SUPREME COURT
STATE OF FLORIDA

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.
_____/

FLORIDA CASE NO.: SC06-2461
Eleventh Circuit Case No. 05-16260-DD

INITIAL BRIEF OF APPELLANTS ON CERTIFIED QUESTIONS FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

JURISDICTION AND CERTIFIED QUESTIONS BY THE ELEVENTH CIRCUIT COURT OF APPEALS

This Court has jurisdiction over the certified questions from the Eleventh Circuit Court of Appeals pursuant to the Florida Constitution and Rule 9.150, Florida Rules of Appellate Procedure. The certification opinion was entered November 28, 2006, and will be repeated in substantial part in this brief. In re: Raborn, 470 F.3d 1319 (11th Cir. 2006).

The Eleventh Circuit certified the following questions as necessitating an answer or answers from this Court:

> I. 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.
>
> 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.

The federal court also granted this Court the discretion to rule on any other relevant issues it might chose to consider. The Record before this Court consists of all of the pleadings, briefs and other documents before the Eleventh Circuit. The Record has been supplemented to include appellants' Record

Excerpts, which are a convenient compilation of all of the necessary documents. This brief will designate documents as they appear in the Record Excerpts by Tab and page number, (Tab ___, p.___) or in the record as (R. ____ p.____).

STATEMENT OF THE CASE AND FACTS

The primary issue in this case is whether a specific real property deed (the "Raborn Deed") operated, as intended by the grantors, to convey the property in trust or whether Section 689.07(1), Florida Statutes, transformed the deed into a conveyance of fee simple title. A second, alternative issue is whether a remedial amendment to the statute, clarifying the existing Florida law applies retroactively to all deeds including the Raborn Deed. The Eleventh Circuit has succinctly stated the controlling issue: "If under state law, the recorded Deed evidenced the intent of the grantors to convey the property in trust, the Bankruptcy Trustee can have no rights as a BFP..."

Eleventh Circuit Opinion

The Eleventh Circuit's opinion sets forth the relevant facts and the court's analysis.[1] It states, in relevant part:

> The facts are undisputed. In 1991, Robert E. Raborn and his wife, Lenore B. Raborn ("Settlors" or "Grantors"), attempted to establish a trust for their children, Douglas, Robin, and Richard ("Beneficiaries"). The corpus of the trust was the Raborn family horse farm. On 25 January 1991,

[1] The opinion contains several important footnotes which are not here quoted. The footnotes are dealt with separately immediately after the opinion.

the Settlors executed two documents. The first document, entitled "Raborn Farm Trust Agreement" ("Trust Agreement"), named Mr. and Mrs. Raborn as Settlors; Douglas Raborn as Trustee; and Douglas, Robin, and Richard as Beneficiaries of the trust. The Trust Agreement also set forth the specific terms and purposes of the trust, including the broad powers of Douglas Raborn as Trustee to deal with trust property. Before the current dispute arose, the Trust Agreement was not recorded in the public records.

The second document, entitled "Conveyance Deed to Trustee Under Trust Agreement" ("Deed"), was recorded in the Palm Beach County real estate records on 5 February 1991. The dispute in this case concerns the meaning and effect of this document. The Deed names Mr. and Mrs. Raborn as "Settlors under the Raborn Farm Trust Agreement dated January 25, 1991" and conveys the farm to "Douglas K. Raborn, as Trustee under the Raborn Farm Trust Agreement dated January 25, 1991." According to the Deed, the Trustee is "to have and to hold the said real estate with the appurtenances upon the trust and for the uses and purposes herein and in said Trust Agreement set forth." The Deed repeatedly refers to the Trust Agreement and acknowledges the Trustee's broad powers to deal with the property. The Settlors signed the Deed and swore before a notary public "that they executed said instrument for the purposes therein expressed."

On 24 August 2001, Douglas Raborn filed for Chapter 7 Bankruptcy. The Bankruptcy Trustee filed an adversary proceeding against the Beneficiaries of the trust, alleging that the farm was part of the bankruptcy estate. The Bankruptcy

Trustee argued that, under Florida Statutes section 689.07(1), the 1991 Deed actually conveyed fee simple title to Douglas individually, rather than conveying mere legal title to Douglas in his capacity as Trustee of the trust. Florida Statutes section 689.07(1), as it existed in 1991 and at the time of the bankruptcy filing, provided that

> [e]very 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.

FLA.STAT. § 689.07(1) (2001). In essence, the statute specifies that a conveyance of property that merely adds the words "trustee" or "as trustee" to the grantee's name is a conveyance of fee simple title and no conveyance in trust unless one of four conditions is met: (1) the deed names the beneficiaries; (2) the deed sets forth the nature and purposes of the trust; (3) a contrary intention appears on the face of the deed; or (4) the trust itself is recorded.

Determining that the property was conveyed to Douglas in his capacity as Trustee of the trust, the bankruptcy court concluded that the farm was not part of the bankruptcy estate and dismissed the Bankruptcy Trustee's complaint for failure to state a claim. On appeal, the district court reversed the bankruptcy court ("Raborn I"). The district court determined that the Deed did not meet the statutory conditions that would have made the Deed a conveyance in trust and that, therefore, the Deed conveyed fee simple title to Douglas in his individual capacity rather than conveying mere legal title to Douglas as Trustee.[1] We then dismissed the Beneficiaries' appeal to this Court because the bankruptcy court had not issued a final order. On remand, the bankruptcy court followed the district court's earlier order and granted the Bankruptcy Trustee's motion for summary judgment.

In 2004, the Florida Legislature, however, added an amendment to section 689.07(1). Responding to Raborn I and a request by the Real Property, Probate and Trust Section of the Florida Bar, the Legislature amended the statute to add a fifth condition that would cause a conveyance to be in trust: language in the deed identifying the trust by either name or date. This 2004 bill expressly provided that the amendment "was intended to clarify existing law and shall apply retroactively." Fla. Laws 2004-19, § 2.

