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Vol. XXIII, No. 3 **THE FLORIDA BAR** **Summer - Fall 2001**

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Outstanding Service Awards Presented at Section Convention



BRUCE STONE



GEORGE MEYER

At the Section's Annual Convention in Fort Lauderdale, four special awards were presented to four special individuals in recognition of their outstanding service to the Section.

Bruce Stone received the **Robert C. Scott Memorial Award** for his tireless effort and longstanding dedication and service to the Section. This award was established in 1985 in memory of Bob Scott, who was a past chair of the Section. The award is presented to Section members who best exemplify Bob's devotion and continued service to the Section and its membership. Bruce joins a very distinguished group of prior recipients of this award, whose names are a veritable "who's who" of the Section's leadership.

Bruce has worn many hats in the Section, including being its Chair in 1998-99. He has been described as "highly motivated, a high

See "Awards," page 16

The Section, Continuing in Service

by J. Michael Swaine, Chair



MICHAEL SWAINE

The Real Property, Probate and Trust Law Section is not a "Johnny-come-lately" organization. Some of you may even be aware that this Section existed prior to the creation of The Florida Bar. It has a long and rich heritage of providing services, both to its members and to the public. Not only has it furnished the best in continuing legal education, it also has maintained a legislative presence, assisting legislators and calling their attention to those things that need to be changed. Likewise, it has provided amicus assistance to appellate courts and has promoted ethical and professional behavior in the practice of law within our particular specialties.

To the extent that the Section has been successful in these matters, that success is attributable to those members who unselfishly give of their time and talents for the betterment of our profession. Many are prior Chairs of the Section, who continue to work long after their term as Chair has been completed. They serve on committees and add their historical perspective to Executive Council discussions. Their continued devotion encourages the rest of us. Many more are younger members, with new ideas and fresh energy. They carry the ball when those of us who are a little older get winded.

But, if the Section is going to provide the

See "Continuing in Service" page 29

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New Florida Building Code (Effective January 1, 2002): Impact on Local Regulations

by Fred R. Dudley and Wellington Meffert, Akerman Senterfitt & Eidson, Tallahassee

The purpose of this memorandum is to generally describe the scope and application of the new Florida Building Code (*F.S.* Chapter 553, Part VII), effective January 1, 2002, its scope and application to local governmental regulations, and the means and procedures for amendments.

Scope and Application

When it goes into effect on January 1, 2002, this new Florida Building Code ("FBC") supersedes *all* local building requirements currently imposed by over 400 cities, 67 counties or 14 different state agencies.[1] The new code expressly *includes* the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures and facilities,[2] except for the following: Buildings/structures regulated by the federal government, railroads and ancillary facilities associated therewith, nonresidential farm buildings on farms, temporary buildings or sheds used exclusively for construction purposes, mobile homes used as temporary offices (except for part V relating to accessibility), structures or facilities of electric utilities directly involved in the generation, transmission, or distribution of electricity, and temporary sets, assemblies, or structures used in commercial motion picture or televisions production, or any sound-recording equipment used in such production, on or off the premises.

However, it *expressly reserves* to local governments zoning requirements, land use requirements, and owner specifications or programmatic requirements that do not pertain to, or govern, the Building Commission's authority. However, a local code enforcement agency may not administer or enforce the new code to prevent the siting of any publicly owned facilities, such as those owned by correctional facilities, juvenile justice facilities, universities, state universities, community colleges, or public educational facilities. Generally, such activities as site improvements are also left up to local jurisdiction and regulations.

Amendatory Process - Local Governments[3]

Not more than once every six months, local governments may amend the FBC, provided each such amendment (1) is *more* stringent than the FBC, and (2) is on a subject already covered by the FBC. These two requirements apply regardless of whether the local amendment is in the area of "administrative" or "technical." All such amendments must be filed with the state commission within 30 days following enactment, and are valid, unless otherwise challenged, for up to three years, which is the maximum review cycle for the commission (see below).[4]

However, there are a number of other requirements that must be met in order for local "technical" amendments to be effective, such as:

1. A public hearing advertised in a newspaper of general circulation at least 10 days in advance.
2. A determination that there is a need to strengthen the FBC "based upon a review of local conditions by the local governing body" that demonstrate that local conditions justify more stringent requirements "for the protection of life and property."
3. That such additional requirements were non-discretionary against materials, products, or construction techniques
4. Local amendments are effective upon adoption and filing, and, unless challenged, remain effective until reviewed by the FBC as part of the required three-year code review.
5. Every county and each city therein must establish a county-wide compliance review board to review any local amendment that is challenged. A compliance review board's determination that a local amendment is in compliance with the statutory requirements is subject to an appeal by any substantially affected party to the state board for a Chapter 120 administrative hearing.
6. All local amendments shall include a fiscal impact statement that reflects the actual costs and benefits thereof, but "the statement itself is not grounds for a challenge to compliance."[5]

Amendatory Process - Florida Building Commission

There are two methods by which the FBC may be amended by the Florida Building Commission ("commission"). First, is the triennial review of the Code by the commission, during which each locally adopted amendment is reviewed for consistency, and either accepted or rejected by the commission. If accepted, it is not necessary for the local government to re-enact the amendment, since it becomes part of the Code by action of the commission itself. If the amendment is rejected, the local government is so notified, and then has an opportunity to again attempt to adopt the amendment as a "local" one.

Second, the commission itself may adopt Code amendments once a year. However, no such amendments are permitted by law until after July 1, 2002.[6]

The commission's amendatory process is one based on a settlement agreement entered into with the Florida Home Builders Association. This agreement, and the procedures outlined therein, were negotiated by the authors, and include the following:

1. Publication on the commission's website at least 45 days in advance of public hearing by each Technical Advisory Committee ("TAC") to which the amendment has been assigned, and all available documentation given to the requesting interested party.
2. Adoption by at least a 3/4s vote of TAC members present (with a

continued...

Thank You for an Extraordinary Year as Section Chair, Wilson Smith

by J. Michael Swaine

Wilson Smith was born in Algiers, Louisiana. Algiers is the town across the Mississippi River from New Orleans.

As a child Wilson would accompany his mother on her weekly shopping trips into New Orleans, where she allowed him to explore some on his own. He reveled in the wonder of what he discovered and, while Wilson ultimately left New Orleans, he still carries a part of it with him in his heart.

From his New Orleans past, Wilson adopted the motto "Laissez Les Bon Temps Roulez!" which translates "Let the Good Times Roll!" And this past year the good times, they did roll.



WILSON SMITH

From a wonderful beginning at the Breakers Hotel in Palm Beach through an outstanding convention in Fort Lauderdale, Wilson left no stone unturned in his pursuit of continued excellence in Section activities and service to its members.

It was not all wine and roses, there was also a little bit of gin and a lot of hard work. Section CLEs were outstanding and continued to have very good attendance. The Section's legislative efforts came to fruition in many areas, including the massive revision to the Florida Probate Code. The Section's Amicus Committee participated where needed in appellate cases and Council meetings ran like clockwork.

Wilson's grand adventure peaked in his out-of-state trip to New Orleans, where Wilson relived old times and shared the "Big Easy" with us. A wonderful time was had by all.

The Section, and particularly the officers who served under him, owe Wilson a debt of gratitude. Therefore, we offer a New Orleans toast "To Wilson Smith, our past chair and a gentleman!"

NEW FLORIDA BUILDING CODE
from page 3

majority required for a quorum) before the proposed amendment can be heard by the full commission.

3. Publication on the commission's website for at least 45 days before a public hearing by the commission, with any action thereon (adoption or amendment) based on the evidence presented during that public hearing.

Conclusions

Every contractor active in Florida, and every manufacturer of a construction product used in Florida, needs to review the impact of the Florida Building Code, regardless of the existence of local ordinances that may have been adopted prior to January 1, 2002. On that date, the effective date of the new code, all such local regulations are superseded!

Thereafter, local governments can make amendments to the code under very strict guidelines and with an effective date delay of up to three years (*i.e.*, the FBC's next triennial review cycle). Even then, all such amendments must be *more* stringent than the code.

If, on the other hand, the new FBC is more stringent, it will continue to control over any attempted local amendments to the contrary. In such cases, it may be necessary that the client actually submit an application for a permit to perform the work, which is usually good for up to one year, and which may thereafter been increased for an additional six months, *before* January 1, 2002. Such a delay may be required to then begin an amendatory process, either at the local level or before the state board itself.[7]

Endnotes:

[1] *F.S.* 553.79(9).
[2] *F.S.* 553.73(1)(a), as amended by Ch. 2000-141, Laws of Fla.
[3] *F.S.* 553.73.73(4).
[4] All local technical amendments stand repealed on January 1, 2002. Ch. 98-287, §62(2), as amended by Ch. 2000-141, §107, and Ch. 2001-186, §135, Laws of Fla.
[5] See *F.S.* 553.73(4)(b)8. The authors believe that the absence of such a statement alone is a ground for challenging the amendment's compliance, but the existence of *some* statement, however weak or incomplete, may not be a ground for such a challenge.
[6] Except in certain extreme cases, such as an emergency. See Ch. 2001-186, §44, Laws of Fla.
[7] For specific statutory authority, see *F.S.* 553.73(5), as amended by Ch. 2001-186, §25, Laws of Fla.

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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

Numerical Index Summary of 2001 Legislative Issues

by Peter Dunbar, RPPTL Legislative Counsel

The final summary of selected legislation passed during the 2001 Legislative Session shown below has been prepared in chronological order with the House bills listed first followed by the Senate bills. The summary identifies the bill by number and provides a brief description of the subject matter.

1. CS/HB 19 (Fair Housing Act): The bill requires communities claiming exemption status under the Fair Housing Act as "housing for older persons" to register with the Florida Commission on Human Relations. The application must be signed by the president of the community association and it must be renewed biennially. (Ch. 2001-98, Laws of Fla.)

2. HB 21 (Intangible Tax): The bill increases the exemption for intangible tax purposes to $250,000 for an individual, $500,000 for a husband and wife filing jointly, and $250,000 for a taxpayer who is not a natural person. (Ch. 2001-225, Laws of Fla.)

3. CS/CS/HB 107 (Unclaimed Property): The bill revises the procedures in the Comptroller's Office for handling unclaimed property received by the state. (Ch. 2001-107, Laws of Fla.)

4. CS/HB 137 (Probate Code Revisions): The bill is the Section's comprehensive rewrite of the Probate Code. The bill also includes revisions to the Elective Share initiative passed in 1999 and the trust law amendments sponsored by the Section. (Ch. 2001-226, Laws of Fla.)

5. CS/HB 367 (Judicial Nominating Commissions): HB 367 modifies the selection process for members of the judicial nominating commissions, providing for appointment of 4 members by the Governor from recommended nominees submitted by the Board of Governors of The Florida Bar and 5 members appointed directly by the Governor, 2 of whom must be members of The Florida Bar. (Ch. 2001-282, Laws of Fla.)

6. CS/HB 411 and HB 1265 (Mobile Home Legislation): HB 411 revises the Florida Mobile Home Act by improving record-keeping requirements at the Division, modifying procedures for rental increases, and providing for relocation compensation for home owners when the use of the park property is changed. (Ch. 2001-227, Laws of Fla.) HB 1265 is the companion measure creating the Florida Mobile Home Relocation Trust Fund. (Ch. 2001-231, Laws of Fla.)

7. HB 579 (Article IX Revisions): HB 579 is the comprehensive revision to Article IX of the Uniform Commercial Code. (Ch. 2001-198, Laws of Fla.)

