FORUM 8

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President's Letter

By Rebecca O'Neill

November is "Gratitude Month." This month, many of us will spend time feasting upon delectable victuals that nourish our bodies while in the company of friends and family, who (ideally) nourish our minds and hearts. It is a month when I typically take time to reflect upon the gifts and challenges, recognizing that there are always rewards hidden within the challenges. It is a month when I also reflect upon the many things I have to be grateful for. Here is my list of 10 things for which I feel gratitude:

I am employed in a profession that permits me to share the company of people with high levels of energy, ethics and intelligence. Additionally, my profession permits me a lifestyle that otherwise may not be achievable. My profession gives me access to people and places I otherwise would not have access to. Most days, it is good to be a lawyer and I give thanks for this opportunity and profession regularly.

My health is good. As I walk through the Shands hospitals, I am reminded of how fortunate I am. I am healthy, have all of my limbs and senses, and can walk on my own. Is your own health good? Celebrate that!

My mental health is still intact. There are those out there who may disagree, but as far as I can tell, I can remember dates, phone numbers, and my name. So I think I'm doing pretty well. This is not an invitation for reminders of the things I've forgotten. I'll deny it anyway because … I've forgotten.

I have abundance in my relationships. I used to ask for abundance and prosperity in my life. The sincerity, honesty, humor, and genuine love and respect I share with friends and family has provided me with that abundance daily. Along this line, I love my pets and my pets love me, no matter what mood I am in.

I am thankful for my beliefs and spirituality (this list is not in order).

This is a great time to be a Florida Gator. Thank you, Urban Meyer and the entire Gator team, past and present! Every single one of you plays a significant role!

I am thankful that there are still woods to wander into or dirt I can dig into when I need grounding. Nature provides that better than anything else.

I love the place I call home, which is currently in Micanopy but also is my heart. So while I can retreat to my physical sanctuary in Micanopy, I carry home with me everywhere. I give thanks that both are in order.

I am grateful for sunscreen for those days when, unexpectedly, conferences are held on the beach.

I feel very thankful for the Board. The people on this Board are ambitious, creative, thoughtful, caring, and have a sincere desire to serve. So please thank them when you see them in public.

I encourage you to take a moment to reflect upon the things in your life that you are grateful for, and to show your gratitude when possible.

Congratulations to Three Rivers Legal Services! They are the recipient of a grant through the Florida Bar Foundation Pilot Pro Bono Grant Program. TRLS was one of 8 out of the 26 grant applications to be selected. To win this grant, TRLS proposed a series of trainings to volunteer attorneys throughout the

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Chief Judge Martha Ann Lott, attorney Cherie Fine and EJCBA President Rebecca O'Neill enjoy high tea on October 2, 2009

About This Newsletter

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Any and all opinions expressed by the Editor, the President, other officers and members of the Eighth Judicial Circuit Bar Association, and authors of articles are their own and do not necessarily represent the views of the Association.

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the **Editor** or **Executive Director** by Email, or on a CD or CD-R labeled with your name. Also, please send or email a photograph with your name written on the back. Diskettes and photographs will be returned. Files should be saved in any version of MS Word, WordPerfect, or ASCII text.

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Deadline is the 5th of the preceding month

The 2009 Holiday Project : A Tradition of Giving Back to the Community… with a Brand New Approach

By Elizabeth M. Collins and Lua J. Mellman

Seasons greeting! The Eighth Judicial Circuit Bar Association Holiday Project is well underway.

This year, the Holiday Committee plans on taking a different approach to our annual project, which will be designed to serve a greater number of children throughout the Eighth Judicial Circuit (Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties), to expand member participation in the delivery of gifts to the schools within our circuit, and to allow your donations, regardless of the amount, to spread holiday cheer for less money per student.

Rather than adopting a single school, we intend to select a single grade level and provide small gifts for every child in that grade throughout the circuit. We will be purchasing school supplies, art supplies, educational tools, and hygiene items in bulk with your generous monetary donations. Then, we will enlist our EJCBA volunteer elves, who enjoy holiday shopping, for assistance in buying "stocking stuffers." A list of small "stocking stuffer" items will be provided to you, specifying certain categories of items to be included in the gift packages. You can shop for as many or as few as you want.

In addition, since we will be delivering packages to a number of schools, we welcome your assistance and attendance during the gift delivery presentations. We invite you to enjoy the results of your generosity first-hand.

Remember, the Holiday Project is funded only though your generosity. **Your membership dues are not used for the Holiday Project**, as your dues are used solely to provide member services. We are currently accepting monetary donations. No sum is too big or too small.

Additional details will follow soon via email. Please ensure that the EJCBA is added to your email address book (execdir@8jcba.org), so that you do not miss out on this information or other announcements.

If you are interested in participating, please sign up at the next bar luncheon or feel free to email Elizabeth Collins at ecollins@dellgraham.com or to contact the Holiday Committee Chair, Lua Mellman, at mellmanl@sao8.org.

Pro Bono News

By Marcia Green

As part of October's celebration of Pro Bono Month, Three Rivers Legal Services recognized the volunteer attorneys of the Eighth Judicial Circuit who provide pro bono services to the low income community.

Special congratulations go out to Sam Boone, Jeff Dollinger, Leslie Haswell, Thomas MacNamara, Frank Maloney, Cynthia Swanson and Jorja Williams for their representation of clients through the Volunteer Attorney Program and their significant contributions over the past year. These attorneys, along with the many others who continually donate their time, are an integral part of the vitality of our legal community.

In addition to their other pro bono cases, Sam Boone and his associate, Jorja Williams, have committed to handling a few Medicaid Waiver challenges. These cases involve advocating for services on behalf of developmentally disabled individuals and their families against the Agency for Persons with Disabilities.

Cynthia Swanson represented a couple in an adoption that involved not only a young child in need of a permanent home and family but also with the transfer of the adoption subsidy from Partnership for Strong Families to the new adoptive parents. Cynthia's breakthrough efforts in this somewhat complicated case may have forged new state guidelines regarding these subsidies and protecting the child's need for services.

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WATCH FOR UPCOMING TRAININGS
Beginning in January

BASICS OF FAMILY LAW
and
BASICS OF WILLS AND PROBATE

- free to volunteer attorneys
- CLE credits
- followup seminars on specific related issues
- technology based forms available
- mentors and followup guidance
- malpractice coverage

ONE CLIENT ~ ONE ATTORNEY ~ ONE PROMISE

Forum 8 Is Going Green!

As of January 2010, this newsletter, Forum 8, will automatically be sent electronically to the email address that EJCBA has for you instead of being mailed to your address. If you wish to continue receiving paper copies of the Forum 8, you must opt in by emailing Judy Padgett, Executive Director, at execdir@8jcba.org. EJCBA is helping our planet, one newsletter at a time.

