ACTIONLINE
REAL PROPERTY, PROBATE & TRUST LAW SECTION
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Important New Method of Saving Documentary Stamp Taxes

by Robert G. Stern, Esq., Trenam, Kemker Law Firm, Tampa Florida

For years, both borrowers and lenders have gone to great measures to avoid paying documentary stamp taxes on promissory notes that are secured by personal property and are not secured by a mortgage on Florida real property. With the passage of C.S/S.B No. 462 during the 2002 Legislative Session, documentary stamp taxes are now capped and limited to a mere $2,450. This new law, which substantially amends Florida Statutes, Section 201.08, was approved by Governor Bush on April 16, 2002, and took effect as of July 1, 2002. As a result of this new law, borrowers and lenders will alter their typical loan closing procedures and will routinely decide to stay in the State of Florida to close loans that are secured by assets other than Florida real property and remit the $2,450 to the Department of Revenue. It should be noted that this new cap on documentary stamp taxes does not apply to or alter the typical mortgage loan transaction which is secured by mortgage on Florida real property.

If new or renewal promissory notes or written obligations to pay money are made, executed, delivered, sold, transferred or assigned within the State of Florida or if a security agreement is recorded in Florida, then documentary stamp taxes are due and payable at the current rate of 35 cents per $100 of indebt-

See "Doc Stamps" page 3

Section Recognizes Outstanding Service by Sandra Diamond



At the Real Property, Probate & Trust Law Section's Legislative Update in Boca Raton in July, 2002, the Section's **Annual Service Award** was bestowed upon **Sandra F. Diamond, Esq.** in recognition of her dedicated service to the Section throughout this past year. Sandy is a board certified wills, trusts and estates attorney at Williamson Diamond & Caton in St. Petersburg.

As Mike Swaine, Chair of the Section, explained "In a year in which we were told not to expect to get anything through the legislature due to redistricting and the budget, the Section got all of its legislation passed and signed by the Governor. There are a number of people who deserve special thanks for that effort, but foremost is the recipient of our Annual Service Award, our Legislative Chair, Sandy Diamond! Sandy worked tirelessly for the Section. Some people say that she actually spent more time in Tallahassee than some of the Legislators."

The Real Property, Probate & Trust Law Section of The Florida Bar presents an Annual Service Award to a Section member who has rendered dedicated and significantly outstanding service to the Section and its varied programs through-

See "Award," page 12

2001 New & Revised Real Property Forms

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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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edness. Thus, in a typical $25,000,000 loan transaction, the required documentary stamp taxes would equal $87,500 prior to the enactment of this new law. As a result, it was common practice for borrowers and lenders to take an airplane and travel outside of the State of Florida or take a boat into international waters to execute and deliver promissory notes and loan documents in order to avoid the payment of documentary stamp taxes. The additional costs associated with hiring a boat captain, chartering a vessel, purchasing airline tickets, hiring legal counsel to properly document the out of state closing, and the delay and travel time of key employees were considered minor when compared to the huge savings of documentary stamp taxes. Under the new law, however, documentary stamp taxes are now capped at $2,450 if the promissory note is executed and delivered within the State of Florida.

Mortgages, trust deeds, security agreements or other evidence of indebtedness filed or recorded in the State of Florida are also taxed at the current rate of 35 cents on each $100 of indebtedness or fraction thereof. The new law also provides that if a mortgage, trust deed, security agreement, or other evidence of indebtedness is subsequently filed or recorded in Florida to secure a transaction upon which tax was previously capped, then tax is due on the subsequent mortgage transaction on the amount of indebtedness shown on the document which exceeds the aggregate amount upon which tax was previously paid under the prior loan transaction. For example, if a lender closed a $10,000,000 loan within the State of Florida that was not secured by real property and paid the $2,450 capped amount of documentary stamp taxes, and subsequently recorded a mortgage to secure this same loan amount, then at that time documentary stamp taxes would be due on the entire $10,000,000 less a credit for the $2,450 already paid by the parties.

Revenue from documentary stamp taxes is divided between the general revenue fund and various trust funds used to acquire pubic land or support affordable housing. Based upon the Department of Revenue's analysis of the bill, the legislature estimated that the cap of documentary stamp taxes authorized in the bill would be "revenue neutral" because they believed that the cap-related loss of revenue from individual transactions would be offset by the revenue generated from transactions that previously would have been conducted outside the State of Florida. Because little data exists on the number of notes closed out of the State that are not secured by Florida real property, I expect this bill will result in a large influx of additional revenue for the State of Florida. Under present law, $2,450 is the amount of documentary stamp taxes that are due and owing on a promissory note or other obligation in the amount of $700,000. Given the transportation costs to go out of state or charter a vessel to go into international waters and the loss of key personnel for at least one-half of a business day, I expect that most banking clients will choose to stay in state and require that the borrower remit the additional $2,450 of documentary stamps taxes.

Commercial lenders routinely make loans to business customers secured by the accounts receivable, equipment, inventory, and other tangible and intangible personal property owned by the borrower. These loans typically are structured with a revolving line of credit promissory note, a detailed loan agreement as to conditions of each advance under the line of credit and financial covenants, a security agreement granting a security interest in various personal property, a UCC-1 financing statement perfecting the same to be recorded with the Secretary of State, and personal guaranty agreements from the owners and principals of the borrowing entity. Such loans are not subject to the nonrecurring intangibles tax (currently 2 mills) since they are not secured by a lien on Florida real property. If a loan secured by personal property is properly closed out of state no documentary stamp taxes are due, or if the loan is closed in the state of Florida it is now subject to $2,450 cap on documentary stamp taxes as provided in the new law. The guaranty agreement is not separately subject to documentary stamp taxes.

This important new method of capping documentary stamp taxes recently provided by the Florida Legislature is a very useful tool in commercial lending practices. It will be used frequently by the banking and business communities and will result in additional revenue for the State of Florida.

Robert G. Stern *is a partner in the Real Estate and Lending Practice Group of the Trenam, Kemker, Sharf, Barkin, Frye, O'Neill and Mullis P.A. law firm in Tampa, Florida. He is a Board Certified Real Estate Attorney. He is an Adjunct Professor teaching real estate finance at Stetson College of Law and is on the Executive Council of the RPPTL Section. Robert can be reached at* rstern@trenam.com.

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.

Mark Your Calendar

For the Probate Code Seminar

OCTOBER 2002						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

Florida Legal Education Association

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Probate Code Revisions

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REGISTRATION FORM

Register early as space is limited! Registration fee is $230.00 per registrant. Subsequent members from the same firm may attend at a reduced rate of $215.00. Refunds will be given for cancellation postmarked (returning **ORIGINAL** confirmation) 48 hours prior to seminar presentation date. Cancellation fee $20.00.

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Florida Uniform Principal and Income Act Chapter 2002-42 L.O.F.

by Russell B. Hale, Esq.

This legislation, which will become effective January 1, 2003, creates the Florida Uniform Principal and Income Act ("FUP&IA"). While modeled after the Uniform Principal and Income Act, it is not identical. The Florida product resulted from a joint effort of the Trust Division of the Florida Bankers Association, the Real Property Probate and Trust Law Section of the Florida Bar and the Florida Institute of Certified Public Accountants.

The FUP&IA repeals all of the current Chapter 738 and replaces it with the new law.

Section 738.101, *et seq.*, provides definitions, general standards for trustees and certain discretionary powers of trustees to make adjustments between principal and income.

Section 738.201, *et seq.*, requires trustees to distribute principal and income to the appropriate beneficiaries, addresses the transition from an estate to a trust and from the end of one income interest in a trust to the creation of another and provides rules for valuing assets.

Section 738.301, *et seq.*, contains rules for the timing of when an income interest begins and ends and when assets become subject to a trust. Rules for apportionment of receipts and disbursements, when a decedent dies or when an income interest begins are also addressed.

Sections 738.401, *et seq.*, 501, *et seq.*, 601, *et seq.*, 701, *et seq.* and 801, *et seq.*, contain rules as to whether income, gains, losses or distributions, should be charged to income or principal.