8. HB 601 (Judgment Liens): HB 601 revises provisions of law concerning judgment liens on personal property to include reference to "filed," rather than "recorded," liens. (Ch. 2001-154, Laws of Fla.)

9. CS/CS/HB 1053 (Homeowners' Association Powers): CS/CS/HB 1053 is the omnibus transportation bill. Section 30 of the bill grants to homeowners' associations the option to convert subdivision roads to private ownership by creating a gated community upon a 4/5ths vote of the homeowners and approval of the county commission. Section 118 of the bill extends to associations the right to tow unauthorized boats and other water craft from the community in the same manner that associations may now tow unauthorized motor vehicles under *F.S.* Chapter 715. (Vetoed by the Governor.)

10. HB 1157 (Florida Secured Transaction Registry): HB 1157 creates the Florida Secured Transaction Registry as a central database for all financing statements, amendments, and assignments thereof. (Ch. 2001-200, Laws of Fla.)

11. SB 94 (Consumer Collection Practices): SB 94 restricts communications with the debtor when the debtor is represented by counsel, prohibits charges to the debtor for collect calls or telegrams, and increases statutory damages from $500 to $1,000. (Ch. 2001-206, Laws of Fla.)

12. SB 130; CS/CS/HB 1053; and HB 1221 (Eminent Domain): SB 130 authorizes municipalities to exercise eminent domain authority for public school purposes. Section 8 of HB 1221 makes minor revisions to the time of notice by the condemning authority to the fee owner, Section 6 of CS/CS/HB 1053 makes a modification to eminent domain procedures by providing that attorney's fees shall not be awarded for services after an offer has been rejected by the defendant unless the final judgment is greater than the offer received, and Section 62 of CS/CS/HB 1053 prevents the taking of outdoor advertising structures without the payment of just compensation. SB 130 (Ch. 2001-77, Laws of Fla.); CS/CS/HB 1053 (Vetoed by the Governor); and HB 1221 (Ch. 2001-256, Laws of Fla.)

13. CS/SB 178 (Real Property Liens): CS/SB 178 corrects language in *F.S.* 55.10 that passed during the 2000 Session concerning the duration of judgement liens on real property and the extension of those liens. (Ch. 2001-130, Laws of Fla.)

14. SB 428 (Payment and Surety Bonds): SB 428 deals with payment and surety bonds relating to improvements to real property. Section 10 of the bill imposes new restrictions on contract indemnity provisions. (Ch. 2001-211, Laws of Fla.)

15. CS/SB 778 (Lawyer Assistance Program): CS/SB 778 provides for confidentiality for records, proceedings, and communications for lawyer assistance programs approved by the Florida Supreme Court or The Florida Bar and immunity for persons reporting or receiving information in good faith and without malice. (Ch. 2001-240, Laws of Fla.)

16. CS/SB 838 (Landlord/Tenant Legislation): CS/SB 838 extends from 15 to 30 days the landlord's notice to the tenant when claiming against the security deposit and raises limits of unclaimed property from $250 to $500. (Ch. 2001-179, Laws of Fla.)

17. CS/SB 886 (Springing Power of Attorney): SB 886 is substantially similar to last year's version of the legislation that did not pass. The bill provides that a durable power of attorney may be conditioned upon lack of capacity of the principal as verified by a physician's affidavit. (Ch. 2001-241, Laws of Fla.)

18. CS/SB 890 (Mortgage Foreclosure): SB 890 by Senator Campbell provides for expedited foreclosure proceedings, requiring entry of a final judgement within 90 days in an uncontested foreclosure when right to a deficiency judgement is waived. (Ch. 2001-215, Laws of Fla.)

19. SB 1020 (Non-Ad Valorem Assessments): SB 1020 extends authority to counties to levy and collect special assessments to fund capital improvements and services. (Vetoed by the Governor.)

20. SB 1132 (Xeriscape):SB 1132 contains xeriscape provisions that are prospective in application and prohibit a homeowners' association in its covenants or a city or county by local ordinance from restricting a property owner from implementing xeriscape or other "Florida friendly landscaping" as defined in the bill. (Ch. 2001-252, Laws of Fla.)

21. SB 1424 (Real Estate Professionals): SB 1424 permits a real estate professional to return escrow funds when the buyer fails to satisfy the financing terms of the contract, and it imposes new supervisory requirements on real estate appraisers. (Ch. 2001-274, Laws of Fla.)

22. CS/SB 1922 (Citrus Canker, Conservation Easements, and Agreements and Density Transfers): CS/SB 1922 is the omnibus Department of Agriculture legislative package. Section 59 of the bill provides for compensation for homeowners when citrus trees are removed as a part of a citrus canker eradication program. Sections 60 through 64 of the bill create the "Rural and Family Lands Protection Act" and make provision for conservation easements and agreements. (Ch. 2001-279, Laws of Fla.)

State Street–

Wright

Condominium Association Arbitration: Quick and Inexpensive Resolution

by Michael J. Gelfand, Esq., Gelfand & Arpe, West Palm Beach

It is not just dog cases! The condominium and cooperative association arbitration program has been swiftly and inexpensively resolving significant disputes. Owners have saved, directly by not having to pay litigation fees, and indirectly through avoiding increased assessments, literally millions of dollars of valuable resources. Once derided, the program has now become an example as to how the state can assist developers, owners, and associations by promoting stability and peaceful conflict resolution.

The overwhelming number of disputes do not involve dogs. Instead, because of ambiguities in the law, changed circumstances, or conflicts in "governing documents," important and serious disputes have arisen. These range from the authority to assess, to the duty to maintain premises, and easement rights. Until 1992 all of these matters were required to be fought in the courts.

Judges and court administrators complained that these matters were clogging the courts. Because many courts did not have expertise in these matter, the litigants, even victorious litigants, were dissatisfied with the process. The cost to litigate these issues became stupefying.

The solution was found by adopting *F.S.* 718.1255 and 719.1255, creating a mandatory arbitration program. Now trained arbitrators are available to provide conflict resolution. Rules are in place to allow disputes regarding settled law to be summarily determined.

F.S. 718.1255(1) defines a "dispute" that is subject to the mandatory arbitration jurisdiction as:

> "(a) The authority of the board of directors, under this chapter or association document to:
>
> 1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto.
>
> 2. Alter or add to a common area or element.
>
> (b) The failure of a governing body, when required by this chapter or an association document, to:
>
> 1. Properly conduct elections.
>
> 2. Give adequate notice of meetings or other actions.
>
> 3. Properly conduct meetings.
>
> 4. Allow inspection of books and records."

There are certain items that are expressly excepted from arbitration jurisdiction, including: title to any unit or common element; the interpretation or enforcement of any warranty; the levy of a fee or assessment, or the collection of an assessment levied against a party; the eviction or other removal of a tenant from a unit; alleged breaches of fiduciary duty by one or more directors; or claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property. *F.S.* 718.1255(1). Note that within the jurisdiction of the Fourth District Court of Appeal (Palm Beach, Broward, Okeechobee, St. Lucie, Martin, and Indian River counties), jurisdiction for matters requiring the joinder of a tenant remains within the circuit courts, not arbitration.

What happens if you file in the wrong place? It can be fatal! Seeking arbitration in a statutorily defined dispute is either a mandatory condition precedent or is jurisdictional. See *Neat v. Cypress Club Condo, Inc.*, 718 So.2d 390 (Fla. 4th DCA 1998). Unlike contractual or other statutory arbitration matters, a dispute filed in circuit court when it should be filed in arbitration is to be dismissed without the court retaining jurisdiction! This may mean that the defendant prevailing will be entitled to recover attorney's fees and costs from the other side. See *F.S.* 718.303(1) and 719.303(1).

2001-02 Executive Council Meetings

2001

Nov. 8 - 11	Executive Council Meeting, Hawk's Cay, Duck Key

2002

March 20 - 24	Executive Council Meeting, Banff, Canada
May 16 - 19	Convention/Executive Council Meeting Sanibel Resort, Ft. Myers
July 25 - 28	Legislative Update/Executive Council Meeting, Boca Raton Resort & Club

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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Statements or expressions of opinion or comments appearing herein are those of the editors or contributors and not The Florida Bar or the Section.

2001 Distinguished Legislative Service Award Recipients

The 2001 recipients of the of the Section's Legislative Service Awards are **Senator Locke Burt** (District 16--R) of Ormond Beach and **Representative Dudley Goodlette** (District 76--R) of Naples. The award has been presented to each "in recognition of his outstanding service as a Member of the Florida Legislature in advancing Florida's Jurisprudence in the field of Real Property, Probate and Trust Law."



BURT



GOODLETTE

Senator Burt was first elected to the Florida Senate in 1991 and has been reelected subsequently. He has previously served as the Majority Leader of the Senate and during his career has been the Vice Chairman of the Corrections, Probation and Parole Committee and Criminal Justice Committee. He has also chaired the powerful Senate Budget Committee and he is the current Chairman of the Senate Judiciary Committee. Senator Burt also serves as a member of the Committees on Appropriations, Criminal Justice, Governmental Oversight and Productivity, Joint Legislative Auditing, and Rules and Calendar during the current term.

Due to term limits, Senator Burt is now entering the final year of his legislative service, and he is currently an announced candidate for the Office of Attorney General which is being vacated by the incumbent Bob Butterworth.

Representative Goodlette is currently serving his second term in the Florida House of Representative, and he is a three-time recipient of the Section's Distinguished Legislative Service Award. He is a former member of the 20th Circuit Judicial Nominating Commission and a former member of the Board of Governors of The Florida Bar.

Representative Goodlette currently serves as a member of the House Committees on Utilities and Telecommunications, and Judicial Oversight, and he is the Chairman of the House Committee on Rules, Ethics and Elections. He also serves a member on the House Council for Ready Infrastructure and the Procedural and Redistricting Council. Representative Goodlette sponsored this year's Section initiative making comprehensive revisions to Florida's Probate Code. The measure also included the Section's trust law initiatives and the final revisions to Florida's elective share statute. Senator Burt was the sponsor of the companion legislation in the Senate. Both men were recognized for their service with an award presentation at the Section's Annual Legislative and Case Law Update.

WACHOVIA–
(Camera-ready art provided)

FLORIDA LAWYERS SUPPORT SERVICES, INC. (FLSSI)

A Non-profit Organization
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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:

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METHOD OF PAYMENT

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Please charge my ❑Visa or ❑Master Card (Sorry, no American Express) Amount to be charged $_____

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Card Number Exp. Date

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Signature of Cardholder Required

Chair Smith Passes Section Leadership to Incoming Chair Swaine at Section Executive Council Summer Meetings in Fort Lauderdale and Palm Beach

The RPPTL Section held Executive Council Meetings in Fort Lauderdale during the weekend of May 24-May 27 and in Palm Beach from July 12-July 15, 2001. The Fort Lauderdale meeting was held in conjunction with the annual Section Convention and the Palm Beach meeting conducted along with the annual Legislative Update and Case Review. Both meetings were a spectacular success as this Section continues to show why it is one of the best Sections of the Bar.

In Fort Lauderdale, a group of local attorneys and Section members attended a safari excursion via airboats at the Seminole Tribe of Florida's Big Cypress Reservation that included alligator wrestling, a peace pipe ceremony, and a swamp water barbeque. Seminars were conducted during the morning on Friday for both practice areas, probate and real property. The probate seminar included clever and creative rounds of "Judges Jeopardy" with the participation of several probate judges from around the state (our newest judicial member, the **Honorable Susan Sexton,** appeared to emerge from the pack as the winner!). The Section luncheon also included some clever and fascinating card tricks by MIO the Magician who performed a sneak preview of what was to come later that evening after dinner and the awards ceremony.

The annual Convention included the passing of the torch from past Chair **Wilson Smith** to incoming Chair **Mike Swaine** and the presentation of the annual service awards to Section members **Bruce Stone, George Meyer,** and spouses **Mary Swaine** and **Jenny Smith.** The Executive Council Meeting on Saturday included a visit by incoming Bar President Terrence Russell, who praised the Section's work and the continuing strength of the Section's leadership and members. After the meeting, attendees and their families had an opportunity to cruise aboard the luxury yacht *Windridge Cay*, which took them on a delightful cruise of the Intra Coastal Waterway and Millionaires' Row while enjoying a sumptuous spread of hors d'oeuvres, dinner, and cocktails.

In July, the Section met at the Ritz Carlton, Palm Beach, for the first meeting of the new Bar year. The Legislative Update Seminar was held on Friday and was packed to capacity as always. That evening, attendees were entertained by a talk by author Ron Kessler, who gave his special insights on the Palm Beach Kennedy clan and other political power brokers and scandals behind the scenes on Capitol Hill. Afterwards, many members retired to the Chair's suite for additional socializing and to enjoy the warm summer breeze from the Atlantic Ocean. Finally, I would be remiss if I did not mention that all members are anxiously awaiting the first two trips of the Swaine era, the trip to Sebring and the trip to Hawk's Cay, Duck Key. **Richard Warner** provided his unique and creative perspective through a scintillating video preview of these upcoming trips (a special thanks to you Richard!). Please join us as it is definitely going to be exciting, interesting, and fun!

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 Convention and Executive Council Meeting in Fort Lauderdale and the Section's Legislative Seminar and Case Update and Executive Council Meeting in Palm Beach:

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The Florida Bar Continuing Legal Education Committee, the Real Property, Probate and Trust Law Section and the Florida Surveying and Mapping Society present

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LIVE PRESENTATIONS:
October 25, 2001 - Fort Lauderdale • October 26, 2001 - Tampa

VIDEO REPLAYS (7 locations): November 9, 2001 - December 6, 2001
Course No. 5108R

CLER PROGRAM
General: 7.0 hours
Ethics: 0.0 hour

CERTIFICATION PROGRAM
Business Litigation: 3.5 hours
Civil Trial: 3.5 hours
Real Estate: 7.0 hours
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CLER PROGRAM
General: 5.0 hours
Ethics: .0 hour

CERTIFICATION PROGRAM
Tax: 5.0 hours
Wills, Trusts and Estates: 5.0 hours

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

Professor Powell's Presentation for Probate Practitioners – Advanced Tax –

ADVANCED LEVEL

ONE LOCATION
Thursday, November 8, 2001 • Airport Marriott • Tampa
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The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

"On the Cutting Edge"

Estate and Trust Litigation Seminar

INTERMEDIATE LEVEL

LIVE PRESENTATIONS:
December 6, 2001 - Ft. Lauderdale • December 7, 2001 - Tampa

VIDEO REPLAYS (7 locations): January 17, 2002 - January 25, 2002
Course No. 5107R

CLER PROGRAM
General: 7.0 hours
Ethics: 2.5 hours

CERTIFICATION PROGRAM
Business Litigation: 3.5 hours
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Wills, Trusts & Estates ; 7.0 hours

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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,
Florida Lawyers Support Services, Inc.

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Tragedy— Whom to Blame? Last-Minute Closing Disruptions

by Michael J. Gelfand, Esq., Gelfand & Arpe, West Palm Beach

Scene: Friday. The last day of the month. 3:00 p.m. Buyer and seller in your conference room.

What are you doing? Reviewing your file for the third time waiting for the lender's closing package. It is now nearly 4:00 p.m.! You suddenly realize that a paper may not have been properly completed, the mortgage broker's two-page association disclosure form.

Are you to blame for the homeowners' or condominium association that refuses to fill out the mortgage broker's form? With increasing frequency, homeowners' and condominium associations are refusing to complete broker forms.

Before the association's manager or president is blamed, take a look at the form. We are not talking about the traditional estoppel letter with five blanks inquiring concerning assessments: frequency, periodic amount, special, next due, and amount delinquent.

These forms go on and on. They are two pages and sometimes longer. These are not quick completion forms.

You suddenly realize that the form has reached the absurd. Many of these forms seek to require associations to verify "under the penalty of perjury" the status of:

a. Retained developer rights;
b. A reserve account creation method;
c. The number of investor owners;
d. Rental units;
e. Number of covenant amendments; and
f. Lender rights,

. . . among other items. This is quite a difference from the typical estoppel letter!

Put yourself in the shoes of a recipient association. Association presidents are volunteers; thus, many of them do not want to sign anything they legally do not have to sign. The verification requirements only add to a volunteer's wariness. After all, it is a thankless job; why add further responsibilities?

What if the information cannot be confirmed? An association manager thinks about losing his or her license and livelihood if asked to verify false information. Think about what the answers require. For purely factual items, such as the number of leases, a manager must be a psychic. Certainly you have heard of individuals who move in and out in the middle of the night without receiving association approval.

But there are more serious problems. The Florida Supreme Court has ruled that association managers are specifically prohibited as others from the unauthorized practice of law. *The Florida Bar re Advisory Opinion — Activities of Community Association Managers*, 681 So.2d 1119 (Fla. 1996). It would appear that answering many of the long form's questions involve the interpretation of legal documents that will significantly impact an owner's rights. Thus, under the Supreme Court's decision, managers appear to be prohibited by law from completing many of the expanded closing letter forms.

What to do? The first thing is, do not get mad. The second thing, please, is not to telephone and scream at association counsel.

Instead, focus on the broker or lender. They are the ones who generated the form that is causing the trouble.

Usually the issue comes down to money. The association does not want to expend funds to have counsel answer or complete the forms. The lender used to have this information completed by lender's counsel or an appraiser, or both. This has become a shifting-of-expense issue.

So, when push comes to shove, what do you do? Find a legal duty. Normally an owner, purchaser, or lender cannot point to any legal duty on an association to complete the questionnaire. The starting point for most discussions are legislative enactments. The Condominium Act and *F.S.* 718.116(8) provides a written disclosure requirement as follows: "Within 15 days after receiving a written request therefor from a unit owner purchaser, or mortgagee, the association shall provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the unit owner with respect to the condominium parcel. Any person other than the owner who relies upon such certificate shall be protected thereby. A summary proceeding pursuant to s. 51.011 may be brought to compel compliance with this subsection, and in any such action the prevailing party is entitled to recover reasonable attorney's fees."

The Cooperative Act has a similar provision in *F.S.* 19.108(6); however, the Cooperative Act does not extend the request right to a purchaser nor automatically provide for summary proceedings.

Note the statutory limitations in terms of scope and timing. Inquiries concern "assessments and other moneys owed to the association by the unit owner." There is no requirement for the association to prepare written responses for any other item. It is noted that some of the information sought may be contained in the "Questions and Answer Sheet" which the association is required to provide as set forth in *F.S.* 718.503(2) and 718.111(12) and, for cooperatives, *F.S.* 719.503(2)(a) and 719.104(2)(a).

What about homeowners' associations? The legislature has not enacted any verification requirement for assessments or other moneys due to a homeowners' association. The only legislation that may be of assistance is contained in *F.S.* 720.303(5), which normally applies to requests for records, not the completion of a form.

You may recall that condominium associations have to respond to written requests under *F.S.* 718.112(2)(a)2 and for cooperatives under *F.S.* 719.106(1)(a)2. Like all sure things, the answer is YES, BUT! While an owner, not a purchaser or lender, can make a written inquiry to an association's board, the association

continued...

TRAGEDY— WHOM TO BLAME
from previous page

has 30 days from the date of receipt to respond, and that timing can be doubled if legal advise is sought. Thus, as a practical matter, seeking written advice is not an acceptable solution.

So what are you to do? Now you are armed with the facts, you can discuss with the lender's representative or broker why they cannot bully an association into providing the extended questionnaire. Of course, if there is a problem with an association, not an estoppel letter, there is always the potential of an inquiry to association counsel before writing a formal demand. Note however that associations generally have 15 days to respond to an estoppel letter request. This time is usually necessary especially for those communities that do not have current property managers, but rely solely upon their volunteer boards of directors.

The key, of course, is to ensure that the file is reviewed well before closing to ensure that all documentation is present, allowing sufficient time for these types of issues to be resolved peaceably, rather than frantically under the gun of a closing deadline.

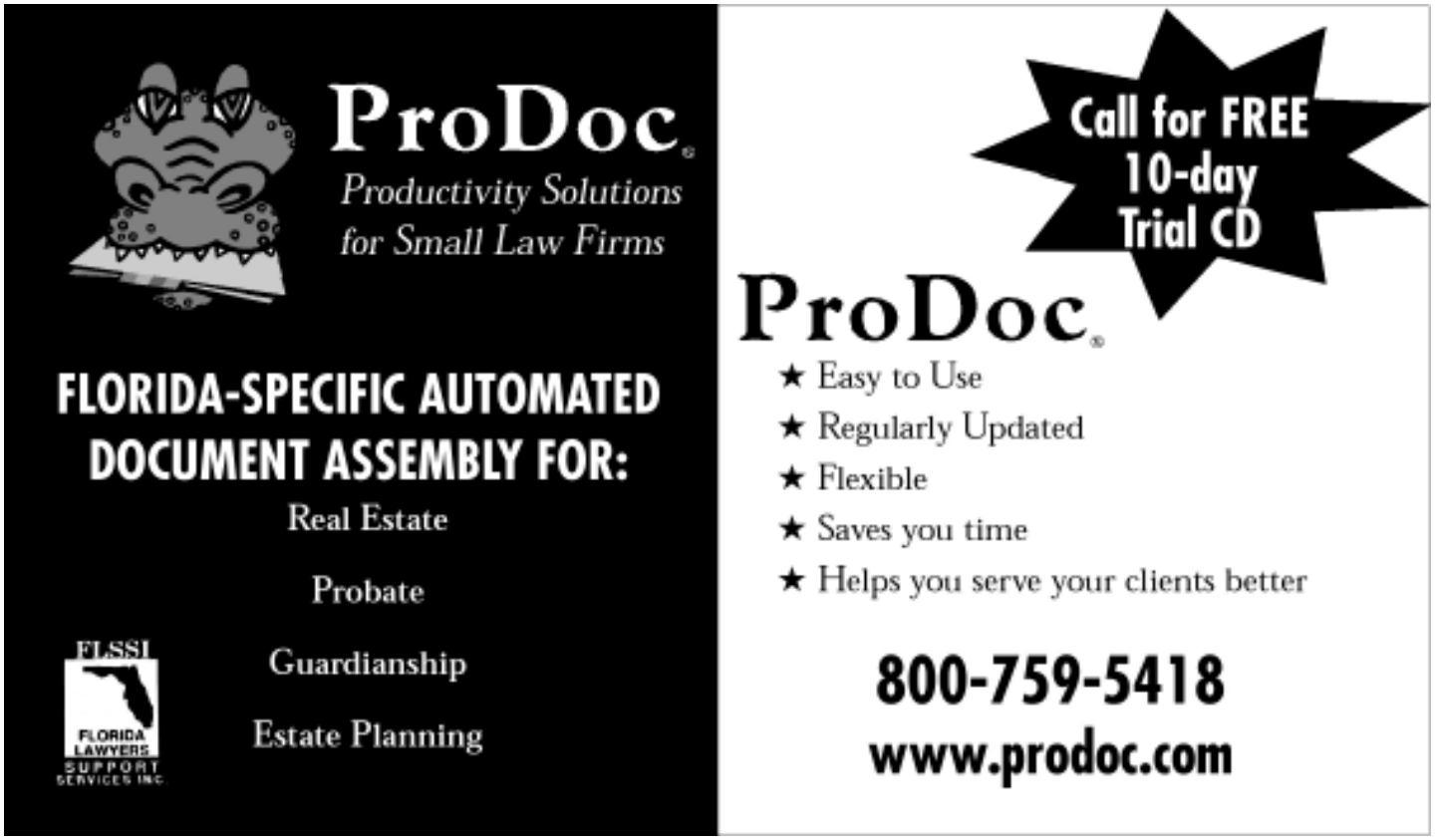
AWARDS
from page 1

achiever and very dedicated," as having "superb leadership skills," as "unassuming" and as "a heck of a nice guy!" Bruce has devoted so much time to the Section that one person commented "When does he have time to practice law?" However, Bruce does practice law and does it exceptionally well. He is a successful estate planning and tax attorney with Holland & Knight in Miami.

The Section's Annual Service Award was awarded to **George Meyer in recognition of his dedicated service** to the Section throughout this past year. George is an attorney with the Carlton Fields firm in Tampa, specializing in construction law. He has served for several years as Chair of the Section's Construction Law Committee and as Chair of the Section's Sponsor Coordinators. His work in both capacities has been outstanding.

The Section has another award, the **Terry Altman Award,** which is occasionally awarded to a spouse who has devoted a great deal of time and effort to assisting the Section. When the award is given, it is to a spouse who exemplifies the devotion and service of Terry Altman, the wife of James J. Altman, who was the Section's Chair in 1982-83. For the first time, that award was bestowed upon two recipients, **Mary Swaine** and **Jenny Smith,** in recognition of their continued dedicated service to the Section. In addition to being involved with spouse and guest activities over many years, both ladies have gone out of their way to welcome newcomers to the Council and to help the Section in any way possible.

The Section is able to accomplish its numerous goals and functions as one of the most successful sections of the Bar due to the dedicated work of many members; however, special congratulations go to Bruce, George, Mary, and Jenny for their extra efforts on behalf of the Section!



The Disclaimer — The Estate Planner's New Best Friend

by Robert A. Dawkins, Esq., Fisher, Tousey, Leas & Ball, Jacksonville, Florida

The passage of the Economic Growth and Tax Relief Reconciliation Act of 2001 (the "Act") promises to dramatically change the landscape of estate planning over the next nine years. The current $675,000 unified credit exemption equivalent will rise to $1,000,000 in 2002 and 2003, to $1,500,000 in 2004 and 2005, to $2,000,000 in 2006 through 2008, and to $3,500,000 in 2009, followed by total estate tax repeal in 2010.

The challenge that many estate planners now face is how the very large increase in the exemption amount and the possible future repeal of the estate tax will affect not only estate plans already in existence, but also estate plans that we prepare from this point forward. Under most estate planning documents, a credit shelter trust is created to take the exemption amount, with the remainder of the estate either passing to the surviving spouse or into a qualifying marital deduction trust. The effect of almost any formula marital deduction language is to allocate the first $675,000 (or whatever is the exemption amount) to the unified credit shelter trust. Only once this trust has been fully funded does the marital deduction come into play.

In many cases, the marital share passes outright to the surviving spouse, because both spouses want to keep their lives as simple as possible; the only reason that they wished to include a credit shelter trust in their estate plan was to save federal estate tax. In the absence of a federal estate tax, they would probably not create a credit shelter trust for the surviving spouse, but would instead leave everything outright.[1] In this case, what can we recommend to our clients with estates between $675,000 and $3,500,000, or to our clients with over $3,500,000 who reasonably expect to live until 2010? The problem with all of the division formulas is that they allocate first to the credit shelter trust. For example, a couple with a combined net worth of $800,000, split evenly between both spouses, with standard credit shelter wills or living trusts, would face the creation of an arguably needless trust if either died during 2002. In this case, the deceased spouse's $400,000 would go into a credit shelter trust that would last for the surviving spouse's lifetime. The reason that the trust is needless is that if the value of this couple's assets is under the $1,000,000 exemption, estate taxes would not have been a problem in any event, assuming growth does not overtake the future increases in the exemption amount. A couple in this situation might well decide to forgo creating a credit shelter trust and simply use an outright bequest to the surviving spouse on the first death. The problem is that we don't know when our clients are going to die. If the first spouse died in 2001, in order to protect against the death of the second spouse in 2001, and certain estate taxes, we would probably want to have a plan that created a credit shelter trust. On the other hand, in 2005, when the exemption is $2,000,000, we would probably not want to do this.

At the other extreme, consider a case where a client with a $20,000,000 estate and a standard marital deduction formula will or living trust dies in 2010. Because the estate tax has been repealed, the entire $20,000,000 would pass to the credit shelter trust, with nothing to the marital share. Now consider an even worse case: let us assume the same $20,000,000 net worth client, who because he considers the current estate tax exemption amount of $675,000 relative chicken feed, has decided to leave the credit shelter amount outright to the children, who could use a little pocket money. Now we have a big problem when this client dies in 2010.

Although it might be possible to draft a formula that would, based on the estate tax law in effect at the first death, either create or not create a credit shelter trust depending on the value of the couple's assets, such a formula would probably be very difficult to draft and apply. On the other hand, although we would like to earn the fees, it does not make sense to force clients to consult with us every year to determine the continued advisability of their plans, or to have to redraft a client's will every few years

continued...



as the exemption amount increases and the client's net worth fluctuates.

The qualified disclaimer is a way out of this dilemma. What we can do is simply have an outright devise to the surviving spouse, but provide that if and to the extent the surviving spouse disclaims the devise, it passes to a standard credit shelter trust for the benefit of the surviving spouse. This way, on the death of the first spouse, the survivor can take a look at the situation and decide whether it make sense to allow the credit shelter trust to come into existence. As we all know, it is almost always best to delay a critical tax decision as long as possible, all other things being equal.

In order for this strategy to be viable, however, it is important to remember the qualifications for a qualified disclaimer and draft before death and plan after death accordingly. As far as pre-death drafting is concerned, we must bear in mind that one of the requirements of a qualified disclaimer is that the property pass without any direction on the part of the disclaimant.[2] Because of this, it is critical that the unified credit shelter trust not grant a special power of appointment to the surviving spouse; this would make it impossible to do a qualified disclaimer into the trust.

A post mortem planning consideration is to make certain that the surviving spouse not receive any of the income or other benefits from the estate or living trust prior to disclaiming, since this as well would disqualify the spouse from disclaiming.[3] To guard against the possibility of an inadvertent acceptance of benefits by a spouse before receiving advice, we should stress to our clients the need to contact us or another trusts and estates attorney as soon as possible after either spouse dies.

Finally, one has to be prepared to contend with the unwillingness of a spouse to disclaim. For whatever reason, we sometimes encounter clients who, even though they paid us good money earlier to try to save estate taxes, suddenly decide after the first death that freedom, flexibility, and lack of continuing accounting expense are more important than saving the children estate tax.

On the whole, the potential problems outlined above seem to be outweighed by the tremendous flexibility inherent in the spouse/disclaimer trust plan. In an uncertain and changing environment, flexibility seems the best strategy.

Robert A. Dawkins *is a Board Certified Wills, Trusts and Estates attorney and shareholder at Fisher, Tousey, Leas & Ball in Jacksonville, Florida.*

Footnotes:

[1]Throughout this article, I am assuming this as a fact pattern. When a client has included a trust in his or her estate plan for reasons other than estate taxes, such as protection of assets for children from a prior marriage, or protection from the claims of a future spouse, the problem that I am trying to address, complexity caused solely by tax planning, simply does not exist.

[2]*IRC* §2518(b)(4).

[3]*IRC* §2518(b)(3).

The Florida Bar Condominium & Planned Development Committee Minutes

Thursday, May 24, 2001

CALL TO ORDER
Chair Robert M. Schwartz called The Florida Bar Condominium and Planned Development Committee meeting to order in the Marriott Harbor Beach Hotel, Fort Lauderdale, Florida, Thursday May 24, 2001, at 2:10 p.m.

ATTENDANCE
Robert M. Schwartz, Chair
Michael J. Gelfand, Vice Chair
Charles D. Brecker
Steven L. Daniels
Peter M. Dunbar
Steven Falk
Patricia K. Fletcher
Robert S. Freedman
John Geiger
Laura Glenn
Mark F. Grant
Louis B. Guttman
Robert M. Haber
John W. McWhirter
Robert E. Murrell
Gary A. Poliakoff
Rudy Pritz
Margaret A. Rolando
Deborah Ross
Karl M. Scheuerman
Martin A. Schwartz
William P. Sklar
Tamela Eady Wiseman

CHAIR'S REPORT
The chair introduced himself and each attendee introduced themselves. The chair discussed scheduling and potential meeting dates. Subject to availability, meetings will be scheduled for September 13 and December 6, 2001. As in the past, the meetings will be from 9:30 a.m. to noon at the Tampa Airport Marriott.

Other items for calendaring are the University of Miami Institute, October 31 to November 2, 2001. The next RPPTL Section Convention is scheduled for May 16, 2002, in Sanibel.

Special note was made of Louise Tudzarov's circumstances and our wishes for swift recovery. Members are urged to call or write.

DIVISION REPORT
The chair thanked the Division's extraordinary effort to attend the meeting and introduced Laura Glenn. She provided handouts including a telephone list re-organization chart. The bureaus which were organized on a program basis (condominium, timeshare, land sales, etc.) have been crafted using a functional basis. The new areas are:
Compliance: Including enforcement and finance;
Standards and Registration: Includ-

ing filings, billing and collection); and Customer Service: General intake of communications.

[Secretary's Notes: The summary is the committee secretary's gross summary of comments.]

Discussion proceeded on the best way to cooperate. Bill Sklar volunteered to continue chairing the Division Working Group Committee. Those who have volunteered to assist Mr. Sklar are: Charles Brecker, Richard D. DeBoest, Robert Freedman, Mark F. Grant, Robert M. Haber, Margaret Rolando, and Gary Saul. Other interested members can send their names to Mr. Sklar.

The Chair inquired on the status of arbitration. There is a potential that new cases will be referred to mediation. Those that do not settle are free to file in court. Arbitration is within the office of the division director. It is not on a chart, but the arbitration section direct telephone number is 850/922-7662.

Discussion proceeded onto finances. A misunderstanding may be present concerning the financial value of arbitration. Just the program's existence, allowing for relatively swift orders, deters many disputes from even being filed.

Inquiry was made on rulemaking status. There will be an effort to confirm the status of matters that have been pending. Ms. Glenn stated her desire to resolve issues open for years, particularly where there is consensus. Mr. Grant noted that the successor developer filing rule is one. Mr. Sklar will circulate the last working group/division rule package. A shorter time frame for promulgation is sought, less than a year.

There is a relatively new issue — whether a hotel is a commercial or residential condominium for various purposes. A solution, if one is available, may be affected by whether the unit owner may stay in the unit. Mr. Sklar noted that statutory issues are moving toward a two-week residency issue in many developments. The Chair proposed a committee to work with the Division, with Larry Kinsolving as chair and including Steven Falk.

Embracing new technology, there is a question of whether documents may be provided to a purchaser on a CD. Apparently this is used in timeshares.

Rudy Pritz was introduced as the head of examinations. He explained the process in which filings move, and solicited suggestions. Unlimited extensions for unresolvable matters will not be allowed indefinitely. Reasonable requests will be permitted.

Form reviews will be assigned to examiners. This may not allow for same day reviews, especially as time is necessary for matters to be entered into the system and assigned. Six of seven staff positions have been filled, and he hopes to fill the last one next month. There are more filings than most outside the bureau anticipated: 50 to 60 new filings per month.

Returning to the reorganization, branch offices remain. Fort Lauderdale and Tampa concern condominium compliance; Orlando, time-shares, and Tallahassee, mobile homes. Priority of counsel work is still awaiting guidance. Average case time in arbitration was down to a positively astounding 100 days per case, much less than the old court alternative. The committee thought the timing was great!

The chair questioned legislative support for arbitration. There is concern that this excellent program, which has positively matured over time, may be misconstrued by legislators. There may be an issue of cost effectiveness. Though very good, it is perceived to benefit a small proportion of persons. Alternate dispute resolution may be key. The true story, that only a small percentage cases are "dog cases," has not been told.

The need to enforce, the impact on the courts, and deterrent impact must be considered. Written opinions have added form by consistent and coherent statements and definition to what were vague areas of the law. The Arbitration program addresses significant issues that had required tying up the courts at everyone's great expense, and has added a level of decision making expertise allowing statewide uniform interpretation with well-thought-out decisions allowing for disputes to be resolved with respected finality.

A motion to support legislation to retain arbitration for condominium and cooperative association complaints passed unanimously.

In other matters, there will be an effort by the Division to review its Website information and posting of databases.

LEGISLATIVE UPDATE

Mr. Dunbar reported on the issues from the last session, including reorganization of the Division with arbitration focus. There was a focus competency and allocations from the trust fund. One reason to cut arbitration is to free up funding.

In other matters, the CAI clean up bill will be considered again. There was a Chapter 720 local bill concerning Marion County. The condominium warranty killer bill did not pass, and neither did the documentary stamp clarification. The committee voted unanimously to restate the support for the proposed documentary stamp legislation.

Discussion proceeded on the proper purpose of our legislative agenda. A need to avoid spreading out support, yet working with others, was understood. The next meeting will discuss whether to support other legislation. It was unanimously approved to seek the deletion of *F.S.* 720.306(1)(c) concerning amendments to vested rights. There was also discussion on opposition to legislation regulating community association by local laws; however, drafting a position may be problematic.

OPEN FORUM

Questions included the termination of a homeowners' association, compliance efforts, foreign corporate associations, and leasing of common elements.

ADJOURNMENT

The meeting was adjourned at 4:40 p.m.

Respectfully submitted,
Michael J. Gelfand, Secretary

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for YOU on The Florida Bar's website!
www.flabar.org

Section Meets in Ft. Lauderdale, May 2001





Left: Bruce and Anita Stone.

Right: Pooh-Bah Emeritus, John Arthur Jones and Joe Fleece.





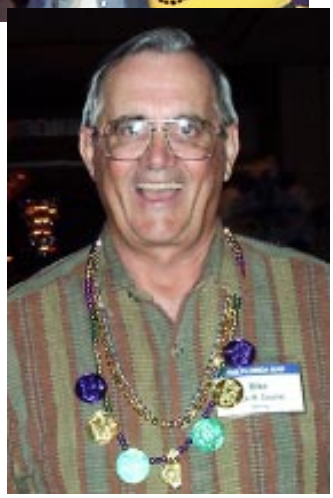
Above:"All Dressed Up and SOMEPLACE to go!" Michelle Trca is ready for the "Mardi Gras" party.



George Meyer displays the Annual Service Award Plaque.

Above: Outgoing Chair, Wilson Smith, is presented a clock plaque by Bruce and Anita Stone.

Right: Chair Mike Swaine is ready for the party.





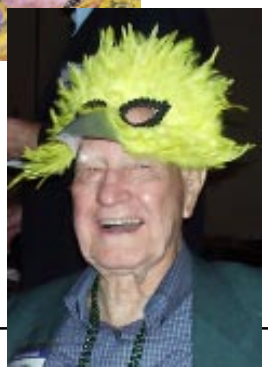
"Pick a card! Any card!" MIO the Magician demonstrates his sleight of hand to Chris Hart and Anne Henderson.



RPPTL's answer to the "Three Tenors," L-R: Wilson Smith, Bruce Stone, and John Grimsley.

Who IS that Masked Man?

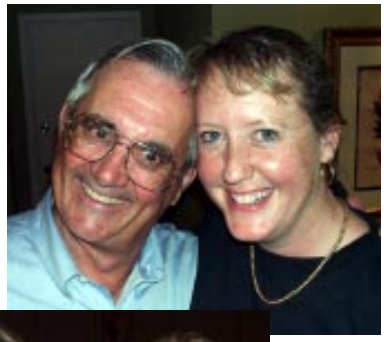




Ah-ha! It's our own John-Arthur Jones (with wife Sally in photo above)



"I'm ready for my close-up!" says Jim Salter.





(Top) "Happy Campers" Mike Swaine and Laura Sundberg and (above) Melissa Murphy and Paula Guttman.

Section Meets in Palm Beach, July 2001



Peggy Rolando and Laura Sundberg pose at the podium.



A lively gathering at the Dance.



Silvia Rojas rates the last speaker (just kidding!)



The beautiful facilities at the Palm Beach Ritz Carlton.

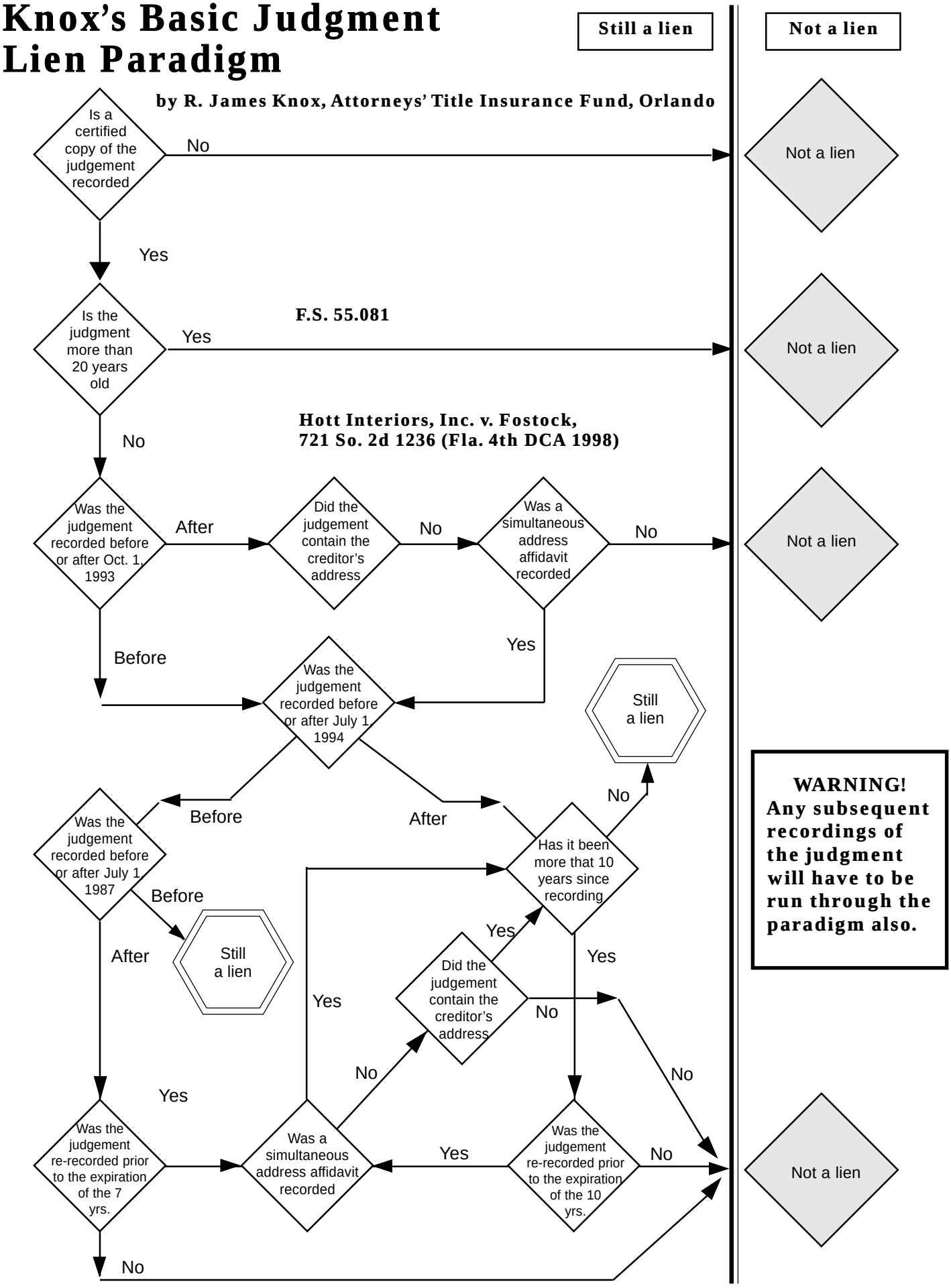


Chair Smith gives pointers to Chair Swaine.



RPPTL is such a HAPPY section! (L-R: Bonnie Bevis, Lisa Hoppe, Dave Brennan, Laura Sundberg)

Knox's Basic Judgment Lien Paradigm



The Basic Judgment Lien Paradigm

The Basic Judgment Lien Paradigm is an effort to organize the various changes to Florida judgment lien law since 1987. The inspiration was Rohan Kelley's use of a paradigm to organize and simplify Florida homestead law, which can be found in The Florida Bar Probate System (Fla. Bar CLE 3d ed. 1996).

Like the homestead paradigm, the sheet is divided into two parts. If the answers to the questions leave you on the left-hand side of the page, the judgment is still a lien. If the answers carry you to the right-hand margin at any point, the judgment is not a lien.

The basic paradigm is based on the following assumptions:

1) It deals only with case law as it exists on April 1, 2001, and statutory law as it exists on July 1, 2001. The user must stay current on statutory and case law changes.
2) It deals solely with Florida judgments. No effort has been made to factor in the various domestication processes for judgments of other jurisdictions.
3) It assumes that the debtor owns a piece of non-exempt property that is subject to levy, i.e., the basic paradigm does not address issues of homestead, entireties, bankruptcy, etc.
4) The word "After" in the paradigm means "on or after." Because the recording of a certified copy is an absolute requirement for a judgment lien, where the words "recorded," "recording," or "re-recorded" are used in connection with a judgment, it means a certified copy.

WARNING: Each recording of a judgment must be reviewed independently to determine if a lien has been created. Just because the initial recording of a judgment contains a defect that prevents it from being a lien, does not preclude a later recording that complies with the requirements to create a lien.