Guns And Roses

By Stephen N. Bernstein

In a landmark ruling in a 2008 case, the *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment bestows an individual right to keep and bear arms. The fact that this case originated in the District of Columbia, a federal enclave, saved for a later day the question of whether and how the Second Amendment also applied to the states. Apparently that day is now coming in the form of *McDonald v. Chicago*, in which Chicago residents challenged the constitutionality of that city's broad and strict gun laws.

The Second Amendment declares that "the right of the people to keep and bear Arms shall not be infringed." There have been contentious differences among federal and state courts about whether this prevents state and local government as well as the federal government from infringing on that right. Some courts, including the federal appeals courts in Chicago and New York, have relied on 19th Century Supreme Court precedents to conclude that state governments are not controlled by the Amendment; the Federal Appeals Court in California reached a different result by concluding that these high court precedents were obsolete. It is time for the Supreme Court to step in and answer the question for everyone.

Given how the Constitution has evolved, lawyers from both the left and the right of the political spectrum will present strong arguments that the Second Amendment applies to state and local government just as the First Amendment does. It would seem incongruous, and may ultimately be legally indefensible, for the residents of the District of Columbia to enjoy constitutional rights that are withheld from people in Chicago or other parts of the country.

But just as in the District of Columbia, it will be important for the Court to recognize that all rights, including those of free speech and assembly, are subject to limits. So should the right to keep and bear arms. Any Supreme Court ruling should explicitly recognize the authority of state and local governments to craft regulations to best protect their communities. Gun laws that make sense in urban populated areas may be unreasonable or unnecessary to protect the public safety in rural populations. The Supreme Court should allow state and local jurisdictions a reasonable flexibility; a civil society must be able to balance the rights of individuals against the compelling interest in maintaining public safety, just like they do in the rose garden up in the District of Columbia.

Alternative Dispute Resolution

Twas The Night Before Christmas

By Chester B. Chance and Charles B. Carter
Twas the night before Christmas and all through the Court,
No cases were filed, not even in tort.
Black robes were hung in chambers with care,
With hopes some State funding soon would be there.

The J.A.'s were sitting with nothing to do,
No hearings were scheduled - all trials cancelled too.
Judge Lott in her kerchief, Judge Glant in his cap,
Noted bailiffs had settled-in for a long winter's nap.

On the Courthouse Square there arose such a clatter,
Nilon sprang from his chambers to see what was the matter.
Down on the first floor he saw a holiday specter:
A sleigh had exploded the metal detector.

Taking judicial notice, to his eyes did appear,
A sleigh pulled by jurists dressed as reindeer!
With a little old driver of undetermined weight,
He knew in a moment it must be Carl Schwait.

Like ambulance chasing attorneys they leapt,
And Schwait whistled and shouted without fear of contempt:
"Now McDonald, now Morris, now Green and Jaworski,
On Moseley, on Cates, on Ferrero and Roundtree".

Each year at this time, Carl in red with a bell,
Plays Santa for children: he's Pater Noel.
During the yuletide, equipped with a sack,
He's assisted by the catalyst: Elf Margaret Stack.

Like spurious pleadings that fast disappear,
Quick as directed verdicts, which all lawyers fear,
To elementary schools these jurists flew,
With a sleigh full of school supplies and sugar plums too!

The Courthouse was closed for a very good reason,
The Eighth Judicial Circuit acknowledged the season.
Supplies were gathered, and wrapped for schools needy.
These lawyers belied their image as greedy.

Needing more items to fill-up the sleigh,
Judge Smith accepts pencils and rulers even ex parte.
A choir of barristers sing-out a Gloria,
Spreading joy both in court and ex curia[1].

Lex Cincia[2] – though ancient – each judge overrules,
Allowing attorneys to distribute chattels this yule.
Children's faces are filled with holiday bliss,
Departing with presents, de bonis asportatis[3].

An order is entered by Good Judge Hulslander:
Critics of the project are guilty of libel and slander.
Filing fees increase by Clerk of Court decree,
"More for the children" explains Buddy Irby.

Cervone and Singer with a loud 'Ho-Ho-Ho',
While examining gifts stored at S.A.O.
For counsel who donate they're filled with excitement;
For those not giving: prepare for indictment.

The Schackows advise: "No need to call Gary,
Just help with this project, it's eleemosynary[4]!"
Honorable Toby S. Monaco with help from his crew,
Throws gifts from his boat christened 'Ex Mero Motu'[5].

All lawyers stopped debating both statutes and laws,
And generously donate to a very worthy cause.
They pulled out their wallets and wrote several large checks,
Because "de minimus non curat lex"[6].

Lua Mellman and Elizabeth Collins take time from litigation,
To advance a project which promotes education.
There are supplies to gather and items to collect,
Please do everything you can to support the Bar's Holiday project.

[1] For those of you under 35 years old, Latin for "out of court".
[2] Ancient law which prohibited certain kinds of gifts and all gifts or donations of property beyond a certain value. Will probably be readopted by the IRS.
[3] A Latin phrase for a form of trespass involving taking personal property. Work this in at your next cocktail party.
[4] Charitable; historically, eleemosyna regis, a penny which King Ethelred ordered to be paid for every plow in England towards the support of the poor, but, who really cares.
[5] "Of his own mere motion", when the court acts on its own; also, sounds like the name of a Japanese Battle Ship.
[6] "The law does not take notice of very small matters". As in: "There once was a lawyer named Rex . . . ."

Immigration Matters

By Evan George

The plight of undocumented children, whose parents or guardians have abandoned, abused or neglected them, is a recurring dilemma in the U.S. immigration system. These undocumented children lack lawful status and cannot avail themselves of the basic privileges of citizens and residents of the United States, including employment authorization, a driver's license, or in-state tuition or other financial assistance to attend college. The same children are often vulnerable to abuse by adults, or to arrest, detention, and deportation by the government. Fortunately, there is a remedy available to children who have been declared dependent by a juvenile court, whose reunification with their parents is not viable due to abuse, neglect or abandonment, and for whom return to their country of origin is not in their best interest.

In 1990, Congress created a category for Special Immigrant Juvenile Status (SIJS) to address the need for legal relief for such unaccompanied children. SIJS is an immigration benefit available to undocumented children in foster care (or those in guardianships or adoptions), who have been the victims of abuse, abandonment or neglect. SIJS is designed to enable such children to gain lawful permanent residence (also called a "green card"), notwithstanding their unlawful status. Under normal family-based immigration processing, an undocumented child must rely upon their U.S. citizen or resident parent to petition for a permanent visa on their behalf. With SIJS, however, an undocumented child does not need the assistance of a family member to obtain protection and lawful permanent resident status. Additionally, SIJS status exempts undocumented children from various grounds of removal from the United States, including inadmissibility based upon entry without inspection, failure to maintain valid nonimmigrant status, misrepresentation, unlawful presence, or being a stowaway or public charge.