On a second appeal from the bankruptcy court, the district court applied the same reasoning as its previous order, affirmed summary judgment for the Bankruptcy Trustee, and denied equitable relief for the Beneficiaries ("Raborn II").[2] The district court determined that "the Conveyance

Deed does not on its face otherwise reflect a 'contrary intention' of the grantors" to convey the property in trust. The district court also concluded that the Bankruptcy Trustee's rights to the property had vested when the bankruptcy was filed in 2001 and that retroactive application of the 2004 statutory amendment would be unconstitutional. This appeal followed.

The Beneficiaries contend that, even under the unamended version of section 689.07(1), the Deed validly conveyed the farm in trust to Douglas Raborn as Trustee because (1) the Deed refers to the nature and purposes of the trust; and (2) the Deed's language clearly demonstrates the intention of the Settlors to convey the farm in trust to Douglas Raborn as Trustee under the Trust Agreement.[3] The Beneficiaries also contend that the 2004 amendment to section 689.07(1) only clarified the statute's meaning and can apply retroactively to the Deed. In their view, retroactive application of the amendment is constitutional because the Bankruptcy Trustee had no vested interest in the farm at the time of the amendment, which was before the bankruptcy court's final judgment.

The Bankruptcy Trustee counters that the district court correctly applied the Florida statute as it existed before the amendment because the Deed (1) merely adds the words "as Trustee" to the name of the grantee; (2) does not name the beneficiaries; (3) does not set forth the nature and purposes of the trust; and (4) does not establish a contrary intention on the part of the grantors. The Bankruptcy Trustee also argues that the district court properly decided that the 2004 statutory amendment did not apply retroactively to

the Deed because even explicitly retroactive legislation cannot be applied retroactively if it impairs vested rights. In addition, pointing to the district court's application of 11 U.S.C. § 544(a)(3), the Bankruptcy Trustee argues that her strong-arm powers give her the rights of a hypothetical bona fide purchaser of the farm from Douglas Raborn and that, theretofore, she can avoid the Beneficiaries' unrecorded equitable interest in the property even if the property was held in trust. See In re Seaway Express Corp., 912 F.2d 1125, 1128-29 (9th Cir. 1990).

As a preliminary matter, we point out that a bankruptcy trustee's rights in the debtor's property vest when the property becomes part of the bankruptcy estate. The district court correctly stated that the Bankruptcy Trustee's rights vested 24 August 2001 because Douglas Raborn filed the bankruptcy petition on that date, which constitutes the "commencement of the case" for purposes of federal bankruptcy law. 11 U.S.C. §§ 541,544(a)(3).

The central issue in this case, however, is not at what point the Bankruptcy Trustee's rights vested, but rather the extent of the rights in the hands of the debtor on the date that rights did vest. An "elementary rule of bankruptcy...is that the [bankruptcy] trustee succeeds only to the title and rights in the property that the debtor possessed." S. Cent. Livestock Dealers, Inc. v. Sec. State Bank, 614 F.2d 1056, 1061 (5th Cir. 1980). In a similar way, the bankruptcy code provides that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest...becomes property of the estate...only

to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541(d).

In this case, the Bankruptcy Trustee could not succeed to rights or title to the real estate that Douglas Raborn, the debtor, did not possess. If Douglas Raborn possessed only legal title to the property as Trustee of the trust (and not as holder of both legal and equitable title in his individual capacity), the Bankruptcy Trustee could neither succeed to nor have any rights -- "vested" or "unvested" -- in the fee simple title to the property. Thus, a necessary threshold determination in this case is the extent of Douglas Raborn's rights in the pertinent property at the commencement of the bankruptcy case (24 August 2001), which is an issue of Florida law.

The Bankruptcy Trustee argues that, regardless of whether Douglas Raborn held only legal title to the property as Trustee of the trust, the Bankruptcy Trustee's strong-arm powers under 11 U.S.C. § 544(a) give her the rights of a hypothetical bona fide purchaser ("BFP") of the property from the debtor, which rights are superior to the Beneficiaries' rights.[4] This argument has little merit, however, because the existence of the Bankruptcy Trustee's rights as a hypothetical BFP depends on whether, under Florida law, the recorded Deed gave the Bankruptcy Trustee constructive notice of the Beneficiaries' equitable interest in the property. If, under state law, the recorded Deed evidenced the intent of the grantors to convey the property in trust, the Bankruptcy Trustee can have no rights as a BFP; and the equitable interest of the

Beneficiaries prevails. Thus, the central issue is whether such intent was apparent from the recorded Deed.

Without ruling upon an unresolved question of state law, we are unable to determine whether a party conducting a search of the Palm Beach County real estate records would have no notice that the Deed might have conveyed the Raborn Farm in trust to Douglas Raborn as Trustee. We are also unable to determine whether the district court correctly applied Florida Statutes section 689.07(1) to the Deed in this case, especially the district court's determination that the Deed failed to express a "contrary intention" on the part of the Grantors to convey the property in trust.

We have said that "[s]ubstantial doubt about a question of state law upon which a particular case turns should be resolved by certifying the question to the state supreme court." Jones v. Dillard's, Inc., 331 F.2d 1259, 1268 (11th Cir. 2003). The Florida Constitution allows this Court to certify a question to the Florida Supreme Court if it "is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." FLA. CONST. art. V, § 3(b)(6). Because we have found no such controlling precedent, we certify the following question to the Florida Supreme Court:

> 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 settlers, and the beneficiaries -- conveys only legal

> title to the property in trust to the grantee as trustee.

This question is solely an issue of Florida state law that should be decided by the Florida Supreme Court.

