2015 SPRING CASE LAW UPDATE

DADE COUNTY BAR - PROBATE AND GUARDIANSHIP COMMITTEE
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AT THE MOVIES EDITION

1. "Face Off." Fifth DCA allows guardian to amend ward's trust to make guardian the trustee and remove current trustee. *Rene v. Sykes-Kennedy*, 156 So.3d 518 (Fla. 5th DCA 2015).

In 2013 Sykes-Kennedy ("Kennedy") was appointed limited guardian of her sister, White. The court during incapacity proceedings found White to be incapacitated and removed her rights to contract, to manage property, to make any gift or disposition of property, to sue and defend lawsuits, to consent to medical treatment, or to make decisions about her social environment or other social aspects of her life. Two months later, Kennedy filed a petition requesting that the court allow her, as White's guardian, to amend White's 2006 revocable trust to appoint herself as the trustee. Kennedy argued that it was necessary for her as guardian to be able to access assets in the trust to be able to care for White. In addition, she claimed White had expressed worry that her property was being controlled by her granddaughter Rene, who was the successor trustee of the trust upon White's incapacity. The trial court did not find any wrongdoing by Rene, but granted Kennedy's petition, allowing Kennedy to amend White's revocable trust to appoint herself as trustee. Kennedy was prohibited from amending the trust in any other manner. Rene appealed to the 5th DCA claiming that the trustee was not properly before the court since a complaint had not been filed against her in circuit court pursuant to F.S. Sec. 736.0201 and contending that the order was not in White's best interest. The 5th DCA rejected White's arguments and held that Florida's Trust Code provides that in accordance with F.S. Secs. 736.0602(6) and 744.441(2), a guardian of the property of the settlor may exercise a settlor's power to amend a trust. The Court held that pursuant to Section 744.441(2) a guardian may exercise any power as trustee that the ward might have lawfully exercised if not incapacitated, if the best interest of the ward requires such action. The opinion does not state how Kennedy was involved in the trial court proceedings and what due process, if any, was given to Kennedy.

Application: This case, along with *Searle v. Bent*, 137 So. 3d 1028 (Fla. 2d DCA 2013), offer significant inroads through the guardianship court to persons who seek to challenge or gain control over trusts executed by the ward prior to the incapacity proceedings. The *Searle* case confirms that the filing of a Verified Statement by Interested Person Pursuant to F.S. § 744.331(6)(f) can be used as a weapon to defeat the argument that an existing revocable trust is a less restrictive alternative to guardianship. The *Rene* case goes further and allows the guardian to take over an existing trust so it can be used to pay for the ward's care as determined by the guardian (who gets herself appointed as trustee). These two cases, *Searle* and *Rene*, raise several issues. It seems

that if the trustee (or would-be successor trustee) of the revocable trust wants to maintain its fiduciary status; the appointment of the guardian needs to be contested from the beginning. In some cases this is difficult since the trustee may not receive notice of the proceedings until after the fact. Even if a person is incapacitated, the law requires the court to consider whether there are any less restrictive alternatives to a guardianship. If the ward's assets are in the revocable trust, the trustee should argue against the appointment of a guardian of the property and that the revocable trust should be kept in place and allowed to function as intended. To the extent a guardian of the property is needed it should only be to administer non-trust assets and a determination made as to whether those assets should be transferred into trust. The trustee must make sure the court is comfortable that the ward is being supported and the ward's care paid for to eliminate the concerns raised by the trial court in its analysis of this case. From an estate planning point of view, one of the main goals of trusts, powers of attorney, and surrogate designations is to avoid guardianships. However, if the planner and client do not carefully consider: (1) what powers of a trust settlor may be exercised by a guardian; (2) how and when a trust can be amended by a guardian; and (3) consider a Designation of Preneed Guardian in the same person as an appointed successor trustee, then the *Rene* issue may arise whereby the appointed fiduciary under documents is supplanted by a court-appointed guardian.

