actionline

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Section Convention

Marriott's Harbor Beach Resort
Ft. Lauderdale
May 24 - 27, 2001

(Registration form on page 33.)

Court Dismisses Qui Tam Documentary Stamp Tax Litigation Against Foreclosure Sale Purchasers

by Michael J. Gelfand, Gelfand & Arpe, P.A., West Palm Beach, Florida

What happened to the huge 1999 documentary stamp litigation against foreclosure sale purchasers?

On April 2, 2001, Leon County Circuit Court Judge L. Ralph Smith, Jr. entered a Final Judgment of Dismissal with prejudice. The trial court dismissed the original Complaint in January and the Amended Complaint in February. The route to this decision appeared long and circuitous, but the end may be near.

As you may remember, the interestingly named plaintiff, Taxpayers for Fairness, Inc., a Florida for profit corporation, brought suit against 850 foreclosure sale purchasers. The Plaintiff alleged that documentary stamps were not properly paid for the Certificate of Title transfers resulting from foreclosures of liens and other encumbrances when a first mortgage remained on the property. The amount of the documentary stamps, interest and penalties were sought.

The trial court's second Order of Dismissal, dismissing the Amended Complaint,

See "Qui Tam," page 20

Message from the Chair, Wilson Smith

Who Moved My Fees?

(with thanks to Spencer Johnson, M.D., author of *Who Moved My Cheese?)*



In the last *Actionline*, we talked about the challenges to the legal profession brought about by change – both technological and social. There has rarely been a change wrought to the legal profession that did not bring about discomfort and even painful adjustment. Yet change is inevitable whether or not we will it, or welcome it. And it is upon us with relentlessly accelerating speed. The real question then, is how do we deal with it. The old, comfortable, ways of earning our fees have, in many instances changed, or even vanished.

I recently read a slim volume that was at first blush simplistic to the point of appearing childish, yet it was number one on both the *New York Times* and the *Wall Street Journal* best seller lists and is currently number two according to *USA Today*. Dr. Spencer Johnson's *Who Moved My Cheese?* is a parable illustrating various ways of dealing with change that reveals profound truths about change and ourselves. I have neither the space nor the inclination to do a book review, but I call it to your attention and commend it to you. It should be less

See "Who Moved My Fees?" page 24

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10 Copies (1 set) each of all 145 forms is $254.66

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Section Meets in Tampa and New Orleans

The Section held an Executive Council meeting at the Marriott Waterside in Tampa over the weekend of December 7-11, 2000. There were 125 members in attendance at the event held at the brand new Marriott in downtown Tampa. Probate Section members were treated to a Probate Roundtable with Probate Judges Susan Sexton and Mel Grossman as speakers. The Real Property members enjoyed a presentation by Section members Homer Duval and Skip Straus regarding the anatomy of an electronic closing, including demonstrations of how it occurred, the technology behind it and the practical problems resolved. After lunch, the Executive Council Meeting commenced with standing room only attendance.

Agenda items at the Executive Council meeting included a discussion of the use of the Section Website and the passage of a motion to hire a Webmaster to administer the website. The motion stated that administration by a paid webmaster was a short term project which will be monitored and the utility of the website will be determined. The project will be abandoned if the website proves to be underutilized. A motion was also made and passed to ratify the Executive Committee Approval of Elective Share Glitch Bill. Numerous committee reports were given by members and various items discussed by the Council.

Approximately 110 members and their spouses attended the out of state meeting held in New Orleans on January 31 through Sunday, February 4th at the Windsor Court Hotel. Members met for committee meetings and the Executive Council Meeting but also had the option to participate in a Louisiana Swamplands and Plantations tour, a Creole Cooking demonstration, a jazz dinner cruise and Breakfast at Brennan's. The trip was a blast for all who attended the special Wilson Smith guided tour of New Orleans!

The Section's Executive Council meetings are open to all Section members. The meetings are always informative and provide an excellent opportunity to become acquainted with other Section members from across the state and country. Any member wishing to attend an Executive Council meeting should contact the Section Administrator, Bonnie Bevis, at The Florida Bar.

Thank you, Sponsors!

The RPPTL Section is able to offer complimentary or below cost lunches, cocktail receptions and entertainment to attendees of Section-sponsored events due to the generosity of event sponsors. Thus, the Section extends its gratitude to the following sponsors of events held in conjunction with the RPPTL Section's Executive Council Meetings in Tampa and New Orleans:

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RPPTL Does "The Big Easy"



Cityscape, New Orleans.



Gwen Herb is ready for a New Orleans event.



Bou models her boa.



Enjoying the reception are Pat and George Meyer and Ross Macbeth.



Karen Reynolds.



Joe Fleece, Bruce Marger, Jim and Gwen Herb.



Front (L-R): John Neukamm, Mary Arpe, Michael Gelfand.
Back (L-R): Kathy Neukamm, Richard Bevis, Bonnie Bevis, Ross Macbeth, Bou Macbeth



Socializing at the reception.

A visit to "Oak Alley"





(Above, left) The scenic, oak-lined drive that leads from the river road to the plantation house (right).



Three Section "belles" warm up on the veranda at Oak Alley. (L-R): Mary Swaine, Bou Macbeth, and Phyllis Emerson.



Bobby and Bob Altman.



Mike and Mary Swaine pose outside the plantation house.

An Adventure in the Bayou!





Waterfront living in the bayou.



Hearty Section members board the boat for the chilly bayou tour.



A little “close encounter” of the reptilian kind.



“Muskrat Love?” Not exactly. Up close and personal with a **nutria** from the bayou.

Meanwhile, back at the party...



Chair, Wilson Smith at the dinner.



Tom Smith and Jay Zschau at the dinner.



Leila Zschau and Joe Fleece

January 29, 2001

Probate & Guardianship Forms As Revised October 1, 2000

The new forms are ready and on sale!! Although the new revised forms have been available since October 1st, this "annual letter" announcing the completion of the revisions is late, and for that I apologize.

Your non-profit corporation, Florida Lawyers Support Services, Inc. (FLSSI) now has (and since October has had) the new forms printed and ready for purchase. Each of the licensees (listed at end of this letter) have integrated the changes into their software and thus the up to date forms are available to you on computer as a part of their service.

The Forms Committee has been fortunate in garnering a number of enthusiastic new members who, with the veteran stand by members, have worked diligently on the review and revision of all forms. Our thanks are certainly due to all members of the Committee, as well as to chair Bill Platt and vice chair Donna-Lee Roden. At least two members of the forms committee reviewed each and every form and such changes as were deemed appropriate or necessary to correct errors, conform the forms to statutory, rule, and case law changes, and to improve language and format have been made.

When revising the forms in October of 1999 the forms committee agreed that, in addition to the use of the block for the signature of the individual attorney as all the forms are printed, those who use the providers may, if so programmed by the provider, use the following as a substitute for the attorney's signature block as it is in the printed forms:

_____
Attorneys for Petitioner

Address: _____

_____

Telephone: ( ) _____

By: _____

Florida Bar No. _____

Because the relevant amendments to the elective share statute by Chapter 99-343 Laws of Florida 1999 do not apply to estates of decedents dying before October 2001, no change in those forms will be made until our review for 2001.

However the forms committee is working on suggested amended forms for the new elective share and has circulated drafts for comment and criticism. Copies may be obtained from FLSSI. Your comments and suggestions would be appreciated. Amended elective share forms will be promulgated when the October 2001 review and revision of all the forms is completed this Fall.

Although there are only a few new forms this year, there have been quite a number of changes to the forms. The list and description of changes in the probate forms is nine pages long while the list of changes in the guardianship forms is six pages long. A list of these changes can be purchased from FLSSI at a price of $62.06 for each set (one for the probate and one for the guardianship forms). This does not include the forms themselves, only the changes. Thus, you could obtain these lists and either purchase only the changed forms or attempt to make the changes yourself. However, I suggest that you simply order full sets of the new forms. I sincerely believe that that will prove more economical and practical than making the changes yourself or having your staff do so.

You may request copies of the new order blanks for probate and guardianship forms via Internet/e-mail at *flssi@nettally.com* or writing to FLSSI at P.O. Box 5647, Tallahassee, FL, 32314 (Phone: 850/656-7590).

The Committee greatly appreciates your calling to our attention any typographical or other errors you may detect. Despite our best efforts there are always some errors and some required changes that are overlooked.

While composing this letter, I noticed an article in the January 15 issue of The Florida Bar *News* on "Practice Tips" titled "Avoiding malpractice claims" containing the following statement:

"Forms also can be helpful in preventing the disorganization or inefficiencies that can result in neglectful malpractice. Be sure to revise and update them regularly."

So make your "loss prevention partner" and your insurance carrier happy! Order an up-to-date set of the Probate & Guardianship Forms today!!

John Arthur Jones
Chairman Emeritus, Forms Committee

FLSSI Licensees: Advanced Logic– 800/454-7703; American Legal Net– 800/293-2771; Automated Legal Systems (ProDoc)– 800/759-5418; Collyer's Legal Software– 800/484-8833; Display Soft– 941/763-5555; Mathew Bender– 404/215-5261; TechSoft Solutions– 888/483-6195; West Group– 800/832-9055; Wright Investment Service– 727/896-2424

Status of 2001 Probate Bill

by J. Dudley Goodlette, Florida House of Representatives, District 76


GOODLETTE

The 2001 omnibus Probate Bill (HB 137) is working its way through the Legislature and has not encountered any problems – and none are expected - on its way to the Governor's desk.

The bill, which I am sponsoring, was prepared after three years of work by hundreds of experienced probate lawyers under the expertise and guidance of the Real Property, Probate and Trust Law Section. Laird Lile, chair of the Legislative Subcommittee of the RPPTL, is to be particularly thanked for his hard work on this important piece of legislation.

In summary, the 2001 Probate Bill will mandate these significant changes to the Florida Probate Code:

- Remove court procedure from the statutes in deference to court rules.
- Provide that the effect of judgment of adoption is controlled by the Probate Code, not the adoption statutes.
- Integrate the Medicaid claims system into the present system of dealing with claims in the estate, and provide a 6-month time limit for presentation of a Medicaid claim.
- Separate notices to creditors from the notice of administration provided to beneficiaries.
- Clarify the grounds for removal of a personal representative and provide specific procedures for replacing a personal representative upon death, resignation or removal.
- Change and simplify the method for opening a safety deposit box.
- Eliminate family administration and increase the jurisdictional amount for summary administration from $25,000 to $100,000.
- Increase the family allowance from $6,000 to $18,000 to adjust for inflation.
- Fix the elective share provisions changed in a previous session, before the changes go into effect in October, 2001.

At this writing, in mid-March and the second week of Session, the bill has been approved and reported out by the Judicial Oversight Committee and the Banking Committee and will be heard next by the Council for Smarter Government and if approved there will head to the House floor.

A quick note: The functions, responsibilities and duties of the former Real Property and Probate Committee of the House have been given, under the wise re-organization of House Speaker Tom Feeney, R-Oviedo, to the new Judicial Oversight Committee, ably chaired by Rep. Larry Crow, R-Dunedin, and a fellow member of the RPPTL.

You can track the progress of HB 137 (and any other bill) on the Internet at the Legislature's official Web Site, Online Sunshine: *www.leg. state.fl.us.*

Once at the site you'll find a wide variety of hyperlinks including bill tracking by number, text or sponsor.

Proposed Legislation – 2001

by Peter M. Dunbar, Esquire, Section Lobbyist

Editor's Note: The following is a brief update of selected bills of special interest to the RPPTL Section as of January, 2001. Please note that this update was prepared prior to the commencement of the 2001 Session, which has, as of this writing at the end of March, been in session for approximately one month. Accordingly, please visit www.leg.state.fl.us *for up-to-date information on the status of these bills:*

1. Probate Bill: HB 137 was prefiled by Representative Goodlette and sponsored by Senator Locke Burt in the Senate. Please see separate update by Representative Goodlette for status as of end of March.

2. Documentary Stamp Tax Bill: Representative Crow is the House sponsor, and Senator Silver is the Senate Sponsor. We are working with the Department of Revenue in an effort to resolve any drafting or fiscal issues. The DOR proposed new language that has been circulated to members of the Section for review and comment. The members who have commented on the language thus far prefer the DOR's language to the initial draft.

3. Principal and Income Bill: The Florida Institute of Certified Public Accountants have expressed serious concerns with the initiative. We have started to meet actively with their representatives to resolve the details.

4. Unclaimed Property: Last session, the Comptroller supported an unclaimed property bill that members of the Section reviewed and revised. That bill did not pass but is refiled again for this Session as HB 107. There is not a Senate companion to date. Members of the Section are reviewing one section of the bill related to small estates.

5. Springing Power of Attorney: Senator Klein plans to file a bill again this Session to address springing powers of attorney. However, the bill text is not yet available.

If you are interested in reviewing the text of any bill, please visit the legislature's website *www.leg.state.fl.us* and follow the instructions. The website is updated daily with newly filed bills. If you wish to review the listing of all filed bills, you may do so very easily. Simply open the site's home page and click on "Bill Information Citator." You will then have the option of reviewing the history of all bills filed in the House or Senate.

Intangible Asset Management Trust: Spouse Allowed As Trustee

by S. Dresden Brunner, Laird A. Lile, P.A.