If the state court answers this first question in the negative and determines that the Deed -- viewed in the light of the unamended statute -- did not convey the property in trust, we also certify the following question:

> 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 the light of the amendment[5] -- to convey only legal title to the grantee in trust.[6]

In certifying these questions, our intent is not to restrict the issues considered by the state court, including whether the Deed and Trust Agreement were effective to create a valid "Illinois Land Trust" covered under Florida Statutes section 689.071 rather than section 689.07(1).[7] Discretion to examine this issue and other relevant issues lies with the state court. See Miller v. Scottsdale Ins. Co., 410 F.2d 678, 682 (11th Cir. 2005) ("Our phrasing of the certified question is merely suggestive and does not in any way restrict the scope of the inquiry by the Supreme Court of Florida."). We also recognize that "latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are given." Swire Pac. Holdings v. Zurich Ins. Co., 284 F.3d 1228, 1234 (11th Cir. 2002) (quoting Martinez v. Rodriguez, 394 F.2d 156, 159 n.6 (5th Cir. 1968)). To assist the state court's inquiry, the entire

> record in this case and the briefs of the parties are transmitted herewith.

In re: Raborn, 470 F.3d 1319 (11th Cir. 2006) at 1320-1325.

Eleventh Circuit Footnotes

The Eleventh Circuit addressed several important points in footnotes. First in note 1, the court recognized that the district judge in Raborn I (Honorable Daniel T.K. Hurley) found the intent of the grantors to be irrelevant. Id. at 1322, n.1. The actual quotation from the Raborn I appellate opinion was: "As a threshold matter, the intent of the grantors' is entirely irrelevant to the statutory analysis and application." (Tab 6, p.4). This holding was then reaffirmed in the Raborn II decision. The Raborns have contended this conclusion was error under Florida law and that § 689.07(1) actually requires the intent of the grantors, as stated in the deed, to be considered.

The Eleventh Circuit Court also noted the conflicting statements in the Senate Staff Analysis on whether the 2004 amendments to § 689.07 would overrule the Raborn I decision. The Eleventh Circuit did not rule on this issue but instead points out the direct conflict within the Staff Analysis. In re: Raborn, at 1324, n.5. The Raborns contend that the Staff Analysis should not have been considered at all because the 2004 Statute was clear and unambiguous. In any event, a conflict in the Staff Analysis did not give the district judge the right to choose one view over another and to disregard the clear legislative statement that the statute applied retroactively to

all deeds. Legislative history created by staff cannot create an ambiguity in a clear statute.

The Eleventh Circuit rejected an argument by the Bankruptcy Trustee that she took title to the horse farm even if it was conveyed in trust based on In re Seaway Exp. Corp., 912 F.2d 1125 (9th Cir. 1990). In re: Raborn, 470 F.3d 1319 at 1323-1324. Because the Eleventh Circuit has ruled against the Trustee on this issue as a matter of federal law, it will not be addressed in this brief. Again, the Circuit Court's statement of the controlling issue is important -- if the deed showed an intent to convey in trust, then the Bankruptcy Trustee has no rights.

SUMMARY OF THE ARGUMENT

This Court should hold that Florida Statute § 689.07(1) does not result in a fee simple conveyance when a recorded deed entitled "CONVEYANCE DEED TO TRUSTEE UNDER TRUST AGREEMENT" makes repeated substantive references to an actually existing trust, thereby placing the public on notice of the intent of the grantors, the existence of the trust and the conveyance to the named trustee under a specifically designated trust. Although the single word "trustee" following the grantee's name in a deed can be considered surplusage under § 689.07, the statute and Florida case law require that the deed be read in its entirety to determine the true intent of the grantor including the "contrary intent" of the grantors to convey the property in trust instead of in fee simple.

This Court should hold that the intentions of the grantors indicated by all of the words of this deed were not mere "amplification" and most certainly were not "entirely irrelevant" as found by the federal district judge. Further, a "trust identifier" stating the name and date of the trust contained in the deed is all that is necessary to satisfy the "contrary intent" provision of the statute.

In the alternative, this Court should honor the will of the Florida Legislature and hold that the Legislature properly clarified existing law on these issues in a retroactive 2004 remedial statute to correct the federal district court's erroneous application of the statute in Raborn I. Under Florida law this 2004 retroactive statute applies to this particular Raborn deed involved in this case because the remedial legislation became effective several months before any final order was entered by the Bankruptcy Court.

STANDARD OF REVIEW

The Eleventh Circuit has certified questions of Florida law and the standard of review is de novo. Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So. 2d 582 (Fla. 2000).

ARGUMENT

I. 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.

Section 689.07(1), in its pre-amendment form as applied by the district judge in Raborn I and Raborn II, read 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 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).

This statute, as applied to the Raborn Deed, was wrongly held to have produced a fee simple conveyance. The Raborn Deed is not the type of "mere trustee deed" that the statute is intended to

address. More importantly, the Raborn Deed does not fall within the literal application of the statute.

The Purpose of the Statute is to Address "Mere Trustee" Deeds

The statute requires that a deed which merely adds the words "trustee" or "as trustee" to the name of a grantee is to be applied as though the word "trustee" had not been used at all. Such a "mere trustee deed" has the effect of conveying title in fee simple rather than in trust.

Florida has long invalidated "mere trustee" deeds by statute. The title of the statute in 1915 as codified in § 5666 was simply: "TRUSTEE" OR "AS TRUSTEE" ADDED TO THE NAME OF GRANTEE GRANTS FEE SIMPLE ESTATE. This is what the statute has always meant. Adding merely "trustee" means little or nothing. This is consistent with § 689.07(1) and also with general Florida law on adding only the word "trustee" to the name of a contract signatory. See Manufacture's Leasing Limited v. Florida Development and Attraction, Inc., 330 So. 2d 171 (Fla. 4th DCA 1976), (the word trustee is merely descriptive and to be disregarded absent other language in the document indicating a different intent).

