ActionLine

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Department of Revenue Update: The Refinancing Dilemma

By Peter O. Larsen, Esq., Akerman Senterfitt, Jacksonville, Florida

As interest rates continue to fall and record numbers of homebuyers and commercial borrowers refinance their debt, the explosion of refinancings may also create an unintended windfall to Florida in the form of documentary stamp and nonrecurring intangible tax revenues. However, with a little foresight, it is possible for "refis" to be accomplished without payment of documentary stamp and nonrecurring intangible taxes on the amount of the debt being refinanced.

The Florida statutes currently impose a documentary stamp tax in the amount of 35 cents per $100.00 on promissory notes, nonnegotiable notes, written obligations to pay money and assignments of salaries, wages or other compensation, which are made, delivered, sold, transferred or assigned in Florida.

A mortgage, trust deed, security agreement (not including a simple UCC financing statement filing) or other evidence of indebtedness filed or recorded in Florida which secures a written obligation to pay money is also taxable. In order to avoid double taxation where there is both a written obligation to pay money and a mortgage in the same transaction, lenders typically place a notation on the written obligation to pay money that the proper stamps have been affixed to the mortgage, trust deed, security agreement or other evidence of indebtedness.

Effective May 1, 2002, the maximum amount of tax payable on a note or other obligation not secured by a mortgage, deed of trust or other lien on Florida real property is $2,450.00. In effect, the cap applies to any obligation in excess of $700,000 (in enacting this cap, the Florida legislature assumed that borrowers and lenders would prefer to pay $2,450 than to close the transaction outside

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Chair's Message:

Announcing The William S. Belcher Lifetime Professionalism Award

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

I am pleased to announce that the Real Property, Probate and Trust Law Section has created a new award in honor of William S. Belcher, whom many of you knew personally and professionally during his long career as a probate lawyer and probate litigator from St. Petersburg, Florida. Bill Belcher was a past chair of the Section and devoted many years of service to the Section and its members. He was highly respected for his expertise and knowledge of Florida probate law, and rather than keeping that knowledge and expertise to himself, he regularly shared his thoughts through seminar presentations and through his numerous publications. Bill's unselfish sense of sharing also extended to a very important area: professionalism. Any person (myself included) who ever knew, worked with, or litigated against Bill Belcher, quickly recognized that Bill promoted the

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CHAIR'S MESSAGE
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highest possible levels of professionalism to attorneys and to all persons with whom he dealt. Bill's professional, civic, charitable, and personal conduct always reflected the highest standards of professionalism and devotion to his profession as an attorney. In dealing with Bill Belcher, whether professionally or personally, one never had the sense that Bill was focused on "the bottom line." To the contrary, he graciously and voluntarily shared his knowledge, expertise, ethics, and professionalism with his fellow attorneys.

During the early years of my career as a young probate litigator, I had frequent contact with Bill Belcher. He always took my calls when I asked for free advice on probate issues, and politely pointed me in the correct direction to find the answer myself. He was a source of wonderful and reassuring advice whenever questioned regarding potentially difficult ethics issues. After I became involved with the Section's Executive Council, I was consistently amazed at the level of Bill Belcher's participation in the Executive Council of the Section, especially with the younger members of that Council, long after his term as Chair had ended. At one point early in my career, I even contacted Bill Belcher to inquire regarding whether he would be interested in hiring a young associate. Although he indicated he would be very interested in hiring me, he said he could not do so because of his close friendship and respect for an attorney with whom I was working at the time. Although through his rejection I lost the potential for learning through working with Bill Belcher, I learned a valuable lesson regarding friendship, loyalty, and respect for fellow attorneys.

I am now proud to be the Section Chair with the honor of announcing the creation of the William S. Belcher Lifetime Professionalism Award. The award will be presented, at the discretion of the Section, to an Executive Council member in recognition of his or her lifetime contributions to the Section, the Executive Council, Florida attorneys, and the public in promoting the highest standards of ethics and professionalism.



John Arthur Jones and his wife, Sally.

Those of you who have been involved with the activities of the Section, whether as members of the Executive Council, as seminar speakers, as authors, or through simply attending meetings, all know and recognize many attorneys who would deserve this award. In many ways, the decision regarding the first recipient of this award was difficult. On the other hand, my choice for the initial recipient of the William S. Belcher lifetime professionalism award received a unanimous vote of approval from the Section Executive Committee. That initial recipient is John Arthur Jones, of Holland & Knight in Tampa, Florida.

I had the honor of working with John Arthur Jones as a second-year law clerk in 1981 and as an associate at Holland & Knight from 1982 through 1986. During those years, John Arthur Jones was a mentor, critic, teacher, counselor, and friend to me. Although I eventually left Holland & Knight, I never left John Arthur Jones and he never left me. At Holland & Knight, John Arthur was well-known for his frequent lunches to which he would invite six or seven young associates with the firm. He was respected for his open door policy, and any young associate was comfortable interrupting him for quick advice or simply to say hello. He permitted me, as a very young attorney, to participate in his client meetings. Through that participation, and through observing his interaction with clients and with other attorneys, I gained valuable insight and experience from John Arthur Jones.

Despite my departure from Holland & Knight, my relationship with John Arthur Jones never changed. His "open door" policy simply switched to an "open phone" policy. Although the frequency of our lunches dropped off (mostly my fault!), we continue to keep in contact both professionally and socially. John Arthur Jones also has continued his volunteer efforts in the Section, as well as locally. He is a consistent attendee at our local bar association Real Property, Probate, and Trust Law Section luncheons, and often is the sole "senior" probate practitioner at those luncheons. Whether at statewide meetings or at local bar association meetings, John Arthur Jones has continued to provide an example of professionalism, loyalty, and the highest ethics to all persons whose lives he has touched. Although I readily admit my bias, I cannot think of a person more entitled to be the initial recipient of this award.

By the time this article is published, I will have had an opportunity to personally express these feelings to John Arthur Jones while presenting him with this award at the Section Convention in St. Petersburg, Florida. All too often, feelings of respect or gratitude are not expressed until post-mortem resolutions or awards are given to that person's family. I am pleased that I have been given this opportunity to express these thoughts to John Arthur Jones personally, and am somewhat embarrassed that I have not done so earlier.

I would like to conclude this message with two thoughts. First, don't wait for that post death memorial service or formal resolution to express your thanks to your mentors and teachers - tell them now and let them know the true impact they have had upon your life both personally and professionally. Second, on occasion we all should stop and reflect upon the lessons we learned from the Bill Belchers and John Arthur Joneses of our lives, continue to pass those lessons to others, and uphold the high standards of professionalism and ethics that they represent. We should do so out of honor to the Bill Belchers who are no longer with us, as well as out of respect for the John Arthur Joneses who continue to have such a positive and uplifting influence on our lives and our profession.

P.S. to John Arthur – it's my turn to buy lunch.

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A Non-profit Organization
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APPROVED BY: The Florida Bar, Real Property, Probate & Trust Law Section and The Florida Association of Realtors

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Shipping $ 8.00
Sales Tax 7.5% _____
Total _____

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Attn: _____ **Attorney #:** _____

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Please charge my ❑Visa or ❑Master Card; Amount to be charged $_____
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_____ ____/____ _____
Card Number **Exp. Date** **Signature of Cardholder Required**

Legislative Report: Numerical Index Summary of 2003 Legislative Issues

By Peter M. Dunbar, Martha Edenfield and Marc Dunbar, RPPTL Legislative Counsel

*The 2003 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. With the Session recently concluded as of this writing, none of the measures has been acted on by the Governor. The legislation will now make its way to the Governor's desk for final action which will take until the middle of June. Several major items remain unfinished, including the State budget, legislation to implement the constitutional smoking ban in the workplace, and legislation to reorganize and fund the State's court system. These items and others will be dealt with in one or more special sessions. The full text of each enrolled bill and its status with the Governor's Office is available on the legislative website (*www.leg.state.fl.us*). A summary of each measure that passed follows in numerical bill order:*

CS/HB 267 (Tax Certificate Sales): The bill amends section 197.432 to permit the electronic sale of certificates for unpaid property taxes and establishes the procedures to be followed by the county tax collector to implement the new procedures. **(Chapter 2003- , Laws of Florida.)**

CS/HB 283 (UCC): The bills amends section 679.509 and authorizes the termination of a financing statement by a person who has been authorized by the debtor to make the filing and the termination statement indicates that the authorization has been given by the debtor. **(Chapter 2003- , Laws of Florida.)**

CS/HB 439 (Guardian Ad Litem): This bill creates the Statewide Guardian Ad Litem Office within the Justice Administration Commission. It provides for the consolidation of existing programs; program oversight; training programs; and development of long term funding options. **(Chapter 2003- , Laws of Florida.)**

CS/HB 861 (Vested Rights, MRTA and Homeowners' Association Powers): The bill contains two the Section's legislative initiatives, amending the Marketable Record Title Act to permit the extension of deed restrictions upon an extraordinary vote of the association board of directors and defining more clearly the "vested rights" of homeowners' association members. The bill also expands the powers of the homeowners' association to permit them to represent members in disputes concerning matters of common interest. **(Chapter 2003- , Laws of Florida.)**

