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Get "Wired!"

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DOR Issues Letter of Technical Advice Regarding Deposits of Tentative Florida Estate Tax

In October 2001, the RPPTL Section requested guidance from the Florida Department of Revenue, in the form of a technical assistance advisement, on whether a deposit of the Florida estate tax would be unnecessary in a certain situation. The query was whether the probate estate or revocable trust of a Florida decedent has to make a deposit of the tentative Florida estate tax when real estate is being sold to a bona fide purchaser if the proceeds from the sale are expected to be needed to pay the debts or administration expenses of the estate or of the trust during its initial administration. Reprinted herein is the Department's response, in which it declines to issue a TAA but instead issues a letter of technical advice as to when the estate or trust is not required to make a deposit of the tentative Florida estate tax.

See letter, page 3

Message from the Chair:

Transaction Attorneys Really ARE Lawyers!!!

By Steven L. Hearn, Steven L. Hearn, P.A., Tampa, Florida, Chair



The title to this article may seem silly to many of you, but it is meant to point out an issue I feel is causing ever-increasing problems both within our profession, as well as between the profession and the public. Simply stated, a large portion of the public, and many members of the trial bar, simply do not view what transactions attorneys do as being the practice of law. Several years ago, a St. Petersburg Times reporter described probate administration as a "no-brainer." In recent discussions with a civil litigation attorney regarding electronic filing issues, he commented that it would be fine for probate, as a purely "forms-driven" practice, but would not work well for civil litigation. Real property closings are regularly conducted by non-attorney title insurance agents with no attorney participation. Tax advice and estate planning are a regular parts of business for many accountants and non-attorney financial planners. In my opinion, the word "attorney" in the phrase "transaction attorney" is gradually being replaced with "planner." If you want to be a planner, that's fine - stop reading this article and go on to the next one. On the other hand, if you still want to be an "attorney," you need to start learning about the issues and getting involved to address the problems.

Those of you who know me probably laugh at the thought that this article is be-

See "Chair's Message," page 6

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The Law Office Economics Committee of the Real Property, Probate & Trust Law Section of The Florida Bar has completed the arduous task of completing suggested forms with comments for the Real Property Practitioner. The forms (cd) are available through Florida Lawyers Support Services, Inc. (FLSSI) to RPPTL Section members.

(These forms will now be reviewed/revised annually.)

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August 1,2002

Mr. Charles Ian Nash, Co-Chair
Liaison with the Florida Department of Revenue Committee
Florida Bar Association
305 Fifth Avenue South. Ste. 204
Naples, FL 34102

RE: Letter of Technical Advice No. 02C3-001
Estate Tax – Release of Estate Tax Lien
Section 198.22, F.S.
Rule 12C-3.012, F.A.C.

Dear Mr. Nash:

This is in response to your letter of October 2, 2001, requesting the Department to provide an opinion on whether the estate of a Florida decedent (either a probate estate or the trust estate of a Revocable Inter Vivos Trust created by the decedent that is being administered in Florida after the death of the decedent) has to make a deposit of the tentative Florida estate tax pursuant to the provisions of Rule 12C-3.0l2(3)(a), F.A.C., when the real estate is being sold to a bona fide purchaser in money or money's worth if the proceeds from such a sale are anticipated to be necessary to pay the legally enforceable debts of or expenses of the administration of the estate of the resident decedent. The expenses of the estate include the expenses of administrating the Revocable Inter Vivos Trust of the resident decedent during the initial trust administration.

The Department of Revenue declines to issue a technical assistance advisernent, and instead is issuing this letter of technical advice in answer to your request.

Section 198.22, F.S., states:

> Lien for unpaid taxes. — Unless the tax is sooner paid in full, it shall be a lien for 12 years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien, and except that such part of the gross estate of a resident decedent as is transferred to a bona fide purchaser, mortgagee, or pledgee, for an adequate and full consideration in money or money's worth shall be divested of such lien and such lien shall then attach to the consideration received for such property from such purchaser, mortgagee, or pledgee. If the department is satisfied that no tax liability exists or that the tax liability of an estate has been fully discharged or provided for, it may issue a waiver releasing any or all property of such estate from the lien herein imposed.

Rule 12C-3.012(3)(a), F.A.C,, requires that the estate of a resident decedent must deposit with the Florida Department of Revenue a portion of the Florida estate tax, based on the value of the Florida real property sought to be released from the lien as it relates to the total value of all of the Florida real property comprising the estate of the resident decedent.

Rule 12C-3.012(3)(a), F.A.C., sets forth the procedure used to secure the release of the lien imposed by 8.198.22, F.Sä Rule l2C-3.012(l)(a). F.A.C., relating to the estate of a resident decedent requires that Form DR-308 (with three copies of a sufficient description of the property to be released) be filed with the Florida Department of Revenue along with the payment of the full, tentative or additional Florida estate tax.

However this rule does not set forth detailed circumstances when a deposit (prepayment) of the Florida estate tax would be considered unnecessary.

The estate of a Florida resident decedent (whether a probate estate or the trust estate of a Revocable Inter Vivos Trust created by the decedent that is being administered in Florida after the death of the decedent) is not required to make a deposit of the tentative Florida estate tax pursuant to provisions of Rule 12C-3.012(3)(a), F.A.C., when the personal representative of the probate estate or the trustee of the revocable living trust has obtained a court order authorizing the proceeds of the real property to be used to pay the legally enforceable debts of the resident decedent or expenses of the administration of the estate of the resident decedent.

Based on the requirements of s. 198.22, F.S., and to avoid the necessity of a deposit prior to the sale of real property, the personal representative must furnish the Department of Revenue Form DR-308 and attach a copy of the signed court order.

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

If you have further questions with regard to this matter and wish to discuss them, you may contact Technical Assistance and Dispute Resolution, 850-922-4712. If you have specific questions and would like a written response, the request should be addressed to the Office of General Counsel, Technical Assistance and Dispute Resolution, Department of Revenue, P. O. Box 7443, Tallahassee, Florida 32314-7443.

Sincerely,

M. E. Clemens, C.P.A.
Senior Tax Specialist
Technical Assistance and Dispute Resolution
Office of General Counsel

2002 Legislative Awards

By Peter M. Dunbar, Pennington Law Firm, Tallahassee, Florida

The annual "Legislator of the Year Awards" of the Real Property Probate and Trust Law Section were presented to **Representative Dudley Goodlette** and **Senator Locke Burt** at the Section's 2002 Annual Legislative Update. Both Legislators were recognized for their key contributions to one of the Section's most successful legislative sessions in history. It is Representative Goodlette's fourth consecutive Award from the Section and Senator Burt's second consecutive recognition.


GOODLETTE


BURT

Representative Goodlette was the prime sponsor of the omnibus bill revising Florida's Uniform Principal and Income Act, and he played key roles in the passage of the other 2002 initiatives of the Section, including the probate and trust law legislation. Representative Goodlette (R) of Naples is the Chairman of the Committee on Rules, Ethics and Elections and he will be entering his third term in the House of Representatives after the November Elections. Representative Goodlette is a former member the Board of Governors of The Florida Bar and long time member the Governing Council of the Section.

Senator Burt (R) of Ormond Beach was the prime sponsor of the legislation revising Florida's probate and trust laws, and he also was instrumental in the passage of other Section initiatives, including the new Uniform Principal and Income Act. Senator Burt has served as the Chairman of the Senate Judiciary Committee for the last two years and he has been a key supporter of the Section's legislative initiatives while he has served in that capacity. Under the term limits imposed by the Florida Constitution, Senator Burt is not eligible for re-election, and he is concluding 11 years of service in the Florida Senate.

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ing written by someone whose practice is limited to estate and trust litigation. In fact, much of my work results from self-written estate plans, unrepresented trustees, advice given by unqualified "planners," and lawyers who have become involved in "no-brainer" probate matters. For me this trend is wonderful from a business standpoint, and will certainly ensure that I will be busy for years to come. On the other hand, I sincerely hate to see the gradual erosion and narrowing of the role of attorneys in various personal and business transactions, and the damage done to the public by the increasing involvement of non-lawyers. Despite what others may argue, the "practice of law" is not and should not be limited to the courtroom. If the present trend continues, that's precisely where we're headed as a profession. The only truly debatable issue is: How soon?

Neither the public nor the trial bar are going to address these issues on behalf of the transaction attorney. Unfortunately, with a few exceptions transactional attorneys have done a very poor job of addressing their own collective future. Simply because of the nature of a transactions practice, many members of the RPPTL Section do not have the same daily contact with other attorneys in the community as do our brethren, the trial lawyers. As a result, although non-litigators often know of their peers, they often do not have the same personal, social, or professional relationships as does the trial bar. That, combined with the ever increasing pressure to perform financially, has created a professional group that at times displays an amazing level of apathy, has little or no current familiarity with issues affecting their profession, and lacks the unity that would otherwise empower them to create changes for their benefit and that of the profession as a whole. Unless we all take action to change, that combination of factors could lead to the decline and eventual extinction of the beast we currently refer to as the "transaction attorney."