Of particular interest to corporate fiduciaries are the provisions of the Act relating to (i) standards to be applied by corporate fiduciaries in determining principal and income, (ii) the trustee's power to make adjustments between principal and income, (iii) the trustee's power to convert to a unitrust, (iv) transition rules related to currently existing trusts, and (v) protections of the trustees for exercising discretionary powers.

The FUP&IA is a "default rule." The specific terms of a trust "trump" the statutory rule and discretionary powers granted by a trust may be exercised, notwithstanding contrary provisions in the FUP&IA. A trustee must exercise any power to adjust granted by the FUP&IA or any discretionary power of administration within the scope of the FUP&IA impartially, based upon what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust clearly manifest an intention that the fiduciary favor one or more of the beneficiaries.

The highlight of the FUP&IA is the trustee's power to adjust between principal and income, pursuant to §738.104, F.S. The power of adjustment applies "to the extent the trustee considers necessary." In order to make an adjustment (i) the trustee must invest as a prudent investor, (ii) the trust must contain an income interest and (iii) the trustee must determine that unless an adjustment is made, it is unable to administer the trust impartially, in a manner that is fair and reasonable to all beneficiaries. In deciding whether and to what extent to exercise the power to adjust, a trustee must consider all relevant factors, including specific criteria set forth in the statute. The statute also contains a list of situations in which a trustee is not allowed to make an adjustment. The power to adjust applies automatically to trusts created after the effective date of the FUP&IA, or which become irrevocable after that date. For trusts existing prior to the effective date, the power to adjust does not exist until the trustee provides a notice to the beneficiaries that the trustee desires the power to adjust and sixty (60) days elapses without written objection of a specified percentage of the beneficiaries.

As an alternative to the power to adjust, §738.1041, F.S., allows a trustee, without court approval, to convert an income trust to a total return unitrust, convert a total return unitrust to an income trust, change the percentage used to calculate the unitrust amount or change the method used to determine the fair market value of the trust. This power is available only to trustees who do not have a power to adjust under §738.104, F.S. A trustee desiring to make a conversion under this section, must create a written plan which contains all of the information required by the statutory section and deliver such plan to the grantor of the trust if living, all living income beneficiaries, all living remainder beneficiaries, all persons acting as trust advisors or protectors and all persons serving as trust advisors or trust protectors. The trustee may not convert the trust if any party receiving notice objects within thirty (30) days. As in the power to adjust, the statute delineates a number of trusts and scenarios under which the unitrust conversion option is not available.

Both Sections 738.104 F.S. (power to adjust) and 738.1041 F.S. (unitrust conversion) contain provisions protecting the trustee who chooses not to adjust or convert. In both cases, the trustee has no duty to make an adjustment. Section 738.105, F.S., provides that a court shall not change a fiduciary's decision to exercise, or

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Upcoming Executive Council Meetings

Nov 21-24, 2002	Executive Council Meeting Casa Monica Hotel, St Augustine, FL
Feb/Mar, 2003	Out of State Meeting ~ To Be Determined ~
May 22-25, 2003	Section Convention/Executive Council Meeting Renaissance Vinoy Resort & Golf Club, St. Petersburg, FL

CHAPTER 2002-42 L.O.F.
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not to exercise the discretionary power, unless the court determines that the decision was an abuse of discretion. The court shall not determine that an abuse of discretion exists merely because the court would have exercised the discretion in a different manner, or would not have exercised the discretion. Further, when the court makes an abuse of discretion determination, the remedy is to readjust the interests of the beneficiaries by either increasing or decreasing future distributions in order to put the beneficiaries back in the position they would have been, if the trustee had not abused its discretion. The trustee has personal liability only if it is impossible to put the beneficiaries back in the position they would have occupied. If the trustee wins the lawsuit, the trustee's costs and attorney fees in defending the action, are to be paid from trust assets.

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Section Meets in Boca Raton in July



"Reptiles" soaking up the sun in Boca Raton. Pictured (L-R) are: crew (standing) Suzanne Hearn, Nancy Baumann and Phil Baumann, and seated: Outgoing Chair, Mike Swaine and Pat Waller.



Enjoying the reception at Boca are: Joseph W. Fleece III, Robert S. Swaine and Joe George.



Also enjoying the reception are: Leigh Goodman, Dreden Brunner and Jody Swaine

SB 720: Summary of Trust Law Revisions

by Russell B. Hale, Esq.

The following is a summary of statutory changes passed in 2002 regarding trust provisions. Ch. 2002-82, Laws of Florida, primarily revises Chapter 737, the trust code. Changes to Chapter 660, are to conform conflicting provisions contained in the Banking Code to the changes made in the trust code.

Section 1. **Technical** - Conforms provisions of Chapter 660 (Regulation of Trust Business) to substantive changes made in Chapter 737 (Trust Code).

Sections 2 and 4. **Elective Share** - Expands the definition of "Qualifying Special Needs Trust" to trusts created for an ill spouse. Current law provides that the term covers only trusts for a disabled spouse. Property in a Qualified Special Needs Trust is not part of the elective share estate. The legislation also recognizes that contingent property interests can be used to satisfy an elective share amount, but only to the extent that such interest does not diminish other property interests used to satisfy the elective share.

Section 3. **Virtual Representation** - Amends the virtual representation statute to clarify that it applies to an administration of estates and trusts, regardless of whether there is a court proceeding, *e.g.*, such as a rendering of accounts. The old statute contained language implying that virtual representation applied only within the context of a court proceeding. The revision is retroactive, as it is intended to clarify existing law.

Section 5. **Presumption of Undue Influence** - Provides that the presumption of undue influence is a presumption which shifts the burden of proof under ss. 90.301 through 99.304, F.S.

Section 6. **Technical** - Clarifies the time period for the presentation of claims against a decedent's estate.

Section 7. **Revocable Trusts** - Requires revocable trusts to contain a statement that "the trustee of a trust may have duties and responsibilities in addition to those described in the instrument creating the trust. If you have questions, you should obtain legal advice." The absence of the notice does not affect the validity of the trust.

Section 8 **Trusts for Care of Animal** - Creates statutory provisions to allow for the creation, validity, enforceability and termination of trusts established for the perpetual care of a designated companion animal. Allows for the appointment of a person to enforce the trust, receive trust accountings and provide consent. Establishes priorities for the distribution of remaining assets upon the termination of the trust. This section is effective January 1, 2003.

Section 9. **Improper Distribution** - Creates a new statute requiring recipients of improper trust distributions to return the assets or funds received, and income from those assets or funds. The provision is intended to codify existing common law regarding over payments to a beneficiary and is patterned largely after a similar provision in the probate code regarding the administration of estates. A provision in the probate code extending this concept to creditors was not included in the trust code because there is no procedure in the trust code for establishing the claims of creditors.

Sections 10 and 11. **Trust Accounting Standards** - These sections create trust accounting standards for accounting periods beginning on or after January 1, 2003. A trust accounting must be a reasonably understandable report from the date of the last accounting (or if none, from the date upon which the trustee became accountable) which adequately discloses the following information: (i) a statement identifying the trust, the trustee furnishing the accounting, and the time period covered by the accounting; (ii) all cash and property transactions and all significant transactions affecting administration, including gains, losses, receipts and disbursements; (iii) to the extent feasible, the value of assets on hand at the close of the period, including the asset acquisition value or carrying value, and the estimated current value; (iv) to the extent feasible, any significant transactions, including name changes of investment holdings, adjustments to carrying value, change of custodial institution and stock splits; (v) reflect the allocation of receipts, disbursements, accruals or allowances between income and principal when the allocation effects the interest of any beneficiary of the trust.