For those who prepare intangible asset management trusts, also known as FLITE or FLINT trusts, a recent Letter of Technical Advice from the Florida Department of Revenue will be of interest. Naming a Florida-resident spouse as trustee of such a trust will not subject the trust to the intangible personal property tax. The entire letter is reprinted as part of this article.

On September 1, 2000, our office requested a Technical Assistance Advisement from the Florida Department of Revenue concerning the practical application of the amended Florida Statute, Section 199.052. Prior to January 1, 2001, a trust which had certain connections with Florida was subject to the annual Florida intangible tax. A foreign trust was treated differently than a Florida trust. The distinction was eliminated by the Florida Legislature during 2000 as a result of changes set forth in Florida Laws 2000-173.

As of January 1, 2001, "[t]he trustee of a trust is not responsible for returning the trust's intangible personal property and is not required to pay any annual tax on it." F.S. § 199.052(5) (2000). "Intangible personal property that is owned, managed, or controlled by a trustee of a trust is exempt from annual tax under this chapter." F.S. § 199.183(4) (2000).

The Florida Administrative Code includes certain "safe harbor" provisions that are applicable to trusts intended to avoid the intangible personal property tax. F.A.C. Rule 12C-2.0063. The safe harbor provisions were adopted prior to the legislative changes enacted during 2000. The Department has indicated that the safe harbor provisions will be amended to comport with the statutory changes.

Rulings were requested on whether the trust or the trustee was subject to Florida intangible personal property tax beginning on January 1, 2001 for each of three intangible asset trusts with different trustees, namely, the taxpayer herself as trustee, the taxpayer's spouse as trustee, and a party not related to the taxpayer acting as trustee. Additionally, we requested a ruling of whether the grantor/beneficiary had a beneficial interest on January 1, 2001 in each of the trusts.

On December 1, 2000, the Department issued a Letter of Technical Advice. Not surprisingly, the trust that had a third party Florida resident as trustee fell within the safe harbor provisions of Rule 12C-2.0063, Fla. Admin. Code. The trust that had the Florida resident spouse of the grantor as trustee was acceptable as well, as falling within the safe harbor provisions. Therefore, a Florida-resident spouse can be named the trustee without subjecting the trust to the Florida intangible tax. (Of course, other provisions of the trust may subject the trust to the tax–such as if the beneficiary has a taxable beneficial interest.)

The trust which had the Florida resident grantor as its own trustee, however, was found to be subject to the intangible tax. The grantor, as grantor, trustee and beneficiary, held title to the legal estate as well as the equitable estate of the trust property. The Department found that the two estates merged, giving the control of the trust to the taxpayer. Therefore, the Florida resident owned, managed, or controlled the intangible property that, as a result, had a taxable situs in Florida. The taxpayer is subject to the intangible tax on the taxable intangible property held in that trust.

An electronic copy of the Request for Technical Assistance Advisement can be viewed on this firm's website: *www.LairdALile.com*. The electronic copy of the Letter of Technical Advice can be viewed on the Hot Topics page of the Real Property, Probate, and Trust Law Section of The Florida Bar: *www.flabarrpptl.org/topics.html*, and the letter itself is reprinted on the next two pages.

Lots of good information for YOU on The Florida Bar's website!

www.flabar.org

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FLORIDA
DEPARTMENT
OF REVENUE
Jim Zingale
Executive Director

General Tax Administration
Child Support Enforcement
Property Tax Administration
Administrative Services
Information Services

December 1, 2000

MR LAIRD A. LILE
LAIRD A. LILE PA
3033 RIVERA DRIVE, SUITE 106
NAPLES, FLORIDA 34103-2746

Re: Letter of Technical Advice No. 00C2-037
Intangible Tax – Taxable Situs – Trust
Section 199.175, F.S., and Rule 12C-2.006(4), F.A.C.

Dear Mr. Lile:

Your letter of September 1, 2000, requests a ruling concerning the application of the intangible personal property tax to the trust documents you have provided. The following information is a summary of the information gathered from the trust documents:

The terms of the three trusts are all identical, except with respect to the trustee of Trust #3.

The taxpayer has waived any right to alter, amend or revoke the trusts. The terms of the trusts provide that the taxpayer may receive income and principal of the trust at the discretion of the trustee, based upon an ascertainable standard.

Upon the death of the taxpayer, the remaining trust property will be distributed to the then acting trustee of the taxpayer's revocable trust, as it is then in existence, or if that trust is not then in existence, to the taxpayer's estate.

The trustee of each trust is a Florida resident. The trustee of Trust #1 is a person who is not related to the taxpayer. The trustee of Trust #2 is the spouse of the taxpayer. The trustee of Trust #3 is the taxpayer.

Based on the information provided you have requested the following rulings:

1. The trusts are not subject to Florida intangible tax beginning on January 1, 2001, and the Trusts are not subject to the reporting and return filing requirements under Chapter 199 or any applicable provisions of the Florida Administrative Code.

2. The trustees of the Trusts are not subject to the Florida intangible tax beginning on January 1, 2001 and the trustees of the Trusts are not subject to the reporting and return filing requirement under Chapter 199 or any applicable provision of the Florida Administrative Code; and

3. The taxpayer does not have beneficial interest beginning on January 1, 2001 as that term is defined for Florida intangible tax purposes in any of the Trusts. Accordingly, the taxpayer is not subject to the reporting and return filing requirements under Chapter 199 or any applicable provision of the Florida Administrative Code.

A ruling on the tax consequences of the situations you have presented with regard to Trusts #1 and #2 fall within the guidelines of the Rule 12C-2.0063, F.A.C. Therefore, the Department will not issue a ruling regarding these two trusts.

Trust #3 presents a different tax consequence to that for Trusts #1 and #2. The taxpayer is the grantor, trustee and beneficiary of the trust. This makes the taxpayer the titleholder of the legal estate and the titleholder of the equitable estate of all the trust property. As the titleholder of the legal and equitable estates, the two estates are merged in the single person giving the control of the trust to the taxpayer. Under the provisions of s. 199.052(1), F.S., any person who owns, manages or controls intangible property that has a taxable situs in this state must file a return and list all such property. Section 199.175(1), F.S., states that intangible property has a taxable situs in this state when it is owned, managed or control by a person domiciled in this state. The taxpayer is domiciled in Florida. Therefore, the taxpayer is subject to intangible tax on all taxable intangible property held in the corpus of Trust #3.

This response is based upon the facts and circumstances of your specific situation as presented and is not an official statement or opinion of this Department but, instead, represents the opinion of the writer. If you wish an official binding statement on these issues, you may file a written request for a Technical Assistance Advisement by following the provisions of the Department's Rule 12-11, F.A.C., a copy of which is enclosed. The request for Technical Assistance Advisement should be sent to the Office of General Counsel, Technical Assistance and Dispute Resolution, Department of Revenue, P.O. Box 7443, Tallahassee, Florida 32314-7443.

If you have further questions with regard to this matter and wish to discuss them, you may contact Technical Assistance and Dispute Resolution, (850) 922-4709. If you have specific questions and would like a written response, the request should be addressed to the Office of General Counsel, Technical Assistance and Dispute Resolution, Department of Revenue, P.O. Box 7443, Tallahassee, Florida 32314-7443.

Sincerely,

J.V. Parramore, Jr.

FLORIDA LAWYERS SUPPORT SERVICES, INC. (FLSSI)

A Non-profit Organization
Post Office Box 5647 - Tallahassee - Florida - 32314
(850) 656-7590 (800) 404-9278 Fax (850) 942-4167 e-mail: flssi@nettally.com Web site: www.flssi.org



Contract for Sale and Purchase Forms

(Revised 8-98)

(Approved for letter size February 2000)

APPROVED BY: The Florida Bar, Real Property, Probate & Trust Law Section and The Florida Association of Realtors

Please forward the item(s) checked below:

___ 1 pad of 100 contracts - **(LEGAL SIZE)** $20.00 + $9.96 S\H fee & sales tax = **$29.96**

___ Lots of 50 FAR/BAR Contracts - **(LETTER SIZE)** $15.00 + $9.61 S/H fee & sales tax = **$24.61**

___ 1 copy of the FAR/BAR Comprehensive Rider - **$6.42 (LEGAL SIZE)**

You may now purchase individual riders & addenda: lots of 25 @ $3.25 each + $4.51 S/H fee & sales taxes = $7.76 **each.**

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___ Homeowners' Association Disclosure
___ Foreign Investment in Real Property Tax Act
___ Coastal Construction Control Line
___ Amendment to Standard A for Adaption to South Florida Contracts
___ Buyer's Attomey Approval
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____ Lead-Based Paint Disclosure
____ Insulation Disclosure for New Residence
____ Insurance Coverage
____ Seller's Attorney Approval
____ Rezoning Contingency
____ Kick Out Clause
____ Seller Financing
____ Post-Occupancy By Seller

Firm: _____ Attn: _____

Street Address: _____

WILL NOT DELIVER TO P.O. BOX

City/State/Zip: _____

Phone: ( ) _____ Fax: ( ) _____

My e-mail address is: _____

METHOD OF PAYMENT

I have enclosed check #_____, in the amount of $_____ on_____/_____/_____.

Please charge my ❑Visa or ❑Master Card (Sorry, no American Express)

Amount to be charged $_____

_____ _____
Card Number Exp. Date

_____
Signature of Cardholder Required

The Florida Bar Condominium & Planned Development Committee Minutes

FRIDAY DECEMBER 8, 2000

CALL TO ORDER

Chair Robert M. Schwartz called the Florida Bar Condominium and Planned Development Committee meeting to order in the Tampa Marriot Waterside, Tampa, Florida, Friday, December 8, 2000, at 9:33 a.m.

CHAIR'S REPORT

The chair noted that the Real Property, Probate and Trust Law Section Executive Council was meeting following the committee meeting, and that the arrangements were made in conjunction with the larger meeting. He then requested that each attendee introduce themselves.

TAXPAYERS LITIGATION

The Chair introduced Peter Dunbar, the Real Property. Probate and Trust Law Section's legislative lobbyist, and Karen Camechis, his partner. Proposed legislation to clarify §201.02 Fla. Stat. was presented and discussed. Representative Larry Crow has agreed to sponsor the legislation. Senator Silver will be requested to be the Senate sponsor.

Mr. Dunbar further reported on the disruption of the legislature's normal course of business by the special session and election issues. In the house, Rep Dudley Goodlette who formerly emphasized real property issues, will be chairing Elections and Ethics Committee. No real estate committee has been designated. No formal assignments have been made.

In the House, the Business Regulation committee may have jurisdiction over the documentary stamp bill. There may also be a reference to the House Tax Committee. Senate committees have not changed much, but chairs have yet to be named. Bill referral is expected to be to the Regulated Industries Committee.

A second item distributed is a memo concerning the "Taxpayer" litigation. The Pennington firm's Tallahassee office is assisting many associations. There are also many with the Becker firm. A Motion to Dismiss that is being filed asserts that the Plaintiff has no right to a claim. Counsel seeks a Motion to Intervene by the Department of Revenue.

It can be positive to let your legislators know about the legislation. The perceived problem is so far behind, so more visibility is best. This is especially so because there are over 3,000 bills submitted.

REORGANIZATION.

The Chair noted the circulation before the meeting of a memo from Mr. Fleetwood. Ms. Richardson is now the only attorney tackling condominium work, including bill analysis. Two more attorneys have recently left the Division. The other attorney remaining at the division, Scott Edmunson, will be responsible for mobile home issues, and a new division, ship brokers. A new general counsel should be named by Christmas. Inquiries were made to see if an organizational chart was available.

Mr. Sklar reviewed the University of Miami's "Meeting with the Division". He described the Division re-organization situation. Concerning "examination," there will still be specialists assigned work, and there may be cross training. Concerning "compliance," that will continue. The "Customer Service Bureau" is less well defined as of this week.

There is the issue of arbitration privatization. This is not apparently publicly decided. It was noted that the division cannot make a unilateral decision as Division involvement is mandated by statute.

Certain activities have stopped, at least publicly, including rulemaking and policymaking. The Committee has a working group which worked with the Bureau on successor developer and filing rules, and other areas such as checklists. All has fallen by the wayside during re-organization.

An inquiry was made concerning examiner training. Mr. Sklar recalled that the Committee offered a training program. The Bureau politely declined, explaining that the industry should not educate the regulator. This is still on the agenda because of perceived different review standards. Even outsourcing is sought, or a checklist.

The chair noted that the Committee is not taking a position on the letter addressed to the Governor which had been circulated. Joe Adams mentioned that Rick DeBoest Sr. passed on the Benson letter. Rick has great concern as to how this will affect filing.

It was noted that part of this effort may result from Representative Stevens' effort to audit the associations' paid trust fund to make administration self sustaining. Apparently there is a surplus from the Time Share area. In contrast, the Real Property area is at a great deficit. The Mobile Homes and Condominiums area is at a slight surplus. Thus there is an effort to reallocate resources.

continued...

Member in the News



CHARLES IAN NASH, who heads up the Trust and Estates Department of the Brevard County law firm of Frese, Nash & Hansen, P.A., recently presented "Marital Agreements; Shoulda, Coulda, Woulda" at the Estate Planning for the New Millennium seminar sponsored by The Florida Bar in Miami, Florida on November 30, 2000, and Tampa, Florida on December 1, 2000. Mr. Nash is a board certified wills, trusts and estates lawyer and a fellow of The American College of Trust and Estate Counsel.

