

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1506

SPONSOR: Senator Campbell

SUBJECT: Judicial proceedings

DATE: March 14, 1999

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Senate Bill 1506 amends provision related to foreclosure proceedings. The bill provides for service of process on persons outside of the United States by mail and if they are not located then by publication, it provides that a guardian ad litem need not be appointed unless official county records indicate or the plaintiff knows the case involves a minor or heirs, a person determined to be incompetent or someone who is deceased, and the bill provides that a 3% attorney fee for a foreclosure action is reasonable and just.

This bill substantially amends the following sections of the Florida Statutes: 48.194, 49.021, 702.01 and 687.06.

II. Present Situation:

Service of process on persons outside of the state of Florida must be done in accordance with chapter 48, F.S. Service may be made by delivery of a copy of the complaint, petition, or other initial pleading or paper to the person to be served by leaving the documents at his or her usual place of residence with any person residing therein who is 15 years of age or older and who is informed of the contents of the document. Service must be made by an officer authorized to serve process in the state where the person is served. Following service an affidavit of the officer must be filed stating the time, manner, and place of service.

Service of process on persons outside the United States may be required to conform to the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. s. 48.194(1), F.S. This convention provides a process by which a person in another country may be served whether that person is a U.S. citizen residing abroad or a citizen of the country where service is made. The Hague Convention discusses several methods of service allowed under the treaty and specifies who may be served by each process and the validity which will be afforded the service by the signatories to the Convention. 28 U.S.C.A. Fed.R.Civ.P.4 (Supp. 1998). Where process is served in accordance

with the Convention it should not be quashed for failure to comply with additional requirements of the statute. *Naclvor v. Volvo Penta of America Inc.*, 471 So. 2d 187 (Fla. 2nd DCA, 1985).

Subsection (2) of section 48.194, F.S., provides for service by mail for in rem or quasi in rem relief in a foreclosure proceeding. When the address of the person to be served is known service may be made by registered mail. If the registered mail is returned with an endorsement or stamp showing “refused,” process may be served by first-class mail. The section does not consider the failure to claim a registered letter as “refused” for purposes of serving by first-class mail. When service is made under this subsection the party making such service or the party’s attorney, must file an affidavit with the court stating the nature of the process as set out in the statute and must attach the required documents regarding service.

If process can not be served under s. 48.194, F.S., service of process may be made by publication in accordance with chapter 49 F.S. Service of process by publication is allowed in any action to enforce any legal or equitable lien or claim to any title or interest in real or personal property within the jurisdiction of the court. s. 49.011, F.S. Process by publication may be made on any party, natural or corporate, known or unknown claiming by, through, under, or against any known or unknown person who is known to be dead or is not known to be either dead or alive; any corporation, its assigns, successors in interest, trustees, or any other party claiming by, through, or against any named corporation or legal entity; or any group, firm, entity, or persons who operate or do business or have operated or done business in Florida; and all claimants under any of the above listed parties. s. 49.021, F.S.

To obtain service by publication the party making service must file a sworn statement regarding the diligent search to locate the party. The statement must address whether the person is over or under 18, if known, and whether the residence is unknown or in some state or country other than this state, it must state the residence if known or that the person has been absent from the state for more than 60 days or conceals himself. For a corporation the affidavit must state that diligent search as been made, whether or not the corporation has ever qualified to do business in this state, that all officers, directors, general managers, cashiers, resident agents, and business agents of the corporation either, are absent from the state, cannot be found within the state, conceal themselves to avoid process or their whereabouts are unknown to the affiant or they are unknown. Affidavits may also be filed for unknown parties, and for parties doing business under a corporate name. s. 49.021, F.S.

The courts have closely examined service of process to ensure it provided due process particularly where it is provided by publication. “Service of process by publication is less likely to provide effective notice to a defendant than personal service; thus, service by publication should only be used when necessary.” *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So.2d 1225 (Fla. 1986). The U.S. Supreme Court in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not permit a state to use constructive service by publication to give notice to non-resident defendants where the addresses of those defendants are known. A state must provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id* The court went further in stating that it did not matter whether the action was *in personam*, *in-rem* or *quasi in-rem*. *Id*. Florida courts require strict compliance with the

statutory procedures for service by publication. *Gmaz v. King*, 238 So. 2d 511 (Fla. 2d DCA 1970) and *Batchin V. Barnett Bank*, 647 So.2d 211 (Fla. 2 DCA 1994). The court in *Batchin* found “that service by publication may be used only when personal service cannot be effected.” *Id* “

Section 702.01, F.S., provides that mortgage foreclosures are an action in equity. The court is required to sever all counter claims against the mortgagee for a separate trial and the foreclosure action is to be tried to the court without a jury.

When the court determines that an infant or incompetent person does not have a duly appointed representative or guardian to represent them in an action the court must appoint a guardian ad litem or must provide for the protection of the infant or incompetent person through some other means. *Rule 1.210, Florida Rules of Civil Procedure*.

Section 687.06, F.S., provides for the payment of attorney fees for enforcement of contracts either in law or equity. The section specifically provides for the determination of a reasonable attorney fee. The court is not required to determine if an attorney fee is reasonable and just when that fee does not exceed 10 percent of the principal sum named in the note or instrument. A fee of 10 percent or less is not to be examined by the courts for reasonableness or fairness absent a plea for equitable considerations such as unconscionability. *Dean v. Coyne*, 455 So.2d 576 (1984). This section has been found not to apply to a mortgage requiring payment of a reasonable fee but which did not set out the specific percentage. *Sand Dollar Investments Inc., v. Anja, Inc.*, 388 So.2d 28 (1980).

III. Effect of Proposed Changes:

The bill amends ss. 48.194 and 49.021, F.S., to provide that it is unnecessary to obtain personal service on a party outside the United States beyond the mail service provided in 48.194(2), F.S., when in-rem or quasi in-rem relief is sought in a foreclosure proceeding.

Section 702.01, F.S., is amended to provide that the court is not required to appoint a guardian ad litem in a foreclosure process unless the plaintiff knows or the public records of the county where the action is commenced affirmatively show that a defendant is deceased or incompetent or that the interests of minors or heirs are involved.

Section 687.06, F.S., is amended to establish reasonable attorney’s fees related to a mortgage. When a mortgage does not specify the exact percentage of the attorney’s fees but does provide for the award of reasonable attorney’s fees the court will not be required to determine what are reasonable and just when the fees do not exceed 3 percent of the original principal sum in the instrument. Further, when the fees are 3 percent or less the fees will be considered liquidated damages in any proceedings for the enforcement of the note or mortgage.

The bill provides an effective date of July 1, 1999. Since the provisions of this bill are procedural in nature they will impact any prospective or pending action for foreclosure. See *Gupton v. Village Key & Saw Shop, Inc.* 656 So.2d 475, 477 (Fla. 1995).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The provisions of the bill would save the parties seeking to foreclose on a mortgage from having to provide for personal service of process in a foreign country thus reducing the cost of service of process and reducing the time to foreclose on a mortgage where the property owner is not in the United States. Further, removing the necessity for the appointment of a guardian ad litem and a court review of attorney fees will reduce costs and time.

C. Government Sector Impact:

The Court will no longer be required to review awards of attorney fees that do not exceed 3 percent of the original principal of the mortgage. There is no information regarding how often this is done by the courts so the exact savings can not be calculated.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