2. **"You've Got Mail!" Fourth DCA considers who qualifies as an interested person in guardianship proceedings. *Rudolph v. Rosecan*, 154 So. 3d 381 (Fla. 4th DCA 2014).**

In this case, the ward's father was appointed plenary guardian of his adult autistic son's person and property. A parenting plan was incorporated into the order appointing the father as guardian, and that parenting plan provided for the father and mother to have shared decision-making authority and information-sharing rights with regard to their son. The plan also provided that the father had ultimate authority to make decisions about his son's person, but did not address financial decision-making authority. The father voluntarily provided the mother with copies of his annual accountings for several years but eventually sought a court order declaring that the mother was not an interested person for purposes of receiving the annual accounting. The trial court agreed, reasoning that the mother had no financial rights or obligations with regard to the son, so she would not be affected by the actions of the guardian of the property. The mother appealed and cited the parenting plan that allowed her to be involved in major decisions regarding her son. The 4th DCA affirmed the trial court and held that the mother was not an interested person for the purposes of F.S. Sec. 744.3701. The Court noted that the concept of an "interested person" is fluid and varies with the facts of the case but that being "next of kin" does not confer "interested person" status. Since the parenting plan did not give the mother any rights relating to ward's finances, in this case the Court held that she was not an "interested person" with standing to receive and object to the annual accounting.

Application: Don't automatically assume, if you represent a guardian, that a close relative (even a parent or child) is an interested person for the purposes of service of various guardianship filings. Especially with regard to accountings and annual reports,

there are specific statutory limits on who is entitled to receive these filings and persons can be added to the service list only by court order. The path for someone wishing to obtain service of guardianship filings begins with the filing of a Request for Notice and Copies or some other relevant court petition. The guardian needs to decide whether to object to such requests on the grounds that the filer is not an interested person in the guardianship or is not interested to the extent they should receive the requested information (such as accountings).

3. **"Brewster's Millions." Second DCA holds that guardians must be paid reasonable fees for bill-paying services on behalf of the ward. *White v. Guardianship of Lubin*, 150 So. 3d 1256 (Fla. 2d DCA 2014).**

White is a professional guardian for Lubin, an incapacitated adult. On January 3, 2011, the circuit court appointed White as the emergency temporary guardian of the person and property of Lubin. The circuit court then appointed White as the plenary guardian of the person and property of Lubin on March 7, 2011. After White's appointment, she learned that Lubin had only minimal assets. As a result, White served as Lubin's guardian without compensation for approximately three years. In 2013, White received on behalf of Lubin a settlement check for approximately $22,000. The receipt of the $22,000 was apparently unexpected. White subsequently filed a petition for her fees and costs covering the period from November 30, 2010, through August 21, 2013. She petitioned the court for the payment of fees of $16,032, representing 267.2 hours of her time billed at her regular rate of $60 per hour and $894.12 in expenses for mileage, copies, and faxes. No one objected to the amount of the fees and costs requested by White. Lubin's sister consented to the entry of an order authorizing the payment of the fees and costs requested. After the hearing, the circuit court granted White's petition but disallowed 31.9 hours of her charges for time spent "reviewing and paying invoices," resulting in a reduction of her requested compensation in the amount of $1,914. In its holding, the Second DCA noted that under F.S. 744.108(1), a guardian is entitled to a reasonable fee for their services rendered on behalf of the ward. It further stated that a trial court deciding whether to grant fees has discretion, which "includes the ability to rely on common sense and experience to adjust the time claimed for common or routine tasks," and "the discretion to deduct time claimed by a guardian for noncore, delegable tasks that are better performed by others and to deduct excess time claimed due to the guardian's own inefficiency." (Quoting *In re Guardianship of Shell*, 978 So. 2d 885, 889 (Fla. 2d DCA 2008). In reversing the guardianship court, the Second DCA held that since it is part of the guardian's duties to examine, approve and pay the ward's bills, she must be paid for the work she was appointed to perform and is required by law to perform. The Court noted that bill-paying duties are substantial, and should not be disregarded as "trivial busy-work." Finally, the Court reminded the trial court to take into account that the guardian had served pro-bono for three years and would likely continue to serve pro-bono again after this fee award until the guardian's retirement or the ward's death.

Application: The decision is a reminder that where the guardian has duties to the ward, the guardian is entitled to fees for services rendered in carrying out the duties. The court has discretion with regard to the reasonable amount of fees but declining to award any

fees where services were indisputably rendered is reversible error.

