minerals for title

insurance purposes. Answer A is not correct because providing affirmative coverage over these oil and gas reservations will certainly subject THE FUND to a possible claim. Answer C is not correct because, although the Alice has shown the oil and gas reservations as an exception on Schedule B-II, the FF9 endorsement effectively states that THE FUND will insure over any harm or damage resulting from the reservation. It is important that the correct answer, B, states that removing the FF 9 coverage from the policy is done by an appropriate notation in Schedule B. The FF 9 Endorsement itself may not be altered on its face.

41) Lack of Homestead Determination in Probate

John Doe died testate survived by his three adult children. He devised his solely owned beach residence to his girlfriend for life with remainder to the three children. The probate court found the property to be properly devised but made no determination of homestead. John Doe's will also provided the appointed personal representative (PR) with the specific power to sell all property. The PR now proposes to convey the property to Jim Smith. For issuing a Fund policy, who must convey the beach property?

- A. The PR, with a specific power of sale set forth in the will, has the authority to convey without the joinder of any beneficiaries.
- B. The three children should join in the conveyance, as well as the PR, since there has been no determination of homestead.
- C. The PR, as well as the 3 adult children and the girlfriend should convey since there has been no judicial determination of homestead.

The correct answer is B. A judicial determination of homestead is not necessary, however, since there has been no judicial

determination of homestead, we must cover all bases and treat it both ways, as homestead and non-homestead. So, the PR must convey, just in case it is not homestead property and is therefore part of the probate estate, and the beneficiaries who would be heirs at law must also convey, in the event that it is homestead property, and therefore passed upon the decedent's death outside of probate. The decedent's girlfriend doesn't have to sign since she does not fit into this category and the decedent's will gave a power to sell all property to the PR.

42) Claim of Lien under Ch. 713, F.S.

Sherry Brown, an interior designer, did work on the Haffords' living room for which she never received payment. Although no notice of commencement has ever been filed, Brown did file a claim of lien on the property. Three months later, the Haffords decided to sell their property. Can the Haffords transfer Brown's claim of lien to security under Sec. 713.24, F.S., without Brown's consent?

- A. Yes. As an interior designer, Brown falls within that class of professional services controlled by the construction lien statutes (Ch. 713, F.S.), whose claims of lien can be transferred to security without the lienor's consent.
- B. No. As an interior designer, Brown does not fall within that class of professional services controlled by the Construction Lien Statutes (Ch. 713, F.S.). The lien cannot be transferred to security under Sec. 713.24, F.S., without Brown's consent.
- C. No. Since a notice of commencement was not filed, this claim of lien cannot be transferred to security under Sec. 713.24, F.S., and Brown's consent would be necessary before a transfer can occur.

The correct answer is A. Under Sec. 713.03, F.S., interior designers are included in that

class of persons performing services for improving real property who can file a claim of lien without having to serve a notice to owner as provided in Sec. 713.06(2), F.S., or an affidavit concerning unpaid lienors as provided in Sec. 713.06(3), F.S. The fact that no notice of commencement has been recorded means only that the lien is established on the date of the recording of the claim of lien. The lien is controlled by Ch. 713, F.S., and can be transferred to security under the requirements set forth in Sec. 713.24, F.S., which do not require the consent of the lienor.

43) Environmental Endorsement

Your client is purchasing a commercial parcel for \$3.2 million and is obtaining a \$2.8 million mortgage. The lender has requested an ALTA 8.1 Environmental Lien endorsement to the mortgagee policy. Which of the following is correct?

- A. You may issue an ALTA 8.1 endorsement only after a thorough review of the environment report that is part of the required due diligence.
- B. You may not issue an 8.1 endorsement because it is only applicable to residential transactions.
- C. You may issue an 8.1 endorsement after a title search reveals no liens, without further inquiry.

The correct answer is C. In 2007 the Florida Office of Insurance Regulation approved a revised ALTA 8.1 Endorsement. The prior ALTA 8.1 stated that its coverage would only be effective if the land was used primarily for residential purposes. The revised form omits all references to residential property, thereby extending the coverage to all properties, including commercial.

44) Ancillary Probate

A private mortgage encumbers property located in Florida. The mortgagee is a New Jersey

resident. The mortgagee dies, and the note cannot be found. The family begins probate in New Jersey. The mortgagor wants to pay off the mortgage. For insuring purposes, which of the following is most correct?