Section 12. **Limitation on Claims against Trustee** - This section substantially revises the statute of limitations with respect to claims against a trustee for matters disclosed by a trustee. Under current law, a six (6) month statute of limitations applies from the date of disclosure for matters fully disclosed in an accounting or other statement. The revision creates three (3) separate statutes of limitation. A six (6) month statute of limitations applies if a trustee provides a beneficiary with a trust disclosure document adequately disclosing the matter and a limitation notice that covers that trust disclosure document. Matters adequately disclosed in a trust disclosure document without a qualifying limitation notice, are subject to the normal statute of limitations from the date of the trust disclosure document. Finally, as to matters not adequately disclosed in a trust disclosure document, the normal statute of limitations begins to run on the date of the final trust accounting regardless of adequate disclosure.

The disclosure standard is revised. The old statute required full disclosure, the new statute requires adequate disclosure. Adequate disclosure is defined as sufficient information so that a beneficiary knows of a claim, or reasonably should have inquired into the existence of a claim with respect to the matter. A "trust disclosure document" is either a trust accounting substantially complying with the trust accounting standards set forth

continued...

SUMMARY OF PROVISIONS
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above, or, any other written report of the trustee.

To make the six (6) month statute of limitations applicable, there must be a limitation notice that covers the trust accounting in which the adequate disclosure was made. A "limitation notice" is a written statement of the trustee that "an action for breach of trust based upon matters disclosed in a trust accounting or other written report of the trustee may be subject to a six (6) month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney." The limitation may, but need not, be identical to the foregoing language.

A limitation notice covers a particular trust accounting under the following circumstances: (i) the limitation notice is contained in the trust disclosure document which it is intended to cover; (ii) the limitation notice accompanies the trust disclosure document it is intended to cover or is delivered separately within ten (10) days; (iii) the limitation notice is contained in, accompanies, or is delivered separately within ten (10) days of any trust disclosure document received within one (1) year prior to the latter trust disclosure document; or (iv) is delivered after the trust disclosure document which it is intended to cover, but only if (x) it offers to provide the beneficiary a copy of the trust disclosure documents less than one (1) year old, or (y) is accompanied by another copy of any trust disclosure documents more than one (1) year old. A trust disclosure document delivered separately, must not be delivered in conjunction with any other written communication.

The intention of the foregoing provisions is that a limitation notice contained in or delivered contemporaneously with a trust disclosure document will cover that trust disclosure document and all further trust disclosure documents for a period of one (1) year. A limitation notice sent after a trust disclosure document must provide (or offer to provide if less than one (1) year) a copy of the trust disclosure document to which it relates.

The changes are effective as to accounting periods beginning after January 1, 2003 and other written statements received after January 1, 2003.

Section 13.**Transition Rules/Effective Dates** - This section contains appropriate transition rules and effective date implementing the foregoing provisions.

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FAR/BAR Contract Update

The Realtor-Attorney Joint Committee (FAR and the Florida Bar) is soliciting suggestions on improving the FAR/BAR Contract, in an effort to update the Contract and to make it more user-friendly.

The Committee also would like comments on making the Contract an "as is" contract with Standards "D" and "N" being removed from the Contract for inclusion in the Rider.

Please send comments, by September 30, to Janet Valentine, at *janetv@far.org,* fax them to (407) 438-1411, or mail them to Florida Association of Realtors, Attn.: Janet Valentine, P. O. Box 725025, Orlando, Florida 32872-5025.

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 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 Perfect 5.0, or Word 6.0 or 7.0 format. Alternatively, articles may be E-mailed to *dbrunner@steel hector.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 at (941) 430-1800 to obtain additional publication guidelines.

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

***Actionline* Issue**	**Publication Deadline**
Winter	October 15, 2002
Spring	December 31, 2002

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

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Probate, Guardianship & Trust Case Summaries

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

It was not an abuse of discretion for a probate court to abate a claimant's motion for an extension of time to file independent action until the return of an estate asset by another claimant where both of their claims were interrelated and the claimant in possession of the property indicated he was holding the asset as collateral for the claimant requesting an extension of time to file an independent action.
Brodfuehrer v. Estate of Brodfuehrer, So.2d (Fla. 3rd DCA 2002); 27 FLW D577 (March 13, 2002).

The father and stepson of a decedent both filed claims in the estate of the decedent on the same day. The father's claim was for funeral expenses and rent paid on behalf of the decedent and the stepson's claim was for repairs he made on a motorcycle owned by the decedent. The stepbrother was in possession of the motorcycle and refused to return the property despite an order of the probate court directing both the father and the stepbrother to return the motorcycle to the estate. Upon objection to his claim, the father filed a motion for extension of time to file an independent action and the probate court abated the motion and held that an order granting the motion was contingent upon the father and stepbrother turning over the motorcycle to the personal representative. Subsequent to the entry of the order, the father filed a motion to sever his claim from the stepbrother's claim, alleging he had no control over the stepbrother's delivery of the motorcycle and the stepbrother filed a motion for payment of the costs of repairing and transporting the motorcycle as a condition of delivery of the motorcycle. Both motions were denied by the probate court. The stepbrother subsequently dismissed his claim. The father appealed the abatement of the motion for extension of time to file independent action and the denial of the motion for severance. On appeal, the District Court upheld the probate court on both matters. With regard to the denial of the motion of severance of the claims, the District Court found that the father and stepbrother's claims were interrelated as the only tangible asset of the Estate was the motorcycle and the stepbrother had asserted that he was holding it as collateral for his father's claims,

The father alleged that he could not compel his son to turn over the motorcycle and therefore he should not be precluded from filing his lawsuit. A severance under this reasoning would allow the stepbrother to maintain possession of the motorcycle and allow the father to be free to pursue his independent action and recover the funeral expenses, while the Estate would never recover its largest asset.

With regard to the abatement of the motion of the father for extension of time to file an independent action, the District Court found that based on the facts of this case, "[t]he appropriate sanction was to abate the motion for extension of time until the parties complied with the court order."

Probate court did not have adequate jurisdiction over a corporation in which the estate held an ownership interest to order the corporation to provide its books and records for inspection to the curators of the estate absent service of process on the corporation by the curators of the petition for accounting.
Paradise of Port Richey v. Estate of Boulis, et al., So.2d (Fla. 4th DCA 2002); 27 FLW D586 (march 13, 2002).

Prior to his death, Gus Boulis owned an interest in Paradise of Port Richey, Inc., which operated a casino boat. Subsequent to the death of Gus Boulis, the curators of his estate filed a petition for an accounting by Paradise of Port Richey, Inc., and for the appointment of an estate representative to attend the regular counts of Paradise's gambling proceeds. The probate court granted the relief requested at a subsequent hearing. Paradise appealed the order claiming that the probate court did not have jurisdiction to enter the order in question as Paradise had never been served with process regarding the petition by the curators. The curators admitted that they had never served Paradise with service of process but alleged that Paradise had waived any objection to the lack of jurisdiction due to their appearance during an earlier hearing regarding the curators' motion for authorization to proceed with the handling of the estate's affairs. On appeal, the District Court reversed the probate court finding that the probate court lacked personal jurisdiction over Paradise. Paradise's appearance at the earlier hearing did not waive their objection to jurisdiction as they did not seek any affirmative relief during the hearing, "We hold that counsel's appearance at a hearing on the curators' powers to assure that those powers are broad enough to include their authority to represent the estate in the Pasco County proceedings was not an appearance where appellant made a request for affirmative relief going to the merits of the case, nor did it seek for the court to take jurisdiction of the matter."

Petition to determine incapacity may not be dismissed by court absent adequate notice to the petitioner which complies with due process requirements. Furthermore, an attorney may not appear on behalf of the alleged incapacitated person without an order of the court substituting counsel where the court had already appointed an attorney to act on the alleged incapacitated person's behalf.
Borden v. Guardianship of Borden-Moore, Etc., So.2d (Fla. 5th DCA

2002); 27 FLW D1169 (May 17, 2002).

