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# Up From Feudalism -- Florida's New Residential Leasing Act

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# UP FROM FEUDALISM—FLORIDA'S NEW RESIDENTIAL LEASING ACT\*

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## I. INTRODUCTION

The 1973 session of the Florida Legislature has produced landmark legislation relating to two of the most prevalent types of residential dwellings—rental apartments and mobile homes. Legislation in this area is of particular importance to Florida's large transient population; to new residents who may wish to permanently retire in a mobile home community (or utilize such facilities or other rental accommodations while seeking a more permanent home); and also to the myriad of young adults upward bound and saving for their dream homes. It is the purpose of this article to delineate the principal features of this legislation and to emphasize the departures from former law.

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## II. FLORIDA RESIDENTIAL LANDLORD AND TENANT ACT

### A. *Background And Coverage*

The Residential Landlord and Tenant Act,<sup>1</sup> with certain exceptions,<sup>2</sup> became effective on July 1, 1973.<sup>3</sup> The Act codifies many aspects of the residential landlord-tenant relationship, substitutes modern contractual principles for archaic conveyancing concepts,<sup>4</sup> and strikes a balance between the rights and obligations of the respective parties.

The Act parallels the recent trend in American law away from the traditional property concepts in this area. The most glaring deficiencies in traditional law have been in areas where economic realities have nullified the theoretical rights and remedies of indigent tenants living in substandard housing. Both legislative and judicial awareness of these problems has resulted in such innovations as the implication of a covenant of habitability,<sup>5</sup> the recognition of retaliation as a defense to an eviction,<sup>6</sup> utilization of the doctrines of apportionment and abatement of rent,<sup>7</sup> and the application of the concept of unconscionability.<sup>8</sup>

The Florida Act is not an all inclusive codification of the landlord-tenant relationship in residential leases, but it does prescribe principal features of the relationship and compensates, or at least tries to compensate, for imbalances in the relative bargaining power of the parties. It is not an indigent tenant's act as such, but, where applicable, it should help considerably the indigent tenant living in substandard housing. It is neither a tenant's nor a landlord's act, but rather a legislative attempt to correct ascertained inequities and to strike a fair balance between the parties.

The Act, by its terms, extends only to the rental of dwelling units and mobile home lots.<sup>9</sup> Specifically excluded is residency or detention, where such is incidental to the provision of medical, geriatric, educa-

1. Fla. Laws 1973, ch. 73-330, creating FLA. STAT. §§ 83.40 *et seq.* [hereinafter referred to as the Act].

2. FLA. STAT. §§ 83.51, 83.56(1) (1973), imposing duties on the landlord to maintain the premises and not violate any building, housing or health codes, and some ancillary sections dependant thereon, became effective on January 1, 1974. Those sections as to public housing authorities will become effective as of July 1, 1975, but the other provisions of the law became effective in regard to public housing on July 1, 1973. Fla. Laws 1973, ch. 73-330, § 15.

3. Fla. Laws 1973, ch. 73-330, § 15.

4. The Hawaiian Act specifically states that one purpose of the act is to change the relationship to one that is primarily contractual in nature. Hawaii Laws 1972, Act 132, § 2(3). The Florida Act contains no such express provision.

5. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

6. *Edwards v. Habib*, 397 F.2d 687, (D.C. Cir. 1968); *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970). See also MODEL RESIDENTIAL LANDLORD AND TENANT ACT § 2-407; Hawaii Laws 1972, Act 132, § 74.

7. See cases cited in note 5 *supra*; FLA. STAT. §§ 83.46 and 83.60(1) (1973).

8. FLA. STAT. § 83.45 (1973); Hawaii Laws 1972, Act 132, § 75.

9. FLA. STAT. § 83.41 (1973). For a more detailed analysis of recent statutory developments relating specifically to mobile home parks, see section III *infra*.

tional, counseling or religious services.<sup>10</sup> Also excluded from coverage are occupancies arising under a contract of sale, transient occupancy, occupancy by a holder of a proprietary lease in a cooperative apartment, and occupancy by an owner of a condominium unit.<sup>11</sup>

## B. *Obligations and Remedies*

### 1. TERMS IMPUTED IN EVERY LEASE BY OPERATION OF LAW

In order to streamline and equalize the law of landlord and tenant relations, the Act has, to a degree, standardized all residential leases by imputing certain terms and concepts and prohibiting others. At the outset, it imposes on every rental agreement an obligation of good faith in its performance or enforcement.<sup>12</sup> Good faith is defined as honesty in fact in the conduct or transaction concerned.<sup>13</sup>

This obligation of good faith could be used by the court to prevent the landlord from unduly harassing the tenant, as, for example, by gaining access to the premises at unreasonable times and at too frequent intervals. Conversely, it could also be used against the tenant in the situation where the tenant refuses and interferes with the landlord's reasonable requests for access to examine the premises or to show them to prospective tenants at the end of the term.

Another instance in which the good faith requirement could be utilized would be where the motive of the landlord is questioned in attempting to evict the tenant. For example, as will be discussed later, the requirement of good faith may be applied to restrain a retaliatory eviction. The concept could be used to deny the landlord the right to evict the tenant if it appeared that his sole reason for the eviction was to retaliate because the tenant notified the housing authorities of a breach of housing regulations, or for some other bona fide assertion of a tenant's rights.

Further, the concept of unconscionability has become a factor in the enforcement of rental agreements. The question of unconscionability is one for the court to decide as a matter of law. Upon a finding of un-

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10. FLA. STAT. § 83.42 (1973). It is significant that under the "geriatric" exception, retirement communities of a comprehensive character may not be within the scope of the Act.

11. *Id.* Of course, where, for example, the owner of a condominium unit is himself a landlord, the Act comes into play. Where a single family home is rented, certain exceptions apply as to the landlord's duties to maintain the premises. See section II, B, 2, a *infra*. A clear problem of interpretation is presented, however, if a condominium unit is rented by an individual owner through the rental agent of the condominium association and the use of the agency is required by the condominium agreement. If all of the units so rented are to be considered in total, the individual owner-landlord may lose his opportunity to avail himself of the exceptions.

