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## Real Property - Florida Supreme Court Survey

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## **Abstract**

This article surveys the decisions made **by** the Florida Supreme Court between October **1, 1989** and September **30, 1990** which deal with real property.

**KEYWORDS:** Florida, property, survey

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This article surveys the decisions made by the Florida Supreme Court between October 1, 1989 and September 30, 1990 which deal with real property. The six decisions concern condominiums, real estate sales, recording and wills. It is interesting that there are so few supreme court decisions in this area despite the fact that real estate is such an important and large part of the practice of law in this state.

### I. CONDOMINIUMS - RECREATION LEASES

#### *Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.*<sup>1</sup>

In 1970, the developer of the Golden Glades Condominium filed a

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1. 557 So. 2d 1350 (Fla. 1990). Justice Overton wrote the opinion in which Chief Justice Ehrlich and Justices Grimes and Kogan concurred. Justices Shaw and Barkett concurred in the result only. Justice McDonald concurred with an opinion.

declaration of condominium. The condominium association<sup>2</sup> immediately leased recreational property from the Golden Glades Club Recreation Corporation; the lease included a rent escalation clause. Later,<sup>3</sup> the lessor merged with the developer and with the Security Management Corporation. As a result of the merger, Security Management became the successor landlord. Security Management brought this suit to collect what it claimed was due for the period between 1980 and January 1987 under the rent escalation clause.

The question originally posed to the court was whether section 718.401(8) of the Florida Statutes prohibited rent escalation under a lease entered into before June 4, 1975, when the statute became effective.<sup>4</sup> After the district court entered its decision in this case, the legislature amended the statute, creating section 718.4015.<sup>5</sup> The 1989 amendment<sup>6</sup> was intended to clarify the 1988 amendment.<sup>7</sup> The supreme court decided it would be appropriate to decide this case under the amended statute, rephrasing the certified question as: "TO WHAT EXTENT DOES SECTION 718.4015(2), FLORIDA STATUTES, PROHIBIT ENFORCEMENT OF ESCALATION CLAUSES IN LEASES ENTERED INTO PRIOR TO JUNE 4, 1975?"<sup>8</sup>

The supreme court expressly rejected any claim that the 1988 amendment allowed the enforcement of escalation clauses contained in leases, like the lease in this case, entered into prior to June 4, 1975.<sup>9</sup> The statute did not change how escalation clauses entered into prior to

2. The association, the Golden Glades Condominium Club, Inc., was apparently controlled at that moment by the developer.

3. The merger occurred in 1981.

4. 557 So. 2d at 1351.

5. See FLA. STAT. § 718.401(8)(a)(b) (1975), amended by FLA. STAT. § 718.4015 (1989).

6. See FLA. STAT. § 718.4015(2) (1989) (amending FLA. STAT. § 718.4015 (1988)).

7. As amended, the statute provides:

(2) [I]t prohibits the enforcement of escalation clauses in leases related to condominiums for which the declaration of condominium was recorded prior to June 4, 1975, but which have been refused enforcement on grounds that the parties agreed to be bound by subsequent amendments to the Florida Statutes or have been found to be void . . . or which have been refused enforcement . . . .

FLA. STAT. § 718.4015(2) (1989).

8. 557 So. 2d at 1351.

9. *Id.*

June 4, 1975 were to be enforced,<sup>10</sup> but merely intended to “recognize established case law and establish a statutory prohibition for escalated rents pursuant to those escalation clauses due after October 1, 1988. This interpretation is also consistent with the 1989 amendment . . . .”<sup>11</sup>

Under the existing case law,<sup>12</sup> passage of section 718.401(8) in 1975 invalidated any rent escalation clause in an existing lease if a lessor and an association had intended to be bound by subsequent amendments to the condominium act. Consequently, the question in this case was whether this lessor had agreed to be bound by subsequent amendments to the Florida Statutes, but in this case, the lessor trying to enforce the rent escalation clause was not the original lessor. Nor was the current lessor one of the parties to the condominium documents in which there was an agreement binding the parties to subsequent amendments to the Florida Statutes.

Even though Security Management had become the lessor and also the successor to the developer, they were separate entities when the declaration and the lease were entered into, and it was “never alleged at trial that the lessor and developer should be viewed as one corporation and that the corporate veil should be pierced.”<sup>13</sup> Consequently, the existing case law was not applicable because it applied only to parties who had agreed to be bound by subsequent statutory amendments, and these had not.

The outcome of this case might have been different if such a claim had been successfully made at trial, and that leaves the reader to speculate on the precedential value of this case. The court might have been hinting at a willingness to pierce the corporate veil under these circumstances. Unfortunately, the court did not reveal why the successor, by a series of mergers, should not be bound by the agreements and the law, which would have bound one of the merged parties. Hopefully, the court did not intend to indicate that a business entity can escape its contractual obligations by merging into another entity.

The court also concluded that there was nothing to suggest that

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10. The treatment of escalation clauses remained unchanged at least for claims arising prior to October 1, 1988.

11. *Id.* at 1355.

12. *See Angora Enter., Inc. v. Cole*, 439 So. 2d 832 (Fla. 1983), *cert. denied*, 466 U.S. 927 (1984).

13. *Golden Glades*, 557 So. 2d at 1355 n.2.

the merger by itself was intended to change the terms of the lease.<sup>14</sup> Therefore, the merger did not have the effect of adding to the lease the provision that the lease would subsequently incorporate amendments to the Florida Statutes, and that the subsequent merger of these parties, by itself, could not cause that change in the lease. This author cannot imagine any logical reason why it would have.

The petitioner had also claimed that the adoption of the definitions from the condominium declaration into the lease had the effect of also adopting into the lease the part of the condominium document whereby the parties would agree to be bound by subsequent amendments of the Florida Statutes. The court apparently found this argument did not merit analysis and simply ignored it.<sup>15</sup>

Justice McDonald concurred. He pointed out that article 1, section 10 of the Florida Constitution prohibits any law impairing the obligation of contracts. He stated: "No matter how hard the legislature may try, it cannot affect the terms of a contract unless the contracting parties indicated an intent to allow it to do so and agreed to follow future legislative enactments. This did not happen here."<sup>16</sup>

Consequently, if the majority had found that this statute prohibited enforcement of a rent escalation clause entered into before the statute's enactment, Justice McDonald would have voted to hold the statute unconstitutional.

## II. REAL ESTATE SALES

### A. *Interstate Land Sales Full Disclosure Act*

#### *Samara Development Corporation v. Marlow*<sup>17</sup>

The Interstate Land Sales Full Disclosure Act<sup>18</sup> is a federal stat-

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14. *Id.* at 1355.

15. *Id.*

16. *Id.* at 1356 (McDonald, J., concurring).

17. 556 So. 2d 1097 (Fla. 1990). Chief Justice Ehrlich wrote the opinion in which Justices Shaw, Barkett and Kogan joined. Justice Overton wrote a dissenting opinion in which Justice Grimes concurred. Justice McDonald dissented without opinion.

