Community Association Newsletter
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ROBERTS MARKEL WEINBERG BUTLER HAILEY PC

IN THIS ISSUE

6 Things You Might Not Know About Fair Housing —2

Should You Name Family Members as an Executor or Trustee? — 4

3 Things to Consider When Choosing a Community Association Attorney—6

Events in San Antonio — 8

Congratulations, Dustin!

We are pleased to announce that Dustin Fessler is now Board Certified by the Texas Board of Legal Specialization in Consumer and Commercial Law. There are only 78 attorneys in the State of Texas that have earned this designation. To earn Board Certification, attorneys must complete a rigorous program established by the Texas Board of legal Specialization and the Supreme Court of Texas. The certification process is designed to set lawyers apart as practitioners with the highest commitment to excellence in their areas of practice.

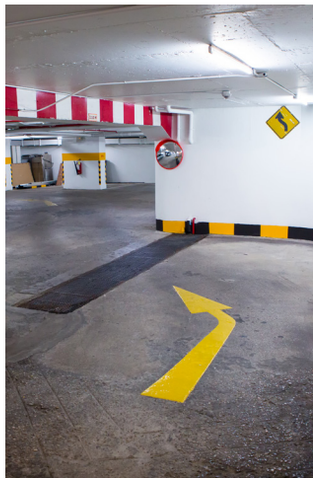
Dustin is a shareholder in the Fort Bend office. He works in the business, real estate, and general civil litigation sections of the firm. He is a member of the Fort Bend County Bar Association, Houston Bar Association, and American Bar Association.

Join us in congratulating Dustin on this distinguished accomplishment!

The information contained in this newsletter is not legal advice, but rather general information for educational purpose, and will not establish an attorney-client relationship. Please consult with an attorney of your choosing before entering into ANY contract.

6 Things You Might Not Know About Fair Housing

By Justin Markel



You might have recently heard about the alleged comfort peacock which was denied access on an airplane. If airline companies can prohibit exotic animals like peacocks, surely a condominium association can also prohibit them, right? You might be surprised. Below are six things you might not know about the Fair Housing Act (FHA) and how it impacts homeowners associations and condominium associations.

1. **Associations might have to allow exotic comfort animals.**

The FHA requires community associations to grant requests for reasonable accommodations to allow disabled individuals an equal opportunity to use and enjoy their dwellings. Under this requirement, community associations generally must make exceptions to deed restrictions and rules restricting animals, like no-pets policies in condominiums, if a disabled homeowner requires an animal's assistance or comfort to enjoy his or her home. Although dogs and cats are the most common comfort animals, exotic animals might also qualify. For example, a homeowner might request an exception to have a comfort pot-bellied pig, comfort iguana, or even a comfort chicken.

According to a memorandum from the U.S. Housing and Urban Development (HUD), requests relating to assistance animals can be denied if the specific animal in question poses a direct threat to the health or safety of others, or if the animal would cause substantial property damage, so long as another accommodation wouldn't alleviate or eliminate those concerns. But according to the memorandum, this determination must be made on evidence of the specific animal's conduct. This makes denying comfort-animal requests difficult to legally justify.

2. **Some condominiums might have to comply with accessibility standards, even if they fall outside the ADA.**

Condominium association board members are often asked whether their buildings must comply with the Americans with Disabilities Act (ADA). The public accommodations title of the ADA, if it applies, requires a condominium building to comply with many design and accessibility requirements, including those relating

to access routes, ramps, doors, bathrooms, and even swimming pools. Generally, the answer is that if a condominium building is not open to the public, but is limited to its residents and guests, then the building is not required to comply with these provisions of the ADA.

Less commonly known is that the FHA itself has its own accessibility requirements, which overlap significantly with the ADA's requirements. If a condominium building was designed and constructed for first occupancy after March 13, 1991, has four or more dwelling units, and has at least one elevator, then all of the units and common areas are subject to the FHA's design requirements. If such a building has no elevator, then the ground-floor units and common areas are subject to the FHA's design requirements.

3. "Adult swim" times and "adults-only" pools probably violate the FHA.

Some community associations have pools with a rule that all the children must exit the pool and take a break 10 minutes out of every hour. Other communities have pools designated as "adults-only" pools, with other pools designated as "family" pools where children are allowed. You might be surprised to find out that this practice is probably illegal.

The FHA prohibits discrimination on the basis of "familial status," which is defined to mean children who live with their parents. In effect, being a child (who lives with his or her parents) in a community is a protected class, and a rule that flat-out prohibits the child from using a community pool probably violates the FHA. Courts tend to view this as akin to not allowing members of other protected classes (e.g., women, Methodists, persons born in Canada, etc.).

4. Associations aren't required to pay for reasonable modifications requested by disabled homeowners.

In addition to granting reasonable accommodations discussed in #1 above, the FHA also requires community associations to allow disabled homeowners to make necessary changes to their homes and the common areas, usually involving construction. These changes are called reasonable modifications. Common examples include installing wheelchair ramps, guard rails, and pool lifts. Although the association must bear the cost of granting a reasonable accommodation, the FHA requires the disabled individual pay for a requested modification.