12. FLA. STAT. § 83.44 (1973). Similar provisions are found in Hawaii Laws 1972, Act 132, § 10.

13. *Id.* § 83.43(8). The requirement of good faith in the enforcement of the lease may very well be the only protection present to the tenant in the face of a retaliatory eviction. Also see text following note 95, *infra*.

conscionability the court has three options; it may: (1) refuse to enforce the entire rental agreement; (2) enforce the remainder of the agreement without the unconscionable provision; or (3) limit the application of any objectionable provision so as to avoid any unconscionable result.<sup>14</sup>

The Act takes an active role in policing rental agreements by prohibiting, as void and unenforceable, any terms in a rental agreement which purport to limit, waive, or preclude the assertion of rights, remedies or requirements provided in the Act.<sup>15</sup> If either party suffers actual damage as a result of such a provision, the aggrieved party may recover those damages.<sup>16</sup> Thus, it would appear that an exculpatory clause purporting to relieve the landlord from any liability arising from his statutory and mandatory duties<sup>17</sup> would be null and void. Moreover, an exculpatory clause purporting to relieve either party of liability for ordinary negligence may likewise be void since the duty not to be negligent "arise[s] by operation of law."<sup>18</sup>

Another "imputed term" in lease agreements provides that where the lease allows the landlord attorney's fees in any action to enforce the rental agreement, the court is given the option to award attorney's fees to a successful tenant in any action by or against the tenant with respect to the rental agreement.<sup>19</sup>

The statutory imposition of attorney's fees should tend to equalize the relative positions of the landlord and tenant. If only the landlord is entitled to such fees, as the lease often provides, the tenant will be discouraged from asserting his right because, even if successful, the cost of the litigation may be in excess of his recovery. Now, since the tenant knows that if he is successful he may recover attorney's fees, he may also be more willing to assert his rights in court. Conversely, both parties will be more reluctant to file frivolous or harrassing suits.

Thus, the Florida approach which makes the landlord's provision for attorney's fees a "two-edged sword" appears to be a sound device. Moreover, this approach is preferable to that taken under section 3-402 of the Model Residential Landlord and Tenant Code which expressly denies attorney's fees to both parties. However, it would appear that optimum recourse to rights protected under the Act would be gained by

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14. FLA. STAT. § 83.45 (1973). It should be noted that this provision bears striking resemblance to FLA. STAT. § 672.302 (1973) (section 2-302 of the Uniform Commercial Code), which applies to transactions in goods. As the Act does not mention factors to be considered in determining unconscionability or which of the three options the court should adopt in a given case, recourse to cases as well as the comments under section 672.302 may be helpful. The Hawaiian provisions are remarkably similar. Hawaii Laws 1972, Act 132, § 75.

15. FLA. STAT. § 83.47 (1973).

16. *Id.* § 83.47(2) (1973).

17. See, e.g., FLA. STAT. § 83.51(1) (1973), delineated following note 21 *infra*.

18. The Hawaiian Act expressly prohibits exculpatory clauses on behalf of the landlord and renders such provisions void. Hawaii Laws 1972, Act 132, § 33.

19. FLA. STAT. § 83.48 (1973). It should be emphasized that such an award is not mandatory, but the court is given an option in this regard.

allowing attorney's fees to the prevailing party without dependence on any provisions in the rental agreement.<sup>20</sup>

## 2. LANDLORD'S OBLIGATIONS AND TENANT'S REMEDIES

### a. Landlord's Duties

In an attempt to curb the problem of the anonymous landlord, the Florida Act provides that prior to the tenant's occupancy of the premises the landlord must disclose in writing to the tenant the name and address of the landlord or his representative authorized to receive notices and demands. Moreover, in the case of construction of new buildings exceeding three stories in height, the landlord must disclose to the initial tenants whether or not fire protection is available.<sup>21</sup>

The duties or obligations of the landlord in regard to maintenance of the leasehold premises are divided into two categories: the first, and most important, is that the landlord must, at all times during the tenancy, comply with the requirements of all applicable building, housing, and health codes. When no such codes are applicable, all basic structural and service components are to be kept in good repair and capable of resisting normal forces and loads. The above duties, however, may be altered with respect to a single family home or duplex if such modifications are put in writing. Also, the landlord is not required to maintain a mobile home or other structure owned by the tenant.<sup>22</sup>

The second set of duties requires that the landlord make reasonable provision for the extermination of rodents and insects, the supply of locks and keys, the maintenance of clean and safe common areas, garbage removal, heat, running water and hot water. However, the above do not apply to the landlord of a single family home or duplex, and in all other situations, may be modified in writing.<sup>23</sup> It should be noted that non-compliance with this second set of duties does not authorize the tenant to raise such non-compliance as a defense to an action for possession.<sup>24</sup>

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20. MODEL RESIDENTIAL LANDLORD AND TENANT ACT § 2-407. The Florida Act also seems preferable to that of Hawaii which authorizes the lease to provide for attorney's fees for the landlord of up to 25% of the unpaid rent, and provides that the Office of Consumer Protection shall provide counsel for indigent tenants if counsel is otherwise unattainable. Hawaii Laws 1972, Act 132, §§ 35, 76.

21. FLA. STAT. § 83.50 (1973).

22. *Id.* § 83.51(1). A similar approach is adopted in the Hawaiian Act with the landlord being responsible for complying with housing, health and similar codes. Hawaii Laws 1972, Act 132, § 42.

23. *Id.* § 83.51(2). It should be noted that the tenants may be charged for garbage removal, water, fuel and utilities. *But see* FLA. STAT. § 83.281(7) (1971) *renumbered* § 83.70(7) (1973), which prohibits the supplying or selling of electricity or gas by a mobile park owner at a price higher than that charged by the public utility from whom the electricity or gas was purchased. This statute is discussed further in section III *infra*.

24. FLA. STAT. § 83.51(3) (1973). Further, if the first set of duties (concerning compliance with health codes, etc.) is the same or greater than any duty imposed under the

### b. Tenant's Remedies

The statute expressly grants access to the courts in order to enforce, by way of civil action, the duties and obligations created under the Florida Residential Landlord and Tenant Act.<sup>25</sup> It is also expressly provided that where there is a failure to comply with the rental agreement or the provisions of the statute, the aggrieved party may recover damages caused by the non-compliance.<sup>26</sup>

Under the Act, the tenant may terminate the rental agreement if the landlord fails to comply with the statutorily imposed duties relative to building and housing codes or structural components, or if he otherwise breaches material provisions of the rental agreement.<sup>27</sup> To take advantage of this option, the tenant must serve a notice on the landlord specifying such non-compliance, and indicating an intention to terminate the rental agreement by reason thereof. The landlord thereafter has seven days to remedy his default<sup>28</sup> and if he fails, the tenant may terminate.