18. Housing & Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, as amended by Housing & Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633; Housing & Community Development Amendments of 1979, Pub. L. 96-153; Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. No. 100-628 (codified as amended at 15 U.S.C. §§ 1700-1720 (1982)). Reference in

ute which was designed to protect consumers. It prohibits developers from engaging in certain activities<sup>19</sup> and requires that developers disclose certain information by filing registration statements<sup>20</sup> and making property reports available to prospective buyers or lessees.<sup>21</sup> When these requirements are violated, the act provides that “[a] purchaser or lessee may bring an action at law or in equity . . . [and] the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable.”<sup>22</sup> When the seller in this case breached the contract,<sup>23</sup> the buyer sought damages under this statute because the contract had limited his remedies to rescission of the contract or to specific performance.

The critical question was whether the Interstate Land Sales Full Disclosure Act even applied. The act exempts from coverage any sales contract which obligated the developer to erect a building within two years.<sup>24</sup> The contract to buy a condominium unit, which this buyer had signed, required that the unit would be completed at a date less than two years from the date of the agreement. Consequently, the seller claimed it fit within the statutory exemption, but the district court had not agreed,<sup>25</sup> and, in this decision, the Florida Supreme Court approved

this article will be to the U.S.C. sections. *See also Beyond Consumer Protection: The Application of the Interstate Land Sales Full Disclosure Act to Condominium Sales*, 37 U. FLA. L. REV. 945 (1985); R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 2.08 (1959).

19. 15 U.S.C. § 1703(a) (1982).

20. *Id.* at §§ 1703(a)(1)(A), 1704-1706.

21. *Id.* at §§ 1703(a)(1)(B), 1707.

22. *Id.* at § 1709(a). Furthermore, the recovery may include “interest, court costs, and reasonable amounts for attorneys’ fees, independent appraisers’ fees, and travel to and from the lot.” *Id.* at § 1709(c).

23. It is not clear how the seller defaulted from either the supreme court’s decision or from the district court’s decision in *Marlow v. Samara Development Corp.*, 528 So. 2d 420 (Fla. 4th Dist. Ct. App. 1988).

24. Section 1702 provides:

(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to-

. . . .

(2) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease under a contract obligating the seller or lessor to erect such a building thereon within a period of two years.

15 U.S.C. § 1702(a)(2) (1982).

25. *Marlow*, 528 So. 2d 540.

of that conclusion.<sup>26</sup>

The basis of the holding was that because the buyer could not recover damages if the seller defaulted, this contract essentially gave the seller the choice of returning the buyer's money rather than completing the project.<sup>27</sup> Thus, the contract did not really obligate the seller to erect a building within two years, and so it did not fall within the statutory exception.

The seller had argued that the HUD guidelines<sup>28</sup> provided otherwise and that the courts should defer to the judgment of the agency empowered to interpret and enforce the act. While the district court had recognized that principle, it had simply followed its own precedent<sup>29</sup> in rejecting the exemption claim, but it felt constrained to certify the question,<sup>30</sup> implicitly acknowledging the conflict between its holding and the HUD guidelines.

That was the point of Justice Overton's dissent.<sup>31</sup> He stated: "If I

26. *Marlow*, 556 So. 2d at 1099.

27. *Id.* at 1098.

28. Guidelines for Exemptions under the Interstate Land Sales Full Disclosure Act, 44 Fed. Reg. 24,010, 24,012 (1979) [referred to as the "1979 HUD Guidelines"], and Guidelines for Exemptions under the Interstate Land Sales Full Disclosure Act, 49 Fed. Reg. 31375, 31376 [referred to as the "1984 HUD Guidelines"].

29. See *Berzon v. Oriole Homes Corp.*, 497 So. 2d 670 (Fla. 4th Dist. Ct. App. 1986).

30. The question certified was as follows:

IS A CONTRACT FOR THE SALE OF A CONDOMINIUM IN FLORIDA EXEMPT FROM THE PROVISIONS OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT, 15 U.S.C. § 1710, WHERE IT PROVIDES FOR COMPLETION WITHIN TWO YEARS BUT RESTRICTS THE BUYER'S REMEDIES FOR BREACH OF THE CONTRACT BY THE SELLERS TO A RETURN OF THE DEPOSIT OR SPECIFIC PERFORMANCE, OR MUST THE CONTRACT ALSO AFFORD THE BUYER THE ALTERNATE REMEDY OF A SUIT FOR DAMAGES?

*Marlow*, 528 So. 2d at 422; *Marlow*, 556 So. 2d at 1098. The reference to section 1710 is rather odd. That section deals the relief available to a person aggrieved by an order or determination of the Secretary of HUD. In all probability, this is merely a typographical error in the district court's opinion which was inadvertently repeated by the supreme court. It should have been 15 U.S.C. §§ 1701-1720 (1982).

31. After establishing the authority of HUD under 15 U.S.C. § 1715 (1982), he examined the 1979 HUD Guidelines, the 1984 HUD Guidelines, and pointed out "numerous [Office of Interstate Land Sales Registration] advisory opinions which state that exemptions will be granted to complete the building within two years and the purchaser is not restricted from seeking specific performance." *Marlow*, 556 So. 2d at 1102 (Overton, J., dissenting).

were writing on a clean slate, I would have no problems reaching the conclusion of the majority.”<sup>32</sup> But, he concluded, “I find that we must defer to the authorized federal agency’s interpretation of the federal statute unless it is shown to be clearly erroneous.”<sup>33</sup> The majority, however, found no conflict.

In examining the 1979 and 1984 HUD Guidelines, it found that the examples were to be merely illustrative, not exhaustive. The example of a non-exempt sale provided in the 1979 Guidelines was a contract which limited the buyer’s right to seek specific performance. The example of a non-exempt sale provided in the 1984 Guidelines was a contract which provided that the breaching seller would be liable only for the return of the buyer’s deposit. But these were not intended to establish the only types of non-exempt sales contracts. “The position indicated by these guidelines is clearly that the obligation to complete construction within two years must not be illusory.”<sup>34</sup>

Furthermore, the court invoked two well established canons of statutory interpretation. First, a statute intended to protect the public should be liberally construed in favor of the public. Second, exceptions should be narrowly and strictly construed. It used these, apparently, as the basis for adopting a liberal definition of “illusory.”<sup>35</sup>

Whether a contract is illusory is a matter of state contract law on which the Florida Supreme Court is the highest authority. The court concluded that under Florida law, “without the availability of at least both specific performance and damages the obligation to complete construction within two years is illusory.”<sup>36</sup> Therefore, this contract did not fit within the statutory exemption, and the buyer was entitled to the statutory remedy.

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The majority, however, pointed out that the dissent relied on advisory opinions issued during a six month period during 1982 and that there were earlier and later advisory opinions which were contradictory. More importantly, the advisory opinions may have been based upon counsel’s representation of state law. *Id.* at 1100 n.2.