4. **"In the Line of Duty." The Federal 11th Circuit holds trustee's attorney does not owe a fiduciary duty to the trust beneficiaries. *Bain v. McIntosh*, ___ F. 3d ____ (11th Cir. 2015).**

Does the attorney for the trustee have fiduciary duties to the trust beneficiaries? The long-standing rule is that an attorney's fiduciary duties extend only to his client, the trustee, and not to the beneficiaries. The federal 11th Circuit Court of Appeal had to determine whether this long-standing rule is the law in Florida in this case. Without giving much information about the factual background of the case, the 11th Circuit opinion noted two things: (1) that the attorney had been retained by the trustee to represent the trustee and had no privity of contract with the beneficiaries; and (2) during the case the beneficiaries did not raise the argument in litigation that they were third-party beneficiaries of the attorney's services to the trustee. The Court held that under Florida law the attorney for the trustee does not have fiduciary duties to the trust beneficiaries. In making its ruling the Court cited to F.S. § 90.5021(2) (2011) and Rule 4-1.7 of the Rules Regulating the Florida Bar. The Court also cited ABA Formal Op. 94-380 (1994) (which states that the majority of jurisdictions consider that a lawyer who represents a fiduciary does not also represent the beneficiaries, and we understand the Model Rules to reflect this majority view). Finally, the Court held that certain language to the contrary in the case of *In re Estate of Gory*, 570 So. 2d 1381 (Fla. 4th DCA 1990)(which stated that "We have no quarrel with the view that counsel for the personal representative of an estate owes fiduciary duties not only to the personal representative but also to the beneficiaries of the estate.") was dicta and not controlling in this case.

Application: Query whether the case might have gone a different way had the beneficiaries argued that they were third-party beneficiaries of the attorney's services. Malpractice liability is a slightly different issue from breach of fiduciary duty liability but these lines get blurred in the complicated fact patterns of trust and estate cases. Legal malpractice in Florida has three essential elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence as the proximate cause of the client's loss. Liability for malpractice was traditionally limited to clients with whom the attorney shared privity of contract. However, the recent trend in Florida case law is that third party beneficiaries of an attorney's legal services can sue the lawyer for malpractice, regardless of privity of contract arguments. See the next case for a current example.

5. **"Disclosure." The 4th DCA holds defense of statutory laches applicable to create a four-year limitation period for accounting to beneficiaries. *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2014).**

The *Corya* case dealt with four irrevocable trusts which were in effect for decades before a qualified beneficiary (son) filed a lawsuit against the trustee (mother). Before the lawsuit was filed, the trustee had never served accountings for any of the trusts on the qualified beneficiaries. The beneficiary demanded accountings from the time the trustee took over the various trusts (as early as 1953). Regarding the duty to account, the trustee

first attempted to argue that there was no duty to account annually prior to July 1, 2007, when F.S. Sec. 736.0813 was passed. The Court found that former trust statute, F.S. Sec. 737.303 also created a duty to account to beneficiaries of an irrevocable trust. Thus, the Court held that there was a statutory duty to provide a beneficiary of an irrevocable trust with accountings before July 1, 2007. The Court then addressed the trustee's affirmative defense of statutory laches and whether that limited the years the beneficiary was entitled to an annual accounting from the trusts. The Court held that under the facts of this particular case, statutory laches under F.S. Sec. 95.11(6) limited the right to an accounting to no more than four years before filing an action for an accounting against the trustee of an irrevocable trust. The Court disagreed with the beneficiary's position that laches should not apply because he did not have actual knowledge that he was entitled to accountings.