Below is *F.S.* 55.10 as amended effective July 1, 2001:

> (1) A judgment, order, or decree becomes a lien on real property in any county when a certified copy of it is recorded in the official records or judgment lien record of the county, whichever is maintained at the time of recordation, provided that the judgment, order, or decree contains the address of the person who has a lien as a result of such judgment order or decree or a separate affidavit is recorded simultaneously with the judgment, order, or decree stating the address of the person who has a lien as a result of such judgment, order, or decree. A judgment, order, or decree does not become a lien on real property unless the address of the person who has a lien as a result of such judgment, order, or decree is contained in the judgment, order, or decree or an affidavit with such address is recorded simultaneously with the judgment, order, or decree. If the certified copy was first recorded in a county in accordance with this subsection between July 1, 1987 and June 30, 1994, then the judgment, order, or decree shall be a lien in that county for an initial period of 7 years from the date of the recording. If the certified copy is first recorded in accordance with this subsection on or after July 1, 1994, then the judgment, order, or decree shall be a lien in that county for an initial period of 10 years from the date of the recording.
>
> (2) The lien provided for in subsection (1) or an extension of that lien as provided for by this subsection may be extended for an additional period of 10 years, subject to the limitations in subsection (3), by rerecording a certified copy of the judgment, order, or decree prior to the expiration of the lien or the expiration of the extended lien and by simultaneously recording an affidavit with the current address of the person who has a lien as a result of the judgment, order, or decree. The extension shall be effective from the date the certified copy of the judgment, order, or decree is rerecorded. The lien or extended lien will not be extended unless the affidavit with the current address is simultaneously recorded.
>
> (3) In no event shall the lien upon real property created by this section be extended beyond the period provided for in s. 55.081, or beyond the point at which the lien is satisfied, whichever occurs first.
>
> (4) This act shall apply to all judgments, orders, and decrees of record which constitute a lien on real property; except that any judgment, order, or decree recorded prior to July 1, 1987 shall remain a lien on real property until the period provided for in s. 55.081 expires or until the lien is satisfied, whichever occurs first.

Government Guardianship in Florida: Ensuring Access & Protection to the Vulnerable

by Joseph P. George, Esq.

A Brief Overview

As counselors for most private guardians know, government or statutory public guardianship in Florida began in 1986 with the advent of the "Public Guardianship Act," created when the legislature found that private guardianship was inadequate when there was no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person. In 1988 the Florida Department of Health & Rehabilitative Services, now the Department of Children & Families (DCF), sponsored creation of the "Adult Protective Services (APS) Act" for exclusive use by the agency, in conjunction with state and local police forces, to provide for the detection and correction of abuse, neglect, and exploitation through social services and criminal investigations. Some private guardians know of the APS Act after becoming targets of APS and/or state attorney's office investigators.

The Adult Protective Services Act, *F.S.* Chapter 415, establishes a program of protective services for all aged persons or disabled adults in need of them. Adult Protective Services is one of a wide variety of programs administered by the Aging and Adult Services Program Office (AAS) of the DCF. These programs are designed to assist aged persons (60 years of age and older) and disabled adults (18 years of age and older) to live as independently as possible. However, like public guardianship, the APS Act provides for involuntary civil commitment if necessary.

When aged persons or disabled adults are unable to care for and/or protect themselves and/or are hurt physically, emotionally, or financially by the conduct of their caregivers or other persons, whether willfully or not, DCF has the right and responsibility to intervene to correct the abuse, neglect, or exploitation through the provision of protective services. At the same time, DCF recognizes that society accepts wide diversity in individual values and lifestyles and protects the individual's freedom of choice. Consequently, in situations in which it becomes necessary for the Department to use the police to protect an aged person or disabled adult from abuse, neglect, or exploitation, the Department's actions must be tempered by the procedures of due process intended to allow such individuals the same rights as other citizens and to place the fewest restrictions on personal liberty and the exercise of constitutional rights. In addition to the Public Guardianship Law and the Adult Protective Services Act, the Florida Mental Health Law ("Baker Act") and the Florida Developmental Disabilities Prevention and Community Services Act are vehicles providing access to the protections of public guardianship.

Good to Know

Do private guardians understand the role of the police in evaluating and taking into custody the aged, disabled, and suspected Mental Health Act (Baker Act) respondents/patients? Do they understand how local police, the office of the state attorney, and the Attorney General's office provide access to private guardians who need their help in order to protect their wards from abuse, neglect, and exploitation, and how wards who need protection from their private guardians get access and protection?

Private guardians know the categories of individuals for whom guardianship is appropriate: (1) the mentally ill, all ages, (2) the developmentally challenged, all ages, (3) the aged/elderly incapacitated, and (4) certain minors (i.e., those who are not disabled but who are entitled to money from injury or inheritance). Private guardians know the basic differences between a Public Guardian and a Private Guardian (Public Caretaker funded by the legislature for civil court division indigents similar to the criminal court division Public Defender Program versus Private Caretaker funded by the incapacitated individual's personal guardianship estate assets). Private guardians know the difference between the court (government) supported Guardian Ad Litem Program for children, and legal guardians for the other categories of vulnerable adults (volunteers for children versus volunteers for the elderly, mentally ill, and developmentally challenged). Private guardians know what a "Guardian Advocate" is and know that there are differences between a guardian advocate for one mentally ill, a guardian advocate for the developmentally dis-

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 Tampa Bay Law Group, 1311 N. Westshore Blvd., Suite 205, Tampa, FL 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 *lahoppe@aol.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) 282-7257 to obtain additional publication guidelines.

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

***Actionline* Issue**	**Publication Deadline**
Fall	October 25, 2001
Winter	December 15, 2001

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

abled, and also guardian advocates for drug dependent newborns.

Most private guardians believe it is important to have a basic understanding of the framework of state, county, and municipal government access and entry points into the system; being the Florida Statutes (*F.S.* Chapters 392, 393, 394, 397, 415, 430, 744, and 825). Most know the network of county and city social welfare and police agencies serving locally, e.g., the Metro-Dade County Police Department and the Alliance for Aging local and statewide network of contractors. It is very helpful to understand the ways the Florida State Court System, the Statewide Office of the Public Guardian, the Department of Children & Families, and law enforcement agencies may rely on partnerships within the community and with local interdisciplinary agencies; e.g., public and private universities and not-for-profit guardianship and other service providers. Private guardians identify their role as a community partner in addressing the needs of the guardianship populations they are asked to serve.

De-Mystify the Process

Most private guardians feel that de-mystifying the government civil rights capacity determination and competence process(es), and the differing procedures used for the differing client populations they serve, is a good and worthwhile goal. Most might agree. Illuminating and dignifying the process for each individualized category of guardianship-eligible individual— the elderly, mentally ill, and mentally challenged— shepherded by a proposed legal guardian and counsel, maintains our own sense of self-determination and liberty, before a petition is filed affecting us.

Joseph P. George c 2001

Real Property, Probate and Trust Law Section Annual Report

Submitted by Outgoing Chair, Wison Smith, Esq.

The Real Property, Probate and Trust Law (RPPTL) Section continues as the number one section of The Florida Bar, with nearly 8,000 members. This is because this section consistently provides superior service to its members and lies directly in the mainstream of Florida practice, in addition to providing exemplary support to lawyers who concentrate their practice in our two substantive practice areas.

Among the many activities of the Real Property, Probate and Trust Law Section under the guidance of Wilson Smith of Miami, chair for the current year, was the conclusion of a three-year comprehensive review of the Florida Probate Code by the section's Probate Law Committee. This review and revision required literally thousands of pro bono hours by this state's leading trust and estate attorneys. The executive council of the section accepted the review and report, and it became section-sponsored legislation. This is the first major overhaul of the Florida Probate Code (with changes to related provisions in other portions of the statutes) since the Code became effective on January 1, 1976. Sponsors of this legislation introduced it in both the Florida House and Senate where, as this is written, it is progressing toward adoption.

The RPPTL Section maintains an active legislative program and not only advances and advocates its own legislative proposals, but monitors and reviews other bills submitted which would impact the practice of real estate or trust and estate law. Our members have direct input and output to and from this process, combining each member's voice with thousands of like-minded others. Our section enjoys a highly respected reputation in the legislative halls because of the quality of our proposals and the high degree of technical expertise we bring to the legislative process.

The section's present legislative proposal to overhaul the Florida Probate Code includes comprehensive amendments to most of its sections. The bill is nearly 200 pages long. Although a large number of the changes are only grammatical or stylistic so the code is more readable and thereby more usable, there are also numerous important substantive changes which will affect the rights of persons involved in the probate process and change the procedures followed by the courts to administer decedent's estates. However, it is evolutionary rather than revolutionary.

For example, some of these proposed changes are: a friendlier and more logical form for self proof of will; addresses glitches in the new elective share provisions which will be effective for estates of decedent's dying on or after October 1, 2001; addresses scattered inconsistent provisions for inheritance rights of adopted persons by providing those rights shall be as provided in the probate code; separates provisions relating to notification of creditors from notification provisions for beneficiaries and other interested persons and clarifies the rights of both; modifies post-death procedures for safe deposit box entry; eliminates the family administration short form of administration and increases the jurisdictional limitations of summary administration to $75,000; increases the amount of the family allowance to $18,000; provides a statutory definition for "protected homestead" and changes various references in the code to that term; allows the personal representative limited and temporary possession of protected homestead real property; modifies and streamlines fee dispute procedures and makes personal representative and attorney compensation subject to the same provisions; clarifies and modifies creditor's rights to enforce their claims against trust assets after the death of the grantor; provides for spouse inheriting the entire estate in small intestate estates; makes anti-lapse provisions applicable to testamentary trust interests; changes the

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requirement for a "written contract" to "written instructions" left by decedent providing for cremation; requires the estate to pay for reasonable expenses of delivery of devised tangible personal property; permits non-pro-rata distribution of fractional interests to avoid incurring capital gains on distribution; clarifies procedures for replacement of resigned, removed, or deceased personal representative; eliminates most gender-specific references; clarifies that the personal representative may sell estate property free of interests of creditors so that property may be sold before the creditor's period expires; and provides for closer integration of provisions for Medicaid recovery into the probate code. There are numerous other changes which can be viewed at the section's website at *www.flabarrpptl.org*, including an in-depth explanation of each proposed change. Of course, the section will sponsor continuing legal education seminars for its members and members of The Florida Bar to fully inform the practitioner regarding these changes.

This year's RPPTL Section activities also included "beefing up" the section's website. Looking forward, the section will undertake a much more intensive member communication and electronic services project. The future direction of this new emphasis will provide an active and informative e-mail list to disseminate up-to-the-minute information needed by dirt and death lawyers to stay current on important information which affects the practice. The RPPTL Section's website will be substantially enhanced and expanded to provide extensive timely content and practice resources to support the practicing lawyer, including the ability for section members to electronically "ask the expert" for help on complex real property problems or probate problems.

The section is exploring the future potential of online preparation of probate pleadings and papers and also for the section to serve as a clearinghouse/filing agent for its members for electronic probate filing in the various circuits. The Bar and our section need to utilize existing technology more fully in order to provide greater service to our members.

Again this year, our section has been one of the most prolific in its presentation of continuing legal education with 14 seminars, including our highly regarded Real Estate Certification Review Course and our Wills, Trusts and Estates Certification Review Course, the latter being in its 16th consecutive year. Our members find these seminars to be a useful broad-based review, even for those who either do not intend to sit for certification testing or are already certified.

The section continues to work with its affiliate, the Florida Lawyer's Support Services, Inc., (FLSSI) to provide Florida lawyers with a high level of support, including extensive substantive practice forms. The indispensable so-called "Florida Bar Probate Forms" and "Florida Bar Guardianship Forms," and the real estate practice forms are really sets of practice forms prepared and updated by the Probate Forms and the Real Property Forms committees of this section. They are published and distributed by Florida Lawyer's Support Services, Inc., not by The Florida Bar, and these forms have no relation to The Florida Bar other than the fact that this section is a section of the Bar.

In addition to practice forms publication, the section publishes a periodic newsletter, *ActionLine*, which is provided free to our members, and we provide a column to The Florida Bar *Journal*.

If you are a member of this section and would like to serve actively on one of its committees, the section welcomes you.

Available committees on the real property side are: Condominium Law, Construction Law, Electronic Commerce (Real Estate Transactions), FAR/BAR Committee and Liaison to FAR, Governmental Regulation of Real Estate, Land Trusts and REITS, Landlord and Tenant, Legal Opinions, Liaisons with FLTA, Mobile Home and RV Park, Mortgages and Other Encumbrances, Real Estate Certification Review Course, Real Estate Development, Real Property Forms, Real Property Litigation, Real Property Problems Study, Real Property Professionalism, Title Insurance and Liaisons, and Title Issues and Standards.