- A. An ancillary administration will be required since the property is located in Florida, and the Florida probate court shall determine the appropriate beneficiary/heir to satisfy the mortgage.
- B. The mortgage must be satisfied by the domiciliary personal representative, since the decedent was domiciled in New Jersey.
- C. A family member may satisfy the mortgage since the family is now receiving all income from the monthly mortgage payments.

The correct answer is B. The note is personal property and therefore is under the jurisdiction of the NJ probate court. The full procedure is set forth in TN 2.08.04, which is based on the requirements of Sec. 734.101, F.S. The Title Note requires: (i) an affidavit from the mortgagor stating that there has been no demand for payment of the debt; (ii) authenticated copies of the domiciliary letters of administration, along with a certificate from the clerk stating that the PR is still duly qualified; and (iii) a proper satisfaction from the domiciliary PR. The mortgage satisfaction, along with the letters of administration and clerk's certificate, must be recorded in the county where the property is located at least 60 days after the date of appointment of the foreign PR as shown by the letters of administration.

45) Error in Legal Description

Last year, Wayward Title handled the sale of real property in Sunshine County. On the deed, the property is described as "Lot 7, Block 8, of RAYBURN PARK as recorded in Plat Book 11, Page 32, Public Records of Sunshine County,

Florida." The owners now want to sell, and your office is handling the transaction. You discover that the deed contains an error: RAYBURN PARK is only located in Plat Book 11 on Page 23, not Page 32. For issuing a Fund policy, which of the following will NOT correct the problem?

- A. A scrivener's affidavit from Wayward Title indicating they meant to write Page 23 instead of Page 32.
- B. A corrective deed from the original grantor.
- C. A clerk's affidavit that this particular plat is the only plat of record located at Plat Book 11, Page 23.
- D. An affidavit from you, the agent who has examined this title, stating that, as a result of your title research, you have confirmed that this is the only plat of record located on Page 23 of Plat Book 11.

A scrivener's The correct answer is A. affidavit will not fix this mistake and should never be relied on by a title searcher to correct the error. While Answers B and C are the most preferred and should be obtained whenever possible, sometimes the grantor cannot be found, and the clerk's office refuses to execute such an affidavit. In those instances, an affidavit from the member agent who has examined the title to this property will be sufficient to correct this problem for title insuring purposes. TN 13.02.02 provides for this method to correct erroneous plat references. It has been referred to as the "2 out of 3 rule." The three factors involved are (1) plat name, (2) plat book reference, and (3) plat book page reference. If a description has two correct factors, follow this Title Note to correct the error in the third factor. This method may also be used to correct erroneous condominium references.

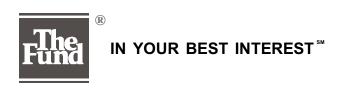
Legislative Changes to the Naming of Limited Liability Companies

By Scott D. Jackson, Fund Underwriting Counsel

The 2007 session of the Florida Legislature has resulted in two significant changes to 608.406, F.S., resulting from House Bill 243 and Senate Bill 2148. Effective Jul.1, 2007, new Limited Liability Companies will no longer be able to use the designation "Limited Company," "L.C." or "LC" when registering with the Florida Division of Corporations. See 608.406(1)(a), F.S.

A new subsection, 608.406(2), F.S. (the original 608.406(2), F.S., was moved to 608.406(3), F.S.) has been added that requires names registered with the Division of Corporations be distinguishable from the names of existing registered business entities (including corporations), except for fictitious name registrations filed pursuant to Sec. 865.09, F.S., and general partnership registrations filed pursuant to Sec. 620.8105, F.S. If a limited liability company wants to register a name that is not distinguishable, they must first obtain written permission from the owner entity, and it will be accepted only if the consent is filed with the Division of Corporations at the time of registration.

Another new subsection, Sec. 608.406(4), F.S., states that if a limited liability company was registered prior to Jul. 1, 2007, with an indistinguishable name, it will not be required to change that name unless it files documents after Jul. 1, 2007, that would otherwise affect the name of the limited liability company.



The CONCEPT

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Dealing With Lost Mortgage Notes

by G. Robert Arnold, Fund Vice President

From time to time, a situation arises where an original mortgage note is lost. This usually surfaces when a mortgagee proposes (1) to assign the mortgage, (2) to satisfy the mortgage, or (3) to foreclose the mortgage.

Assignment of Mortgage. The general law is that the mortgage follows the note secured thereby. See TN 22.01.02. If a mortgage note is not endorsed over or otherwise transferred to an assignee of a mortgage assignment, the assignee may lose out to the actual holder of the original mortgage note. See *American Bank of the South v. Rothenberg*, 598 So.2d 289 (Fla. 5th DCA 1992), in which an assignee who received only a copy of the note lost out to an another assignee who received the original note.