MINUTES
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Mr. Gelfand questioned whether privatizing arbitration will undermine the neutral decision-making function necessary for peace in communities. Mr. Adams advised that the privatization may be defeated because of the statutory change. It was noted that if the arbitration change seeks to save $400,000, that is only 3000 hours of arbitrator time at $150. The "in-house" program is much more cost effective. One comment noted that one or two arbitrators had or will be leaving and may not be replaced; however, that was not confirmed.

Concerning education, Mr. Adams noted that with Ms. Baker changing positions, education was not a separate area. It was recalled that the Division of Community Colleges was appropriated $500,000; however that Division declined the assignment. During the last legislative session, privatization of education was again funded. The Center of Community Living won the bid, and CAI protested the bid. The Governor's office advised a start date of 2001, in numerous counties.

DISCUSSION ISSUES

Mr. Gelfand proceeded with a number of issues, some briefly circulated by e-mail, some not, that appeared unsettled:

Woodside v. Jahren. It was reported that oral arguments are scheduled for April 1, 2001. John Little is submitting an amicus brief on behalf of The Florida Bar's Real Property, Probate and Trust Law Section supporting a condominium association's ability to pass amendments.

"Taxpayer's" Amendment. There was detailed discussion of the proposed amendment's text to §201.02 Fla. Stat. At first glance the language may appear to be convoluted; however, by necessity it may have to parallel existing laws. Further suggestions and comments are solicited.

Skylights. An issue was raised as to whether §163.04 Fla. Stat. applied to a skylight system. The statutory amendment was apparently intended to allow the Statute to overrule community regulations. The issue is still unclear.

Telecommunications Act. There was a query whether an association may limit the number of installed devices. Apparently the FCC has ruled that two are allowed. The equal access rule may impact and allow numerous providers. Depending on how the issue is framed there may also be a fair housing act national origin issue implicated. It was asserted that a unit owner challenge may be directly with the FCC rather than the Division of Land Sales.

Violence. What does one do with abusive members? Practical aspects were briefly raised. Manner of handling appeared paramount.

Roadway Restrictions. There was extensive discussion regarding an association's regulation of roadways which by plat are dedicated to a political subdivision. The problem is aggravated when the declaration is recorded before a plat, and the association does not join into the platting process. Ms. Rolando noted the case of *Smith v. Horne*, 70 So. 435 (Fla. 1915) regarding the title issues implicated by the platting process. Easements may also effect a conclusion. Mr. Dunbar noted the recent Attorney General's opinion concerning a community association's potential of becoming a public agency with "Sunshine Act" records if the community undertakes municipal functions.

NEXT MEETING

It is proposed that there be a meeting on Friday, May 26, 2001 at the Harbor Beach Hotel in Ft. Lauderdale. The location and time coincides with the Section's annual meeting. Members' comments on the scheduling are solicited.

ADJOURNMENT.

The meeting was adjourned at 11:35 a.m.

Respectfully Submitted,
Michael J. Gelfand, Secretary

Moving?
Need to update your address?

The Florida Bar's website (www.FLABAR.org) now offers members the ability to update their address by using a form that goes directly to Membership Records. This process is not yet interactive (the information is not updated automatically), but addresses are processed timely. The address form can be found on the website through "Find a Lawyer" and then "Attorney Search." It can also be found under "Member Services."

This newsletter is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a SERVICE to the membership.

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OFFICIAL PROBATE, GUARDIANSHIP FORMS & THE FAR/BAR CONTRACT FOR SALE & PURCHASE

Prepared by the Forms Committee of the Real Property, Probate and Trust Law Section and marketed through Florida Lawyers Support Services, Inc. (FLSSI, the Section's non-profit corporation). These forms are prepared by the same committee and practitioners who have been preparing and modifying the probate forms in excess of ten years. The committee consists of leading Florida probate & guardianship practitioners who are committed to a complete annual review **(2000 forms now available)**, as necessary, revision of the forms and the copyrighted forms hereafter will contain evidence of their annual revision. The committee and the RPPTL Section will also continue to work with Probate Judges of Florida to assure them that the forms containing the FLSSI logo are the only forms officially sponsored by our Section.

Additionally, FLSSI is now licensing software vendors* to use the official Section forms, which license mandates that the software will prohibit any changes to the text of the form using our font. This gives Probate Judges confidence in the integrity of the forms.

You should be aware that software programs are now available that are advertised as official "Florida Bar" forms. These are not the current forms sponsored by the Real Property, Probate and Trust Law Section and prepared by the Section's specialists. As with all products that you purchase, satisfy yourself that you are obtaining the best product available and, in this instance, also satisfy yourself that you are obtaining the input of the best legal talent available. I would submit that this talent is and has been found in the Forms Committee of the Real Property, Probate and Trust Law Section.

Respectfully submitted,
Roger O. Isphording, President,
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The Uniform Prudent Investor Act

"The old order changeth, yielding place to new." —Alfred, Lord Tennyson
"The more things change, the more they remain the same." —French Proverb

by Helen W. George and Diane H. Timpany, Wright Investors' Service

The Restatement (Third) of Trusts, published in 1992, signaled a new era in trust investments and led, two years later, to the Uniform Prudent Investor Act (the "Act"). Both of these reforms reflected the previous decade's advances in understanding the workings of the efficient marketplace. The centerpiece of the new approach to investing, called Modern Portfolio Theory ("MPT"), was the conclusion that proper diversification of investments can substantially minimize much of the unsystematic risk inherent in the securities marketplace.

Florida's version of the Act (Fla. Stat. §518.11) took effect on October 1, 1993. Much of the Act merely codifies existing case law and statutory provisions governing a fiduciary's obligations. However, the Act also heralds new approaches to the fiduciary's standard of care, investment risk, diversification of investments and delegation of duties. It is the statute's unambiguous articulation of the duty to diversify, and perhaps even to delegate, that denotes the revised standard of prudence under the Act, and requires increased attention to the needs of the remaindermen.

Recognizing the Remaindermen

Under the Act, the general standard by which a trustee's actions are judged remains that of a prudent investor exercising reasonable care, skill and caution. However, the Act now enumerates several factors that must govern, to a greater or lesser degree, a fiduciary's investment decisions. It also directs that the needs and resources of all beneficiaries be weighed impartially. Although it is likely that a conscientious fiduciary would have considered the listed factors in any case, the specificity of the Act adopted by the Florida legislature now makes it more difficult for fiduciaries and courts to ignore or minimize the claims of a remainderman. For example, the Act mandates that trustees consider not only the preservation of capital but also its appreciation. Clearly this goal cannot be achieved if trustees, guardians and personal representatives ignore the growth opportunities of the equity market and, relying on previous case law, continue their traditional practice of investing primarily in low risk, fixed-income securities that suffer the effects of inflation. The Act now makes it imperative that all fiduciaries consider the suitability of other types of investments for the trust.

Reasonable Risk and Return

In a significant departure from previous law, the Act declares that no investment is too risky *per se*. Rather, each investment must now work as part of the overall financial strategy of the trust and is to be judged in the context of the portfolio as a whole. Whereas it had often been the case that the investment objective was primarily to generate income without risking capital, now the Act demands that the investment strategy reflect both risk and return objectives reasonably suited to the trust, guardianship or estate plan. Posit, for example, a five million dollar trust with a general objective of income and growth, one primary beneficiary and a sole remainderman under six years old. Would not investing a small percentage of the corpus in, for example, foreign stocks or mutual funds specializing in international equities, be reasonable, that is, prudent? Would a portfolio that includes an appropriate mix of stocks, bonds and cash -– whether or not some of them have negative returns — satisfy the duty to manage the assets impartially for the good of all beneficiaries?

Diversification

In the absence of the Act, a fiduciary's duty to diversify was often interpreted only as a way of *avoiding* risk. Therefore, fiduciaries typically made several different investments, but all at the same minimal risk level (e.g., bonds issued by different agencies of the U. S. Government). However, MPT has demonstrated the inescapable correlation between risk and return. A primary precept of MPT is that underdiversification increases uncompensated risk; that is, risk for which there is no concomitant return. Thus, uncompensated risk constitutes needless risk. Under both the former and the current standard, the trustee who assumes unnecessary risk is not prudent.

The purpose of diversification is to *manage* risk. Wherever possible, therefore, a fiduciary must diversify investments across different levels of risk. The reasonableness of any one investment, that is, its risk/return profile, can only be judged by its position in the portfolio as a whole. The test of prudence becomes then one of conduct, not outcome.

Lack of diversification can only be justified by what the Act calls "special circumstances." Presumably these would include, for example, adverse tax consequences or a settlor's specific direction in the trust instrument. In a 1990 article in *Trust and Estates* magazine, Ed Halbach, reporter for the project on the prudent investor rule for the Restatement (Third) of Trusts, paraphrased it this way: "You have to diversify unless you don't have to diversify."

Delegation

Given the Act's use of the more complex portfolio approach and its explicit instruction to diversify investments, a fiduciary who is not an investment expert and who fails to engage a professional investment advisor may be breaching his fiduciary duty, regardless of whether the client's portfolio appreciates or depreciates. Whereas the proper man-

agement of a portfolio may be beyond the time or expertise of an attorney or other individual fiduciary, competent professional investment advisors have both. A reputable manager will already have risk tolerance questionnaires and an understanding of how various types of investments can be used to achieve different objectives. Moreover, a truly professional manager will employ persons skilled in interpreting market fluctuations and calculating their likely effects on portfolios with different objectives. The Act does not mandate an "all or nothing" delegation. For example, it may be reasonable for a fiduciary, who presumably has a superior knowledge of the circumstances of the beneficiaries, to make general asset allocation decisions. Then the fiduciary can delegate to the investment manager the duty of selecting prudent investments to fulfill that allocation. In Florida, delegation can only follow notice to the beneficiaries or, in cases of guardianship, consent of the court.

Under the Act, the standard for proper investment delegation is the same as in other areas of trust law: the decision must be a reasonable exercise of discretion. The fiduciary's duties shift to selecting, instructing and monitoring the investment manager. Further, the Act reassures trustees, guardians and personal representatives that they will not be liable if they perform those obligations with care. Instead, aggrieved beneficiaries will have a direct action against the professional manager, who is automatically subject to the jurisdiction of the state courts.

Application to All Fiduciaries

Florida's version of the Act applies not only to trustees, but also to executors, guardians, personal representatives, and other fiduciaries who, by reason of court order, will, or other legal document, are responsible for the management of assets on another's behalf. This includes not only professional fiduciaries, such as attorneys and CPAs representing their clients in a fiduciary capacity, but also family members and other individuals as well. Persons in the last two categories who have been named in trust documents or wills often have no idea what the Prudent Investor Act is, or that they are legally required to comply with it. The higher standard of care required by the Prudent Investor Act can potentially make a family member's assumption of fiduciary responsibility more complex, as well as increase the need for long-term protection against liability.

Attorneys would be providing a much needed public service by informing and educating their clients about the Act, and by suggesting and arranging for the delegation of a highly qualified investment manager to manage the fiduciary account assets. Rohan Kelley, an attorney in practice in Fort Lauderdale and former Chair of the Probate Law Committee of the Florida Bar, has prepared a "Fiduciary Investing Primer," which provides his clients with an overview of their investment responsibilities. Among other cautions, Kelley warns clients that prudent delegation is not simply giving a broker discretion over an account. He advises them instead to seek the advice of a professional investment manager.

Conclusion

With clients living longer, and investment horizons for fiduciary accounts increasing in length accordingly, the issue of what constitutes prudent investment becomes even more important. Fortunately, the revised standard for fiduciaries enunciated in the Act bestows more flexibility as well as more responsibility. Attorneys who act as fiduciaries or who advise fiduciaries would do well to review their portfolios in light of the extensive guidance given in the Act.

Helen W. George *is admitted to practice in Connecticut and New York and is Senior Vice President of Legal Affairs for Wright Investors' Service, an investment advisor to, among others, corporate and non-corporate fiduciaries. Diane H. Timpany, CFP, CEBS (dtimpany@wisi.com), is Senior Vice President of Private Investment Management for Wright Investors' Service, which has offices in Milford, Connecticut, and St. Petersburg, Florida.*

RPPTL – University of Miami Law School Liaison Meeting

by Phillip A. Baumann

The liaison meeting held at the University of Miami on Tuesday, February 13, 2001, was attended by approximately 45 students from all three levels of the law school. Also attending were three members of the law placement office and two faculty members. One professor was so enthused about his students attending the liaison meeting that he moved his class, which conflicted with our meeting.

Presenters at the meeting were Sean Kelley, Shane Kelley, Alex Rubio, and Jill Soman Reiter. Participants heard a discussion by the presenters on the experiences of young lawyers in transitioning from law school to work. After hearing the presentations and consuming pizza and sodas provided courtesy of our Section, many of the students engaged the presenters in one-to-one discussions for over 30 minutes after the one-hour presentation.

Topics covered included the importance of billing, the value of seeking an LLM, importance of understanding the scope of work being assigned by a mentor, the importance of good mentoring, and the young lawyer's role in mentoring.

There is one additional liaison meeting scheduled this year at Nova Southeastern University on March 22.

I would like to publicly thank Karen Scully-Clemmons of the University of Miami placement office for her enthusiastic promotion of this event within the law school and her promised coordination with Nova Southeastern to help them make their event equally successful.