Application: This case is troubling on a number of levels. It seems it was potentially influenced by the burden of asking an individual trustee to reconstruct and reconcile every financial decision she's made for multiple trusts going back decades. This was seemingly balanced with the fact that the beneficiary was aware of the trusts and his beneficiary status. He could have inquired at some earlier date about the trusts and the Court found he should not be able to say he did not understand the law and his rights. However, I think this bootstrapping use of statutory laches is in error. The opinion has no analysis of F.S. Sec. 736.1008, the limitations statute in the Trust Code relating to trustees. The opinion does not analyze the relevant court cases that address the issue of limitations when the trustee has failed to account at all. Those cases are *Smith v. Bank of Clearwater*, 479 So 2d 755 (Fla. 2d DCA 1985) and *Nayee v. Nayee*, 705 So. 2d 961 (Fla. 5th DCA 1998). I'm not sure if this lack of discussion is because the statute and cases weren't argued by the parties or because the Court just did not deem it necessary to explain how to reconcile its decision with that existing law. The lack of discussion of F.S. Sec. 736.1008 is troubling because it specifically provides that the statute of limitations does not run for issues not adequately disclosed in an accounting. I don't think it makes sense to have a specific statutory scheme mandating disclosure in order to get the benefits of a limitations period in F.S. Sec. 736.1008 and then allow trustees to disclose nothing and say "laches" after 4 years in order to avoid the accounting obligation. This allows trustees to use statutory laches as an end run to get to the same four year limitations period you would otherwise only get by adequate disclosure under F.S. Sec. 736.1008. My understanding of lack of accountings was that they were regarded as continuing breaches of trust for which no limitations would run and that you would need pretty bad facts to avail yourself as a trustee of a laches defense.

6. "**Two Weeks Notice." The Fourth DCA notes that the attorney for a personal representative cannot be forced to disgorge fees if he has not been served with formal notice. *Simmons v. Estate of Baranowitz*, ___ So. 3d ___ (Fla. 4th DCA 2015).**

In this estate dispute, the personal representative filed a petition for discharge and final accounting. The accounting indicated that the personal representative and his counsel had received certain amounts as compensation for their services. The trustee of the decedent's trust filed objections to the accounting, as well as a petition to review the fees

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which the personal representative and his counsel received. The trustee argued that the compensation was excessive in relation to the value of the estate and that any excessive compensation should be refunded. The court held an evidentiary hearing on the objections and trustee's petition. At the hearing, the personal representative, through counsel, argued that the court lacked jurisdiction over counsel because counsel was not a party. The personal representative and his counsel then presented evidence in support of the compensation which they received. The probate court determined that the compensation which the personal representative and his counsel received was excessive. The court then ordered the personal representative and his counsel to disgorge those amounts which the court determined to be excessive. On appeal, the personal representative argued, among other things, that the court had no personal jurisdiction over his counsel because his counsel never was served with initial process of any potential disgorgement or surcharge action against him individually by a summons or formal notice. The Fourth DCA noted that disgorgement is an action against the attorney individually so he must receive formal notice in order for the court to have jurisdiction over him individually. The trustee argued that formal notice is not required since F.S. Sec. 733.6175 gives the court authority to review compensation paid to a personal representative's employee, and if it finds that excessive compensation was paid, to order that employee to make appropriate refunds. However, there is a distinction between the court's authority to act and the way the court notifies the employee (the attorney) that action may be taken. To take action against an employee under F.S. Sec. 733.6175, service by formal notice is required.

Application: This case builds on the similar recent case of *Kozinski v. Stabenow*, 152 So. 3d 650 (Fla. 4th DCA 2014), where the Fourth DCA held that a proceeding seeking an order for judgment imposing a surcharge against a fiduciary or fiduciary's agent, individually, and the immediate return of money to a trust, probate, or guardianship estate as a result of a breach of fiduciary duty (such as charging excessive fees) is tantamount to a judgment for damages, requiring personal service on the fiduciary as an individual and not merely in their representative capacity.

7. **"Waiting for Superman." The Second DCA finds Florida's trust reformation remedy is not limited to correction of scrivener's errors or administrative matters . *Megiel-Rollo v. Megiel*, ___ So. 3d ___ (Fla. 2d DCA 2015).**

In this case, the decedent died leaving behind three children. Prior to her death, she transferred her home into a revocable trust. The trust provided that it was to terminate upon the death of the decedent, and the property should be distributed to the beneficiaries in accordance with their respective interests as set forth on an attached Schedule of Beneficiaries. Unfortunately, the draftsman of the trust forgot to prepare the Schedule of Beneficiaries. One of the daughters filed a complaint arguing that the trust was void for lack of beneficiaries, and, therefore, the residence passed through probate to the three siblings pursuant to the terms of an earlier will. Another daughter counterclaimed seeking a judicial reformation of the trust, arguing that the mother had instructed her attorney (the draftsman) to name two of the three siblings as the beneficiaries of the trust. She claimed that the trust was not void or ambiguous but

rather had mistakenly left out missing text. The trial court denied reformation at a summary judgment hearing. In analyzing the case, first the Second DCA held that the trust did not fail for lack of beneficiaries, since the mother was the beneficiary of the trust during her lifetime. But what about the merger doctrine, which terminates a trust if the legal and equitable interests in the same trust are held by the same person as both sole trustee and sole beneficiary? The Second DCA held that apparent merger (as existed in this case) does not mean that reformation of the trust is unavailable to supply the missing names of the remainder beneficiaries. In its discussion of reformation and the applicable statutes, F.S. Sec. 736.0415, the Court noted that pre-Florida Trust Code case law does not limit reformation to the correction of mere scrivener's errors or administrative matters. Reformation is broadly defined in the statute, not narrowly, so the Court did not give the statute a narrow interpretation. F.S. Sec. 736.0415 provides that reformation of the terms of a trust is available "if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." The statute also provides that the court may reform the terms of a trust, even if unambiguous, and in determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument. The Court held this to be a remedial statute, to be liberally construed. Here there was sufficient evidence of the settlor's intent for two of her three children to be the beneficiaries of the trust after her death. Since the draftsman's failure to draft the schedule was what thwarted that intent, reformation is available. The Court declined to limit reformation to scrivener's errors or administrative matters, finding the limitation nowhere in the statutory text, or law, and finding that standard unworkable.

Application: This case, and the applicable statute, provides a remedy for trusts containing mistakes where there's "clear and convincing evidence" that the mistake is contrary to the settlor's intent. Since the statute's "remedial" in nature, courts should err on the side of granting access to it whenever possible even for significant issues such as beneficiary identification. Just note that "clear and convincing evidence" is a high evidentiary bar to meet.

8. **"Mr. Deeds." The Fourth DCA revives *Habeeb v. Linder* and use of a deed language without further disclosure as a waiver of homestead rights. *Stone v. Stone*, 157 So.3d 295 (Fla. 4th DCA 2014).**

Jerome Stone and his wife, Alma owned a residence as tenants by the entireties. On March 27, 2000, Jerome and Alma executed a warranty deed conveying the property to themselves as tenants in common. On the same day Jerome executed the Jerome M. Stone Qualified Personal Residence Trust (QPRT) and then Jerome (joined by Alma) executed a warranty deed conveying his ½ TIC interest in the residence to Jerome and Alma as cotrustees of the QPRT. Alma did the same thing with her ½ TIC interest in the residence with regard to a QPRT. The retained term of Jerome's QPRT was the earlier of five years or Jerome's death, and if Jerome died prior to the end of the five year term, the property would revert to Jerome's estate. Jerome died prior to the conclusion of the five year term survived by Alma and his two adult children, Ross and Nancy. Jerome's

Will was a pour over will which devised all property into Jerome's Revocable Trust which provided that the assets were held in continuing trust for the remainder of Alma's lifetime. Upon Alma's death, the trust was to be terminated in favor of Nancy (excluding Ross as a beneficiary). Nancy and Ross became involved in a dispute in Jerome's estate as to whether the residence was Jerome's homestead, and therefore devise restricted (which would result in Ross receiving ½ of the remainder interest), or whether the property was not Jerome's homestead upon his death and the devise under Jerome's revocable trust was valid (which would result in Nancy receiving the entire remainder interest upon Alma's death). The 4th DCA held that since Jerome died before the term of the QPRT, it is as if the QPRT never existed, at least for the purposes of this case. The 4th DCA further held that upon the reversion from the QPRT to Jerome's estate on his death, the property was then subject to the homestead devise restrictions and that when a homeowner transfers property to a QPRT pursuant to F.S. Sec. 732.4017 and the property later reverts back to the homeowner's estate because the homeowner fails to survive the term of the QPRT, a subsequent disposition of the property pursuant to the homeowner's will is a devise. The Court then ruled that even though the residence was subject to devise restrictions upon Jerome's death (and the devise would generally have failed as an improper devise), the particular devise in Jerome's Revocable Trust in this case was upheld based on a waiver of Alma of her homestead rights pursuant to F.S. Sec. 732.702. Alma waived her homestead rights by executing the March 27, 2000 warranty deed splitting the property into two one-half tenancy in common interests and then transferring her interest into her QPRT. This is the same rationale used by the Third DCA *Habeeb* court (opinion later withdrawn) to find a waiver when property was deeded from both spouses into the name of one spouse. In this case, the deed contained language providing that Alma, "grants, bargains, sells, aliens, remises, releases, conveys, and confirms' the property 'together with all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining."