The importance in getting the mortgage note when taking an assignment of mortgage is shown in Lawyers Title Insurance Company, Inc. v. Novastar Mortg., 862 So.2d 793 (Fla. 4th DCA 2004), involving an assignment of mortgage where the first assignee did not obtain physical possession of the mortgage note. After a subsequent assignee that had possession of the note satisfied the mortgage, the first assignee attempted to foreclose the mortgage but it was not allowed to do so because it was not the holder of the note. The appellate court held that the assignment of mortgage constituted constructive delivery of the note, notwithstanding

the fact that the note was not delivered to the first assignee, making the assignee a person entitled to enforce the note, even without physical possession. The court went on to explain that the owner of the note, whether it was lost or wrongfully retained by the assignor, could have sought to reestablish the note pursuant to Sec. 673.3091, F.S. The court held that the first assignee's failure to take action to enforce its rights on the note precluded his having a claim under his mortgagee title insurance policy.

(Continued on page 30)

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Lost Note ... (continued from page 23)

When the original note has been lost and cannot be transferred to the assignee, the mortgagee will generally have to bring a suit to reestablish the lost note pursuant to Sec. 673.3091, F.S. Lovingood v. Butler Construction Co., 131 So. 126 (Fla. 1930). If this is not done, the assignee is going to run into the complicated problems of the lost note if and when it goes to foreclose or satisfy the mortgage. See cases discussed below on the difficulty in reestablishing a lost note where several assignments are involved because of the requirement to prove who had the note when it was lost.

In attempting to reestablish a lost mortgage note, some plaintiffs have attempted to comply with the less stringent requirements of Sec. 71.011, F.S., dealing with establishing lost papers, records or files. However, the courts have held that a lost promissory note is a negotiable instrument that is governed by Sec. 673.3091, F.S. *Mason v. Rubin*, 727 So.2d 283 (Fla. 4th DCA 1999).

See Florida Real Property Litigation (CLE 3d.), Ch. 6-A for a detailed discussion of the procedure when a lost note is involved.

Satisfaction of Mortgage. After a mortgage is paid off, the common practice used to be to require surrender of the promissory note marked "paid in full" or "cancelled." In today's hectic financial world where mortgages have frequently been assigned and notes sometimes misplaced or mortgage files are lost, this practice has gradually disappeared. In fact, the standard today appears to be for the mortgagor not to get the original note back. The mortgagor after paying off a mortgage usually receives only a satisfaction of the mortgage and that is if he is lucky.

Failing to obtain surrender of the note, however, creates the risk that the note may have been assigned or pledged to a third party who might assert that the satisfaction is ineffectual even though the third party's rights are not reflected of record. This is illustrated by the old case of Garrett v. Fernauld, 57 So. 671 (Fla. 1912). The Supreme Court of Florida held that payment to the original mortgagee was no defense to an action brought by an assignee of the mortgage who had not recorded the assignment. The mortgagor was not protected from his "own negligence" in not obtaining a surrender of the original note on full payment. A subsequent bona fide mortgagee or purchaser probably would have protection against the

The mortgagor was not protected from his "own negligence" in not obtaining a surrender of the original note on full payment.

unrecorded assignee. Manufacturers' Trust Co. v. People's Holding Co., 149 So. 5 (Fla. 1933).

In a current transaction where a mortgage is being paid off or refinanced, prior to issuing a Fund policy without an exception for the mortgage, the Fund Member Agent should demand in addition to a satisfaction of the mortgage the return of the original mortgage note marked "paid in full" or "cancelled." Ideally, if the mortgagee cannot return the note, the mortgagee should bring a suit to reestablish and cancel the lost note pursuant to Sec. 673.3091, F.S., or a lost instrument bond should be obtained which would protect THE FUND until the lien of the mortgage is barred. See *Cardet*

v. Rodriguez, 673 So.2d 578 (Fla. 3d DCA 1996); Mason v. Rubin, 727 So.2d 283 (Fla. 4th DCA 1999).

Meanwhile, back to the real world, if the mortgagee cannot return the original note, under certain circumstances, alternative procedures may be acceptable for issuing a Fund policy as discussed in TN 22.05.06. At a minimum, THE FUND requires that the mortgage holder execute an affidavit reciting that: (1) it has lost the note and has been unable to locate it despite best efforts to do so; (2) it has not assigned or pledged the note, collaterally or otherwise; and (3) it will indemnify and hold THE FUND harmless against any loss or damage, including court costs and attorney's fees, which it might suffer in the event a third party attempts to enforce the lien of the mortgage based on ownership of the lost note. Fund Member Agents are asked to consult with a Fund underwriting counsel about specific facts they are faced with involving lost notes.