But there are practical considerations beyond what's legally required. Even though the statute doesn't require the association to pay for a requested modification, the association might want to consider doing so if it is not too expensive. If the disabled homeowner is the one hiring the contractor, the association loses much of the control over the construction, design, and aesthetics of the modification. This can be a problem if the construction relates to the common areas, as the association would bear the responsibility of maintaining the modification.

5. Parking spaces and their related ramps, curb cuts, and signage constitute an accommodation, not a modification.

As we've discussed in #1 and #4 above, reasonable accommodations generally involve exceptions to rules, whereas reasonable modifications generally involve construction. So granting a request for a disabled parking space is an accommodation (as an exception to a rule assigning spaces or a "first-come, first-served" rule), and the related curb cut and signage is a modification, right? Actually, no. A Joint Memorandum from HUD and the DOJ says that the whole package constitutes a "parking accommodation"—which the association would be required to pay for.

6. A community association can be found liable for a third party's harassment.

The FHA prohibits certain kinds of harassment on the basis of a protected class, such as race, sex, or disability. Predictably, an association can be held liable for harassment committed by its board members or officers. But you might be surprised to learn that an association can also be held liable for a third party's harassment, if (1) the association knew or should have known about the harassment, (2) the association had the power to stop the harassment, and (3) the association

did not take prompt action to stop the harassment. So if one neighbor harasses the other because of the person's race, and the other neighbor complains to the association that the harassment constitutes a violation of the deed restriction prohibiting nuisances, the association might be required to begin enforcement procedures against the alleged harasser, or else risk a harassment claim by the complainant under the FHA.

As the above six topics show, the Fair Housing Act is not intuitive and sometimes leads to unexpected results. Board members and managers with questions about fair housing should consult the association's legal counsel.

Justin Markel is a shareholder with the firm's Labor and Employment, Corporate, and Community Association sections. He regularly advises community associations regarding their obligations under the federal and Texas Fair Housing Acts, and also defends community associations and management companies against agency investigations and litigation involving housing-discrimination claims. He is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. Justin graduated summa cum laude from South Texas College of Law in 2010.

Should You Name Family Members as an Executor or Trustee?

By T. Aaron Dobbs

Many people consider naming family members to be executors of their estate or trustees of their trusts. The rationale, it seems, is that family members would be honored to serve in these positions and offended if not named. However, naming a family member or loved one may have unintended consequences. Here are four things to consider when naming loved ones as executors or trustees in your wills and trusts:

1. Executors and trustees are fiduciaries

A fiduciary is a person who owes another person a high duty of good faith, fair dealing, honest performance, and strict accountability. In other words, a fiduciary is held to a high and exacting standard, with no exceptions. Being an executor or trustee carries potential liability, and you should consider that in some cases, serving in these roles can end up being more of a burden than an honor – particularly in situations with "difficult" personalities.

2. Executors and trustees owe beneficiaries duties of candor and full disclosure

An executor or trustee cannot operate in secrecy. Family members do not always get along, especially in times of stress like the death of a loved one, but dysfunction and drama do not excuse a fiduciary from communicating with beneficiaries. Likewise, a fiduciary must keep complete books and records and be ready to provide accountings to beneficiaries at certain times or on demand. As a result, a fiduciary must always be personable and organized.

3. Executors and trustees must serve all beneficiaries with loyalty and impartiality

A fiduciary must put the interests of its beneficiaries before his or her own interests. Likewise, unless a will or trust provides otherwise, a fiduciary cannot play favorites or treat certain classes of beneficiaries with deference over others – even if the executor or trustee feels one beneficiary is less deserving or less responsible than other beneficiaries.

4. Executors and trustees must manage estate assets or trust property prudently

Not only does this mean that property must be securely maintained, it also means that the property must be appropriately invested so that the varying interests of beneficiaries can be managed. This duty can include insuring property, diversifying investments, preparing tax returns, maintaining property tax exemptions and balancing an investment portfolio.

If your executor or trustee fails to carry out these and other duties, they could be sued for damages and be removed from their role – even if they had the best of intentions. As a result, give some additional thought to the persons you are naming to serve as executor or trustee in your estate planning documents. You should talk about these considerations with your estate planning attorney and also consider alternative options like naming a third party or a professional executor or trustee, such as a trust company or bank with a trust department. You may be doing your family a favor by not naming them as executor or trustee.

T. Aaron Dobbs is a shareholder with the firm's Estate Planning, Probate and Trust Administration section. He is Board Certified in Estate Planning and Probate Law. Aaron routinely advises clients on the development of estate plans to achieve their post-mortem objectives and to mitigate income and transfer taxes. He also assists beneficiaries, fiduciaries, creditors, and nonprofit organizations in all aspects of estate and trust administration, probate, will contests, trust and fiduciary litigation, creditor claims, and guardianship disputes before trial and appellate courts across the state of Texas.