The statutes establishing eligibility requirements for the SIJS have recently gone through significant reform. In December 2008, Congress expanded the SIJS eligibility requirements, which now include undocumented children who fall into the following categories: 1) those who have been declared dependent by a juvenile court; 2) those who a juvenile court has legally placed under the custody of a state agency or department; or, 3) those who have been placed under the custody of an individual or entity appointed by a state or juvenile court. The state court must find that reunification with one or both of the parents is not viable due to abuse, neglect or abandonment, or a similar basis under state law. The SIJS petitioner must also demonstrate that it would not be in their best interest to be returned to their home country, or that of their parents. To be eligible, the undocumented child must be under 21 years old and unmarried at the time of filing for SIJS status. Importantly, the United States Citizenship and Immigration Service will not deny a child's petition for having aged-out, as long as the child submitted the petition while under age 21.

If the undocumented child applies for this status and is successful, s/he may remain in the United States, work legally, qualify for in-state tuition at college, and in five years apply for U.S. citizenship. This legal remedy is not free of risk, however, as the undocumented child could be placed in removal proceedings and deported if their petition is denied.

Next month's column will address recent increased efforts of the United States Immigration and Customs Enforcement targeting U.S. employers, including local family businesses, for I-9 compliance and other workplace enforcement issues. If you have an immigration-related issue or question, feel free to contact me at 352-378-5603 or evan@evangeorge-law.com.

Circuit Judge Stan R. Morris To Retire

In a letter to Governor Charlie Crist dated September 15, 2009, the Honorable Stan R. Morris announced his plans to retire as Circuit Judge for the Eighth Judicial Circuit, effective at 11:59 p.m. on January 31, 2010. Judge Morris was elected as Alachua County Court Judge in 1980 and has served the citizens of Alachua, Baker, Bradford, Levy, Union and Gilchrist counties since his appointment to the Circuit Court bench in 1986 by Governor Bob Graham. Judge Morris served as Chief Judge of the Eighth Judicial Circuit from 2001-2005.

Buyer's Liability for a Change of Requirements Under a Requirements Contract

By Siegel, Hughes & Ross

A requirements contract is a unique type of contract because the buyer and seller do not agree on a specific amount to be purchased. The buyer agrees to buy all that it needs, and the seller agrees to supply sufficient quantities to meet the buyer's need. Requirements contracts are governed by section 306 of the Uniform Commercial Code. (*Fla. Stat.,* §672.306). The statute provides:

A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Difficulties can arise when there are significant increases or decreases in a buyer's needs. Under what circumstances can a buyer increase its demands if the market changes to increase the value of the contract? How much can a buyer decrease its demand if its needs change? While the "good faith" requirement is applicable to both questions, there are additional considerations which differ depending on whether need increases or decreases.

A seller is not required to meet increased needs if the increase is "unreasonably disproportionate to any stated estimate." If there is no stated estimate a seller is not obligated to meet an increased need if the increase is disproportionate to "any normal or otherwise comparable prior" requirements. A stated estimate may be included in the contract, but is more likely to be part of negotiations for the contract. Difficulties can arise when there is no stated estimate. An example of such difficulties is seen in *City of Lakeland, Fla. v. Union Oil Co. of Cal.*, 352 F. Supp 758 (M.D. Fla. 1973). Lakeland had a requirements contract with Union Oil to supply oil for its electric generating facility. When the price of oil rose in the early 1970's the contract was very favorable to the city. At that time the city also had an interchange agreement by which it supplied Tampa Electric with wholesale electricity from its excess generating capacity. Using its advantageous contract to purchase its oil, Lakeland substantially increased the amount of electricity it sold to Tampa Electric which substantially increased the amount of oil it required. Given the favorable price under the contract, Union Oil refused to perform. The court recognized that Lakeland had made an advantageous contract with Union Oil. However, it was not authorized to substantially increase its requirements by selling additional wholesale electricity to Tampa Electric.

The simple fact is that Union entered into an agreement which later proved to be improvident, from its point of view, when the market price of oil advanced to unforeseen heights. The City, on the other hand, realized a concomitant advantage; and that is precisely what the business and the law of contracts is all about. This is not to say, however, that the City may add insult to injury by taking undue advantage of its favorable contract and increase its wholesale exchange of energy with a neighboring system. "Such increases must be regarded as beyond the contemplation of the parties and the scope of the contract…" *Id.* at 768.

The buyer's ability to reduce its requirements also is limited by good faith. According to Comment 2 to section 306 of the UCC, "reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance." Florida Courts have not yet specifically addressed the application of § 672.306, *Fla.Stat.,* to a situation where a buyer under a requirements contract reduces its requirements to zero. However, a number of other state and federal courts have addressed the issue under statutory provisions identical to section 672.306 and have found a reduction to zero to be permissible as long as supported by a good faith business reason.

The leading case on this issue is *Empire Gas Corp. v. American Bakeries Co.*, 840 F. 2d 1333 (7th Cir. 1988). In *Empire*, a propane gas company (the seller) and a bakery company (the buyer) entered into a requirements contract, by which the buyer agreed to purchase all of the propane gas it required from the seller. *Id.* at 1335. Within days of entering into the contract, the buyer decided that it no longer needed the propane and cancelled the contract. *Id.* The seller sued the buyer for damages based upon the estimated propane

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"View From the Bench" Seminar a Hit

By Peg O'Connor, FBA Secretary

The courtroom was packed, the spectators hanging on every word. For four hours, they sat in rapt attention. Some furiously scribbled notes, others simply listened. What kind of hearing could garner this much interest? What kind of proceeding would warrant the presence of five distinguished federal judges at both the district and circuit levels? And most importantly, what kind of court event involves food and libations afterward?

The Federal Bar Association's "A View From the Bench" Seminar, that's what! On Thursday, October 1, the FBA presented a comprehensive seminar focusing on best practices in appellate writing and oral argument. Senior United States District Judge Maurice Paul graciously hosted the event in his courtroom, which for the day was converted into a classroom, complete with handouts and Powerpoint presentations. We first heard from appellate specialist Steven Brannock, a board-certified appellate lawyer who formerly headed up Holland & Knight's appeals division. He provided a complete overview of appellate process and jurisdiction, ranging from types of appealable orders to how issues should be framed in order to get the most favorable standard of review.

Chief Judge Stephan Mickle then updated us on developments in the Northern District, including a proposed revision of the local rules. We also heard about the new courthouse and federal building being planned in Pensacola. Judge Mickle announced changes to CM/ECF (the federal court's electronic filing system), and then yielded the floor to Bill McCool, the Clerk of the Northern District, to explain the mechanics of electronically transmitting the record on appeal to the Eleventh Circuit. Mr. McCool walked the audience through the filing process using a Powerpoint presentation, noting upcoming modifications to docket entries, transcript order forms, and other issues. This presentation was especially timely, given that these changes coincidentally went into effect on the day the seminar was held.

After a short recess, we reconvened to hear a panel of judges (Eleventh Circuit Judge Charles Wilson, Senior Northern District Judge William Stafford, and Middle District Magistrate Judge Gary Jones, with additional help from Chief Judge Mickle and Middle District Judge William Terrell Hodges) discuss the "do's and don'ts" of trial and appellate practice. Moderator Rob Griscti did an excellent job keeping the discussion flowing, taking questions from the audience, and playing the straight man to Judge Stafford's many jokes and amusing stories.

