IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-2461

Federal App. Case No.: 05-16260-DD

DOUGLAS K. RABORN, as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991; RICHARD B. RABORN, as Trustee of Raborn Farm Trust Agreement dated January 25, 1991, and as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991; and ROBIN RABORN, a/k/a ROBIN RABORN PALLANTE, individually and as beneficiary of Raborn Farm Trust Agreement dated January 25, 1991, jointly and severally,

appellants,

v.

DEBORAH C. MENOTTE, Trustee in Bankruptcy for DOUGLAS K. RABORN,

appellee.
_____/

REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR'S BRIEF AS *AMICUS CURIAE* FAVORING APPELLANT'S POSITION

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STATEMENT OF IDENTITY OF *AMICUS CURIAE*

Your *amicus curiae* is The Real Property Probate & Trust Law Section of The Florida Bar. We are a group of Florida lawyers that principally practice in the areas of real estate, trust and estate law and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public pro bono, draft legislation, draft rules of procedure and occasionally befriend courts to assist on issues related to our field of practice. Our Section has over 10,000 members.

Our entire membership is impacted by this case, as we draft trusts and fund them and teach other lawyers how to do so. The failure of the district court below to give effect to all of the terms in section 689.07(1), Florida Statutes, will effectively alter too many trusts to count. The intent of the grantor/settlor in deciding who shall be the objects of his or her bounty will simply become irrelevant. Hence, our interest in this case, and our alliance with the appellant's position that the decision of the district court should be reversed.

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Executive Committee of the Board of Governors of the Florida Bar has

approved the Section's involvement in this case as being within the purview of the Section. Robert W. Goldman, Esquire, and John W. Little III, Esquire are co-chairs of the amicus committee of the Section, which is charged with preparing amicus briefs for the Section.

SUMMARY OF ARGUMENT

The Circuit Court of Appeals asked this Court to review the deed to Mr. Raborn and decide whether it, as a matter of state law, transferred a fee simple interest in the real property to Mr. Raborn, individually.

The intent of a grantor in making a conveyance and the intent of a settlor in making a trust are the polestars from which we interpret deeds and trusts. These common law concepts were codified in section 689.07(1) with a catchall clause that a trustee will be treated as owning real estate in fee simple "unless a contrary intention shall appear in the deed or conveyance;…". The intent of the grantor/settlor in this case was expressly and erroneously ignored by the district court, but was recognized and highlighted by the Circuit Court of Appeals. In fact, the question certified to this Court is so loaded with the grantor's intent to transfer the property in trust, it practically answers itself:

> Whether, under Florida Statutes section 689.07(1) as it existed before its 2004 amendment, this Deed-which is a recorded real estate conveyance deed to a named trustee of a private express

> trust identified in the deed by name and date, and contains other language referring to the unrecorded trust agreement, the settlors, and the beneficiaries-conveys only legal title to the property in trust to the grantee as trustee.

In re Raborn, 470 F.3d 1319, 1324 (11th Cir. 2006)[1]

In the unlikely event this Court determines that the deed transferred the property to Mr. Raborn, individually, the Circuit Court of Appeals asked this Court to determine whether, as a matter of state law, the 2004 amendment to section 689.07(1) applies retroactively to this case. *Id*.

The Legislature speaks through its legislation, not its staff. The language of the legislation is clear and, absent a constitutional infirmity, must be applied as clearly written. Remedial statutes intended to clarify existing legislation and apply retroactively, if indeed remedial, do not unconstitutionally impair vested rights.

[1] Interestingly the Circuit Court of Appeals emphasized that it was not certifying this question because it was in "substantial doubt" about the correct answer. Instead, it was certifying the question because it was outcome determinative and there was no controlling precedent of this Court. *Id*.