The daughter of Elsa Marie Borden-Moore ("Elsa") filed a petition to determine incapacity of her mother and for appointment of a guardian in the event she was determined to be incapacitated. Subsequent to the filing of the petitions by the daughter, the trial court entered an order appointing the daughter as an emergency temporary guardian, appointing an examining committee, appointing an attorney to represent Elsa, freezing Elsa's assets and enjoining the Elsa's husband (who was 17 years younger than Elsa) from having any contact with Elsa or interfering with her assets. The day after the orders were entered, the husband filed an emergency petition asking the court to set aside the order enjoining him from contact with Elsa. The court held a hearing on the matter during which the trial court granted the relief sought by the husband and additionally dismissed the incapacity proceedings based on a finding that Elsa was competent. Elsa's court appointed attorney was not notified and did not participate in the proceedings although another attorney did appear on behalf of Elsa. The daughter appealed the ruling dismissing the incapacity proceedings alleging she was denied procedural due process as no motion to dismiss the proceedings had been filed at the time of the hearing and she was not provided with proper notice that dismissal would be considered. The District Court reversed the trial court's order dismissing the petition for incapacity and remanded the mater for further proceedings. The District court stated that Fla.Prob.R. 5.042 requires reasonable notice of any matter to be heard by the court and that right to reasonable notice also implicated constitutional due process concerns, "Procedural due process requires both fair notice and a real opportunity to be heard." Additionally, the District Court held that the court appointed attorney was entitled to notice of the hearing as no order allowing for substitution of counsel had been sought or obtained prior to the hearing pursuant to Florida Rule of Judicial Administration 2.060(h). Finally, the District Court found that as an examining committee had been appointed, F.S. §744.331 requires that the examining committee reports must be filed prior to an adjudicatory hearing being held.

Widow was entitled to attorneys fees for her efforts to require a recalcitrant personal representative to pay her family allowance under *Bitterman* (*Bitterman v. Bitterman,* 714 So.2d 356 (Fla. 1998)) and because her efforts provided a benefit to the estate.

Hoyt v. Hoyt, So.2d (Fla. 2nd DCA 2002); 27 FLW D996 (May 3, 2002).

The widow of a decedent filed a petition family allowance pursuant to section 732.403. The probate court granted the petition and entered an order requiring the personal representative (the son of the decedent from a prior marriage) to pay the allowance in a lump sum from the assets of the estate. The personal representative failed to make the payment to the widow and the widow was forced to file motions to compel the payment. The probate court once again ordered the personal representative to pay the allowance in a lump sum to the widow, but the personal representative proceeded to pay the family allowance in six monthly installments instead of in a lump sum as ordered by the court. The widow subsequently filed a petition for attorneys fees arguing that she had benefitted the estate by her efforts pursuant to *In re DuVal Estate*, 174 So.2d 580 (Fla. 2d DCA 1965), and that the "inequitable conduct doctrine" as described in *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998) applied to the actions of the personal representative. The probate court denied the petition of the widow for fees and the widow appealed. The District Court reversed the probate court finding that the widow had benefitted the estate through her actions and that the "inequitable conduct doctrine" did apply to the facts of the case.

A judgment for attorneys' fees against a personal representative by a defendant in a wrongful death action based on an offer of judgment made by the defendant to the personal representative as the plaintiff in the wrongful death action constituted a Class I claim against the estate under F.S. 733.707, but was not subject to the limits imposed by F.S. 733.702 and F.S. 733.710 because it was not a claim against the decedent's estate which arose before death.

Thompson, et al., v. Hodson, et al., So.2d (Fla. 1st DCA 2002); 27 FLW D1042 (May 9, 2002).

The personal representative of an estate filed a wrongful death action against numerous defendants including several doctors and the hospital where the decedent died. All of the defendants settled with the personal representative prior to trial except one doctor. The doctor sent an offer of judgment pursuant to Fla.R.Civ.P. 1.442(c) to the personal representative which was rejected and the matter proceeded to trial. The doctor prevailed at trial, and therefore, the estate became liable for the attorneys' fees and costs of the doctor in defending the wrongful death action. The Civil Court entered a judgment against the personal representative for attorneys' fees and costs incurred by the doctor. Upon entry of the judgment, the doctor filed a claim in the estate for the amount of the judgment and sought to compel payment of the claim from the settlement proceeds obtained by the personal representative from the other defendants in the wrongful death action. The personal representative objected to the claim arguing that the claim was barred under F.S. 733.702 and F.S. 733.710 as it had been filed more than two years after the decedent's death. Even though the probate court ruled that the judgment for attorneys' fees and costs against the personal representative was a class I claim under F.S. 733.707, and not subject to F.S. 733.702 and F.S. 733.710 as it was a liability which arose after the death of the decedent, the probate court denied the motion

continued...

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PROBATE, GUARDIANSHIP & TRUST CASE SUMMARIES
from previous page

of the doctor to compel payment. The probate court held that the claim could only be paid from estate assets, and as all of the settlement proceeds obtained by the personal representative were allocable to the survivors, there were no funds with which to pay the claim. The doctor appealed the decision and the District Court affirmed the trial court on all issues finding,

> A claim against the estate, however, is payable from funds held by the estate. In this case, the estate has no assets. We reach this conclusion because the estate had no claim in the wrongful death case . . . If the personal representative's apportionment of settlement proceeds is reasonable and equitable, the apportionment will be upheld even when it allots no funds (or funds insufficient to pay creditors' claims) to the estate.

Extrinsic evidence can prevent the ademption of a specific bequest if the bequeathed property can be traced to existing assets and the evidence reflects that the testator did not intend to alter the testamentary scheme contained in his will by the disposal of the property.
In re Estate of Budny, So.2d (Fla. 2nd DCA 2002); 27 FLW D1071 (May 10, 2002).

A decedent's will devised specific property to his son and specific property to his stepdaughter. Several of the properties devised to the son and both of the properties devised to the stepdaughter had been sold by the decedent prior to his death. The stepdaughter filed a petition for determination of beneficiaries and shares alleging that the decedent intended for her to share equally in the estate with the son and that the decedent had never expressed an intention that she should be disinherited. At the hearing on the petition, witnesses testified that during the decedent's last hospitalization he stated that he wanted his son and stepdaughter to share equally in his estate. The probate court held that it was the decedent's intent in his will to provide for the son and stepdaughter equally, and declared that the stepdaughter was a devisee of the will and entitled to share equally in the distribution of the assets of the estate. The District Court reversed the ruling of the probate court indicating that as the will was clear and unambiguous, no extrinsic evidence could be introduced to alter the clear terms of the will. As the properties devised to the stepdaughter had been sold by the decedent prior to his death, those devises adeemed. In reaching their decision, the District Court noted, "Florida recognizes an exception to this rule: Extrinsic evidence can prevent the ademption of a specific bequest if the bequeathed property can be traced to existing assets and if the evidence reflects that the testator did not intend by his disposal of the property to alter the testamentary scheme contained in his will." As there was no evidence introduced at the hearing tracing the proceeds of the sale of those properties, the exception was not applicable in this case.

A co-trustee was liable to the beneficiary of the trust for funds stolen from trust by another dishonest co-trustee where the co-trustee was totally inattentive to the actions of the dishonest co-trustee.
Anton v. Anton, So.2d (Fla. 4th DCA 2002); 27 FLW D1090 (May 8, 2002).

Appellant was a co-trustee of a trust with his brother. The dishonest co-trustee, who was also a lawyer, had the appellant sign blank checks on the trust checking account and the appellant otherwise delegated the administration of the trust to the dishonest co-trustee. The probate court found the appellant liable to the trust beneficiary for the funds stolen by the dishonest co-trustee and the appellant appealed. The District Court held that the appellant was liable to the beneficiary of the trust for the stolen funds as each trustee was under a duty to participate fully in the administration of the trust, and, "One trustee who delegates to another the administration of a trust breaches the duties of a trustee." The fact that the dishonest co-trustee who stole the funds was a lawyer did not relieve appellant from his personal responsibility to the trust.

AWARD
from page 1

out the current year. In selecting the recipient of this annual award, the Section considers both the character and magnitude of the service furnished by the nominee throughout the year, and particular emphasis is given to the benefits which accrue to the Section and the lawyers of Florida as a result of such service.