While I know better to even imply that I know more than the countless others who have researched and studied these issues (my good friend Charlie Robinson, for example), I do have some thoughts, based upon my personal experiences, that I feel might be of use in attempting to slow down this potentially destructive flood that already is raging downriver:

DO YOUR RESEARCH (or at least read the research done by others) - Without putting down this newsletter, are you able to briefly describe the current problems facing the profession relating to MDP, MJP, UPL, DPR, SA and other current "hot" acronyms (and I mean more than just figuring out the acronym!!)? At the risk of increasing the number of angry letters that I already will receive as a result of this column, I venture to guess that many of you are unable to do so, and more of you might know the acronym but have little working knowledge of the real issues behind those acronyms. In less than the amount of time that you spend reading about your favorite college sports team, or surfing the web to research your next electronic gizmo purchase, you can gain a basic understanding of these issues. Until you know the problems facing you and the profession, you will be helpless to make any change.

EXAMINE YOUR PRACTICE (or at least think about what you're doing) - Before you can change, you need to know what you are doing and what needs to be changed. After you learn about the issues, it takes some real thought to figure out how these issues will affect you personally.

For example, the Florida Supreme Court is seriously studying the issues of "unbundling" legal services in an effort to reduce the critical and already overwhelming burdens placed upon the court system by pro se parties in family law proceedings. The initial reaction of most probate lawyers is "So what - I don't practice family law anyhow..." But in these days of computer software, self-prompting forms, and the already present ability to file a notice of limited appearance in a probate proceeding (see Florida Probate Rule 5.030(b)), will this elegant (and inevitable) solution for family law practitioners open Pandora's box for "legal technicians" and "paralegals" to quickly "unbundle" your probate practice?

Unless you learn about these types of issues, and think about how they apply to your personal practice, these results can occur before you ever know what is about to hit you - and then it's too late. I assure you that the billable hours you lose will pale in comparison to what you might lose in the future, not only financially but also professionally.

SPREAD THE WORD (or at least talk to someone other than your fellow employees, wife, and kids) - As a non-litigator, you do not have the "pleasure" of chatting with other trial lawyers while waiting around outside of the judge's chambers for the hearing to begin. You need to make an intentional effort to get outside of your firm, meet other lawyers, and tell them what you have learned. While you gossip over lunch with other attorneys about the latest partner or associate leaving [insert name of local big firm here] to go to work for [insert name of other local big firm here], mention what you know about issues affecting the profession. They might be bored by the message (as I am certain I am boring several of you with this column), but you never know when what you say might spark some interest and begin to burn away that dull haze of apathy.

GET NOISY (or at least let "The Florida Bar" know you are concerned) - Before I make my point here, it's time for a little classroom study on "Florida Bar 101." Other than mailing out the Bar News, the Bar Journal, dues statements, and seminar announcements, I suspect a substantial number of Florida lawyers have little knowledge regarding what "The Florida Bar" does or how it operates. Most, if not all, of the legislative, ethical, and professional positions taken on behalf of "Florida Lawyers" are the result of actions by "The Florida Bar." Your local Board of Governors representatives are part of a statewide body that, with the guidance of the Bar President, determine policies for all Florida attorneys. As (I hope) you are aware, the lawyers in each judicial circuit elect their representatives to the Board. For many of the reasons noted above, a substantial majority of the elected representatives are trial lawyers - it's simply the nature of the

beast. The result is that Florida Lawyers, including a very substantial portion who are *not* trial lawyers, are governed by a body of mostly trial lawyers.

Just as in any legislative style of governance, your representatives cannot represent you if they are unaware of your concerns or interests. If you take the time to learn about issues, and apply them to yourself, the only way to even hope to have "The Florida Bar" make policy to address your concerns is to make sure your Board representative knows of your concerns. Even this does not guarantee you will be heard.

For example, almost three years ago the Board of Governors was embroiled in a controversy over issues related to non-lawyer participation in ownership and operation of legal practices and related unlicensed practice of law issues. Those issues, and the proposals pending before the Board of Governors, had (and, in my opinion still have) the potential of substantial negative impact upon attorneys other than trial lawyers. At a Board of Governors meeting in Tampa, Florida, representatives of several transaction law related sections (including the Tax Section, Business Law Section, and RPPTL Section) all offered alternate proposals to that supported by the trial lawyer laden Board of Governors subcommittee appointed by the Bar President. Despite the solid opposition by groups representing what I submit to you was a substantial majority of Florida attorneys, the Sections' suggestions were largely ignored, and the Sections' representatives presenting those suggestions were aggressively attacked by certain members of the Board.

The purpose of the above message is to make you realize that unless you "get noisy," through both your communications to the Bar *and through your votes* in electing your Board representatives, your efforts to change (and potentially save) your profession might not be supported by "The" Bar.

GET INVOLVED (or at least support those who do so) - My initial title for this column was going to be "Confessions of a Bar Groupie." You all know us, even if not personally. We speak at too many seminars, write too many articles, show up at too many local, state, and national bar meetings, and devote far too many hours on "Bar work."

You do not need to be a "Bar Groupie" to get involved. You can make an impact by attending *and participating* in committee meetings. Attend *and participate* in your local bar activities, your local estate planning council, realtor association meetings, or any other gathering of attorneys with whom you share interests and professional goals. Additionally, and more importantly, offer your local "Bar Groupies" whatever support you might be able to provide, regardless of how limited you think that support may be. Offer to provide research for a portion of an article, provide suggested language for a statute or procedural rule that fixes the problem about which you are complaining, let your local RPPTL representatives know of your connections to legislators and offer to contact them if the Section needs their help. Offer to get the ear of your trial lawyer partner who is on the Board of Governors, and attend and listen at committee meetings, even if you do not have the time or desire to participate on a more involved level. You run the risk of learning something (see point #1 above) and run absolutely no risk of being forced to do any "non-billable" work - unless you want to do it.

For those of you aspiring "Bar Groupies" who want to participate even more, contact your Section representatives and let them know your interest. Attend committee and Executive Council meetings for the Section of your choice (even if you are not officially a member) and *volunteer* to do things. Although the time commitment can be daunting at times, I assure you that through the professional and personal contacts you make, as well as the knowledge that you gain, your time commitment will be repaid (both financially and professionally) repeatedly in the future.

I will now end this rant for this issue. Hopefully those of you still reading this column are doing so for one of two reasons. Some of you are angry and are finishing the article to get complete information for your angry letter to me. Others of you are reading because somehow I may have sparked some interest in learning about issues affecting you and, hopefully, in possibly participating a little more. In either case, whether through your anger or your interest, hopefully I have burned off a little of that haze of apathy.

ATTENTION BAR LEADERS:

Mark your calendars by placing a large red circle around January 16! Or for the legal tekkies out there, punch the date into your electronic organizer for the **2003 All Bar Conference.**

Florida Bar President Tod Aronovitz requess your participation in this special meeting to review the Dignity in Law campaign and engage in lively dialogue on the need to increase public awareness about the important role lawyers play in society.

The conference will be held in conjunction with **The Florida Bar's Midyear Meeting,** held **January 15-18** at **the Hyatt Regency in Miami.** Invitations have been issued by the president to Florida Bar leaders including The Florida Bar Board of Governors, The Florida Bar Young Lawyers Division Board, Voluntary Bar leaders, Section and standing committee chairs, members of the board of The Florida Bar Foundation, and members of the judiciary.

Dignity in Law is a public awareness campaign designed to promote dignity in the profession as well as emphasizing the need for a fair and impartial judiciary by applying an intensive, consistent communications effort. The plan is designed to complement existing public relations efforts of the Bar.

2003 All-Bar Conference DIGNITY IN LAW



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Swaine "Races" Through Another Year

By Steven L. Hearn, Steven L. Hearn, P.A., Tampa, Florida, Chair



M. SWAINE

With his successful and well attended convention program at Sanibel, Sebring lawyer Mike Swaine completed his term as 2001-2002 Chair for the Real Property, Probate & Trust Law Section of The Florida Bar, and finished an extremely productive year. Through his subtle, yet firm leadership style, Mike ably guided the Section through a very challenging year for legislative issues. Turnover from term limits, legislative focus upon redistricting, and State budget issues all threatened to sideline the substantial legislative packages drafted and promoted by the Section. Despite less than favorable odds, under Mike's leadership the Section was successful in obtaining passage of almost all of its real property, probate, and trust legislation.

More importantly, through his personal and professional conduct, Mike Swaine provided an important example of professionalism and highest ethics to all of those who have come in contact with him. His articles in ActionLine have consistently encouraged all of us to take the proverbial "high road" in our dealings with other attorneys, with the judiciary, and with our clients. In these days of the high stakes battle between often tasteless lawyer advertising versus costly public relations campaigns attempting to repair the image of the profession, Mike has provided the perfect example of the most important (and quite cost-effective) method of preserving the profession's image: simply make sure that your own actions and conduct always exceed the highest levels of professionalism.

