SUPREME COURT
STATE OF FLORIDA
Florida Case No.: SC06-2461

Eleventh Circuit Court of Appeals Case No. 05-16260 - DD

DOUGLAS K. RABORN, RICHARD B. RABORN and ROBIN RABORN, a/k/a ROBIN RABORN PALLANTE

Appellants.

vs.

DEBORAH C. MENOTTE, Trustee in Bankruptcy for Douglas K. Raborn,

Appellee,
_____/

On certified questions from the Eleventh Circuit Court of Appeals

ANSWER BRIEF OF APPELLEE DEBORAH C. MENOTTE

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INTRODUCTION

The case arises out of a Chapter 7 Bankruptcy proceeding filed by Douglas K. Raborn ("Debtor") on August 24, 2001 (RE-4, pg. 2). Deborah C. Menotte (the "Bankruptcy Trustee") is the Chapter 7 Trustee for the bankruptcy estate of the Debtor (RE-4, pg. 2). The matter on appeal before the Eleventh Circuit Court of Appeals is an adversary proceeding brought by the Bankruptcy Trustee seeking a determination that pursuant to Fla. Stat. §689.07, the Debtor holds fee simple title to certain real property (the "Property") and therefore that Property is an asset of his bankruptcy estate.

The Property was conveyed from Robert E. Raborn and Lenore E. Raborn to the Debtor "as Trustee under the Raborn Farm Trust Agreement dated January 25, 1991" by an instrument captioned "Conveyance Deed to Trustee under Trust Agreement" (the "Deed") dated January 25, 1991, and recorded February 5, 1991 (RE-15). Debtor, Richard Raborn and Robin Raborn (collectively, the "Beneficiaries") claim to be the beneficiaries under the Raborn Farm Trust Agreement (the "Trust") and contend that the Debtor holds only bare legal title to the Property and that the beneficial ownership of the Property lies with the Trust.

Appellants' Initial Brief filed with this Court will be referred to as the "Initial Brief." All record references in this Brief will be to the Record Excerpts that accompanied the Initial Brief and will be cited as (RE - __, pg. __).

STATEMENT OF THE ISSUES PRESENTED

This Court has accepted jurisdiction in this case to rule on the following two

questions certified to this Court by the Eleventh Circuit Court of Appeals in In Re Raborn, 470 F. 3d 1319 (11th Cir. 2006):

> I. Whether, under Florida Statutes section 689.07(1) as it existed before the 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 in trust to the grantee as trustee.
>
> II. Whether, as a matter of Florida law, the 2004 statutory amendment to Florida Statutes section 689.07(1) applies retroactively to the Deed in this particular case and causes the Deed – in light of the amendment – to convey only legal title to the grantee in trust.

Fla. Stat. §689.07(1), as it existed prior to the 2004 statutory amendment, provided as follows:

> 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 for other than for the benefit of the grantee.

The general rule is that such a deed is deemed to grant fee simple title to the grantee designated "as trustee." The issue in this case is whether the Deed falls within one of the exceptions to the general rule set forth in the statute.

STATEMENT OF THE CASE AND OF THE FACTS

The Bankruptcy Trustee concurs with the Beneficiaries that the opinion of the Eleventh Circuit Court of Appeals sets forth the relevant facts as set forth in the Initial Brief on pages 2-11 under the caption "STATEMENT OF THE CASE AND FACTS – Eleventh Circuit Opinion." However, the introductory statement on page 2 of the Initial Brief under the caption "STATEMENT OF THE CASE AND FACTS" and the section on pages 11-12 of the Initial Brief captioned "STATEMENT OF THE CASE AND FACTS – Eleventh Circuit Footnotes" do not accurately describe either the findings or action taken by the Eleventh Circuit or the issues as certified to this Court by the Eleventh Circuit. Also, as discussed, infra, there are several statements of fact in the Initial Brief that are either incorrect or not supported by the record.

First, the questions certified by the Eleventh Circuit to this Court stand on their own and do not need further explanation by the parties to this appeal. Second, the Eleventh Circuit did rule on two federal law issues - one in favor of the Beneficiaries and one in favor of the Bankruptcy Trustee. The ruling in favor of the Beneficiaries was that the Eleventh Circuit rejected the Bankruptcy Trustee's alternate theory of relief that the bankruptcy code gave the Bankruptcy Trustee "strong arm powers" that would allow her to avoid the interest of the Beneficiaries in the Property if a purchaser of the Property from the Debtor would be a *bona fide* purchaser under Florida law, even if the grantee was determined to be the Trust and not the Debtor individually. In re Raborn, 470 F. 3d at 1323-1324. The ruling in favor of the Bankruptcy Trustee was to affirm the

Bankruptcy Trustee's position that any interest she had in the Property vested on August 24, 2001, the date the Debtor filed his petition for bankruptcy and not, as argued by the Beneficiaries, November 22, 2004, the date final judgment was entered by the bankruptcy court. In re Raborn, 470 F. 3d at 1323. Therefore, the argument on pages 36-37 of the Initial Brief that the Bankruptcy Trustee had no vested rights in the Property until November 22, 2004, has already been determined adverse to the Beneficiaries and is not appropriate for consideration by this Court.