CS/HB 1307 (Cell Phone Towers— Preemption of Local Restrictions): Section 1 of the bill creates a new subsection (11) of section 365.172 which creates a partial preemption of local land development regulations to permit the location for wireless communication equipment antennae and related equipment. **(Chapter 2003- , Laws of Florida.)**

CS/HB 1431 (Mobile Homes–Affixed to Real Property): The bill modifies section 316.261 to permit the owner of a mobile home which is permanently affixed to real property owned by the same person to permanently retire the title to the home. The procedure permits the affixed mobile home with a retired title to be conveyed by deed and to be financed by conventional mortgage secured by the real property and affixed mobile home. **(Chapter 2003- , Laws of Florida.)**

CS/HB 1623 (Florida Business Corporation Act): The bill makes a series of changes to the Florida Business Corporation Act to modernize and simplify its provisions. **(Chapter 2003- , Laws of Florida.)**

CS/CS/HB 1719 (Construction Lien Law): The bill revises Florida's Construction Lien Law providing modified notice provisions for property owners and lenders, revising procedures for the final payment to the contractor, and revising the statement that must be provide to the owner of real property by the authority issuing the building permit. **(Chapter 2003- , Laws of Florida.)**

CS/HB 1721 (Tax Deeds on Property Contiguous to Subdivision Lands): The bill requires the tax collector to notify the record owner of contiguous property in a subdivision when application is made for a tax deed on submerged land or common elements of the subdivision. If there are no bidders for the certificates on such properties and the county does not elect to purchase the land, the county must notify the contiguous property that the land is available for taxes. The bill also provides that ad valorem and non-ad valorem assessments shall be made against the lots in a subdivision and not against the subdivision property as a whole. **(Chapter 2003- ,Laws of Florida.)**

CS/SB 260 (Condominiums– Display of Armed Services Flags): The bill modifies Section 718.113 of the Condominium Act to permit unit owners to display in a respectful manner Armed Services Flags not to exceed 4 2 feet by 6 feet on designated holidays. **(Chapter 2003- , Laws of Florida.)**

CS/CS/SB 340 (Baker Act– Release of Patient): The bill provides that a patient may also be released by the receiving facility when approved by an attending emergency department physician with experience in the treatment of mental and nervous disorders after completion of an involuntary examination. **(Chapter 2003- , Laws of Florida.)**

continued, next page

SB 482 (Landlord and Tenant Termination): The bill revises the provisions relating to the termination of residential tenancies with a specific duration by creating a new Section 83.575. The bill also provides that no landlord shall discriminate against a member of the United States Armed Forces in offering a dwelling unit rent or in any of the terms of the rental agreement. **(Chapter 2003- , Laws of Florida.)**

SB 524 (Rules of Evidence): The bill makes modifications to rules of evidence in Chapter 90 providing that objections to admitting or excluding evidence do not have to be renewed to preserve the claim on appeal; providing for notice and the opportunity to challenge when evidence is being provided by certification; and providing for the admissibility of evidence or records maintained in a foreign country. **(Chapter 2003- , Laws of Florida.)**

CS/CS/CS/SB 592 (Condominiums and Homeowners' Association): This is the comprehensive bill dealing with most of this Session's changes to the laws governing condominiums, cooperatives, and mandatory homeowners' associations. Among the sections in the bill are provisions to authorize the optional "electronic transmission" of meeting notices in condominiums, cooperatives and mandatory homeowners' associations; the Section's initiative to permit the domestication of foreign not-for-profit corporations; clarification of the insurance requirements for condominium associations; authorization for condominium and cooperative associations to charge for requested information and assessment certificates issued to a prospective purchaser or lienholder; and authorization for condominium and cooperative associations to waive the retrofit requirement of fire sprinklers upon a two-thirds vote of the membership. **(Chapter 2003- , Laws of Florida.)**

CS/SB 676 (Continuously Maintained Roadways): Section 54 of this bill is the Section's initiative permitting a roadway to be considered a dedicated public right of way when it has been continuously maintained by a county, municipality or the Department of Transportation for seven consecutive years. **(Chapter 2003- , Laws of Florida.)**

CS/SB 1098 (Landlord and TenantBMilitary Personnel): The bill amends section 83.682 to permit military personnel to terminate a rental agreement when moving into government quarters or when being transferred. The bill permits military personnel to terminate motor vehicle leases and insurance contracts. The bill also creates a new section 689.27 permitting a member of the armed forces to terminate contracts for the purchase of a house, condominium or mobile home that is intended as a primary residence when the member is transferred or required to move into military quarters. **(Chapter 2003- , Laws of Florida.)**

CS/CS/SB 1220 (Disclosure Summary on Residential Property): The bill revises the required disclosure summary required in residential real estate transaction pursuant to section 689.26, and it provides that a purchase contract that does not comply with the disclosure requirements is voidable by the purchaser prior to closing. The bill was amended from its original version to conform to the recommendations of the Section's Legislative Committee. **(Chapter 2003- , Laws of Florida.)**

CS/CS/SB 1286 (Residential Construction Defect Disputes): The bill provides an alternative dispute resolution procedure for construction defect claims or claims relating to defective material or products in residential communities. The bill is applicable to condominium, cooperative, mobile home and mandatory homeowners' associations, and provides for mandatory pre-suit procedures and the right of the contractor or design professional to cure the defects prior to the filing of an action in court. The bill was amended from its original version to conform to the recommendations of the Section's Legislative Committee. **(Chapter 2003- , Laws of Florida.)**

CS/SB 1944 (Mobile Home Relocation Trust Fund): The bill provides additional funding for the Mobile Home Relocation Trust Fund. Each park owner will pay $1 per mobile home lot per year, each mobile home owner will pay $1 per year at the time of the renewal of the owner's tag, and the park owner changing the use of the park property will pay an increased contribution for the relocation of homes in the park. **(Chapter 2003- , Laws of Florida.)**

SB 2450 (Uniform Principle and Income Act): The bill is the Section's initiative making minor changes to last year's bill relating to a trustee's power to adjust, the serving of the statement on the legal representative or natural guardian, and the calculating of the percentage within a unitrust. **(Chapter 2003- , Laws of Florida.)**

CS/SB 2568 (Guardianship): This bill is a comprehensive compilation of changes dealing with guardianship, health care, and nursing home administration policies. Section 5 of the bill amends Section 765.401 by adding clinical social workers to those who may make health care decisions for a patient if no individual

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in a prior class is reasonably available. Sections 6 through 16 of the bill deal with guardianship and public guardians. Sections 7, 11 and 12 are the RPPTL initiatives dealing with fees in proceedings to determine guardian's and attorney's fees, education requirements for parent/guardians, and reasonable fees and costs for persons employed by the guardian. Section 16 of the bill creates the 10-member Guardianship Task Force for a two year review of guardianship laws and specifies that RPPTL shall designate a member of the Task Force. The Task Force language also passed as a part of **CS/SB 1822. (Chapter 2003- , Laws of Florida.)**

SB 2700 (Probate and Trust): This is the Section's 2003 Probate and Trust initiative. The bill adds evidence of exposure to a "specific peril" as a basis for presuming death with particular venue provisions for petitioning a court for such a determination, and it conforms Florida law to provide that properly executed military testamentary instruments are valid wills in this state. It also establishes a specific conflict of interest standard for certain trustees; it addresses gaps in the anti-lapse laws; amends provisions relating to the serving of the notice administration and notice to creditors; clarifies the personal representative's powers pertaining to control and expenditure of funds for protected homestead; provides that civil actions based on constructive fraud must be initiated within four years of discovery; and eliminates a conflict in the law by removing the exception of homestead property form the application of the Florida Uniform Disposition of Community Property Rights at Death Act. (Chapter 2003- , Laws of Florida).

Understanding the Differences Between Oaths and Acknowledgements for Florida Notaries

By Jennifer Bertsch, Notary Education Coordinator, Office of Governor Jeb Bush

Many notaries use their commissions to perform one specific duty related to their employment. Some notaries specifically administer oaths to individuals while others take acknowledgements from signers on various documents. It is when you are asked to perform notarial acts outside of your normal job functions that it is important to understand the differences between oaths and acknowledgements.

When you notarize a signature, you must perform one of two official notarial acts: take an acknowledgment from or administer an oath (or affirmation) to the document signer. These two acts have different purposes. The lack of understanding of these basic duties causes confusion and often leads to errors in notarizations, even among the most experienced notaries.

Acknowledgment

To make an acknowledgment, the document signer must personally appear before you, the notary public, and declare that he or she has signed the document voluntarily. You should ensure that the signer understands the document and has not been coerced into signing. If there is any question about the signer's willingness to execute the document or his or her understanding of the contents of the document, you should refuse to notarize and perhaps refer the person to an attorney for legal advice. You may want to ask the signer, "Do you acknowledge that this is your signature and that you are executing this document of your own free will?" If the answer is yes, you should then complete a certificate which states that the execution of the document was acknowledged by the signer. Documents typically requiring an acknowledgment include deeds, mortgages, contracts, and powers of attorney (except those pertaining to motor vehicle titles).

Oath or Affirmation

An oath or affirmation is administered to a document signer when the signer is required to make a sworn statement about certain facts. The signer personally appears before you to swear (or affirm) to you, an officer duly appointed to administer oaths, that the information contained in the document is true. A person who makes a false oath or affirmation is subject to criminal charges for perjury. Sworn statements are commonly used in affidavits, depositions, and applications.