An article about Mike Swaine's year as chair would not be complete without mention of the incredible effort provided by his gracious wife Mary. As those of us who attended Executive Council meetings always were aware, Mary devoted countless hours of her time to make sure that while Section members were in meetings and seminars, their spouses and guests always had a place to go, and always had a smiling face to greet them. Mary consistently sacrificed her personal and private space, even allowing her Sebring home to be invaded during a raging thunderstorm for a "quaint" dinner party with 120 of her closest Section friends. Mike and Mary's efforts were particularly impressive in light of the fact that they had also played a major role in assisting Miami attorney Wilson Smith during his previous year as Section Chair.

Through their selfless sacrifice, their hard work, and their overwhelming grace, style, and professionalism, Mike and Mary Swaine established a high standard for Section leadership - a standard that will always be a goal that each of us should try to attain. The lawyers, spouses, staff, and friends of the Section certainly were fortunate to have Mike Swaine as Chair, and we all extend a hearty "THANK YOU" to Mike and Mary Swaine.

WANTED!

Transactional Attorneys

To provide pro bono services to non-profit affordable housing organizations. "Lawyers for Affordable Housing," a collaborative effort of the Pro Bono Committee of the Real Property Probate and Trust Section of the Florida Bar and the Florida Housing Coalition ("FHC"), invites transactional attorneys to join its statewide panel. Panel members will have the opportunity to accept representation of qualifying FHC members with real estate, lending or organization issues.

Technical assistance will be available through FHC. To learn more, call Andrew M. O'Malley at 813/250-0577, or Chris O'Ryan at 813/639-9599.

American Red Cross to Issue Payments for 9/11 Deaths

The American Red Cross is preparing to issue flat gift payments of $45,000 to each of the estates of those killed as a result of the September 11, 2001 attacks.

It has asked us to ask you to contact the personal representatives or families of those victims you know of, and request permission to provide the American Red Cross with the information it needs to reach every estate of those killed in the attacks.

If any of you have specific information about the personal representatives and/or other representatives of these estates, please contact Daniel Zellman, Coordinator of Financial Assistance using the contact information below.

Thanks for your help.

Via mail:	Financial Assistance Program American Red Cross 100 Varick Street New York, NY 10013
Via e-mail:	fgp3@usa.redcross.org
Via phone:	212-875-2019

Section Salutes Wilson Smith at September Reception

By Jo Claire Spear, Esq., Jo Claire Spear, P.A., St. Petersburg, Florida

The Real Property Probate & Trust Law Section, Fidelity Title, and Steel Hector & Davis LLP co-hosted a reception honoring Wilson Smith at the Pearl restaurant and bar in South Beach Miami on September 21, 2002. The event celebrated Wilson's 50-year anniversary as a lawyer. Wilson was presented a plaque in honor of this milestone, and throughout the evening Wilson injected his usual dose of good humor.

Wilson's contributions to the Section are legendary. After obtaining his undergraduate and JD degrees from the University of Florida, in 1952 Wilson joined the predecessor to Steel Hector & Davis. Since that time, Wilson has focused his practice in the areas of probate and trust administration, and developed special expertise in probate litigation. He has been a member of the Section since 1978, served as the 2000-2001 Chair of the Section, and continues to be active in numerous state and federal probate law and trust and estate litigation committees. Wilson has also contributed to several Florida Bar probate, probate litigation, and trust administration CLE publications and lectured frequently on these topics. Wilson is included among the Best Lawyers in America, Trust and Estate Section.

Those that have worked with Wilson attest to his knowledge, high ethical standards, and commitment to mentoring young lawyers. Colleague and fellow Executive Council member Bob Goldman of Naples states, "What truly separates Wilson from most other lawyers is his truthfulness, humanity, and compassion. He taught me that the hallmark of a great lawyer is feeling in depth what your client is going through, what the other parties to a case are feeling, the human concerns of the judge, and the concerns of opposing counsel." According to Bob and Wilson's partners, these are just a few of the principles exemplified by "The Great One" and his work.

Congratulations Wilson; the Section salutes you!



AT THE RECEPTION:

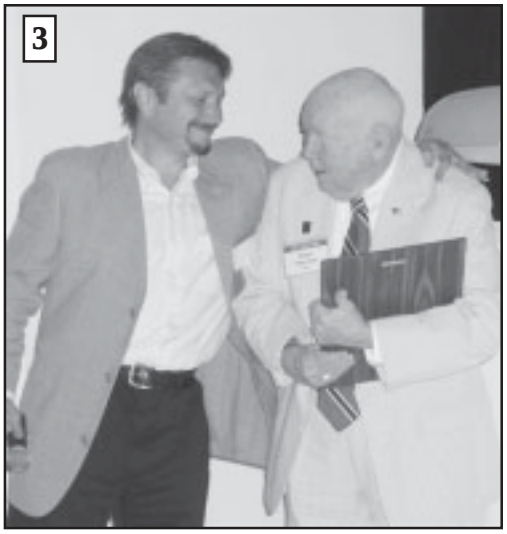
1. Steve Hearn congratulates Wilson Smith, as Lynn Banister and Suzanne Hearn look on.

2. Wilson is all smiles with an adoring fan.

3. Clay Craig and Wilson.

4. Wilson takes in the Pearl with James Skinner, Judge Maria Korvick and Lynn Banister.







Florida Community Association Legislative Update: Action and Reaction

By Michael J. Gelfand, Esq., Gelfand & Arpe, West Palm Beach, Florida

The Legislature has adjourned. The Governor has signed or vetoed bills. It is time for the annual Florida community association legislative update!

This year's legislation may be explained by physics: for every action there is an equal and opposite reaction! Very little occurred during the legislative session that was not directly related to a court decision.

Legislation did not concentrate on one type of community or area of law. Nevertheless, in quick summary it is doubtful that any of this year's legislation will have any immediate impact upon Florida community associations. Note that the legislation is subject to judicial review:

Flags. Florida Laws 2002-50. Paralleling Condominium Act provisions, two statutory changes were enacted as follows:
§720.304(2): Any homeowner may display one portable, removable United States flag in a respectful manner, regardless of any declaration rules or requirements dealing with flags or decorations.

§720.305(3): Homeowners' association documents, including declarations of covenants, articles of incorporation, or bylaws, may not preclude the display of one portable, removable United States flag by property owners. However, the flag must be displayed in a respectful manner ~~way and may be subject to reasonable standards for size, placement, and safety, as adopted by the homeowners' association~~, consistent with Title 36 U.S.C. chapter 10 ~~and any local ordinances.~~

Amendments. Florida Laws 2002-27. Responding to the first *Woodside Village Cd 'm Assn., Inc. v. Jahren* decision (See *Memorandum to Clients*, May 2000) which restricted condominium association amendments, numerous laws expressly grant condominium associations the authority to make changes as follows: §5 amends §718.104(4)(h), multi-condominium shares of common expenses; §5 amends §718.104(5), use restrictions; §7 amends §718.110(4), transfers of common area use rights; §9 amends §718.112(3), Bylaw provisions; §10 amends §718.113(2), authority for alterations and improvements; §11 amends §718.115(1), multi-condominium expenses. Notably, this law was passed after the Supreme Court's review of *Woodside* (See *Memorandum to Clients*, February 2002), reaffirming a condominium association's authority to amend documents.

Space Swapping. Florida Laws 2002-27, §6, enacted in response to *Brown v. Rice*, 716 So. 2d 807, (Fla. 5th DCA 1998), amending § 718.106(2)(b), to permit unit owners to exchange appurtenances such as parking spaces with the association's approval as provided in the condominium's declaration.

Money. Florida Laws 2002-27, §8. Condominium association funds may be used for property acquired as "association property." §718.111(4). In addition, § 718.111(13), extends the deadline for providing condominium association annual financial reports until twenty-one days after the report is completed or received, if no longer than 120 days after the end of the fiscal year or other date as provided in an association's bylaws.

Elections. Florida Laws 2002-27, §12 amends §718.1255(5), providing that disputes regarding condominium directors' elections are to be handled in arbitration on an "expedited basis."

Questions and Answers. Florida Laws 2002-27, §14. Condominium associations no longer have to prepare a "Questions & Answers" sheet, amending §718.503(2).

Foreclosures. Florida Laws 2002-8. The Documentary Stamp Tax paid at foreclosure sales is only to be paid on the amount of a bid for association lien foreclosures, amending §201.02(8).

Gated Communities. Florida Laws 2002-235, §2. A homeowner's association may seek title to public roads. The community must restrict access and have assessment authority to maintain the roads.

Timeshares. Florida Laws 2002-87, §1, amending 721.111(2) increases the number of promotional prizes, and §2, amending § 721.13, provides that management company rentals may be on a lower bulk rate and permitting pooling of certain funds.

Liability. Florida Laws 2002-285, seeks to limit one of the most significant liability decisions, *Owens v. Public Supermarkets, Inc. and Soriano v. B & B Cash Grocery Stores, Inc.*, 802 So.2d 315, (Fla. November 15, 2001), by amending §316.2121 to limit defendant land owners' burden of proof.