SUMMARY OF ARGUMENT

Both certified questions should be answered in the negative. With respect to the first certified question, the Deed conveyed a fee simple estate in the Property to the Debtor, which subsequently became a part of his bankruptcy estate. The Deed is one described in Fla. Stat. §689.07(1) because it the Deed fits in with the general statutory rule that the conveyance is of fee simple title because the words "as trustee" are added to the name of the Debtor. Since (1) the beneficiaries of the Trust are not named, (2) the nature and purposes of the Trust are not set forth, and (3) neither the Trust nor a declaration of trust was recorded, none of the exceptions set forth in the statute apply. The Beneficiaries argue that the Deed should be interpreted to convey only bare legal title to the Debtor because a "contrary intention" appears in the Deed. However, this argument is not supported by applicable Florida case law. First, in accordance with the well established rule of statutory construction known as the "doctrine of the last antecedent," the language in Fla. Stat. §689.07(1) "unless a contrary intention shall appear in the deed

or conveyance," relates not to the question of whether the deed vests fee simple title in the "trustee," but rather to the question of whether the grantee has full authority to convey both the legal and beneficial interest in the real estate. Secondly, even if the "contrary intention" language does apply for the purpose suggested by the Beneficiaries, the language in the Deed does not evidence that contrary intention.

Therefore, the Debtor owned fee simple title to the Property on the date he filed his petition for bankruptcy, the Property is property of the bankruptcy estate of the Debtor under 11 U.S.C. §541, and the Bankruptcy Trustee succeeded to the Debtor's interest in the Property as of the date the Debtor filed his petition for bankruptcy.

With respect to the second certified question, the amendment to Fla. Stat. §689.07 made by the 2004 Florida legislature by the enactment of Chapter 2004-19, Laws of Florida, does not cause the Deed to convey only legal title to the Debtor. A law that affects vested rights cannot apply retroactively, even if the legislature expressly states that intent in the law. Since, as the Eleventh Circuit held, the Bankruptcy Trustee's interest in the Property vested on the date Debtor filed his petition for bankruptcy, Chapter 2004-19 does not affect that interest.

STANDARD OF REVIEW

Since both of the issues that have been certified to this Court are issues of law, review by this Court is de novo.

ARGUMENT

A. BY VIRTUE OF FLA. STAT. §689.07(1), THE DEED CONVEYED FEE SIMPLE TITLE IN THE PROPERTY TO THE DEBTOR, AND NOT ONLY LEGAL TITLE.

Fla. Stat. §689.07(1) provides as follows:

> 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.
>
> (emphasis supplied).

Judge Hurley's ruling in Raborn I succinctly and correctly held that by virtue of this statute, the Deed conveyed fee simple title in the Property to Debtor:

> Because the deed conveying the property to Douglas Raborn "as Trustee" did not name the trust beneficiaries nor state the trust nature or purpose, and because the Agreement and declaration of trust was never recorded, under Fla. Stat. §689.07(1), the debtor became the fee simple owner of the property and the bankruptcy trustee succeeded to his fee simple interest in the property. See, e.g., Crabtree v. Craig, 871 F. 2d 36 (6th Cir. 1989) (deed to grantee "as trustee" conveyed fee simple title under

> Fla. Stat. §689.07(1); Schiavone v. Dye, 209 B.R. 751 (Bankr. S.D. Fla. 1997), aff'd (S.D. Fla. 1997) (Judge Zloch, unpublished); Zosman v. Schiffer/Taxis, Inc., 697 So. 1018 (Fla. 3d DCA 1997); Glusman v. Warren, 413 So. 2d 857 (Fla. 4th DCA 1982).

(RE-6, page 6).

This ruling was the foundation for the bankruptcy court's Amended Summary Judgment for Plaintiff (RE-12) and Raborn II (RE-14), which is the order on appeal before the Eleventh Circuit Court of Appeals.

Since the Debtor owned fee simple title to the Property on the date he filed his bankruptcy petition, the Property automatically became an asset of the bankruptcy estate pursuant to 11 U.S.C. §541, such that the Bankruptcy Trustee succeeds to the Debtor's interest in the Property. In re: Schiavone, 209 B.R. 751 (Bankr. S.D. Fla. 1997), affirmed (S.D. Fla. 1997) (Judge Zloch, non - published).

1. The Purpose of the Statute is to Prevent Secret Trusts and to Allow Those Dealing with the Grantee to Rely on the Record.