A notarization requiring an oath begins with the administration of an oath or affirmation. The courts have held that there should be a verbal exchange between the notary and the document signer in which the signer indicates that he or she is taking an oath. An oath similar to one administered in court by a judge or bailiff would be sufficient. Or, you may simply ask, "Do you swear (or affirm) that the information contained in this document is true?" After receiving an affirmative answer, you must complete a proper notarial certificate indicating that an oath or affirmation was taken. If the document you are asked to notarize contains a prepared notarial certificate, look for the key words "acknowledged" or "sworn to" to tell you which notarial act is required. If there is no notarial certificate on the document, the signer must direct you whether he or she wants to make an acknowledgment or take an oath. Unless you are an attorney, you are not authorized to advise a person which notarial act is appropriate for the document presented for notarization, and you may not advise the person about the contents of the document.

Sample Certificates

Here are some sample certificates for oaths and acknowledgements:

continued, next page

For an oath or affirmation:

STATE OF FLORIDA
COUNTY OF _____

Sworn to (or affirmed) and subscribed before me this _____ day of _____, (year) , by (name of person making statement) .

(Signature of Notary Public - State of Florida)
(seal)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known _____ OR Produced Identification _____
Type of Identification Produced_____

For an acknowledgment in an individual capacity:

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, (year) , by (name of person acknowledging) .

(Signature of Notary Public - State of Florida)
(seal)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known _____ OR Produced Identification _____
Type of Identification Produced_____

For an acknowledgment in a representative capacity:

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, (year) , by (name of person) as (type of authority, . . . e.g. officer, trustee, attorney in fact) for (name of party on behalf of whom instrument was executed) .

(Signature of Notary Public - State of Florida)
(seal)

(Print, Type, or Stamp Commissioned Name of Notary Public)
Personally Known _____ OR Produced Identification _____
Type of Identification Produced_____

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October 2003						
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12	13	14	15	16	17	18
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Register early as space is limited! Registration fee is $255.00 per registrant. Subsequent members from th same firm may attend at a reduced rate of $240.00. Refunds will be given for cancellation postmarke (returning **ORIGINAL** confirmation) 48 hours prior to seminar presentation date. Cancellation fee $20.00.

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All Members of the Real Property,Probate & Trust Law Section of The Florida Bar

Re: Probate & Guardianship Forms as Revised January 1, 2003

The new forms are ready!!

Although the new revised forms have been available for some time, my "annual letter" announcing the completion of the revisions is late (very late), and for that I apologize.

Your non-profit corporation, Florida Lawyers Support Services, Inc. (FLSSI), has the new forms printed and ready for purchase. The licensees have integrated the changes into their software and the forms are thus available to you on computer as a part of their service.

During the past two years there have been vast changes to the Probate Code and to the Florida Guardianship Law as well as to the Florida Probate Rules. This has required the Forms Committee, and especially its Chair, William R. Platt, to expend an extraordinary amount of time attempting to see that the forms are right. This has been especially difficult because the text of the Code and the provisions of the Rules do not always fit together seamlessly.

At least two members of the Forms Committee reviewed each and every form and made such changes as were deemed appropriate or necessary to correct errors, to conform the forms to statutory, rule and case law changes, and to improve language and format. As with any other forms, you, the practitioner, must make the final decision as to whether a particular form fits your purpose and complies with the law and the rules.

Mr. Platt reports that there are four new Probate forms, one new Guardianship form, and that twenty-eight of the Probate forms and thirty-six of the Guardianship forms have been revised substantially, while a great number of the forms in each classification have changes that were not considered sufficiently material to list them as "revised."

ALL OF THE ABOVE INDICATES THAT IT IS IMPERATIVE THAT YOU OBTAIN YOUR OWN COPIES OF BOTH THE PROBATE AND THE GUARDIANSHIP FORMS.

You may request copies of the new order blanks for the probate and guardianship forms by visiting FLSSI's Web Site at www.flssi.org or by writing to FLSSI at P. O. Box 5647, Tallahassee, FL 32314 (Phone 850-656-7590 or 1-800-404-9278).

While I have your attention, I must call to your attention the greatest bargain since the penny all-day sucker -– Professor Powell's EPTC PLUS+ 2003 software, which is also available from FLSSI. You can subscribe for $200.00 or, if you are already a subscriber, you can get the current up-date for $100.00. It includes the NEW PROBATE CODE and RULES, (not FLSSI's probate forms) with complete coverage of EGTRRA, (OK, you can look that up), and a Users Guide. I personally would not be without it and wholeheartedly recommend it to you. (So you are not "computer literate." Well, if I can handle it, anyone can!)

The Committee greatly appreciates your calling to their attention any typographical or other errors you may detect. Despite the Committee's best efforts there are always some errors and some required changes that are overlooked. You can "chat" with the FLSSI staff by phone or Internet/e-mail at flssi@nettally.com.

John Arthur Jones
Chair Emeritus, Forms Committee

FLSSI Licensed Software Vendors are listed below:

Advanced Logic
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Des Moines, IA 50312
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Automated Legal Systems (ProDoc)
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ebustan@americanlegalnet.com

Tax Section Pays Tribute to Edward F. Koren

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

On April 11-12, 2003, the Tax Section of The Florida Bar held its 25th Annual Meeting at the Portofino Bay Hotel in Orlando, Florida. A highlight of the event was the Section's presentation of the prestigious Gerald T. Hart Outstanding Tax Attorney of the Year award. This year, the accolade went to Edward F. Koren, partner in the Tampa and Lakeland offices of Holland & Knight where he serves as Chair of the firm's Trusts and Estates National Practice Group. The award signifies the Tax Section's choice of the one individual who has made major contributions to the advancement of the practice of tax law, and who exemplifies the highest standards of competence and integrity.



John Arthur Jones (L) and Bill Henry (R) stand with 2003 Gerald T. Hart Outstanding Tax Attorney of the Year Award recipient, Ed Koren.

The award was presented by former Chair of the Tax Section, Don Tescher, who, along with another former Chair, Sam Ullman, represented the Section in presenting the award. All speakers paid tribute to Ed's long standing service to The Florida Bar, the American Bar Association, and the American College of Trusts and Estates Counsel. During the presentation of the award, Sam stated, "Ed has distinguished himself as a highly competent and respected attorney. He has written extensively, and, his work is well known and cited often. He has spoken and lectured, and served both the Florida and American bar associations in leadership roles. He has, through hard work and example, elevated himself to what a tax lawyer is supposed to be."

During the event, Lou Conti, partner with Holland & Knight in Orlando and another former Chair of the Tax Section, presented Ed with a proclamation. Lou explains, "The proclamation signifies the firm's recognition of Ed's achievements and his significant contributions not only to the firm, but to The Florida Bar, the ABA, and ACTEC. Ed is a leader in the practice of trust and estates law, as well as an accomplished author (in trusts and estates, taxation, estate planning and administration)." According to fellow partner, Bill Lane, "All of us in the Tax Section are familiar with Ed's energy, vision, and leadership skills. His talents have advanced Holland & Knight's trust and estates practice into the largest of its kind in the United States."

Ed's impressions of the award are reflective. He states, "Two of the first four or five recipients of this award were mentors of mine and responsible for the growth of the Tax Bar in Florida. It is an honor to be included in this group." Two of Ed's mentors, Bill Henry (former Tax Section Chair, past recipient of the Hart Award, and former President of The Florida Bar) and John Arthur Jones (former RPPTL Section Chair), were among those participating in the awards ceremony.

Ed states that his clients' planning issues are among the most challenging aspects of his practice, but also one of the most fulfilling. In addition, he cites his work on the legislative initiatives of The Florida Bar and ABA as highly rewarding. He notes, "Work at this level helps the practice overall and there are tangible results." Of interest, Ed was counsel of record for ACTEC in filing an amicus brief in *Commissioner of Internal Revenue v. Estate of Hubert*, decided by the U.S. Supreme Court in 1997. The Court cited the ACTEC brief in its opinion. In August 2002, Ed assumed the chairmanship of the RPPTL Probate & Trust Division's Principal and Income Law Committee. His committee achieved a consensus among competing interests concerning the enactment of the Florida Uniform Principal & Income Act, and SB2450 was passed during the 2003 legislative session. In August 2003, Ed will become Chair-Elect of the ABA's RPPTL Section. These are just a few of Ed's accomplishments.

Ed was humbled by the congratulatory cards and letters he received from friends, colleagues, and clients. He muses, "I guess, with the receipt of this award and the acknowledgement of your peers, you start realizing you're moving along on your journey." RPPTL joins the chorus saying, "Well deserved, Ed!"

For more information on Ed's extraordinary career, which spans almost thirty years, see XXI, No. 2 Tax Section Bulletin, March, 2003, at 3.