This Court addressed an early codification of the § 689.07(1) (Section 3793, RGS) in Arundel Debenture Corp. v. LeBlond, 190 So. 2d 765 (Fla. 1939). Arundel is often cited as establishing the principle that the statute was intended to prevent "secret trusts" by protecting a third party from fraud

who relies on the deed "when dealing with the grantee." (emphasis supplied). Arundel at p. 767.

Arundel involved a classic "mere trustee deed." There, property was conveyed to Schultz "as trustee," without naming the real purchaser, LeBlond. Other than the word "trustee," the deed contained no other mention of a trust because none actually exited. Purchaser LeBlond was the plaintiff and asserted that there was "general knowledge" that Schultz was his agent and "trustee." This Court held that a fee simple conveyance to Schultz had occurred under Section 3793. The court nonetheless held that equity would still impose a "resulting trust" in favor of the real purchaser, LeBlond. Arundel is often cited as establishing the principle that the statute was intended to protect against "secret trusts" by protecting third parties from fraud in their dealings with the "grantee" under the deed. Arundel at p.767. The case deals with the old Florida practice of designating grantees as "trustees" in deeds when there was actually no trust in existence.

The Statute Recognizes Various "Trust Identifiers" that Remove a Deed from its Application

The statute has always been intended to address "mere trustee" deeds, not deeds that manifestly reflect the existence of an actual trust. Section 689.07(1) -- as it existed in 1991 when the Raborn Deed was recorded -- recognized this policy and listed four deed attributes, or "trust identifiers" -- any one of which would render the statute inapplicable. These four provisions, in logical order are: (1) "contrary intention"

language on the face of the deed indicating the grantor's intent to convey in trust rather than fee simple; (2) recordation of the trust; (3) identification of any trust beneficiary in the deed; or (4) disclosure in the deed of the nature and purpose of the trust.

The Raborn Deed Contains "Trust Identifiers"

The Raborn Deed does not fall within the ambit of the statute for numerous reasons. First, the statute, 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. The grantee of the Raborn Deed was not "Douglas Raborn as trustee" but "Douglas K. Raborn, as Trustee under the Raborn Farm Trust Agreement dated January 25, 1991." Thus, the Raborn Deed never came within the threshold provisions of the statute.

Moreover, the Raborn Deed, on its face, fully satisfied the "contrary intention" provision of the statute. A deed using the word "trustee" and also containing "contrary intention" language is not transformed into a fee simple deed. Judge Hurley ruled as a matter of law that the "contrary intentions" of the grantors stated in the deed were "totally irrelevant." In certifying this question to this Court, the Eleventh Circuit noted its concern with this ruling and even stated that it was "especially" concerned with the ruling as to the absence of any stated contrary intentions by the grantors. In re: Raborn, 470 F.3d 1319 at 1324.

Stating the title and date of the trust is the type of trust identifier which Florida cases have recognized as canceling the fee simple application of § 689.07(1). For example, in One Harbor Financial Ltd Co. v. Hynes Properties, LLC, 884 So. 2d 1039, 1043 (Fla. 5th DCA 2004), the court held that because the deed "did not identify either trust" or fulfill the other prescriptions, the statute produced a fee simple. Thus, under One Harbor, a deed which did identify a trust would not have been within the statute.

Florida lawyers have long understood that specifically identifying the trust in a deed was sufficient to indicate the grantor's intention to convey in trust. See e.g., Administrations of Trusts in Florida, Chapter 14, Title Problems and Issues, § 14.11 (Third Edition 2001), which states:

> 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. (emphasis supplied).

In addition, a detailed statement in the deed of the trustee's broad powers to dispose of the property describes the "nature and purpose" of the trust, and also serves to make § 689.07(1) inapplicable. See Resnick v. Goldman, 133 So. 2d 770 (Fla. 3d DCA 1961).

The Entire Deed was to be Considered

The district judge took a hypertechnical approach to this deed instead of construing the entire document and looking to

the many references to the trust agreement which were obviously present in the deed. Thrasher v. Arida, 858 So. 2d 1173 (Fla. 2d DCA 2003), holds at p. 1175 that:

> The most basic rule in a court's interpretation of a deed is for the court to 'consider the language of the entire instrument in order to determine the intent of the grantor, both as to the character of estate and the property conveyed and to so construe the instrument as if legally possible to effectuate such intent.' (emphasis supplied)

This is precisely what the Raborn I and Raborn II orders do not do. Indeed they hold the intent of the grantor to be irrelevant. Florida law is directly contrary and holds the entire document must be considered to determine the intent of the grantors and if there is any ambiguity, the parties have to be allowed to present evidence. See Reid v. Barry, 112 So. 845 (Fla. 1927), (modern decisions depart from arbitrary common-law rules and consider entire documents); Pierson v. Bill, 182 So. 631 (Fla. 1938), (grantor's intent is controlling). Here, instead of allowing evidence, summary judgment against the Raborns was granted based solely upon the Raborn I decision. The bankruptcy judge said his hands were tied and he had no choice.

Florida law is similar on the interpretation of a deed and the interpretation of a statute such as § 689.07. In Jones v. ETS of New Orleans, Inc., 793 So. 2d 912 (Fla. 2001), this Court held that a basic tenet of statutory interpretation is that a statute should be interpreted to give effect to every clause and

to give meaning and harmony to all parts of the statute. Under Jones, statutory phrases are not to be read in isolation but instead in the context of the entire statute.

In Raborn I and Raborn II, Judge Hurley again did precisely the opposite, and held the grantors' intent to be "totally irrelevant," notwithstanding the trust identifier in the Raborn Deed and the statutory mandate that a grantor's "contrary intention" to a fee simple conveyance be controlling. Instead or reading the whole statute, each phrase is considered individually. As previously indicated, Judge Hurley concluded that since the word "trustee" might give notice of the existence of the trust, and since that word had to be disregarded, that everything else in the deed concerning the trust was mere "amplification" and should also be disregarded. (Raborn I and Raborn II; Tab 3, p.5; Tab 14, p.8). This is indeed contrary to Florida law.