Foreclosure of Mortgage. To maintain a mortgage foreclosure, the plaintiff must either present the original promissory note or give a satisfactory explanation for its failure to do so. Under Sec. 673.3091, F.S. 2003, a limited exception applied for lost, destroyed, or stolen instruments, where it was shown that "the person was in possession of the instrument and entitled to enforce it when loss of possession occurred." An illustration of this is found in Gutierrez v. Bermudez, 540 So.2d 888 (Fla. 5th DCA 1989), involving an action to reestablish a lost promissory note and mortgage and to foreclose the mortgage. The trial court erred in summarily dismissing the action where the mortgagees established a prima facie case that the note was lost — one mortgagee testified that she had place the original note and mortgage in a desk drawer in a room in her home, after which the documents mysteriously disappeared, and that a number of people had access to the room; the mortgagee also identified copies of the original note and mortgage.

Prior to 2004, Sec. 673.3091, F.S., required possession either by the assignor at the time of loss or by the person seeking to enforce the note. The courts stated that this right of enforcement can be assigned even though the assignor was never in possession of the note in order to prevent defendants in a foreclosure action from receiving a windfall. See National Loan Investors v. Joymar Associates, 767 So.2d 549 (Fla. 3d DCA 2000). In State Street Bank and Trust Company v. Lord, 851 So.2d 790 (Fla. 4th DCA 2003), involving multiple assignments of the mortgage, the court concluded that the exception of Sec. 673.3091, F.S., did not apply where the assignee had no evidence as to who possessed the note when it was lost. In 2004, the Florida Legislature amended Sec. 673.3091, F.S., by Ch. 2004-3, Laws of Florida, effective March 29, 2004, to allow for a person not in possession of an instrument to enforce the instrument when the person seeking to enforce acquired ownership of the instrument directly or indirectly from a person who was entitled to enforce instrument when the loss occurred.

Conclusion. The mortgage follows the note secured thereby. The mortgage note is a valuable document and its loss creates problems and complications for the mortgagor, mortgagee and any assignee. Unfortunately, there are many unscrupulous people out in this world, and an ounce of prevention will avoid giving them an opportunity to exploit a lost mortgage note.

2013 TITLE TEASERS – PART II

BY JOHN D. BENSON, FUND SR. UNDERWRITING COUNSEL; MICHAEL MIRRINGTON, FUND SR. UNDERWRITING COUNSEL; MINDY SCHLOSBERG, FUND SR UNDERWRITING COUNSEL; SARAH D. DIAZ, FUND UNDERWRITING COUNSEL

5. Plaintiff in Foreclosure

- **Q.** Tommy Tune executed a mortgage as a single man in favor of MERS, as nominee for ABC Funding, Inc. ABC Funding, Inc. assigns the mortgage to Tripoli Holdings LLC. Tripoli Subsidiary, Inc., starts a foreclosure on the property alleging that they hold the mortgage and the note. The original promissory note is filed with the court. Mr. Tune is personally served, defaults for failure to answer and the foreclosure proceeds through to Certificate of Title in favor of Merry Melody. Merry is now selling the property. May a title policy be issued to the purchaser despite the lack of an assignment to the plaintiff in the foreclosure action?
 - A. No. A re-foreclosure by MERS is necessary as the mortgage was never assigned to the plaintiff.
 - B. No. An assignment of mortgage from Tripoli Holdings, LLC, to the plaintiff is needed confirming that the assignment was effective as of the date of filing of the foreclosure suit.
 - C. Yes. Nothing more is required regarding the named plaintiff.
- **A. The correct answer is C**. The mortgage follows the note and no one in this foreclosure action objected to the named plaintiff. See *American Bank of the South v. Rothenberg*, 598 So.2d 289 (Fla. 5th DCA 1992); Harvey v. Deutsche Bank Nat. Trust Co., 69 So.3d 300 (Fla. 4th DCA 2011). The court in the *Harvey* case held that even an original note endorsed in blank is sufficient to entitle the holder to enforce its terms.