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Department of Revenue Gaining Ground in Challenging *Kuro*-like Transactions

By Mitchell I. Horowitz, Esq., Fowler White Boggs Banker, P.A., Tampa, Florida

The Department of Revenue has been taking an increasingly aggressive stance in attacking the Second District Court of Appeal's opinion in *Kuro, Inc. v. Department of Revenue*, 713 So.2d 1021 (Fla. 2nd DCA), *appeal dismissed*, 728 So.2d 201 (Fla. 1998). There currently are two cases on appeal, one to the First District Court of Appeal and the other to the Third District Court of Appeal, where the Department is strongly questioning the validity of *Kuro* and, in any event, seeking to limit *Kuro's* application strictly to the facts of that case. In *Kuro*, the Second DCA held that the contribution of unencumbered real estate, owned 50-50 by a father and son, into a corporation which they already owned 50-50, with no additional issuance of stock, was not subject to documentary stamp taxes on the fair market value of the real estate. The court ruled that this was a mere book transaction, with no "purchaser," as required under section 201.02(1), F.S.

The case being appealed to the First DCA (*International Paper Company v. DOR*, Case. No. 1D02-3947) is a direct appeal from the Notice of Decision issued by the Department under section 120.68, F.S.. Thus, there is no lower court opinion to be reviewed. The facts are simple and straight-forward. The taxpayer, a large corporation, formed a single member Delaware limited liability company on Day 1, and contributed cash in exchange for the LLC interest. On Day 2, the taxpayer transferred unencumbered real estate into the LLC, but did not receive any additional interests. The taxpayer paid over $100,000.00 in documentary stamp taxes upon recording the deed, and filed a claim for refund. The Department denied the claim, to which the taxpayer filed an informal protest. The Department issued the Notice of Decision sustaining the refund denial, resulting in the appeal to the First DCA. At the time of preparing this article, the parties had completed the filing of briefs and are awaiting the scheduling of oral arguments (and an *amicus curiae* brief was filed on behalf of an industry group supporting the taxpayer's position).

The case on appeal to the Third DCA (*Crescent Miami Center, LLC v. DOR*, Case No. 3D02-3002) involves a somewhat more complicated set of facts. In this case, the taxpayer is a Delaware limited liability company to which the unencumbered real estate, located in Miami-Dade County, was transferred. The taxpayer was formed on Day 1 by a higher-tier entity, a Texas LLC (the "Parent"). Immediately afterwards, the Parent transferred into a Delaware limited partnership a 99.9% interest in the LLC, and the remaining 0.1% interest to a separate single member LLC, which was the sole general partner of the limited partnership. The general partner then immediately transferred its 0.1% interest in the taxpayer to the limited partnership, making the taxpayer a wholly-owned single member LLC of the limited partnership. On the next day, the Parent directly transferred the unencumbered real estate into the taxpayer, rather than doing a multiple series of drop-down deeds through the general partner and the limited partnership. No additional interests in any of the intermediate entities, or in the taxpayer, were transferred for the real estate. The taxpayer paid over $1 million in documentary stamp taxes (including the local Miami-Dade County tax), and filed a claim for refund, which the Department denied. The taxpayer eventually challenged the refund denial in circuit court which, on cross-motions for summary judgment, granted the Department's motion and denied the taxpayer's motion. The court's order gives no basis for its position. Oral arguments were presented to the court on March 24, 2003; at the time of the writing of this article, the parties were awaiting the court's decision. An *amicus curiae* brief was filed on this case as well on behalf of the same industry group.

In both cases, the Department argues that *Kuro* was wrongly decided and should, at a minimum, be strictly limited to its facts. Among its arguments, the Department relies on the old federal documentary stamp tax (upon which the Florida statute was originally based), as well as creating the concept of "deemed consideration" and inventing a step-transaction doctrine not before seen in the documentary stamp tax context. However, in all of its arguments, the

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KURO-LIKE TRANSACTIONS
from preceding page

Department attempts to avoid any discussion of the requirement that there be a "purchaser" in order for the tax to apply. Instead, the Department attempts to argue that the 1990 amendments to section 201.02(1), F.S., creating a statutory definition of "consideration," automatically requires taxation of any real estate transfer except those it deems to be exempt (*e.g.*, mergers). In fact, in both cases, the Department asserts that "whenever there is consideration, there is a purchaser." This is a complete misreading of many prior cases, including *State Ex-Rel Palmer-Florida Corp. v. Green*, 88 So.2d 493 (Fla. 1956), and *Florida Department of Revenue v. DeMaria*, 338 So.2d 838 (Fla. 1976), where transfers of real estate from a corporation to its shareholders were held not taxable (except to the extent of mortgage indebtedness) because the transfers were "mere book transactions" and lacked the presence of a purchaser. In the legislative history to the 1990 amendments, there is no mention of the Legislature's intent to overrule these cases. Interestingly, while these cases were on appeal, DOR issues TAA 02B4-013 (12/10/02), in which it applied *Kuro* to a non-commercial factual setting, although there is no apparent statutory support for such a distinction.

In the past, many have argued (including this author) that the Department's rule changes in response to the 1990 amendments were wrong and not legislatively authorized. Although *Kuro* remains the law of the state unless another DCA or the Florida Supreme Court issues a contrary opinion, practitioners should be aware of the Department's position and advise their clients accordingly.

Editor's Note: For a more in-depth review of the cases, Kuro *and* Muben-Lamar, *see* "Kuro *and* Muben-Lamar *In the Eye of the Beholder?" by Barton, Burke and Horowitz in The Florida Bar* Journal, *May 2002.*

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CLE Corner

By Pat Jones, CLE Coordinator, Real Property Law Division, and Jim Herb, CLE Coordinator, Probate and Trust Law Division

On April 25 – 27, 2003, the Florida Bar CLE Committee conducted a Program Chairs workshop in St. Augustine, Florida. For those of you who were unable to attend this valuable session, this Column highlights some of the interesting information the attendees shared.

Quality. A quality program means among other things, selecting the best topics for presentation, selecting a catchy title, recruiting the "right" speakers, compiling meaningful program materials, and developing the presentation skills of the speakers.

Topics. Did you know that 74% of those surveyed report that a good topic is more important than a good speaker? Start selecting topics by looking at the obvious "hot" subjects created by changes in the law or emerging trends in the field. Then review the presentations given in previous years to avoid repeating topics that have been recently treated and to select other topics that would be appropriate to update.

Titles. Catchy titles can make a difference. For example, the Government Lawyers Section offered, "Death is Different" as opposed to, say, "Advanced Appellate Workshop." Another example of an effective title is the seminar sponsored by the Workers' Compensation Section on Sexual Harassment at a venue in South Florida. They called it, "The Birds and the Bees in the Keys." From our own Section, you may recall a Probate seminar called, "The Nuts and Bolts of RIVTs." Because they rhyme, or play on words, or have double meanings, topics like these grab our attention and appeal to us in ways of which we are only subconsciously aware.

Speakers. A bad speaker cancels out a good topic. The worst experience that can happen to a Program Chair is to have a designated speaker send an inexperienced person to speak in his or her stead. A Program Chair may be well advised to select her own substitute speaker, someone who knows the subject area and can speak intelligently about it, rather than accept a new associate who does not know the subject, lacks experience in the field, and has done no previous public speaking.

For those interested in Speaker Development, the Internet offers unlimited resources. A "Google" search on the Internet on "public speaking" will uncover a host of intriguing sites, such as, "Ten Tips for Successful Public Speaking," "How to Conquer Public Speaking Fear," "So You Wanna Deliver an Effective Speech?" and "Effective Speech Writing." Also, Toastmasters International is a world-wide public speaking organization with clubs throughout the country, which focus on overcoming the fear of public speaking and improving public speaking skills. You can locate a chapter near you through Toastmasters' website: www.toastmasters.org.

Materials. One reason people pay to attend Bar-sponsored and Section-sponsored seminars is for the materials. They should be useful reference materials that can stand on their own, as opposed to "bare bones" outlines. For seminars that are geared toward the practical aspects of the subject, forms and checklists are appreciated. One of the more frequent (and bitter) complaints the Bar's staff receives is about materials that were given as a separate handout because they were not received by the Bar in time for inclusion in the printed manual. Program Coordinators and Program Chairs should consider canceling a speaker if he or she is unable to meet deadlines.

Some people who are effective public speakers are reluctant to accept speaking engagements because they don't want to prepare the corresponding material (and certainly not by the short-fuse deadline the Program Chair is suggesting!). There is no law requiring a speaker to write his or her own materials. If a Program Chair is aware of a person who prefers writing to public speaking, the Chair should consider assigning the writing and speaking tasks to different individuals.

More ideas about materials: in some cases, the materials may already be written. The Bar's CLE Publication staff has suggested that a CLE manual (or selections within a manual) can be the basis of a seminar. Consider the manuals that already exist in this Section alone — "Florida Real Property Sales Transactions," "Florida Real Property Complex Transactions," "Practice under Florida Probate Code" — the possibilities are endless. And one last note about preparing meaningful materials: don't forget the Internet. Surfing the Net can provide inspiration, new ideas, new information on your topic, and links to organizations that are active in your field. A list of relevant websites is itself a valuable item to include in one's materials.

We hope this Column has given you enough ideas to get you started as you begin your seminar program planning for the coming year. In the next issue we will be providing more in-depth information on Quality and Innovation in seminar presentations. And if you have ideas that you would like to share, or if you have comments or questions about our CLE programs, please email Pat Jones at *pjones@thefund.com*.



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RPPTL Does Sonoma!

Reported by David Carlisle, Esq., Akerman Senterfitt, Miami, Florida

This year's out-of-state meeting took us from sunny Florida to sunny California. Steve Hearn, Section chair, could not have picked anything more perfect than barrel tasting in Sonoma, California as the theme of the tour. The excursion (February 26 through March 2, 2003) was very well attended with over 62 members and their spouses making what proved to be a most memorable trip.

The center of activity was the town of Healdsburg, California, nestled at the mouths of the Russian River and Dry Creek valleys. This, as we learned, is Zinfandel country, but what also surprised us with the outstanding cuisine and variety of wines grown in the region.

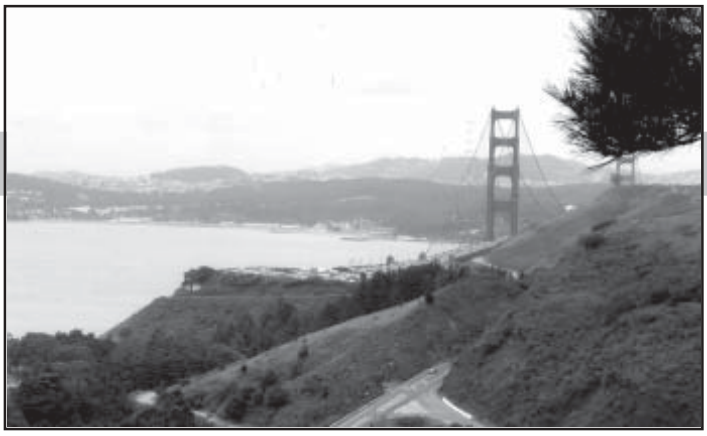
The festivities commenced with a reception at our host hotel, the Hotel Healdsburg located on the quaint town square. The hotel featured a California/Zen decor (and an outstanding lounge).

For those who had arrived by Thursday (February 27), there was a wine tasting tour of the Alexander Valley which was followed by an outstanding dinner at Hanna winery. A picture perfect day followed on Friday (February 28) as sunny, cloudless skies and mid 60's temperatures ushered us on our way to the first day of barrel tasting.

For those who did not make the trip, barrel tasting is a weekend long annual festival celebrating the beginning of the growing season. For a modest one-time charge of $5, you get a commemorative tasting glass and are on your way…. All of the wineries participate and, in addition to their regular offerings, "roll out the barrel" and allow you to taste (and buy in advance) the wines that they will be releasing the next year. We split into two tours: one to sample the Russian River Valley wines and the other to the Dry Creek Valley.

The Dry Creek Valley tour was lead by our intrepid liaison, Bonnie "Que Shiraz, Shiraz" Bevis. The tour stopped at Michel-Schlumberger (they are *Swiss* ...not what you were thinking) Rashambo (which included an amazing lunch) and topped off by a stop at Ferrari-Carano, with its Disney-for-adults gardens and cellar.

The next day, it was back to reality and an Executive Council meeting (March 1). The Section budget for 2003-2004 was unanimously approved. The liveliest debate came over the proposals to adopt updated title standards in real estate transactions. Finally, after vigorous debate, the "no reports" carried the day and all were off to an afternoon of more gorgeous weather and spectacular wine tasting. The finale was dinner and dancing at Chalk Hill winery followed the next day by a picturesque drive through San Francisco and a long flight home.



Leaving San Francisco for the Wine Country



The Guttmans and Neukamms enjoy lunch in Sausalito

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Kathy Neukamm admires barrels of Jordan Wine



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J Winery's Vineyards



Steve Hearn is ready for a refill at Silver Oaks



A Section tour group is ready to "Toast" at Korbel



Section members enjoy a Wine Tasting at Gary Ferrell Winery

All photos courtesy of John B. Neukamm



Steve and Suzanne Hearn, Laird Lile and Mike Stafford relax after an exhausting day of winery tours



Sandra and Frank Diamond and Tom Smith know how to have fun



John and Kathy Neukamm, with Kathy's parents



Down to Business...The Executive Council meets



The California Coast



Steve and Suzanne Hearn enjoy our hosts' company at Chalk Hill Estate

All photos courtesy of John B. Neukamm

Real Property Case Summaries

by Stephen Edward Silkowski, Esq., Jacksonville

In eminent-domain proceedings, penalties relating to a statutory offer of judgment are not sanctions that the Rules of Civil Procedure control.
Fla. Dept. Of Transportation v. Enterprising Professional Investment Co., 809 So. 2d 19 (Fla. 2nd DCA 2002).

On February 11, 2000, a final judgment was entered that incorporated a jury verdict awarding Enterprising Professional Investment Company (EPIC) $65,000 for the value of land taken and severance damages. The final judgment also reserved jurisdiction to award fees, costs, and interest to be determined by the trial court at a later hearing. Four months after entry of the final judgment, EPIC filed a Motion to Tax Fees and Costs seeking an expert appraiser's fee and litigation costs incurred. At the hearing on EPIC's Motion to Tax Fees and Costs, counsel for both parties confirmed that the final judgment award was less than the amount of an offer of judgment made by the Department. The Department argued that because the final judgment award was less than the DOT's offer of judgment, EPIC was precluded, under the express language of section 73.032(5), Florida Statutes (1999), from recovering any fees or costs incurred after rejectionof the offer of judgment. EPIC objected to any reference to the offer of judgment, arguing that the Department had not timely filed a motion for sanctions under Florida Rule of Civil Procedure 1.442(g) governing proposals for settlement. The Department responded that it was not seeking sanctions as contemplated by the rule. The trial court ruled that the nonpayment of fees and costs is a sanction that must be timely sought under rule 1.442. The court awarded EPIC its litigation costs and expert appraiser's fee. The appeal court reversed.

On appeal, the Department asserted that the trial court erred in refusing to consider the offer of judgment because section 73.032(5) divested the court of any discretion to award costs incurred after the rejection of the offer of judgment. EPIC responded that application of section 73.032(5) constitutes a sanction that must be invoked by the timely filing of a motion pursuant to rule 1.442(g), which the Department failed to do. Thus, the question raised by this appeal was whether section 73.032(5) constitutes a sanction, the imposition of which is controlled by the procedural requirements of rule 1.442(g).

The court held that section 73.032(5) is not a sanction as that term is used in rule 1.442. Rather, it is a substantive legislative enactment that prohibits the award of certain fees and costs in eminent domain proceedings where the judgment obtained is equal to or less than a rejected offer of judgment. Furthermore, its application need not be invoked by the filing of any motion. The case was remanded for a determination of whether any of the awarded costs were prohibited by section 73.032(5).

A co-op unit used as a residence may qualify for homestead protection against forced sale.
Southern Walls, Inc., v. Stilwell Corp., 810 So. 2d 566 (Fla. 5th DCA 2002).

The issue that the court resolved is whether a co-op constitutes a homestead under Florida law so as to render it exempt from forced sale under Article X, Section 4(a)(1), Fla. Const. The court began its analysis by noting that the concept of homestead will be given different meanings depending on the context in which it is used. Homestead has significance in the law relating to devise and descent, taxation, and exemption from forced sale. The Florida Supreme Court had held that a co-op is not homestead for purposes of the laws relating to devise and descent, but may qualify as homestead for purposes of taxation.

The purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law. As a matter of policy as well as construction, the Florida courts have consistently held that the exemption should be liberally construed in favor of protecting the family home and those whom it was designed to protect. The nature of the title and the estate that are necessary for one to claim the homestead exemption need not be fee simple title to the property. For purposes of taxation of homestead property, Article VII, Section 6(a) of the Florida Constitution designates the cooperative form of ownership as homestead.

That the owner of a co-op can receive the relatively nominal benefit of the exemption for tax purposes while facing the seizure of the property by creditors is inconceivable. The public policy underlying the homestead exemption from forced sale is clearly more compelling than the public policy underlying the tax exemption. The homestead exemption should ensure more protection from forced sale than it receives from the tax exemption, not less.

A fee simple estate evidenced by a warranty deed is not essential for a co-op owner to claim the exemption. A life estate interest, for example, that gives the owner the right to use and possess a co-op as his residence may be sufficient. The nature of the residence may take many forms. Underlying the policy considerations embodied within the provisions of Article X, Section 4(a)(1), is the adage that "a man's home is his castle", regardless of whether one's castle is a traditional family home or a modest cottage, whether it is a rural farmhouse or a villa by the sea, whether it floats or sits on wheels, whether it is a condominium or a co-

continued, next page

op, it should receive the same protection under Florida law. Therefore, in order to constitute a residence for purposes of claiming the exemption, a co-op must be a dwelling that an individual has an ownership interest in that gives him the right to use and occupy it as his place of abode.

"Cooperative" means that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property. Generally, when an individual purchases a co-op, he purchases shares in a corporation that owns the property in which the co-op is situated. The shares collectively constitute the document evidencing a unit owner's membership or share in the association. The corporation conveys a lease to the purchaser as part of the consideration of the purchase of the shares. This lease agreement typically gives the purchaser title and the right to exclusively possess and occupy the apartment for the life of the purchaser.