The Future. The 2003 Florida legislative session likely will discuss many issues. For condominium associations, this includes insurance coverage and hi-rise fire code compliance. For homeowner associations, this includes clarifying the ability to amend. For all associations this includes easier compliance with the Marketable Record Title Act and domestication of foreign associations.

It is never too early to adjust your procedures to take into account this year's legislative action and to consider contacting your legislators for next year's session.

Ethics Questions?

Call The Florida Bar's

ETHICS HOTLINE

1/800/235-8619

Executive Council Meeting, St. Augustine, Florida

November 21-24, 2002



We stayed in the beautifull Casa Monica Hotel.



Enjoying an evening at Casa Monica are (L-R): Pat Waller, Chip Waller (back), Phil Bauman, Suzanne Hearn, Nancy Baumann, David Brennan and Mike Swaine.



Tami Conetta, Barry Spivey and his talented daughter SPOON up the last bit of fun at Sunday breakfast.



Section members and guests bravely prepare to take a "Ghost tour" of St. Augustine.



Silvia Rojas, Dan Adams, Bill Haley, and Julie Williamson between meetings."



Halleluia! I think he said "We're adjourned...!"



Winifred and Joel Sharp pose with a stony-faced Henry Flagler.

Photos courtesy of Michael Gelfand, Michael Mosher and Silvia Rojas.

Estate and Trust Tax Planning Committee Minutes – Abbreviated, RPPTL Section of The Florida Bar

September 20, 2002
Key Biscayne, Florida

The meeting of the Estate and Trust Tax Planning Committee (the "Committee") of the Real Property, Probate and Trust Law Section of The Florida Bar was held on Friday, September 20, 2002, at the Ritz Carlton Hotel, Key Biscayne, Florida.

The first order of business involved the upcoming seminar. Rick Gans gave an update on the seminar, which is to be held on Wednesday, December 11th and Thursday December 12th. Rick confirmed that all of the speakers have been lined up and discussion took place as to what speaker we would have at lunch. It was decided that Rick and Jerry Wolf would come up with a speaker with the hopes that they would be able to get Steve Leimberg of Leimberg Information Services.

The next order of business was the Committee's proposed changes to Section 222.22 of the Florida Statutes. At the July 25th meeting Michael Stafford had volunteered to draft legislation to incorporate Section 529 plans in Section 222.22 of the Florida Statutes so as to specifically grant those plans protection from levy, attachment or execution by judgment creditors. Mike was unable to attend this meeting but sent the proposed changes to Charlie Nash. Discussion of the proposed legislation took place and Charlie presented Mike's draft. The consensus of the committee was that an additional section be added to Section 222.22 to exempt Section 530 Education IRAs from the reach of creditors.

Charlie Nash, after discussion among the committee members, agreed to prepare a revised draft of Section 222.22 of the Florida Statutes and forward that revised draft to each of the committee members via e-mail. Jay Wolfe and Brian Sparks each agreed to have a bankruptcy attorney in their respective law offices also review the proposed legislation. After receiving comments from each committee member, Charlie would then make whatever modifications deemed advisable to the proposed legislation and then submit it to Bonnie Bevis, Section Administrator for the Real Property, Probate and Trust Law Section, to be included as an action item in the agenda for the Executive Council Meeting to be held in St. Augustine on November 22, 2002.

Next, the Committee discussed proposed charitable regulations. Charlie Nash passed out proposed Reg. 115781-01 dealing with the definition of guaranteed annuity and unitrust interests. It was determined that these should be studied and discussed at the meeting in November.

Thereafter, Jerry Wolf reported that the American Bar Association had approved multi-jurisdictional practices so if a person has practiced for more than five years that they would be permitted to come to another state such as Florida and practice. Charlie Robinson will be reviewing this on behalf of The Florida Bar.

Finally, Brian Sparks indicated that a new committee had been formed and they were soliciting comments with regards to addressing the Revised Uniform Limited Partnership Act. Comments concerning that act should be submitted to Brian Sparks.

2003 Executive Council Meetings

Feb. 26 – Mar. 2
Out of State Executive Council Meeting: Healdsburg, CA

May 22 -25
Section Convention and Executive Council Meeting: Renaissance Vinoy Resort & Golf Club, St. Petersburg, FL

July 31 – Aug. 3
Legislative Update and Executive Council Meeting: The Breakers Hotel, Palm Beach, FL

Upcoming CLE Seminars

December 11 -12:	Estate Planning CLE Seminar: "One Size Doesn't Fit All: Customizing the Estate Plan" Live Presentations: Ft. Lauderdale (Dec. 11) and Tampa (Dec. 12) Video Replays: 6 locations (Jan. 9 – Jan. 31, 2003)
February 5 -6 :	Landlord Tenant CLE Seminar, Live Presentations: Ft. Lauderdale and Tampa
February 20-21:	Probate Litigation CLE Seminar, Live Presentations: Ft. Lauderdale and Tampa
March 6 -7:	Real Property Litigation CLE Seminar, Live Presentations: Ft. Lauderdale and Tampa

Real Property Case Summaries

by Stephen Edward Silkowski, Esq., Jacksonville

Condominium declaration amendment that restricts the leasing of units is not arbitrary, against public policy, or in violation of some fundamental constitutional right.
Woodside Village Condominium Association, Inc., v. Jahren, 27 FLW S34 (Fla. 2002)

At issue was the validity of amendments to the Declaration of Condominium adopted by the condominium owners that restrict the leasing of units. When an amendment has been passed by an association's membership, a court would presume that the restriction was valid and uphold it unless it was shown that the restriction was arbitrary, against public policy, or in violation of some fundamental constitutional right. Unit owners were on notice that the condominium form of ownership that they acquired when they purchased their units was subject to change through the amendment process, and that they would be bound by properly adopted amendments.

The Association had acted within the framework of the Declaration in adopting the lease-restriction amendment, and the unit owners failed to demonstrate that the restriction, in and of itself, violates public policy or their constitutional rights. It was apparent from the circumstances giving rise to its adoption that the amendment was intended to promote owner occupancy of the condominium units, a goal certainly consistent with the concept of condominium living as originally contemplated by the Legislature. Persons acquiring units in condominiums are on constructive notice of the extensive restrictions that go with this unique, and some would say, restrictive, form of residential property ownership and living. Accordingly, the court concluded that the amendment was valid and enforceable against the unit owners.

As to the question of how far could a super-majority of condominium owners go in restricting leasing rights in the condominium units, the answer would usually be found in the legislative scheme creating and governing condominiums.

Landlord is vicariously liable to tenant for defective work of independent contractor that landlord negligently hires.
Suarez v. Gonzalez, 27 FLW D104 (Fla. 4th DCA 2002)

Tenant sustained a spinal cord injury, resulting in partial paralysis of his arms and legs, when a kitchen cabinet fell from the wall and struck him on the head. Landlord did not know the name of the contractor who installed the cabinets. A relative had hired him off the street and the landlord paid him in cash.

Where the employer is negligent in selecting, instructing, or supervising the independent contractor, he becomes vicariously liable for the contractor's work. Landlord negligently selected the anonymous "phantom" contractor who installed the cabinets. Where there is a foreseeable risk of harm to others, it is the duty of an employer of an independent contractor to exercise reasonable care to employ only contractors competent to do the work with reasonable assurance of safety to others.

Landlord also contended that the trial court erred in excluding the anonymous independent contractor from the verdict form as a nonparty so that the jury could assess comparative fault. Because landlord negligently hired the "phantom" contractor, she is vicariously liable for his negligence. This is not a situation where there were joint tortfeasors, so the comparative fault statute does not apply.

A structure that causes recurrent flooding of adjoining land constitutes a continuing tort, with fresh causes of action for nuisance and trespass accruing with each occurrence.
Carlton v. Germany Hammock Groves, 27 FLW D103 (Fla. 4th DCA 2002)

Carlton filed suit for damages resulting from the flooding of his property caused by a berm on New Hammock Groves property. The four count complaint sought damages on the theories of nuisance (count I), trespass (count II), express easement (count III) and an easement by implication (count IV).

Carlton owned Carlton Parcel 1 and Carlton Parcel 2. New Hammock Groves owned the parcel of land on the southern border of Carlton Parcel 1and 2, known as Section 32. This case dealt with the flooding and drainage of Carlton Parcel 1 and 2. Prior to 1980, all of the land at issue was owned by Carlton. In 1980, Carlton conveyed Section 32 along the southern border of Carlton Parcel 1 and 2 to Old Hammock Groves, New Hammock Groves' predecessor in interest. Surface water naturally flowed south from Carlton's Parcels 1 and 2, over the Old Hammock Groves' land, Section 32, and into Germany Canal which is the southern boundary of Section 32.

After the 1980 conveyance, Old Hammock Groves constructed a berm on the northern border of Section 32, which runs along the southern border of Carlton Parcel 1 and 2. At that time, as a gratuitous gesture, Old Hammock Groves installed a culvert into its berm to allow drainage from Carlton Parcel 1 and to ease intermittent flooding on Carlton Parcel 1 and 2.