However, if the failure to comply with the statutory provisions of the rental agreement are due to causes beyond the control of the landlord *and* he seriously attempts to comply, the rental agreement may be terminated or modified by the parties as follows:

a) If the landlord's failure to comply renders the dwelling untenable *and* the tenant vacates, the tenant shall not be liable for rent during the period of uninhabitability;

b) If the tenant remains in occupancy and only part of the dwelling unit is untenable, the rent for the period of non-compliance shall be reduced in proportion to the loss of rental value caused by such non-compliance.<sup>29</sup>

These statutory provisions appear to be somewhat of a modification of the common law doctrine of constructive eviction or breach of the covenant of quiet enjoyment.<sup>30</sup> The initial statutory statement seems to be substantially equivalent except that it clarifies the responsibilities of both sides, especially with regard to the procedure for assertion of the claims and opportunity to remedy the defects. When the defects are not timely remedied, then the tenant may vacate and be excused from further liability.

The second part of the provision, however, is troublesome. It states

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second set of duties, then the landlord's duty is determined by the first set. FLA. STAT. § 83.51(4) (1973). See section II, B, 2 *infra*. That non-compliance with the first set of duties is a defense to an action for possession, see text at note 36 *infra*.

25. FLA. STAT. § 83.54 (1973).

26. *Id.* § 83.55.

27. *Id.* § 83.51(1) imposes duties on the landlord, while § 83.56 allows the tenant to terminate for non-compliance. See text following note 21 *supra*.

28. FLA. STAT. § 83.56(1) (1973).

29. *Id.*

30. See generally *Richards v. Dodge*, 150 So. 2d 477 (Fla. 2d Dist. 1963); 2 R. BOYER, FLORIDA REAL ESTATE TRANSACTION §§ 35.09[2], [3] (1973).

that where the housing defects are beyond the control of the landlord, then the parties may terminate or alter the agreement in one of two ways.<sup>31</sup> If, as the statute seems to indicate, such termination or modification is dependent upon the mutual agreement of the parties, it may be questionable whether it performs any function at all since the parties would be free in any event to terminate or alter their agreement. The only possible deterrent might be that the modification might lack consideration, but presumably that could be overcome without too much difficulty. In the case of a voluntary termination, the tenant is surrendering his leasehold and the landlord is excusing him from further performance. In the case of modification, the tenant is excusing the landlord from strict adherence to his statutory duties, and the landlord is giving up some of his rent in return therefor.

If the options are meant to be mandatory or exclusive, then some difficulty may result in their application. If the parties have not made an express agreement as to one or the other, will such an agreement be automatically applied once the court determines that there was non-compliance by the landlord with his statutory duties, and that such non-compliance was beyond his control? If so, and if the tenant vacates and the landlord does not agree that the rental agreement has been terminated, will subsection (a) be applied so that the tenant will be excused only during the period of uninhabitability? If so, note the difficulty of the tenant's position. Presumably, on repair of the premises, the rental agreement revives and the tenant would have to move back in or find another tenant. The statute does not provide for moving expenses, increased rent that the tenant may have to pay for short term accommodations elsewhere, or for possible damages to his personal effects as a result of the untenable condition of the premises. After repairs, the landlord would have to let the tenant return. Of course, if the parties voluntarily agree to this procedure, neither has any complaint.

Under the subsection (b) alternative of the statute, if the tenant remains in possession during the landlord's nonintentional failure to comply with his duties, the tenant is liable only for a reduced rent. In the event the parties do not expressly agree to this procedure nor to the amount by which the rent should be reduced, the proper amount can be determined in a subsequent suit, but as will be explained below,<sup>32</sup> presumably the tenant will have to pay the whole rent into court as it comes due in order to safeguard against a successful eviction suit by the landlord.<sup>33</sup> This provision for an abatement of rent under these circumstances is certainly a departure from traditional landlord and tenant concepts.

These statutory procedures in case of defects beyond the landlord's

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31. FLA. STAT. §§ 83.56(1)(a),(b) (1973); see text following note 28 *supra*.

32. See text at note 40 *infra*.

33. FLA. STAT. § 83.60(2) (1973).



control are obviously meant to be fair to both parties, but they do raise serious questions. If such procedures are applicable only when the parties expressly agree to termination or modification, what happens when they affirmatively disagree? If an agreement is to be implied from their conduct, when the tenant moves out, what criteria will determine whether they agreed to terminate or simply agreed to excuse the tenant from rental liability during the period of uninhabitability? Further legislative consideration of these procedures may be in order.

This statutory remedy whereby the tenant may stay in possession without paying rent, or at least without paying all of the rent stipulated in the agreement, appears to be a statutory incorporation of the covenant of habitability implied recently in other jurisdictions.<sup>34</sup> Breach of the landlord's duties giving rise to this remedy are those mandatory duties prescribed by applicable health, safety and building, or housing codes. Similar duties have likewise constituted the basis of the implied covenant of habitability in other jurisdictions with similar results.<sup>35</sup> The fact that the tenant may stay without paying rent, or with paying a reduced rent, treats this implied covenant as dependent rather than independent. The imposition of a duty to pay reasonable rental value when the premises are not totally untenable sounds in quantum meruit or quasi-contract. It may also be noted that the statutory provision requiring the tenant in possession to pay into court any rents that may be ascertained<sup>36</sup> is analogous to the "rent strikes" allowed in some jurisdictions.<sup>37</sup>

It should also be noted at this point that both the landlord and tenant waive their rights to terminate the rental agreement or to bring a civil action for non-compliance, should either party accept or pay rent to the other party with knowledge of any non-compliance. This waiver, however, does not affect any subsequent or continuing non-compliance.<sup>38</sup>

A significant departure from common law principles is the provision that the tenant may raise the defense of the landlord's material non-compliance with mandatory duties<sup>39</sup> in actions brought by the landlord to recover possession or unpaid rent.<sup>40</sup> As above stated,<sup>41</sup> however, the defense of material non-compliance may only be raised if seven days have elapsed after delivery of written notice by the tenant to the landlord specifying such non-compliance, and indicating an intent not to pay rent by reason thereof.<sup>42</sup>

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34. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

35. See cases cited note 42 *supra*.

36. FLA. STAT. § 83.60(2) (1973).

37. See, e.g., N.Y. REAL PROP. ACT. & PROC. LAW § 755 (McKinney Supp. 1973).

38. FLA. STAT. § 83.56(5) (1973).

39. *Id.* § 83.51(1). However, the landlord's failure to comply with the duties enumerated in subsection (2) of the statute cannot be asserted as a defense to an action for possession.