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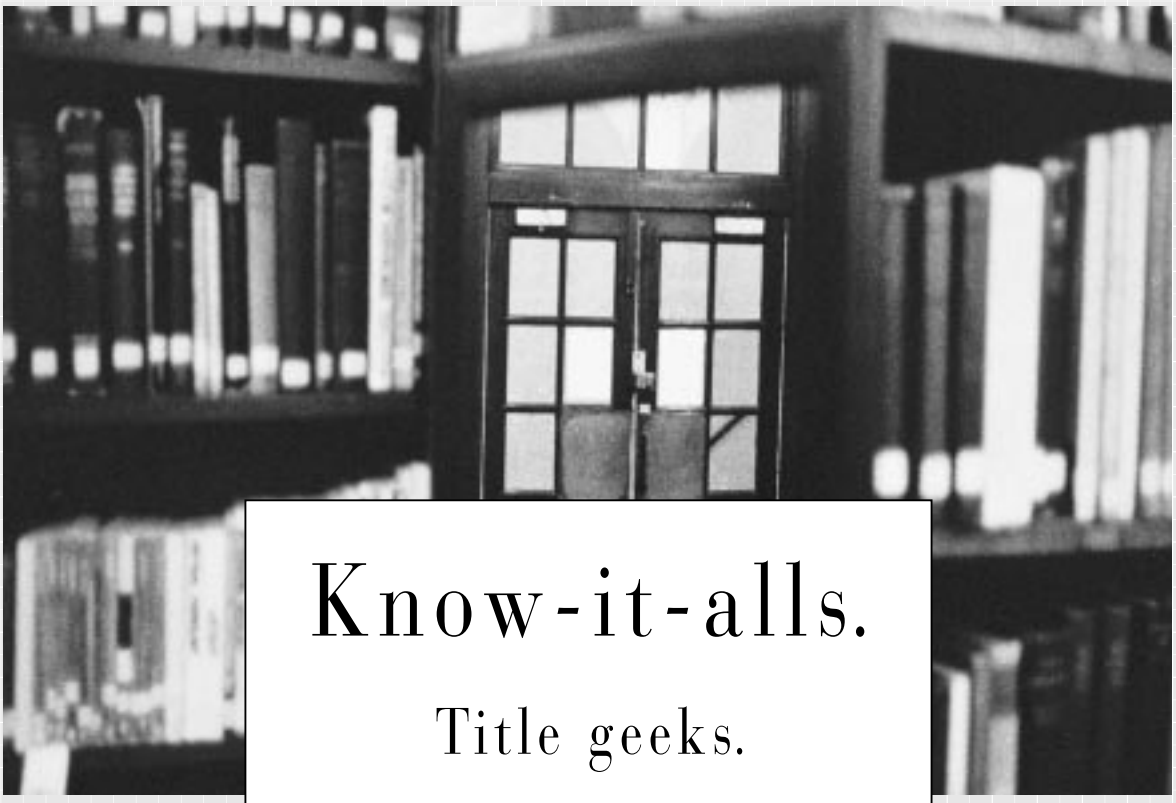

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Real Property Case Summaries

by Stephen Edward Silkowski, Esq., Jacksonville

FORECLOSURE SALE PRICE THAT IS APPROXIMATELY 70% OF APPRAISED VALUE IS NOT GROSSLY OR STARTLINGLY INADEQUATE, AND DOES NOT PROVIDE GROUND TO OVERTURN SALE.
Blue Star Investments, Inc., v. Johnson, 801 So. 2d 218 (Fla. 4th DCA 2001).

Blue Star Investments, Inc. was the purchaser of a home at a foreclosure sale. Blue Starpurchased the home for $41,459.10; the appraised value of the home was $60,000, and the mortgagor sought to set aside the sale.To vacate a foreclosure sale, the trial court must find, inter alia, that the foreclosure sale bid was grossly or startlingly inadequate. This case failed the test, in that the purchase price was 69.09% of the property's appraised value, an amount that is not grossly or startlingly inadequate. Generally, cases where foreclosure sales have been properly vacated have involved situations in which a very small, usually only nominal, amount has been bid for property of substantial value.

PROPERTY APPRAISER'S VALUATION LOSES PRESUMPTION OF CORRECTNESS ONLY IF TAXPAYER SHOWS BY PREPONDERANCE OF EVIDENCE EITHER THAT THE APPRAISER HAS FAILED TO CONSIDER THE CRITERIA SET FORTH IN SECTION 193.011, FLORIDA STATUTES, OR THAT ASSESSMENT IS ARBITRARILY BASED ON UNUSUAL APPRAISAL PRACTICES.
Smith v. Royal & Sons, Ltd., 801 So. 2d 255 (Fla. 4th DCA 2001).

The trial court erred as a matter of law when it determined that because the Value Adjustment Board modified the appraiser's assessment, the appraiser's assessment lost its presumption of correctness. In a taxpayer challenge to an assessment made by a property appraiser, the assessment is accorded a presumption of correctness if it was made in accordance with section 193.011, Florida Statutes. The presumption is lost only if the taxpayer demonstrates that the property appraiser failed to consider properly the criteria of section193.011, or if the assessment is arbitrarily based on appraisal practices that differ from practices generally applied to comparable property in the same county.

The action of the Value Adjustment Board in lowering the property appraiser's assessment does not operate to eliminate the presumption of correctness in favor of the appraiser's assessment. In 1997, the legislature enacted section 194.301, Florida Statutes, and changed the taxpayer's burden of proof in cases where the presumption of correctness is retained. The statute does not alter the status or authority of a Value Adjustment Board vis-a-vis the property appraiser so that the Board's adjustment operates to destroy the presumption of correctness which attaches to the appraiser's assessment. The law continues to be that the appraiser loses the presumption only if the taxpayer shows by a preponderance of the evidence either that the appraiser has failed to consider the criteria set forth in section 193.011, Florida Statutes, or that the property appraiser's assessment is arbitrarily based on appraisal practices which are different from the appraisal practices generally applied by the property appraiser to comparable property within the same class and within the same county.

If the taxpayer makes this showing by a preponderance of the evidence, the property appraiser's presumption of correctness is lost, and the taxpayer will thereafter have the burden of proving, also by a preponderance of the evidence, that the appraiser's assessment exceeds just value. If, however, the taxpayer fails to prove by a preponderance of the evidence that the appraiser failed to consider the statutory criteria or applied arbitrary appraisal practices then the taxpayer will be required to prove by clear and convincing evidence that the assessment exceeds the just value.**City's temporary closing of a hotel inextricably intertwined with drug and prostitution activity is not a compensable taking.**Keshbro, Inc., v. City of Miami, 801 So. 2d 864 (Fla. 2001).The question posed was whether temporary closures ordered by nuisance abatement boards to abate public nuisances constitute compensable takings. In this case, the operation of appellant's hotel had become inextricably intertwined with the drug and prostitution activity sought to be enjoined, and, on this record, the court concluded that the city acted reasonably in ordering the temporary closure of the hotel.

NEITHER THE CLERK OF COURT'S FAILURE TO PROVIDE NOTICE TO THE PREPARER OF THE MORTGAGE NOR THE TAX COLLECTOR'S HAVING A DEPUTY TO PROVIDE THE STATEMENT TO THE CLERK INVALIDATES A TAX DEED.
Bostwick.v. Clukies, 801 So. 2d 961 (Fla. 5th DCA 2001).

Clukies sought to clear title to real property that he had purchased through a tax deed. Bostwick, a mortgagee, countered that the clerk of court had breached a duty by failing to send notice of the sale to the attorney whose name and address appeared on the face of the mortgage he had held, and that the tax collector was similarly neglectful in having a deputy provide the statement to the clerk.

