



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

HB 529 amends s. 689.07, F.S., to further limit the circumstances whereby a deed or conveyance of real property will be deemed to grant a fee simple interest in property within a trust to the trustee individually. The proposed legislation is in reaction to a recent bankruptcy court opinion and provides an additional circumstance whereby a deed or conveyance of real property to a person as a "trustee," and not as an individual, does not grant a fee simple interest in the real property to the trustee, provided that the conveyance contains the trust date or an identifier of the trust.

The bill provides that its provisions are intended to be clarifying in nature and apply retroactively to deeds and conveyances of real property made prior to the effective date of the bill. The bill takes effect upon becoming a law.

#### Background

Section 689.07, F.S, provides that under certain limited circumstances, 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."<sup>1</sup> These circumstances are limited to cases "in which no beneficiaries are named nor the nature and purposes of the trust, if any, are set forth...unless a contrary intention shall appear in the deed or conveyance; provided that there shall not appear...among the public records...a declaration of trust by the grantee so described declaring the purposes of such trust... that the real estate is held other than for the benefit of the grantee."<sup>2</sup>

The statute "was enacted to protect persons who rely upon the public land records to obtain title to real property when a beneficiary's interest is not disclosed in the grantor/grantee index by either the deed transferring title or a recorded declaration of trust. The statute is intended to prevent so-called 'secret trusts' by conveying both beneficial and legal title to the grantee."<sup>3</sup> An interested third party needs to be able to ascertain with certainty, from readily accessible information, if an individual or entity is holding

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<sup>1</sup> Section 689.07(1), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> *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. 5<sup>th</sup> DCA 1987); *In re Crabtree*, 871 F.2d 36 (6<sup>th</sup> Cir. 1989); and *In re Ocean Beach Properties*, 148 B.R. 494 (Bankr. E.D. Mich. 1992).

an interest in real estate in trust and therefore, their interest is limited to exercising certain powers and duties as delineated in the trust.

Pursuant to s. 689.07, F.S., a conveyance of real property to a grantee as a “trustee” without a trust date or without a trust identifier is presumed to create a fee simple title in the grantee as if the words “as trustee” were not present. Likewise, a conveyance of real property to a grantee “as trustee” which includes the trust date or trust identifier indicates the conveyance is as trustee and not to the grantee in fee simple. Further, if the trust document is recorded or if the beneficiaries are listed in the deed to the trustee, or if the nature or purpose of the trust is described in the deed, then the named grantee as trustee will not be treated as a fee simple owner of the deeded property. Finally, s. 689.07, F.S., provides that the named trustee/grantee will not be treated as a fee simple owner of the deeded property if the language of the deed or conveyance indicates a contrary intent. In an opinion addressing a substantially identical predecessor version of this law, the Florida Supreme Court has interpreted the statute as “intended to prevent...any fraud being perpetrated upon all who might subsequently rely upon the record when dealing with the grantee.”<sup>4</sup>

### Present Situation

*In re Raborn*,<sup>5</sup> a recent bankruptcy case interpreting s. 689.07, F.S., held that because the deed conveying the real property at issue did not name the beneficiaries of the trust, did not state the nature or purpose of the trust and declaration of the trust was never recorded, that the deed to Raborn, as trustee of the trust, did convey a fee simple interest in the real property to Raborn individually. As a result of the Court’s interpretation of s. 689.07, F.S., the bankruptcy trustee succeeded to Raborn’s fee simple interest in the real property and thereby could sell the property to pay Raborn’s personal creditors. Raborn and the affected trust argued that the intent of the grantor was to convey the real property to the trust and not to Raborn individually and, pursuant to s. 689.07, F.S., this intent limited Raborn’s interest in the property.

The *Raborn* Court held, as “a threshold matter, the intent of the grantors’ is entirely irrelevant to the statutory analysis and application.”<sup>6</sup> The Court found that to convey a limited interest in the property to the trustee, the grantors should have recorded the trust agreement in the public records. “Having failed to do so, they are now estopped from disputing the record title of the property which passed to the debtor according to the operation of s. 689.07(1)...[the conveyance deed] is deemed insufficient to give constructive notice of the rights of potential third parties claiming an unrecorded beneficial interest in the property, and does not serve to impose a duty to inquire about the possible undisclosed interests of third parties.”<sup>7</sup>

The purpose of s. 689.07, F.S., as stated by the *Raborn* Court “is designed to facilitate the exchange of marketable title by clearly defining the title of properties otherwise clouded by reference to nonpublic trust documents which potentially create beneficial interests in undisclosed third parties. Multiple references to the mere existence of an otherwise undefined trust document within a deed do not remove the cloud created by the undisclosed interests...”<sup>8</sup>

The Real Property, Probate and Trust Section of the Florida Bar reports that this holding is contrary to what has been the generally accepted interpretation of s. 689.07, F.S. The Section further states that the “*Raborn* holding requiring publication of the details of a trust is against the public policy purpose of trust instruments. One of the functions of a land trust is to keep the grantor’s affairs private, the requirement of recording of the trust information in the public records is not a desirable event. The

<sup>4</sup> *Arundel Debenture Corp. v. LeBlond*, 190 So. 765, 707 (Fla. 1939).

<sup>5</sup> *In re Raborn*, 16 Fla. L. Weekly Fed. D 257 (S.D. Fla. 2003).

<sup>6</sup> *Id.* at 258 citing *In re Schiavone*, 209 B.R. 751 (S.D. Fla. 1997).

<sup>7</sup> *Id.* citing *F.J. Holmes Equipment, Inc. v. Babcock Building Supply, Inc.*, 553 So.2d 748, 749 n. 1 (Fla. 5<sup>th</sup> DCA 1989).

<sup>8</sup> *Id.*

hallmarks of trust documents are that they are private and confidential in nature. It is rare to find a deed which exposes the names of the beneficiaries to the public or even to the beneficiaries themselves.”<sup>9</sup>

C. SECTION DIRECTORY:

**Section 1:** Amends s. 689.07, F.S., relating to “trustee” being added to certain written transfers of interest in real property.

**Section 2:** Provides the bill is intended to be clarifying in nature and applies retroactively.

**Section 3:** Provides the bill will take effect upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local governments’ revenues.

2. Expenditures:

The bill does not appear to have any impact on local governments’ expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The Real Property, Probate and Trust Section of the Florida Bar reports that “[u]nless the statutory language is changed to avoid a result similar to that in *In re Raborn*, there will be significant consequences to the practice of real property, probate, and trust law. Unless clarified, there will be a direct adverse economic impact on the citizens of the state who have relied on the generally accepted interpretation” of s. 689.07, F.S.<sup>10</sup> The negative impact of not passing the bill will be on those trusts and their beneficiaries which lose real property intended for their benefit but determined to be held in fee simple by their trustee contrary to the grantor’s original intent for the trust.

D. FISCAL COMMENTS:

None.

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<sup>9</sup> Real Property, Probate and Trust Section of the Florida Bar, *White Paper: In Re Raborn, Fix/Conveyance of Real Property*, on file with the Committee on Judiciary.

<sup>10</sup> *Id.*

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The bill does not create the need for rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES