WHITE PAPER
PROPOSED AMENDMENT TO FLORIDA STATUTE 61.075

The proposed amendment to F.S. 61.075(4) and the creation of F.S. 61.075(12) pertains to the rights in real property awarded in dissolution of marriage cases.

I. SUMMARY

Part 1- F.S. 61.075(4)-To be amended to adopt a new subsection

The proposed amendment to F.S. 61.075(4) would require that a notice of rights awarded to real property or the proceeds from its future sale or refinance be contained either (1) in a deed amongst the parties to the dissolution of marriage case or (2) in a separate instrument. Such deed or instrument (which could be either a certified copy of an entry from the dissolution of marriage case file or a separate notice) would have to be recorded in the Official Records of the county in which the property is located in order to provide notice to subsequent purchasers and creditors.

The proposed bill offers three benefits. It would help prevent delays in real estate closings by avoiding the necessity in most cases of obtaining and reviewing the marital settlement agreement. This is a time-consuming process, especially when, as often is the case, the marital settlement agreement is not contained in the dissolution of marriage case file. Additionally, a recording requirement would likely enhance compliance with the terms of the dissolution of marriage judgment and marital settlement agreement because the rights reserved would be public knowledge without having to look beyond the Official Records. Finally, making it unnecessary to review dissolution case files would provide protection against the infringement on the privacy of the parties to the dissolution.

Part 2- F.S. 61.075(12)-Proposed

The proposed new subsection provides that if a judgment lien did not attach because the real property was held as tenants by the entireties prior to the judgment dissolving the marriage and title was subsequently distributed to one spouse, the lien of a judgment creditor will not attach to the interest in the property received by the spouse whom the creditor's lien is not against. This would provide the same protection to a former spouse that is now available to a current spouse whom there is not a judgment lien against who while married held title as tenants by the entireties.

This protection would exist regardless of whether the final judgment of dissolution of marriage had the effect of automatically transferring title or whether a subsequent deed was required to effectuate the terms of the dissolution judgment, mediation award or voluntary settlement. Further, it would not matter that a deed transferring title from one spouse to the other was recorded prior to or subsequent to the entry of the final judgment of dissolution of marriage.

II. CURRENT PRACTICE

Part 1- F.S. 61.075(4) Currently

Property interests and rights to a share of the proceeds are typically transferred or allocated in dissolution of marriage cases, whether it be the final judgment of dissolution of marriage, mediation award or marital settlement agreement. Because these documents are generally not put of record, it is standard practice for title examiners to review the dissolution of marriage case file to determine whether or not an individual, even one who conveyed title to their ex-spouse, either (i) reserved or acquired an interest in the real property or (ii) is entitled to a share of the proceeds upon the property's subsequent sale or refinance.

The requirement to review the dissolution of marriage case file is almost always a source of contention due to the delicate nature of the subject matter. However, this practice is necessary to ensure that the terms of an unrecorded judgment which may contain a meditation award or marital settlement agreement were complied with, thereby preventing a cloud on title.

Part 2- F.S. 61.075(12)

Holding title as tenancy by the entireties is only available to individuals married to each other. It allows married couples to hold title while providing a right of survivorship upon the death of the first spouse. There is the added benefit that a judgment against only one spouse that had not attached as a lien on the property prior to the creation of the tenancy by the entireties does not attach so long as the parties remain continuously married through the date of a transfer of interest. The key point for this discussion is that if title is not transferred prior to the dissolution becoming final, a judgment lien against only one of the former spouses would attach as a lien because the property is now held as tenants in common and not as tenants by the entireties.

Currently, there is case law (which is not codified by statute) that extends the protection unique to tenancy by the entireties when the dissolution of marriage judgment acts as a transfer of title. The courts have held that the judgment lien does not attach to the property received by the former spouse whom the judgment lien is not against because at no time did the spouse whom the judgment lien is against hold title as tenants in common with their former spouse or in their own name. However, under current law, when title is not automatically transferred by a dissolution of marriage judgment and a deed required to transfer title is not recorded until after the entry of the dissolution of marriage judgment, a lien against only one former spouse attaches to the property because the tenancy by entireties terminates by operation of law upon the entry of the dissolution of marriage judgment and the now former spouses hold title as tenants in common.

III. SECTION-BY-SECTION ANALYSIS

Part 1- F.S. 61.075(4)

Currently, F.S. 61.075(4) is as shown below and does not have any subsections. It reads as follows:

> (4) The judgment distributing assets shall have the effect of a duly executed instrument of conveyance, transfer, release, or acquisition which is recorded in the county where the property is located when the judgment, or a certified copy of the judgment is recorded in the official records of the county in which the property is located.

It is proposed that F.S. 61.075(4) become F.S. 61.075(4)(a) and that F.S. 61.075 (4)(b)(i) and 61.075(4)(b)(ii) be adopted as follows:

> (b)(i) Interests in real property retained or acquired by a party who was not in title or who is no longer in title, and the right to proceeds from a subsequent sale or refinancing of the property, shall not constitute an interest, lien or encumbrance upon the property, nor shall be good or effectual in law or equity against creditors or subsequent purchasers for a valuable consideration, unless a notice identifying the rights retained or acquired in such property or to proceeds from subsequent sale or refinancing is recorded in Official Records of the county in which the property is located. If the notice is not contained in a deed conveying title, the instrument must also contain the name of the party retaining the interest and the description or address of the affected property.
> (ii) The failure to comply with the terms of this section does not impair the rights of parties to obtain a monetary award as substitute compensation for any loss in the rights in the affected property.

To accomplish the objective of simplifying the real estate process and not having to look beyond the Official Records, the deed containing the notice or a separate instrument must be recorded in the Official Records of the county in which the real property is located for the reserved rights to be a valid lien on the real property.

The addition of F.S. 61.075(4)(b)(ii) clarifies that the rights of a former spouse to a share of the proceeds from a future transaction are not eliminated by the failure to record a deed or an instrument containing a notice but the former spouse's right shall not constitute a lien on the real property.

Part 2- F.S. 61.075(12)

It is proposed that F.S. 61.075(12) be adopted as follows:

> (12) Provided that a judgment lien had not previously attached to the real property by operation of law prior to it being acquired by the married couple as tenants by the entireties and the real property was held as tenants by the entireties without interruption through the entry of the judgment dissolving the marriage, a lien of a judgment in existence at the time of the judgment dissolving the marriage shall not attach to the real property received by the spouse whom the judgment is not against when the interest to be received by the spouse is contained or incorporated into the judgment dissolving the marriage, irrespective of whether title is transferred or conveyed before or after the entry of the judgment dissolving the marriage.

The impact of this new section is that, regarding the protection afforded married couples from a judgment against only one spouse not attaching to property held by a married couple as tenants by the entireties, it would put former spouses who there is not a judgment against on equal footing with married individuals.

It would accomplish this by codifying existing case law that extends protections afforded to mandated transfers of real property which take effect by operation of law based on the terms of the court order. Most importantly, it would also extend the protection to transfers effectuated after the entry of the dissolution of marriage judgment, whether they were done to comply with the terms of a court order that merely directs a party to execute a deed, or whether they were to effectuate mediation awards or marital settlement agreements.

This would do away with the incentive for former spouses to delay transferring title until after the entry of the final judgment of dissolution for the purpose of burdening their former spouse with a lien that is solely their responsibility.

The judgment creditor would still be able to enforce the lien against the other assets of the judgment debtor.

IV. CONSTITUTIONAL ISSUES

None

V. OTHER INTERESTED PARTIES

Family Law Section, Business Law Section and FLTA.