As stated by this Court in Arundel Debenture Corp. v. Leblond, 190 So. 765 (Fla. 1939), this statute "was intended to prevent secret trusts, to convey the beneficial title to the grantee along with the legal title, in order to prevent any fraud being perpetrated upon all who might subsequently rely upon the record when dealing with the grantee." 190 So. at 767 (emphasis in original). The Beneficiaries assert on page 16 of the Initial Brief that this Court's pronouncement in Arundel was intended to deal with "the old Florida practice of designating grantees as 'trustees' in deeds where there was actually no trust." However, that statement both contradicts the language in Arundel, which explicitly referred to secret

trusts, and is belied by the significant number of subsequent Florida cases and secondary authority that continue to adhere to its principles. See, e.g. One Harbor Financial Limited Co. v. Hynes Properties, LLC, 884 So. 2d 1039, 1043 (Fla. 5th DCA 2004); Meadows v. Citicorp Leasing, Inc., 511 So. 2d 622 (Fla. 5th DCA 1987); Turturro v. Schmier, 374 So. 2d 71, at 74 (Fla. 3rd DCA 1979); 55A Fla. Jur. 2d Trusts §31.

There is nothing in the record on appeal to support the Beneficiaries' contention, set forth on pages 24-25 of the Initial Brief, that trust instruments are often not recorded. In any event, that is irrelevant to this case. So is the Beneficiaries' assertion on page 25 of the Initial Brief that "this Raborn situation was a perfectly above-board family trust conveyance." Those facts do not change the statute or its applicability to this case. By its enactment of Fla. Stat. §689.07(1), the Florida Legislature has decided what information must be included in a deed to a "trustee" to protect the public. As a result there may be situations where, as here, a grantor's intent may not be realized, but the wisdom of a statute is an issue for the Florida Legislature, not the courts. Hechtman v. Nations Title Insurance, 840 So. 2d 993 at 997 (Fla. 2003); Van Pelt v. Hillard, 75 Fla. 792, 78 So. 693 (1918). In fact, the Florida Legislature's amendment of Fla. Stat. §689.07(1) in 2004 is their decision to reduce (but not totally eliminate) the number of transactions where a grantor's intent might not be recognized.

It is also inaccurate to imply, as do the Beneficiaries, that the Florida Legislature does not care about "secret trusts" or that society has no reason to object to them. For example, Fla. Stat. §286.23 requires public disclosure of the holders of beneficial interests

of trusts prior to the trust contracting to sell real property to state or local government agencies. The dangers of undisclosed beneficial interests in secret trusts recently came to light in a major way in connection with the indictment (and subsequent guilty plea) of a former Palm Beach County Commissioner who allegedly violated that statute when he concealed from the public his beneficial interest in a land trust that entered into a land swap with the South Florida Water Management District (D.E.1. - United States v. Masilotti, Case No. 06-80158 –CR- Ryskamp/Hopkins (FLSD), filed October 27, 2006).

Also, as noted in Raborn I, the Beneficiaries could have protected themselves by simply recording a declaration of trust (RE–6, pg. 5). As the court found in Schiavone, supra,

> In accordance with Florida law, this Court also finds that Dye, through reasonable diligence or care, could have protected herself by properly recording evidence of the Trust prior to the petition date. Fla. Stat. §689.07(4) . . . Furthermore, this Court recognizes, as did the Florida Supreme Court in Reasoner [Reasoner v. Fisikelli, 114 Fla. 102, 153 So. 98 (1934)], the harshness of this result. However, as stated by the Florida Supreme Court in Reasoner, "When one of two innocent persons must suffer a loss, it should fall upon him who by reasonable diligence or care could have protected himself." Id. at 99.
>
> 209 B.R. 751 at 757.

This allows the conveyance to a trust, while still achieving the purpose of the statute.

2. Mere "Trust Identifiers" are Insufficient to Remove a Deed or Conveyance from the Operation of the Statute.

The Beneficiaries initially argue, on pages 15-18 of the Initial Brief, that Fla. Stat. §689.07(1) does not apply because the Deed contains what they refer to as "trust identifiers." On page 16 of the Initial Brief, they allege, without legal foundation, that the "statute has always been intended to address 'mere trustee' deeds." They further contend on page 17 of the Initial Brief that Fla. Stat. §689.07(1) "by its literal terms, applies only to deeds where the words "trustee" or "as trustee" – without more - are added to the name of the grantee." This is incorrect. First of all, the "literal terms" of the statute do not contain the phrase "without more." Secondly, the only case the Beneficiaries cite to support this argument - One Harbor Financial, supra - in fact was decided by reference to the version of the statute after it was amended in 2004 to include the addition of the language "and the trust is not identified by title or date." 884 So. 2d at 1043.

As Judge Hurley correctly found in Raborn I, under Fla. Stat. §689.07(1) as it existed prior to amendment, the position of Beneficiaries is clearly a distinction without a difference. The addition of the words "as trustee," after the name of the grantee, indicates that title is being given to the grantee in a trustee capacity, regardless of how it is further identified. The statute has the effect of ignoring that designation of the grantor and deeming the conveyance to be in fee simple, unless one of the exceptions set forth in the statute is met.

The Beneficiaries also rely on secondary sources such as Florida Bar CLE materials, Attorneys' Title Insurance Fund Title Notes and treatises to support their argument relating to "trust identifiers" (pgs. 22 to 25 of Initial Brief). However, the

excerpts cited from those authorities are not inconsistent with the law expressed by Raborn I and Raborn II, as they all discuss the fact that adding "trustee" or "as trustee" to the granting clause may create a conveyance in fee simple, if the exceptions to Fla. Stat. §689.07(1) do not apply. In fact, the Bankruptcy Trustee would suggest that the form of conveyance commonly used in Florida for these types of transactions contains the language that is included in the deeds construed in Grammer v. Roman, 174 So. 2d 443 (Fla. 2nd DCA 1965) and Resnick v. Goldman, 133 So. 2d 770 (Fla. 3rd DCA 1961) but which is missing from the Conveyance Deed (see discussion at pages 16-18, infra).