The Raborn Deed here is replete with references to the actual specific trust instrument. Substantive provisions in the deed contain seven separate and conspicuous references to the Raborn Farm Trust Agreement:

-- the document is entitled "Conveyance Deed to Trustee Under Trust Agreement"

-- the grantors in the conveyance deed are identified as the Settlors under "the Raborn Farm Trust Agreement dated January 25, 1991." These quoted words are used twice in the first paragraph of the deed and are unquestionably a trust identifier.

-- the grantee is identified as Douglas K. Raborn as Trustee under the Raborn Farm Trust Agreement dated January 25,

1991 and his address in the Village Golf where the property is located is provided.

-- the deed conveys the property "to have and to hold...for the uses and purposes herein and in said trust agreement."

-- the deed is sworn to stating it was executed for the "purposes expressed therein."

The penultimate substantive paragraph of the Raborn Deed contains three additional references to the trust agreement and an express reference to the beneficiaries thereunder. In addition, the conveyance deed contains additional references to the grantee's capacity as a "trustee."

The Raborn Deed's many references to the trust with specificity renders this deed qualitatively different from the deeds in the cases relied upon in Raborn I and Raborn II, which were all "mere trustee deeds" or "classic trustee deeds" or which actually support the Raborn view of the deed.

The grantors/settlors said they were creating the Raborn Farm Trust and conveying the family horse farm to one of their sons to hold the property as trustee. The deed stated that there was a "Raborn Farm Trust" and that the trust document was in writing. The public and the Bankruptcy Trustee were thus on notice of the trust if they simply read the recorded deed. The trust identifier has been held to be within the § 689.07(1) statement of contrary intentions. Even without the new statute, this has always been Florida law. This contrary intention required by Florida law was specifically stated several times in this deed. Judge Hurley stated that all of these substantive deed provisions were merely "amplification" of the word

"trustee" and should be disregarded. No Florida case has ever analyzed a deed under this "amplification" theory. The theory and the label in this context are contrary to Florida law. As stated in Thrasher v. Arida at p.1174, "the character of [the] estate and the property conveyed" is to be gleaned from the "entire instrument" and it is the court's function to "effectuate that intent" if legally possible. Counsel for the Trustee has even argued that the statute has the effect of "ignoring" the grantor's intent.

Grammer v. Roman, 174 So. 2d 443 (Fla. 2d DCA 1965) holds that the addition of "as trustee" alone following the name of a grantee has no real effect. However, the Grammer court went further and read the entire deed and concluded that other language took the deed out of the operation of § 689.07. At p.466, the court stated the essence of § 689.07(1) as follows:

> In essence 'trustee' or 'as trustee' following the name of the grantee in a deed which contains no other reference to the trust agreement does not, of itself, constitute notice of a trust and fee simple title vests in the trustee. (emphasis added).

The Florida Bar Continuing Legal Education publications and the Fund Title Notes by Attorneys' Title Insurance Fund, Inc. are considered authoritative by Florida courts and are in common use by Florida attorneys. Snyder v. Davis, 699 So. 2d 1008 (Fla. 1997) note 2.

In Fund Title Note 31.04.02, the "mere trustee deed" concept is stated. There the professional title insurance attorneys state:

> If the conveyance to the trustees was in conformity with the provisions of Sec. 689.07, F.S., containing merely the addition of the words 'trustees' or 'as trustees' after their names, without naming any beneficiaries or stating the nature and purposes of the trust or otherwise showing an intent to create a trust, and if there was no declaration of trust of record when the deed was recorded, a fee simple title would have been conveyed to them. (emphasis supplied).

If more than "merely the addition of the word" trustee is contained in the deed, then it is not a "mere trustee deed" and not a conveyance in fee simple. In addition, language showing an intent to create and convey to a trust totally does away with the default fee simple.

In Section 10.36 of the Florida Bar's Florida Real Property Practice I, Second Edition manual the authors address § 689.07(1), as follows:

> Under certain conditions, the addition of the words 'Trustee' or 'as Trustee' to the name of the grantee in a conveyance of real property has the effect of vesting a fee simple estate in the grantee free of any trust or notice of trust. These conditions are that no beneficiaries are named in the conveyance; the nature and purpose of the trust are not set out in the conveyance; there is no contrary intention expressed in the conveyance, such as a disclosure of an unrecorded trust arrangement; and there does not appear of record at the time of the recording of the conveyance a declaration of

> trust made by the grantee.... (emphasis supplied).

Thus the "disclosure of an unrecorded trust arrangement" is a stated "contrary intention" to a fee simple conveyance.

The use of a conveyance deed similar to the Raborn deed accompanied by an unrecorded trust document has long been typical Florida practice. Not recording a trust document is common in Florida and the district judge was misinformed in concluding it was suspicious not to record a trust or that recording the trust was the only way to convey to a trust.

The well accepted treatise, Administration of Trusts in Florida, § 14.11 (4th Edition 2005), states:

> 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 name of the person as if the words 'as trustee' were not present. (emphasis supplied).

Thus, if the deed includes a trust date and a trust identifier, a fee simple title is not presumed. This is exactly the situation presented here. Section 14.11 of this 2005 version of the book cited above appeared in prior editions and was written long before the 2004 legislation. The text in the 2005 edition also goes on to discuss Judge Hurley's Raborn I order noting that he has "taken a more expansive view" of § 689.07(1). Clearly, Judge Hurley also did not accept the author's prior statements concerning a trust identifier in a deed as making § 689.07(1) inapplicable. This subsection of Administration of Trusts in Florida also notes that the Florida Legislature has

"clarified F.S. 689.07 as to the original intent [of the Legislature] to exclude trusts mentioned by date and title from the operation of the statute." (emphasis supplied).

