

The End of the Two Subscribing Witnesses Requirement for Florida Leases

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The Florida Legislature passed a bill in the 2020 session amending Section 689.01, Florida Statutes (known as the Statute of Conveyances) so that two witnesses will no longer be required for a lease of real property.^[1] On June 27, 2020, Governor DeSantis signed the bill into law.^[2] This change brings Florida in line with the vast majority of other states, will simplify the lease execution process, and will cut down on parties seeking to get out of deals on technical grounds.

Until now, Section 689.01(1), Florida Statutes, which has existed in its present form since 1829—before Florida became a state—provided that a lease for a term of more than one year could be created only by an instrument in writing signed in the presence of two subscribing witnesses.^[3] As a practical matter, the witness requirement in Section 689.01(1) infrequently applied to the landlord's execution of a Florida residential lease because many of those leases are written for a term of one year or less.^[4] Non-residential leases, however, are usually for a longer term and this requirement almost always applied to them.

Under the amended version of Section 689.01(1), no subscribing witnesses will be required for leases at all,^[5] with leases specifically exempted from the requirement of subscribing witnesses to transfers of property interests:

No estate or interest of freehold, or for a term of more than 1 year, or any uncertain interest of, in, or out of any messuages, lands, tenements, or hereditaments shall be created, made, granted, transferred, or released in any other manner other than by instrument in writing, signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring, or releasing such estate, interest, or term of more than 1 year, or by the party's lawfully authorized agent, unless by will and testament, or other testamentary appointment, duly made according to law; and no estate or interest, either of freehold, or of term of more than 1 year, or any uncertain interest of, in, to, or out of any messuages, lands, tenements, or hereditaments, shall be assigned or surrendered unless it be by instrument signed in the presence of two subscribing witnesses by the party so assigning or surrendering, or by the party's lawfully authorized agent, or by the act and operation of law; provided, however, that no subscribing witnesses shall be required for a lease of real property or any such instrument pertaining to a lease of real property. No seal shall be necessary to give

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validity to any instrument executed in conformity with this section. Corporations may execute any and all conveyances in accordance with the provisions of this section or ss. 692.01 and 692.02.[6]

(changes underlined and indicated via strike-through, as appropriate).

With this change, Florida has removed an anachronistic, formalistic, and infrequently enforced procedural hurdle to the execution of leases and joins the many states that removed such requirements long ago.

This article explains why the Florida Legislature's move benefits landlords and tenants and brings Florida into the modern era of leasing law. It begins by outlining the origins of the prior requirement of two witnesses to a lease and the reasons why such a requirement was historically necessary. Then, it traces case precedent dealing with this requirement to show how Florida courts have moved away from enforcing the two-witness requirement. The article concludes with thoughts on the wisdom of removing the two-witness requirement in the current transactional environment, and why the legislature has taken a step in the right direction by eliminating the requirement.

The requirement for two witnesses to a real estate conveyance can trace its origins at least as far back as ancient Rome. As early as the second century A.D., Romans conveyed both personal and real property by a formalistic ceremony known as conveyance by mancipation.[7] In this highly formalized exchange, no fewer than five witnesses—Roman citizens above the age of puberty—were required to be present.[8] The presence of witnesses served as a verification mechanism for the transaction and legitimized the exchange of property.

Early Anglo-Saxon law was similarly concerned with the number of witnesses to acts and contracts, a concern that naturally made its way into the law of real property conveyances. In fact, at least one author has described the attestation of witnesses to a deed as "the most important part of the execution of the deed in the early days,"[9] where reputable and literate witnesses served an important evidentiary role. In fact, in the event a question arose about the validity of a conveyance, the witnesses would sometimes be made part of the jury called upon to determine the question of the conveyance's legitimacy.[10]

In these "early days," witnesses were often individuals of some renown, including local officials, courtiers, and even monarchs.[11] Indeed, some historical deeds include as witnesses God and saints to lend a sense of authority and solemnity to the document.[12] As recently as the 19th century, Scottish legal scholars promoted the use of "famous witnesses" or "witnesses of the best character" for deeds, again evidencing the historical use of witnessing as a practice that served to elevate mundane transactions to exchanges carrying the imprimatur of the upper echelons of society.[13]