6. CHANGING OF REMAINDER FOLLOWING LIFE ESTATE

Q. Cindy, an un-remarried widow, conveys to herself a life estate retaining enhanced powers, with remainder to her adult children June and Samuel. Cindy decides to change the remaindermen by executing and recording a subsequent deed to herself, as life tenant, again retaining enhanced powers, with remainder to her sister, Jennie. Cindy succumbs to sun poisoning and passes away, not survived by a spouse or minor child. The property is now being sold to a bona fide purchaser. For insuring the subsequent sale, who is required to execute deeds?

- A. Deeds are required from June and Samuel only.
- B. Deeds are required from June, Samuel and Jennie.
- C. A deed is required from Jennie only.
- A. The correct answer is B. The first deed from Cindy vested a remainder subject to divestment in June and Samuel. Typical life estate deeds give powers to the life tenant to convey or mortgage the fee simple to a third party purchaser or mortgagee and The Fund will recognize and authorize the issuance of a title policy to a third party purchaser on an arms' length conveyance from the life tenant of the entire fee simple interest. Because Jennie may claim an interest in the property as a result of the second deed, a deed just from June and Samuel is not sufficient for purposes of insuring title to the bona fide purchaser. A deed from all three remaindermen is required. For further information on enhanced life estates, see "Fund Insures Enhanced Life Estates," 31 Fund Concept 124 (Aug. 1999), and "Enhanced Life Estates - An Underwriting Update," 34 Fund Concept 149 (Nov. 2002).

7. Foreclosure Judgment

- **Q.** A final judgment of foreclosure also includes an award for monetary damages based on a separate count not dependent on the amount recovered at the foreclosure sale. The borrower, Ian Raleigh, a single man, is personally served and the foreclosure continues through to the Certificate of Title. The lender records a certified copy of the final judgment. Mr. Raleigh has other properties in the same county, one of which is being sold as a short sale. May a title policy be issued in the short sale transaction without regards for the recorded final judgment?
 - A. Yes, the final judgment entered in a foreclosure on a separate property is not a lien on other property.
 - B. No, it is a judgment lien against any property that is owned by Mr. Raleigh in that county.
 - C. Yes, in a short sale there is no money

to pay junior judgment creditors so the final judgment can be ignored.

A. The correct answer is B. Though a foreclosure judgment is not a general judgment under Sec. 55.10, F.S., this particular judgment includes a separate award for monetary damages and it is certified and recorded in the same manner as a Sec. 55.10, F.S., judgment lien. See *Fort Plantation Investments, LLC v. Ironstone Bank*, 85 So.3d 1169 (Fla. 5th DCA 2012). Based on this, the lien exists on this property as a general lien and must be released for title to be insured without exception for that judgment lien.

8. Mortgage Modification

- **Q.** Sam Spade's client, Aggressive Bank, has agreed to modify an existing \$1,000,000 loan which was previously insured by an ATIF loan policy. There are no changes to the terms of the note and mortgage, no new money is being advanced, but the bank would like to spread the lien of the mortgage to an additional property owned by borrower. Aggressive Bank has allocated \$300,000 of the loan amount to the new property. May an Old Republic endorsement be issued to the ATIF policy insuring the modification and the additional collateral?
 - A. Yes, as long as a premium is paid on the allocated loan value of the spreader property.
 - B. Yes, and no new premium is payable.
 - C. No, a new stacked policy must be issued insuring the lien on the spreader property, with a premium based on the portion of the loan allocated to the spreader property.
- **A.** The correct answer is **C**. The ATIF policy cannot be endorsed to add the additional property. A new Old Republic policy must be issued containing the appropriate "stacking" provisions. The policy shall be issued only for the amount of the loan allocated to the spreader property and shall only insure the new parcel being encumbered.
- 9. FEDERAL RESTITUTION LIEN AND ENTIRETY PROPERTY

- **Q.** Tom and Millie Gator reside in a condominium located in sunny Floridacre that they purchased in an all cash transaction. They are now financing a mortgage with University Mortgages, Inc. Tom has a federal restitution judgment recorded against him. For issuing a loan policy insuring University Mortgages, Inc., may the judgment be ignored?
 - A. Yes, the judgment may be ignored as Tom and Millie are taking title as tenants by the entirety.
 - B. Yes, the judgment may be ignored as the mortgage is a purchase money mortgage.
 - C. No, the judgment may not be ignored.
- **A.** The correct answer is **C**. The judgment must be cleared or made exception for. The federal restitution lien against one spouse is enforceable against property held as an estate by the entirety under *U.S. v. Craft*, 122 S. Ct. 1414 (2002), since that lien is enforceable in the same manner as a federal tax lien. See TN 18.06.13.