Under the cooperative form of ownership, the owner receives shares in the cooperation and a long term lease as evidence of his title, rather than a deed of conveyance. For purposes of the homestead exemption, the court found that this is a distinction without a difference. What is significant is that a co-op owner owns the unit, pays valuable consideration for it, and has the right to the exclusive use and possession of it for the duration of the lease. In addition, consideration must be given to the co-op owner's intention to make the co-op his homestead and the actual use of the property as the principal residence. Therefore, a co-op that is used as a residence may indeed qualify as a homestead that is exempt from forced sale to satisfy a creditor's judgment.

Clear language in condominium declaration controls calculation of owners' assessments.
PGA Property Owners Assn., Inc., v. Golf Villas, 813 So. 2d 256 (Fla. 4th DCA 2002).

PGA Property Owners Association, Inc., appealed the trial court's final declaratory judgment that formulated a new monthly assessment for the owners in the Golf Villas, a set of condominium units located in PGA Village. PGA is the master homeowner association in charge of the entire development. All of the property in PGA Village is subject to the Master Declaration.

PGA attempted to assess the owners of Golf Villas for the benefit of a guardhouse and security gate that were not utilized at their complex, arguing that Golf Villas benefited from them because they increased the overall value of the property. In addition, PGA urged that, because Golf Villas' residents were allowed to go behind the gated area, they ultimately benefited from the added security. On the other hand, Golf Villas' residents testified that they were regularly denied access to the gated area in PGA Village. There was also an increase of nine dollars per month charged to all owners at PGA Village for the twenty-four hour roving security guard. Golf Villas disputed PGA's contention that the security service conducted roving patrols through the Golf Villas communities. Overall, at that time, the fees being assessed to Golf Villas increased from approximately $31 a month to $95.91.

Golf Villas filed an action for declaratory judgment, asking that they no longer be required to pay for services that did not benefit its owners and a refund of previously paid, improperly assessed fees. The trial court calculated a percentage of the total PGA budget that Golf Villas should be responsible for in the year 2000 based on the ratio of assessments attributable to Golf Villas in 1996 and the total 1996 PGA budget.

First, the appellate court found that Golf Villas qualifies as a sub-district under the definition of a sub-district as set forth in the Master Declaration. Nevertheless, in fashioning its remedy, the trial court's assessment plan was not consistent with the definitions provided in the Master Declaration. When a document's language is clear, a court cannot indulge in construction or interpretation of its plain meaning. Pursuant to the Master Declaration, a base assessment must be (1) equally assessed to all owners and (2) reflective of the operating funds of the Association that are utilized for the betterment of the entire community. In order to accomplish those criteria, a base assessment would not include the charges for benefits that the entire community does not receive. In addition, all owners throughout the entire PGA Village should pay the same base assessment. Then, an additional sub-district or district assessment may be determined and charged to each individual development within the PGA Village to account for any additional expenditures for services that benefit that particular development (such as maintenance, lighting, security, etc.).

The trial court's remedy did not re-

continued, next page

Electronic Court Filing On Hold

The Electronic Court Filing Committee of the RPPTL Section, chaired by Rohan Kelley, has been studying the potential to implement electronic court filing in the probate and guardianship practice areas. The Committee prepared an extensive review of the history of electronic court filing in Florida, the technology issues arising on the sending as well as the receiving end of electronic filing, and how an electronic filing system could work. The report also reviewed anticipated costs if the RPPTL Section were to sponsor a project to provide Florida courts with the beginning point for actual electronic court filing and to create standards for use throughout the state. The Committee's White Paper can be viewed or downloaded at *www.flabarrpptl.org/pdf/ECFwhitepaper.pdf*. Due to recent developments, however, including the Article V funding issue in which the State of Florida will take over the responsibility for funding the local court systems, the Committee has indefinitely suspended its efforts.

flect the clear definitions included in the Master Declaration because it created neither a base assessment to be charged equally for funds utilized by the entire PGA Village nor a sub-district assessment that accounted strictly for the benefits received by Golf Villas. Because the trial judge erred in interpreting how a base assessment and a sub-district assessment should be charged and, therefore, erred in determining a percentage of the annual budget to be charged, the order was reversed.

Furthermore, it was unclear from the trial court's order whether owners of units in Golf Villas should be charged for the benefit of the roving security, security gate, and guardhouse since the trial court simply stated that they received "less benefit" than those owners who resided behind the gate. Consequently, a factual finding would be required on the issue of whether Golf Villas receives sufficient benefit from those additional expenditures to justify its being charged for them.

General contractor who knowingly engages unlicensed subcontractor cannot recover on subcontractor's performance bond for defaults related to lack of license.
Kvaerner Construction, Inc., v. Am. Safety Casualty Ins. Co. 2003 Fla. App. Lexis 5459 (Fla. 5th DCA April 17, 2003).

In July 1998, Kvaerner was hired as the general contractor. A few months later, Kvaerner entered into a subcontract with Steel Tec for the structural framing and miscellaneous decking and sheathing for the project. The subcontract required Steel Tec to obtain and pay for all necessary permits and licenses for the project and to comply with all federal, state, municipal and local laws and regulations. The subcontract also required Steel Tec to furnish Kvaerner with a performance and a labor and material bond, which it did through American. The performance bond provided that if Steel Tec would perform its subcontract, the bond obligation would become null and void.

Steel Tec started working on the project in late 1998. In February 1999, the County stopped work on the project because Steel Tec was unlicensed. Kvaerner declared Steel Tec in default for failure to have a license and other breaches of the subcontract. Kvaerner then demanded American remedy the default under the performance bond. When American declined to do so, Kvaerner filed this lawsuit against American for breach of its bond obligations. American moved for summary judgment pursuant to section 489.128, Florida Statutes, that renders contracts by unlicensed contractors unenforceable. American argued Kvaerner hired Steel Tec knowing it was unlicensed. Therefore, Kvaerner could not enforce its contract with Steel Tec and consequently could not recover on the performance bond because American's liability as a surety cannot be greater than that of its principal Steel Tec.

A party may recover upon an apparently illegal contract only if he himself is not guilty of wrongdoing, that is, if he is not in pari delicto with the actual malefactor. The court could not allow one to invoke the judicial process when, for his own financial benefit, he has participated in the very activity that that law precludes, with the resulting danger that the law seeks to avoid. In the present case, the County stopped work on the project because Steel Tec was not licensed as a steel erection contractor. Some license was clearly required. Kvaerner knew that Steel Tec had no license even before work started on the project.

Under the common law of suretyship, fraud or misrepresentation by the principal in inducing the surety to enter into the contract will not affect the liability of the surety unless there is knowledge or participation by the creditor. Here Kvaerner (the creditor) hired Steel Tec knowing it had no license and allowed Steel Tec to work on the project without a license.

Under section 489.128, it seems Kvaerner could not enforce its contract with Steel Tec. As a matter of public policy, the court held that Kvaerner could not indirectly recover on that contract by enforcing the performance bond from American.

Executive Council Meetings 2003-04

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Probate, Guardianship & Trust Case Summaries

by Shane Kelley, Esq., The Kelley Law Firm, Ft. Lauderdale, Florida and Sean Kelley, Esq., Sean W. Kelley, P.L., Key West, Florida

Guardian's authority over the assets of a ward automatically terminates upon the ward's death and the assets become assets of the decedent's estate subject to the authority of the personal representative.

In re: Voluntary Guardianship of Jensen, 834 So.2d 376 (Fla. 2nd DCA 2003); 28 FLW D230 (January 15, 2003).

A guardian of a deceased ward appealed an order of the probate court suspending her letters of guardianship with regard to the voluntary guardianship of Melba Jensen upon Melba Jensen's death. In affirming the order of the probate court, the Second DCA held that a guardian's authority over the assets of a ward terminates upon the ward's death and the assets become subject to the authority of the personal representative. Based on this reasoning, "[T]he guardianship terminated upon Ms. Jensen's death, and no formal removal of the guardian pursuant to Florida Probate Rule 5.660 was necessary in order to suspend the now invalid letters of guardianship."

There was no valid cause of action for unjust enrichment against the estate of a decedent for support, services, comfort and affection provided to the decedent by someone who mistakenly believed he was the decedent's father.

Magwood v. Tate, et al, 835 So.2d 1241 (Fla. 4th DCA 2003); 28 FLW D314 (January 29, 2003).

Although never married, the Appellee, Anderson Lee Tate, Sr., and Virginia Barrett lived together for many years. During that time Virginia Barrett had a son who was named Anderson Lee Tate, Jr. (Tate, Jr.). Appellee believed Tate, Jr., to be his son at all times during the 22 years until Tate, Jr., died. During those 22 years Appellee had an active role in raising Tate, Jr., and contributed to his expenses. As a result of a settlement of a wrongful death suit, the estate of Tate, Jr., recovered $1,822,499.00 of which 15% was allocated to Tate, Jr.'s father. At that time a DNA test was performed which excluded Appellee as the father of Tate, Jr. Appellee filed a suit against the personal representative of the estate of Tate, Jr., based on unjust enrichment for "support, services, the value of comfort, affection, and enjoyment of life, given to decedent". Appellee obtained a jury verdict in the amount of $130,000.00 and the estate appealed. The Fourth DCA reversed the judgment finding that the Appellee had no valid cause of action against the estate of Tate, Jr., for unjust enrichment. In reaching that conclusion the Fourth DCA indicated, "To evaluate Tate, Sr.'s claim against the estate it is essential to understand that the estate stands in the shoes of Tate, Jr. . . . so a person has no greater rights against the estate than the person would have had against the decedent during his lifetime." Thus the Fourth DCA reasoned, "Here, there is no cause of action for a contract implied in law because it is inequitable to force the child to reimburse the mistaken father . . . It was not the fault of the child that he was born into the midst of a family where his paternity was so uncertain."