Judge Hurley chose not to recognize any of these Florida authorities on "mere trustee deeds" being the only deeds within the statute. He also did not accept the authorities approving the use of a trust identifier of an unrecorded trust document in the recorded deed as being sufficient to show a contrary intent and to abrogate the effect of the fee simple default provision. This refusal to follow recognized Florida law has made this Court's decision on these issues necessary.

The Florida authorities recognize that trust documents, most often will not be recorded. The district judge expressed his distrust of anyone who would not record a trust document. With due respect, these suspicions were completely unfounded. Florida law and practice recognizes the confidential nature of trust documents and they are commonly not recorded. Again § 14.11 of the Administration of Trusts treatise cited above recognizes "a client's desire as to the confidentiality of the trust agreement." Florida trust documents are generally private. This Raborn situation was a perfectly above-board family trust conveyance. Any person reading the deed was on notice of the trust and the conveyance to the trust. Neither the trust nor the trustee resignation documents of 2000 were immediately recorded.

The Raborn decisions rely primarily on Schiavone v. Dye, 209 B.R. 751 (S.D. Fla. 1997), affirmed (August 19, 1997, J.

Zloch)(unpublished); F.J. Holmes Equipment, Inc. v. Babcock Building Supply, Inc., 553 So. 2d 748, 749 n.1 (Fla. 5th DCA 1989); and One Harbor Financial Ltd. Co. v. Hynes Properties, LLC, 884 So. 2d 1039 (Fla. 5th DCA 2004). Several other federal cases of little application were cited. In addition the Trustee relied upon Resnick v. Goldman, 133 So. 2d 770 (Fla. 3d DCA 1961).

The One Harbor decision was previously discussed and actually supports the Raborn position that a trust identifier is sufficient to render § 689.07 inapplicable. One Harbor at p.1043. The case was decided based on a deed that "did not identify either trust" and for that reason, § 689.07 was held applicable.

Thus, a trust identifier providing the name and date of the trust was all that would have been necessary to take the One Harbor deed outside of § 689.07. The opinion shows that identifier was not present and the result would have been a trust conveyance had the identifier been present.

Resnick is a 1961 Third District decision. A deed had been drawn to a bank as trustee and as is the normal practice the trust agreement was not recorded. The trial court held there was enough in the deed concerning the nature and purpose of the trust to take the deed out of the statute. Thus the bank was held to have received the property in trust and not in fee simple. This holding was affirmed on appeal in the Third District. Even though the deed actually stated that the bank held title in "fee simple," the District Court expressly held

that "the bank held the property in trust and not in fee simple under § 689.07." (Resnick at p.771). Despite the court's reliance on the "nature and purpose" provision, there is nothing to suggest that this deed did not also express a contrary intention to the fee simple conveyance. In addition, we invite the Trustee to point out the words in the Resnick deed which showed the nature and purpose of the trust. The only deed language is very similar to the Raborn deed granting broad powers to the designated trustee. Thus the Resnick court held this broad power language showed the nature and purpose of the trust. Resnick implicitly rejected the argument that this broad power language was consistent only with a fee simple conveyance. Giving a trustee broad powers to manage property and subdivide and convey it for development purposes states the nature and purpose of the trust. This is what the Resnick trial court held and this was the ruling which was affirmed.

The case relied upon most heavily was Schiavone, a decision by a bankruptcy judge which involved two non-lawyers who went to a seminar on living trusts and came home and gave each other printed form quitclaim deeds to a home which the unmarried girlfriend had been living in. The deed conveyed the property to "209 Salzedo Street Trust, Don Schiavone, Trustee." The deed was recorded and some sort of land trust agreement presented a problem for a Trustee in Bankruptcy who came upon the scene when the man who later married the woman filed for Chapter 7 protection. The bankruptcy judge dealt with numerous common law exceptions to § 689.07 and concluded that the Trustee in

Bankruptcy succeeded to fee simple title to the property. The case is distinguishable because again, this was a mere trustee deed in the form of a printed quitclaim deed. The defenses raised were based on the Florida common law and the deed was in the nature of a "bare trustee deed." Schiavone is distinguishable or was also wrongly decided under Florida law. It was apparently affirmed in an unpublished order and thus did not cause the same shockwaves among Florida trust attorneys as Raborn I caused.

The F.J. Holmes Equipment, Inc. case is favorable to the Raborn position herein rather than supporting Judge Hurley's order. At p.749, the court stated in a footnote: "The bare designation of 'trustee' or 'as trustee' on a recorded deed does not give constructive notice." Again this was a "mere trustee" deed and thus the statute did apply.

It is only necessary to read this Raborn deed to detect the obvious -- it is not a "mere trustee deed." It was a deed expressing "an intent to convey something short of fee simple." (R. 20 p.8). The grantors stated under oath that they intended to convey the property in trust and that was all that was necessary.

A useful exercise is to simply delete the words "as trustee" from the fifth line of the first paragraph of the Raborn Deed. (Tab 15, p.1). If the deed is read after deleting these two words, there still can be absolutely no doubt that the deed expresses an intent to create a trust, to convey property to the trust and to not convey the property in fee simple to a

single person. The word "trustee" alone may be surplusage but if this word is deleted from this deed, there still can be no question that there was a stated contrary intent to the creation of a fee simple conveyance. Anyone reading the public land records in Palm Beach County would read the deed and be on notice of the trust and the trust conveyance. No one could be misled and indeed there was no assertion that anyone was misled.

No One Relied on the Deed

There were absolutely no alleged third parties engaged in transactions with Douglas Raborn or with his brother who took over the trustee position in 2000.