10. CONDOMINIUM SURVEY

- **Q.** Samantha Ibis is selling her condominium unit and the new lender has requested that the survey exception be deleted from the commitment. This is a high rise condominium and the plans are attached to the Declaration showing no encroachments or other survey matters of concern when it was recorded 10 years ago. For issuing a new loan policy to the lender, may the standard survey exception be deleted?
 - A. Yes, the standard survey exception may be deleted with an affidavit from Samantha that she has reviewed the survey and there are no additional improvements to the property or surrounding the property that could encroach.
 - B. Yes, the standard survey exception may be deleted with a statement from the condominium association stating that there are no additional improvements to the property or surrounding the property that could encroach.
 - C. Yes, the standard survey exception may be deleted as long as Fund Member has no actual knowledge of any additional improvements to the property or surrounding the property that could encroach.
- A. The correct answer is C. Noting that this is not a high risk claims issue and obtaining affidavits or statements from the seller or association may not contribute to lowering the risk, The Fund has revised its requirements for review of a survey plus an affidavit of

no additional improvements with reference to a sale of a condominium unit.

11. UNSATISFIED MORTGAGE

- **Q.** Sarah Seller is selling her property. When she purchased the property two years ago there was no exception for revolving line of credit (RLC) mortgage from the prior owner in the policy Sarah received from a title insurer other than Old Republic. The member examining title was not given Sarah's prior policy as a base and while searching title found the open mortgage. The prior policy is for \$300K, the current policy to be issued is for \$200K and the outstanding RLC mortgage was \$100K. May a new policy be issued to the purchaser without any additional documentation regarding the RLC mortgage?
 - A. Yes, all open mortgages are covered under the Mutual Indemnification Treaty.
 - B. No, an indemnification letter is required from the prior title insurer.
 - C. No, a copy of the closing statement showing that payment was made to the prior lender would be required.
- A. The correct answer is B. An indemnification letter should be obtained from the prior title insurer. Because this was an RLC mortgage, there is a greater risk that the previous seller may continue to draw monies from this presumably closed loan. RLC mortgages are not covered by the mutual indemnity treaty. A copy of the closing statement showing the payoff would not protect against the seller on the prior transaction continuing to draw monies from the account set up for the equity line despite paying off the outstanding balance at the time of the previous closing.

12. Foreclosure - Junior Lien

- **Q.** General Motors obtained a judgment against Hank in 1995. It contains the creditor's address, is certified and was recorded that same year in the county where Hank owns a home. In 2007, Hank gave a mortgage to Big Bank. In 2012, GM re-recorded a certified copy of its judgment. Big Bank filed a lis pendens to foreclose the mortgage in 2013. For insuring title, which of the following is true?
 - A. Big Bank does not need to join GM as a junior lienholder because GM did not re-record its judgment within 10 years.
 - B. Big Bank must join GM in its foreclosure in order

- to wipe out GM's lien.
- C. Big Bank does not need to join GM because Big Bank's mortgage was a purchase money mortgage.
- A. The correct answer is B. The original GM judgment lien established by the 1995 recording expired in 2005, ten years after recording -- under Sec. 55.10(1), F.S. In 2012 the judgment was still less than 20 years from its rendition. Therefore, GM could re-record the judgment and revive its lien with a new priority established as of the date of re-recording. By the time of the re-recording however, Big Bank had already recorded its mortgage, so that mortgage is superior to the re-recorded judgment and GM would need to be joined in the foreclosure action in order for its lien to be divested. See TN 18.03.03(d) and the authority cited therein. See also Jim Knox's judgment lien paradigm at www.TheFund.com.

13. Foreign Probate

- **Q**. A Canadian citizen died testate in October 2011, owning real property in Florida. There are no assets located in Canada requiring probate. As a result no domiciliary probate has been conducted. Can an ancillary administration in Florida be conducted if there has never been a domiciliary administration?
 - A. Yes.
 - B. No.
- **A.** The correct answer is **A**. Sec. 734.102, F.S., does not contain a requirement that a domiciliary proceeding must first be completed before an ancillary can be filed in Florida. The statute also defers to the Probate Rules for procedural matters.

14. Outstanding Water Bill

Q. Ms. Green is selling Floridacre, a single family investment property that has been occupied by a tenant. Your municipal lien search reveals an outstanding water bill for \$500 attributable to the account established by the tenant, who failed to pay his bill before moving out. For issuing an owner's policy to the buyer without exception for this outstanding utility bill, which of the following is most correct?