Trustees had authority to label a trust distribution as an income distribution rather than a principal distribution even though the amount of the distribution exceeded the income of the trust at the time of the distribution.

Frazier, et al v. Brechler, et al, 839 So.2d 761 (Fla. 3d DCA 2003); 28 FLW D378 (February 3, 2003).

Appellants were serving as co-trustees of a trust which provided for mandatory income distributions to the surviving spouse of the deceased grantor and also provided for a discretionary power in the trustees for principal encroachment on behalf of the spouse. Various distributions were made to the surviving spouse from the trust at his request during 2001. The co-trustees accounted for the payments as advances against income due the surviving spouse rather than as distributions of principal even though there was insufficient income in the trust at the time of the distributions to cover the amount of the distributions. At the end of 2001, the surviving spouse filed a motion to compel the trustees to make a distribution of $113,397.07 in income which had been earned by the trust during 2001. The Appellants indicated that the earlier distributions were an advance on the income earned by the trust during 2001. The circuit court found the distributions to the surviving spouse were distributions of principal and ordered the Appellants to distribute the $113,397.07 to the surviving spouse. The First DCA reversed the order of the circuit court finding that the trust instrument provided the co-trustees with the appropriate authority and discretion to determine that the payments made to the beneficiary were advances on the income earned by the trust that year.

Probate court did not abuse its discretion in finding a creditor was reasonably ascertainable, and therefore entitled to actual notice of administration, where entries in decedent's check book indicated periodic payments to creditor during the year preceding the decedent's death.

Strulowitz v. The Cadle Company, II, Inc., 839 So.2d 876 (Fla. 4th DCA 2003); 28 FLW D700 (March 12, 2003).

continued, next page

Notice of Administration was published in an estate on August 21, 2000 and the creditors period ran on November 20, 2000. On or about January 18, 2001, the personal representative of the estate was contacted by Appellee, a potential creditor, regarding a debt allegedly owed the Appellee by Decedent. This was the first time the personal representative became aware of the existence of the alleged debt and, therefore, had not served Appellee with Notice of Administration during the statutory claims period. On February 16, 2001, Appellee filed a claim for the alleged debt to which the personal representative filed a Petition for Order Striking Untimely Filed Claim. The probate court appointed an attorney ad litem to investigate whether the Appellee was an ascertainable creditor entitled to actual Notice of Administration. The attorney ad litem concluded that Appellee was in fact a reasonably ascertainable creditor entitled to actual notice based in part on the fact that the decedent's check book indicated that the Decedent had written checks to Appellee periodically during the year preceding the Decedent's death. During the evidentiary hearing on the petition, the personal representative indicated that he had received no bill, phone call, or correspondence from the Appellee indicating the existence of the debt and that there were no records of any debt in the Decedent's bills and correspondence. At the conclusion of the hearing the probate court found that Appellee was a reasonably ascertainable creditor and denied the personal representative's petition to strike the claim. In upholding the decision of the probate court, the Fourth DCA indicated that this is an area which should be clarified by the RPPTL section of The Florida Bar,

> [T]he personal representative highlights a concern that makes his appeal problematic: the absence of any written rules or guidelines on specific steps that an estate administrator must take during the course of a diligent search . . . In this regard, we think it would be helpful if the Probate Section of the Florida Bar Probate Rules Committee considered proposing or extending the existing rules to give estate administrators and trustees more direction in their diligent searches for creditors.

While the probate court has discretion in appointment of personal representative, in order to appoint someone other than the preferred person under F.S. 733.301 the record must show that the statutorily preferred person is not fit to serve.

Devaughn, et al, v. Devaughn, et al, 840 So.2d 1128 (Fla. 5th DCA 2003); 28 FLW D825 (March 26, 2003).

When Rusty was two years old, Rusty's mother and father signed a document giving custody of Rusty to his uncle. Rusty's uncle raised him until Rusty was killed at the age of 19 and during that time the mother and father had no contact with Rusty. Upon Rusty's death, the uncle filed a petition for administration requesting appointment as personal representative of the estate and indicating that he was an intestate beneficiary of the estate as a "de facto" parent of Rusty. Rusty's mother filed an objection and filed her own petition for administration seeking appointment as personal representative. During a hearing on

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the dueling petitions, the probate court appointed the uncle as personal representative even though the judge found that the uncle was not a beneficiary of the estate. The mother appealed and argued she was entitled to preference under F.S. 733.301 and that the only real asset of the estate was a potential wrongful death recovery of which she and Rusty's father were the only real parties in interest. The Fifth DCA reversed the order appointing the uncle as personal representative as the record did not indicate that the mother was unfit to serve in that capacity. In support of its decision, the Fifth DCA held that if the statutorily preferred person is not appointed as personal representative, the record must indicate that the person is not fit to serve in that capacity. In the present case, the record did not support such a finding, "A trial court has discretion to appoint someone other than the preferred person, but where there is no evidence that the preferred person is not fit to be personal representative the court is not at liberty to ignore the statutory directive in order to appoint a person whom the court deems more morally worthy." The District Court also indicated, "[T]he statute favors heirs for appointment as personal representative because those who are eligible to take under the laws of intestacy are more likely to advance the interest of the other takers."

A writ of garnishment can now be served upon an estate if approved by the probate court in which the estate administration is pending, as F.S. 733.306 and F.S. 778.01 have rendered the holding of the Florida Supreme Court in *Post v. Love,* 19 Fla. 634 (1883) obsolete.

Murray v. NationsBank of Florida, N.A., et al, _ So.2d ___(Fla. 4th DCA 2003); 28 FLW D861 (April 2, 2003).

Appellant recovered a judgment against Paula Gambrill for $112,342.38, plus interest, costs and attorney's fees. Appellant served a writ of garnishment on the estate of Gambrill's deceased husband of which she was the personal representative and a substantial beneficiary. The estate moved to dismiss the writ based on *Post v. Love*, 19, Fla.634 (1883) which held that an executor could not "be held to answer to a writ of garnishment at the instance of a creditor of a legatee" and the circuit court dismissed the writ on that basis. The Fourth DCA reversed the trial court finding that changes to the garnishment statute subsequent to the *Post* decision and the enactment of F.S. 733.306 have rendered the *Post* decision obsolete,

> Section 733.706 is the type of express statute required by *Post* and *Flanary* to change the common law rule 'that executors are not subject' to garnishment 'on account of legacies payable to a debtor.' . . . Finally, the legislature has expanded the scope of section 77.01 to reach intangible personal property such as Gambrill's interest in her husband's estate. Changes in the garnishment statute since 1883 have rendered the holding of *Post* obsolete.

It was error for the court to dismiss an independent action of a claimant pursuant to Fla.R.Civ.P. 1.420(e) for lack of record activity where independent action had earlier been transferred from the civil division to the probate division under the case number of the pending estate and the estate was still open at the time of dismissal.

Helm v. Foote, So.2d (Fla. 2d DCA 2003); 28 FLW D876 (April 4, 2003).

Appellant filed a claim in a probate estate which was objected to by the curator. The Appellant then filed an independent action in the civil division which was subsequently transferred back to the probate division upon the motion of the curator. Upon transfer, the independent action was given the same case number as the estate and according to the Second DCA, "After the transfer, there was no separate action and no separate case number for Helm's claim; it was subsumed into the probate case." As there was no record activity in the independent action for over a year, the curator of the estate filed a motion to dismiss for failure to prosecute the independent action pursuant to Fla.R.Civ.P. 1.420(e), which the probate court granted. The Second DCA reversed the probate court indicating, "Because the probate case was still pending when the trial court granted the dismissal, the dismissal was not authorized by the rule."

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Action Line Publication Schedule

Action Line 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 (239) 430-1800 to obtain additional publication guidelines.

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

***Action Line* Issue**	**Publication Deadline**
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.

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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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of Florida). The documentary stamp tax cap does not apply to a mortgage, security agreement, or other lien filed or recorded in Florida. A mortgage, security agreement, or other lien filed or recorded in Florida is subject to documentary stamp tax on the full amount of the obligation secured.

Nonrecurring intangibles tax is also currently imposed at the rate of 2 mills of indebtedness on the just value of a note or other obligation to pay money that is secured by a mortgage, deed of trust or other lien on Florida real property.

When performing refinancings with new lenders, most lenders prefer to use their own standard form documents and, in order to clean up the chain of title to the mortgaged property, record a satisfaction of mortgage with the county clerk's office. Most lenders then rely on the renewal rules under Section 201.09, Florida Statutes, in order to avoid additional documentary stamp and nonrecurring intangibles taxes on the mortgage. However, lenders may be surprised to learn that this technique may result in the imposition of documentary stamp and nonrecurring intangibles taxes.