The Beneficiaries also overstate the weight accorded such secondary sources in the interpretation of Florida law. The footnote in Snyder v. Davis, 699 So. 2d 1008 (Fla. 1997) referred to merely indicates that an issue was discussed in a Florida Bar publication and makes no reference to other treatises or Fund Title Notes.

A case that is far more relevant on this issue is Schiavone, supra. In Schiavone, a Patricia Dye ("Dye") created the 209 Salzedo Street Trust with Don Schiavone ("Schiavone") as trustee and herself as beneficiary, and conveyed her property by quit-claim deed to "209 Salzedo Street Trust, Don Schiavone, Trustee." The quit claim deed did not identify Dye as the beneficiary of the 209 Salzedo Street Trust or the nature and purpose of the 209 Salzedo Street Trust, and neither a copy of the instrument creating the 209 Salzedo Street Trust nor a declaration of trust relating thereto was recorded in the public records. Schiavone later filed for bankruptcy and claimed an exemption for his interest in the property. In response to Schiavone's claim that he only held bare legal title,

and not equitable title, to the subject real property, the court held as follows:

> It is undisputed that the quit-claim conveying the Property to the Debtor failed to disclose either the purpose of the Trust or Dye's interest as a beneficiary of the Trust. It is also undisputed that Dye failed to record a declaration of trust in the public records before the Debtor filed his voluntary petition. Consequently, the Debtor held fee simple title to the Property as of the petition date and the Trustee succeeded to the Debtor's fee simple interest.

209 B.R. at 754.

It is therefore clear that it is immaterial whether the name of the trust is included in describing the "trustee." Were that not the case, the outcome of the Schiavone case would have been different. The Beneficiaries attempt to distinguish Schiavone by arguing that it was "a mere trustee deed" (page 28 of the Initial Brief). However, that directly contradicts their previous argument (see page 15 of the Initial Brief) that a "mere trustee deed" is one that does nothing more than add the words "trustee" or "as trustee."

3. The Deed Does Not Evidence a "Contrary Intent" to the Grant of Fee Simple Title to the Debtor.

The Beneficiaries next argue, at pages 18-30 of the Initial Brief, that even if none of the exceptions set forth in the statute apply, the Deed does not grant fee simple title in the Property to the Debtor because a "contrary intent" appears in the Deed. This, in turn, is based not on any one statement in the Deed, but on their assertion that the multiple references to the "trust" and the "trustee" in the Deed evidence that "contrary intent." This argument must fail for two reasons.

First, in accordance with a long standing Florida rule of statutory construction, the phrase "unless a contrary intention shall appear in the deed or conveyance" should be interpreted to modify the immediately antecedent language granting the named trustee with full power and authority to convey both the legal and beneficial interest in the subject property, not the more remote antecedent language relating to how the conveyance to the trustee is supposed to be worded. This statutory construction is based on what is known as the "doctrine of the last antecedent," under which "relative and qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to, or including, others more remote." City of St. Petersburg v. Nasworthy, 751 So. 2d 772, 774 (Fla. 1st DCA 2000); Accord, Vreuls v. Progressive Employer Services, 881 So. 2d 688 (Fla. 1st DCA 2004); McKenzie v. State, 830 So. 2d 234 at 237 (Fla. 4th DCA 2002); Brown v. Brown, 432 So. 2d 704, 710-711 (3rd DCA 1983), pet. for rev. denied, 458 So. 2d 271 (Fla. 1984).

This construction is consistent with the intent of Fla. Stat. §689.07 to allow third parties to rely on the record, because the statutory modifier allows the grantor to provide in the conveyance that the named trustee does not have unfettered authority and power to convey the property. Such language would, in turn, provide clear notice of such fact to third parties. The correctness of this construction was also recognized by Judge Hurley in his footnote on page 8 of Raborn II (RE-14, page 8). Further support of this construction is the fact that none of the cases interpreting the meaning of Fla. Stat. §689.07(1) even mention "contrary intent" in their analysis. On the other hand, the construction supported

by the Beneficiaries is inconsistent with the intent of Fla. Stat. §689.07(1). The statute clearly on its face sets forth what is required to take a deed out of the operation of the statute and therefore provides a great measure of certainty to a third party reviewing the public records. It would be impossible for a third party to make that determination if in each instance the entire instrument had to be reviewed to determine if the requisite "contrary intent" existed.