40. FLA. STAT. § 83.60(1) (1973).

41. See text following note 28 *supra*.

42. FLA. STAT. § 83.60(1) (1973).

A material non-compliance with such statutory duties is a complete defense to an action for possession based on non-payment of rent, but, upon hearing, the court or jury shall determine the amount, if any, by which the rent is to be reduced to reflect the diminution in value of the rental unit.<sup>43</sup> When the tenant asserts any defense other than payment to a possessory action based on non-payment of rent, the tenant shall pay into the registry of the court the accrued and accruing rent as alleged in the complaint or as determined by the court.<sup>44</sup> Failure of the tenant to pay rent into the registry of the court constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to an immediate default.<sup>45</sup>

### 3. TENANT'S OBLIGATIONS AND LANDLORD'S REMEDIES

#### a. Tenant's Duties

The Act has set forth minimum standards in the maintenance and use of the rental unit by the tenant. Specifically, the tenant must: (1) comply with all obligations imposed upon him by applicable housing, building and health codes; (2) keep his dwelling unit clean and sanitary; (3) keep all plumbing fixtures in the dwelling unit clean, sanitary and in repair; (4) remove from his dwelling unit all garbage; (5) use and operate all facilities and appliances in a reasonable manner; (6) refrain from destroying or in any way damaging any property belonging to the landlord; and (7) conduct himself and require others on the premises with his consent to conduct themselves in a reasonable manner.<sup>46</sup>

#### b. Landlord's Remedies

As was stated above,<sup>47</sup> the rights and duties expressed in the statute are enforceable by civil action, and failure to comply with the rental agreement or the provisions of the statute establishes a cause of action for damages arising from such non-compliance.<sup>48</sup> The landlord may also elect to terminate the rental agreement if the tenant *materially* fails to comply with his statutory duties or with material provisions of the lease.<sup>49</sup>

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43. *Id.*

44. *Id.* § 83.60(2).

45. *Id.* The landlord may apply to the court for disbursement of all or part of the funds or for prompt, final hearing when the landlord is in danger of losing the premises or suffering other personal hardship resulting from loss of income. FLA. STAT. § 83.63 (1973).

46. FLA. STAT. § 83.52 (1973). Similar provisions are found in Hawaii Laws 1972, Act 132, § 51.

47. See notes 25 & 26 *supra* and accompanying text.

48. FLA. STAT. §§ 83.54, .55 (1973). *Cf.* Hawaii Laws 1972, Act 132, § 69, where, among other remedies, the landlord is authorized to correct the tenant's delinquencies and bill him for the reasonable cost thereof, such bill to be treated as rent due and payable on the next regular rent collection date, or if the tenancy has terminated, immediately upon receipt by the tenant.

49. FLA. STAT. § 83.56(2) (1973).

The prerequisite procedures to an election to terminate are clearly delineated in the statute. If the tenant's breach is based on a failure to pay rent when due, and the default continues for three days after delivery of written demand by the landlord for payment of rent or possession of the premises, the landlord may terminate the rental agreement.<sup>50</sup>

In the case of a material breach other than failure to pay rent, the landlord may terminate the agreement only after serving written notice specifying the non-compliance and indicating an intention to terminate the agreement. The notice must give the tenant seven days in which to remedy the default.<sup>51</sup>

The landlord may recover possession of the dwelling unit from a tenant holding over after the expiration of the rental agreement without the permission of the landlord.<sup>52</sup> Further, the landlord may recover double the amount of rent due for the period in which the tenant refuses to surrender possession.<sup>53</sup> The eviction procedure is delineated in the statutes. When the rental agreement is terminated and the tenant does not vacate, the landlord may recover possession by filing with the county court in the county where the premises are located a complaint describing the dwelling unit and the facts that authorize its recovery.<sup>54</sup> The landlord is entitled to the statutory summary procedure,<sup>55</sup> and the court may advance the cause on the calendar.

The landlord is restricted from recovering possession of a dwelling unit except: (a) in an action for possession under the Act, or in other civil action in which the issue of right of possession is determined; (b) when the tenant has surrendered possession to the landlord; or (c) when the tenant has abandoned the dwelling unit. As to abandonment, the statute raises a presumption in favor of the landlord, that, in the absence of actual knowledge of abandonment, the tenant has abandoned if he is absent from the premises for a period of time equal to one-half the time for periodic rental payments. However, such presump-

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50. *Id.* § 83.56(3).

51. *Id.* § 83.56(2). *Cf.* Hawaii Laws 1972, Act 132, § 69, where the notice to terminate under similar conditions must allow the tenant not less than thirty days to comply with his obligations.

52. FLA. STAT. § 83.58 (1973).

53. *Id.* A similar provision is applicable to the now commercial landlord and tenant section. FLA. STAT. § 83.06 (1973). It should also be noted that section 83.06 was construed as not authorizing the recovery of double rent when the tenant held over in good faith believing he had a right to do so. *Painter v. Town of Groveland*, 79 So. 2d 765 (Fla. 1955). In all probability, this statute would be similarly construed.

The Hawaiian Act limits the recovery of double rent to one month, and thereafter the tenant's liability is limited to the monthly rent under the previous agreement. It is also provided that the landlord's acceptance of rent in advance after the first month's holdover shall create a month-to-month tenancy in the absence of an agreement to the contrary. Hawaii Laws 1972, Act 132, § 71(c).

54. FLA. STAT. § 83.59 (1973).

55. *Id.* § 55.011. The procedure is the same as that provided for the eviction of commercial tenants. FLA. STAT. § 83.21 (1973) (except that the county court is specifically designated as the proper court). See note 58 *infra* and accompanying text.

tion does not apply if the rent is current or if the tenant has notified the landlord of an intended absence.<sup>56</sup> The prevailing party is entitled to have judgment for costs and execution in an eviction proceeding.<sup>57</sup>

Upon entry of judgment in favor of the landlord in an action for possession, the clerk shall issue to the sheriff a writ describing the premises and ordering him to put the landlord in possession twenty-four hours after notice has been posted conspicuously on the premises.<sup>58</sup> With regard to mobile homes, the writ shall not be issued prior to thirty days from the service of the complaint upon the tenant.<sup>59</sup>

#### 4. LANDLORD'S ACCESS TO THE DWELLING UNIT

In hopes of resolving what must be considered a particularly sensitive area of landlord-tenant relationships, the Florida Residential Landlord and Tenant Act prescribes rules and regulations governing the landlord's right of access during the tenancy. The Act provides that the tenant shall not unreasonably withhold consent to the landlord to enter the dwelling unit from time to time to inspect and maintain the premises, supply agreed services, or exhibit the premises to prospective or actual purchasers, tenants, workmen, or the like.<sup>60</sup>

Where entry by the landlord is for the above stated purposes, such entry may be had: (1) with the consent of the tenant; (2) in the case of emergency; and (3) when the tenant unreasonably withholds consent. In addition, the landlord may enter when the tenant is absent from the premises for a period of time equal to one-half the time for periodic rental payments; however, when the landlord is notified by the tenant of an intended absence, and if the rent is current, the landlord may enter only with the permission of the tenant or for the protection and preservation of the premises.<sup>61</sup> The landlord is given a statutory right to enter the dwelling unit at any time for the protection and preservation of the premises.<sup>62</sup> The landlord is cautioned, however, that his right of access

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56. FLA. STAT. § 83.59(3) (1973).

57. *Id.* § 83.59(4). As to the court which has jurisdiction in eviction cases: Article V, section 5, of the Florida Constitution, as amended in 1972, provides that the circuit courts shall have original jurisdiction not vested in the county courts, and section 6 provides that the county courts shall exercise the jurisdiction prescribed by general law. FLA. STAT. § 26.012 (Supp. 1972), *inter alia*, confers exclusive original jurisdiction on circuit courts: "In all actions involving the title, boundaries, or *right of possession* of real property." (emphasis added). FLA. STAT. § 34.011 (Supp. 1972), provides that the county court shall have concurrent jurisdiction with the circuit court to consider landlord and tenant cases involving claims in amounts which are within its jurisdictional limitations (\$2,500). FLA. STAT. § 83.59(2) (1973), specifies only the county court for eviction of residential tenants.

58. FLA. STAT. § 83.62 (1973).

59. *Id.*

60. FLA. STAT. § 83.53(1) (1973).

61. *Id.* § 83.53(2).

62. *Id.* The landlord is not given such a *carte blanche* right under the Hawaiian law, and under that act generally must give the tenant two days notice of his intent to enter. See generally Hawaii Laws 1972, Act 132, §§ 53, 70(b).

shall not be abused, nor used to harass the tenant.<sup>63</sup> As the Act is silent as to the right of the parties to extend or modify their statutory rights or obligations in this regard, presumably the statute would prevail over contrary provisions in the rental agreement.

### C. *Rent and Duration of the Tenancies*

#### 1. RENT

Under the Act, unless otherwise agreed, rental payments for residential units are payable without notice or demand; periodic rent is payable at the beginning of each rent payment period; and rent is uniformly apportionable from day to day.<sup>64</sup> The provisions for payment at the beginning of the period and apportionment are departures from traditional common law concepts, but are in accord with modern-day practices and concepts of fairness. Most rental agreements do, in fact, provide for payment at the beginning of the period, and apportionment in housing rentals appears justified where the rental agreement may be terminated between rental periods, especially if the termination is the fault of neither party, or at the fault of one seeking an advantage from the time of payments. Moreover, housing units are by their character an easily saleable market commodity, and vacancies can be turned over quickly, in contrast to commercial units which may require extensive negotiations and alterations in order to be turned over.

The provisions as to duration of the tenancy, where the rental agreement contains no provision as to duration, are similar to the Florida statutory tenancies at will<sup>65</sup> in that the duration is determined by the provisions for which the rent is payable. If the rent is payable weekly, then the tenancy is from week to week; if payable monthly, then from month to month; if payable quarterly, then from quarter to quarter; and if payable yearly, then from year to year.<sup>66</sup>

In addition to the remedies of the landlord previously discussed,<sup>67</sup> a further remedy is provided according the landlord a lien for accrued rent on all personal property of the tenant located on the premises.<sup>68</sup> The lien is in addition to any other the landlord may acquire by law, but may be modified or waived, in whole or part, by the provisions of a written rental agreement. The head of a family is, of course, entitled to a \$1,000 personal property homestead exemption, and it is expressly provided that the statute does not authorize any greater exemption than

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63. FLA. STAT. § 83.53(3) (1973).

64. *Id.* § 83.46(1) (1973). Somewhat comparable provisions are contained in Hawaii Laws 1972, Act 132, § 21.

65. FLA. STAT. §§ 83.01, .02 (1973).

66. *Id.* § 83.46(2).

67. See note 48 *supra* and accompanying text.

68. FLA. STAT. § 713.691 (1973).

that provided by the Florida constitution.<sup>69</sup> The traditional remedy of distress for rent has been abolished with respect to residential tenancies.<sup>70</sup>

## 2. DURATION AND TERMINATION OF INDEFINITE TENANCIES

Either party may terminate a tenancy which has no specific duration by delivering a written notice to the other.<sup>71</sup> The requirements for such delivery are set forth in the statute and are the same for delivering notice under other statutory sections.<sup>72</sup> The minimum length of notice is as follows: (a) sixty days prior to the end of any annual period when the tenancy is from year to year; (b) thirty days prior to the end of any quarterly period when the tenancy is from quarter to quarter; (c) fifteen days prior to the end of any monthly period when the tenancy is from month to month, and (d) seven days prior to end of any weekly period when the tenancy is from week to week.<sup>73</sup>

### D. Security Deposits and Advanced Rental Payments

#### 1. LANDLORD'S DUTIES

The problematic area of security deposits and advanced rental payments has again been reformed by the Florida Legislature, the former statute<sup>74</sup> regulating such deposits having been amended, renumbered and incorporated into the new residential landlord and tenant code.<sup>75</sup> In regard to the manner of holding such deposits, the statute applies to both deposits as security for performance of the rental agreement, and to advanced rent which is held in excess of three months by the land-

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69. *Id.* § 713.691(2). The homestead exemption is found in FLA. CONST. art. I, § 4.