32. *Marlow*, 556 So. 2d at 1102.

33. *Id.*

34. *Id.* at 1099-1100.

35. *Id.* at 1101. The author suggests that the conclusion of the court that this obligation is illusory is only for the purposes of deciding whether this sale is exempt from the Interstate Land Sales Full Disclosure Act and is not to suggest that such a contract is illusory for any or all other purposes.

36. *Id.* at 1101.

## B. Closing Practices

### *Warren Finance, Inc. v. Barnett Bank of Jacksonville*<sup>37</sup>

This case does not deal directly with real property. It deals with cashier's checks. However, it is included in this survey because it reflects upon a common practice at real estate closings.<sup>38</sup> Real estate purchase contracts frequently provide that the buyer will pay the purchase price, above new or existing mortgages, by cashier's check. The buyer has the cashier's check made out to himself or herself, and then at the closing, endorses the cashier's check over to the seller. Buyers follow this practice so that if the closing is aborted, it will be easy for them to deposit the check into their own accounts. This practice raises several questions for the seller and his or her attorney. Does the contract require the seller to accept that endorsed cashier's check? Is the seller taking any additional risks by accepting that check?

In *Warren Finance*, the supreme court was presented with the following certified question: "MAY THE ISSUING BANK ASSERT THE DEFENSES OF A PAYEE OR ENDORSEE AGAINST THE RIGHT OF A SUBSEQUENT ENDORSEE TO RECEIVE PAYMENT ON A CASHIER'S CHECK?"<sup>39</sup> If the issuing bank could refuse to pay the check and escape liability by asserting the defenses of the payee or endorsee,<sup>40</sup> then the seller taking the endorsed cashier's check would have an instrument which might not be paid for a greater number of reasons than if the seller had received a cashier's check made out to him or her directly. By accepting the endorsed check, the seller might be taking additional risks thereby losing some of the protection sought by having the contract provide for payment by cashier's check. Of course, whether the seller would be required to accept that check would depend on the terms of the particular contract, so informed parties should consider this case carefully before drafting a contract and negotiating its terms.

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37. 552 So. 2d 194 (Fla. 1990). Justice McDonald wrote the opinion in which Justices Overton, Barkett, Grimes and Kogan and Chief Justice Ehrlich joined. Justice Shaw wrote a special concurrence.

38. The common practice referred to is namely, the closing of the sales transaction when the buyer pays the price and the seller delivers the deed.

39. *Id.*

40. See *infra* text and accompanying notes 50-60. Defenses of the payee and endorsee include fraud in the underlying transaction between the payee or endorser and the endorsee who is presenting the cashier's check for payment.

In this case, Barnett Bank issued three cashier's checks naming Redan as payee and Blossam and Butler as purchasers. The payee endorsed the cashier's checks to Warren who deposited them in its account at another bank. Having a change of heart,<sup>41</sup> the payee and one of the purchasers convinced Barnett Bank to refuse payment based upon allegations that the endorsee had committed fraud. The endorsee brought this suit against the bank for the wrongful dishonor of the checks. The district court remanded the case to determine if Warren was a holder in due course,<sup>42</sup> but this court quashed that decision, ordering the reinstatement of the trial court's judgment that the bank pay damages to the endorsee.<sup>43</sup>

Two theories are currently in vogue regarding cashier's checks. One is the cash equivalent theory, which analogizes the cashier's check to a certified check. Under U.C.C. section 4-303,<sup>44</sup> because a certified check has already been accepted by the certifying bank, it may not be dishonored "based either on its own defenses or the defenses of another party to the check"<sup>45</sup> and so neither may the cashier's check. The court rejected this analysis.

The other approach is the note theory. Characterizing a cashier's check as a draft drawn by the bank upon itself, this theory relies upon U.C.C. section 3-118, which provides that such a draft is "effective as a note."<sup>46</sup> Under the U.C.C., the defenses available against one presenting a note would depend on whether the person was a holder in due course.<sup>47</sup> The court rejected this analysis too.

Rather than adopt either of these theories,<sup>48</sup> the court pointed out

41. The payee sought to stop payment because Warren had allegedly breached other terms of their agreement by refusing to advance funds to Redan. *Warren Finance*, 552 So. 2d at 195.

42. *Barnett Bank v. Warren Finance, Inc.*, 532 So. 2d 676 (Fla. 1st Dist. Ct. App. 1988).

43. *Warren Finance*, 552 So. 2d at 201.

44. U.C.C. § 4-303 (1987). The court prefers to refer to the Uniform Commercial Code sections rather than to the statutory counterpart, chapters 671-680 of the Florida Statutes. *See Warren Finance*, 552 So. 2d at 196 n.2. This discussion will follow the same format.

45. *Id.* at 197.

46. *Id.* (quoting U.C.C. § 3-118 (1987)).

47. *See* U.C.C. § 3-305 (1987).

48. It may also be possible to analogize a cashier's check to a letter of credit, which under U.C.C. § 5-114(2), a customer may enjoin the issuing bank from honoring due to fraud in the transaction if the presenter is not a holder in due course. However, further analysis of these three theories is beyond the scope of this article, which is to

that the U.C.C. lacks any provisions which govern the problem<sup>49</sup> and that: "When used in place of a personal check or other negotiable instrument, the parties' expectation is that the cashier's check will remove all doubt as to whether the instrument will be returned to the holder unpaid due to insufficient funds in the account, a stop payment order or insolvency."<sup>50</sup> Therefore, the court invoked U.C.C. section 1-103<sup>51</sup> and U.C.C. section 1-102(1)<sup>52</sup> as the basis for giving prime importance to the commercial use of cashier's checks and expectations of people using cashier's checks.

It concluded that the issuing bank must not be placed in the middle of disputes about underlying transactions and that payees and endorsees must be able to rely upon the cash-like quality of cashier's checks,<sup>53</sup> but, "[a] rule that would absolutely forbid a bank's refusing to pay the holder of a cashier's check . . . would be inordinate."<sup>54</sup> It adopted the rule that "upon presentment for payment by a holder, a bank may only assert its real and personal defenses in order to refuse payment on a cashier's check issued by the bank,"<sup>55</sup> and it went on to state that:

The only inquiry a bank may make upon the presentment of a cashier's check is whether or not the payee or endorsee is in fact a legitimate holder, i.e., whether the cashier's check is being presented by a thief or one who simply found a lost check, or whether the check has been materially altered.<sup>56</sup>

It seems that the court is, in this dicta, narrowing the scope of "real

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focus on the effect of the case upon real property law and practice.

49. Of course, a contrary argument can be made. The U.C.C. clearly provides the rules which apply to checks and, by not treating a cashier's check any differently, the drafters and the adopting legislatures have indicated an intent that these rules apply the same way to cashier's checks as they do to checks drawn by others.

50. *Warren Finance*, 552 So. 2d at 196.

51. This section provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." U.C.C. § 1-103 (1987).

52. This section provides that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies," noting that one of these is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." UCC § 1-102(2)(b) (1987).

53. *Warren Finance*, 552 So. 2d at 201.

54. *Id.*

55. *Id.*

56. *Id.*

and personal defenses” available to the issuing bank and thereby eliminating some, such as the failure of consideration in the purchase of the cashier’s check.<sup>57</sup> Whether the court really intended to go so far and whether subsequent courts will feel bound by this language is uncertain.

The language quoted above would seem to eliminate any reason for a seller to hesitate in accepting a properly endorsed cashier’s check at a real estate closing. If only the court had stopped there. Unfortunately, the court created some uncertainty when it chastised the district court for its mistaken reliance on an Ohio case.<sup>58</sup> In that case, one person was both the purchaser and payee of a cashier’s check. He had purchased a car, paying for it with a cashier’s check that he endorsed over to the car’s seller. Upon discovering the condition of the car had been misrepresented, the purchaser/payee convinced the issuing bank to refuse payment. The Ohio court had held that the issuing bank could, in its discretion, refuse payment at the request of the purchaser/payee without incurring liability.

The Florida Supreme Court emphasized that the Ohio case was distinguishable, correctly stressing that the case before the court did not deal with a purchaser/payee as did the Ohio case.<sup>59</sup> What follows begins — “[m]oreover, banks cannot be permitted . . . .”<sup>60</sup> “Moreover” means “in addition to what has been said.”<sup>61</sup> The problem is that the opinion did not clarify to what the addition applied. Is it in addition to what had already been said about the reasons the Ohio case should not have been followed, i.e., does it mean that, in addition to being factually distinguishable, the Ohio case is also badly reasoned and would not have been followed even if not distinguishable? Or was the court simply reiterating the reasons for its holding without considering the persuasive value of the Ohio case?

This author would suggest that the former is more likely the correct interpretation. The reasons that followed the “moreover” were that banks should not be allowed the discretion to refuse to pay cashier’s

57. See U.C.C. § 3-408 (1987), entitled “Consideration.” This section states that “[w]ant of failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3-305) . . . .”

58. *Leo Syntax Auto Sales, Inc. v. Peoples Bank & Sav. Co.*, 6 Ohio Misc. 226, 35 Ohio Op. 2d 330, 215 N.E.2d 68 (1965).

59. *Warren Finance*, 552 So. 2d at 200.

60. *Id.*

61. WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 957 (College ed. 1964).

checks and that banks should not arbitrate disputes over the payment of cashier's checks. Both would occur if banks could refuse to pay the endorsee/holder of a cashier's check based upon another's defenses regardless of whether that third party was both the purchaser and the payee. Thus, it would seem what followed the "moreover" were additional reasons why the Ohio case should not have been followed even if it had not been factually distinguishable.

Such an interpretation would help eliminate some doubts which sellers of land may have about accepting an endorsed cashier's check as payment, and this author would certainly endorse such an interpretation. Unfortunately, it is merely dicta and unclear dicta at that.<sup>62</sup> While judicial conservatives will fault the court for going beyond the facts of this case, many members of the practicing bar will lament that the court did not go far enough. The rights of an endorsee/holder of a cashier's check which was purchased by the named payee/endorser have yet to be made clear and certain.

The uncertainty results, in part, from the existence of another possible interpretation of this case; the court may have been exercising judicial restraint and, therefore, the reasons after the "moreover" were simply a reiteration of the reasons, already expressed, for the holding. Why, one may ask, did the court go to the trouble of factually distinguishing that case if it intended to indicate that the reasoning of the Ohio court was erroneous? Why make a big deal out of the distinguishing facts if those facts were not significant enough to have produced a different outcome? But if the court did not disapprove of the Ohio case, it might be followed in the future in a case that is not factually distinguishable. That should concern real estate lawyers because the distinguishable facts in the Ohio case, which involved a purchaser/payee,<sup>63</sup> are exactly what would be encountered in a typical real estate closing.

If the supreme court did not intend to disapprove of the Ohio case, then why was it even raised?<sup>64</sup> The court might have simply been taking the district court to task for what it considered sloppy workmanship<sup>65</sup> in hopes of getting a better quality product in the future, but

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62. If only a phrase of clarification had been added. For example, "moreover, even if not distinguishable, this case is not persuasive because . . ." or "moreover, reiterating the reasons for our decision . . ."

63. The purchaser of the cashier's check is also the purchaser of the real estate.

64. Of course, that is an excellent argument for the proponents of the first interpretation, i.e., that the court intended to express its disapproval of its reasoning.

65. The impression the court is complaining of (sloppy workmanship) may be based upon the court's language that "[t]he district court's reliance [on the Ohio case]

that hardly seems warranted by this district court decision. Rather, the court might have been leaving open the possibility that it might, at some time in the future, allow a bank to escape liability for wrongful dishonor, where a real estate buyer purchased a cashier's check, used it at closing to pay the purchase price by endorsing it over to the seller, and subsequently convinced the issuing bank not to honor it based upon a claim that the condition of the property had been misrepresented. That possibility, however remote it may seem, might encourage a disgruntled or unscrupulous buyer to try it, might encourage the bank to agree,<sup>66</sup> and should concern sellers and their lawyers. Because of the language in this case, the real estate seller who accepts the endorsed cashier's check does so with the risk that the buyer might try to have the cashier's check dishonored and possibly succeed.<sup>67</sup> Nor is it entirely clear, that the seller would be in any better position with a cashier's check made out directly to him or her.

This author doubts that the Florida Supreme Court, particularly in light of its recognition of the importance of facilitating commercial practices, intended to create this uncertainty or intended to discourage this use of cashier's checks. Under the current state of the law, sellers might be well advised to negotiate for a contract term which requires that the deed be held in escrow until the buyer's check has cleared. A land seller who accepts an endorsed cashier's check at closing should realize the risk, but if the contract merely provides for payment by cashier's check, he or she may have little choice but to take it and hold his or her breath until the check clears.

It may be advisable to do everything possible to minimize that time between accepting the check and its being paid by the issuing bank. The seller might bargain for a term in the contract which requires the cashier's check to be drawn on a local bank. The land seller/endorsee could immediately present the cashier's check at that bank for

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is untenable." *Warren Finance*, 552 So. 2d at 200. Untenable seems an extreme word if the court was merely substituting its judgment for that of the lower court.

66. It is far beyond the scope of this article to suggest whether the lawyer for an issuing bank should consider dishonoring a cashier's check or whether it might incur liability by doing so. The point here is that a bank might actually do it and that could cause considerable harm to a real estate seller even if the bank is subsequently held liable or, as is more likely, the matter is subsequently settled.