Secondly, even if the Beneficiaries' interpretation of the application of the "contrary intent" concept is correct, the Deed does not establish the contrary intent suggested by the Beneficiaries. First, there are several factual errors in the Beneficiaries' analysis. There is nothing in the Deed stating that the settlers were "conveying the family horse farm to one of their sons to hold the property as trustee" (page 21 of Initial Brief). The Deed does not state that "the trust document was in writing" (page 21 of Initial Brief). There is nothing in the Deed that indicates that the Debtor's address in the Village of Golf is where the Property is located (pages 20-21 of Initial Brief). In addition, the Beneficiaries ignore or gloss over the facts that there is only one generic reference to "beneficiaries" in the entire Deed, no description of the trust instrument other than its name appears in the Deed, and there is clear, unequivocal language giving the Debtor full power and authority to deal with the Property "as it would be lawful for any person owning the same to deal with the same." (RE-15, Exh. 1). In fact, contrary to the assertion on page 21 of the Initial Brief that the "public and the Bankruptcy Trustee were thus on notice of the trust if they simply read the recorded deed," what they really were

on notice of was that for all purposes the Debtor had the full right to convey, mortgage, encumber or otherwise deal with the Property by himself.

The Beneficiaries discuss two cases in the Initial Brief that interpret Fla. Stat. §689.07(1) and, they contend, support their position. It must be initially noted that neither of these cases either address the "contrary intent" proviso in Fla. Stat. §689.07(1) nor deal with the issue of whether the named "trustee" owns merely legal title or equitable title as well. In addition, the language in the deeds in both of those cases is significantly different from the language in the Deed. In Grammer, supra, discussed on page 22 of the Initial Brief, the issue was whether under the terms of the subject deed the "trustee" could convey the subject land without the joinder of the beneficiaries of the hypothetical trust referred to in the deed. The court held that he could. The deed in question was "executed April 3, 1958 by Charles and Ann Reese, his wife, under a trust agreement dated April 3, 1958 and known as Trust No. 1." 174 So. 2d at 444. Contrary to the Beneficiaries' assertion that the title and date of the trust is "enough," the court had to review the entire deed before it could determine that the "deed contains enough reference to the nature and purpose of the underlying trust agreement to take it out of the operation of Fla. Stat. §689.07." 174 So. 2d at 446. Unlike the Deed, the deed in Grammer described the interest of the beneficiaries as being limited to "only in the earnings and avails of the property," and that the interest of the beneficiaries "is personal property carrying no legal or equitable title to the trust realty." 174 So. 2d at 445-446.

A somewhat similar issue was involved in Resnick, supra, discussed on pages 26-

27 of the Initial Brief. In Resnick, the deed in question was an instrument captioned "Warranty Deed To Trustee Under Land Trust Agreement," and was from Resnick to "Central Bank and Trust Company of Miami, Florida, . . . as Trustee under the provisions of a certain Trust Agreement, dated the 15th day of August, and known as Trust No. 57-149." 133 So. 2d at 771. Also see Appellee's Supplement to Record. As in Grammer, the deed contains language missing from the Deed specifically describing the nature of the interest of the beneficiaries, as follows:

> The interest of each and every beneficiary hereunder and under the Trust Agreement and Declaration of Trust hereinbefore referred to and of all persons claiming under them or any of them shall be only in the earnings, avails, and proceeds arising from the sale or other disposition of said real estate, and such interest is hereby declared to be personal property, and no beneficiary hereunder shall have any title or interest, legal or equitable, in or to said real estate as such but only an interest in the earnings, avails and proceeds thereof as aforesaid.

In the instant case, anyone reading the Deed would assume that they did not need to be concerned with beneficial interests because the Deed grants "full power and authority" to the Debtor to "deal with said real estate and every part thereof in all other ways and for such considerations as it would be lawful for any person owning the same to deal with the same. . . ." (RE-4, Exh. 1). Also, see page 16, supra.

The Beneficiaries next contend, on pages 18-20 of the Initial Brief, that Raborn I and Raborn II were decided incorrectly because Judge Hurley held the grantors' intent to be "totally irrelevant." This is an inaccurate description of Judge Hurley's rulings. Raborn I did contain a statement to that effect (RE-6, page 4). However, as the following

discussion in Raborn II indicates, what Judge Hurley found to be irrelevant were matters outside of the Deed:

> Further, the bankruptcy court correctly determined this issue by summary judgment, without reference to the various affidavits of "contrary intention" submitted in opposition to the motion. Under a plain and natural reading of §689.07(1), the subjective intent of a grantor is irrelevant to interpretation of deed meeting description of the statute only where it is made to appear as a "contrary intention" on face of the deed – in other words, it is relevant only if an objective manifestation of that intent appears in the body of the deed or conveyance itself.
>
> No such contrary intent is made to appear in the Conveyance Deed in question here, and extraneous indicia of the grantors' intent expressed in affidavits executed in 2004 was properly excluded by the bankruptcy court as immaterial to the issues before it on summary judgment.
>
> (RE-14, page 9) (emphasis in original)

It is also clear from the following footnote from Raborn II that Judge Hurley carefully reviewed and considered the Beneficiaries' arguments relative to "contrary intent."