70. FLA. STAT. § 713.691(3) (1973). The distress remedy as provided was possibly unconstitutional as a denial of procedural due process in that it allowed the landlord to seize the tenant's chattels without notice or hearing. See *Fuentes v. Shevin*, 407 U.S. 67 (1972), dealing with replevin; *Stroemer v. Shevin*, No. 72-1627-CIV-WM (S.D. Fla. 1973), specifically dealing with FLA. STAT. §§ 83.08-19 (1971); *Barber v. Rader*, 350 F. Supp. 183 (S.D. Fla. 1972), dealing with FLA. STAT. §§ 713.67-69 (1971), discussed by Wisotsky, 46 FLA. B.J. 605 (1972); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972), dealing with FLA. STAT. §§ 713.67-69 (1971). *But see* *Northside Motors, Inc. v. Brinkley*, 282 So. 2d 617 (Fla. 1973). The summary procedure authorized by the Residential Landlord and Tenant Act now provides for notice and hearing. FLA. STAT. § 85.011(5) (1973).

71. FLA. STAT. § 83.57 (1973).

72. The manner prescribed for giving notice is contained in FLA. STAT. § 83.56(4) (1973).

73. FLA. STAT. § 83.57 (1973). It may be noted that the minimum period for giving notice to terminate residential tenancies is shortened from that applicable to non-residential tenancies in the instances of year-to-year and quarter-to-quarter lettings. Under the general statute applicable to statutory tenancies at will, FLA. STAT. § 83.03 (1973), there is required a three months' notice to terminate a year-to-year rental, and a forty-five days' notice to terminate a quarter-to-quarter leasing. The minimum notice required to terminate a month-to-month or week-to-week letting is the same under both statutes.

74. FLA. STAT. § 83.261 (Supp. 1972). This statute has been criticized as being unworkable in application.

75. FLA. STAT. § 83.49 (1973).

lord or his agent.<sup>76</sup> The total of such sums shall either be held in a separate account for the benefit of the tenants and not commingled with funds of the landlord, or the landlord shall post a surety bond with the clerk of the circuit court in an amount equal to the total of the security deposits and advanced rent or fifty thousand dollars, whichever is less.<sup>77</sup>

Whenever the deposit, or advanced rent, is held in excess of six months, the deposit or advanced rent shall accumulate interest at the rate of five percent simple interest.<sup>78</sup> However, no interest shall be required when the moneys are held in a separate account for the benefit of the tenants and not commingled with funds of the landlord, and the landlord does not pledge or in any way make use of such moneys until they are actually due him. If, on the other hand, such funds are deposited in an interest-bearing account, the account must be in a Florida banking institution, and the landlord must notify the tenant of the identity of the bank. The tenant shall be entitled to seventy-five percent of the interest payable in lieu of the payment of the five percent interest otherwise payable by the landlord. The landlord is required, within thirty days of the receipt of the advanced rent or security deposit, to notify the tenant of the rate of interest, if any, which the tenant is to receive. The landlord is further required to pay or credit the interest to the tenant at least once annually.<sup>79</sup>

Upon vacating the premises pursuant to termination of the lease, the landlord has fifteen days to either return the security deposit with any accrued interest, or to give the tenant written notice by certified mail of his intention to impose a claim against the deposit. The form of notice is prescribed in the statute, and substantial compliance is sufficient. Failure of the landlord to give such notice forfeits his right to impose a claim upon the security deposit.<sup>80</sup>

The tenant, after receipt of notice by the landlord of an intent to impose a claim on the security, has fifteen days to object, and if he does not, the landlord may then deduct the amount of the claim and remit the balance of the deposit to the tenant. If either party institutes an action to adjudicate his rights to the security deposit, the prevailing party is entitled to court costs plus reasonable attorney's fees.<sup>81</sup>

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76. *Id.* § 83.49(1).

77. *Id.* The statute further provides that the bond shall be conditioned upon faithful compliance by the landlord and shall run to the governor for the benefit of any tenant injured by the landlord's violation of his duties with regard to such deposits.

78. FLA. STAT. § 83.49(2) (1973).

79. *Id.*

80. *Id.* § 83.49(3).

81. *Id.* The award of costs and attorney's fees is probably an essential requirement to allow a tenant to assert his rights to the security deposit as such costs and fees would almost invariably exceed the amount in controversy. However, due to the transient nature of the Florida population, the requirement that a dispute be resolved only after termination of the lease may preclude institution of suit by the tenant for practical reasons if the tenant intends to move any distance from the county in which the rental premises are located. An alternative to alleviate this problem might be to allow a suit to declare the

## 2. SECURITY DEPOSITS AND ADVANCED RENTALS-DISTINGUISHED OR ASSIMILATED?

It may be significant that the above discussed statute, in prescribing the manner in which the landlord shall keep the tenants' deposits, uses concepts of both security deposits and advanced rentals,<sup>82</sup> but that in detailing the procedure for the return of said deposit, uses only the term security deposit.<sup>83</sup> Traditionally, advanced rentals are not recoverable by a defaulting or abandoning tenant,<sup>84</sup> but security deposits in excess of any damage occasioned by the tenant are returned after the tenancy is terminated. Thus, it is conceivable that the detailed statutory procedure for the return of the security deposits relates only to security as such, and if a tenant abandons before that time and has paid advanced rent, as, for example, rent for the twelfth month, he will be unable to recover such advanced rent. It is submitted, however, that such result appears at least somewhat inconsistent with other provisions of the Act. These other provisions are: that rent is uniformly apportionable;<sup>85</sup> that each party has an obligation of good faith,<sup>86</sup> which possibly includes an obligation of the landlord to relet the premises to mitigate damages; and, that unconscionable provisions will not be enforced,<sup>87</sup> possibly meaning that payment of rent for a period of time the tenant does not occupy the premises is unconscionable. Also, the fact that the legislature has placed advanced rental payments into the same category as security deposits for the purpose of protecting the tenant's rights may indicate an intent to treat both equally for all purposes even though the provisions as to return of deposits refers only to security.

