

STORAGE NAME: h0029s1z.br.doc
DATE: May 9, 2002

****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 2002-233, Laws of Florida

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
BUSINESS REGULATION
FINAL ANALYSIS**

BILL #: CS/HB 29, 2ND ENGROSSED
RELATING TO: Land Trusts
SPONSOR(S): Smarter Government Council and Representative(s) Kyle

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) BUSINESS REGULATION YEAS 10 NAYS 0
- (2) SMARTER GOVERNMENT COUNCIL YEAS 12 NAYS 0
- (3)
- (4)
- (5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

The term "real estate broker" has been the focus of extensive litigation. Nevertheless, confusion or disagreement can arise under certain, usually complicated circumstances, as to the application of the provisions of chapter 475, F.S., relating to real estate brokers, to particular brokerage relationships. This bill is partially designed to further clarify the application of the term real estate broker. The bill specifies that a real estate broker acting as a trustee is subject to the statutory provisions regulating real estate brokers. The bill clarifies that financial institutions operating with trust powers are excluded from the requirements of the real estate statutes.

Chapter 689, F.S., relates to conveyances of land and declarations of trust. The bill amends s. 689.071, F.S., to include the term "other entity" to recognize the ability of limited partnerships and limited liabilities companies to act as trustees of land trusts.

The bill further amends chapter 689, F.S., to allow a surviving co-owner of a joint tenancy with rights of survivorship or tenancy by the entirety to make a tax-qualified disclaimer within nine months of the cotenant's death and thus could make a disclaimer under section 2518 of the IRS Code. The bill clarifies that a disclaimer does not cause the disclaimed interest to become homestead property for the purposes of descent and distribution under the law. The bill also clarifies that the disclaimed interest is equal to one-half of the property interest.

The bill does not have a fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

B. PRESENT SITUATION:

Regulation of real estate brokers and salespersons is established under part I of chapter 475, F.S. The Florida Real Estate Commission under the Division of Real Estate of the Department of Business and Professional Regulation administers this program. Regulation is designed to assure the minimal competency of real estate practitioners in order to protect the public from potential financial harm. Applicants for licensure must meet character and educational requirements, submit to a background check, and pass an examination.

Currently, several real estate terms are used in chapter 475, F.S., including the following:

The term "broker" is statutorily defined as a person who for compensation buys, sells or leases real property or negotiates the transaction for others. The definition includes a general partner, officer, or director of a partnership or corporation which acts as a broker.

A "single agent" is a broker who represents, as a fiduciary, either the buyer or seller but not both in the same transaction. A "dual agent" is a broker who works as an agent for both the buyer and seller and is specifically prohibited in Florida, s. 475.278, F.S.

A "transaction broker" is a broker who facilitates a brokerage transaction between a buyer and a seller. The transaction broker does not affirmatively represent either the buyer or seller as an agent, and no fiduciary duties exist, except for the duty of accounting and the duty to use skill, care, and diligence. However, the transaction broker must treat the buyer and seller with honesty and fairness and must disclose all known facts materially affecting the value of the property in residential transactions to both the buyer and seller.

A "fiduciary" is a broker in a relationship of trust and confidence between that broker, as agent, and the seller or buyer, as principal. The duties of the broker as a fiduciary are loyalty, confidentiality, obedience, full disclosure, and accounting and the duty to use skill, care, and diligence.

Though not specifically defined in chapter 475, F.S., the term “trustee” is identified in Black’s Law Dictionary as one who holds legal title to property in trust for the benefit of another person (beneficiary) and who must carry out specific duties with regard to the property. The trustee owes a fiduciary duty to the beneficiary.

“Trust powers” for purposes of the Financial Institutions Code, which includes chapter 658, F.S., is defined to mean the rights and powers necessary to act as a fiduciary and, where the context so requires or admits. By this definition the term also means the authority granted to a bank, state or federal association or trust company by, or pursuant to, the laws or any other jurisdiction to engage in trust business.

Chapter 689, F.S., relates to real property law and addresses conveyances of land and declarations of trust. Section 689.071, F.S., addresses land trusts transferring interests in real estate. Current provisions specify that every conveyance of real property by recorded instrument to any person, corporation, bank, or trust company qualified to act as a fiduciary in this state that designates the person, corporation, bank, or trust company as “trustee” without naming the beneficiary of the trust, creates a vested interest in that property on behalf of the trustee.

Section 689.21, F.S., addresses disclaimers of interest in property passing under nontestamentary instruments or under certain powers of appointment. The statute requires that disclaimers be filed within 12 months after the effective date of the transfer creating the interest sought to be disclaimed. Section 2518 of the Internal Revenue Code, however, authorizes a surviving co-owner to make a tax-qualified disclaimer of a survivorship interest in real property held as joint tenants with right of survivorship or as tenants by the entirety within nine months from the date the first co-owner dies.

Pursuant to ss. 732.401 and 732.4015, F.S., homestead property descends in the same manner as intestate property. The surviving spouse takes a life estate, with a vested remainder to the lineal descendants, if the decedent is survived by a spouse and lineal descendants. This provision does not apply to property owned by the decedent and surviving spouse as tenants by the entirety.

C. EFFECT OF PROPOSED CHANGES:

The bill specifies the provisions of chapter 475, F.S., apply to a real estate broker acting as a trustee of a trust created under chapter 689, F.S. The bill clarifies that financial institutions operating with trust powers are excluded from the requirements of chapter 475, F.S.

The bill includes the term “other entity” in s. 689.071, F.S., to statutorily authorize limited partnerships and limited liability companies to act as trustees of land trusts.

The bill allows a surviving co-owner of a joint tenancy with rights of survivorship or tenancy by the entirety to make a tax-qualified disclaimer within nine months of the cotenant’s death. The bill clarifies that a disclaimer does not cause the disclaimed interest to become homestead property for the purposes of descent and distribution under the law. The bill also clarifies that the disclaimed interest is equal to one-half of the property interest.

The bill takes effect upon becoming a law.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates subsection (4) of s. 475.01, F.S., to clarify that the provisions of chapter 475, F.S., apply to brokers acting as trustees of a trust created under chapter 689, F.S., unless the

trustee is a bank, state or federal association, or trust company possessing trust powers as defined in s. 658.12(23), F.S., of the Financial Institutions Code.

Section 2. Amends s. 689.071, F.S., to include reference to the term “other entity” in this section in order to statutorily authorize limited partnerships and limited liability companies to act as trustees of land trusts.

Section 3. Amends s. 689.21, F.S., to allow a surviving co-owner of a joint tenancy with rights of survivorship or tenancy by the entirety to make a tax-qualified disclaimer under section 2518 of the IRS Code within nine months of the cotenant’s death; clarifies that a disclaimer does not cause the disclaimed interest to become homestead property for the purposes of ss. 732.401 and 732.4015, F.S. and clarifies that the disclaimed interest is equal to one-half of the property interest.

Section 4. Effective date – upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None anticipated

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None noted.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION:

Prepared by:

Alan W. Livingston

Staff Director:

Paul Liepshutz

AS REVISED BY THE SMARTER GOVERNMENT COUNCIL:

Prepared by:

Alan W. Livingston

Staff Director:

Don Rubottom

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON BUSINESS REGULATION:

Prepared by:

Alan W. Livingston

Staff Director:

M. Paul Liepshutz