> The Raborn beneficiaries urge that such a contrary intent is made to appear in this case through the internal reference in the deed to the "Raborn Farm Trust," and the conveyance made to Douglas Raborn, "as Trustee of the Raborn Farm Trust dated January 25, 1991" to hold the property "for the uses and purposes herein and in said Trust Agreement" – features which they maintain distinguish this case from the line of "classic" cases where a grantee is simply named "as trustee" for an undisclosed person(s), resulting in conveyance of fee simple.
>
> The court does not agree that this amplification operates to signal some limitation on the grantee/trustee's authority to control both legal and equitable title to the property, to put persons searching the record on notice of undisclosed equitable interests of third persons, or to otherwise operates as expression of "contrary intention" – i.e. an intent to convey something short of fee simple – within the expression of statute, particularly when it is

> read in conjunction with other language in the deed which is fully consistent with an intent to convey unfettered fee simple interest. The Conveyance Deed thus recites:
>
> "Full power and authority is hereby granted to said Trustee…to contract to sell, to grant options to purchase, to sell on any terms, to convey either with or without consideration…to release, convey or assign any right, title or interest in or about said real estate or any part thereof; and to deal with said real estate and every part thereof in all other ways and for such other considerations as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified at any time or times hereinafter.
>
> "In no case shall any party dealing with said Trustee in relation to said real estate…be obliged to see that the terms of this trust have been complied with…or be obliged or privileged to inquire into any of the terms of said Trust Agreement; and every deed, trust deed, mortgage lease or other instrument executed by said Trustee…shall be conclusive evidence…that such conveyance or other instrument was executed in accordance with the trusts conditions and limitations contained in this indenture and in said trust agreement and binding upon all beneficiaries thereunder."
>
> (RE-14, page 8).

The construction of the Deed made by Judge Hurley in Raborn II is consistent with the intent of the statute which is, as stated by this Court in Arundel Debenture Corp., supra, "to prevent secret trusts, to convey the beneficial title to the grantee along with the legal title, in order to prevent any fraud being perpetrated upon all who might subsequently rely upon the record when dealing with the grantee." 190 So. at 767 (emphasis in original). In that respect, Fla. Stat. §689.07(1) is very similar to Fla. Stat. §695.01, which provides that conveyances of real property must be recorded to be good and effectual against bona fide purchasers. Similar to Fla. Stat. §689.07(1), the purpose of Fla. Stat. §695.01 is to protect purchasers against secret deeds. Rabinowitz v. Keefer, 100

Fla. 1723, 132 So. 297 (1931). As the court stated in Fong v. Batton, 214 So. 2d 649 (Fla. 3rd DCA 1968),

> The recordation statute, Fla. Stat. §695.01, F.S.A., has always been primarily intended to protect the rights of bona fide purchasers of property, and creditors of property owners, rather than the immediate parties to the conveyance of the property.

214 So. 2d at 652 (emphasis supplied).

Similarly, deeds without the two witnesses required by Fla. Stat. §689.01 are insufficient to convey title, regardless of the intent of the grantor. American Gen. Home Equity, Inc. v. Countrywide Home Loans, Inc., 769 So. 2d 508 at 509-510 (Fla. 5th DCA 2000); Walker v. City of Jacksonville, 360 So. 2d 52 at 53-54 (Fla. 1st DCA 1978); Santos v. Bough, 334 So. 2d 833 (3rd DCA), cert. denied, 341 So. 2d 293 (Fla. 1976).

4. Whether Anyone Actually Relied on the Deed is Irrelevant.

Finally, the point raised on pages 29-30 of the Initial Brief, that no third parties relied on the Deed, is irrelevant. 11 U.S.C. §541 of the federal bankruptcy code allows a bankruptcy trustee to assume the position of a hypothetical bona fide purchaser as of the date the petition for bankruptcy is filed. 11 U.S.C. §544(a) provides in material part as follows:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by:
>
> * * *
>
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be

> perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of commencement of the case, whether or not such a purchaser exists.

Therefore, if the Debtor had fee simple title to the Property on the date he filed his petition for bankruptcy, the Bankruptcy Trustee succeeds to that interest as if she were a bona fide purchaser.

The amicus curiae brief filed by the Real Property Probate & Trust Law Section of The Florida Bar adds nothing to the consideration of the issues in this case. The amicus brief cites cases on general rules of statutory construction, none of which specifically address Fla. Stat. §689.07(1). However, two specific points raised in the amicus brief need to be addressed.

First, the amicus brief discusses at length the alleged "major impact" on the trust and probate area of the law if Raborn II is upheld. However, Raborn II does not address the retroactive nature of Chapter 2004-19 as applied to all other deeds. It only holds that Chapter 2004-19 does not retroactively apply "to this particular case" (emphasis supplied) (RE Doc. 14, pg. 11). Therefore, Raborn II does not prevent the general retroactive application of Chapter 2004-19, Laws of Florida, to achieve its alleged intent of clarifying the law in this area (page 31 of Initial Brief, page 12 of amicus brief). This is supported by the fact that the court in One Harbor Financial, supra, automatically referred to the amended version of the statute in its decision.