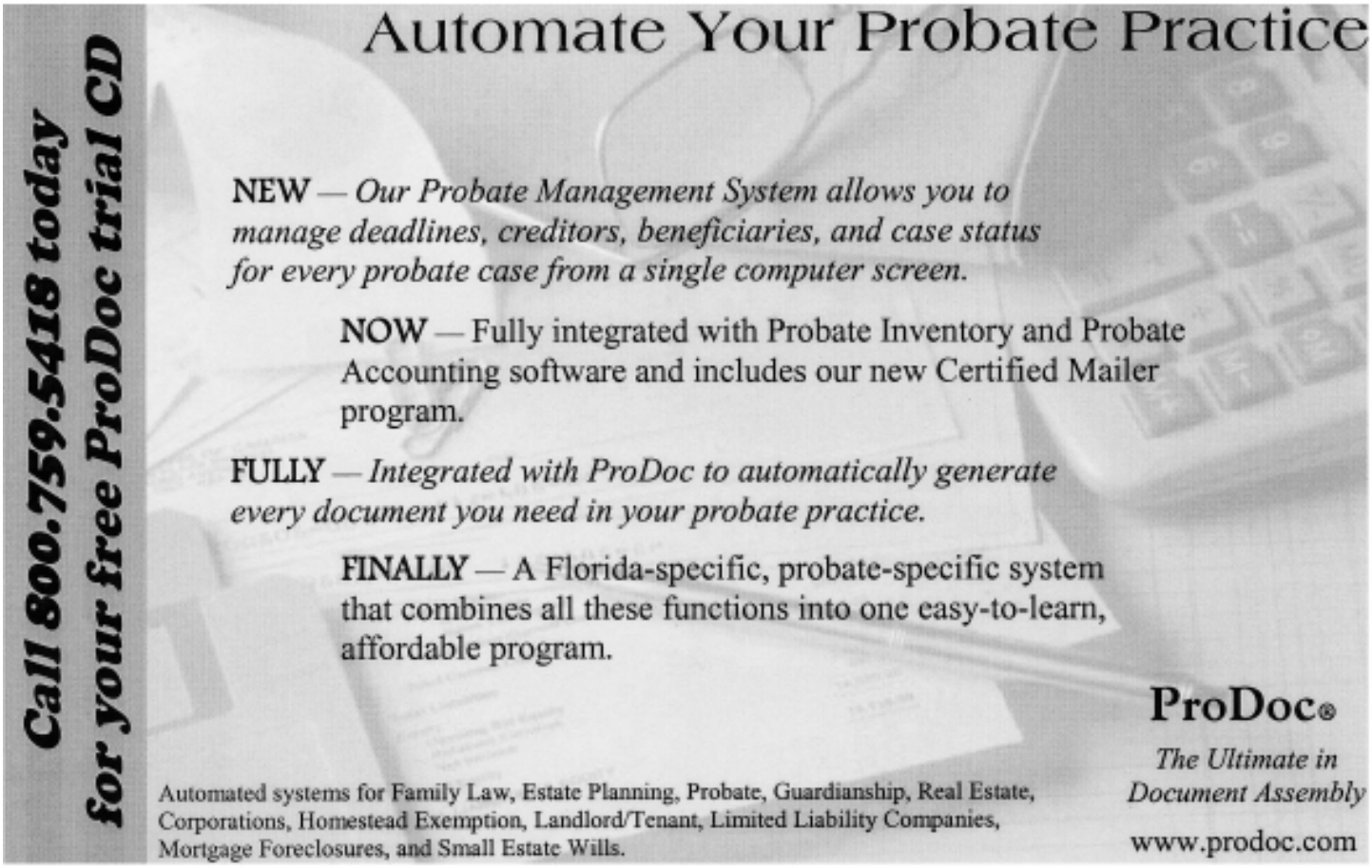
There is no requirement that notice of the tax deed sale be sent to the preparer of the mortgage. Even if there was, the clerk of court is only responsible to notify the names provided to him in the tax collector's statement, and need not search all

public records available todetermine the actual status of ownership. Further, the tax collector is not required to search all available records for names and addresses, and, moreover, the clerk of court has no duty to determine the accuracy of the tax collector's information. For these reasons, the clerk of court's failure to provide notice to the preparer of the mortgage had not invalidated the tax deed.Regarding Bostwick's argument that the tax deed should be invalidated because the tax collector statement provided to the clerk had been signed by an employee serving under the tax collector, rather than the tax collector himself, the court pointed out that tax collectors "may appoint deputies to act in their behalf in carrying out the duties prescribed by law." §§ 197.103, Fla. Stat. (2000).

CLIENTS' STATEMENT TO A REAL-ESTATE BROKER THAT THEY HAVE NO INTEREST IN PROCEEDING WITH THE TRANSACTION, AND THAT THE BROKER IS FREE TO PURSUE IT HERSELF, TERMINATES THE BROKER'S RESPONSIBILITY TOWARD THEM.
Portell International Realty, Inc., v. Jacobson, 802 So. 2d 431 (Fla. 3rd DCA 2001).

The clients desired to buy two condominium units that were to be constructed in a new condominium building; the broker represented them in that negotiation. When the purchase contract was negotiated with the developer to the point that it was ready for signature, the clients failed to sign, despite repeated requests that they do so. Ultimately the clients told the broker that they had decided not to purchase the property. The broker then asked the clients for permission to buy the two condominium units. They agreed and also gave her permission to use the contract which the clients had negotiated, but declined to sign. The broker met with a representative of the developer, who agreed to sell the two units to the broker. The effective price for the broker was somewhat higher, because the developer required the broker to pay her own buildout expenses. The developer did, however, agree to reduce the amount of the deposit which the broker would have to pay because the broker had already contracted to purchase another condominium unit in the new building. During the time period when the clients had been actively pursuing the condominium transaction, they had attempted to have the developer reduce the amount of the deposit. This negotiation had been conducted by the clients' real estate attorney, not the broker, but the developer had refused to reduce the required deposit.

The clients told the broker that they had no interest in proceeding with the transaction, and that the broker was free to pursue it herself. The broker was thus entitled to take the clients attheir word. Her responsibility to the clients with regard to the purchase was at an end. The fact that thereafter the developer agreed to reduce the deposit requirement for the broker makes no difference. There was no breach of duty at all. Furthermore, the clients failed to clearly and convincingly establish their claim to a constructive trust in the condominium units.



The Florida Bar Condominium & Planned Development Committee Minutes

Thursday, May 16, 2002

CALL TO ORDER.

Chair Robert M. Schwartz called The Florida Bar Condominium and Planned Development Committee meeting to order in the Harborview Room, Sanibel Harbor Resort, Ft. Myers, Florida, on Thursday, May 16, 2002, at 2:15 p.m. After the Chair's welcome, members and guests were invited to introduce themselves.

LEGISLATIVE UPDATE.

This has been a quite busy year with significant legislation passed, and more to come.

General Report.

Peter Dunbar, the Real Property Probate and Tax Law Section's lobbyist, provided a summary report of legislation enacted and signed into law. Unfortunately circumstances beyond his control prevented him from attending the meeting. Mr. Gelfand desired to recognize Mr. Dunbar's efforts in assisting the Section and the Committee in particular achieving many goals.

Among the Bills Mr. Dunbar reported passing the Legislature and enacted into law are the following:

A. Collection procedures for homeowner association assessments which clarified that documentary stamp taxes are to be calculated solely on the final bid in the foreclosure of condominium and homeowner association liens. (Chapter 2002-8).
B. Respectful display of a portable removable American flag in homeowner association communities (2002-50).
C. Converting roadways to private gated committees with a transfer of certain roads and right of ways to a residential homeowner association under specified conditions. (2002-235).
D. Mobile homes rent increases and relocation funding have been changed. (Chapter 2002-27).
E. Time share promotional piece uses and developer rights were expanded. (Chapter 2002-87).
F. Developments of regional impacts thresholds using "vested rights" language was adopted. (Chapter 2002-18).
G. Official records exemptions to prevent placement of social security numbers on items filed with the Clerk of the Circuit Court. (Chapter 2002-256).
H. Sales tax on services resolution created a joint legislative committee to review sales tax exemptions.
I. Growth management revisions were made to the numerous statutes including school concerns, concurrency and water supply planning. (Chapter 2002-13).

Insurance.

Leigh Fletcher was not able to attend the meeting but promises to provide information by Internet. She reported conferring with Senator Geller clarifying what is an insurable interest for associations and retroactive effect. There appears to be a consensus that there must be a determination of what carriers seek and if there is a substantial change in the law, then what adjustments will occur to ensure that a raise in one type of risk premium will be countered by a reduction in premiums where there is a lower risk.

Vested rights.

Mark B. Schorr circulated language which will be considered at the next meeting.

Glitch bill.

Joe Adams provided an extensive report on the status of the changes effecting condominium associations. His written report has been circulated by e-mail to all members.

Marketable Record Title Act.

Rachel Peterkin with her committee made an extensive effort to propose a workable change in how homeowner associations will obtain authority to record notices. The committee's comments were very supportive and suggested technical changes. Joe Adams will confer with her to transmit those ideas.

Corporate Domestication.

Mr. Gelfand noted that the this matter is still progressing allowing domestication of foreign condominium incorporated associations.

Phantom Unit Assessments.

After a brief discussion it was determined that there was likely to be no consensus regarding whether the committee should take a stand on revising §718.116 language.

Master Associations.

Many members have sought additional legislation regulating master associations. There is concern regarding any effort to denigrate the attorney client privilege. We look forward to the opportunity to consult with sponsors to work out practical alternatives.

Fire Code.

Many high rise communities are concerned regarding the fire code requirement that upon receipt of a notice an association has six months to prepare a plan to implement sprinkler systems, particularly in communities where that does not appear cost effective. There appears to be a consensus that the committee would not look adverse upon Mr. Dunbar representing a number of communities in the Naples area and elsewhere in the state regarding this issue.

DIVISION OF LAND SALES RULES UPDATE.

Mr. Sklar presented an extensive summary of proposed rule changes. He noted that the working group addressed a number of successor developer issues; however, the bulk of the changes were suggested by the Division staff as "cleanup". The changes were received in a positive manner. Among comments concerning formatting, there was discussion concerning:

61b-17.011(1) indicating that the al-

ternative media delivery of documents was not objectionable; however, recognizing that the goal of a prospectus is an educated consumer and that frequently waivers are quickly signed, the prospectus without exhibits should still be required to be provided in "hard" paper copy.

61b-18.004. There will be an inquiry why the receipt of documents was proposed to be deleted.

61b-22.003(7). Recognizing that frequently budgets are not adhered to because they are mere estimates, this section should only apply to situations when there is a change in the amount of assessments or when special assessments are levied.

61b-15.007 and -17.006. There was extensive discussion concerning the developer related amendments. In particular, there are questions of what disclosures are appropriate and when, and when a change in status justifies an amendment but not a new filing. Particular concern was raised with the impracticality of providing that a reservation in the context of a conversion.

Mr. Sklar will be reviewing these issues with a division representative immediately. There is anticipated to be a phone conference workshop on May 24, 2002.

RECENT CASES.

Mr. Gelfand presented the following recent cases of note which include:

Fuller v. Becker & Polikoff, P.A., Fed. Supp. , (Md. Fla. March 11, 2002), which held that under the particular circumstances claims could be brought against a law firm for the collection of assessments which allegedly violated the Fair Debt Credit Collection Practices Act. Of note distinguishing the decision reference was made to *Schimmel v. Slaughter*, 975 F.Supp. 1357 (M.D. Ga. 1997), and *Dutton v. Wolhar*, 809 F.Supp. 1130 (D.Del., 1992);

Garcia v. Crescent Plaza Cd'm Ass'n, Inc., 27 Fla. L. Weekly D569 (Fla. 2nd DCA, March 8, 2002) applying business judgment rule to condominium association directors;

Southern Walls, Inc. v. Stilwell Corp., 810 So. 2d 566 (Fla. 5th DCA March 8, 2002) holding that a cooperative apartment interest was to be considered a homestead constitutionally exempt from for sale for a judgment debt.

Southwin, Inc. v. Verde, 806 So. 2d 586 (Fla. 3rd DCA January 30, 2002) holdling that $5,237,893.00 judgment would be sustained for construction defects relating to 67 homes when only three homes interiors were inspected though exterior of all homes was inspected.

Suarez v. Gonzalez, 27 Fla. L. Weekly D730 (Fla. 4th DCA, March 27, 2002) holding that property owner could be held liable for independent contractors negligence if the independent contractor was an employee when the owner did not make proper inquiry as to independent contractor's qualifications to undertake the work allegedly causing the injury.

MINUTES.

A motion was made to the reading and approve the Minutes of the December 6, 2001 meeting which was approved without objection.

MEETINGS.

A meeting will be tentatively scheduled for the "Legislative Update" executive counsel meeting weekend at the Boca Raton Resort. A meeting will also tentatively be planned for September at the Tampa Airport.

MEMBERS ISSUES FOR DISCUSSION.

A number of issues were raised for discussion. Mr. Sklar announced that the annual University of Miami Institute will be held on October 23, for real property and October 24 and 25, 2002 for condominium and plan developments. The committee will plan to hold a meeting in conjunction with the Institute, likely on its Friday afternoon. Mr. Adams reviewed additional potential legislative issues including bringing technology to association governance, terrorism insurance exclusions and the Division's functions.

ADJORNMENT.

The meeting was adjourned by unanimous vote at 5:15 p.m.

Respectfully Submitted,
Michael J. Gelfand



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Respectfully submitted,
Roger O. Isphording, President,
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Red Flags of Mortgage Fraud

The Mortgage Law Committee of the Real Property, Probate and Trust Law Section of The Florida Bar has compiled this summary of red flags to assist the real estate closer in preventing mortgage fraud. It is suggested that all real estate closers from time to time review the list and become more vigilant to the possibility of a fraudulent mortgage transaction.

1. Recently Recorded Deeds or Satisfactions - may be recorded by a defrauder to get record title into his/her name, or clear an unpaid mortgage as an encumbrance. PREVENTION SUGGESTIONS: Contact the grantor/lender to confirm and verify the instrument. Compare signatures from other previously recorded documents in the public records. Request the customer bring the original mortgage and note to your office for your verification.

2. Recently Recorded Deeds with Minimal Documentary Stamps - might be an indication of a fraudulent deed in preparation to obtain a mortgage on property not owned by the culprit. PREVENTION SUGGESTION: Contact the grantor to confirm and verify the instrument, and the circumstances leading up to the execution of the instrument.

3. Recently Recorded Quit Claim Deeds. PREVENTION SUGGESTIONS: Verify the signatures and circumstances by contacting the grantor(s). Ask why a warranty deed was not used.

4. Intra-Family Instruments - Deeds or satisfactions between or among relatives are suspect inasmuch as such instruments are more often forged than instruments between strangers. PREVENTION SUGGESTION: Contact the grantor/lender to confirm and verify the instrument, and to learn of the circumstances surrounding the execution of the instrument.

5. Instrument not Returnable to a Title Company or Attorney - Deeds or satisfactions which do not appear to be prepared in an arms-length transaction should be verified.

6. Instruments Signed Outside the Presence of the Closer - may be forged. PREVENTION SUGGESTIONS: The closer should directly contact the proposed signer to request their signature and advise that the documents will be delivered directly from the closer to the signer. Do not give the documents to others to deliver to the signer. Even an honest middleman (e.g., realtor) may innocently and unknowingly hand the papers to a future forger . Request the papers be returned directly to the closer and not to another for eventual delivery to the closer. Require that the notary include a copy of the photo identification of the signer when returning the signed documents to the closer. If an instrument has already been signed and delivered to the closer, the closer should contact the signer to confirm and verify the instrument.

7. Confirm in Writing (fax or mail) Changes in lender's written closing instructions. Do not rely on verbal changes from the loan processor or mortgage broker.

8. Prepare the HUD Closing Statement Accurately and Precisely, reflecting exactly where the monies are coming from, and to whom the monies are paid. If the monies did not pass through your escrow/trust account, then the HUD must show the monies received and paid "POC".