ARGUMENT

I. STANDARD OF REVIEW

In order to answer the certified questions this court will need to review and interpret a deed and construe a statute. The interpretation of a deed, like other documents, is something this Court does *de novo*. *See Gossett & Gossett, P.A. v. Mervolion*, 941 So. 2d 1207,1210 (Fla. 4th DCA 2006); *Wilson v. Rex Quality Corporation*, 839 So. 2d 928, 930 (Fla. 2d DCA 2003). Further, the standard of review for statutory construction is *de novo*. *BellSouth Telecomms., Inc. v. Meeks,* 863 So. 2d 287, 289 (Fla.2003).

II. THE DEED TO DOUGLAS RABORN TRANSFERRED PROPERTY TO HIM IN TRUST

This case turns on the proper interpretation of section 689.07, Florida Statutes. Section 689.07(1) provides as follows:

> (1) Every deed or conveyance of real estate heretofore or hereafter made or executed, in which the words "trustee" or "as trustee" are added to the name of the grantee, and in which no beneficiaries are named nor the nature and purposes of the trust, if any, are set forth, shall grant and is hereby declared to have 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 the real estate conveyed, unless a contrary intention shall appear in the deed or conveyance; provided, that there shall not appear of record among the public records of the county in which the real property is situate at the time of recording of such deed or

> conveyance, a declaration of trust by the grantee so described declaring the purposes of such trust, if any, declaring that the real estate is held other than for the benefit of the grantee.

Florida law requires that courts interpret section 689.07 in a manner consistent with its purpose. *See Smalbein v. Volusia County School Board*, 801 So. 2d 169 (Fla. 5th DCA 2001). Courts are not to construe the statute absurdly or in a manner that leads to harsh results. *See City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950) (*en banc)*. And, courts are to interpret the statute in a manner that gives meaning to all phrases used in the law, without construing words within a section in isolation from one another. *See Hechtman v. Nations Title Insurance of New York*, 840 So. 2d 993, 996 (Fla. 2003); *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001)

Further, the legislative history of a statute is irrelevant where, as here, the wording of the statute is clear, S*ee Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank,* 609 So. 2d 1315, 1317 (Fla.1992), and courts "are not at liberty to add words to statutes that were not placed there by the Legislature." *Hayes v. State,* 750 So. 2d 1, 4 (Fla.1999).

As for the purpose of section 689.07, this Court should follow *Jones v. ETS of New Orleans,* 793 So. 2d at 914 (court's analysis of the meaning of statutory term must be based on statutory interpretation guided by Supreme

Court's prior case law interpreting the applicable statutes). Interpreting a substantially identical predecessor version of this law, this Court said the statute "…was intended to prevent … any fraud being perpetrated upon all who might subsequently rely upon the record when dealing with the grantee." *Arundel Debenture Corporation v. Le Blond*, 190 So. 765, 767 (Fla. 1939). The statute avoids clouding title for third parties who deal only with the trustee. *See Adams v. Adams*, 567 So. 2d 8 (Fla. 4th DCA 1990)

Employing Florida's tools of statutory construction, for section 689.97(1) to cause a transfer in fee to a trustee, individually, there must be a third party who, as a result of a dearth of information, cannot recognize with any certainty that the grantee is holding real estate in trust and that his or her interest is limited to exercising certain powers and duties. The statute indicates that if the trust document is recorded *or* if the beneficiaries are listed in the deed to the trustee *or* if the nature and purpose of the trust are described in the deed, then the third party is deemed to recognize the trust relationship and the trustee/grantee will not be treated as a fee simple owner of the deeded property.

The law further provides that the 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. As a matter of Florida common law,

not inconsistent with the statute, the settlor/grantor's intent is indeed crucial to any analysis of trust and deed issues. *Pierson v. Bill*, 182 So. 631 (Fla. 1938); *Knauer v. Barnett*, 360 So. 2d 399, 405 (Fla. 1978); *L'Argent v. Barnett Bank, N.A.*, 730 So. 2d 395, 397 (Fla. 2d DCA 1999)[2]

The district court's order addressed intent, but in a footnote simply said that the multiple references to the trustee and trust agreement were insufficient. The district court seemed to miss the real question. Does any reasonable person, including the district court judge, having read the deed at issue, honestly believe the deed was intended to convey title to the trustee individually, rather than in trust? We dare to think no reasonable person would confuse the deed as having passed the family farm on to an individual rather than in trust.