The FutureLawyer:

Palm Vx and Omnisky— Stay on Top of the Latest Technology

Submitted by the Practice Management Committee

The final version of the Omnisky wireless modem and the Palm Vx are a perfect marriage of hardware and software, creating a seamless and wireless Internet connection at respectable speed.

The Palm Vx is the sleekest and coolest of the Palm handhelds. It has 8 mb of memory, which is plenty for dozens of Palm Apps and other stuff.

I have been beta testing the Omnisky modem, which the Palm Vx neatly slides into, for about a year. Each new version of the software has made wireless email and web browsing easier and more productive.

Forget about those brain dead WAP (wireless access protocol) cell phones that are becoming as ubiquitous as bunny rabbits in springtime. The small screens and lack of a credible text entry system make them worthless, in the FutureLawyer's opinion. Why pay $9.95 a month for something that you can't do real work with?

Before I walk you through the Omnisky marvel, however, let's take a closer look at the Vx. It is the sleekest Palm, weighing in at only 4.0 ounces, and the smallest PDA form factor on the market, at 4.7 by 3.2 by 0.4 inch in size. The aluminum case makes it futuristic and cool looking, and more and more are being seen everywhere. The Vx, with 8 mb of memory, can be had for a very reasonable street price of $449.

For some time, the success of the Palm has been tied directly to the software developers who are writing applications for it. For the past year, however, its greatest value to the FutureLawyer, other than the Internet access provided by the Omnisky modem, has been the synchronizing apps written by Alumni Computer Group, Inc. (PcLaw) , Gavel and Gown (Amicus), and some pioneering Internet companies like AvantGo.

In a hand held package, I can press a sync button on the Palm Vx cradle at the office, and the entire Amicus and PcLaw databases are transported into the Palm for use at court or while traveling. Alumni's new application, PcLaw TE, allows the entry of time and expense entries on the road, and posting via the sync function back at the office. It is very neat to be able to enter time remotely, by calling up the PcLaw client and matter database on the Palm. Amicus has been synching to the Palm for some time, allowing both attorney and staff to be working with the same calendar, to do , and PIM data at all times.

Now Omnisky has added wireless Internet functionality to the Palm Vx with the addition of another 4 ounces. POP email, PQA wireless Internet browsing, and access to the AvantGo channels make this a must-have application for any traveling lawyer or professional.

PQA is Palm's answer to the channel language pioneered by AvantGo, and allows the creation of HTML code that neatly fits on the Palm screen. Many web sites have created tiny versions of their pages, which are small enough to be efficiently used by wireless handheld users.

PQA (Palm query application) is a way to efficiently view information at sites which provide small versions of themselves. This even permits some small graphics, a feat that is impossible on the new WAP (Wireless Internet Protocol) phones.

The Omnisky modem can be had for $299 (and deals are now available with $150 rebates), and the unlimited Internet service is only $39.95 a month.

The Omnisky's one negative is that is only works in areas of the country with CDPD (Cellular Digital Packet Data) networks. That means it only works in 60% of the country. Ah, well. It is still far and away the best wireless solution out there, and it fits in your pocket.

I really enjoy pulling it out in an airplane terminal, and accessing email, flight information, weather information, sports and general news, and thousands of other useful nuggets available on the Internet.

Browsing the web on the Palm will never be confused with broad-band access and a 19 inch color computer monitor. But, for a gadget that fits in your coat pocket, it provides access to the world of information on the Internet, at a reasonable price. For the professional on the move, it is an essential tool for the 21st century. Even the most Luddite among us has to admit that such technology will change the way we move around in the world.

I have seen the future, and it is in my pocket.



Richard M. "Rick" Georges *is a sole practitioner in St. Petersburg, Florida, and is the immediate past Chair of the Technology Committee of The Florida Bar. He is the author of the column, "Future Lawyer" tm, which is published in Warfield's Tampa Bay Review and many other publications. He is a member of the Florida Courts Technology Commission by appointment of the Florida Supreme Court and the Law Office Management Assistance Service Advisory Committee of The Florida Bar (LOMAS). He has taught law office management, computer-assisted legal research, and micro-litigation skills at the college level. He has presented seminars and training on all aspects of the use of technology in the legal profession, for local, state and national bar associations, and for may public and private entities. He can be reached via email at* ***rgeorges@futurelawyer.com,*** *or at his home page at* ***http://www.futurelawyer. com.***

Tax-deferred Exchanges Under §1031 I.R.C.

by Derrick M. Tharpe, Esq.
Wachovia Exchange Services, Inc., Winston-Salem, North Carolina

Tax-deferred Exchanges Under §1031 IRC

The concept of the tax-deferred exchange is quite simple: If a taxpayer exchanges current property for like-kind replacement property there is no immediate tax consequence resulting from the transaction. Any realized gain is deferred until the eventual sale of the replacement property. However, the IRS has imposed mechanical requirements on the execution of a §1031 exchange which must be strictly adhered to if the taxpayer is to achieve a successful tax-deferred exchange.

I. EXCHANGE BASICS

Under §1031 of the Internal Revenue Code a taxpayer may exchange property currently held for investment or productive use in a trade or business, for similar or like kind property. If the exchange of property is carried out consistent with the provisions of §1031 then the taxpayer will receive a deferral of the capital gains tax associated with the transfer. The legislative rationale which forms the basis for tax-deferred exchanges is that the exchange of an asset for a similar asset of equal or greater value represents a continuity of investment which should not be taxed at the time of the exchange.

The §1031 tax-deferred exchange is not a new concept. In fact the earliest guidance was set forth in 1921,[1] and, although establishing the initial framework for the conduct of an exchange, these regulations left many issues central to a tax-deferred exchange unresolved. As a result, taxpayers exercised, and the Courts accommodated, wide latitude in structuring various exchange transactions.[2] However, as a result of the landmark legal decision in *Starker v. Commissioner*,[3] basic guidelines were established which made exchange opportunities much more practical for the taxpayer. Thereafter, through the Tax Reform Act of 1984 and subsequent 1991 Treasury Department Regulations, rules were adopted which imposed the mechanical requirements that define the current structure of §1031 exchanges, including the "Safe Harbor" rules as well as the 45 day identification period and 180 day replacement period.[4]

II. Qualified Exchange Properties

"Held For" Requirement

In determining the viability of a §1031 exchange transaction, the taxpayer must first determine whether the properties to be exchanged will meet the qualified purpose requirement of §1031. Pursuant to § 1031(a)(2) property will not be eligible for non-recognition treatment unless it is held by the taxpayer for use in a trade or business, or for investment.

However, neither §1031 nor the Regulations define the terms "held for productive use in trade or business" or "held for investment". Therefore, the determination as to whether the property is held for a qualified purpose is a question of fact,[5] and is to be determined at the time the exchange takes place.[6] As such, the prior or subsequent use of either the relinquished or replacement property in the hands of another party is immaterial to the exchange.

It should also be noted that the taxpayer has the burden of proof in establishing that the property has been held for a qualified purpose.[7] Although not determinative, an important consideration in evaluating whether the exchange property meets the qualified purpose requirement is the amount of time which the property has been held by the taxpayer. While there is no specific holding period for either the relinquished or replacement property, the longer the property has been held the more likely the taxpayer will be able show the requisite purpose.[8]

The Like-Kind Requirement

Under §1031, the property which the taxpayer intends to exchange must be like kind to the replacement property the taxpayer plans to acquire. In the context of a tax-deferred exchange, "like kind" refers to the nature or character of the property, not its grade or quality.[9]

The regulations further provide that both real property and personal property may be exchanged. However, the distinction as to whether the property to be exchanged is real or personal property is critical, as real property is not like-kind to personal property.[10] Additionally, the definition of like kind is much more restrictive for personal property transactions. Generally, the determination as to whether the property to be exchanged is either real or personal property, is based upon the law of the state in which the property is located.[11]

Real Property

As to the exchange of real property (or real estate), the regulations are extremely broad, and provide that, as a general rule, all real property is like kind as to all other real property. For example, improved real property is like kind with raw land,[12] and, an apartment complex is like kind with a retail shopping center. As such, like kind is not defined by the value of the real estate to be exchanged, but rather it is established by the underlying character of the property.

Personal Property

Although many tax professionals are familiar with the use of §1031 exchanges upon the disposition of highly appreciated real estate, the tax-deferred exchange of personal property has been relatively underutilized. However, the disposition of personal property, due to the accelerated depreciation of assets, often presents a valuable opportunity for §1031 exchanges.

While the definition of like kind for real property is very broad, the like kind requirement for personal property is much more specific. §1031 contains a "like-class" safe harbor for the exchange of most types of personal property.[13] Under this "like class" safe harbor, personal property

continued...

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may qualify as like kind if the properties to be exchanged are within the same "General Asset Class",[14] or within the same "Product Class", as defined by the Standard Industrial Classification Manual.[15] However, personal property which does not qualify under the like class safe harbor may still qualify for IRC §1031 treatment if the taxpayer can demonstrate that the properties to be exchanged are in fact like kind.[16]

Ineligible properties

Despite the flexibility offered by § 1031, certain properties are ineligible for like kind exchange treatment. These properties include:

- Stock in trade or other property held primarily for sale (Inventory);[17]
- Stocks, bonds or notes;[18]
- Other securities or evidence of indebtedness;[19]
- Partnership interests;[20]
- Certificates of trust or beneficial interests;[21] and
- Choses in action.[22]

III. QUALIFIED INTERMEDIARY

Role of Qualified Intermediary

A §1031 tax-deferred transaction is defined by the exchange of property for other like kind property. However, if a taxpayer receives the proceeds from the sale of the relinquished property prior to acquiring the replacement property, the transaction will constitute a sale and not qualify as a tax-deferred exchange.[23] Therefore, the central element in structuring a deferred exchange is the avoidance of actual or constructive receipt of the sale proceeds (or "boot") by the taxpayer. According to the Regulations the taxpayer is in receipt of the funds if taxpayer receives the economic benefit of the money; or when the funds are credited to the taxpayer's account, set apart for the taxpayer, or otherwise made available so that the taxpayer may draw upon the proceeds.[24]

To assist the taxpayer in avoiding actual or constructive receipt of the proceeds from the sale of the property, the 1991 Regulations provided newly defined "Safe Harbors" for the conduct of §1031 exchanges. Through the establishment of these safe harbors, the Regulations provided taxpayers with mechanisms which, if followed, would preclude a determination by the IRS that the taxpayer is in actual or constructive receipt of money, boot or the other proceeds from the exchange.

The Safe Harbors provided by 1.1031[25] are:

- Security or Guarantee Arrangements
- Qualified Escrow
- Qualified Intermediaries
- Growth Factors & Interest

The most significant Safe Harbor created by the 1991 Regulations is that for Qualified Intermediaries.[26] A Qualified Intermediary ("QI") is an independent third party who is designated by the taxpayer to receive the proceeds from the sale of the taxpayer's relinquished property. Following receipt of the funds, the QI will continue to hold the proceeds throughout the entire term of the exchange. As a result of this direct conveyance of funds to the QI, the taxpayer is able to avoid constructive

QUI TAM
from page 1

provided twenty days for Taxpayers to file a Second Amended Complaint. By the deadline, calculated by the Court to be March 6, 2001, no Second Amended Complaint nor leave of Court for an extension was sought.

Many motions were disposed of just before press time. Apparently leading the docket was a Motion to Recuse with an affidavit dated February 26, 2001. A Taxpayers for Fairness director asserted that the Court was prejudiced because:

A. With an apparent total disregard for Plaintiff's rights to due process and an opportunity to be heard, this Court entered an Order dismissing the Plaintiff's Amended Complaint based upon the Court's conclusions that it was incumbent upon the Plaintiff to specify the exact amount of damages incurred by the State and that the Plaintiff purportedly did not establish a sufficient similarity in nature as to the defenses which may be raised by the Defendants in the action.

B. The Court's sua sponte dismissal without allowing our counsel the opportunity to present legal support to substantiate our claim and an opportunity for us to be heard has resulted in my grave concern over our ability to have a fair and impartial hearing on the merits of our claim.

As one would anticipate reading the allegations, the Court denied the Motion to Recuse by an Order entered February 28, 2001.

Thereafter a Motion for Extension of Time was filed seeking an additional thirty days to "attempt to overcome the Court's objections to the complaint in its current format." As the Court's Order denying the motion noted, information supporting the current amount of all liens and encumbrances "it should have been alleged originally or alleged in the first Amended Complaint," and the plaintiff "does not need an additional (30) days to make such required allegation, if there is a basis to do so."

Finally, on April 2, 2001, a Final Judgement of Dismissal with prejudice was entered. The Court retained jurisdiction to award attorney's fees and costs. We await word as to whether there will be an encore!

Email Mike with your comments at mjgelfand@gelfandarpe.com *or telephone (561) 655-6224.*

receipt of the proceeds from the relinquished property sale. At present, the regulations regarding the use of a QI are clear and sufficiently generous to allow a high degree of flexibility in structuring transactions so that most tax-deferred exchanges are currently conducted using a QI.

In selecting a Qualified Intermediary, the taxpayer should be aware that certain persons may be disqualified from acting as the Intermediary. Most notably, any person who has acted as the taxpayer's employee, attorney, accountant or real estate broker/agent within the two years preceding the exchange may not act as the Intermediary.[27]

The Exchange Agreement

To effectuate a §1031 exchange using the Qualified Intermediary safe harbor, the taxpayer and the Intermediary must enter into an Exchange Agreement prior to the sale of the relinquished property.

The Exchange Agreement defines the QI/taxpayer relationship and must set forth the procedures, consistent with the terms of 1.1031(k)-1, for accomplishing a like kind exchange through the use of an Intermediary. Most notably, the Exchange Agreement must specifically limit the taxpayer's right to receive, pledge, borrow or otherwise obtain the benefits of the relinquished property sale proceeds prior to the expiration of the exchange period.[28]

Upon execution of the Exchange Agreement the taxpayer must also assign all rights and duties under the relinquished property sales contract to the Qualified Intermediary. Thereafter, upon the sale of the relinquished property, the proceeds from the sale are forwarded to the QI. The QI will then hold these proceeds until the taxpayer's acquisition of the replacement property. Prior to the acquisition of the replacement property, the taxpayer must also assign the replacement property purchase contract to the QI. The QI will then transfer the proceeds to the seller of the replacement property to complete the §1031 exchange. Because the proceeds from the relinquished property sale are held by the Qualified Intermediary throughout the exchange process, the taxpayer is deemed not to be in constructive receipt of the proceeds.

Despite the fact that the QI receives an assignment of both the relinquished property sales contract and the replacement property purchase contract, the regulations do not require the QI to take legal title to the properties involved in the exchange. Rather the regulations provide that the relinquished property may be directly conveyed to the buyer, and the seller may directly convey the replacement property to the taxpayer.[29] This mechanism of "direct deeding" has become the preferred method of undertaking an exchange as it allows the taxpayer to avoid duplication of costs associated with the closing and transfer of property.

IV. §1031 Time Limits

Pursuant to IRC §1031, there are strict time limits imposed upon all tax-deferred exchanges. Following the transfer of the relinquished property which the taxpayer intends to exchange, the taxpayer then has 45 days to identify the replacement property and 180 days to actually purchase the property.[30] Both the 45 and 180 day time periods are calculated from the date upon which the taxpayer transfers the relinquished property.[31] If there are multiple transfers of relinquished property, the respective time periods begin to run on the date of the earliest transfer.[32]

Identification Period

Under IRC §1031, the Taxpayer must identify the replacement property within 45 days after the transfer of the relinquished property.[33] The identification of the replacement property must be in writing and must be delivered to the appropriate party, usually the Qualified Intermediary, prior to the expiration of the 45 day period.[34] If, however, the taxpayer completes the acquisition of the replacement property prior to the expiration of the 45 day identification period, there is no need to designate the property in a written document.[35]

Replacement Period

§1031 requires that the taxpayer must complete the purchase of the replacement property before the *earlier* of:

- 180 days following the transfer of the relinquished property: OR
- The due date of the taxpayer's tax return for the year in which the transfer of the relinquished property occurred.[36]

Therefore, if the taxpayer's return is due prior to the expiration of 180 days, the taxpayer will have less than 180 days to close on the replacement property, unless he or she requests an extension for filing the return.

For example, if the relinquished

continued...

Chair Wilson Smith Announces Long Range Planning Nominations for 2001-2002:

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property closing occurs on Dec. 1, 1999, the taxpayer will have 45 days within which to identify the replacement property. However, if the due date for his or her individual tax return is on April 15, 2000, this is prior to the expiration of the 180 day period. Therefore, the taxpayer must acquire the replacement property on or before April 15, 2000 or obtain an extension for filing his or her return.[37]

Strict Compliance

When considering a §1031 exchange, the taxpayer should be aware that there are no exceptions to these deadlines. The 45 and 180 day time periods terminate on exactly midnight of the respective dates, and are calculated without regard to weekends or holidays.

V. Identification of Replacment Property

As stated previously, following the transfer of the relinquished property, the taxpayer has 45 days to provide written identification of the replacement property which he or she intends to purchase to complete the exchange. As to the nature of the identification required, §1031 requires the written identification to "*unambiguously*" describe the replacement property to be acquired.[38] The regulations provide 3 examples of unambiguous descriptions of real property:

- Legal description; or
- Street address; or
- A distinguishable name.[39]

For an exchange of personal property, the regulations require a specific description of the particular type of property. The example provided by the regulations indicates that for a truck, the identification should include the specific make, model and year.[40]

For the taxpayer, careful preparation and review of the written identification is essential. If an improper identification is submitted, it may be determined that the taxpayer failed to acquire substantially the same property as he or she identified, thereby eradicating any taxable benefit of the exchange.

Identifying Multiple or Alternative Properties

For purposes of a §1031 Like-Kind exchange , a taxpayer may also identify multiple or alternative Replacement Properties. However, §1031 imposes mechanical, and oftentimes confusing, limitations on the number of properties which may be identified. Pursuant to the regulations, the maximum number of Replacement Properties which may be identified are set forth in the following rules.

3 Property Rule

The taxpayer may identify three replacement properties without regard to the fair market value of the properties.[41]; **or**

200% Rule

The taxpayer may identify any number of replacement properties limited by the total fair market value not to exceed 200% of the fair market value of all Relinquished Properties valued as of the date they are transferred by the taxpayer.[42]

However, if the taxpayer violates both the 200% rule *and* the 3 property rule, the taxpayer is deemed not to have identified **any** replacement property, with two exceptions

Any property received within 45 days following the sale of the relinquished property will qualify for 1031 treatment;[43] and

If the fair market value of the Replacement Property actually received by the taxpayer is at least 95% of the total fair market value of all identified Replacement Properties.[44]

VI. Conclusion

Tax-deferred exchanges are intended to allow business owners, individuals, and corporations to transfer the full value of one asset or group of assets to another of like-kind without currently paying capital gain taxes on the transaction. While conceptually the transaction appears clear, the taxpayer should seek the advice of his or her tax counsel to determine whether, given the particular property and the current tax situation, it would be favorable to consider a tax-deferred exchange transaction. Tax-deferred exchanges are highly regulated and both taxpayers and tax advisers should use due care in exchange matters and adhere to the Regulations to the greatest extent possible.

Endnotes:

[1] IRC §202 (c); IRC §1001; IRC § 1031

[2] See, *Starker v. Commissioner*, 602 F.2d 1341 (9th Cir. 1979); *Estate of Bowers v. Commissioner*, 94 T.C. 582 (1990); *Magneson v. Commissioner*, 753 F.2d 1490 (9th Cir. 1990).

[3] *Starker v. Commissioner*, 602 F.2d 1341 (9th Cir. 1979)

[4] IRC §1031; Treas. Reg. 1.1031.

[5] See *Gulf Stream Land & Development Corp.*, 71 TC 587 (1979)

[6] *Klarkowski v. Comm.*, TC Memo 1965-328, aff'd 385 F.2d 398 (CA7 1967).

[7] *Land Dynamics v. Comm.*, TC Memo 1978-259.

[8] See Ltr Rul 8429039, The IRS has stated that a 2 year holding period would be sufficient holding period for the qualified use test.

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[9] Treas. Reg. 1.1031(a)-1(b).
[10] Rev Rul 59-229, 1959-2 CB 180; Oregon Lumber Co. v. Comm., 20 TC 192 (1953)
[11] *Aquilino v. U.S.*, 363 U.S. 509 (1960); *Coupe v. Commissioner*, 52 T.C. 394 (1969). [Note: The Regulations do make specific reference to a 30 year lease as real property, Treas. Reg. 1.1031 (a)-1(c)(2), and remaining option periods under the lease are to be considered in calculating the 30 year term of the lease. *Century Electric Company v. Commissioner*, 192 F. 2d 155 (8th Cir. 1951)]
[12] Treas. Reg. 1.1031(a)-1(b).
[13] Treas. Reg. 1.1031(a)-2
[14] See Rev Proc 87-56, 1987-2 C.B 674
[15] Division D of the Standard Industrial Classification Codes, Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual
[16] Treas. Reg. 1.1031(a)-2(a)
[17] Treas. Reg. 1.1031(a)-1(i)
[18] Treas. Reg. 1.1031(a)-1(ii)
[19] Treas. Reg. 1.1031(a)-1(iii)
[20] Treas. Reg. 1.1031(a)-1(iv)
[21] Treas. Reg. 1.1031(a)-1(v)
[22] Treas. Reg. 1.1031(a)-1(vi)
[23] See Treas. Reg. 1.1031(k)-1(f)(1)
[24] Id.
[25] Treas. Reg. 1.1031(k)-1(g)
[26] Treas. Reg. 1.1031(k)-1(g)(4)
[27] Treas. Reg. 1.1031(k)-1(k)(2)
[28] Treas. Reg. 1.1031(k)-1(g)(6)
[29] Treas. Reg. 1.1031(k)-1(g)(4)(v); see also *Rev. Rul*, 90-34.
[30] Treas. Reg. 1.1031(k)-1(b)
[31] Treas. Reg. 1.1031(k)-1(b)(2)
[32] Treas. Reg. 1.1031(k)-1(b)(2)(iii)
[33] Treas. Reg. 1.1031(k)-1(b)(2)(i); IRC §1031(a)(3)(A)
[34] Treas. Reg. 1.1031(k)-1(c)(2)
[35] Treas. Reg. 1.1031(k)-1(c)(1)
[36] Treas. Reg. 1.1031(k)-1(b)(2)(ii); IRC §1031(a)(3)(B)
[37] See Example provided in Treas. Reg. 1.1031(k)-1(b)(3)
[38] Treas. Reg. 1.1031(k)-1(c)(3)
[39] Id.
[40] Id.
[41] Treas. Reg. 1.1031(k)-1(c)(4)(i)(A)
[42] Treas. Reg. 1.1031(k)-1(c)(4)(i)(B)
[43] Treas. Reg. 1.1031(k)-1(c)(4)(ii)(A)
[44] Treas. Reg. 1.1031(k)-1(c)(4)(ii)(B)

Register for the Section's Annual Convention using the form on page 35.

2000 - 2001 Executive Council Meetings

May 24 - 27
Section Convention/Exec. Council Meeting,
Harbor Beach, Ft. Lauderdale

July 12 - 14
Legislative Update/Executive Council Meeting,
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WHO MOVED MY FEES?
from page 1

than an hour's read.

How do we adapt to the changing climate of our society and recognize the possibly legitimate criticisms leveled against our ancient profession? We must recognize that we no longer have a monopoly in some areas once considered our exclusive province. There are others who can do some of the tasks traditionally considered to belong only to lawyers just as well and for less cost than we must charge. Let us concentrate on work that calls for our skill and training, and is often more profitable as well.

Nevertheless, we must recognize that we are in danger of pricing ourselves out of some markets. This is especially true of litigation, which is extremely labor intensive. We must continue to find ways to deliver quality legal services at a reduced cost to the client, through the use of legal assistants and paralegals and labor saving electronic media. The Section is currently exploring the feasibility of linking all our members electronically for email delivery, access to committee reports and to court decisions as well as the section web site.

Litigation is probably the one area of our practice that tends to arouse the most client resentment. Why is this? Probate litigation, by its very nature, requires substantial discovery and often is highly colored by the client's emotions. And it is virtually impossible to accurately estimate either the cost or the outcome in advance. Although a client may say he or she would rather pay you the money than give it in settlement to the enemy, you may be certain that feeling will have long vanished when they receive your final bill. How then, can the costs of probate litigation be controlled?

There already exists a process intended to accomplish that result which is more and more accepted by the bar and the bench. As a matter of fact, we may be on the leading edge of a substantial evolution in dispute resolution that could easily become the norm within a generation of lawyers. I believe that the time of alternative dispute resolution has come – at least in the probate area. Arbitration and mediation will, and should, be utilized more extensively; some courts already require at least an attempt at mediation before the parties can go to trial.

One reason I believe probate litigation is amenable to mediation is the nature of the action. Unlike personal injury or commercial litigation in which the plaintiff is generally seeking to be made whole for a financial loss or physical damages, in probate litigation the parties are fighting over what is in effect a new pot of money which will all go to the victor. There is no jury that can split the baby and reach a compromise result – it is winner take all, after the litigation costs and lawyers' fees are paid. Although emotions do generally run high in probate litigation, especially at the beginning, a client can be persuaded of the benefit to be obtained with a result that divides the pie in a roughly equitable manner. This is where an effective mediator and professionally responsible counsel on both sides are critical to the success of the process. Lawyers, conscious of their role as an advocate, often tend to emphasize the strengths of their client's case and minimize the opposition. The mediator must take a balanced and neutral view and, while avoiding undercutting the advice previously given by counsel, point out to parties on both sides the weaknesses of their case and the strength of the opposition.

A successful mediation saves the clients money, removes a case from the crowded docket and allows counsel to go on to other matters. It usually results in both parties feeling relieved that it is over with a settlement that an objective third party assured them was fair, and often they thank the mediator for helping to bring the conflict to an end.

The message of Dr. Johnson's book is that while life changes, it does go on. Our profession is evolving and flexibility is required to adapt to that evolution. Lawyers are bright enough to do that – they just don't like it.

FLEA Probate Team Schedules 2001 Seminars

Seminars to be presented by the Probate Team are:

- **REAL PROPERTY SEMINAR**
  (Program Chair Chip Waller) on September 7 & 8, 2001 at the Wyndham Harbour Island Hotel in Tampa. CLE credit will be assigned.
- **ESTATE PLANNING IN THE REAL WORLD**
  (Program Chair David Brennan) on October 26 & 27, 2001 at the Wyndham Harbour Island Hotel in Tampa. CLE credit will be assigned.

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Questions concerning your personal designation or certification credit should be directed to The Florida Bar's certification department. 800/342-8062.

Real Property Case Summaries

by Homer Duvall, III, Holland & Knight, St. Petersburg

Title Insurance Agents Can Give It Away

Chicago Title Insurance Co. v. Butler, 770 So.2d 1210 (Fla. 2000).

S. Clark Butler, a commercial developer filed an action against the Florida Department of Insurance for judgment declaring unconstitutional certain statutes and administrative rules which prevented title insurance agents from rebating any portion of the title insurance premium. The Florida Home Builders Association and one title insurer, National Title Insurance Company intervened in the case as plaintiffs. Several title insurers, agents, and title industry trade organizations intervened as defendants in the action. The Real Property, Probate & Trust Law Section of the Florida Bar appeared as *Amicus Curiae*.

Butler claimed that the anti-rebate statutes and administrative rules violated his substantive due process rights under Article I, §9 of the Florida Constitution, primarily basing his argument on *Department of Insurance v. Dade County Consumer Advocate's Office*, 492 So.2d 1032 (Fla. 1986), which held that similar anti-rebate statutes were unconstitutional as applied to certain general lines insurance agents. The trial court held in favor of Butler and certain of the title insurer intervenors appealed. The First District Court of Appeal certified the case directly to the Florida Supreme Court, as a matter of great public importance.

On appeal, the Florida Supreme Court rejected the appellant's arguments distinguishing title insurance agents from general insurance agents, and upheld the judgment of the circuit court holding that sections 626.611(11), 626.8437, 626.9541(1)(h) 3.a., 627.780, 627.782 and 627.783, *Florida Statutes*, and Rule 4-186.003(13)(a), *Florida Administrative Code*, are unconstitutional to the extent that they prohibit title insurance agents from rebating any portion of their risk premium.

Disagreement over Condominium Parking is Not a Dispute for Arbitration

Florida Tower Condominium, Inc. v. Mindes, 770 So.2d 210 (Fla. 3d DCA 2000).

In a dispute over title to and the right to use particular condominium parking spaces, the trial court held that the dispute was not subject to the non-binding arbitration provisions of §718.1255, *Florida Statutes*. The Third DCA agreed, citing §718.1255(1) – "'Dispute' does not include any disagreement that primarily involves: title to any unit or common element."

Seller is Not a Debtor In Possession

Southampton Development Corp. v. Palmer Realty Group, Inc., 769 So.2d 1113 (Fla. 2d DCA 2000).

Realtor agent learned that Seller was interested in selling property for which Realtor agent had a prospective buyer. Realtor and Seller entered into an agreement whereby Seller would pay Realtor a commission if Realtor's buyer entered into a contract to purchase property from Seller. Although Realtor's buyer negotiated with Seller, eventually Realtor's buyer broke off the negotiations.

Seller contracted to sell the property to another buyer. However, the closing was delayed and Seller filed a petition for Chapter 11 bankruptcy.

Seller, as debtor in possession, petitioned to have the court approve the sale of the property to the contract purchaser, but several creditors objected. The court agreed that the property should be sold, but allowed other bids to be submitted. Of the three bids received, Realtor's buyer's bid was approved, and a plan of reorganization including the sale to Realtor's buyer was confirmed.

Realtor applied to the bankruptcy court for compensation, but the bankruptcy court denied the request. Realtor filed an amended proof of claim, which the bankruptcy court also denied. Realtor then sued Seller for breach of contract. The trial court held that since Realtor had not received proper notice of the bankruptcy, it was a nullity as to the Re-

continued...

Actionline Publication Schedule

Actionline is in constant need of brief, newsworthy articles, and readers are invited to submit material for publication. Please forward any proposed articles concerning **real estate, estate planning, probate, or articles of general interest** to Lisa A. Hoppe, c/o Wetherington, Hamilton & Harrison, P.A., Suite 2625, 400 N. Tampa Street, 33602. Please include a hard copy of the proposed article, along with a computer diskette containing the article in Word Perfect 5.0, or Word 6.0 or 7.0 format. Alternatively, articles may be E-mailed to Lisa at *lah@whh-law.com.* Articles NOT submitted on disk may delay publication. Please do NOT include graphics on the disks, unless they are illustrative charts or graphs. Prospective authors may call Lisa at (813) 225-1918 to obtain additional publication guidelines.

The publication deadlines for upcoming issues of *Actionline* are as follows:

***Actionline* Issue**	**Publication Deadline**
June - July	May 15, 2001
August - September	July 1, 2001

Persons with comments or suggestions for improvement of *Actionline* may send them to the above address.

altor, and that the bankrupt Seller was obligated to pay the Realtor a commission.

On appeal, the Second DCA reversed. The appellate court found that although there was an agreement between Seller and Realtor for a commission if Seller contracted with Realtor's buyer for the purchase and sale of the property; however, the appellate court said no such contract ever existed. Instead, Realtor's buyer contracted with the debtor in possession of the bankruptcy estate, which the appellate court differentiated from the bankrupt Seller. Since the Seller had never contracted with Realtor's buyer, Realtor had no claim against Seller.

It's Good to be Organized, but Only if You Have Capacity

Asociacion De Perjudicados Por Inversiones Efectuadas En U.S.A. v. Citibank, F.S.B., 770 So.2d 1267 (Fla. 3d DCA 2000).

A group of investors organized under the laws of Spain in order to sue for damages resulting from alleged securities fraud. The association of foreign investors filed their lawsuit in the Circuit Court for Dade County, Florida. The defendants in the lawsuit moved to dismiss for lack of standing and lack of capacity. The trial court granted defendant's motion and dismissed the case with prejudice, because the plaintiff group of investors was an unincorporated association.

On appeal the unincorporated group of investors urged the court to apply the common law rule that required unincorporated associations to be treated like partnerships, and following the Revised Uniform Partnership Act ("RUPA"), §620.8307(1), *Florida Statutes*, which allows partnerships to sue or be sued in their own name.

The Third DCA upheld the trial court, stating that it was the legislature's clear intent that RUPA does not apply to not-for-profit organizations. The appellate court held that the unincorporated association of investors did not have the capacity to sue and that only the individual members of the association or a properly certified class would have proper standing.

Court Liens On Unjust Enrichment of Homestead Owner

Spridgeon v. Spridgeon, 25 Fla. L. Weekly D2806 (2d DCA, No. 2D99-4181, Dec. 8, 2000). **Note:** *At this writing, this Opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.*

Although divorced, ex-husband provided funds for ex-wife's purchase of condominium, as well as funds for certain repairs and renovations to the condominium. Ex-husband arranged for ex-wife to apply for a mortgage on favorable terms, but ex-wife refused to sign the application. Ex-husband sought an equitable lien on the condominium. Wife objected, contending that the condominium was her homestead.

The trial court found that the ex-husband's expenditures were offered and accepted as loans which were to be repaid from the proceeds of a third party mortgage which ex-wife had agreed to obtain. The trial court did not find that ex-wife had engaged in any fraud or misrepresentation. Still the trial court held for the ex-husband and imposed an equitable lien on the ex-wife's homestead. Ex-wife appealed.

Relying on the Florida Supreme Court's holding in *Palm Beach Savings & Loan Assoc. v. Fishbein*, 619 So.2d 267 (Fla. 1993), the Second DCA upheld the equitable lien, on the basis that equitable liens can be imposed on homestead property to prevent the owner of the homestead from being unjustly enriched. By imposing the equitable lien on ex-wife's homestead, ex-wife was no worse off than if she had kept her agreement to obtain a mortgage loan.

Mortgagor Granted Right to Untimely Redemption

Deluxe Motel, Inc. v. Patel, 770 So.2d 283 (Fla. 5th DCA 2000).

In May 1996, Sellers brought a suit against Buyers to enforce amounts due under promissory notes, which was later amended to include a count to foreclose the mortgage securing the notes. In September 1997, the trial court granted a motion for summary judgment foreclosing the mortgage and ordering the sale of the Buyers' property. Although the Buyers' appealed, they did not seek a stay order, and while the appeal was pending, on October 29, 1997, the Seller's bought the property at the foreclosure sale. On November 10, 1997, absent any attempt by the Buyers to redeem the property, a certificate of title was issued to the Sellers.

On February 12, 1999, the appellate court reversed the original foreclosure judgment and remanded the matter to the trial court for further proceedings. The Buyers did not seek to vacate the public sale or the certificate of title or to regain possession or ownership of the property.

At trial following the remand, the trial court entered a final judgment of foreclosure in favor of the Sellers stating:

> No public sale of the property is ordered because the [Sellers] have already taken over possession of the property, and have made substantial improvements thereto, based on their successful bid at a previous foreclosure sale?[Buyers] shall have until January 7, 2000, to exercise their right to redeem the property by paying to the [Seller] the entire amount found due under the mortgage?

This final judgment was dated January 14, 2000. The Buyers again appealed maintaining that the trial court's judgment denied their right to redeem the property.

The Fifth DCA agreed with Buyers. The portion of the judgment setting forth the erroneous redemption period was vacated, and the matter was again remanded to the trial court with instructions to amend the judgment to provide for a fifteen (15) day redemption period.

Mortgagor Denied Right to Untimely Redemption

Cueto v. Manufacturers & Traders Trust Company, 25 Fla. L. Weekly D2792 (Fla. 4th DCA No. 4D00-760, Dec. 6, 2000). **Note:** *At this writing, this Opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.*

Lender obtained judgment foreclosing mortgage against Owners and property was sold and a certificate of sale was issued October 29,

1999. A certificate of title was issued on November 9, 1999. Thereafter, the Owners sought to redeem the property on the grounds that the Owner wife had not informed her husband of the foreclosure action, the judicial sale or the receipt of the certificate of title. Although admitting that the timing of their attempt to redeem was untimely, Owners asserted that the judgment should be set aside on the basis of mistake, inadvertence, surprise or excusable neglect, under Rule 1.540(b), *Florida Rules of Civil Procedure*. The trial court granted this request and vacated the certificate of sale, the certificate of title and the foreclosure judgment.

The Fourth DCA reversed the trial court's ruling, stating that the only grounds for vacation of a foreclosure sale are: "(1) that the foreclosure sale bid was grossly or startlingly inadequate; and (2) that the inadequacy of the bid resulted from some mistake, fraud or other irregularity of the sale." Neither the trial court nor the appellate court found any inadequacy in the purchase price at the foreclosure sale. There is no authority that would permit a party relief from a judicial sale based on that party's own negligence.

Witness Protection Program

American General Home Equity, Inc. v. Countrywide Home Loans, Inc., 769 So.2d 508 (Fla. 5th DCA 2000).

In settling a dispute regarding conflicting priorities based on competing deeds, the Fifth DCA confirmed that a deed must have two subscribing witnesses in order to be valid, and that although the notary may also serve as a witness, unless the notary signs in the capacity of a witness, the mere existence of the notary's acknowledgement on the deed does not raise any presumption or proof that the notary was in fact a witness. The court adopted a definition of "subscribing witness" from *Black's Law Dictionary*, to-wit:

> He who witnesses or attests the signature of a party to an instrument, and in testimony thereof subscribes his own name to the document. One who sees a writing executed, or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.

If Association Has a Lot, That's Enough

Cudjoe Gardens Property Owners Association, Inc. v. Payne, 770 So.2d 190 (Fla. 3d DCA 2000).

Homeowners' Association sought to enforce deed restrictions against property owner. Trial court held that the Association lacked standing to sue, based on *Palm Point Property Owners' Association of Charlotte County, Inc. v. Pisarski*, 626 So.2d 195 (Fla. 1993), which denied relief to the appellant association in that case because it had "not shown that it [was] the assignee of the developer's right of enforcement or that the covenants were created for its benefit."

The Third DCA reversed because the record showed that the Homeowners' Association in the instant case was a lot owner within the subdivision and therefore had standing to sue regardless of whether the restrictive covenants were created for its benefit as successor to the developer.

If Tax Collector Has an Incorrect Address, All Could Be Lost

Saggese v. Department of Revenue of the State of Florida, 770 So.2d 1244 (Fla. 4th DCA 2000).

Former property owners sought to quiet title against the grantee in a tax deed conveying their property. The former owners contended that they did not receive any notice of the tax deed sale, primarily because the tax collector had an incorrect address on the tax rolls. The notice sent to the former owners was returned marked "Undeliverable as Addressed." (The tax rolls showed an address of "129 Lehane Terrace, No. 1380" when in fact the correct address was "Apt. 138"). The correct address was on the recorded warranty deed which conveyed title to the former owners. The trial court held for the grantee in the tax deed and former owners appealed.

The Fourth DCA affirmed the trial court, holding that §197.522, *Florida Statutes*, requires only that the clerk send notice to the address appearing on the latest assessment roll. There is no requirement that the notice be received. Quoting *Mullin v. Polk County*, 76 So.2d 282 (Fla. 1954) the court stated, "[i]t would place an intolerable burden on the clerk to make an independent examination in every case to determine if the names and addresses recorded in the collector's office were accurate."

Be Careful Who You Trust

The North American Islamic Trust, Inc. v. Muslim Center of Miami, Inc., 771 So.2d 1227 (Fla. 3d DCA 2000).