Second, the amicus brief cites to Shriners Hospitals for Crippled Children, Inc. v. Zrillic, 530 So. 2d 64 at 67 (Fla. 1990), supporting "the right of a settler/grantor to

transfer his or her property as he or she desires" (pages 10-11 of amicus brief). Shriners Hospital actually held that, notwithstanding the general rule of construction that the intent of the testator prevails, that intent would not control "where it would defeat both the plain meaning and logic of the statute." 563 So. 2d at 64. Therefore, it is clear that the right of a person to convey property as he or she desires is subject to the conveyance being done in accordance with applicable statutes.

B. THE AMENDMENT TO §689.07, FLORIDA STATUTES, ENACTED BY THE 2004 FLORIDA LEGISLATURE, DOES NOT APPLY RETROACTIVELY TO THIS CASE.

The Beneficiaries argue that Judge Hurley should have applied Chapter 2004-19, Laws of Florida, which amended Fla. Stat. §689.07 to add an additional exception to the statute for conveyances that identify the title or date of a trust, to this case. The Beneficiaries primarily rely on section 2 of Chapter 2004-19, Laws of Florida, which provides that its amendments to Fla. Stat. §689.07 "are intended to clarify existing law and shall apply retroactively." However, even if legislation expresses an intent that it apply retroactively, it cannot do so if the statute "impairs vested rights, creates new obligations or imposes new penalties." State Farm Mutual Automobile Ins. Co. v. Laforet, 658 So. 2d 55 at 61 (Fla. 1995); accord, Metropolitan Dade County v. Chase Federal Housing Corp., 737 So. 2d 494 at 503 (Fla. 1999).

A vested right has been defined as "a 'fixed' right that cannot be abrogated or taken away without violation of the possessor's right to due process." Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388 at 398 (5th DCA 2002), rev. dismissed 848 So. 2d

1153 (Fla. 2003); cert. denied, 540 U.S. 1049, 124 S. Ct. 821 (2003), and as "an immediate, fixed right of present enjoyment" or "a present, fixed right of future enjoyment." Promontory Enterprises, Inc. v. Southern Engineering, 864 So. 2d 479 at 485 (Fla. 5th DCA 2004), citing City of Sanford v. McClelland, 121 Fla. 253, 163 So. 513, 514-515 (1935); Campus Communication; supra.

The Beneficiaries do not challenge Raborn II's ruling that the Bankruptcy Trustee has a vested interest in the Property (RE Doc. 14, pgs. 11-12). Instead, the Beneficiaries argue that Chapter 2004-19, Laws of Florida should nonetheless have retroactive application. This argument relies solely on the language in Chapter 2004-19 stating that its amendments "are intended to clarify existing law and shall apply retroactively" (RE Doc. 14, pg. 4).

The Beneficiaries' argument is without merit. Florida case law clearly holds that rights in real property are vested rights that are protected from retroactive legislation. For example, this Court, in Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So. 2d 521 at 526 (Fla. 1973), held that mineral rights constitute a "valuable vested property interest" and therefore a statute providing that a grant or reservation of mineral rights is limited to 20 years if not exercised could not retroactively extinguish the unexercised mineral rights of the holder thereof. See, similarly, Biltmore Village, Inc. v. Royal Biltmore Village, Inc., 71 So. 2d 727 (Fla. 1954). And in Sarasota County v. Andrews, 573 So. 2d 113 at 115 (Fla. 2nd DCA 1991), the court found that a mortgage on real property was a vested right that was substantially impaired by an ordinance subordinating

the mortgage to the County's code enforcement lien, precluding the ordinance from being applied retroactively.

Therefore, the interest of the Bankruptcy Trustee in the Property is a vested right which cannot be impaired by the retroactive application of Chapter 2004-19, Laws of Florida.

Chapter 2004-19, Laws of Florida, is not a "remedial or procedural statute," as argued on pages 35-36 of the Initial Brief. As this Court stated in City of Lakeland v. Catinella, 129 So. 2d 133 (Fla. 1961), a case curiously cited by the Beneficiaries to support their argument,

> Remedial statutes, or statutes relating to remedies or modes of procedures, which do not create new or take away existing vested rights, but only operate in furtherance of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retroactive operation of statutes. 129 So. 2d at 136.

To the contrary, as discussed infra, Chapter 2004-19 is clearly designed to take away existing vested rights. Grammer, supra, at 446, and Fonte v. AT&T Wireless Services, Inc., 903 So. 2d 1019 (4th DCA), rev. denied 918 So. 2d 292 (Fla. 2005), although cited by Beneficiaries at page 35 of the Initial Brief, do not support their argument that Chapter 2004-19 is merely a "remedial statute."

In addition, despite the arguments of the Beneficiaries to the contrary, it is not even clear that the Florida Legislature intended Chapter 2004-19, Laws of Florida to apply to this pending case. To the contrary, the Florida Senate Staff Analysis and Economic Impact Statement accompanying the legislation specifically states that "[this] bill would

not affect the recent contrary ruling of a federal district court in a bankruptcy" (RE Doc. 14, pg. 10). In addition, as to the issue of retroactivity in general, the abovementioned Impact Statement also recognized that there was an issue as to whether the bill's retroactive application is constitutionally permissible because the "bill may be deemed by a court of competent jurisdiction to impair vested rights" (RE Doc. 14, pg. 10).