There was absolutely no hint of any attempt to commit a fraud on anyone. This was a perfectly proper family trust situation. Douglas Raborn was designated as the trustee and ten years later, during which time there were no transactions concerning the property, he filed for bankruptcy protection after he had already resigned as trustee. Douglas Raborn's bankruptcy had absolutely nothing to do with the family horse farm property and absolutely no third party or creditors relied upon this deed. No one was misled. There simply are no third parties involved.

Section 689.07 has been repeatedly held applicable only for the purpose of protecting a third party who deals with the grantee under a deed and relies on that person's title to the property. As previously pointed out, Arundel so holds at p.767 where this Court stated that the statute was to protect those

who might "rely upon the record when dealing with the grantee." This was also the holding in Adams v. Adams, 567 So. 2d 8 (Fla. 4th DCA 1990), (the "purpose of the statute was to prevent fraud on persons who might rely on the record title when dealing with the grantee."); Callava v. Feinberg, 864 So. 2d 429, 432 (Fla. 3d DCA 2003), (§ 689.07 does not apply unless "a party has detrimentally relied on his [the grantee's] ownership status")' and Meadows v. Citycorp Leasing Inc. 511 So. 2d 622, 623 (Fla. 5th DCA 1987), citing to Arundel for the same construction of § 689.07. Reliance on the deed by a third party was required.

Thus, overwhelming Florida law is directly contrary to Raborn I and Raborn II. The Raborn Deed, considered in its entirety, overwhelmingly showed the "contrary intention" of the grantors and thus the deed is outside the presumed fee simple requirement of the law. Moreover, the words "Raborn Farm Trust" plus all of the details specified in the deed concerning the broad powers of the trustee were an adequate statement of the "nature and purpose" of the trust, independently sufficient to remove the deed from the operation of the statute.

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?

Judge Hurley ruled against the three Raborn beneficiaries in Raborn I. The Raborn I order was appealed but held by the

Eleventh Circuit not to be a final order subject to appeal. This resulted in a remand for a final order by a second bankruptcy judge and another appeal to Judge Hurley, which produced Raborn II. Judge Hurley's ruling in Raborn I -- that the Raborn Deed conveyed fee simple title and that the grantors' intent was irrelevant -- produced shockwaves among Florida lawyers because it substantially changed Florida law under § 689.07(1). At the urging of the Florida Bar Real Property, Probate and Law Section, the Florida Legislature reacted to Raborn I by enacting a retroactive amendment clarifying that Raborn I was wrong and contrary to what the statue had meant from the beginning. Judge Hurley ruled that the "clarifying" and "retroactive" amendments by the Florida Legislature were not intended to apply to this particular case despite the fact that Raborn I was the sole basis for the emergency amendments. Raborn II further holds the Trustee already had a vested right in the property and therefore the new Florida remedial legislation should be disregarded as unconstitutional. The Eleventh Circuit has asked for an answer to this question only if this Court rejects our position on the first certified question and determines that the unamended version of § 689.07 requires a conclusion that there was no conveyance in trust. The 2004 amendment merely added "...and the trust is not identified by title or date" to the statute.

The Amended Statute, Unambiguously Applies Retroactively to ALL Deeds, Including the Raborn Deed

The Raborn II order recognizes that the "amendment's retroactivity provision is unqualified" but then inconsistently holds this does not "signal a legislative intent for universal application to all conveyances created prior to its effective date." (emphasis supplied). This is an unexplained non sequitur. The unqualified word "retroactive" certainly did not mean "apply retroactively to some but not to all." The statute is clear and not ambiguous in stating:

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

2004 Fla. Laws Ch. 2004-19 § 2. The statute should be held to have applied universally to all prior deeds.

Judge Hurley based his refusal to apply the statutory amendments on this illogical non sequitur reasoning, plus one sentence in one Senate Staff Analysis of the bill. This part of the staff report stated that the bill "would not affect the recent contrary ruling of a federal district court." (R. 78 at 4). This single sentence was written by a staff member in a document not approved by the members of the Legislature.[2]

[2] It appears entirely possible that the author of this staff analysis was under the erroneous assumption that this litigation had concluded, and that the first Order (Raborn I) was final because the Eleventh Circuit had dismissed the first appeal. Certainly, there is nothing in the staff analysis to suggest that the author was aware that the Raborn I order was not final and was subject to further litigation. As the Eleventh Circuit stated: "We then dismissed the Beneficiaries' appeal...because the bankruptcy court had not issued a final order."

Indeed, the staff analysis itself states at p.5: "This Senate staff analysis does not reflect the intent or official position of the Bill's sponsor or the Florida Senate." (R. 72, Exh. 1, at 5). (emphasis supplied).

Although the Staff Analysis should not have been relied upon at all, another section of that Analysis also stated: "This bill amends § 689.07 F.S. to supersede the contrary federal district court ruling in the bankruptcy matter of In re: Raborn." The Eleventh Circuit noted this important inconsistency in its opinion but did not attempt to decide how Florida would deal with such a situation.

Determining legislative intent of a clear Florida statute from directly conflicting staff views was improper and this Court should say so. This is obviously an undecided question of Florida law but this Court should most certainly not accept the view that a Florida statute may become ambiguous based solely upon the comments of Legislative Staff. What is important is what the statute says rather than what staff says about it in an unapproved report.

The actual words of this statute are clear and not ambiguous in the slightest. Section 2 of the actual statute clearly and unequivocally states the amendment was to be applied to all prior deeds and this contradicts the inconsistent single staff analysis statement. It simply makes no sense that the Legislature intended to clarify the law as to the thousands of trust deeds in existence in Florida before the 2004 amendments but intended to make an exception for the Raborn deed, which

gave rise to the clarifying amendment. The Trustee argues that the 2004 statute was intended to apply to every Florida deed except the Raborn deed. No reason for this absurd approach has been suggested.