The Muslim Center of Miami, Inc. ("MCM") sought to purchase property upon which to build a mosque, but it did not have sufficient funds. It applied for a loan from The North American Islamic Trust, Inc. ("NAIT"). MCM agreed to transfer $50,000 to NAIT and to title the property in NAIT's name. MCM executed a promissory note to NAIT evidencing a loan of $170,000. MCM supplied the balance of the $640,000 purchase price, purchased the property and titled it in NAIT's name.

Later, NAIT declared that it would not transfer title to MCM upon repayment of the $170,000 loan. MCM filed an action against NAIT seeking to impose a constructive or resulting trust, and the trial court granted this relief to MCM. NAIT appealed.

The Third DCA affirmed holding that where one party pays the consideration for purchase of realty but title is taken in the name of another, a resulting trust is created.

But Can You Float Alone?

In re Mead, 255 B.R. 80 (U.S. Bkrptcy Ct. S.D. Fla., 2000).

Debtor in Chapter 7 bankruptcy proceeding claimed that a 34 foot Hatteras boat, docked at Slip #10, 12 Isle of Venice, Fort Lauderdale, Florida, was his homestead and therefore exempt under Article X, §4, *Florida Constitution*. The bankruptcy trustee objected and moved to compel the Debtor to turn over the boat as property of the bankruptcy estate.

The court found that the boat was in fact the Debtor's only residence and that he lived there with his family. The boat was connected to a boat dock that the Debtor leased, and was therefore connected to land that he lawfully possessed.

Held: The boat qualifies as exempt homestead property.

Probate, Guardianship and Trust Case Summaries

by Sean Kelley, Esq., and Shane Kelley, Esq., The Kelley Law Firm, Ft. Lauderdale, Florida

There was no conflict of interest in an incapacity proceeding which would mandate the disqualification of the alleged incapacitated person's counsel where the attorney also represented two other interested persons because all of his clients sought to establish the alleged incapacitated person's capacity.
Miller v. Hayman et. al., _So.2d _(Fla. 4th DCA 2000); 25 FLW D1541 (June 28, 2000).

A daughter instituted guardianship proceedings against her mother and sought to be appointed as her plenary guardian. The court appointed an attorney for the mother and subsequently the mother hired a separate attorney, Fiss, to represent her in the proceedings. Fiss also filed notices of appearance on behalf of the alleged incapacitated person's son as well as her neighbor, both of whom filed a suggestion of capacity. The daughter moved to have Fiss disqualified as counsel due to a conflict of interest as he was representing several parties in the proceedings, including the alleged incapacitated person. The trial court granted the motion and disqualified Fiss from representing any of the parties in the proceedings. The Second DCA reversed the order disqualifying Fiss finding that there was no conflict of interest as all of the parties represented by Fiss, including the alleged incapacitated person, sought to establish her capacity. The court went on to hold that the only conflict of interest was between the court-appointed attorney and Fiss, as the court-appointed attorney did not seek to establish the Ward's capacity, and the conflict was not sufficient to require Fiss' disqualification absent a finding by the trial court that the continued representation of the neighbor would somehow deprive the other parties to the proceeding of an impartial forum.

Where a trustee may be entitled to an award of attorney's from the trust estate for defending itself in an action brought by the beneficiaries for mismanagement of the trust after the grantor's death, it was error for the trial court to enter an order requiring distribution of entire trust corpus. Additionally, where a trust is liable for the claims, expenses and taxes imposed on the probate estate, the trustee cannot make complete distribution of the trust until the probate estate has been substantially concluded.
First Union National Bank v. Jones, So.2d _(Fla. 4th DCA 2000); 25 FLW D2370 (October 4, 2000).

The remainder beneficiaries of the Revocable Living Trust of Charles L. Hodgkins sued the trustee, First Union National Bank, for alleged mismanagement of the trust after the death of the grantor. The remainder beneficiaries also filed a motion with the trial court requesting an order directing First Union to distribute the entire trust corpus to the remainder beneficiaries. The trial court entered an order in favor of the remainder beneficiaries requiring distribution of the entire trust corpus and First Union appealed.

The District Court reversed, finding that an action against First Union for their alleged breach of their fiduciary duty for mismanagement of the trust constituted an action against the trust for purposes of awarding costs and attorney fees pursuant to F.S. § 737.627. Because First Union may be entitled to attorney's fees and costs for defending the action filed by the remainder beneficiaries, it was error for the trial court to order distribution of the entire trust corpus. Additionally, the District Court found that when a trust is charged with the duty to pay the expenses, claims and taxes imposed on the probate estate, the trustee cannot make complete distribution of the trust until the administration of the probate estate has been substantially concluded, which was not the case here.

Lawyer who prepares a will owes no duty to a beneficiary who had been included in a previous will, even if the lawyer also represents that beneficiary in another matter, and as a matter of law, an attorney who merely drafts a will excluding a beneficiary who had been included in the previous will cannot be held to have intentionally interfered with the inheritance of that beneficiary.
Chase v. Bowen, _So.2d _(Fla. 5th DCA 2000); 25 FLW D2400 (October 6, 2000).

Lennon Bowen, an attorney, represented Naomi Chase, her mother and the Lavenders in various matters, including drafting Naomi's and her mother's testamentary documents. Prior to her death, Bowen amended the mother's will and trust omitting Naomi as a beneficiary and instead devising her assets to her business associates, the Lavenders. Naomi sued Bowen for legal malpractice, claiming that because Bowen represented her, her mother and the Lavenders, he possessed an irreconcilable conflict of interest in preparing the amended will and trust of which he failed to disclose to the parties. The trial court entered summary judgment in favor of Bowen.

The District Court affirmed the trial court's ruling and held that Rule 4-1.7(a) of the Rules of Professional Conduct (Conflict of Interest; general rule) did not prevent Bowen from drafting the mother's amended testamentary documents which removed Naomi as a beneficiary and where an attorney drafts wills for various members of a family, the attorney assumes no obligation to op-

pose the testator or testatrix from changing their will. Therefore, Naomi simply had no legal right to object to Bowen representing her mother in the revision of her testamentary documents. The court stated, "In our view that a lawyer who prepares a will owes no duty to any previous beneficiary, even a beneficiary he may be representing in another matter, to oppose the testator or testatrix in changing his or her will and, therefore, that assisting in that change is not a conflict of interest."

In a dissenting opinion, Judge Sharp found that the case should be remanded to the trial court to allow Naomi to try and plead a cause of action for intentional interference with inheritance. The majority opinion rejected this "invitation" from the dissenting judge and held that ". . . as a matter of law, an attorney who merely drafts the will of one who changes his or her mind and excludes from a later will a beneficiary who had been included in an earlier one cannot be found to have intentionally interfered with the inheritance of such beneficiary. Drafting a will in accordance with the instruction of the testator or testatrix is simply not tortious conduct."

Provisions of a trust authorizing trustee to retain underproductive property did not waive the application of the underproductive property statute.
Sauter v. Bravo, _So.2d _(Fla. 4th DCA 2000); 25 FLW D2515 (October 25, 2000).

The decedent established a revocable living trust as well as a pour over will, which devised the remainder of the decedent's probate estate to the trust. The trust provides income to his surviving spouse, Rose Bravo, for life. Upon Rose's death, the trust will be distributed to his children from his first marriage, one of whom is Matilda Sauter. Bravo moved for summary judgment on the issue of whether she is entitled to three percent of the value of the combined value of the estate and trust assets pursuant to the underproductive property statute (F.S. § 738.12(1)(a) (1997)). Sauter argued that certain language permitting the trustee to retain, hold or acquire underproduc-tive realty or personalty and to invest and reinvest trust assets in any type of property or security regardless of whether the asset produced any income waived the application of F.S. § 738.12(1)(a).

The District Court upheld the ruling of the trial court, finding that these trust provisions did not waive the application of the underproductive property statute, and that Bravo was entitled to three percent of the value of the estate assets payable to the trust, as well as three percent of the trust assets. Additionally, for the years that Bravo did not occupy the marital home, Bravo was entitled to income equal to three percent of the value of the residence. The District Court discussed the case of *Bacon v. Marden*, 518 So.2d 925 (Fla. 3rd DCA 1987), where based on clear and unambiguous language in the trust document, the court concluded that the settlor's contrary intent superseded the underproductive property statute. In this case, however, the District Court found that the language of the trust did not clearly evidence a contrary intent on the part of the decedent, and although the trust language permitted the trustee to retain underproductive property, nothing in the document excused the trustee from producing income for the beneficiary. In fact, the District Court found that such an interpretation of the trust would be inconsistent with the decedent's stated intent to provide income for the surviving spouse for life.

The District Court noted that neither party requested an evidentiary hearing, argued that the entry of a summary judgment was improper because there were issues of fact, or asserted that there was an ambiguity.

Where trust provided income to surviving spouse for life, and upon her death provided for the trust income to be distributed three-quarters to the grantor's daughter and one-eighth to the grantor's two grandchildren for the daughter's life, grandchildrens' remainder interest in the trust vested upon the death of the surviving spouse. Where grandchild died after the surviving spouse, but prior to the death of the daughter, grand-child's remainder interest in the trust passes through his estate pursuant to the law of intestacy.
Goldenberg v. Golden, et. al., _So.2d (Fla. 3rd DCA 2000); 25 FLW D2569 (November 1, 2000).

The grantor, Sam Wiener, created a testamentary trust under his will. The terms of the trust provided that the income from the trust was to be paid to his surviving spouse until her death. Upon the death of the surviving spouse, the trustees were to distribute three-quarters of the income from the trust to the grantor's daughter, Eunice Goldenberg (Eunice), for the remainder of her life. The remaining one-quarter of the trust income was to be distributed equally between Eunice's two children, Carl Goldenberg (Carl) and Robin Golden (Robin). Upon Eunice's death, the

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trust corpus was to be distributed to Carl and Robin, in equal shares.

Upon the surviving spouse's death in August of 1995, the trustees began distributing the trust income to the grantor's daughter (Eunice) and her two children (Carl and Robin) in accordance with the provisions of the trust. In October of 1995, Carl died intestate, leaving his widow Nicole Goldenberg (Nicole) and no lineal descendants. The trustees filed a declaratory action, seeking to determine the proper beneficiaries of the trust. The trustees, Eunice and Robin all took the position that Carl's interest was divested by his death, and that the Grantor's surviving child, Robin, succeeded to Carl's share. Nicole argued that her deceased husband's share in the trust had vested prior to his death and passed to her under the laws of intestacy. The trial court entered summary judgment in favor of the trustees and ruled that Robin succeeded to Carl's interest in the trust.

The District Court reversed, finding that Carl's interest in the trust had vested upon the death of the surviving spouse and that his interest passed to Nicole under the laws of intestacy. The District Court cited the case of *Sorrels v. McNally* as controlling, which provides in relevant part, "The rule seems to be well settled that where there is a devise to an individual or class upon attaining a certain age, such devise is prima facie contingent; but when the devise carries to the same individual or class, the income from the estate to accrue in the meantime, it will be construed as conferring a vested interest. In other words, the strongest argument against contingency and in support of the early vestiture of devises, no contrary intent being shown, is the fact of the provisions for enjoyment of the income by the legatee prior to coming in possession of the inheritance." *Sorrels v. McNally*, 89 Fla. 457, 467-468, 105 So. 106, 110-111 (Fla. 1925). Under the rule in *Sorrels*, Carl's interest in the trust vested when the surviving spouse died, and his interest in the trust passes through his estate.

Potential conflict between person appointed as personal representative in a will and a beneficiary of the will was not a sufficient reason to refuse to appoint that person as personal representative absent additional circumstances.

Schleider v. Estate of Schleider, So.2d _(Fla. 4th DCA 2000); 25 FLW D2582 (November 1, 2000).

A decedent appointed one of her daughters as alternate personal representative under her will (the decedent's husband who was nominated as personal representative was unable to serve) and the other daughter, who was also a beneficiary under the will, objected to the appointment of her sister as personal representative. The trial court refused to appoint the daughter as personal representative even though she was otherwise qualified stating that the sisters have been at odds throughout the guardianship of the decedent and the decedent's husband and there is a potential conflict between them. The Fourth DCA reversed the order stating that the order did not set forth sufficient detail to support the refusal to appoint the daughter as personal representative as a dispute between the beneficiaries of the estate standing alone is not a sufficient basis to refuse to appoint the person named as personal representative in the decedent's will, if she is otherwise qualified to serve. While a dispute between the beneficiaries in itself is not a sufficient reason to deny the appointment of a person nominated as personal representative in a will, the Fourth DCA did recognize that such a dispute when combined with other factors may be a sufficient reason to deny appointment. Accordingly, the Fourth DCA also remanded the case for further consideration and directed the trial court to "[c]onsider the totality of the circumstances in light of the factors as provided in *Padgett* [*Padgett v. Estate of Gilbert*, 676 So.2d 440 (Fla. 1st DCA 1996)], Judge Campbell's well-reasoned dissent in *Pontrello* [*Pontrello v. Estate of Kepler*, 528 So.2d 441 (Fla. 2d DCA 1988)], and *Estate of Snyder* [*In re Estate of Snyder*, 333 So.2d 519 (Fla. 2d DCA 1976)]."

F.S. § 733.702 is a statute of limitations which cannot be waived in a probate proceeding by failing to object to the timeliness of a claim, but the time period can be extended based upon the grounds of fraud, estoppel or insufficient notice of the claims period, while F.S. § 733.710 is a jurisdictional nonclaim statute that is not subject to waiver or extension in a probate proceeding. In order to comply with the time limitations set forth in 733.702, a creditor must file a claim within the later of three months *after* the time of first publication of the notice of administration or, as to any creditor required to be served with a copy of the notice of administration, 30 days *after* the date of such service of a copy of the notice on the creditor.