The seminar wound down with tours of judges' chambers and the clerk's office, giving a rare glimpse of the "camera" part of *in camera*. After the tours, a reception was held in the jury assembly room with hors d'oeuvres and a selection of wine. The FBA elected a new slate of officers and board members, held a short meeting, and then called it a day. A very, very productive day.

The Young Lawyers Division announces its new Board of Directors

By Kelly R. McNeal, YLD President

The EJCBA Young Lawyers Division is pleased to announce the Board of Directors for the 2009-2010 term:

President: Kelly R. McNeal
Secretary/Treasurer: Alison Walker
CLE Director: Robert Folsom
Social Director: Evan D. George
Membership Director: David Sams
Special Events Directors: Justin Jacobson and Louis Frank
Director: Rhonda Stroman

We are looking forward to another productive year and hope all young lawyers (in practice less than 5 years **or** under age 36) in the 8th Circuit will join us for our social events, CLEs, and other charitable events we offer throughout the year. Please see our link on the EJCBA website for more information (http://8jcba.org).

Buyer's Liability

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the buyer would have used during the term of the contract. *Id.* The *Empire* Court noted that since the contract did not state a specific amount of propane, the contract was a requirements contract. *Id.* at 1336. In determining whether or not the buyer breached the contract, the *Empire* Court looked to the applicable provision of the UCC (which is identical to § 672.306 *Fla.Stat.*). *Id.* The *Empire* Court held in a requirements contract setting, it was permissible for a buyer to reduce its requirements to zero, as long as the buyer was acting in good faith. *Id.* at 1338. Good faith was defined as a legitimate business reason for reducing its requirements to zero. *Id.* at 1339.

Providing additional explanation of this rule, the Fourth Circuit Court of Appeals noted in *Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F. 3d 355, 364 (4th Cir. 1994) that a seller in a requirements contract assumes the risk that a buyer will in fact reduce its requirements even to the extent of the buyer liquidating or discontinuing its business. *Id.* at 365. As long as the buyer acts in good faith, there is no breach. In determining whether or not a buyer is acting in good faith, the *Brewster* Court again defined good faith as a legitimate business reason.

Sale of a business has been considered a legitimate business reason for reducing a buyer's requirements to zero. In *Schawk, Inc. v. Donruss Trading Cards, Inc.*, 746 N.E. 2d 18, 20 (Ill. App. Ct. 2001), a trading card company entered into a requirements contract with graphic arts company to purchase all of its requirements for prepress art services. As the market for trading cards declined, the buyer sold its entire trading card business to a third party. *Id.* The *Schawk* Court found that the duty of good faith for a buyer in a requirements contract does not require a company to stay in business. It rejected the notion that the sale of a business is in and of itself a breach of the duty of good faith. *Id.* at 24. The essential inquiry is whether or not the buyer has a legitimate business reason for reducing its requirements to zero - if so, there is no breach of contract. *Id.* at 25.

One final question is whether a buyer's right to reduce its demand in good faith is limited by the statutory language that "No quantity unreasonably disproportionate to any stated estimate or ... disproportionate to any normal or otherwise comparable prior output or requirements may be tendered or demanded." Can a buyer's demand be so disproportionately below an estimate or normal output as to violate the contract? At least one case has held that it may not. The court in *Empire Gas Corp., supra,* recognized that a literal reading of the statute would prevent a buyer from disproportionately reducing its requirements as well as increasing them. However, the court held that the weight of the authority is to treat the overdemanding and underdemanding cases differently. A seller, it held, "assumes the risk of all good faith variations in the buyer's requirements even to the extent of a determination to liquidate or discontinue business." *Empire Gas Corp. v. American Bakeries Co., supra,* at 1337-38.

In summary, requirement contracts are enforceable in Florida. Any significant change in requirements must be the result of a good faith business decision, and any substantial increase in demand must be proportionate to the quantity discussed or anticipated.

President's Letter

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Eighth and Third Judicial Circuits. The trainings will focus primarily in the areas of family law and wills/probate since many of TRLS's clients have a need for legal assistance in these areas. TRLS plans to provide training for attorneys and additionally provide technology to simplify the form pleadings. TRLS foresees the use of such technology being expanded to the attorneys' private practices.

I was fortunate to attend a seminar held by Three Rivers Legal Services on September 23rd at the downtown Santa Fe branch on waiver of fees for people who are indigent. Jean Sperbeck provided instruction on how to complete the application for determination of civil indigent status. Staci Chisholm provided an overview of the changes to the law and other relevant data. So I amend my list to reflect that I am grateful that, in this economy, our legislature recognized the need to carve out alternate means for people who otherwise could not afford to pay filing fees in order to gain access to the courts.

For those who missed it, the EJCBA-sponsored reception for Chief Judge Martha Ann Lott on October 2 was a lovely event. It was well attended, the company was splendid, and the food was outstanding. It was catered by Omi's Catering.

Criminal Law

By William Cervone

Put this one in the category of "Exactly why is it that people make fun of at best and loathe lawyers more often than not?" discussions and topics.

Back on May 8, 2004, Alfred Rava attended an Oakland A's baseball game. That date coincided with Mother's Day and the A's held a promotion for the game through which a plaid reversible bucket hat was given away, as in presented free, to the moms who attended the game. As those who have attended professional sporting events know, give-aways of this sort are a frequent event in all sorts of forms and fashions. Heck, they even happen now and then at Gator sporting events around here. In any event, Rava, who we can conclude by gender was not a mom, was not given a hat.

If not a mom, however, he was an attorney. Naturally, he not only took exception to this gender based discrimination, he did what all too many lawyers would do and sued. Not only did he sue to address his own deprivation of this no doubt worthless and tacky trinket, he went the whole nine yards and made it a class action suit. The basis of his suit, of course, was illegal, immoral, unjustifiable and blatant sex discrimination against all the non-moms of the world who were in attendance and denied their no doubt constitutionally guaranteed right to a freebie.

There followed three years worth of litigation. This past summer, I suspect being worn into submission, the A's finally capitulated and settled. The terms of the settlement included payment of up to $250,000 to a maximum of 2500 men who can prove that they were at the game when this dastardly slight occurred, $260,000 to pay for a variety of attorneys fees, costs and other expenses related to the case (the lion's share of which, one assumes, going to Rava), and an additional $20,000 specifically to Rava as something called an "enhancement fee" for representing the class in the suit. Macy's, a co-sponsor of the ill fated give-away, is also on the hook for the amounts involved and while I suspect that neither Macy's nor the A's will go under because of this, that really isn't the point. The A's have also wisely but sadly decided that they will no longer offer male or female only give-aways. This year, for example, on Mother's Day the first 10,000 fans all received a free tote bag.