An analysis of the deed that is the subject of this appeal reveals the manifest intent of the grantors to deed the real estate in trust, to a particular trust identified quite specifically in the deed, along with language regarding the nature of the trust and the trustee's powers and interest as trustee.

To be sure, the district court's erroneous ruling is not without precedent, but it is without support in Florida law. The decisions that seem

[2] Statutes should be construed to harmonize with the common law, unless a contrary intent is clearly expressed in the statute. *See Hollar v. International Bankers Insurance Company*, 572 So. 2d 937, 939 (Fla. 3d DCA 1991).

to support the district court's ruling are *Schiavone v. Dye*, 209 B.R. 751 (S.D. Fla. 1997) and *In Re Crabtree*, 871 F.2d 36 (6th Cir. 1989). These decisions, like the decision below, seem to ignore the significance of the grantors' intent as expressed in the deed unless that intent is precisely expressed through a listing of beneficiaries, a statement of the nature and purpose of the trust, or by recording of the trust. Despite the statutory language to the contrary, intent of the grantor otherwise expressed in the deed appeared to be irrelevant in those cases.[3]

The statutory construction used by these courts not only fails to interpret the statute as a whole, it leads to absurd and harsh results and is wholly inconsistent with the purpose of the law and Florida practice. Indeed, Florida practitioners heretofore understood that identifying the trust in the deed was sufficient to avoid the "fee-simple" default conveyance to the trustee individually:

> Under F.S. 689.07, a conveyance of real property to a person as "trustee" without a trust date or without a trust identifier is presumed to create a fee simple title in the named person as if the words "as trustee" were not present.

[3] The *Schiavone* and *Crabtree* decisions do not indicate if they too had the substantial identification of the trust and other expressions of intent to convey to a trust that appear in the deed in this case. *Schiavone* certainly suggests that very little language regarding the trust and the trustee's power was included in the quit claim deed that was the subject of that case. 209 B.R. at 753.

Administration of Trusts in Florida, Chapter 14, Title Problems and Issues § 14.11 (3rd ed. 2001). And, concerns about fraud on third persons, which is what the Legislature intended to avoid through 689.07, do not exist in the present case. The identity of the trust in this case and the power of the trustee were anything but a secret upon the recordation of the deed at issue.

It is also no surprise that the trust document was not recorded. The hallmark of trust documents is their private and confidential nature. Rare indeed is the case where an instrument of trust is recorded in the public records. Perhaps more rare is to find a deed which exposes the names of the beneficiaries to the public, or, for that matter, to the beneficiaries themselves. Again, the idea is repugnant to the private nature of the trusts. *See* Fleece, Joseph W. and Kelly, Karen M., *Basic Estate Planning In Florida*, "Funding The Living Trust", §9.11 (Fla. Bar 2000) ("One of the perceived advantages of a living trust is that it preserves the privacy of the grantor in the ultimate disposition of the trust assets. …Because one of the functions of a living trust is to keep the grantor's affairs private, the recording of the trust instrument in the public records is not a desirable event.")

The district court's decision, if upheld, would have a major impact in probate as well. If property deeded to a trustee in the form used in this case

is to be included in the trustee's personal bankruptcy estate, then it would seem that the property should also be included in the trustee's probate estate. Property held in many trusts with deeds similar to these will need to be included in the estates of dead trustees for estate tax purposes. In addition, once the property is included in the dead trustee's estate, the property is subject to the dead trustee's creditors. Imagine all of the closed estates that will have to be reopened to address this "newly discovered" property.