67. It may certainly be argued that there is no legitimate reason to mention the Ohio case other than to leave the door open for a subsequent case to follow it without being inconsistent with this decision.

payment.<sup>68</sup> Even if deposited at another bank, a local check would clear more quickly than an out-of-state check, and, therefore, be more likely to clear before there was time for the buyer to make a protest to the issuing bank. At the very least, the real estate seller should try to schedule the closing so as to minimize the time between the closing and the time when the check would normally be expected to clear.<sup>69</sup>

Justice Shaw concurred specially in *Warren*, noting that he would have preferred to adopt the cash equivalent theory, and he would have preferred that the court go no further than was necessary to decide this case. Since the bank in this case did not assert any real or personal defenses, it was, he stated, inappropriate to speculate upon the question of whether they could be asserted against the presentment of an endorsed cashier's check.<sup>70</sup>

The uncertainty in the use of cashier's checks is a problem which could be quickly and easily solved by the legislature. It has not, thus far, been hesitant to modify the terms of the U.C.C., and, solving this problem would not require elaborate statutory surgery. Until that happens, or the supreme court has the opportunity to clarify this holding, the current practice of a seller accepting an endorsed cashier's check is under an unfortunate, and probably inadvertent, cloud.

### III. RECORDING

#### A. Title Search

*Erskine Florida Properties, Inc. v. First American Title Insurance, Inc.*<sup>71</sup>

The court state the issue in this case as: "WHEN A PARTY CONDUCTS A TITLE SEARCH OF A PIECE OF PROPERTY AND SEARCHES ONLY THE DIRECT AND INDIRECT ALPHABETICAL INDEXES, CAN IT BE HELD LIABLE FOR FAILING TO DISCOVER AN IMPROPERLY INDEXED

68. Perhaps the land seller might present it to the issuing bank and obtain, in exchange, a cashier's check in which he is the named payee and the purchaser. Asking for cash will probably result in a ridiculous delay, possibly refusal for lack of sufficient cash, and the unpleasant attention of both the D.E.A. and the I.R.S.

69. For example, the closing should be scheduled so there is no weekend between the closing and the anticipated payment of the check by the issuing bank.

70. 552 So. 2d at 201 (Shaw, J., concurring specially).

71. 557 So. 2d 859 (Fla. 1989). Justice Shaw wrote the opinion for an unanimous court.

CLAIM?"<sup>72</sup> The question could probably be better stated by asking if an abstractor could be held liable for failing to discover an outstanding interest which was not properly indexed in the official grantor-grantee indexes but was discoverable in another index. Both questions are answered by the word "yes."

Erskine contracted for First American to provide a title search. First American searched only the "alphabetical indexes maintained in the county clerk's office,"<sup>73</sup> but failed to discover a third party's superior interest because evidence of that had not been properly indexed.<sup>74</sup> The interest could, however, have been discovered by reference to a computerized index system which identified the parcels by numbers.<sup>75</sup>

The court reasoned that an abstractor has contracted to determine what is in the public record.<sup>76</sup> Therefore, the abstractor may be held liable for breaching that contract<sup>77</sup> if the search is not conducted "skillfully and diligently."<sup>78</sup> The problem in this case is that the plaintiff had not introduced any expert evidence that the search failed to meet this standard.<sup>79</sup> The evidence did show, however, that an index organized by parcel numbers existed which the abstractor admitted was relied upon "as a security check," although "her office caution[ed] abstractors not to rely solely on [it] . . ."<sup>80</sup> The supreme court found that this was sufficient evidence to support the trial court's conclusion that the abstractor had failed to perform its contractual duty.<sup>81</sup>

72. *Id.*

73. *Id.*

74. A more complete explanation of the facts may be discovered in the district court's opinion, but it is not necessary for the discussion here. *See* First Am. Title Ins. Co. v. Erskine Florida Properties, Inc., 528 So. 2d 1229 (Fla. 4th Dist. Ct. App. 1988).

75. The abstractor testified that parcels of land are assigned an identification number and that number is used when the information is entered into the computer. *Erskine*, 557 So. 2d at 860.

76. *Id.* (quoting with approval *Williams v. Polgar*, 391 Mich. 6, 20, 215 N.W.2d 149, 157 (1974)).

77. *See, e.g.*, First Am. Title Insurance Co. v. First Title Serv. Co., 457 So. 2d 467 (Fla. 1984); *Stickler v. Indian River Abstract & Guar. Co.*, 142 Fla. 528, 195 So. 195 (1940). Note that this impliedly, though not expressly, overrules the holding in *Kovaleski v. Tallahassee Title Co.*, 363 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1978).

78. *Erskine*, 557 So. 2d at 860 (quoting *First Am. Title Insurance Co.*, 457 So. 2d at 472).

79. This was the point on which the trial court's judgment for the plaintiff had been reversed by the district court. *See* First Am. Title Insurance Co. v. Erskine Florida Properties, Inc., 528 So. 2d 1229 (Fla. 4th Dist. Ct. App. 1988).

80. *Erskine*, 557 So. 2d at 860.

81. *Id.* More informative is the dissent of Judge Letts in the district court's opin-

The court may seem to be adopting a rule that an abstractor must examine any secondary indexes which are available, but the court did not necessarily go so far. It only found that the evidence here was sufficient to uphold the trial court's decision. Thus, the holding is merely that an abstractor can be found liable, without the introduction of expert testimony on the level of care and skill required, for failing to find a misindexed encumbrance which could not have been found in public records but could have been found in a secondary index.<sup>82</sup> The court pointed out that "First American was free to introduce its own experts to show that it conducted a skillful and diligent search."<sup>83</sup> The outcome of this case might have been different if the abstractor had introduced expert evidence to show that the standard in that county did not require searching both indexes.

Furthermore, confusion is created by the fact that the court never stated whether the second index involved was an official index or a privately owned index.<sup>84</sup> Nor is there anything in the district court's opinion to clarify that point. It seems possible that the parcel identification index here was an official index,<sup>85</sup> but even so, this case may be opening the door to a future holding that an abstractor cannot rely solely upon the official index if a highly regarded private index exists. Abstractors and title searchers should be concerned.

## B. *Lis Pendens*

### *American Legion Community Club v. Diamond*<sup>86</sup>

Under the doctrine of *lis pendens*, once litigation has commenced

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ion. Judge Letts, an admitted "former abstract-thumber," pointed out that "[i]n the instant case, the trial court held 'from its own experience' that a 'title searcher reviews the records via legal description' and, in effect, took judicial notice of that fact. I see no room for an argument about such a basic tenet of abstracting." *Erskine*, 528 So. 2d at 1231 (Letts, J., dissenting).

82. *Erskine*, 557 So. 2d at 860.

83. *Id.*

84. For example, an index based upon a privately owned title plant.

85. The case notes that the parcel identification index was organized by numbers assigned by the tax assessor's office. Further, the quote used by the court regarding the abstractor's contractual obligation was that "an abstractor is hired to determine what is in the public record. . . ." *Id.* (quoting *Williams v. Polgar*, 391 Mich. 6, 20, 215 N.W.2d 149, 157 (1974)).