Rava is not a stranger to this kind of litigation. He previously represented one Michael Cohn in a separate class action suit against the Los Angeles Angels and Corinthian Colleges, which jointly sponsored a similar Mother's Day give-away at an Angels game. That suit sought $4000 for each man who had not been given a red nylon bag. Unlike the A's, the Angels fought back and the suit was eventually dismissed at the trial court level. The dismissal was upheld on appeal. The Angels, however, like the A's after them, have capitulated on the issue of limiting give-aways by gender. This year, all fans 18 or older who attended their Mother's Day game got a pink tote bag. I'm sure most of the men cherished this piece of memorabilia, but that solution appears not to be acceptable to Rava, who is quoted as saying that this still violates the civil rights of fans under 18 who are denied a tote because of age.

In a similar vein to all of this, the Hudson Valley Renegades, a minor league baseball team in New York, were recently warned by county officials that a planned ladies' night promotion "violated the New York State Human Rights Law ... and the [federal] guarantee to equal protection."

There is just so much that could be said here. I suspect my feelings are clear but if not let me put it this way: in our quest for perfect justice and equality have we lost our collective minds? This scenario isn't even all that special or unusual in terms of the realm of the bizarre. We all hear about the million dollar verdict because someone wasn't warned that a cup of hot coffee might be, well, hot. And many of us are guilty of caving in because the cost of fighting is higher than the cost of giving up. To me, there ought to be some provision in the law that allows courts to look at a complaint and say, in effect, "That's a bunch of hooey - stop wasting everyone's time and get a life" while tossing it in the trash, theoretically debatable issue or not. I just don't believe that the Founding Fathers intended for us to waste time and energy on who gets pink tote bags or thought that equality meant ignoring reality. But that's not going to happen. Personally, I find it harder and harder to defend what some of our professional colleagues do. And to any who this offends, let me say I'm sorry, but get a life.

To Be or Not to Be (Part 1 - Undisclosed Witnesses)

By Cynthia Stump Swanson

The Family Law Section last met on September 15, 2009. As always, we appreciate the attendance of our family law judges and the input they provide. Judges Moseley and Smith attended this meeting. Much of the discussion of the group surrounded the compliance and lack of compliance with various case management and pretrial orders. One specific concern had to do with witnesses being presented at a trial who were not disclosed on a pretrial witness list.

The pretrial orders in general use in this circuit require the exchange of witness lists some number of days before the trial. Hopefully, enough days before trial to allow the other side to depose the listed witnesses, if desired, but not so far ahead of trial that all likely witnesses may not yet be known. There is no rule of family law or civil procedure which touches on this specifically, and instead trial courts are imbued with more of that discretionary power to run the trial. Generally speaking, a trial judge's discretion in determining whether an unlisted witness can testify should be guided primarily by whether prejudice would accrue to the objecting party. "Prejudice" in this connection is considered to mean that the objecting party might well have taken some action to protect himself had he received timely notice of the witness and that there exists no other alternative to alleviate the prejudice.

The leading Florida case on this issue is Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981). In that case, when the parties exchanged witness lists, the plaintiffs listed their primary witnesses, and also included the usual catch-all, "any and all necessary impeachment or rebuttal witnesses." The defendants also listed a particular expert witness, and the plaintiffs took that expert's deposition. They then had an expert of their own review the deposition, but did not identify their expert to the defendants, relying on their "any impeachment or rebuttal witnesses" notification. The trial judge allowed the plaintiffs' expert to testify, over the defendants' objection.

The case made its way to the Florida Supreme Court to resolve a conflict between appellate districts. The Supreme Court characterized one view as saying that the law in Florida is well-settled to the effect that impeachment witnesses need not be disclosed prior to trial. The rule, suggest these proponents, was rooted in the belief that all witnesses, but especially expert witnesses, would be tempted to exaggerate or stray from the truth if they knew from looking at a witness list that their testimony was not going to be challenged.

Those on the other side argue that the rule permitting nondisclosure of impeachment witnesses is not so broad, but rather is limited to those situations in which the need for an impeachment witness is totally unforeseeable and arises from matters which come out for the first time during trial. They suggest that an impeachment witness who testifies on an issue disclosed by the pleadings or through discovery must be identified prior to trial, in order to prevent a party from secreting a witness and waiting to ambush his opponent's witnesses. They argue that trials in Florida are no longer sporting matches, and that full disclosure is the order of the day.

Resolving these differing points of view, the Florida Supreme Court held that a pretrial order directing the parties to exchange the names of witnesses requires a listing or notification of all witnesses that the parties reasonably foresee will be called to testify, whether for substantive, corroborative, impeachment or rebuttal purposes. Obviously, a general reference to "any and all necessary" impeachment or rebuttal witnesses, as was the case at trial in the Binger case, and as is a very common practice in this circuit, constitutes inadequate disclosure. The Court went on to hold:

It follows, of course, that a trial court can properly exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order. The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). If, after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure

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Guardian, Power of Attorney, Guardian Advocate, Ad Litem, Curator, Custodian, Conservator, Executor De Son Tort

By Judith B. Paul

Florida Statutes are rife with titles of persons who can apply to care for the person and/or property of other individuals while they are alive. There are also titles for persons who propose to care for the property of a decedent. But deciding whether to appoint a guardian, an administrator, a custodian or a curator can be confusing to new attorneys.

There are multiple alternatives available for someone to take care of another living person or the estate of a deceased person, or the property of someone who is missing and their status is unknown. But which alternative should you recommend? Each of these appointments includes a particular duty to the court and/or the person, estate or beneficiaries for whom he acts as a fiduciary.

Durable Power of Attorney

A durable power of attorney is a written power of attorney by which a principal designates another as the principal's attorney in fact.[1] The purpose of a durable family power of attorney is to provide a means by which the family members can help a potentially disabled or incompetent person by handling that person's legal, business, and property affairs and to avoid the time, expense and embarrassment involved in having to establish a guardianship for that person.[2] During a petition for determination of incapacity the authority granted under a durable power of attorney is suspended until the petition is dismissed or withdrawn or the court determines that certain authority granted by the durable power of attorney is to remain exercisable by the attorney in fact.[3] The attorney-in-fact may act on behalf of the principal under the Power of Attorney unless it is revoked by the principal, or the principal dies or is declared incapacitated.[4] The principal can be very susceptible to fraud, duress, undue influence, deceit, and whims of fancy and may revoke or change his power of attorney based on the influence or attentions of another person or for no reason at all. An individual may execute a limited power of attorney if he is unable to perform some legal duty and requires someone to act on his behalf in a particular legal matter. A power of attorney may be exercisable immediately or may be conditioned upon the principal's lack of capacity to manage property and specific requirements must be met.[5] The person to whom this power is granted, the agent or attorney in fact owes the principal a fiduciary duty. The principal's money and resources are not to be used for the benefit of the agent, but for the benefit of the principal, and the agent cannot make gifts to himself, transfer property to himself, or otherwise use the power for his personal gain.[6] If the principal is concerned about the agent having access to his finances, it may be prudent to consider appointing a corporate attorney in fact, such as a financial institution. If the principal later undergoes an adjudication of incapacity certain authority granted by the durable power of attorney may remain exercisable by the attorney in fact after adjudication of incapacity to create a less restrictive guardianship for the ward and be in the ward's best interests.[7]