## 3. EXCEPTIONS

The provisions concerning security deposits do not apply to transient rentals by hotels or motels, nor to those instances where the amount

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parties' rights to the security deposit at some period before termination of the rental agreement. However, the landlord would then be at the mercy of the tenant who, after getting a return of his security, might feel free to damage the premises.

82. FLA. STAT. § 83.49(1),(2) (1973).

83. *Id.* § 83.49(3).

84. *Wagner v. Rice*, 97 So. 2d 267 (Fla. 1957); *Casino Amusement Co. v. Ocean Beach Amusement Co.*, 101 Fla. 59, 133 So. 559 (1931); *Paul v. Kanter*, 172 So. 2d 26 (Fla. 3d. Dist. 1965).

Much ingenuity has been exercised in the phrasing of the clauses of leases dealing with such funds. The basic function and justification of such a fund is to provide security for the lessor that the lessee will discharge his agreed obligations. . . . These efforts have had little success when the wording of "liquidated damages" has been used; have been recognized as effective in a minority of states when the "consideration for the execution of the lease" phraseology has been employed; and have been most effective when made in the form of "advance payments of rent."

2 R. POWELL, REAL PROPERTY, ¶ 231[2] (1973) (footnotes omitted).

85. FLA. STAT. § 83.46(1) (1973); note 64 *supra* and accompanying text.

86. FLA. STAT. § 83.44 (1973); note 12 *supra* and accompanying text.

87. FLA. STAT. § 83.45 (1973); note 14 *supra* and accompanying text.



of rent, deposit or both, is regulated by law or regulations of a public body (other than for rent stabilization). Further, the provisions relating to interest on the deposit do not apply to any landlord who rents fewer than five individual dwelling units.<sup>88</sup>

### E. Problem Areas and Possible Sources of Friction

#### 1. LIQUIDATED DAMAGES

The Florida Residential Landlord and Tenant Act has left largely untouched several areas of the previous law. One such area concerns the validity of, and distinction between, stipulations for damages and deposits for security. It appears that the legislature has left to the judiciary the determination of whether a particular deposit operates as a penalty, a valid provision for liquidated damages, or a fund out of which actual damages may be recovered.<sup>89</sup> Since no provision in the Act deals specifically with this problem, presumably the former law governs. Once again, however, the semantic distinction between advanced rental payments and security deposits has been retained.<sup>90</sup>

#### 2. ABANDONMENT OR SURRENDER—LANDLORD'S OPTIONS

Under Florida law, a landlord has four options in the event the lessee fails to pay rent and abandons possession: (1) he may accept a surrender of the leasehold, terminate the lease, relieve the tenant of all further obligations, and resume possession for his own purposes; (2) he may repossess for the account of the lessee and hold him for any damages occasioned by the abandonment and reletting; (3) he may let the premises remain idle and sue the tenant for each rent installment as it comes due, or sue for the entire amount when it is matured; or (4) he may sue for anticipatory breach of contract.<sup>91</sup> It is to be noted that under the third option above the landlord has no duty to mitigate damages. This seemingly inequitable result has not been expressly changed by the Act, but, such provisions as good faith and unconscionability might eliminate that option.<sup>92</sup>

88. FLA. STAT. § 83.49(4), (5) (1973).

89. As to the distinctions and general treatment, see *Kanter v. Safran*, 68 So. 2d 553 (Fla. 1953); 82 So. 2d 508 (Fla. 1955), 99 So. 2d 706 (Fla. 1958); *Paul v. Kanter*, 172 So. 2d 26 (Fla. 3d Dist. 1965); *Platt v. Mannheimer*, 124 So. 2d 503 (Fla. 3d Dist. 1960); Boyer & Ross, *Real Property Law*, 18 U. MIAMI L. REV. 848 (1963); 2 R. BOYER, FLA. REAL ESTATE TRANSACTIONS, §§ 36.14-.16 (1970). Compare note 84 *supra* and accompanying text.

90. In addition to the distinction noted in the text following note 81 *supra* advanced rent is defined in FLA. STAT. § 83.43(9) (1973), and deposit money is defined in FLA. STAT. § 83.43(11) (1973).

91. *Kanter v. Safran*, 68 So. 2d 553 (Fla. 1953); 2 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 36.18 (1970) and cases cited therein.

92. See note 85 *supra* and accompanying text, for a discussion of the possible effect of the act on advanced rental payments.

### 3. EXCULPATORY CLAUSES

It appears clear from a reading of the statute that exculpatory clauses that attempt to relieve the landlord from liability, at least with regard to non-performance of his mandatory statutory duties, will be held void.<sup>93</sup> Exculpatory clauses relating to negligence on the part of the landlord or his agents would appear to be invalid as well.<sup>94</sup> It should also be noted that any exculpatory clause may be challenged on the grounds of unconscionability.<sup>95</sup>

### 4. RETALIATORY EVICTION

Under the Act, the existence of any building, housing or health code violation plays a major role in determining the relative rights and obligations of the landlord and tenant.<sup>96</sup> The legislature has not, however, provided what may be considered an adequate tool for effective enforcement of the various codes. No provision is expressly formulated prohibiting eviction because the tenant has reported such violations to the authorities.

The importance of providing such protection has been aptly stated by Judge Skelly Wright in *Edwards v. Habib*:

The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself.<sup>97</sup>

In addition to such rationale, it is believed that the Act, as previously suggested,<sup>98</sup> does have sufficiently flexible provisions to enable the courts to outlaw strictly retaliatory measures regardless of the reasons giving rise to the retaliation.