86. 561 So. 2d 268 (Fla. 1990). Justice Overton wrote the opinion for an unanimous court.

regarding title to land, any subsequent purchaser is bound by the outcome of that litigation. By statute, Florida has modified that doctrine by requiring the recording of a notice of lis pendens<sup>87</sup> in the office of the clerk of the circuit court in the county where the property is located. Under the statute, the filing of the notice acts as a bar to all subsequent claims and also to any prior unrecorded claims unless the claimant intervenes in the proceedings within twenty days.<sup>88</sup> The notice is only effective for one year “unless the relief sought is disclosed by the initial pleading to be founded on a duly recorded instrument . . . .”<sup>89</sup> The district courts had produced inconsistent interpretations of that phrase.<sup>90</sup> In *Diamond*, the Florida Supreme Court eliminated the conflict by providing the authoritative interpretation.

In the first suit, the American Legion Community Club (hereinafter “Club”) had sued to cancel a lease to Murray Diamond.<sup>91</sup> Diamond counterclaimed and also filed a third party complaint against Del Rossi Enterprises, Inc.<sup>92</sup> The trial court held that the lease was valid and awarded Diamond damages on its third party complaint.<sup>93</sup> On the day of the trial court’s decision, the Club conveyed the land to Del Rossi. Three years later, on November 19, 1987, Diamond sought the forced sale of the property to satisfy his judgment against Del Rossi. Unfortunately, in the interim, the property had already been the subject of a settlement agreement in another suit.

In the second suit, the American Legion Department of Florida (hereinafter “Department”) had filed suit alleging, *inter alia*, that the

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87. FLA. STAT. § 48.23 (1985). Although the statute has not been modified since its 1985 enactment, this discussion will refer to the 1985 codification which was the topic of this case.

88. *Id.* at § 48.23(1)(b).

89. *Id.* at § 48.23(2).

90. See *Diamond v. American Legion Community Club*, 544 So. 2d 239 (Fla. 3d Dist. Ct. App. 1989) (the case which the Florida Supreme Court was reviewing); *Albega Corp. v. Manning*, 468 So. 2d 1109 (Fla. 1st Dist. Ct. App. 1985); *Berkley Multi-Units, Inc. v. Linder*, 464 So. 2d 1356 (Fla. 4th Dist. Ct. App. 1985); *Mohican Valley, Inc. v. MacDonald*, 443 So. 2d 479 (Fla. 5th Dist. Ct. App. 1984); *Chapman v. L & N Grovel, Inc.*, 244 So. 2d 154 (Fla. 2d Dist. Ct. App. 1971).

91. The basis for this suit was the claim that the corporate officers who made the lease lacked the necessary authority.

92. The basis for the third party complaint was that Del Rossi had “intentionally and maliciously interfered with the lease agreement between American Legion Community Club and Diamond.” 561 So. 2d at 270.

93. That decision was affirmed. See *American Legion Community Club v. Diamond*, 461 So. 2d 130 (Fla. 3d Dist. Ct. App. 1984).

deed to Del Rossi should be declared void. It filed a notice of lis pendens on June 27, 1985. In a settlement agreement, entered as a judgment on December 29, 1987, Del Rossi agreed to reconvey the property to the Department.

If the notice of lis pendens filed in the second suit was still effective when Diamond sought to execute its judgment from the first suit, then Diamond's execution sale would fail because the sale would be subject to the outcome of the first suit, i.e., the agreed reconveyance to the Department, and Diamond had no basis for executing against the Department's property.<sup>94</sup> In other words, Diamond would not be able to force the sale of the property which belonged to the Department to satisfy his judgment against the Club. However, if the Department's notice of lis pendens had expired when Diamond sought the execution sale, that sale would take priority over the agreement to reconvey to the Department.<sup>95</sup> The sale was more than one year after the filing of the lis pendens in the second suit, so the notice would no longer be effective unless "the relief sought [was] disclosed by the initial pleading to be founded on a duly recorded instrument . . . ."<sup>96</sup>

The second suit was based upon the claim that the deed was void because it was "neither considered nor approved by the requisite number of members of the Executive Committee, Board of Directors, and Board of Trustees . . . and there was a total absence of consideration."<sup>97</sup> The court noted that these were circumstances surrounding the execution of the deed. In pointing out the conflict among the districts, the court quoted from a Fourth District<sup>98</sup> decision to the effect that the crucial point should be whether notice of potential litigation was afforded by the recorded instrument itself. It contrasted a recorded mortgage, which by its nature gives notice to all that there is the potential for foreclosure, with the recording of a warranty deed, as occurred here, which does not give any warning that an action may occur to test its validity. While the court never expressly approved the Fourth District's decision, it did state that it was "better reasoned"<sup>99</sup> than the other decisions. The court concluded that a notice of lis pendens is

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94. *Diamond*, 561 So. 2d at 271.

95. *Id.*

96. FLA. STAT. § 48.23(2) (1985).

97. *Diamond*, 561 So. 2d at 270.

98. *Id.* at 271-72; see *Berkley Multi-Units, Inc. v. Linder*, 464 So. 2d 1356, 1357-58 (Fla. 4th Dist. Ct. App. 1985).

99. *Diamond*, 561 So. 2d at 272.

founded upon a recorded instrument only when the claim is based upon the terms and provisions contained in the document.<sup>100</sup> To do otherwise, it stated, would practically eliminate the one year limitation.<sup>101</sup>

The court further dismissed any claim that Diamond was bound by the outcome of the second suit because he had constructive notice of it.<sup>102</sup> The court relied upon the plain language of the statute that “[n]o notice of lis pendens is effectual *for any purpose* beyond one year . . . .”<sup>103</sup> without further explanation, noting that the Department could have requested that the trial court extend the period of effectiveness of the notice.<sup>104</sup> The implication is that any claim to extend the effectiveness of the recorded notice had been waived.

#### IV. WILLS - MORTMAIN

##### *Shriners Hospitals for Crippled Children v. Zrillic*<sup>105</sup>

Florida Statute section 732.803 (1985) was a mortmain statute. It provided that the spouse or lineal descendant could avoid a devise made to a “benevolent, charitable, educational, literary, scientific, religious, or missionary institution, corporation, association, or purpose . . . or a county, city or town . . .” if made within the six months preceding the testator’s death.<sup>106</sup> When her mother left the substantial residue of

100. *Id.* at 271.

101. *Id.* at 272.

102. Why he had “constructive notice” of it is not suggested. Probably, the claim was that the expired notice of lis pendens should have been discovered in the title search and, consequently, its existence in the record should have put the world on constructive notice even though it had expired.

103. *Id.* at 272 (emphasis supplied by the court).

104. *Id.* The court can grant an extension on reasonable notice, for good cause and subject to such terms as the court concludes that justice requires. FLA. STAT. § 48.23(1)(b) (1985).

105. 563 So. 2d 64 (Fla. 1990). Justice Barkett wrote the opinion for the court, joined by Chief Justice Ehrlich and Justices Shaw and Kogan. Justice Grimes wrote an opinion concurring with the result. Justice McDonald wrote an opinion, joined by Justice Overton, concurring with the result and dissenting in part.