3 Things You Should Consider When Choosing A Community Association Attorney

By Grace Gonzalez

If you're a board member or community manager of a community association, you know the unpleasantries that may occur on daily basis. When issues escalate and homeowners fail to pay association assessments, don't maintain their home in accordance with governing documents, or violate any of the specific requirements set forth in rules and regulations, it may be time to consult with a community association attorney. There are many attorneys out there that represent community associations, but not all are community association attorneys. It can be difficult to even know where to begin with the selection process. Here are a few things to look out for when screening your potential attorney.

1. Recognition matters

Does your community association attorney need to be a full-time practitioner in the field of community association law? No, but it sure does help in instances where you need someone who has the background and broad base of knowledge in the issues you are at odds with. The Community Associations Institute recognizes attorneys who have not only dedicated their practice to the field but also have practice for several years, have participated in legislative activities, published works on the topic, educated others in their state and nationally, as well as other requirements. Those attorneys who have reached the bar may apply to become a Fellow in the College of Community Association Lawyers. There are fewer than 200 Fellows currently in the United States. When choosing a community association attorney you should ask if they are members of the College of Community Association Lawyers. Did you know, according to the Texas Board of Legal Specialization (TBLS), there are over 100, 000 attorneys licensed to practice in Texas? Only 7,400 have earned the right to be publicly recognized as Board Certified specialists in one of 24 select areas of law. When choosing a community association attorney you should ask if they are planning on applying for the certification or becoming a board certified property owners association attorney.

If you're hiring an attorney to represent your association, find an attorney who is certified in Real Estate Law—Residential and/or Commercial. This certification ensures that an attorney has substantial, relevant experience in a select field of law, and tested, special competence in that area of law. Recently, due to the increase in Property Owners Associations (POA) and complexity of

issues POAs deal with, TBLS and the Supreme Court officially launched the Board Certification in Real Estate Law - Property Owners Association this year. If you hire an attorney who is board certified, it reinforces that they are specialist in the field and this designation also sets them apart as being an attorney with the highest public commitment to excellence in their area of law.

2. Quality over quantity

Almost all community associations and board of directors are comprised of volunteers. The community association is normally a non-profit entity and often has a restricted budget to spend on legal fees which could result in hiring an attorney who may not be the most qualified to handle all the intricacies of your needs. If you hire an attorney who is Board Certified, a fellow of the College of Community Association Lawyers (CCAL), or hold a numerous amount of accolades, you might see a substantive billing rate in comparison to an attorney who does not hold these credentials. You may also find attorneys who obtain similar credentials and still see a difference in billing rate.

So, how does one choose an attorney merely with a budget in mind? It's easy, you shouldn't. While logically, you might opt for the attorney whose billing rate is less expensive to stay within your budget; but, there are follow-up questions you should ask. One attorney may charge $350 an hour vs another who charges $250 an hour. The question you should be asking is how long it will take them to complete [insert task here]. The attorney charging $350 an hour might take an hour while the other attorney charging $250 an hour takes two (or three) hours to complete. The old adage, "You get what you pay for" still holds true today. Be sure the attorney you hire is upfront about all costs and what kind of results you should expect.

3. Industry Involvement

The greatest compliment an attorney can receive are referrals. When a client receives exceptional service, it's rare that they keep it a secret—consequently, when a client receives poor service, it's not long before the information is circulated within the industry. Do your research and ask co-workers, colleagues, and other professionals in the industry if they have first-hand experience with the attorneys you are considering. Find out which attorneys are active in the community. Many attorneys volunteer their time by providing educational seminars, writing articles for publications, and some go as far as becoming certified by The Commission for Case Manager Certification (CCMC), an exam for community managers. Additionally, some attorneys not only provide training for clients, but for other attorneys at events such as State Bar of Texas Seminars, and other approved continuing legal education providers. Find out how your potential attorney serves in their community and if they align with your expectations.

When it comes to hiring a community association attorney, it's crucial to find someone who you not only work well with, but can also provide you with a knowledge-base to overcome the highest of obstacles. Spend time researching which attorneys are best suited for your association as it can make a world of a difference. Hopefully you can take these tips to the table when selecting your new community association attorney.

Grace Gonzalez manages the online and print content marketing strategies for RMWBH. Her responsibilities include: advising clients of educational opportunities, website tracking and analysis, social media marketing, content creation, web maintenance, SEO, and managing the RMWBH online brand. Prior to joining RMWBH in 2016, Grace worked as a corporate marketing developer for a financial institution.

Education Seminar in San Antonio

A Toast to Education: Developer Focused Drafting Tips

The Top 10 Things That Provide Longstanding Benefits Beyond Transition

March 21, 2018
RMWBH Training Room
4630 N Loop 1604 West, Ste. 311
San Antonio, Texas 78249
4:00 p.m. – 6:00 p.m.

Join attorneys Jane Janecek and Marc Markel as they welcome developers and offer drafting tips and suggestions that will work toward successful progression of communities well-beyond transition. One size does not always fit all. Simple additions or revisions can be put in place during the initial drafting phase or even as amendments during the development phase that focus on the smoothest transition possible through provisions that are specific to each community.

Appetizers and drinks will be provided | RSVP here

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