Guardianship

The Florida Legislature has recognized that adjudicating a person totally incapacitated and in need of a guardian deprives that person of all her civil and legal rights and may not be completely necessary.[8] All guardians in the state of Florida must be represented by an attorney who is licensed to practice law in Florida.[9] Since the ward is the intended beneficiary of the guardianship, the attorney who represents the guardian of a person who is adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as the guardian.[10] This does not mean that this attorney can fairly represent the interests of the ward. It is not only important but it is required that the potential ward, also referred to as the alleged incapacitated person or AIP, be represented by their own attorney to protect their interests.[11] If the AIP cannot afford an attorney,

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The Florida Bar Board Of Governors Report

By Carl B. Schwait

At its September 25, 2009, meeting in Hollywood, The Florida Bar Board of Governors:

· Heard a report from Communications Committee Chair about three improvements being made to the Bar's Web site: an improved Google-based search engine, a "quick links" function on the homepage to help users find popular parts of the site, and a new career resource center to help connect lawyers looking for jobs and firms with openings. It was reported that the Bar is reviewing requests for proposals and nearing the selection of a consultant on revamping the Bar's Web site this year. The board approved committee motions for a Consumer Protection Law Committee public service campaign on legal rights regarding foreclosure and applying for a Florida Bar Foundation grant to fund the campaign, and for the 2009-10 Board of Legal Specialization and Education Strategic Communication Plan Implementation Campaign.

· Gave final approval to a rule change that adds new requirements for lawyers suspended or ineligible to practice for three years or longer and seeking reinstatement. These include that the lawyers must complete 10 hours of CLE for each year or part of a year they are ineligible to practice and those ineligible to practice for five years or longer must retake the Florida section of the bar exam.

· Heard a report that Bar CLE operations have shown an overall increase despite a slow economy and that revenues from the Bar's Member Benefits Program are also up.

· Heard a report that Bar investments are up 16 percent for the year and more than 9 percent for the quarter. Bar President Jesse Diner said if the good performance holds, that the current Bar budget will likely have a surplus instead of the initially expected $300,000 deficit. It was stated that the Investment Committee has begun a sweeping review of Bar investment policies, at the suggestion of its advisor, Morgan Stanley Smith Barney.

· Heard a report about ongoing efforts to bring e-filing to the state court system amid the broader goal of having electronic access to court records. It was stated that the Supreme Court Technology Commission is overseeing the work and that it is critical that the courts, not the clerks, set the standards and control an e-filing and electronic access system to prevent each county court clerk from setting up a separate system. It appears that legislative action earlier this year has spurred recent activity, but it will also be necessary for the legislature to come up with funding.

· Heard the annual report from the Public Interest Law Section that the section and the Bar's Legal Needs of Children Committee are working together to create a Children's Law certification area.

I was pleased as vice-chair of the Disciplinary Review Committee to oversee the discussion/debate of the Committee and then oversee the discussion/debate of disciplinary matters before the Board of Governors.

Family Law

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should be modified and the witness should be allowed to testify.

Clearly, the better practice is to disclose all your witnesses, so that there is no surprise, and who knows? Knowing who all the witnesses are and what they're going to say might even help promote settlement. In the Binger case, the Florida Supreme Court did rule that the plaintiffs should have disclosed their expert, that the defendants were actually surprised, and that they were unfairly prejudiced. A new trial was ordered.

The Family Law Section meets on the third Tuesday of each month at 4:00 p.m. in the Chief Judge's Conference Room in the Alachua County Family and Civil Justice Center. If you know anybody who wants to get on or off the family lawyers email list, please email me at cynthia.swanson@acceleration.net. Likewise if you have some ideas for programs, topics or speakers, please do not hesitate to contact me.

Announcement

Law Offices of Gloria W. Fletcher, P.A. is pleased to announce that Erica Bloomberg-Johnson has joined the firm located at 4510 N. W. 6th Place, Gainesville, 352-374-4007 or Fax 352-337-8340 or email ebloombergj@bellsouth.net.

Guardian

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the court appoints an attorney from a list of attorneys *ad litem*.[12] These attorneys act in particular legal issue only, representing the expressed wishes of the AIP to the extent it is consistent with the rules regulating the Florida Bar.[13] Because a guardianship has the potential of removing a person's constitutionally protected rights, the court hears each guardianship petition and the AIP is given the opportunity to testify, present evidence, call witnesses, confront and cross examine witnesses and have the hearing open or closed at their discretion.[14] The AIP may also remain silent and refuse to testify which is not to be held against them in the determination of capacity.[15] A guardianship should be consistent with the welfare and safety of the AIP but must be the least restrictive appropriate alternative means of caring for another person.[16] If the AIP has executed a durable power of attorney or health care surrogate or trust, the court will consider these pre-arrangements to establish a limited guardianship and allow the AIP to retain more control of the tasks necessary to care for his or her person or property.[17]

Guardian Advocate

A guardian advocate is a person who has been appointed by the court to represent a person with developmental disabilities.[18] In Florida, there are five enumerated developmental disabilities: (1) Prader-Willi syndrome, (2) autism, (3) cerebral palsy, (4) retardation, and (5) spina bifida; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.[19] A circuit court may appoint a guardian advocate without an adjudication of incapacity for a person with developmental disabilities, if the person lacks the decision-making ability to do some, but not all, of the decision-making tasks necessary to care for his or her person or property, or if the person has voluntarily petitioned for the appointment of a guardian advocate.[20] At the hearing required pursuant to F.S. §393.12(6), the ward is entitled to be present and to have representation by a guardian *ad litem* who is appointed by the court if the ward has no funds with which to hire an attorney to protect his interests.[21] Occasionally there is some confusion by practitioners and guardian advocates who have incorrectly assumed that reports are not required under Chapter 363 Florida Statutes. However it is clearly stated that a guardian advocate has the same powers, duties and responsibilities are found under F.S. §744.351 so the guardian advocate must file the required reports with the court annually.[22]

Administrator ad litem and Guardian ad litem

When it is necessary that the estate of a decedent or a living ward be represented in any probate or guardianship proceeding and there is no personal representative of the estate or guardian of the ward, or the personal representative or guardian may be interested adversely to the estate of the ward, or is enforcing the personal representative's or guardian's own debt or claim against the estate or ward, or the necessity arises otherwise, the court may appoint an administrator ad litem or guardian ad litem, as the case may be, without bond or notice of that particular proceeding. [23] A guardian ad litem is appointed to represent the ward, if the current guardian is unable to do so, or if no guardian has been appointed, for example, to represent the minor's interest before approving the settlement of the minor's portion in any case in which a minor has a claim for personal injury, property damage, wrongful death, or other cause of action in which the gross settlement of the claim exceeds that amount allowed by statute, and currently is $15,000.00.[24] An administrator ad litem is appointed by the court to represent the estate in a particular proceeding if the personal representative is unable to do so.[25] These appointments are for a particular legal matter only and the guardian ad litem or administrator ad litem is then discharged when his duty is complete.[26]