The Beneficiaries also argue that the amendments to Fla. Stat. §689.07 made by the Legislature membership in 2004 can somehow serve to explain the intent of a different Legislative membership in 1959. This argument may have some validity where, as in Lowry v. Parole and Probation Commission, 473 So. 2d 1248 (Fla. 1985), a case cited by the Beneficiaries on page 35 of the Initial Brief, the amendments are enacted shortly after the original legislation. However, prior to this recent amendment, Fla. Stat. §689.07 had not been changed since 1959, or 45 years previous. As this Court held with respect to a much shorter time interval (distinguishing Lowry):

> We did state in Lowry that a clarifying amendment to a statute that is enacted soon after controversies as to the interpretation of a statute arise may be considered as a legislative interpretation of the original law and not as a substantive change. It would be absurd, however, to consider legislation enacted more that ten years after the original act as a clarification of original intent; the membership of the 1992 legislature substantially differed from that of the 1982 legislature.

Laforet, supra, 658 So. 2d 55 at 62. (Fla. 1995).

Accord, Betts v. McKenzie Check Advance, 879 So. 2d 667 at 674 (Fla. 4th DCA 2004); Hypower, Inc. v. State, 839 So. 2d 856 at 857 (Fla. 1st DCA 2003).

The Beneficiaries go on to assert that "if the Legislature can clarify laws that

generate controversies within a few years of their enactment, then a fortiori, it can act when, as here, a new judicial ruling by a non-Florida court (Raborn I) contravenes the accepted interpretation of the law over a period exceeding forty years" (page 35 of Initial Brief). The premise is wrong, and the conclusion is unsupported by law. If 10 years is absurd, see Laforet, supra, then 45 years is even more so. Of course, the Legislature always has the authority to clarify its laws, but under the circumstances of this case it is impossible for such a clarification to be considered a legislative interpretation of the prior law. Also, as previously addressed, Raborn I did not contravene prior interpretation of the law. Finally, Chapter 2004-19 is not a clarifying amendment. Rather, it adds another exception to the statute by excluding conveyances that identify the title or date of a trust. The amendment does nothing to clarify the other exceptions or how the "contrary intent" proviso is intended to apply.

Based on the foregoing, it is clear that Chapter 2004-19, Laws of Florida, cannot be considered when interpreting Fla. Stat. §689.07 as it existed prior to amendment.

The Beneficiaries lastly argue as to this issue that the Legislature should have the power to retroactively amend existing law concerning a case which was still in the process of being litigated, and that the Bankruptcy Trustee had no vested right in the Property on the date Chapter 2004-19, Laws of Florida, became effective. This is directly contrary to the Eleventh Circuit's ruling in this case. The Eleventh Circuit ruled that under federal bankruptcy law the Bankruptcy Trustee's interest in the Property vested on August 24, 2001, the date the Debtor filed his petition for bankruptcy. In re Raborn, supra, at page

1323. Therefore, that question is not appropriate for consideration by this Court. Even if it were, the Beneficiaries are clearly incorrect.

Assuming Fla. Stat. §689.07(1) had the effect of making the Deed a conveyance of the Property in fee simple to the Debtor, the Debtor had a vested right in the Property on the day the Deed was recorded. The Bankruptcy Trustee "acquired" her vested right in the Property on August 24, 2001, the day the Debtor filed his petition for bankruptcy. This is because 11 U.S.C. §544(a) provides that the bankruptcy trustee obtains its interest in the property of the debtor "as of the commencement of the case." See discussion on pages 21-22, supra.

C. THE TRUST IS NOT AN ILLINOIS LAND TRUST.

Finally, the Beneficiaries argue that the Trust is actually an Illinois land trust created pursuant to Fla. Stat. §689.071, but cite no case law in support. It is true that in 1963 the Florida legislature enacted what is now Fla. Stat. §689.071 to permit the so-called Illinois land trust. However, Fla. Stat. §689.071 expressly provides that "[t]his act does not apply to any deed, mortgage, or other instrument to which s. 689.07 applies." Therefore, before a land trust can "benefit" from Fla. Stat. §689.071, it must be one to which Fla. Stat. §689.07(1) does not apply.

CONCLUSION

The certified questions should both be answered in the negative.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail to Robert C. Furr, Esq., 2255 Glades Road, Suite 337W, Boca Raton, FL 33431, to John Beranek, 227 South Calhoun Street, Tallahassee, FL 32301, to Charles W. Throckmorton, Esq., 2525 Ponce De Leon Boulevard, 9th Floor, Coral Gables, FL 33134-6012, to the Office of the U.S. Trustee, 51 S.W. First Ave., Room 1204, Miami FL 33130, to Robert W. Goldman, Esq., 745 12th Avenue South, Suite 101, Naples, FL 34102, and to John W. Little, III, Esq., 250 South Australian Avenue, Suite 1601, West Palm Beach, FL 33401-6161, this 9th day of February, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is submitted in Times New Roman 14 point font and therefore complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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