The district court's ruling could also have a drastic impact on corporate trustees. If property deeded to a trustee in the form used in this case is to be included in the trustee's personal bankruptcy estate, then it would seem that the property should also be included in the corporate trustee's financial statements. If the district court's ruling is correct, publicly traded corporate trustees doing business in Florida may have to go back and restate their financial statements to include those assets.

These results are uniformly inconsistent with the settlor/grantor's intent. When the settlor/grantor transferred property to a trust, he or she intended to transfer the trust estate ultimately to his or her beneficiaries, not in fee to the trustee or the trustee's creditors. And the right of a settlor/grantor to transfer his or her property as he or she desires is an extremely valuable property right recognized by the Supreme Court of the

United States in *Hodel v. Irving*, 481 U.S. 704, 715 (1987) and in article I, section 2, Florida Constitution, as interpreted by this Court in *Shriners Hospitals For Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990).

III. SECTION 689.07, AS AMENDED, APPLIES RETROACTIVELY AND TO THE RABORN DEED

Remedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases. See, e. g., *Turner v. United States*, 410 F.2d 837 (5th Cir. 1969); *City of Lakeland v. Catinella*, 129 So. 2d 133 (Fla.1961); *Grammer v. Roman*, 174 So. 2d 443 (Fla.2d DCA 1965). *See Birnholz v. 44 Wall Street Fund, Inc.*, 880 F.2d 335, 339 (11th Cir. 1989)

"A remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good. It is also defined as [a] statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before." *Fonte v. AT & T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005), quoting *Adams v. Wright*, 403 So. 2d 391, 394 (Fla.1981).

The legislative change to 689.07(1) merely stated what had previously been thought by Florida real estate lawyers to be obvious, namely that identifying a trust by title or date in a deed was indicative that the deeded

property was being deeded to the trustee in trust, rather than outright to him, individually.

Section 2 of Laws of Florida 2004-19 provides:

> The amendments to section 689.07, Florida Statutes, provided by this act are intended to clarify existing law and shall apply retroactively.

These words are refreshingly clear and succinct. Therefore, the court below erred under state law when it waded into the ambiguous phrasing of a well-meaning legislative staff. S*ee Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank,* 609 So. 2d 1315, 1317 (Fla.1992). Further by considering the staff analysis, rather than the words of the legislature, the district court effectively rewrote the above-quoted legislation, which compounded the error. *See Hayes v. State,* 750 So. 2d 1, 4 (Fla.1999).

The bankruptcy trustee never had a vested right in the real property under the old version of 689.07. The Legislature simply underscored that fact for the court below and for those bankruptcy judges and trustees who might otherwise make the same mistake regarding an innumerable number of deeds funding trusts with real estate.

CONCLUSION

This is not a game of form over substance where we play "gotcha" with the property rights of Floridians. Everyone involved in this case knows the grantors intended to deed their property in trust. That intent, evidenced in the deed alone, should be the beginning and end of the inquiry. Though it thought itself clear on that point, when the court below so misapplied the words of the statute, the Legislature stepped in, as it should, to clarify its intent and protect the citizens it represents.

For these reasons, the court should determine that the deed in this case transferred property to Mr. Raborn in trust.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this brief was served by mail on Charles W. Throckmorton, 2800 First Union Financial Ctr, 200 S. Biscayne Blvd., Miami, FL 33131-2335; Robert C. Furr, 2255 Glades Road, #337W, Boca Raton, FL 33431; Michael Bakst, 222 Lakeview Avenue, Suite 1330, West Palm Beach, FL 33401; Morris G. Miller, Esquire, Adorno & Yoss, P.A., 1551 Forum Place, Building 200, West Palm Beach, FL 33401 and John Beranek, Ausley & McMullen, P.A., 227 South Calhoun Street, Tallahassee, FL 32301 this January___, 2007.

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Robert W. Goldman, FBN 339180

CERTIFICATE OF FONT COMPLIANCE

I CERTIFY this response complies with the font requirements of rule 9.210(a) (2), Florida Rules of Appellate Procedure.

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Robert W. Goldman, FBN 33980