Pursuant to Section 201.09, Florida Statutes, a renewal note is exempt from documentary stamp taxes (currently 35 cents per $100.00 of indebtedness) if the following statutory requirements are met: (1) the original note is attached to and kept with the renewal note, (2) the renewal note is executed by the original obligor, (3) the renewal note renews and extends only an amount equal to or less than the outstanding principal balance of the original note as of the date of execution of the renewal note and (4) the renewal note bears a notation similar to the following: "This note is a renewal of a note on which documentary stamp taxes have been paid." In addition, the appropriate amount of documentary stamp taxes must actually have been paid on the original note or mortgage (as applicable).

For nonrecurring intangibles tax purposes, if the renewal note is for an amount equal to or less than the outstanding principal balance of the original note, plus accrued and unpaid interest, no additional nonrecurring intangibles tax is due, regardless of whether the obligors on the renewal note are identical to the obligors on the original note. If the renewal note secured by Florida real property is for an amount in excess of the outstanding principal balance of the original note, and the new obligor has not assumed the original note prior to execution of the renewal note, then nonrecurring intangibles taxes are due on the entire amount secured by the Florida mortgage. If the obligors on the renewal note are the same as those on the original note, nonrecurring intangibles taxes are due only on the increased amount of the renewal note above the original face amount (in the case of revolving loans) or the outstanding balance (in the case of term loans). Please note that, for intangible tax purposes, "original obligor" means the current obligor, who may be an assignee of the initial obligor (in contrast with the documentary stamp tax rules which require that the obligor continue to be the initial obligor).

In order for the note and mortgage to be exempt as a renewal, the renewal must generally be some form of modification of an original document that changes the terms of the indebtedness evidenced by the original document by adding one or more obligors, increasing the principal balance, or changing the interest rate, maturity date or payment terms.

There has been much confusion and debate as to whether a "refinancing" qualifies as a renewal that is exempt from documentary stamp and nonrecurring intangibles tax. Like many other areas of documentary stamp tax, the form of the transaction governs the tax consequences because the documentary stamp tax is a document tax. Thus, the structuring of the transaction will result in certain lenders structuring their transactions (many times inadvertently) in a taxable manner while other lenders' transactions will be exempt.

For documentary stamp and nonrecurring intangibles tax purposes, if a lender uses new documents to memorialize the terms of the new loan and records a mortgage satisfaction with the county clerk, the Department of Revenue takes the position that the refinancing is a new loan that is fully subject to documentary stamp and nonrecurring intangibles tax because the lender and the borrower are entering into a new loan. In essence, the Department of Revenue takes the position that there is nothing to "renew" because the old loan was satisfied and extinguished prior to the new extension of credit. In addition, the new loan is not subject to the documentary stamp tax cap because the new loan is secured by a mortgage on Florida real property.

On the other hand, if the old lender files a "release of lien" with the county clerk that releases the lien of the old mortgage (rather than a satisfaction which declares the loan to be paid in full), the Department of Revenue takes the position that the old loan was not extinguished or satisfied and that the loan is eligible for a "renewal" under Section 201.09, Florida Statutes, so long as the four renewal requirements have been met. In order to confirm that a refinancing is exempt under Section 201.09 and under the nonrecurring intangible tax rules, the old lender (if a new lender is involved) or the existing lender (for an in house refinancing) should refrain from marking the old note "Paid in Full" and should instead use the notation "Paid by Renewal." In such a case, the old lender may want to release its note to the borrower as paid by renewal instead of assigning the note to the new lender (as an alternative to an assignment of note and mortgage followed by execution of a renewal note and amended & restated mortgage, which gets quite cumbersome).

Editor's Note: See accompanying Notice of Intent to Make Tax Refund Claim Changes (DR-1200R) issued by the Department of Revenue denying a refund request because the proceeds of the new note were used to pay off the old note and there was a specific satisfaction of mortgage filed.

continued, next page

DR-1200R
R. 10/99

FLORIDA DEPARTMENT OF REVENUE

Notice of Intent to Make Tax Refund Claim Changes

for Intangible Class C Tax, Ch. 199, F.S.

SSN/FEIN: [redacted] Refund Control No: [redacted]

Name and Address of Taxpayer

[redacted]

Reply to:

Florida Department of Revenue
Refunds Subprocess
P.O. Box 6470
Tallahassee, FL 32314-6470

(1) The Department of Revenue presents you with this Notice of Intent to Make Refund Claim Changes for the Intangible Class C Tax Refund claimed on or about OCTOBER 08, 02 (postmark date).

This proposed refund denial is detailed as follows:

Refund Amount Claimed.....	$220.66
Proposed Denial Amount.....	($220.66)
Proposed Refund Due.....	$0.00

(2) Reason(s) for Denial: See attachment.

(3) If you do not agree with these findings, you may request an informal conference to discuss any factual, statutory, or regulatory issues relating to the above refund denial. Your request for an informal conference must be made, in writing, to the above referenced office within 30 days of the issuance of this notice.

(4) If you agree to the findings set forth in paragraphs (1) and (2) of this Notice of Intent to Make Refund Claim Changes, you will expedite the processing of your claim by signing this form in the space below and returning it to the office indicated above. The proposed refund due is subject to further review and may be reduced based on other factors including, but not limited to, any outstanding liabilities reflected on your account.

(5) Failure to request an informal conference within 30 days from the issue date of this notice will result in the issuance of a Notice of Proposed Refund Denial on or about DECEMBER 26, 2002 (add 30 days to letter date). Specific instructions regarding the availability of further protest rights will be included with the Notice of Proposed Refund Denial.

****NOTE: This notice is not intended to be a binding agreement and is solely a mechanism to notify you of proposed changes to the refund amount you claimed. The amount reflected above as "Proposed Refund Due" is not final and is subject to additional review. If the amount of proposed refund due is changed or adjusted during this additional review, you will be notified of those changes.**

Signature of Officer or Taxpayer	Title	Date
NELL COLLIS	Tax Auditor	11/26/2002
Auditor's Name	Title	Date

ATTACHMENT TO
FLORIDA DEPARTMENT OF REVENUE
NOTICE OF INTENT TO MAKE
INTANGIBLE TAX REFUND
CLAIM CHANGES, CH. 199, F.S.

CONTROL NUMBER: 02283043

REFUND AMOUNT CLAIMED	$ 220.66
REFUND AMOUNT DENIED	$(220.66)
REFUND AMOUNT DUE	$ -0-

EXPLANATION: This is in reference to your request for a intangible tax refund. The issue is whether a refund should be given for tax paid on a mortgage.

Section 199.145(4), F.S., states: "Where a note, bond, or other obligation upon which a nonrecurring tax has previously been paid is refinanced with the original obligee or its assignee:

(a) No additional nonrecurring tax is due if the principal balance of the new obligation is less than or equal to the unpaid principal balance of the original obligation, plus accrued but unpaid interest, as of the refinancing.

(b) Additional nonrecurring tax is due if the principal balance of the new obligation exceeds the principal balance of the original obligation, plus accrued but unpaid interest, as of the refinancing. If the original obligor is not liable to the oblige under the new obligation, the additional nonrecurring tax shall be computed on the entire principal balance of the new obligation, the additional nonrecurring tax shall be computed on the excess of the principal balance of the new obligation over the principal balance of the original obligation, plus accrued but unpaid interest, as of the refinancing."

A review of the documentation provided with your request shows that the proceeds of the new note were used to pay off the old one, and that there was a specific release or satisfaction, thus the new note is not considered a renewal. In this case, the intangible tax due upon the recording of the mortgage securing the new note would be due on the full amount.

Therefore, this refund request is denied.

ACTIONLINE BULLETIN BOARD

CERTAIN JUDGMENT LIEN CERTIFICATES MUST BE FILED PRIOR TO OCTOBER 1, 2003 – Pursuant to F.S. 55.201-.209, if your client obtained a judgment lien on personal property by delivering a writ of execution to the Sheriff prior to October 1, 2001, such lien loses its priority and the writ is deemed abandoned unless: (1) a judgment lien certificate is properly filed with the Department of State before October 1, 2003, together with (2) a creditor affidavit or Sheriff's certification attesting to the docketing date of the original writ. Upon compliance, the judgment lien is deemed filed on the docketing date of the writ as to personal property located in that county on October 1, 2001 (and remaining continuously in that county thereafter). As to all other property of the judgment debtor, the lien is effective as of the date and time of state filing. Note, the lien acquired under these provisions generally lapses and becomes invalid five years after the date of state filing. The judgment creditor may acquire a second judgment lien (not a continuation), effective for one additional five year period, by filing a second judgment lien certificate within six months of the scheduled lapse of the original lien.

—Jo Claire Spear

ADMINISTRATIVE TAX RELIEF FOR U.S. MILITARY AND SUPPORT PERSONNEL. *The IRS has issued guidance on administrative tax relief for U.S. military and support personnel involved in combat operations in the Arabian Peninsula Areas (see Notice 2003-21 in question-and- answer format). The tax relief includes the exclusion of income earned in combat zones and the automatic extension of return filing and tax payment deadlines. 4-11-2003 TNT, Published by Tax Analysts™*

NOTICE OF TRUSTEE DUTIES. Reminder: The new Notice of Trustee Duties statute (§ 737.115) applies not only to revocable trusts executed after January 1, 2003, but also to *trust amendments* executed after that date.

– S. Dresden Brunner

*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: J*oclairespearpa@aol.com*. Each item should be limited to 100 words or less and should contain your name.*

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