106. FLA. STAT. § 732.803 (1985). Actually there may be some academic argument about whether the statute was really a mortmain statute, but that is of no great importance. Justice McDonald did state in *Zrillic*: “Our statute is not a mortmain act. The Legislature never intended by the enactment of the statute to place any restriction upon the right of benevolent, charitable, educational, or religious institutions to take and hold property . . . .” *Zrillic*, 563 So. 2d at 72 (McDonald, J., concurring in part and dissenting in part) (quoting *Taylor v. Payne*, 154 Fla. 359, 364, 17 So. 2d 615,

her estate to the Shriners Hospitals for Crippled Children, Lorraine E. Zrillic invoked the statute. The circuit court held that she had standing to invoke the statute, but that the statute was unconstitutional.<sup>107</sup> On the latter point, the Fifth District Court of Appeal reversed.<sup>108</sup>

Before it could reach the constitutional issue, the supreme court had to deal with the standing issue. It had been argued that the daughter, Lorraine Zrillic, did not have standing to invoke the statute because she has been expressly disinherited, except for the specific bequest of certain antique dishes and figurines. The statute provided that the devise could be avoided by a spouse or lineal descendant "who would receive any interest in the devise, if avoided . . ."<sup>109</sup> There was no doubt that the daughter was testator's lineal descendant, but it was argued that the testator's clearly expressed intent was that her daughter receive only that specific property. To give her part of the residue would violate the testator's intent, and the general rule of will interpretation is that the intent of the testator controls.<sup>110</sup>

The court rejected the argument. It held that the statute was a specific statute which would, following the rules of statutory interpretation, supersede general rules like the rules of will construction.<sup>111</sup> Further, the plain meaning of the statute did not deny standing to any lineal descendant simply because that descendant would otherwise be limited to a specific devise. More importantly, the purpose of the statute would be undermined if the only ones to have standing would be those that the testator intended to receive the devise because the point of the statute is to deprive an intended beneficiary of the property which the testator expressly intended it to have.<sup>112</sup>

The court, however, found that the statute was unconstitutional on

618, *appeal dismissed*, 323 U.S. 666 (1944)).

107. *Id.* at 66.

108. *Zrillic v. Estate of Romans*, 535 So. 2d 294 (Fla. 5th Dist. Ct. App. 1988) had held the statute constitutional. Consequently, the daughter could invoke it to avoid the residuary devise to the hospital and the residue would then pass to her by intestate succession. Plaintiff, the testator's daughter, would be entitled to an intestate share.

109. FLA. STAT. § 732.803(c) (1985).

110. *Zrillic*, 563 So. 2d at 66. There is no mention of an alternate residuary legatee, so Lorraine E. Zrillic would apparently inherit all or part of the residue under the laws of intestate succession.

111. *Id.*

112. Possibly the Shriner's argument was that the statute could only be invoked by a lineal descendant who was a residuary legatee, but even that makes little sense. Moreover, the point seems moot since the statute was held unconstitutional.

two grounds.<sup>113</sup> First, it violated article I, section 2 of the Florida Constitution. Second, it violated the equal protection clause of both the Florida Constitution<sup>114</sup> and the United States Constitution<sup>115</sup>.

The Florida Constitution provides that all natural persons have the right to “acquire, possess and protect property” subject only to the exception that “ownership, inheritance, dispossession and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law.”<sup>116</sup> The court relied upon “a common sense reading of the plain and ordinary meaning of the language to carry out the intent of the framers as applied to the context of our times.”<sup>117</sup> The court concluded that the historical treatment of devise as a statutory right, rather than a common law property right, is an anachronism to be discarded, and as a property right, it would be protected by this provision.<sup>118</sup>

Since the right to devise property is protected by the constitution, a statute which interfered with that right would be constitutional only if it was “reasonably necessary.”<sup>119</sup> The court concluded that this statute was not.<sup>120</sup> The historical justification of mortmain statutes was “to restrict the church’s ability to acquire property” and there is no comparable need today.<sup>121</sup> Nor did the statute protect the testator’s dependent or needy family from disinheritance. Family members were already adequately protected by other Florida laws,<sup>122</sup> so this statute merely provided windfalls to some relatives, contrary to the wishes of the testator. It is important to note that the “reasonably necessary” standard may now be used as the test of any statute, i.e., probate statutes, which in any way may interfere with this newly recognized constitutional right

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113. *Id.* at 68-69.

114. FLA. CONST. art 1, § 2.

115. U.S. CONST. amend. XIV.

116. FLA. CONST. art. I, § 2.

117. *Zrillic*, 563 So. 2d at 67.

118. *Id.* at 68-69.

119. *Id.* at 68.

120. *Id.* at 69.

121. *Id.* at 68.

122. *See, e.g.*, FLA. CONST. art. X, § 4 (homestead exemptions for real and personal property); FLA. STAT. §§ 732.401-4015 (1985); FLA. CONST. art. X, § 5 (a coverage restriction); FLA. STAT. § 731.111 (1985); FLA. STAT. §§ 732.201-215 (1985) (an elective share as provided by the Uniform Probate Code); FLA. STAT. § 732.402 (1985) (personal property exemptions); FLA. STAT. § 732.403 (1985) (family allowance); FLA. STAT. § 732.5165 (1985) (protection against fraud, duress, mistake, and undue influence).

to devise property.

The court also found that the statute violated the equal protection guarantees of the Florida and United States Constitutions by creating a class of testators whose final wishes would be ignored without rational justification.<sup>123</sup> The court found the statute to be both underinclusive and overinclusive.<sup>124</sup> It was underinclusive in that it did not protect against the evils of gifts being made without proper deliberation or as a result of undue influence if the testator happened to live more than six months after the will was executed. Furthermore, it only protected against the possible overreaching by a narrow group of beneficiaries, while failing to protect against the dangers posed by "unscrupulous and greedy relatives, friends, or acquaintances."<sup>125</sup> Conversely, it was overinclusive because it would allow avoidance of a charitable devise or bequest even though none of the evils feared had occurred simply because the testator died within six months after the will was executed. Consequently, the use of the six month dividing line was irrational and the statute was unconstitutional.

Justice Grimes concurred with the result. He expressed agreement with the court's conclusion that the statute violated the equal protection clauses of both constitutions, but disagreed with the court's conclusion that the right to leave property in a will was a constitutional right under the Florida Constitution. He emphasized that the mortmain statute had been upheld in 1944 despite similar language in the version of the Florida Constitution then in effect<sup>126</sup> and "[n]othing has occurred since that date to suggest that this analysis was wrong."<sup>127</sup> The majority, however, had pointed to that very case as an example of "unquestioned allegiance to an antiquated way of thinking," i.e., that case was overruled, not because of subsequent events, but due to the precedent's failure to properly analyze the matter.<sup>128</sup>

Justice McDonald concurred with the result, but dissented in part.