In 1989, the culvert was crushed by Old Hammock Groves. Since that time, Carlton had been refused the right to drain either Carlton Parcel 1 or 2 into the culvert or over or upon Section 32. The berm along the northern border of Section 32 caused flooding on Carlton Parcels 1 and 2.

continued...

In 1992, Old Hammock Groves was purchased by New Hammock Groves, which also refused Carlton's right to drain his land onto Section 32.

Carlton took no action against Old Hammock Groves or New Hammock Groves until he filed the instant suit against New Hammock Groves in 1998. The complaint alleged that the berm on New Hammock Grove's property impounded water and caused severe flooding of Carlton Parcels 1 and 2. The complaint alleged that the berm and resulting flooding constituted a nuisance (count I) and trespass (count II). The complaint also alleged an express easement to drain Carlton Parcel 1 (count III) and an easement by implication to drain Carlton Parcel 2 (count IV). Carlton asserted the flooding of his land was a reoccurring injury that resulted in reoccurring damages during each wet season. Carlton argued that under the continuing torts doctrine, each successive flooding since 1989 gave rise to new causes of action under the nuisance (count I) and trespass (count II) theories, against which the statute of limitations begins to run from the time of each successive injury. New Hammocks Groves argued that the flooding is a permanent injury which occurred four years before suit was filed, thus barring the instant action on the nuisance and trespass theories.

Both an action for nuisance and an action for trespass on real property shall be commenced within four years from the time the cause of action accrues. The issue was whether the limitations period started running in 1989 when the culvert was crushed for a single cause of action comprising permanent damage (past, present and prospective), so that the cause of action was barred in 1993; or whether each successive flooding after 1989 gave rise to a new cause of action against which the statute of limitations started to run from the time of each successive injury, so that Carlton could recover for the damage resulting from the floodings that occurred in the four years prior to filing suit.

When the statue of limitations commences to run against damages from overflow of land caused by an artificial construction or obstruction, regardless of whether the theory of liability is trespass or nuisance, the determination of the question whether the flooding of land gives rise to a single right or successive rights of action depends ordinarily upon whether the injury or the causative condition is permanent or temporary. The rule prevailing in most jurisdictions is that if the injury is permanent, or if the causative structure or condition is of such a character that injury will inevitably result and the amount of the damage can be determined or estimated, a single action may and should be brought for the entire damages, both past and prospective. But if the overflow is merely temporary, occasional, or recurrent, causing no permanent injury to the land, or if the situation involves other elements of uncertainty, such as the possibility or likelihood of the alteration or abatement of the causative conditions, or uncertainty in regard to the future use or improvement of the land, so as to prevent a reasonably accurate estimate of future damages, it is generally held that each repetition of the overflow gives rise to a new cause of action for which successive actions may be brought. The period of limitations does not commence to run against a cause of action for permanent damage to realty until the damage is apparent and it becomes obvious such damage is of a permanent character.

Carlton alleged sufficient facts with regards to the flooding and resulting damage occurring in the four years preceding the date suit was filed so as to urge application of the continuing torts doctrine. Damage to the property was caused by intermittent flooding occurring during rainfall, and the flooding was abatable. The flooding did not occur before the culvert was crushed; and thus, a culvert would abate the flooding. Because the injury is allegedly reoccurring and abatable, it is arguably not a permanent injury to the land, but rather a reoccurring injury to the land. Because there are genuine issues of material fact concerning whether there was a permanent or reoccurring injury to the land, the trial court had erred when it granted summary judgment on counts I (nuisance) and II (trespass).

Accordingly, the order of summary judgment was reversed with respect to counts I and II, and affirmed with respect to the causes of action for an implied easement (count III) and an express easement (count IV). A cause of action for an easement accrues when an adverse party prevents use of the easement. The causes of action accrued in 1989 when the culvert was crushed, thereby preventing drainage of Carlton's land and denying his use of the easement. This case was filed in 1998, beyond the time prescribed by the applicable statutes of limitations.

Subdivision lots should bear the benefits or burdens of a corrected plat mistake proportionately, unless application of the rule would be impractical, where the parties have established a boundary by agreement, or where a party's surveyor has found the original surveyor's monuments.

Petryni v. Denton, 27 FLW D212 (Fla. 2nd DCA 2002)

This case evolved from a dispute as to the boundaries between three lots in a platted residential subdivision. The Petrynis own lot 4, and Denton and Barco own lots 5 and 6, respectively. Each lot has frontage on a private subdivision road. According to the subdivision plat, lots 5 and 6 each have 125 feet of frontage, and lot 4 has 120 feet of frontage, consisting of two angled sections, one 55 feet long and the other 65 feet long. The dispute arose when it was discovered that the actual total road frontage of the three lots, when measured on the ground, was ten feet less than the measured distances on the plat due to an error in the original plat.

The subdivision was originally platted in 1958. In 1982, Denton placed four concrete boundary monuments between lots 4 and 5 along what Denton contends is the true boundary line. Denton's boundary line effectively placed the entire ten-foot deficiency within the Petrynis' lot and decreased the Petrynis' frontage from 120 feet to 110 feet. Moreover, Denton's boundary line encroached within 3.1 feet of the Petrynis' house, rendering their house out of compliance with the county code setback requirements. The Petrynis filed an ejectment action against Denton seeking removal of the monuments and shrubbery

continued...

planted along the Denton-created boundary line, removal of a water well near the Denton-created boundary line, and removal of a boat ramp which all the parties agreed was on the Petrynis' property. Denton filed a third party claim against all of the other lot owners in the subdivision, each of whom successfully obtained dismissal from the case, except for Barco.

After a trial on the issues, the trial court denied the claim of ejectment, in effect, attributing the entire ten foot deficiency to lot 4 and denied the claim for ejectment for removal of the boat ramp on the ground that Denton had offered to remove it in a letter he wrote to his attorney approximately one month before the complaint was filed. The Second District Court of Appeal reversed.

An action for ejectment is the appropriate method for determining boundary disputes. When division lines are run splitting up into parts larger tracts, it is occasionally discovered that the original tract contained either more or less than the area assigned to it in a plan or prior deed. Questions then arise as to the proper apportionment of the surplus or deficiency. In such cases the rule is that no grantee is entitled to any preference over the others, and the excess should be divided among, or the deficiency borne by, all of the smaller tracts or lots in proportion to their areas. The causes contributing to the error or mistakes are presumed to have operated equally on all parts of the original plat or survey, and for this reason every lot or parcel must bear its proportionate part of the burden or receive its share of the benefit of a corrected resurvey. This rule for allotting the deficiency or excess among all the tracts within the limits of the survey may be applied where the original surveys have been found to have been erroneous, or where the original corners and lines have become obliterated or lost. If the lines of a survey are found to be either shorter or longer than stated in the original plat or field notes, the causes contributing to such mistakes will be presumed to have operated equally in all parts of the original plat or survey, and hence every lot or parcel must bear the burden or receive the benefit of a corrected resurvey, in the proportion which its frontage as stated in the original plat or field notes bears to the whole frontage as there set forth.

This apportionment rule has its exceptions. The rule should not be applied where it is impractical, where the parties have established a boundary by agreement, or where a party's surveyor has found the original surveyor's monuments. As to this latter exception, the monuments placed on the ground by the original surveyor control over the written plat. That which the original surveyor actually did rather than what he might have intended is the primary consideration.

The monument located adjacent to the road in this case was placed by subsequent surveyors and not the original surveyor. Accordingly, the trial court should have apportioned the deficiency among lots 4, 5, and 6. The trial court should have ordered removal of the boat ramp as prayed for by the Petrynis. The parties agreed that the boat ramp encroached upon the Petrynis' property even using Denton's proposed boundary line. The mere fact that Denton had previously agreed to remove the boat ramp was not a defense to the action for ejectment.

Sale contract clause requiring buyer to pay for repairs on other parcel is not illegal, even though buyer misrepresented to county his ownership of other parcel to avoid hiring a contractor.
Vollmer v. Key Financial Corp., 27 FLW D203 (Fla. 2nd DCA 2002)

In this action on a real estate contract, the buyer, Vollmer, challenged the trial court's order rescinding the contract and canceling the mortgage based on its finding that one of the contract provisions was illegal.

In 1995, Vollmer and Bobby J. Key entered into a real estate contract by which Vollmer agreed to buy a parcel of real estate (Parcel A) from Key. By an addendum, the parties agreed that Vollmer would pay $25,000 of the purchase price by replacing or repairing an existing seawall on an adjacent piece of property (Parcel B) owned by Bobby Key. The addendum stated, "Buyer to pay for permits, supplies and labor . . . . Buyer to use repair and replacement of seawall as equity in purchase with an estimated value of $25,000". As part of the closing, Bobby Key quitclaimed title to Parcel A to Key Financial Corporation, and Key Financial deeded the property to Vollmer.

Consequently, the parties to the resulting mortgage and the promissory note used to secure the seawall repair were Key Financial and Vollmer; Bobby Key was not a party to any of these transactions. Bobby Key was a party only to the original real estate contract, to which Key Financial was not a party.