Custodian

A custodian is a person designated by the court to care for custodial property of a minor, and by way of a circular explanation, is one who has custody of something, such as property.[27] Nomination of a custodian does not create a custodianship until the property is actually transferred to the custodian.[28] A custodianship remains subject to the act despite a change in residence of the custodian, the minor, or relocation of the property unlike property placed in a guardianship that normally transfers with the ward to the new state of residence. [29] The information on custodians is found under Chapter 710 Florida Statutes, the Transfers to Minors Act. Property transferred to a custodian for the benefit of a minor beneficiary must be titled properly, for example, "(Custodian's name) as custodian for (the minor's name) under the Florida Uniform Transfers to Minors Act."[30] A custodianship is used when a minor receives property via a will, trust, benefit plan, intestacy, a liquidated debt, an irrevocable gift, or a security.[31] A custodian collects, holds, manages, invests and reinvests the property for the minor until the minor reaches the age of majority,

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keeping that property separate from his own and other property in a manner sufficient to identify it as custodial property of the minor.[32]

Curator

If a person dies while owning property and no personal representative has been appointed and there are assets that must be taken care of during this time, the court has the authority to appoint a curator to take control of the property to prevent waste, destruction or loss through removal.[33] Typically a curator is appointed if there is a delay in the appointment of a personal representative which could be due to a will contest, failure of anyone to petition the court, removal of a personal representative, failure to nominate and appoint a successor, or the inability of someone nominated as a personal representative to act in that capacity.[34] A Curator is ordinarily appointed only as a temporary expedient to take possession of and preserve the assets of the estate until a personal representative is appointed; or conceivably, after an estate is ready for distribution and an heir is missing, to take possession of and preserve the share of the estate to which such heir is entitled, pending a search for him and his heirs.[35] Formal notice must be given to all persons apparently entitled to letters of administration.[36] The fundamental concern of the curatorship is the protection of estate property.[37] A curatorship ends when the personal representative is appointed and letters of administration are issued. The curator has the same fiduciary duty as a personal representative.

Conservator

A conservator is appointed by the court to hold the assets of an absentee until the absentee either returns or is declared deceased.[38] A conservator is appointed for members of the Armed Forces, Red Cross or Merchant Marines who are serving during a period of time when a state of hostilities exists between the United States and any other power and for 1 year thereafter if that person has been reported as missing in action, interned in a neutral country, beleaguered, besieged or captured by the enemy.[39] A conservator is also appointed when a resident of this state or any person owning property in this state disappears under circumstances indicating that he or she may have died either naturally, accidentally, or at the hand of another, or may have disappeared as the result of mental derangement, amnesia, or other mental cause.[40] The petition for conservator must include sufficient information about the missing person so that the court can conclude that there is a necessity of establishing a conservatorship.[41] If the necessity exists for providing for the care of the estate, property, spouse and children, or parents of the missing person, if appropriate, a conservator may be appointed.[42] The court, in its discretion, may appoint a guardian ad litem to represent the alleged absentee at the hearing similar to appointing a guardian ad litem to represent a ward in a guardianship action.[43] Until the court has made a determination based on the evidence that a person is deceased, the estate of that person is treated similarly to a guardianship. The circuit court has the same responsibilities as to a conservatorship as it has to a guardianship of the property.[44]

Executor de son tort - not a legally appointed representative

An executor de son tort is one who, without authority, does acts properly belonging to the administrator and is thus liable for assets with which he has meddled.[45] He is a person who has not been appointed by the court to represent the estate but acts as though he has that right and holds himself out to be the executor of the estate causing others to rely on his actions.[46] Although a person may be motivated by a desire to intercede on behalf of "family property" or other good intentions, if he has no authority to do so and without the permission of the beneficiaries, he has intermeddled in the affairs of the estate and he is liable to the personal representative if the property is taken or converted for his own use or if the estate is otherwise deprived of its right to the property.[47] This person will not be allowed credits for debts discharged which were not legal claims against the estate and will not be entitled to any set-off from application of assets to his own claim against the decedent. An executor de son tort cannot pay to himself any debt due to him by the deceased, no matter how just and valid it is.[48] The executor de son tort is subject to all the liabilities of ordinary executors or administrators or personal representatives but has none of the privileges and can not obtain a personal advantage from intermeddling.[49] However, the executor de son tort may later be appointed as the personal representative in the estate and after receipt of his letters of administration, may ratify his previous actions for the benefit of the estate and beneficiaries.[50]

There are multiple persons who can be appointed by the court to intercede on behalf of a principal, to care for property, the estate, a potential ward or AIP, a ward, a child, a decedent, or a person who is missing. Once the practitioner has a grasp of what particular duties are required by the appointed person then determining what to recommend in which situation is simplified. A chart of appointments and references to this article available on request at judithrmk@bellsouth.net.

Probate Section Report

By Larry E. Ciesla

The Probate Section held its regular monthly meeting on September 9, 2009. Judy Paul began the meeting with a discussion regarding procedures being utilized by the probate courts in Miami-Dade County for summary administration and determination of homestead status of real property. In Judy's case, the court refused to enter routine orders admitting will to probate and summary administration combined with determination of homestead status of real property (the form promulgated by the members of the probate section and commonly utilized in this circuit). In lieu of receiving her requested orders, Judy was advised of the following requirements of the probate division: 1) Proof that the funeral bill has been paid; 2) An affidavit by a disinterested person attesting to facts establishing homestead status of real property; 3) separate affidavit to be signed by petitioner acknowledging personal liability for payment of valid creditor claims up to the value of the assets received; 4) the order of summary administration cannot contain provisions for determination of homestead; a separate order is necessary; 5) the order admitting will to probate will not be entered without a consent by the non-petitioning beneficiary; and 6) Notice to Creditors must be published and proof thereof filed with the court in cases involving real property; no order for summary administration or determination of homestead will be entered until after expiration of the creditor claims period.

In the ensuing discussion, it was decided that 1) it is fortunate that we do not live or practice in Miami-Dade County, and 2) despite the fact that the probate code does not contain a requirement for any of the 6 items set forth above (and the optional provision for publication of notice to creditors in summary administration cases has been deleted from the probate code), this situation is governed by what we sometimes refer to as "The Golden Rule", which states as follows: The one with the gold makes the rule. The conclusion being that if you want the Probate Court in Miami-Dade County to enter your requested orders, you will follow the rules as established by the Probate Court in Miami-Dade County. It was suggested to Judy that she may want to consult with or retain co-counsel who lives in that jurisdiction, which is always a good idea when handling any type of case in a jurisdiction outside of your regular practice area.