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Similar witnessing requirements also took root in the early United States in the form of state statutes.^[14] Florida's Section 689.01 was one such statute and in fact predates Florida's statehood.^[15]

Leasing is a newer concept of transfer of property,^[16] and, as such, so is the requirement of witnesses to a lease. That being said, the same principles governing other conveyances of interests in real property historically applied to leases.^[17] The witness requirement was originally designed to protect the landlord from fraudulent conveyances. However, as the laws and practices governing the conveyance of property interests modernized over time, the risk of fraud dissipated and not infrequent oversights in obtaining subscribing witnesses started to be used as a means of avoiding a deal on the basis of a technicality.

Likely for this reason most states no longer require subscribing witnesses for leases. In fact, only Connecticut, Georgia, Louisiana, and South Carolina still require two witnesses to the execution of a lease.^[18]

Moreover, a review of Florida case law reveals spotty enforcement of the two-witness requirement and an erosion of the two-witness formality over time (although some courts have continued to enforce the requirement strictly).^[19] For example, in 1908, the Florida Supreme Court held that a deed need not contain the "magic words" "In the presence of" to comply with the two-witness requirement.^[20] In rejecting this formal attestation requirement, the court ensured that substance would govern over form and whittled away—even if only slightly—at the long-standing formality of the two-witness requirement. *Reed v. Moore*, 109 So. 86 (Fla. 1926) presents another unique workaround to the two-witness requirement endorsed by the Supreme Court. There, the court held that a lease attested only by one witness rather than the required two was not enforceable as a lease, but nevertheless could be specifically enforced by the landlord as a contract.^[21] Florida courts have also held that the two-witness requirement may be waived by acceptance of rent and performance under the lease, offering a clear out for parties who fail to observe the statutory formalities.^[22] In such cases, courts have been quick to accept estoppel as a defense to invalidation of the lease.^[23] Finally, in 1962, the Second District Court of Appeal held that a deed would be enforceable even when signed by only one witness when a second witness was present but acknowledged witnessing the deed and signed after suit on the deed was filed.^[24]

Thus, over the past century, it has been clear that Florida courts can and will find ways to enforce leases even when the formal statutory requirement of two witnesses is not met. It should therefore come as no surprise that the Florida Legislature would finally erase the two-witness requirement for leases from the statute books.

The requirement for subscribing witnesses no longer promotes its original fraud prevention policy in a meaningful way. It has become a "gotcha" requirement, providing a technicality to be used by a party seeking to void an agreement it no longer wanted to honor. It also became cumbersome in the

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closing of transactions, especially in this time of pandemic when social distancing makes the possibility of a landlord and two witnesses signing a lease in the presence of each other problematic. Finally, the requirement of two subscribing witnesses posed a major hurdle to the electronic execution of leases, which is the modern trend.

The recent amendment to Section 689.01 represents a step forward for Florida leasing law, as the benefits of the witness requirement for leases are outweighed by the drawbacks. As described above, courts in many cases have still enforced leases even where the two-witness requirement was not met,^[25] and other workarounds to the witness requirement are often available to landlords and tenants in litigation.^[26] By exempting leases from Section 689.01's two-witness requirement, the Florida Legislature has recognized the realities and practicalities of the commercial leasing industry and has removed a procedural hurdle that for many years has done more harm than good.

[1] H.B. 469, 2020 Leg., 122 Reg. Sess. (Fla. 2020).

[2] Ch. 2020-102, 1, at 1, Laws of Fla. (2020).

[3] § 689.01(1), Fla. Stat (2019). The statute also covers other interests in real property not relevant to the scope of this article.

[4] One of the significant reasons that residential leases are written for a term of one year or less is that sales taxes are payable on the rent paid under residential leases having a term of more than one year. That being said, the change to section 689.01 does apply to the growing number of residential leases for a term of more than 12 months, such as leases of single-family homes where tenants are often seeking longer terms and leases for terms of 12 months plus a prorated partial month.