Three years after the closing, Vollmer applied for and obtained permits from Lee County allowing him to proceed with the seawall repairs he had agreed to perform. Because he was not a licensed contractor, however, in order to obtain the permits, he misrepresented that he owned the property on which the repairs were to be done. Lee County apparently allows homeowners to perform their own repairs. Vollmer then performed the repairs to the seawall.

Key Financial filed a complaint against Vollmer, requesting rescission of the real estate contract and cancellation of all other related documents on the basis of illegality of the contract. Key Financial argued that the contract was illegal because the seawall provision required Vollmer to do an illegal act - perform construction work without a license.

Because this issue came to the appellate court on review of the trial court's interpretation of the contract, it was entitled to de novo review. The contract provision does not require that Vollmer personally perform the seawall repairs. Rather, it states that he is required to "pay for permits, supplies and labor." If anything, this language implies that the parties anticipated that Vollmer would hire a contractor to do the agreed work, not that he would personally do it. Therefore, the court concluded that the contract provision is not illegal and that the contract itself is not illegal. If Key Financial believed that the work was shoddily performed or not up to the quality that it bargained for, it could pursue a cause of action for damages.

Condominium & Planned Development Committee Minutes – Abbreviated, RPPTL Section of The Florida Bar

July 25, 2002, Boca Raton, FL

CALL TO ORDER

Chair, Robert M. Schwartz, called the Florida Bar Condominium and Planned Development Committee meeting to order in the Mizner Room, Boca Raton Resort & Club, Boca Raton, Florida, on Thursday, July 25, 2002, at 2:10 p.m.

LEGISLATIVE UPDATE

Mr. Gelfand reported that this has been a quite busy year with significant legislation passed. This meeting was called to plan the 2003 agenda, both offensively and defensively.

Insurance

There is a practical question of what can be accomplished. Significant problems include increasing deductibles and exclusions. Many owners especially without mortgages do not have insurance. There is a question of retroactive impact. Potential action items include: what is covered; addressing deductibles, the potential of reserves and self insurance pools; and mandatory insurance.

Mr. Grant suggested a sub-committee to review the situation and propose solutions. Numerous individuals volunteered to assist, but chairing is another matter. There is a potential of a sub-committee meeting before the next committee meeting.

Vested Rights

Mark B. Schorr distributed draft language which he developed with the assistance of Vicki Carter. Discussion proceeded as to the meaning of the phrase "substantive membership rights." There is a need to ensure that existing document amendment rights are not limited. Mr. Schorr will provide a final draft incorporating comments after the meeting.

Marketable Record Title Act

This issue was passed to allow the working group to report at the next meeting.

Master Associations

There was discussion as to whether there will be a bill addressing master associations. Concern was expressed that any effort not lose site of practical impact. The members will closely watch this issue, including the potential of seeking assistance from the Section's lobbyist.

Unbuilt "Phantom Units

There was a renewed interest in this issue. Discussion was initiated, noting that even developer's counsel recognized the correctness of the Second DCA decisions and the incongruity of the Fourth DCA's decisions. There appeared to be unanimous interest in proposing legislation to address the Fourth DCA's decisions.

Discussion proceeded on related termination issues. There may be a problem seeking a solution with unbuilt units that cannot be built. There was also extensive discussion on how to address termination of an existing project in a practical method. One potential method may be allowing the withdrawal of unbuilt property upon payments. Relating to termination of condominiums, there is a need to address changing use rights and questions of hold outs and non-responsive owners.

Fire Codes

Mr. Dunbar noted that the issue causing debate regarding high rise sprinklers is not the health-safety issue but instead the issue of who insures the physical loss. Self insurance is always an option.

DIVISION OF LAND SALES RULES UPDATE

Mr. Sklar reported that, as of July 11, the "final version" with the blessing of the Division Director and General Counsel were set for review to

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Do you or your company offer a product or service that may be useful to the members of the Real Property, Probate & Trust Law Section of The Florida Bar or their clients? Do you want to target your marketing efforts to the more than 8,000 attorneys who practice Florida real estate, probate and estate planning law within and outside the State of Florida? If so, an advertisement in *Actionline* might be the perfect vehicle to reach your target audience. *Actionline* is now accepting paid advertising from outside vendors; full-page, half-page and quarter-page advertising space is now available. If you are interested, please contact George J. Meyer at (813) 229-4133 or *gmeyer@carltonfields.com* for advertising guidelines and rates.

MINUTES
from previous page

the Secretary's office. The product is the result of two years hard work. The industry and State contacts deserve great credit in crafting the most substantial changes in seven to ten years.

Among the changes are:

- Clarification of days notice and meeting;
- New developer filing statements, for phases, revitalization, subsequent developer, filing checklist, notice of recording, and receipt for documents;
- Filing is now available by CD Rom and e-mail;
- New definitions of developer and media, the latter being expansive and concerning developers, the focus is on the filing which follows the project;
- List of filings that are not material and adverse, including name and ownership so long as business organization is the same;
- Not having filing fees will hold up review time;
- Assurances are clarified, including reporting, escrows & types;
- Delivery of documents by alternative media requires a paper option.
- Reserves criteria are defined for pooling.

Proposed conversion deposit rule was not accepted and may be addressed at the Institute. Mr. Sklar will raise that issue and the request for a paper prospectus requirement with the Division. There was a consensus to seek Section legislative action for passage.

RECENT CASES.

Mr. Gelfand presented in quick order a number of decisions issued after the main meeting which may be of import including the following:

Holiday Square Owners Association, Inc. v. Tsetsenis, 27 Fla. L. Weekly D1600 (Fla. 5th DCA July 12, 2002) which affirms the novation theory stated in *Jakobi v. Kings Creek Village Townhouse Ass'n. Inc.*, 665 So. 2d 325 (Fla. 3rd DCA 1995).

Emerald Estates Comm. Ass'n, Inc. v. Gorodetzer, 27 Fla. L. Weekly D1161 (Fla. 4th DCA May 15, 2002) addressing alteration restrictions in which the burden is on the opponent to prove a restriction is unreasonable, enforcing an anti-waiver covenant and holding that there is no reasonable reliance upon a developer sales person when the declaration requires a writing from the association.

Anton v. Anton, 27 Fla. L. Weekly D1096 (Fla. 4th DCA May 8, 2002) holding that co-trustees may not rely upon the other trustee to administer the trust even if the other trustee is an attorney.

Venetian Isles HOA, Inc. v. Albrecht, 27 Fla. L. Weekly D1575 (Fla. 2nd DCA July 10, 2002) providing for plain meeting of covenants including duration provisions.

Campus Communications, Inc. v. Earnhardt, 27 Fla. L. Weekly D1595 (Fla. 5th DCA July 12, 2002) concerning vested rights issues.

Becker v. Re/Max Horizons Realty, Inc., 27 Fla. L. Weekly D1357 (Fla. 1st DCA June 12, 2002) providing that late charges may be utilized to satisfy a jurisdictional amount in a claim upon a note.

Seelbinder v. County of Volusia, 27 Fla. L. Weekly D1281 (Fla. 5th DCA May 31, 2002) the county's land owner did not have duty to warn of lightening risk; however, once duty was assumed then duty must be undertaken in a reasonable manner.

Berne v. Beznos, 27 Fla. L. Weekly D1370 (Fla. 3rd DCA June 12, 2002) holding that concierge service in New York is not valid under Florida law.

Stamato v. Stamato, 27 Fla. L. Weekly D1380 (Fla. 4th DCA June 12, 2002) non-receipt of order inducing settlement not grounds to vacate a settlement.

Dr. Lakes Inc. v. BrandsMart U.S.A. of West Palm Beach, 27 Fla. L. Weekly D1484 (Fla. 4th DCA June 26, 2002) holding that mediation confidentiality statute will not bar testimony of settlement to determine whether a unilateral mistake justified vacating settlement agreement.

R. J. Reynolds Tobacco Co. v. Kenyon, 27 Fla. L. Weekly D1513 (Fla. 2nd DCA June 28, 2002) addressing legal holidays and filing deadlines.

Moossun v. Orlando Regional Health Care, 27 Fla. L. Weekly S596 (Fla. June 20, 2002) case management conference order does not constitute record activity justifying the fate of motion to dismiss for lack of prosecution.

Healthcomp Evaluation Services Corp. v. O'Donnell, 27 Fla. L. Weekly D1398 (Fla. June 14, 2002) holding that arbitration clause prohibiting appeal from arbitration decision is unenforceable and may be severed from arbitration agreement.

Respectfully Submitted,
Michael J. Gelfand, Vice Chair

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.