May v. Illinois National Insurance Company, 771 So.2d 1143 (Fla. 2000); 25 FLW S1046 (November 16, 2000).

In this case, the Florida Supreme Court reviewed a question of law certified by the United States Court of Appeal for the Eleventh Circuit. The question certified was as follows:

> Whether § 733.702 and § 733.710 of the Florida Statutes considered separately and/or together operate as statutes of nonclaim so that if no statutory exception exists, claims not formally presented within the designated time period are not binding on the estate, or do they act as statutes of limitations which must be pleaded and proved as affirmative defenses in order to avoid waiver.

The Florida Supreme Court first addressed the issue of whether § 733.702 was a statute of limitations or a nonclaim statute. The Court found that based on the amendments to the statute, § 733.702 operates as a bar to untimely filed claims against an estate even if no objection is asserted based on the timeliness of the claim. However, based on the fact that the statute may be extended based upon fraud, estoppel or insufficient notice of the claims period, the Court held that § 733.702 is a statute of limitations (the Court noted that a true jurisdictional statute of nonclaim could not be extended). The Court did find that while an objection based on the timeliness of a claim could not be waived in a probate proceeding, the time period is waived in

a separate action outside of the probate proceedings if not raised as an affirmative defense because the non-waiver provision contained in the statute is limited by its own terms to the probate proceeding. However, a waiver in a separate action does not render a judgment recoverable from an estate because F.S. § 733.706 requires that claims on all judgments against a decedent must be filed in the same manner as other claims against the decedent's estate. Therefore, the sole possibility for an adverse party who obtains a judgment against an estate in a separate action, but who has not timely filed a claim against the estate in the probate proceeding, is for the probate court to grant an extension of time for the filing of a claim on the grounds of fraud, estoppel or insufficient notice of the claims period.

The Florida Supreme Court then addressed § 733.710, and held that when read in pari materia with § 733.702, § 733.710 was clearly a jurisdictional statute of nonclaim that is not subject to waiver or extension in the probate proceedings. The Court acknowledged the conflict which existed between Florida's Third District Court of Appeal (*Baptist Hospital of Miami v. Carter*, 658 So.2d 560 (Fla. 3rd DCA 1995)) and Fourth District Court of Appeal (*Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So.2d 163 (Fla. 4th DCA 1996)), which was more recently joined by the Second District Court of Appeal (*Lutheran Brotherhood Legal Reserve Fraternal Benefit Society v. Estate of Petz*, 744 So.2d 596 (Fla. 2nd DCA 1999)). Citing the *Comerica* decision, the Florida Supreme Court adopted the Fourth District's findings that "section 733.710 'obviously represents a decision by the legislature that 2 years from the date of death is the outside time limit to which a decedent's estate in Florida should be exposed by claims on the decedent's assets'."

The Court went on to address the specific facts of this case, and found that although the claimant, Mr. Prockup, had failed to file a document titled "statement of claim" in the probate estate until more than three months after first publication of the notice of administration and more than two years after the decedent's death, the claimant did file a petition with the probate court seeking the appointment of an administrator ad litem (the petition). The claimant also later filed a petition for administration (the counter-petition) with the probate court seeking the appointment of the already appointed administrator ad litem as personal representative of the estate. The Court held that the pleadings filed by the claimant in the probate proceeding could serve as a "statement of claim" because they substantially satisfied the requirements for a claim found in Florida Probate Rule 5.490(a) and that "it would be placing form over substance to hold that the petition and counter-petition did not satisfy the essential requirements of section 733.703 and Rule 5.490(a)."

Based upon the finding that the claimant filed the equivalent of a "statement of claim" within two years of the decedent's death, 733.710 did not operate to bar the claim. The Court did find, however, that the claimant failed to satisfy the provisions of 733.702 because his "statement of claim" was filed ***before*** the notice of administration was published. The Court found that because the word "after" was used in the statute, it had no choice but to ascribe to the word its plain meaning. Additionally, the Court found that it was the specific intent of the legislature to strictly apply the meaning of the word "after" in the application of this statute. While acknowledging that requiring a creditor to file a claim after the publication of the notice of administration or service of a copy of the notice of administration runs counter to the general proposition that a claim filed before notice is given is sufficient to state a claim against an estate, this result is mandated by the clear language used in the statute. Accordingly, the Court found that the claimant did not satisfy the time period prescribed in 733.702.

Personal injury action against a decedent's estate for alleged torts committed by decedent during life is not a contingent claim and the plaintiff in that action was not precluded from filing a claim in the decedent's estate subsequent to the expiration of the estate claims period under F.S. §733.702 where the personal representative had knowledge of the action during the claims period and did not serve the plaintiff with notice of administration.

Foster v. Cianci, __So.2d __(Fla. 2d DCA 2000); 25 FLW D2756 (November 29, 2000).

Laura Cianci filed a personal injury action against Tracey Garey prior to Garey's death, but Garey died before being served with the summons or complaint. Cianci learned of the Garey's death and filed two amended complaints both naming the personal representative of Garey's estate as a defendant. Both amended complaints were served on the personal representative prior to the expiration of the claims period under F.S. §733.702, but Cianci did not file a claim in the estate prior to

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Chair Appoints Special Study Committee Regarding Electronic Communication

On February 20, 2001, Chair Wilson Smith appointed Bruce Stone to serve as chair of the special study committee to investigate the feasibility of utilizing electronic communication more widely and effectively in the Section. The other members are Chuck Wilder and Rohan Kelley.

the expiration of the claims period. Upon the expiration of the claims period, the personal representative filed an answer asserting the claim was barred by failure to timely file the claim within the time period proscribed under F.S. §733.702. Cianci immediately filed a motion to extend the time to file her claim arguing that because the personal representative had never served her with notice of administration, she should be granted an extension. The trial court granted her motion and the personal representative appealed the order, asserting that Cianci's claim was a contingent claim, and therefore, she was not entitled to actual notice. The Second DCA upheld the order finding that the claim was not barred because it was not a contingent claim and that under *Tulsa Prof'l Collection Servs, Inc. v. Pope*, 485 U.S. 478 (1988), she was entitled to be served with notice of administration.

A will which was not signed at the end by the testator as required under F.S §732.502 could not be admitted to probate even though it was clear that the absence of a signature resulted from a mistake in the execution and the will represented the intention of the testator. Furthermore, a constructive trust could not be imposed in favor of the beneficiaries under the will as that would, in effect, be validating an invalid will.
Dalk v. Allen, _So.2d _(Fla. 5th DCA 2000): 25 FLW D2871 (December 15, 2000).

A testator went to her attorney to execute a living will, durable power of attorney and a last will and testament. During the execution of the documents, there was some confusion in the circulation of multiple original documents for signature, and the last will and testament was never physically signed by the testator. While she did not actually sign the will, the testator did declare in the presence of witnesses and the notary that the document was her last will and testament. Upon the testator's death, the person appointed as personal representative offered the will for probate and the probate court granted the petition and admitted the will. In the order admitting the will, the trial judge also concluded "[t]hat as a matter of law . . . a constructive trust would properly be imposed . . . in favor of the beneficiaries named in the Will if the Will were not admitted to probate." The Fifth DCA reversed the order admitting the will and held that even though the absence of a signature resulted from a mistake of fact, a will is not entitled to be admitted to probate unless the testator strictly complies with the provisions for formal execution under F.S. §732.502. Additionally, the Fifth DCA stated that the circumstances found in *In re Estate of Tolin*, 622 So.2d 988 (Fla. 1993), were not present in this case, and that a constructive trust would not be a proper remedy, "Ordering a constructive trust here would, in effect, be validating an invalid will, and we have found no case law which supports such a result." In order to determine the reach of *Tolin* as intended by the Supreme Court, the 5th DCA certified the following question to the court as one of great public importance:

> MAY A CONSTRUCTIVE TRUST BE IMPOSED OVER THE ASSETS OF AN ESTATE IN FAVOR OF A BENEFICIARY NAMED IN AN INVALIDLY EXECUTED WILL, WHERE THE INVALIDITY IS THE RESULT OF A MISTAKE IN ITS EXECUTION, AND THE INVALID WILL EXPRESSES THE CLEAR INTENTION OF THE DECEDENT TO DISPOSE OF HER ASSETS IN THE MANNER EXPRESSED THEREIN?

The correct standard for determining whether a guardian may exercise a power under F.S. §744.441 on behalf of the ward is the substituted judgment standard and the approval or disapproval of a specific exercise of power falls within the discretion of the trial court. The appellate court declined to rule on the specific issue as to whether state or federal law permits Medicaid planning on behalf of a ward.
Rainey et al. v. Guardianship of Mackey, __So.2d __(Fla. 4th DCA 2000); 26 FLW D3 (December 20, 2000).

A guardian filed a petition pursuant to F.S. §744.441(17) and (21) to transfer a ward's assets to her daughter in order that the ward would become Medicaid-eligible for the cost of her nursing home care. While the trial court would not accept evidence in the matter, the court did allow the proffer of two witnesses. One witness proffered that the ward and her daughter had a close relationship, that the ward had created several joint bank accounts with her daughter, and that she wanted to provide for her daughter in the event of the her (the ward's) death. Another witness, a specialist in elder law, proffered that Medicaid planning is a common tool used to preserve the estate of a ward for intended beneficiaries. The trial court found that it was not in the best interest of the ward to allow Medicaid planning, and denied the petition. The Fourth DCA reversed the order of the trial court finding that the trial judge had applied the wrong standard (the best interest standard) in reaching his decision. The Fourth DCA held that the correct standard for determining whether a guardian may exercise a power under F.S. §744.441 on behalf of the ward is the substituted judgment standard and the approval or disapproval of a specific exercise of power falls within the discretion of the trial court. Because there was no evidentiary hearing on the petition, the record was insufficient to allow the Fourth DCA to determine whether the transfer of the ward's assets to her daughter would cause a period of ineligibility before the ward could qualify for Medicaid benefits, and, if so, whether there would be sufficient assets to pay for the ward's nursing care during the period of ineligibility. Therefore, the Fourth DCA remanded the matter to the trial court to hold an evidentiary hearing on the matter. The Fourth DCA declined to rule on the specific issue as to whether state or federal law permits the type of Medicaid planning proposed by the guardian; "[i]t is unclear whether this form of Medicaid planning is even authorized under state or federal law."

Plaintiff who would have inherited remainder of uncle's trust if uncle died childless sufficiently

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stated a cause of action for fraud upon the court by alleging that eighty-eight year old uncle's adoption of the seventy-two year defendant was a sham to enable the defendant to inherit trust assets which should have gone to Plaintiff. Plaintiff had standing to challenge the adoption even though she was a contingent beneficiary of the trust, and the fact that she was not a party to the adoption would not preclude her from collaterally attacking it. *Rickard v. McKesson*, So.2d (Fla. 4th DCA 2000); 26 FLW D45 (December 27, 2000).

Donald Blackwell was the income beneficiary of a trust which provided that if he died childless, the remainder of the trust would be distributed to the appellant, Silvia Rickard. In 1994, Donald Blackwell, who was then eighty-eight years old and childless, adopted Gordon McKesson, who was then seventy-four years old. Upon Blackwell's death, McKesson asserted his right to inherit the trust corpus as a child of Blackwell. Rickard brought an action to void the adoption on the grounds that it was a fraud upon the court. To support her claim, Rickard alleged that the adoption had been concealed, that Blackwell and McKesson were a gay couple, that the adoption violated F.S. § 63.042(3) (1993) which bars homosexuals from adopting, and that the adoption was a sham to deprive her of her inheritance. The trial court dismissed the complaint, finding that the complaint failed to allege a cause of action for fraud upon the court, and therefore the action was barred by Rule 1.540(b) because it was not brought within one year of the adoption.

On appeal, McKesson argued that Rickard's complaint failed to state a cause of action on three grounds: (1) Rickard had no standing to challenge the adoption because at the time of the adoption she was only a contingent beneficiary of the trust and was not a party to the adoption; (2) this did not amount to fraud upon the court; and (3) the statute prohibiting a homosexual from adopting is unconstitutional. In dealing with the preliminary issue of standing, the District Court found that Rickard had standing under the case of *Richardson v. Richardson*, 524 So.2d 1126 (Fla. 5th DCA 1988) even though her interest in the trust was contingent at the time of the adoption. The fact that she was not a party to the adoption also did not deprive her of standing because she did not receive notice of the adoption and enforcement of the judgment would adversely affect her substantial rights (citing *Zoning Board of Monroe County v. Hood*, 484 So.2d 1331, 1333 note 4 (Fla. 3rd DCA 1986)). The District Court addressed the issue of constitutionality in a footnote citing the Florida Supreme Court case of *Cox v. Department of H.R.S.*, 656 So.2d 902, 903 (Fla. 1995).

In deciding the main issue of the case, whether Rickard's allegations stated a cause of action for fraud upon the court, the District Court held that the trial court had focused too narrowly on the alleged violation of the statute and not enough on the fact that Rickard's right to inherit under the trust gave her standing to question the legitimacy of the adoption. The allegations involving the illegitimacy of the adoption were found to be sufficient for Rickard to maintain an action to set aside the judgment of adoption based upon fraud on the court.

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