9. Close on "Cleared" Funds. Make sure the checks you receive have cleared your bank and unconditionally credited to your account. Note that foreign checks (even from a banking institution) may take several weeks to clear and be unconditionally credited to your bank account. Make sure that wired funds have been received and unconditionally credited to your account.

10. Absentee Owners or Owners of Vacant Land - Check to see that the person paying the taxes and assessments is the person involved in your transaction. Make sure that an imposter is not taking advantage of an absentee owner.

11. Check Tax Bills - Check the mailing address of the tax bill with the mailing address of the seller/borrower to make sure an imposter is not using you for a fraudulent transaction. Has there been a recent sale? Could an illegal flip be occurring?

12. "Rush" Deals from New Customers should be treated with caution.

13. Illegal Flips -

a. Land sold at highly inflated values are suspect - the purchase price should not be disproportionate to the tax valuation unless there have been substantial improvements made to the property which have been verified.

b. Imposter borrowers or a misrepresentation of the borrowers ability to pay - Confirm with the borrower his/her occupation and salary as shown on the loan application.

c. Inaccurate HUDs - failing to show the exact origins and payees of funds can facilitate an illegal land flip.

d. Commitments erroneously showing the "middle man" in title instead of the actual owner. Schedule A of a title insurance commitment should be a true reflection of ownership.

e. Performing two closings and using the money from the second closing's buyer to pay the seller in the first closing without full disclosure to the buyer and new lender on the HUD.

f. Inaccurately indicating the actual equity position of the borrower who is purchasing with borrowed funds from another closing, yet reflecting on the HUD that the borrower is coming to the closing with cash.

14. Foreclosure or Deed-in-Lieu - Was the mortgage valid or just a ruse to wipe out other creditors? How long has the mortgage been of record?

Combating Mortgage Fraud Resources

One way to prevent mortgage fraud is to stop and think through the proposed transaction. If you feel un-

continued...

RED FLAGS
from previous page

comfortable, talking it out with another or your title insurance underwriter may help. Also, the following is a list of resources which may assist you and preventing a fraudulent transaction:

- Local State Attorney's Office
- Department of Justice - Consumer Fraud; *www.usdoj.gov/consumerfraud.html*
- Department of Banking & Finance, Office of Comptroller (800) 848-2792; www.dbf.state.fl.us; Sharon Dawson at 954-712-4800, website: *www.dbf.state.fl.us/regions.html*
- Mortgage Bankers Association - Predatory Lending Resource Center & Mortgage Fraud Alert, *www.mbaa.org/alerts/index.html*
- Mortgage Bankers Association - Mortgage Fraud Subcommittee *www.mbaa.org*
- American Land Title Association, *www.alta.org*
- Internal Revenue Service - Tax Fraud Hotline, (800) 829-0433
- HUD Hotline (800) 347-3735; fax (202) 708-4829
- Reverse Mortgage Fraud - Better Business Bureau *www.bbb.org/library/first.asp*
- Security Mortgage Fraud, *www.consumerlaw.org/consumer/secmort.html*
- AARP (American Association of Retired Persons) email: *member@aarp.org; www.aarp.org/indexes/money.html#consumer*
- ACORN (Association of Community Organization for Reform Now) Phone: (202) 547-2500 or (877) 55ACORN; *email: ACORNCAMPAIGN@acorn.org www.acorn.org*
- *FraudIndex.com* - for e-mail newsletter on mortgage fraud prevention
- Appraisers Licenses, *www.asc.gov* (Appraisal Subcommittee of the Federal Financial Institutions Examination Council)
- Florida Abuse Hotline (800) 962-2873

A Special Thanks to the members of the subcommittee who researched and prepared the above report:

Subcommittee Chair: Patricia J. Hancock

Subcommittee Vice-Chair: Ralph R. Crabtree

Members Develop Digital Court File Demonstration Project

Section Member Judge Susan Sexton met recently with a group of probate attorneys and computer specialists to develop a digital court filing demonstration project for the Thirteenth Judical Circuit in Hillsborough County. Attorneys will be able to deliver digital documents over the Internet and review the court case file throught their web browsers.

Reviewing a digital judicial case file created for the demonstration are, pictured at right (L-R): Kenny Williams, computer specialist (standing); Brenda Edgerton, judicial intern; Honorable Susan Sexton; Gregory Meyers, computer specialist; Amanda D'Wynter, court staff attorney; Britton Goodlad, judicial intern; Jeff Hopper, computer specialist; (seated) attorneys Scott Barnett and Lisa Hoppe.



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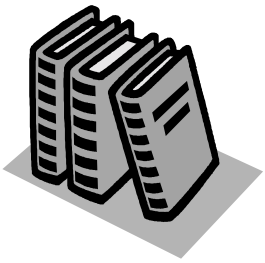

Tax Library

Contains relevant sections of the IRC and Regulations

Florida Library

Includes the full text of all Florida Statutes and Rules relating to probate, trusts and guardianships

Testing Center



A beta version of the EPTC Plus+ Testing Center. Find out how much you know about the Federal Gift Tax.

The entire Reference System has been updated to include the New Tax Act, the New proposed regulations on IRA distributions, and the New Probate Code. Only the EPTC Plus+ gives you one click access to the new Probate Code, The old Probate Code and the Probate Law Committee comments. You even get a redlined version of each revised section of what was changed.

The EPTC Plus+ Reference System is a work in progress. Visit the EPTC Online website at http://www.dpowell.com for news about revisions and enhancements. ***SEE ATTACHED ORDER FORM FOR ORDERING INFORMATION*****.**

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The EPTC Plus+ requires Microsoft Windows 95, 98 or NT. The program is shipped on CD ROM. The EPTC Plus+ v2002 is sold on a calendar year subscription basis. A separate subscription is required for each individual user. Discounts are available for multi-user and upgrade subscriptions. In addition, each subscription includes a complimentary mid-year update on CD.

What's new in the 2002 edition:

Users Guide, a Hypertext Treatise on estate planning; a Tax Library containing relevant sections of the IRC and Regulations, CLE Library; containing CLE articles authored by some of the state's leading practitioners. Including the **NEW PROBATE CODE AND RULES,** complete coverage of EGTRRA.

The 2002 edition of the program no longer requires Hyper shelf. This change has decreased program size and increased program speed. Also the 2002 edition Express utility has been enhanced to include quick access to the many examples in the main treatise. It also provides quick and easy access to the EPTC Plus+ Update Wizard which automatically checks for program updates and enhancements on the EPTC online web site. www.dpowell.com.

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RPPTL Meeting/CLE Seminar Schedule

2002

*October 9 - 14	ACTEC (American College of Trust and Estate Counsel)
*October 9 - 13	ACREL (American Counsel of Real Estate Attorneys)
*October 25 - 26	FLEA Probate Code Seminar, Wyndham, Orlando
Nov 1 - 2	RPPTL Strategic Planning Meeting, Pier House, Key West
Nov 21 - 24	**Executive Council Meeting, Casa Monica Hotel, St. Augustine**
Dec 11 - 12	Estate Planning CLE Seminar, Ft. Laud/Tampa

2003

Jan 10	Condominium Law CLE Seminar, Tampa
*Jan 15 - 18	The Florida Bar Midyear Meeting, Hyatt, Miami
Feb 6 - 7	Landlord Tenant CLE Seminar, Ft. Lauderdale/Tampa
Feb 20 - 21	Probate Litigation CLE Seminar, Ft. Lauderdale/Tampa
Feb 26 - Mar 2	**Out of State Executive Council Meeting - Hotel Healdsburg, Sonoma County, California**
*March 5 - 10	ACTEC, Las Croabas, Puerto Rico
March 6 - 7	Real Property Litigation CLE Seminar, Ft. Lauderdale/Tampa
*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
July 30 - Aug 3	**Legislative Update/Executive Council, The Breakers, Palm Beach**
*Sept 3 - 6	The Florida Bar General Meeting, Airport Marriott, Tampa
*Oct 29 - Nov 3	ACTEC, Charleston, S.C.
*October 23 - 26	ACREL, New Orleans, LA

** Related Groups*

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