- A. You may ignore this bill because it was not recorded in the public records.
- B. You may ignore this bill because it was the personal responsibility of the tenant.
- C. You must require that this bill be paid because it creates a lien on the land-lord's property.
- **A. The correct answer is B.** Under Sec. 180.135(1)(a), F.S., any such unpaid service charges incurred by a former occupant will not be the basis for any lien against the rental property or legal action against the present tenant or owner to recover such charges except to the extent that the present tenant or owner has benefited directly from the service provided to the former occupant. Sec. 125.485, F.S., is the county analogue to Sec. 180.135, F.S.

15. DESCENT OF HOMESTEAD

- **Q.** Peter Rabbit died intestate on Jan. 12, 2011. He was survived by his wife Bunny and two adult children. Floridacre, which was titled solely in Peter's name, was determined to be homestead property by the Probate Court. You have obtained an order authorizing the personal representative to sell Floridacre. For insuring the sale, the closing agent will need deeds from Bunny and the two adult children because:
 - A. Under Florida law, a surviving spouse takes a life estate in homestead with vested remainder to the decedent's lineal descendants.
 - B. Under Florida law, a surviving spouse may elect to take a half interest as tenant in common with the lineal descendants.
 - C. Both A and B are correct.
- A. The correct answer is C. The intestate descent of homestead is governed by Sec. 732.401, F.S. Specifically, under subsection (1) thereof a surviving spouse obtains a life estate in the homestead with remainder to the decedent's lineal descendants in being, per stirpes. As amended in 2010, subsection (2) of Sec. 732.401, F.S., gives the surviving spouse the alternative of electing to take the half interest as tenant in common with the lin-

eal descendants. That election must be made within six months of death under Sec. 732.401(2)(b), F.S. Under either scenario, the surviving spouse and lineal descendants obtained title to the homestead upon Peter's death. For insuring purposes, the court order authorizing the personal representative to sell the potential homestead should not be relied on.

16. Foreclosure - Divorce

- **Q.** Fannie and Freddie Mac, husband and wife, default on their mortgage to Big Bank which commences fore-closure proceedings. Your examination of title reveals a valid judgment lien against Fannie in favor of American Express prior to the LP in the foreclosure action. Subsequent to the foreclosure LP, and during the course of the action, Fannie and Freddie obtain a dissolution of marriage. For insuring title, must American Express be named as a defendant in Big Bank's foreclosure action?
 - A. No. The American Express judgment does not attach to property held as an estate by the entirety.
 - B. Yes. The American Express judgment attaches to the subject property at the time of the divorce.
 - C. No. The American Express judgment is subject to Big Bank's LP.
- A. The correct answer is C. If a husband and wife are in title at the time a LP is recorded in a foreclosure action and thereafter are divorced, a junior lien holder against one spouse only does not need to be named as a defendant in the foreclosure action. Pursuant to Sec. 48.23(d), F.S., except for the interest of persons in possession or easements in use, and provided that during the pendency of the proceeding the notice has not expired, been withdrawn or discharged, the recording of a notice of lis pendens constitutes a bar to the enforcement of all interests and liens unrecorded at the time of the recording of the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of the unrecorded interest or lien does not intervene and the proceedings are prosecuted to a judicial sale, the property shall be forever discharged from all such unrecorded interests and liens. If the notice of lis pendens expires or is withdrawn or discharged, the expiration, withdrawal or discharged of the notice does not affect the validity of any unrecorded interest or lien. See TN 12.05.02.

The course manual also includes Basic Concept Reviews related to:

- Real Property Ownership
- Liens
- Homestead
- Satisfaction of Mortgages
- Legal Descriptions
- Business Entities
- Trusts and Trustees

For more information on Basic Affiliate Training or to register, please contact the Education Registrar at (888) 407-7775 or educationregistrar@thefund.com.



TITLE Q&As

1. Devise of Homestead Property

- Q. Homestead property is solely owned by Edna. Under Edna's will the property is devised to her husband, John, then to their adult son, Eric, should John predecease Edna. John subsequently passes away, and Edna marries Bill. Upon Edna's death, she is survived by Bill and three adult children, including Eric. There is no codicil to Edna's will changing the devise of the property. If Bill wishes to convey his interest to Eric, who must execute deed(s) in order to issue an owner's policy to Eric?
- **A.** Since the property was Edna's homestead, she was survived by her spouse, Bill, and there was no change to Edna's will devising the property to her new husband, the devise under the will to her former husband is invalid. Title to the property thereby passes to Bill for life, with a remainder to all of Edna's descendants pursuant to Sec. 732.401, F.S. To insure title into Eric, the descendants must be determined. Deeds from Bill and all of Edna's descendants are required. Since the descendants are the owners of the homestead property, it is necessary to perform an appropriate name search for each descendant and clear all general liens that are revealed by the name searches.