Available committees on the probate and trust side are Estate and Trust Tax Planning; Guardianship Law and Powers of Attorney; Liaison with Corporate Fiduciaries; Liaison With Elder Law Section; Liaison with Tax Section; Principal and Income Law; Probate and Trust Litigation; Probate and Trust Problems Study; Probate and Trust Professionalism; Probate Forms; Probate Law; Probate Rules; Qualified Plans and Employee Benefits; Rule Against Perpetuities; Trust Law; and Wills, Trusts, and Estates Certification Review Course.

Various general standing committees are also available for membership. Membership on a few of the committees is limited.

The work of the RPPTL Section will be carried on this coming year under the chairmanship of J. Michael Swaine of Sebring. Contacts for the section may be found in the September Bar *Journal* under the title, "Florida Bar Groups," or at our website, *www.flabarrpptl.org*.

— Rohan Kelley, Secretary

Third Annual Alan C. Sundberg, Jr. Memorial 5K Run

Saturday, October 27, 2001

8:30a.m., Maclay Gardens, Tallahassee, Florida

Race start time is 8:30 a.m. The entry fee is $12 and includes a race T-shirt. All proceeds will be donated to the Florida Skin Cancer Foundation. FSCF was founded in 1996, and is dedicated to educating Floridians about the dangers of prolonged exposure to the sun. For more information about the race or the Foundation, please contact Bill Sundberg at (850) 402-3000.

Probate, Guardianship and Trust Case Summaries

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

In determining whether to authorize termination of life-prolonging procedures under F.S. Chapter 765 and In re Guardianship of Browning, 568 So.2d 4 (Fla. 1990), trial court is not required to appoint guardian ad litem simply because surrogate decision-maker stands to inherit by intestacy if life-prolonging procedures are terminated and in deciding issue of whether to allow termination of life-prolonging procedures, court must use clear and convincing standard of proof. This standard, while very high, permits decision in the face of inconsistent or conflicting evidence.

In Re: Guardianship of Schiavo, 780 So.2d 176 (Fla. 2d DCA 2001).

In February 1990 Theresa Schiavo (Theresa) suffered a cardiac arrest and since that date remained in a persistent vegetative state during which her brain severely deteriorated. In May 1998 her husband petitioned the court for the entry of an order authorizing the discontinuance of artificial life support. The trial court granted the order and Theresa's parents appealed the decision.

The first ground for the appeal was that a guardian ad litem should have been appointed to represent the interests of Theresa because in the early 1990's her husband, as her guardian, filed a medical malpractice action and obtained a sizable monetary award. Therefore, he should not be allowed to act as a surrogate decision-maker as he would be the person to inherit through intestacy upon her death. The Second DCA held that the fact that a surrogate decision-maker may ultimately inherit from the patient should not automatically compel the appointment of a guardian and found that in this case it was not necessary. In this case, Theresa's husband simply presented the question of whether to terminate the life-prolonging procedures to the court for resolution and in those circumstances the trial court essentially serves as the ward's guardian and a guardian ad litem would tend to duplicate the function of the judge.

Additionally, the parents argued that the testimony was conflicting and was insufficient to support the trial court's decision by clear and convincing evidence. In upholding the decision of the trial court, the Fourth DCA reiterated that the evidentiary standard is clear and convincing and that that standard, while very high, permits a decision in the face of inconsistent or conflicting evidence. Although the district court upheld the trial court's decision, it reconfirmed that a court's default position must favor life: "In making this difficult decision, a surrogate decisionmaker should err on the side of life . . . In cases of doubt, we must assume that a patient would choose to defend life in exercising his or her right of privacy."

F.S. 744.441(19), which authorizes guardian to create trusts with regard to guardianship property, allows creation of trusts only to accomplish "tax planning" or "estate planning", and trusts created by guardian for minor wards simply to postpone minors' attaining property past age of majority were not authorized by statute.

In Re: Guardianship of Bernstein, 777 So.2d 1125 (Fla. 4th DCA 2001).

The father of two minor children passed away and guardianships were established to protect the property the children inherited from their deceased father. Shortly after the creation of the guardianship, the mother of the minor children and the guardian agreed that irrevocable trusts should be created for the minor children with the guardianship property, providing that the children would not receive the property when they became 18. Upon the petition of the guardian, the court allowed the creation of the trusts under which the children would not receive the principal until they reached age 30 and the guardian was appointed trustee of the trusts. The guardian/trustee did not file any statements or reports with the court for several years after creation of the trusts and the children filed an action to compel the guardian/trustee to comply with the guardianship accounting statutes and also alleged that the guardian/trustee had mishandled trust funds. The trial court found that the trustee had committed no violations for which monetary liability should be imposed but held that the guardian/attorney should bear his own attorney's fees and costs. Both parties appealed. The Fourth DCA held that because *F.S.* 744.441(19) allows the creation of revocable or irrevocable trusts of a ward's property only in connection with "estate, gift, income, or other tax planning or in connection with estate planning," there was no authority for the creation of these trusts under Chapter 744. Because there was no valid statutory basis for the creation of the trusts, the guardian could not be relieved of his statutory duties under the guardianship laws with regard to the property. Furthermore, the Fourth DCA upheld the decision of the trial court in denying the guardian's attorney's fees, stating that if he had only done what the guardianship statutes required, the litigation would not have been initiated.

Kindred of decedent's predeceased spouse are "heirs" for purposes of homestead exemption from decedent's creditors.

Moss v. Estate of Moss, 777 So.2d

continued...

1110 (Fla. 4th DCA 2001).

Elsa Moss died testate with no surviving spouse and no minor children. The relevant portions of her last will provided that the remainder of her estate was devised 1/4 to her niece, Marian Chinich, 1/4 to her niece, Lois Rothenberg, 1/4 to her husband's brother, Herbert M. Moss, and 1/4 to her husband's niece, Marilyn Moss. The personal representative filed a Petition to Determine Homestead Status of Real Property which sought an order determining that the constitutional exemption of the decedent's homestead from creditors' claims against her estate inured to the remainder beneficiaries of her estate.

The trial court found that the constitutional exemption inured to the decedent's nieces Marian Chinich and Lois Rothenberg because they were intestate heirs, but ruled that the exemptions did not inure to the heirs of the decedent's predeceased spouse, Herbert M. Moss and Marilyn Moss. The trial court cited *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997) as authority for its finding that "heirs of the predeceased spouse of the decedent do not qualify as heirs under the intestacy laws." The trial court noted that although *Snyder* did not specifically address this specific issue, "the result in the web of problems it creates was anticipated in the dissent by Justice Grimes."

The District Court reversed, finding that the kindred of the last deceased spouse were entitled to the homestead exemption from the decedent's creditors under subsection five of the intestacy statute (*F.S.* 732.103) and the broad definition of "heirs" given by the court in *Snyder*.

Orders extending temporary guardianship over person and property of ward that were issued after death of ward and after appointment of personal representative of ward's estate constituted departure from essential requirements of law and threatened irreparable harm.
Batzle v. Baraso, 776 So.2d 1107 (Fla. 5th DCA 2001).

The decedent, Philip Batzle, then 85 years of age, was removed from his marital home in Dade County by his daughter, Dolleda Baraso, and brought to her home in Lake County. Baraso was appointed temporary guardian of the decedent's person and property on May 11, 2000, which order was set to expire within 60 days.

On July 1, 2000, the decedent died and his will was admitted to probate in Dade County. Daphne Batzle, the Decedent's surviving spouse, was appointed personal representative of his estate on August 4, 2000, by the Dade County Circuit Court. Thereafter, Baraso filed a petition with the Lake County Circuit Court seeking an extension of the temporary guardianship, which was entered without hearing, even though the ward was now deceased. According to the allegations in the certiorari petition, the order entered by the Lake County Circuit Court on September 22, 2000 extended the temporary guardianship of the person and property of the decedent, did not limit the extension to the 30-day period prescribed by *F.S.* 744.3031(3) and made no finding that the emergency on which the original petition had been granted still existed.

Noting that they were challenged by the concept of a court ordering a guardianship of the person of a decedent, the district court found that the order entered by the trial court departed from the essential requirements of law and that the harm threatened by the order was irreparable.

Error to deny amended claim against estate filed outside three-month statutory period when amended claim merely added interest and therefore amended claim related back to original claim.
Harrison v. Estate of Sweeney, 777 So.2d 1150 (Fla. 3d DCA 2001).

It was error for the trial court to deny the appellant's amended claim which merely added interest to her timely filed original claim. Although the amended claim was filed outside of the three-month statutory period for filing claims, it merely added an amount for interest and therefore it related back to the original claim.

When marital property settlement agreement provided that decedent's house was to pass to his former wife upon his death, any expenses paid by decedent's estate to preserve house were of no benefit to estate and it should be reimbursed for payments.
Getzler v. Getzler, 782 So.2d 997 (Fla. 4th DCA 2001).

Under the terms of a marital property settlement agreement, upon the death of the decedent, his former wife became the owner of his house. During the pendency of the estate, the estate made payments to preserve the house and the probate court ordered that the estate was responsible for those expenses. On appeal, the Fourth DCA held that the estate should be reimbursed for the expenses from funds held in escrow as all of the expenses paid by the estate for the house benefited the former wife directly and

FLEA Probate Team 2001 Seminar

Seminars to be presented by the Probate Team are:

- **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.

To register, visit the FLSSI website: *http://www.flssi.org* or email FLSSI at *flssi@nettally.com*

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

proved of no benefit to the estate.

Law firm hired by personal representative to probate will that is later determined to have been procured by undue influence of named personal representative and is denied probate is not entitled to attorneys' fees from estate for defending that will, but may be entitled to fees for work it did in actually administering estate to extent that firm's services benefited estate under F.S. 733.6175. Statute of limitations for challenging payment of those fees did not begin to run against person named as personal representative in will ultimately admitted to probate until that person was actually appointed by court in that capacity.
Onofrio v. Johnston & Sasser, P.A., 782 So.2d 1019 (Fla. 2d DCA 2001).

The decedent died on April 12, 1994, and the appellee presented for probate a will of the decedent dated March 4, 1994, under which he was the sole beneficiary and personal representative. He hired Johnston & Sasser, P.A. (J&S) to represent him in the probate proceedings. The appellant filed a petition to revoke the March 1994 will and produced an earlier will for probate under which she was a named beneficiary and personal representative. J&S represented the appellee in the defense of the March 1994 will. The probate court declared the March 1994 will invalid because of the appellee's undue influence and the earlier will offered by the appellant was admitted for probate. The appellant then moved for an order requiring J&S to repay the $16,000 in fees the firm had been paid from the estate in probating the March 1994 will and for defending the appellee in the action to revoke probate. The trial court denied the request for return of fees, finding that J&S provided reasonable and proper legal services to the estate.

On appeal, the first issue the Fifth DCA decided was whether the four-year statute of limitations under *F.S.* 95.11(3)(f) precluded the appellant from recovering the fees. Specifically, the Fifth DCA needed to determine when the statute of limitations began to run against the appellee. The Fifth DCA held that although the statute of limitations may have started to run against the appellee individually when she became aware of the payment of the fees, it did not begin to run against the appellee in her capacity as personal representative of the will ultimately admitted to probate until she was appointed as personal representative by the court.