## III. MOBILE HOME PARKS

### A. Introduction

Abuses in the operation of mobile home parks and the rental of lots therein led to the enactment of remedial legislation in 1972.<sup>99</sup> Such legislation, however, did not go far enough; therefore, it was amended, supplemented and incorporated into the Residential Landlord and Tenant Act of 1973. The legislation tends to equalize the relative position

93. FLA. STAT. § 83.47(1)(a) (1973). See also note 17 *supra* and accompanying text.

94. FLA. STAT. § 83.47(1)(b) (1973); note 18 *supra* and accompanying text.

95. FLA. STAT. § 83.45.

96. See, e.g., FLA. STAT. §§ 83.51, .56, 92.40 (1973).

97. 397 F.2d 687, 701-02 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

98. See text following note 19 *supra*.

99. FLA. STAT. §§ 83.271, .281, .291 (Supp. 1972).

of the park owner and dweller, outlaws specific unfair practices, regulates eviction matters, and creates specific remedies.

### B. *Grounds for Eviction*

Under the 1972 statute, the mobile home park owner was entitled to evict a dweller for three reasons: (1) nonpayment of rent; (2) violation of some federal, state or local law detrimental to the safety and welfare of the other dwellers in the park; or (3) violation of any rule or regulation of the mobile home park owner.<sup>100</sup> These grounds are retained but, under the new Act, in order to evict a dweller, a *conviction* of a violation of applicable law is required, or if the eviction is based on violation of an "owner rule," the rule must withstand the test of reasonableness.<sup>101</sup> A fourth ground for eviction is provided for in the Act. Where a change in the use of the land of the mobile home lot is planned, the park owner may evict the dweller so long as the dweller is given at least ninety days notice of the need for him to secure other accommodations.<sup>102</sup>

### C. *Restrictions on Disposal of Mobile Homes*

Under the 1972 law, a mobile home park owner could not require the dweller to remove the mobile home from the park solely on the basis of the sale of the home. However, the park owner was permitted the right to approve the new purchaser so long as the permission was not unreasonably withheld.<sup>103</sup> These provisions remain substantially unchanged under the Act, but, if for any reason the park owner refuses to permit the dweller to sell to a qualified buyer after three bona fide offers, the next offer may be accepted as a matter of course.<sup>104</sup>

### D. *Requirements of Entry*

Three major remedial provisions to correct abuses have been included in the Act. First, a prospective tenant shall not be required to

100. *Id.*

101. FLA. STAT. § 83.271(1) (Supp. 1972), *renumbered* § 83.69 (1973). As to what may be termed as reasonable, the Act states:

A mobile home park rule or regulation shall be presumed to be reasonable if it is similar to rules and regulations customarily established in other mobile home parks located in this state or if the rule or regulation is not *immoderate or excessive*.

*Id.* (emphasis added).

If the above provision is construed to mean that the regulation may satisfy either of the two tests, then it would appear that concerted efforts on the part of owners to establish a particular inequitable regulation would be successful. In view of the fact that many regulations prohibited in the Act were matters of common practice, the value of the above provision would be nullified. Hopefully, the court will invalidate an immoderate or excessive regulation, however commonplace.

102. FLA. STAT. § 83.271(1)(d) (Supp. 1972), *renumbered* § 83.69 (1973).

103. FLA. STAT. § 83.291 (Supp. 1972).

104. FLA. STAT. § 83.291 (Supp. 1972), *renumbered* § 83.71 (1973). A "qualified buyer"

make any permanent improvements that become a part of the real property of the park as a condition of entry into the park.<sup>105</sup> Second, the Act provides for a schedule for the return of entry fees where the dweller's occupancy is less than two years in duration.<sup>106</sup> Third, the Act prohibits the resale of electricity or gas by the owner to the dweller at a rate higher than that charged by the public utility from which the electricity or gas was purchased.<sup>107</sup> All three provisions are designed to correct specific abuses.

### E. *Judicial Remedies*

#### 1. CIVIL REMEDY

A mobile home owner or dweller is authorized by statute to maintain an action for damages for violation of the Act's provisions relating to eviction, restrictions on disposal and entry requirements. Equitable relief, where appropriate, may be granted, and costs and attorney's fees may be awarded to the prevailing party in the discretion of the court.<sup>108</sup>

#### 2. INJUNCTION

In addition to any other remedies available for violation of the provisions of the Act, the state attorney may, upon sworn affidavit of any park owner or dweller alleging a violation of the provisions relating to eviction, disposition or entry, petition for an injunction restraining any further violations. The right to an injunction does not depend upon an existing adequate remedy at law, and the injunction may, in the court's discretion, issue without bond.<sup>109</sup>

The Act also creates standards for minimum tie-down requirements for mobile homes.<sup>110</sup> However, the technical requirements are beyond the scope of this article.

### IV. CONCLUDING REMARKS

The Residential Landlord and Tenant Act and the legislation relating to mobile home parks, collectively constitute a significant step in better protecting a large segment of the population which is least able to protect itself. The general act attempts a delicate balance between the rights of the landlord and tenant respectively, while the mobile home provisions appear more directed at specific abuses. No doubt partisan

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appears to mean one who would "qualify with the requirements of entry into the park under the park rules and regulations."

105. FLA. STAT. § 83.281(5) (Supp. 1972), *renumbered* § 83.70(5) (1973).

106. FLA. STAT. § 83.281(6) (Supp. 1972), *renumbered* § 83.70(6) (1973).

107. FLA. STAT. § 83.281(7) (Supp. 1972), *renumbered* § 83.70(7) (1973).

108. FLA. STAT. § 83.301 (1973).

109. *Id.* § 83.311.

110. *Id.* § 320.8325.

proponents of either the landlord or the tenant, or the park operator or of the mobile home owner can find alleged defects in substance or drafting, and can forcefully argue that certain statutes either go too far, or not far enough, in a particular direction. Be that as it may, the legislation is a noble accomplishment. There must be a beginning, and if nothing else, this is a rather comprehensive beginning away from encrusted traditional thinking of conveyancing and estates in rental housing where the consuming tenant is primarily interested in obtaining a package of goods and services, really livable accommodations for a temporary or indefinite period, and not an eternal estate to establish a family dynasty. If the legislation is found wanting in the testing of time, and if the judicial constructions are out of harmony or prove unsatisfactory, there is always the opportunity for subsequent amendments. In the meantime, the right step has been taken to conform residential leaseings to modern needs.