RPPTL-PAC Endorsements

By Peter M. Dunbar, The Pennington Law Firm, Tallahassee. Florida

RPPTL-PAC, the political action committee of contributing members of the Real Property, Probate and Trust Law Section, was an active participant in the 2002 State Legislative races. All 120 seats in the Florida House of Representative and all 40 seats in the Florida Senate were contested in 2002, and RPPTL-PAC endorsed and contributed to the election campaigns of the following candidates for the State House and Senate:

Senators:
Richard Mitchell (District 3)
Charlie Clary (District 4)
Evelyn Lynn (District 7)
Jim King - (District 8)
Mike Fasano (District 11)
Dennis Jones (District 13)
Bill Posey (District 15)
Mike Bennett (District 21)
Lisa Carlton (District 23)
Bill Posey (District 24)
Jeff Atwater (District 25)
Dave Aronberg (District 27)
Mandy Dawson (District 29)
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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 Dresden Brunner, Steel Hector & Davis, 3003 Tamiami Trail N., Suite 300, Naples, FL 34103. Please include a hard copy of the proposed article, along with a computer diskette containing the article in Word 6.0 or 7.0 format. Alternatively, articles may be E-mailed to *dbrunner@steelhector.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 Dresden Brunner at (941) 430-1800 to obtain additional publication guidelines.

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

***Actionline* Issue**	**Publication Deadline**
Spring 2003	January 31, 2003
Summer 2003	April 30, 2003
Fall 2003	July 31, 2003
Winter 2003	October 31, 2003

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

Probate, Guardianship & Trust Case Summaries

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

Enforcement clause in a real estate contract which provided for attorney's fees to prevailing party was not a contract for attorney's fees within the meaning of F.S. 737.306(1).
Jonathan D. Commander, P.A., et al. v. McCann-Coyner-Clarke Real Estate, Inc, So.2d (Fla. 4th DCA 2002); 27 FLW D1588 (July 10, 2002).

Commander, an attorney, served as a co-trustee with regard to a piece of real property on behalf of a foreign investment group. His law firm (Commander P.A.) also provided legal services with regard to the sale of the property and his real estate company (3 Bridges) performed some negotiations with potential buyers of the property, although those negotiations were ultimately unsuccessful. The ultimate buyers of the property were brought to the attention of the foreign investors by a real estate company other than 3 Bridges, but Commander P.A. negotiated the land sale contract and performed the closing. After the closing, Commander P.A. filed an interpleader action to determine whether 3 Bridges would be entitled to the commission on the sale of the property and the other real estate company filed claims against Commander, individually and as trustee, and 3 Bridges. The court held that 3 Bridges was liable for tortuous interference with a contract and that Commander was personally liable for the interference but made no ruling with regard to any liability of Commander in his role as co-trustee. The land sale contract contained a provision indicating that the prevailing party was entitled to recover attorney's fees from the non-prevailing party. Based on that clause, the trial court found that Commander, as trustee, was the non-prevailing party, and imposed personal liability on him under F.S. 733.306(1). The 4th DCA reversed the award of attorney's fees because the trial court never entered a judgment against Commander, as co-trustee. The 4th DCA also held that even if Commander, as co-trustee, were the non-prevailing party under the contract, F.S. 737.306(1) would not be applicable in this situation. Section 737.306(1) is only applicable in situations where a trustee actually hires an attorney during the course of his administration of the trust. The Court ruled that:

> "The attorney's fees provision of the land sale contract was an agreement between the parties allocating attorney's fees if any litigation should arise concerning the contract. It was not a contract for attorney's fees in and of itself. Commander makes the public policy argument that holding such clauses to be attorney's fee contracts within the meaning of section 737.306(1)(a) would have the effect of opening trustees to personal liability under every contract containing an attorney's fee clause. We agree."

***Robinson* adopted by the 5th DCA and circuit court had authority to reform a trust even though reformation was not plead, because circuit court, sitting as a court of equity, has wide discretion in fashioning remedies to satisfy the circumstances before the court.**
Schroeder, et. al., v. Gebhart, et. al., 825 So.2d 442 (Fla. 5th DCA 2002); 27 FLW D1652 (July 19, 2002).

The Appellants appealed a decision of the trial court finding that the testamentary aspects of the Eleanor C. Russell inter vivos trust (referred to below as the "Trust") contained a drafting error and that the Trust should be reformed to include several other beneficiaries. The 5th DCA affirmed the trial court and in doing so specifically adopted *In re Estate of Robinson*, 720 So.2d 540 (Fla. 4th DCA 1998). The trial court's decision was upheld even though the Appellees never requested reformation in any of their pleadings. The complaint filed by the Appellees only sought the imposition of a constructive trust, not reformation. The 5th DCA concluded that the trial court, as a court of equity, had the authority to reform the trust even though that remedy was not specifically plead, "Once a court of equity acquires jurisdiction over a dispute, it is authorized to administer full, complete and final relief. . . . We conclude that the trial court, sitting as a court of equity, had the authority to reform the trust, although reformation was not sought."

It was not error for the court to decline to appoint a guardian for a Ward which had been adjudicated incapacitated where there was a DPOA in place which could be utilized to care for the Ward and that was the least restrictive alternative given the circumstances of the case.
Smith, et al., v. Lynch, et al., 821 So.2d 1197 (Fla. 4th DCA 2002); 27 FLW D1717 (July 24, 2002).

The trial court entered an order finding that a proposed Ward was incapacitated but declined to appoint a guardian. The trial court felt that the expense and intrusion of a formal guardianship was not necessary as the Ward had previously executed a valid DPOA appointing her spouse and step-daughter as attorneys-in-fact and they were capable of caring for her financial needs. In affirming the decision of the trial court, the 4th DCA discussed F.S. 744.331(6)(f) which appears to require the appointment of a guardian upon the entry of an order of incapacity and F.S. 709.08(3)(c) which provides that the DPOA may remain in effect despite a judicial determination of incapacity if, "[t]he court determines that certain authority granted by the durable power of attorney is to remain exercisable by the attorney in fact." The 4th DCA indicated that the conflict between the statutes was only "apparent and not real" as F.S. 744.344(2) and F.S. 744.1012 make it

clear that, "The obvious import behind all of these provisions is to require the appointment of a guardian only when no other lesser intrusion on the privacy of the ward will accomplish the purpose of protecting the ward's property." The 4th DCA was careful to emphasize the specific facts of this case in upholding the decision of the trial court indicating that (1) the Ward and her spouse were married for 18 years, (2) the spouse was a "loving, caring husband", (3) the petitioners for the guardianship were not as close to the Ward as the spouse, and (4) the Ward had a very modest estate apart from her joint interest in the marital home.

Constructive trust may not be imposed over assets of an estate in favor of a beneficiary named in an invalidly executed will. Question certified to be of great public importance. Supreme Court declined to extend In re Estate of Tolin, 622 So.2d 988 (Fla. 1993).
Allen v. Dalk, 826 So.2d 245 (Fla. 2002); 27 FLW S708 (August 29, 2002).

Prior to her death, a decedent went to her attorney to execute a will, a DPOA and a living will and designation of health care surrogate. While all of the other documents were properly executed, the decedent failed to sign a copy of the will (although the witnesses signed the will). The decedent's niece petitioned for the administration of the unsigned will. The probate court entered an order admitting the will to probate finding that the decedent's failure to sign the will did not impose a bar to probate because the decedent ratified the typed signature on the will contemporaneously with the signature of the witnesses to the document. The order also ruled that if the will was not admitted to probate that as a matter of law a constructive trust should be imposed in favor of the petitioner. The 5th DCA reversed the order admitting will and found that since the will was improperly executed a constructive trust could not be imposed as that would have the effect of validating an invalid will. While the 5th DCA reversed the order of the probate court, they certified the following question to be of great public importance:

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

While the niece conceded that the will was not properly executed, she argued to the Florida Supreme Court that the 5th DCA erred by reversing the order imposing a constructive trust based on the earlier reasoning of the Florida Supreme Court in *In re Estate of Tolin*, 622 So.2d 988 (Fla. 1993), which imposed a constructive trust when a decedent attempted to revoke a codicil but failed to comply with the statutory requirements for revocation by a physical act. The Florida Supreme Court declined to extend the reasoning of *Tolin* to the facts of the present case and answered the certified question in the negative. In reaching their decision the Florida Supreme Court stated, "An order imposing a constructive trust under these facts would only serve to validate an invalid will."

Order appointing co-personal representative was not an appealable order as it does not finally determine a right or obligation of an interested person.
Garces v. Montano, So.2d (Fla. 3rd DCA 2002); 27 FLW D1791 (August 7, 2002).

The probate court appointed a personal representative to administer an estate. The court subsequently appointed a co-personal representative and the first personal representative appealed the order. The 3rd DCA held that the order appointing a co-personal representative was not an appealable order under Fla.Prob. R. 5.100 as it did not finally determine a right or obligation of the original personal representative. The 5th DCA therefore treated the appeal as a petition for writ of certiorari and certiorari was denied.

An order of a Montana court approving a settlement agreement which resulted in the assignment of an incapacitated beneficiary's interest in a Florida probate estate to third parties was not subject to attack in the Florida probate court where the incapacitated beneficiary was a Montana resident and was subject to a conservatorship in Montana.
In re Estate of O'Keefe, Deceased, So.2d (Fla. 2nd DCA 2002); 27 FLW D1814 (August 9, 2002).