123. *Zrillic*, 563 So. 2d at 70. The court acknowledged that recognition as a property right of the testator's right to leave property in a will may possibly indicate that a heightened level of scrutiny would be appropriate, but it did not address that issue because it concluded that this statute would not even survive the minimal scrutiny of the rational basis test. *Id.* at 70 n.6.

124. *Id.* at 70.

125. *Id.*

126. *See Taylor v. Payne*, 154 Fla. 359, 17 So. 2d 615, *appeal dismissed*, 323 U.S. 666 (1944).

127. 563 So. 2d at 71.

128. *Id.* at 68.

He would have upheld the constitutionality of the statute because the right to leave property in a will has continuously been held to be merely a statutory right in Florida and because it is a rational way to protect testators' families from the danger that a testator will exercise poor judgment in the face of impending death.<sup>129</sup> However, he would never have reached that issue. He had concluded that the plaintiff in this case did not have standing to invoke the statute because "[u]nder these circumstances other lineal descendants would be the residual legatees who would receive any voided bequests, not Mrs. Zrillic."<sup>130</sup>

This statement leaves the reader with some confusion over the facts of the case which, unfortunately, cannot be not cleared up by reading the district court's opinion. Were there, as Justice McDonald suggests, other legatees named in the will who would divide the residue including the hospital's interest if its devise was eliminated by the statute? If so, then it makes little sense to hold that Mrs. Zrillic had standing because she would not have benefitted by invoking the statute, and the only possible reason for her invoking it would have been to spite the intended beneficiary, the hospital.

If, as may have been the case, there was no other residuary legatee, the residue property would have been divided between those entitled to an intestate share. As the deceased's daughter, Mrs. Zrillic should have taken the property, or at least a share in it, and so she should have standing to invoke the statute because it would have produced a benefit for her, unless the statute provided otherwise. Unfortunately, the statute was less than clear on this point and this opinion does not eliminate the confusion about the standing issue.

The statute provided that the devise could be avoided by a spouse or lineal descendant "who would receive any interest *in the devise* . . . ."<sup>131</sup> Was Mrs. Zrillic given standing because invoking the statute would result in her taking more of her mother's estate, or did she have standing because she had received a specific devise under the will, even though that interest would not be enlarged by invoking the statute? This author would be shocked to learn that it was the latter, but it is certainly possible to interpret this decision as indicating that.

The focus on standing under the statute may seem pointless since the statute was held unconstitutional. However, it is worth considering because the legislature might attempt to enact a replacement statute.

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129. *Id.* at 71.

130. *Id.*

131. FLA. STAT. § 732.803(c) (1985) (emphasis added).

Hopefully, the legislature would avoid creating a statute with similar shortcomings. Moreover, this case may be applied by analogy to other statutes and any precedent which creates confusion about standing may cause unforeseen problems in the future.

## V. CONCLUSION

The year has not produced any particularly noteworthy developments in real estate law from the Florida Supreme Court or, for that matter, from the legislature<sup>132</sup> or elsewhere.<sup>133</sup> These decisions do not

132. Some may disagree and the author acknowledges that the legislature did significantly amend Florida Statute chapter 713, Part I, the mechanics' lien laws, even transforming "mechanics' liens" into "construction liens." 1990 Fla. Laws 109. In addition, it did: create section 695.26, Florida Statutes, which provides that no instrument affecting title to real property executed after July 1, 1991 may be recorded unless certain formal requirements are satisfied (e.g., names must be typed, printed or stamped legibly beneath each signature and a one and one half inch square at the top right hand corner must be left empty for the clerk's use), 1990 Fla. Laws 183; enact a statute providing immunity from civil suit by a trespasser under the influence of drugs or alcohol, 1990 Fla. Laws 140; enact the Mortgage Lending Act which requires the licensing of certain mortgage lenders, 1990 Fla. Laws 353; enact 1990 Fla. Laws 149 regarding mortgage insurance; amend Florida Statute ch. 723, the Florida Mobile Home Act, 1990 Fla. Laws 198; repeal section 421.102, Florida Statutes, which provided that a tenant of public housing could be evicted for certain drug offenses, but only the guilty person could be evicted and not the other members of the household, 1990 Fla. Laws 137; and amend the Residential Landlord and Tenant Act by requiring smoke detectors in single-family and duplex homes and by allowing the landlord and tenant to enter a separate agreement absolving the landlord of liability or responsibility for storage of tenant's personal property after surrender or abandonment by the tenant, 1990 Fla. Laws 133.

133. There are, of course, a plethora of cases and some are interesting. See *Gerber v. Longboat Harbor North Condo., Inc.*, 724 F. Supp. 884 (M.D. Fla. 1989) (concerning the constitutionality of a condominium's rule prohibiting a member from flying the United States flag); *Fish v. Post of Amvets #85*, 560 So. 2d 337 (Fla. 1st Dist. Ct. App. 1990) (regarding sufficiency of a complaint in a quiet title suit); *Whitice Bonding Agency, Inc. v. Levitz*, 559 So. 2d 755 (Fla. 4th Dist. Ct. App. 1990) (regarding the priority of a corrective mortgage); *Hopkins-Easton & Assoc., Inc. v. Santana Properties, Inc.*, 557 So. 2d 70 (Fla. 3d Dist. Ct. App. 1990) (clarifying the broker's right to both part of the forfeited deposit of a defaulting buyer and a commission on the subsequent sale to another buyer); *Hall v. City of Orlando*, 555 So. 2d 963 (Fla. 5th Dist. Ct. App. 1990) (regarding the appropriateness of granting an injunction against over-use of a drainage easement); *Pelican Island Property Owners Assoc., Inc. v. Murphy*, 554 So. 2d 1179 (Fla. 2d Dist. Ct. App. 1990) (regarding waiver or estoppel and the violation of deed restrictions by the building of a carport without the association's approval).

break any new ground or depart from established trends. Some of these opinions should be viewed with caution because of the uncertainties which they create.

Like last year,<sup>134</sup> no discernable voting or decision patterns have emerged. Of the six opinions, Justice Overton wrote two and Justices Barkett, Ehrlich, McDonald and Shaw each wrote one. Justice Grimes, who wrote more real property decisions last year than any other Justice, did not write any this year, but he did write a concurrence. Only Justice Kogan seems to be uninvolved in real property,<sup>135</sup> but that may simply be a product of the small sampling available.<sup>136</sup>

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134. See Brown, *The 1989 Survey of Florida Law, Real Property*, 14 NOVA L.REV. 939 (1990).

135. Justice Kogan did not write any opinion, simply joining with the majority opinion in each of the cases.

136. Last year Justice Kogan wrote the opinion in *Gibson v. Courtois*, 539 So. 2d 459 (Fla. 1989) (holding that a buyer could not recover attorney's fees provided for by a contract which the buyer had successfully argued had never come into existence because the offer had never been accepted before it was revoked).