

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1986

SPONSOR: Senator Aronberg

SUBJECT: Deeds or Conveyances of Real Estate

DATE: February 20, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable</u>
2.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill amends ch. 689, F.S., which governs conveyances of land and declarations of trust. The bill is offered as clarifying existing law that limits the circumstances under which a transfer or assignment of property or interest therein to a person as a trustee is considered a transfer or assignment to the trustee individually, provided the deed, conveyance, mortgage, or other instrument relating to the real property or interest therein identifies a trust by title or date. This bill applies retroactively to all deeds, conveyances, mortgages or other instruments in existence prior to the date of this bill and subject to its provisions. This bill would not affect the recent contrary ruling of a federal district court in a bankruptcy. However, the bill would apply to future judicial actions.

The bill takes effect upon becoming a law.

This bill substantially amends section 689.07, Florida Statutes.

II. Present Situation:

Conveyance of Land and Declarations of Trust

Under s. 689.07, F.S., a deed or conveyance of real property to a grantee as a “trustee” without evidence of contrary intent or specification as to the nature and purposes of the trust is presumed to create a fee simple title in the grantee as if the words “as trustee” were not present. Under this limited circumstance, a trustee is deemed to have been granted “a fee simple estate with full power and authority in and to the grantee in such deed to sell, convey, and grant and encumber both the legal and beneficial interest in real estate conveyed.” Almost identical parallel provisions apply if it involves an instrument transferring or assigning an interest in real property

to a transferee or if it involves a mortgage of real estate interest to a mortgagee or assignee in which case the person is transferred and assigned the full power and authority of the transferor, or the person is vested with full rights of ownership, respectively. However, under the following circumstances, no absolute fee simple title is granted, no full power or authority is transferred and assigned or no full right of ownership vests individually in the trustee if:

- the deed or conveyance, instrument, mortgage or assignment or declaration of trust is recorded;
- the beneficiaries are listed in the deed to the trustee, or the nature or purpose of the trust is described in the deed; or
- the language of the deed, conveyance, mortgage, or instrument indicates a contrary intent.

Case Law

The general intent of s. 689.07, F.S., is to protect persons who rely upon the public land records to obtain clear title to real property when a beneficiary's interest is not otherwise disclosed in the grantor/grantee index by either the deed transferring title or by a recorded declaration of trust, to prevent fraud, and to discourage so-called 'secret trusts.'¹ In matters of property transfers, an interested third party needs to be able to ascertain with certainty, from readily accessible information, if an individual or entity is holding an interest in real estate in trust and therefore, their interest is limited to exercising certain powers and duties as delineated in the trust.

In March 2003, a federal district court overturned a bankruptcy court ruling that strictly interpreted the provisions of s. 689.07, F.S., in a way that was contrary to the alleged intent of the grantor² and allegedly contrary to general construction by practitioners in this area of law.³ The federal district court in *In Re Raborn* held that a deed that conveyed real property to the trustee conveyed absolute fee simple ownership title to the trustee individually because the conveyance deed failed to name the beneficiaries of a trust or sufficiently state or describe the nature or purpose of the trust, and because neither the trust agreement or the declaration of trust was ever recorded. The trustee and the affected trust argued that the intent of the grantor was to convey the real property to the trust, not to the trustee individually and, pursuant to s. 689.07, F.S., this intent was to have limited the trustee's interest in the property. The court held that the grantor's intent was entirely irrelevant to the plain reading and application⁴ and that either the grantors should have recorded the trust agreement or the beneficiaries should have recorded the declaration of trust in the public records as permitted by s. 689.07, F.S., if they had wanted to limit the trustee's interest in the property. The court went on to state that the purpose of s. 689.07, F.S., is "to facilitate the exchange of marketable title by clearly defining the title of

¹ Real Property, Probate and Trust Section of the Florida Bar, *White Paper: In Re Raborn, Fix/Conveyance of Real Property*.

² *In re Raborn*, 16 Fla. L. Weekly Fed. D 257 (S.D. Fla. 2003).[Not yet reported in F. Supp. 2d] This holding is not without precedence. See also *In re Schiavone*, 209 B.R. 751, 754 (S.D. Fla. 1997), citing *Arundel Debenture Corp. v. LeBlond*, 190 So. 765 (Fla. 1939); *Meadows v. Citicorp Leasing, Inc*, 511 So.2d 622 (Fla. 5th DCA 1987); *In re Crabtree*, 871 F.2d 36 (6th Cir. 1989); and *In re Ocean Beach Properties*, 148 B.R. 494 (Bankr. E.D. Mich. 1992).

³ See Robert Goldman et al, *Intent Doesn't Matter?!*, ActionLine, Real Property, Probate, and Trust Section, The Florida Bar, Vol. XXV, No.1, Fall 2003.