Janie Hendricks raised an issue regarding an estate situation where the only asset is real property having an estimated fair market value and a mortgage balance of approximately the same amount. She expressed frustration in dealing with the mortgage holder in its failure to cooperate for acceptance of a deed in lieu of foreclosure. Your author stated he had a similar situation recently and he simply mailed the house keys to the lender with a note indicating that no further mortgage payments would be forthcoming and if they had any interest in avoiding the cost of a foreclosure action, the client would be happy to consider executing a deed in lieu of foreclosure. Another suggestion was made that since the property was a condominium unit, it may be possible to quit-claim the unit to the condo association, as it may have some interest in acquiring title so as to attempt to collect its condo fees by a subsequent sale of the unit. It was also suggested that the client could execute a quit-claim in favor of the mortgage holder, record it, and mail it to the mortgage holder. This idea was not looked upon with favor, as it was considered to be too close to the line of what could be considered unprofessional or unethical to put title to real property in another party's name without their knowledge or consent.

The Probate Section welcomed a new member, Connie Brown, who has been serving as a trust officer for Wachovia Bank (and its predecessors) in Gainesville for many years. During the September Probate Section meeting, Connie outlined several matters regarding the current state of Wachovia's trust department. For the next two years, Wachovia will continue using the same name (Wachovia Bank, N.A.). It will operate as a wholly owned subsidiary of Wells Fargo. Wachovia's current annual fee schedule for acting as trustee or as investment advisor for a revocable trust is 1% of the market value of the first one million dollars; .6% on the next three million dollars; and .4% on anything over five million dollars. There is an additional fee of .3% of the value of all real property owned by the trust. For irrevocable trusts, the annual fee schedule is 1.5% of the first three million dollars; 1% on the next two million dollars; and .7% on anything over 5 million dollars. Additional fees are charged for preparation of tax returns and for buying and selling securities. Wachovia currently has a general minimum account size of $500,000.00; however, they do occasionally accept smaller accounts. To accept an account, Wachovia requires the trust agreement to

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specify that the trustee shall be paid in accord with its published fee schedule; it will not agree to accept a trust with a clause providing for payment to the trustee of a "reasonable fee". Wachovia typically also requires a clause allowing it to resign at any time, and will not take on the responsibility of selecting the successor trustee. Wachovia generally believes that active fund managers can outperform the overall market and hence they do not generally use index funds. They negotiate with active fund managers for annual management fees which are heavily discounted from the standard annual fee charged ton retail investors. Wachovia strives to attain diversification among asset classes. Connie will be happy to discuss any of these matters in further detail with anyone who is interested in considering the possibility of choosing Wachovia to serve as a trustee or an investment advisor. She can be reached at 335-3413 or connie.brown@wachovia.com.

A final matter was raised during the September meeting by Peter Ward, who led a discussion regarding use of the "convenience account" for estate planning clients. These accounts are governed by section 665.80, Florida Statutes. Peter explained that the primary reason he likes to use these accounts is that FS 665.80(1) specifically provides that the designation by the account owner of the authority of the convenience agent to make deposits and withdrawals to the account survives the incapacity or death of the account owner. The net effect of which is that the convenience agent is legally authorized to continue writing checks to pay bills following initiation of incapacity proceedings and following death of the account owner. Peter likes this as a solution to the problem that if the account owner executes a power of attorney in lieu of establishing a convenience account, the use of a power of attorney is suspended upon the filing of a petition for determination of capacity and terminated upon a finding of incapacity; also the right to use a power of attorney terminates upon the death of the principal. The use of a convenience account also carries with it one additional benefit. When properly established, the statute clearly provides that the money in the account never passes from the account owner to the convenience agent. This is in contrast to the situation with so-called "joint accounts", whereby ownership of the funds is generally held to pass to the surviving joint owner upon the death of the original account owner. The main problem with this type of account is that in many cases disputes arise, leading to litigation, over the issue of whether or not the funds in the account should rightfully pass to the survivor. This issue is usually said to be a question of the intent of the original account owner, which, in some cases, is less than clear, as where none of the little boxes on the bank's new account form are checked, making it difficult to determine if a true joint account with rights of survivorship was intended. As was pointed out in last month's Probate Section article, the RPPTL Section is in the process of drafting a proposed bill which could impose upon a personal representative a duty to institute litigation against a surviving joint account holder in some cases. Use of the statutory convenience account is one way to avoid such post-death disputes.

The Probate Section continues to meet on the second Wednesday of each month at 4:30 pm in the 4th floor meeting room in the civil courthouse. All interested persons are invited to attend. If you would like to receive an email notice of future meetings, you may send an email to lciesla@larryciesla-law.com.

Pro Bono News

Continued from page 3

Jeff Dollinger worked diligently on behalf of a rural homeowner trying to keep open the access to his home and Thomas MacNamara has been assisting a disabled mother save the mobile home and land she has been purchasing in a rural community as the original owner faces foreclosure.

Leslie Haswell and Frank Maloney both made great efforts on behalf of their clients facing extensive and involved family law cases.

We thank these volunteers and all of the others of the Eighth Judicial Circuit who give of their time and expertise to ensure access to the legal system and we are grateful to those of you who have made financial contributions to our program. Your help enables Three Rivers to expand our services to reach more individuals and families in their times of need.

FORUM 8

Eighth Judicial Circuit Bar Association, Inc.
Post Office Box 127
Gainesville, FL 32602-0127

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November 2009 Calendar

4 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
5 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
5 Deadline for submission to November Forum 8
7 UF Football v. Vanderbilt, Gainesville, TBA
11 Veterans Day – County & Federal Courthouses closed
11 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
12 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
13 EJCBA Luncheon, Hon. Larry Cretul, Florida House Speaker and District 22 Representative speaking on issues to be addressed in the 2010 pre-session.
13 Bench-Bar Committee Meeting (immediately following Bar Luncheon)
14 UF Football at South Carolina, TBA
17 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
21 UF Football v. Florida International, Gainesville, TBA
26 Thanksgiving Holiday – County & Federal Courthouses closed
27 Day After Thanksgiving Holiday – County Courthouses closed
28 UF Football v. Florida State, Gainesville, TBA

December 2009 Calendar

2 EJCBA Board of Directors Meeting; Ayers Medical Plaza, 720 SW 2d Avenue, North Tower, Third Floor – 5:30 p.m.
3 CGAWL meeting, Flying Biscuit Café, NW 43rd Street & 16th Ave., 7:45 a.m.
4 Deadline for submission to November Forum 8
9 Probate Section Meeting, 4:30 p.m., 4th Floor, Family & Civil Courthouse
10 North Florida Association of Real Estate Attorneys meeting, 5:30 p.m.
11 EJCBA Luncheon, Chief Tony Jones, GPD, "Visions and Goals for the Future of the Gainesville Police Department", Steve's Café, 11:45 a.m.
15 Family Law Section Meeting, 4:00 p.m., Chief Judge's Conference Room, Alachua County Family & Civil Justice Center
24-25 Christmas Holiday, County Courthouses closed
25 Christmas, Federal Courthouse closed

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at dvallejos-nichols@avera.com.