2. Series LLC

- Q. ABC, LLC, a Delaware series limited liability company, is giving a loan to Jane Doe to finance the purchase of her property in Miami-Dade County. The loan will be secured by a first mortgage encumbering the property. ABC, LLC requests that the commitment and loan policy show the insured as "ABC, LLC (Series D), a Delaware series limited liability company." Can the loan policy be issued insuring the series LLC?
- **A.** No. A series entity is not an independent entity capable of holding a mortgage or conveying title. A series entity is created by state statute as a sub-entity formed under a parent entity for the purpose of allocating assets and liabilities. The parent entity must be shown as the lender in the mortgage and the insured in a loan policy.

3. Lessee Acquiring Fee Simple Title

- Q. ABC Corp was an insured under a leasehold owner's policy with an option endorsement to purchase the property from John Brown, the owner. Upon the exercise of the option to purchase and the recording of the deed from John Brown to ABC Corp, is ABC Corp entitled to a reissue rate on a new policy insuring the fee simple interest of ABC Corp?
- A. Yes. When a lessee, who has obtained a policy from an insurer to insure his lease, thereafter purchases the property, makes application for an owner's policy, and surrenders the original policy insuring the leasehold, the reissue rate applies. See Chapter 690-186.003(6), F.A.C. The owner's policy must be issued for the full insurable value of the property. Any amount of the new owner's policy in excess of the previously issued policy insuring the leasehold is calculated at original issue rates. See *Fund Procedures Handbook*, Chapter 9.

4. Conveyance of Non-Resident's Florida Property

Q. Mary dies a resident of Michigan. At the time of her death she owned a coop in Miami. Her estate was probated in Michigan and the co-op was devised to her niece. For the purposes of issuing an owner's policy to a bona fide purchaser insuring the leasehold interest, may the Michigan personal representative execute the necessary documents for the transfer of the co-op?

A. No. An ancillary proceeding in Florida will be necessary. Neither the Michigan probate court, nor the Michigan personal representative has any authority over Florida real property interests. The process for ancillary administration is found in Sec. 734.102, F.S. (Sec. 734.1025, F.S. for Florida estates not exceeding \$50.000). Also, in limited circumstances and if the conditions are met under Sec. 734.104, F.S., the will can be admitted to record in Florida and once admitted, shall be as valid and effectual to pass title to real property as if the will was admitted to probate in Florida. See also TN 2.05.04.

5. Missing Notary Signature

Q. A mortgage was executed by the borrowers and witnessed by two witnesses. The notary was present, signed as a witness, filled in the acknowledgment and affixed his seal. However, the notary inadvertently failed to sign the acknowledgment. The mortgage was then recorded. The notary proposes to re-record the mortgage after signing the acknowledgment with a notation that the mortgage is being re-recorded to affix the notary's signature. Will this be sufficient to cure the lack of the notary's signature in the original recording?

A. No. Sec. 92.50, F.S. requires the signature of the notary on the acknowledgment. The signature is an essential part of the acknowledgment and without the signature of the notary the acknowledgement is not just deficient,

it is void. See TN 1.02.08. While Secs. 95.231(1), and 695.05, F.S. may cure some defects in an acknowledgment, the lack of the notary's signature is not a "defect." Its omission is tantamount to a complete lack of acknowledgement. Options for curing the inadequate acknowledgment include 1) in the presence of the borrowers, retake their acknowledgement and complete a new acknowledgement on the original mortgage, then re-record, 2) have the borrowers both re-execute and re-acknowledge the original mortgage, complete a new acknowledgement and re-record, or 3) prove the mortgage by oath of a witness as described in TN 1.05.03.

6. Animal Citation

Q. A municipal lien search indicates an animal control citation was issued against the seller in a transaction, however, no lien or notice has been recorded in the public records. For purposes of issuing an owner's policy to the buyer, must this citation be cleared?

A. No. Animal control citations are excluded from coverage under the pre-printed terms of the 2006 ALTA policy. Paragraph 1(a) excludes from coverage claims that arise by reason of, "any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to the occupancy, use, or enjoyment of the Land; or the effect of any violation of these laws, ordinances, or governmental regulations." However, this exclusion does not modify or limit the coverage provided under Covered Risk 5, which provides coverage if a notice had been recorded in the public records setting forth the violation or intention to enforce.





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