⁴ *In re Raborn* at 258 citing *In re Schiavone*, 209 B.R. 751 (S.D. Fla. 1997).

properties otherwise clouded by reference to nonpublic trust documents which potentially create beneficial interests in undisclosed third parties.”⁵

The court held that multiple references to the mere existence of an otherwise undefined trust document within a deed could not remove the cloud created by the undisclosed interests.⁶ The court did not appear to consider the part of the statutory provision that would have allowed the court to construe these multiple references to the undefined trust as the intent of the grantor even though beneficiaries were not named, and the nature and purposes of the trust were not set forth. Consequently, the property at issue was held to be a part of the trustee’s bankruptcy estate (not the trust) and subject to the trustee’s personal creditors. The case was remanded to the bankruptcy court for further proceedings consistent with this ruling.

III. Effect of Proposed Changes:

This bill amends s. 689.07, F.S., to supersede the contrary federal district court ruling in the bankruptcy matter of *In re Raborn* such that the judicial ruling of this case and that of *In re Schiavone* will no longer have precedential value over future judicial construction of this statute. The bill is offered to clarify that a deed or conveyance does not grant fee simple title in the property to the trustee individually unless no beneficiaries are named, the nature and purposes of a trust are not set forth and the trust is not identified by title or date. The same limitations apply to transfers of property or interest therein through a mortgage, assignment, or other instruments, provided a trust is identified by title or date.

The bill states that its provisions are intended to clarify existing law and shall apply retroactively to deeds, conveyances, mortgages, assignments, or other instruments transferring or assigning property or interest therein in existence prior to the effective date of the bill.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁵ *Id.*

⁶ *Id.*

D. Other Constitutional Issues:

The retroactive application of this bill may implicate a violation of the due process clause of the Fourteenth Amendment of U.S. Constitution. A statute may be applied retroactively if: 1) there is clear evidence that the Legislature intended the statute to apply retroactively; and 2) the retroactive application of the statute is constitutionally permissible.⁷ The bill explicitly provides for its retroactive application. Therefore, at issue is whether its retroactive application is constitutionally permissible. A retroactive application of a statute is impermissible where the statute impairs vested rights, creates new obligations, or imposes new penalties.⁸ Although the bill explicitly provides that its intent is to clarify existing law, the provisions of this bill may be deemed by a court of competent jurisdiction to impair vested rights or create a new obligation because the bill adds a condition, i.e., that the trust is not identified by title or date, to the current list of conditions for a valid conveyance to a trustee.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill may avoid the negative impact that trusts and beneficiaries may encounter by losing real property intended for their benefit but determined to be held in fee simple individually by the trustee contrary to the grantor's original intent for the trust.

The Real Property, Probate and Trust Section of the Florida Bar officially supports this legislation to add "nor the trust is identified by title or date" to clarify that a deed to "X, as Trustee of the XYZ Trust dated 1/1/01" does not convey title to X individually, contrary to the interpretation in *re Raborn*, 16 Fla. L. Weekly Fed. D 257 (S. D. Fla. 2003).⁹ In a white paper prepared on this issue, the section reported without this legislation, there would be significant consequences to the practice of real property, probate, and trust law and adverse economic impact on owners of property.¹⁰ Additionally, the section also believes that requiring public recording of the details of a trust, as the court held in *In Re Raborn*, to be against public policy because one of the purposes of a trust instrument is to keep the grantor's affairs private and confidential from the public and in some cases even from the beneficiaries.

⁷ *Promontory Enterprises, Inc., v. Southern Engineering & Contracting, Inc.*, 864 So.2d 479 (Fla. 5th DCA 2004)

⁸ *Id.*

⁹ See website hyperlink:

<<http://www.flabar.org/tfb/TFBLegNW.nsf/dc7ee304c562ed5b85256709006a26ee/e9db5ca1c9671a0385256b2f006cd0ce?OpenDocument#Real%20Property%2C%20Probate%20and%20Trust>>

¹⁰ Prepared by Real Property, Probate and Trust Section of the Florida Bar, *White Paper: In Re Raborn, Fix/Conveyance of Real Property*.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

It is not clear whether s. 689.071, F.S., would need to be republished in order to ensure that the amendments to s. 689.07, F.S., are incorporated. Section 689.071, F.S., relates to land trusts that transfer property ownership interest to a trustee such that the trustee has a vested interest in that property. This section specifically exempts out from the application of this provision those deeds, conveyances, mortgages, and other instruments subject to s. 689.07, F.S. Under the rules of statutory construction, if a section of law is amended and that amended section is cross-referenced in another section of law, the section containing the cross-reference does not automatically incorporate the amendments to the cross-referenced section unless it is re-enacted (or republished). If not reenacted or republished, the statutory cross-reference is linked to the version of the section that existed prior to being amended. Sometimes, it does affect the substance of the cross-referenced section but other times it does. Since the bill provides for the amendment to s. 689.07, F.S., is clarifying existing law and applies retroactively, no changes may be necessary.

VIII. Amendments:

None.