[5] Notwithstanding the amendment to section 689.01(1), if the parties intend to record the lease, the lease must still be "acknowledged by the party executing it, proved by a subscribing witness to it, or legalized or authenticated" as provided in section 695.03, Florida Statutes.

[6] Ch. 2020-102, 1, at 1, Laws of Fla. (2020).

[7] George Sellet, et al., *Archaic Methods of Validating a Contract: The "Blow" and the "Libation"*, 21 Mich. L. Rev. 79, 80 (1922).

[8] *Id.*

[9] III William Searle Holdsworth, K.C., D.C. L., *A History of English Law* 231 (Little, Brown & Co. 1923).

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] I Walter Ross, Lectures on the History and Practice of the Law of Scotland 148 (Bell & Bradfute 1822).

[14] See IX Edward Thompson, The American and English Encyclopedia of Law 148-50 (David S. Garland and Lucius P. McGehee, eds., Edward Thompson Co. 1898) (1898).

[15] See 689.01(1); Act Nov. 15, 1828, § 1.

[16] James H. Baker, An Introduction to English Legal History 319-22 (1979).

[17] See, e.g., Fla. Stat. 689.01(1) (applying to both deeds and leases).

[18] See H. Final Bill Analysis, HB 469, 2020 Leg., 122 Reg. Sess. (Fla. 2020); Teo Spengler, Who Can Witness a Real Estate Signing, San Francisco Chronicle (Feb. 11, 2019) <https://homeguides.sfgate.com/can-witness-real-estate-deed-signing-52835.html> (last visited Mar. 13, 2020). 39 states require no witnesses. Of the remaining 11 states that require a witness: four require only one witness, one state (Alabama) requires two witnesses for a term greater than 20 years, and one state (Virginia) requires witnesses for a term greater than five years.

[19] See, e.g., *S&I Invs. v. Payless Flea Market, Inc.*, 36 So. 3d 909 (Fla. 4th DCA 2010); *Bedrick v. Costilla*, 97 So. 3d 316 (Fla. 2d DCA 2012).

[20] *E. Coast Lumber Co. v. Ellis-Young Co.*, 45 So. 826, 829 (Fla. 1908).

[21] *Reed v. Moore*, 109 So. 86, 88-89 (Fla. 1926). See also, *Skylake Insurance Agency, Inc. v. NMB Plaza, LLC*, 23 So.3d 175 (Fla. 3d DCA 2009) in which the Third District Court of Appeal expressly declined to permit the landlord to profit from its own failure to comply with the witnessing formality by holding that the non-witnessed lease, though invalid as a conveyance, was binding as a contract for which the landlord was liable for damages for its breach.

[22] *Gill v. Livingston*, 29 So. 2d 631 (Fla. 1947); *In re Belize Airways Ltd. v. Aeroservice Int'l Inc.*, 12 B.R. 387 (S.D. Fla. 1981); *Skylake Ins. Agency, Inc. v. NMB Plaza, LLC*, 23 So.3d 175 (Fla. 3d DCA 2009).

[23] *Bodden v. Carbonell*, 354 So.2d 927 (Fla. 2d DCA 1978); *Taylor v. Rosman*, 312 So. 2d 239 (Fla. 3d DCA 1975); *Arvanetes v. Gilbert*, 143 So. 2d 825 (Fla. 3d DCA 1962); *Lipkin v. Bonita Garden Apts., Inc.*, 122 So. 2d 623 (Fla. 3d DCA 1960).

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[24] *Medina v. Orange Cty.*, 147 So. 2d 556 (Fla. 2d DCA 1962).

[25] See e.g., *Skylake*, 23 So.3d 175; *Bodden*, 354 So.2d 927; *Lipkin*, 122 So. 2d 623.

[26] See *Reed*, 109 So. 86; *Gill*, 29 So. 2d 631; *Belize Airways*, 12 B.R. 387, *Medina*, 147 So. 2d 556.

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