On September 27, 1996 a decedent's will dated May 14, 1996 was admitted to probate and the decedent's brother, Anthony, was appointed personal representative. Subsequently, $250,000 of the estate assets were placed in the decedent's trust and the remaining assets were distributed to four of the decedent's seven children pursuant to the terms of the will. In May 1999, Anthony, as personal representative, petitioned for revocation of probate of the May 14, 1996 will on the basis that Anthony had actually forged the signa-

continued...



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ture on the will. In July 1999, the probate court appointed a guardian ad litem for one of the decedent's disinherited children, Sally, as Sally had been "suffering from a severe mental disorder since birth" and was a resident of a state hospital in Montana. In January 2000, probate of the May 14, 1996 will was revoked and the probate court ruled that the decedent died intestate with all seven of his children as his heirs. As was to be expected, there were "many difficulties" in attempting to recover the assets previously distributed.

Upon the entry of the order of the probate court in Florida, one of the children, Patrick, petitioned a Montana court to appoint him as "conservator" for his incapacitated sister and in that capacity filed a petition for approval of a proposed family settlement agreement. The family settlement agreement would unconditionally assign to four of the children Sally's interest in the decedent's estate in return for a contingent promise to establish a special needs trust for Sally with $50,000.00. While the Florida guardian ad litem voiced strong opposition to the proposed settlement to the parties involved, she did not participate in the Montana proceedings despite being properly noticed. The proposed family settlement agreement was approved by the Montana court and the four children who received the assigned interest in the estate petitioned the Florida probate court for recognition of the Montana judgment. At this time the Florida guardian ad litem for Sally objected to recognition of the Montana judgment contending that the Montana court was without subject matter jurisdiction to approve the assignment of Sally's interest in her father's Florida probate estate and that the four children had obtained the assignment through fraudulent conduct or acts of self-dealing in order to circumvent the Florida probate proceedings. The probate court denied the application for recognition of the Montana judgment finding that the assignment was obtained through the fraud and self-dealing of Patrick and the Montana court was without subject matter jurisdiction to enter a judgment that affected the disposition of property in a Florida decedent's estate.

The 2nd DCA reversed and remanded the order of the probate court indicating that the Montana court indisputably had both personal and subject matter jurisdiction when it entered the judgment as Montana courts have general personal jurisdiction over all persons found within the state of Montana and Montana courts have subject matter jurisdiction of guardianships and conservatorships involving incapacitated Montana residents in need of protection. Accordingly, the judgment of the Montana court was entitled to full faith and credit in Florida courts and the issue of fraud or self-dealing was a matter for Montana to decide, "Last, there is no showing on the instant record of extrinsic fraud. . . . The integrity of the conservator and the merits of his petition were matters to be resolved only by the Montana court in light of the evidence presented in that forum. Fraud that goes to the merits of a case constitutes intrinsic, not extrinsic, fraud."

Also see *In re Estate of O'Keefe*, 27 FLW D1816 (August 9, 2002) for a connected case.

Crime/fraud exception to attorney client privilege not only applies to attorneys who represent corporate fiduciaries but also to estate planning and probate lawyers.

Niles v. Mallardi, et. al., So.2d (Fla. 4th DCA 2002) 27 FLW D1997 (September 4, 2002); *opinion withdrawn and superceded for clarification at* 2002 WL 31374844 (October 23, 2002).

The decedent's children sued the decedent's widow for breach of fiduciary duty and intentional interference with their expected inheritance. While the case is unclear as to how the alleged interference was accomplished, a jury found that the widow had breached her fiduciary duty and intentionally interfered with the children's expected inheritance. According to the facts of the case, the widow was serving as personal representative of the decedent's estate and somehow through the terms of her will transferred assets to her children which, "[s]hould have gone into marital trust for the benefit of [the decedent's] children . . . ." The decedent's children then brought an action against the attorney who had

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acted in various capacities on behalf of both the decedent and the widow for intentional interference with an expectancy and breach of fiduciary duty. Specifically, the attorney (1) drafted the decedent's will which provided for a marital trust which would be distributed to the decedent's children upon the widow's death, (2) represented the widow as personal representative of the decedent's estate and (3) concurrently with the estate administration drafted a will for the widow providing for the residue of the "marital trust" to pass to the widow's children upon her death.

When the children noticed the attorney for deposition, he objected based on the attorney-client privilege. The trial court held that the attorney-client privilege did not apply to this case as the crime/fraud exception abrogated the privilege. The attorney then petitioned the 4th DCA for certiorari review of the trial court's decision. Citing *First Union National Bank v. Whitener*, 715 So.2d 979, the 4th DCA denied the petition and stated, "The essence of the claim is that, with the assistance of petitioner, Marilyn [the widow] diverted assets which should have been inherited by the deceased's children for the benefit of her own children. We conclude that these allegations, if true, would fall within the fraud exception to the attorney-client privilege."

Testator's attempt to revoke certain provisions of a will by marking through or altering those specific provisions was a legal nullity and the will was entitled to be admitted to probate as originally written.
Taft, et al., v. Zack, et al., So.2d (Fla. 2nd DCA 2002); 27 FLW D2266 (October 18, 2002).

The decedent, Sarah Zack Taft, died on August 3, 2000, and her will dated January 26, 2000 was filed for probate. The decedent's children contested the will seeking to have an earlier will of the decedent admitted to probate alleging the January 26, 2000 will had been revoked by the decedent. The will had apparently been altered in two places where the decedent lined through the devise to her husband and the clause appointing him as personal representative. Written beside the clauses that had been lined through were the word "void" and initials "SZT". Other than the attempt to delete the references to her husband, the will was otherwise unmarked. The probate court held that the will had been revoked and the decedent died intestate. On appeal, the 2nd DCA reversed the order of the probate court finding that the evidence reflected an attempt to partially revoke the will which failed because Florida law does not allow partial revocation unless the requirements of F.S. 732.505 were met, and stated "The requirements were not met because the decedent did not sign the altered will at the end; her name was not subscribed at the end of the will by another person in her presence and at her direction; and there were no attesting witnesses to the altered will."

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Feb 26 - Mar 2	**Out of State Executive Council Meeting - Hotel Healdsburg, Sonoma County, California**
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*March 20 - 23	ACREL, Las Vegas, NV
*May 15 - 17	Fund Assembly, Kissimmee
May 22 - 25	**Section Convention/Executive Council Meeting, Vinoy, St. Pete**
June 5 - 8	**Attorney Trust Officer Conference, Ritz-Carlton Tiburon, Naples**
*June 25 - 28	The Florida Bar Annual Meeting, World Marriott, Orlando
*June 26 - 29	ACTEC, St. Paul, Minnesota
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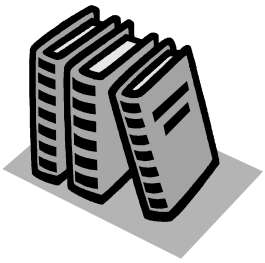

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NOVEMBER § 7520 RATE FALLS TO AMAZINGLY LOW 3.6 PERCENT: The Internal Revenue Service announced that the § 7520 rate for November would be 3.6 percent. This rate is used for GRATS, Private Annuities and Self Canceling Installment Notes. With this same announcement, the government indicated that the short-term rate (for notes less than three years that could be used for inter-family sales) dropped to 1.82 percent, where the mid-term rate for sales up to nine years is 3.06 percent. These types of rates make it a good time to talk with clients about GRATS, sales to defective trusts and other freeze techniques.
– Richard Franklin

DON'T INVADE THE RECORDING CLERK'S SPACE: Section 695.26 (1)(e), Florida Statutes, provides that an instrument to be recorded in the Public Records must have a 3-inch by 3-inch space at the top right-hand corner of the first page, and a 1-inch by 3-inch space at the top right-hand corner of subsequent pages. The Orange County recording department has been rejecting documents that do not provide these spaces, requiring strict compliance with these statutory provisions. – Pat Hancock

FLORIDA ESTATE TAX FORM F-706, REVISED 10/01: The Florida Estate Tax Form, F-706, is out of sync with the Federal Estate Tax Form, Form 706, namely, the line 5 reference to credit for state death taxes (for an ancillary estate). The form refers to line 15 of the Form 706, whereas the amount is on line 13 of the Form 706 for decedents in 2002. The legal department of The Department of Revenue acknowledges the matter and advises that it is in the process of revising the form, not yet complete.
– Dresden Brunner

LEGAL RESOURCES ON-LINE—FREE: Still paying those "outside of contract" extra fees for on-line research? Next time, peruse www.findlaw.com. Findlaw provides a wonderful array of links to federal and state statutes, regulations, and recent court opinions, reference resources (such as on-line law reviews and libraries), forms, legal news, legal organizations, and general practice information by topic. The information you seek may be available via a free download!
– Jo Claire Spear

This space is dedicated to providing space and opportunity to readers to share practice tips and brief items of general interest to the RPPTL reader. Contributions may be submitted to Jo Claire Spear by fax or email: Fax: (727)576-6407; email: Joclairespearpa@aol.com. *Each item should be limited to 100 words or less and should contain your name.*

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