Finding that the appellant, in her capacity as personal representative, was not precluded by the statute of limitations from recovering the fees, the Fifth DCA addressed the issue of whether the fees paid to J&S should be returned to the estate. The Fifth DCA vacated the order to the extent J&S had incurred fees in defending the appellee in the action to revoke probate, finding that as a matter of law J&S provided no benefit to the estate in that action. "Exposure of an estate to the offer of spurious wills . . . is of no more benefit `than exposure to contagious disease.'" While the Fifth DCA vacated the probate court's order to the extent that J&S incurred fees in defense of the appellee in the will contest, they ruled that J&S may be entitled to fees under *F.S.* 733.6175 for services they performed in actually administering the estate that did provide a benefit to the estate, such as publishing notice to creditors, protecting assets, and considering and dealing with tax issues. Accordingly, the matter was remanded to the trial court to determine the portion of J&S's services that resulted in a benefit to the estate.

CONTINUING IN SERVICE
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same and perhaps better services to its members, we need your help. We need to know what you would like for the Section to do for you. The Executive Council cannot work in a vacuum. It will not be successful trying to guess what you need. If you have a suggestion about membership services or how the Section can improve the delivery of those services, please let us know.

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Stricter Rules Ahead for Local Government Quasi-judicial Proceedings?

by Fred W. van Vonno

Ever since the groundbreaking 1993 ruling of the Florida Supreme Court in the *Snyder* case members of the public have had to deal with the mystifying rules of quasi-judicial proceedings that must be followed by local governments in some land use decisions. Having come to a meeting of their city council or county commission to give their views on a proposed zoning change citizens have found themselves sworn in to testify as to their views and had those views subjected to cross examination by attorneys on both sides of the issue.

The Supreme Court of Florida in *Board of County Commissioners of Brevard County v. Snyder*, held that zoning changes of limited impact are quasi-judicial in nature subject to "strict scrutiny" review. As a result, local governments have had to adopt procedures for rezonings and other quasi-judicial decisions that are similar to those in courtrooms. Florida courts have struggled with the standards set forth in *Snyder* since that 1993 decision.

Interestingly, a recent Alaska Supreme Court ruling, *Cabana v. Kenai Peninsula Borough*, 21 P.3d 833 (Alaska, April 27, 2001) expressly rejected the holding of the Florida Supreme Court. The Alaska Court found that small scale rezonings are legislative, not quasi-judicial proceedings. The process for legislative decisions is more in keeping with the public's general understanding of how a local government makes land use decisions. Individuals can call up their city or county commissioners and express their views without that being considered an "ex-parte communication" that must be disclosed in a public meeting by the elected official. In addition, from a legal standpoint, a legislative decision is generally accorded much greater deference by the courts.

However, it does not appear that the Florida Supreme Court will recede from the quasi-judicial standards set forth in *Snyder*. To the contrary, the Florida Supreme Court in *G.B.V. International Ltd. v. Broward County*, 26 FLW S389 (Fla. June 7, 2001) referred to the Rules of Judicial Administration Committee of The Florida Bar the issue of whether local governments must issue final written decisions (as courts do) with detailed findings of fact in local land use actions that are subject to review in the Courts.

Although the facts in *G.B.V. International Ltd.* are somewhat complex, essentially this case involved an application for a plat approval by the developer of a thirty acre tract of land in the City of Coconut Creek in Broward County, Florida. The county staff report found that the proposed plat complied with all applicable county requirements and recommended approval. The County Commission approved the plat but at a lesser density than the applicant believed it was entitled to under the Broward County Land Use Plan. In accordance with the requirements of the Florida Rules of Appellate Procedure and the established case law the developer filed a Petition for a Writ of Certiorari with the Circuit Court to appeal the decision of the County Commission. The Circuit Court denied the developer's Petition ruling that the Commission's decision was *legislative* in nature and that the developer could not raise its claim because it had misrepresented certain matters before the County Commission. G.B.V. International then filed a Petition for Writ of Certiorari with the Fourth District Court of Appeal. The Court of Appeal reversed the Circuit Court finding that the approval of a site plan is a quasi-judicial function and since the record before the County Commission established that the developer had complied with all the county's requirements that the County Commission was *required* to approve G.B.V. International's application for a plat approval. The District Court of Appeal remanded the case back to the Circuit Court to enter an order directing Broward County to approve the plat as requested.

Broward County then filed a Petition for Writ of Certiorari to the Florida Supreme Court to appeal the ruling of the Fourth District Court of Appeal. As was expected, the Supreme Court agreed with the District Court of Appeal that the approval of a site plan is a quasi-judicial function. But in a ruling that is meaningful only to members of the legal community interested in the arcane rules of certiorari review, the Supreme Court ruled that the District Court of Appeal had violated the principles governing certiorari review in that it evaluated the Broward County Commission's decision and remanded the case for an order directing the Commission to approve the plat at ten units per acre. This action by the Court of Appeal violated the standard for review set out in *City of Deerfield Beach v. Vailliant*, 419 So.2d 624 (Fla. 1982) that delineates the standards of review for local agency action at both the circuit and district court levels. The Supreme Court found that:

> The district court proceeded to evaluate the merits of the Commission's decision and remanded for entry of an order directing the Commission to approve the plat at ten units per acre. This was improper. Pursuant to *Vailliant*, the district court's role on second-tier certiorari review was limited to a two- pronged review of the circuit court decision, not a de novo review of the agency decision. Once the district court granted certiorari and quashed the circuit court order– i.e., once the court halted the miscarriage of justice– the district court's job was ended.

G.B.V. International Ltd., 26 FLW S389 (Fla. June 7, 2001)

Of more general interest in the *G.B.V. International Ltd.* case is the fact that the Supreme Court found reason to refer to the Rules of Judicial Administration Committee of The Florida Bar the question of whether local governments must issue final written decisions (as courts do) with detailed findings of fact in local land use actions that are sub-

ject to review in the Courts. The concept of requiring local governments to enter written decisions gets strong support in Justice Pariente's strongly worded and well reasoned dissent as well as in some statements in the majority's opinion. It certainly appears more possible now that a general rule will be adopted to require local governments to enter a written order with detailed findings of fact. This would reinforce and amplify the quasi-judicial nature of the proceedings and rules that must be followed by local governments in some land use decisions.

Ultimately the effect of the rulings in *Snyder* and *G.B.V. International Ltd*. and other cases that follow *Snyder* shifts the rules in favor of greater predictability in the outcomes of local land use decisions. Landowners who are seeking a rezoning or a plat approval that is consistent with the local governments' comprehensive plan will be more assured that their applications will not be derailed by neighborhood opposition of the NIMBY variety. By the same token, affected neighborhoods will be more assured that decisions are being made based on the governing law rather than in "smoke- filled back rooms." But this does come at the cost of having local government decision making in this area being governed by the complex rules of quasi-judicial proceedings.

Fred W. van Vonno *is a Senior Associate with the law firm of Warner, Fox, Wackeen, Dungey, Seeley, Sweet, Wright, & Beard, L.L.P. in Stuart, Florida, where he edits that firm's Land Use and Eminent Domain Newsletter. Formerly a Senior Assistant County Attorney for Martin County, he was admitted to practice in Florida in 1986. He has been a member of the Eminent Domain Committee of The Florida Bar since 1990. Mr. van Vonno received his law degree at the University of Miami (1985), A Bachelors of Arts degree from the University of Florida (1974), and a Masters Degree in City Planning from the Georgia Institute of Technology (1985). Mr. van Vonno's areas of practice include: Land Use and Development, Eminent Domain, Local Government Law, Real Estate, Environmental Permitting, Administrative Law, and Litigation.*

Results of 2001 Legislature/ Community Association Issues

by Joe Adams

- **HB 1907/SB 1796** (also treated at HB 207/SB's 348 and 2210): Miscellaneous Condominium Act Amendments (Woodside/Wellington, etc.) **- Died.**
- **HB 1923/SB 2210** (also treated at HB 1817/SB 348): DBPR Reorganization/ Elimination of Condominium Arbitration - **Died.**
- **HB 1645/SB 1742:** Condominium Act Warranties, Unit Owner Vote Requirement to Approve Construction Litigation, etc - **Died.**
- **HB 1679/SB 2032:** Community Association Redevelopment (Right of First Refusal on Sale of Recreation Facilities by Developer, etc.) - **Died.**
- **HB 1835/SB 1632** (also treated at SB 1542) Document Stamp Taxes, Taxpayers For Fairness, etc.: - **Died.**
- **HB 1901/SB 2298:** Special HOA Legislation for Marion County - **Died.**
- **HB 343/SB 1504:** Business Establishments/Discrimination - **Died.**
- **HB 1681/SB 2042** (also treated at HB 355/SB1052): Permitting Local Ordinances That Mandate Termite Inspections For Multi-Residential Buildings: - **Passed. Ordered Enrolled.**

Short Summary: *Amends Chapter 482 relevant to pest control. New s.482.242(1)(c)(1) permits local governments to require, for multi-complex dwellings in excess of ten units, annual termite inspections for termite activity or damage, and remediation of same. This law does not mandate the inspections and treatment, but simply permits local governments to adopt such standards, pest control otherwise being generally pre-empted by state regulation and not susceptible of local regulation.*

- **HB 1165/SB 1132** (also treated at HB's 441 and 1225/SB's 126, 460 and 2290): Xeriscape - **Passed. Ordered Enrolled.**

Short Summary: *Amends various Florida statutes, including s.720.375, statute applicable to HOA's. Prohibits homeowner association covenants recorded after October 1, 2001 from prohibiting "xeriscape" of a lot owner's land. Xeriscape, also known as "Florida friendly landscape" is defined as "quality landscapes that conserve water and protect the environment and are adaptable to local conditions and which are drought tolerant."*

- **HB 411/SB 442** (also treated in HB's 1265 and 1397/SB 1393, 1612 and 1920) Mobile Home Relocation Costs, etc.: **Passed. Ordered Enrolled.**

  Short Summary: *Amends Chapter 723. Establishes "Mobile Home Relocation Corporation" to administer trust fund for payment to homeowners displaced by sale of mobile home parks. Amends s.723.037 regarding lot rental increase negotiations, comparable rent study procedures, etc.*

- **HB 19/SB 294:** Registration of Housing For Older Persons: **Passed. Ordered Enrolled.**

Short Summary: *Amends Chapter 760 regarding housing for older persons exemption (HOPA). Requires associations claiming exemption to file forms with Florida Commission on Human Relations. Provides penalties for non-filing. The law states that filing does not confer presumption of compliance with HOPA, and that failure to file does not constitute non-compliance with HOPA.*

- **HB 1833/SB 178:** Duration of Liens - **Passed. Ordered Enrolled.**

Short Summary: *Amends s. 55.10. It provides that judgments or liens recorded on or after July 1, 1994, have an initial duration of ten years, as opposed to seven years.*

- **HB 667/SB 284:** Reviser's Bill - **Passed. Ordered Enrolled.**

Short Summary: *Corrects numer*

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ous perceived typographical and citation errors in various Florida statutes. Several amendments to Chapter 718 dealing with cross references to other sections of the statute.

- **HB 107/SB 1398:** Disposition of Unclaimed Property - **Passed. Signed by Governor, effective date October 1, 2001 (Chapter 2001-36).**

Short Summary: *Amendment to Chapter 717 involving disposition of unclaimed property. Reclassifies "abandoned" property as "unclaimed" property. Establishes due diligence standards.*

- **HB 959/SB 890:** Expediting Uncontested Mortgage Foreclosures - **Passed. Ordered Enrolled.**

Short Summary: *Amends Chapters 697.07 and 702.10. Provides for award of attorney's fees in default foreclosure without hearing if fees do not exceed three percent of amount owed. Provides for expedited disposition of uncontested foreclosures.*

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