Florida courts do not look to legislative history unless a statute is ambiguous to the extent of requiring a court to interpret or construe it. See Shelby Mut. Ins. Co. of Shelby v. Ohio v. Smith, 556 So. 2d 393 (Fla. 1990) (court declined to follow legislative intent described in staff analysis because statute was not ambiguous on its face); Hooper v. Zurich Ins. Co., 789 So. 2d 368 (Fla. 2d DCA 2001), (court declined to follow staff analysis where the plain wording and meaning of the statute required a result at odds with the staff's expressed intent); Battles v. State, 595 So. 2d 183 (Fla. 1st DCA 1992) (court declined to follow comments in Senate staff analysis where statute was not ambiguous).

The 2004 statutory amendment explicitly provides for retroactive application. Indeed, the same Senate staff analysis recognizes this and states: "The bill explicitly provides for its retroactive application." (R. 72, Exh. 2 at 4). The same document also states:

> This bill applies retroactively to all deeds...in existence prior to the date of this bill....

The Amendments were Remedial and can be Applied Retroactively

The Florida Legislature has the power to enact remedial amendments that clarify legislation after controversies arise

concerning the meaning of such statutes. See Lowry v. Parole and Probation Commission, 473 So. 2d 1248, 1250 (Fla. 1985). 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. There was no need for legislative clarification until Raborn I interpreted the statute differently than the Legislature originally intended, as followed by practitioners and lower Florida courts for forty years. The cases cited by Judge Hurley all involved "mere trustee deeds" which are completely different from the Raborn Deed.

Remedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation and such statutes can be held immediately applicable to pending cases. City of Lakeland v. Cantinella, 129 So. 2d 133 (Fla. 1961); Grammer v. Roman, 174 So. 2d 443, 446 (Fla. 2d DCA 1965). A remedial statute is "designed to correct an existing law" and "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 Services, Inc., 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005), quoting Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981).

An issue as to the retroactive application of § 689.071 was specifically discussed by the Second District Court of Appeal in Grammer v. Roman, supra. At p.446, the court stated:

> Remedial statutes are exceptions to the rule that statutes are addressed to the future, not the past. One of the purposes of such a statute is to give effect to acts and contracts of individuals according to the intention thereof. A remedial statute is one which confers a remedy, and a remedy is the means employed in enforcing a right or in redressing an injury. Crawford, Statutory Construction, § 73, p. 105. Remedial statutes do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. Cunningham v. State Plant Board of Florida, Fla.App. 1959, 112 So. 2d 905.

This portion of Grammer concerned the 1963 amendment which added § 689.071 to the trust law of this state. If § 689.071 can be retroactively applied as a remedial statute, then the clarification of § 689.07 can also be applied retroactively when the Legislature so states. The district judge relied on Grammer but overlooked this clear ruling.

As a matter of Florida law this Court should hold that the Legislature had the power to clarify existing law and to do so in a retroactive fashion concerning a case which was still in the process of being litigated. No final and appealable order had even been entered by the Bankruptcy Court when the retroactive statute became effective. The statute became effective on April 24, 2004, and the Bankruptcy Court's Summary Judgment was issued on November 22, 2004. This was the first final order in the bankruptcy court in favor of the Trustee. The only other final order was the first Bankruptcy Judge's order which dismissed the Trustee's complaint with prejudice.

The Trustee certainly had no vested rights whatsoever under the first final order.

The Illinois Land Trust (§ 689.071)

On the issue of the Illinois Land Trust, the Raborns had contended from the beginning that this was actually an Illinois Land Trust under § 689.071, Florida Statutes. The attorney who drafted this deed filed his affidavit that he intended this to be an Illinois Land Trust but the district judge, at the urging of the Trustee, refused to apply or even consider § 689.071 governing such trusts.

As previously indicated, the Illinois Land Trust statute (§ 689.071) has now been reenacted as the Florida Land Trust Act in a 2006 amendment by the Florida Legislature. (Laws of Florida 2006-274(3)). However, this amendment again seems to make the two statutes (§ 689.07 and § 689.071) mutually exclusive. If § 689.07 applies then the Illinois Land Trust statute now renamed as the Florida Land Trust Act (§ 689.071) does not apply. Therefore it is necessary for the Raborn appellants to deal first with the holding that § 689.07(1) does apply. If § 689.07(1) does apply, then there simply is no trust because there is no trust corpus. Conversely, if this was a conveyance in trust and not within § 689.07 then there is no real need to address the Illinois Land Trust issue. From the beginning of this case and throughout the two appeals, the Trustee in Bankruptcy has contended that the Illinois Land Trust statute was not applicable and that solely § 689.07(1) was applicable.

Although Judge Hurley refused to consider § 689.071, it should be noted the stated purposes of an Illinois Land Trust is to allow the trustee to convey the property without the joinder of the unidentified beneficiaries of the trust which is always an unrecorded trust. Although the trustee has title, the beneficiaries have control and are the true owners. See In re: Langley, 30 B.R. 595, 599 (Bankr. N.D. Ind. 1983) and In re: Ainslie, 145 B.R. 950, 955, 956 (Bankr. N.D. Ill. 1992). The broad powers of the trustee listed in this deed show that this was very similar to an Illinois Land Trust as § 689.071 existed before the 2006 amendments. For unstated reasons, Judge Hurley refused to consider anything other than § 689.07(1) and refused to apply § 689.071. A fee simple conveyance was never intended and no matter which statute is applied, this Court should hold that a conveyance in trust occurred under Florida law.

CONCLUSION

Appellants respectfully request that this Court answer the first certified question in the affirmative in which case an answer to the second question will be unnecessary. In the alternative, the second question should be answered by holding the 2004 amendment applied retroactively as clearly stated by the Florida Legislature.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

CERTIFICATE OF SERVICE

I hereby certify that a true copy has been furnished by mail to the following this 16th day of January, 2007:

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