Application: The case does not discuss the issue of "fair disclosure" by Jerome of his estate to Alma at the time the deed was signed. F.S. Sec. 732.702(2) requires fair disclosure in a homestead waiver by a married spouse and traditionally it was thought that homestead waivers were thus best achieved by postnuptial agreements with disclosure. Disclosure here seems to be implied by the Court as part of the circumstances of the marital relationship. Where there is some conveyance of the homestead property pursuant to broader estate planning, be aware that homestead rights may now be waived (perhaps inadvertently) even if there is no strict adherence to the provisions of F.S. Sec. 732.702.

9. **"The Contract." First DCA Court clarifies joint accounts versus payable on death accounts. *Blechman v. Estate of Blechman*, 160 So. 3d 152 (Fla. 4th DCA 2015).**

This case involved the decedent's testamentary devise (through a revocable trust) of his 50% ownership interest in an LLC to his girlfriend in contravention of the LLC operating agreement. In 2009, the decedent and his sister formed the LLC and executed an

operating agreement, which outlined the business's basic structure and gave each sibling—as an owner—a 50% membership Interest in the company. In addition to providing a managerial framework, the agreement imposed restrictions upon each member's ability to convey his or her interest in the company. The agreement conditioned each member's ability to transfer "all or any portion of his or her Membership Interest in the Company" on obtaining "the prior written consent of all of the other Members," unless limited exceptions applied. One such exception arises where the member transfers, "during lifetime or at death, all or any portion of his or her Membership Interest outright or in trust to or for the benefit of any member and/or any person or persons who are a member of the immediate family of the Member." The member's "immediate family," in this context, was comprised of his or her "living children and issue of any deceased child," not parents, spouses, stepchildren, or paramours. The girlfriend and the kids ended up fighting over the devise in probate court. The probate court upheld the trust provision. However, the 4th DCA found that since the attempted devise to the girlfriend violated the operating agreement, upon his death the default provision of the operating agreement was activated and his interest immediately vested in his children (as the takers under the default provision). Under Florida law a contractual agreement addressing property disposition at death defeats a testamentary disposition of the same property, held the Court.

Application: All a beneficiary has under a will or trust is an expectancy until the death of the testator or settlor. Contract rights, however, are created upon the execution of the contract unless the contract stipulates otherwise. Here, the decedent signed away his right to unilaterally give the LLC interest to his girlfriend by contract and could not come back later and devise that property by will or trust without compliance with the LLC operating agreement. In this respect the LLC operating agreement is similar to an insurance contract or bank account beneficiary designation that trumps a decedent's estate planning documents that might be to the contrary.

10. **"Old School." The Second DCA reminds us that Florida common law applies to trusts in addition to the Florida Trust Code. *Peck v. Peck*, 133 So. 3d 587 (Fla. 2d DCA 2014).**

In this case, the settlor of an irrevocable trust completely funded by her father was able to terminate the trust because she and all the beneficiaries consented to the termination. Under his will, Peck (the father of the settlor) devised equal shares of his residual estate to his son and daughter in separate trusts established by each of them. Peck, a lawyer, prepared the trust for his daughter, Constance, and funded it with gifts. Constance was the settlor and a co-trustee of the Trust and Peck was her co-trustee. When Peck died in 2009, Constance's brother, Daniel, succeeded Peck as Constance's co-trustee. Three years after her father's death, Constance as current beneficiary and co-trustee of the trust, filed an action to terminate the trust. Constance's children, the remainder beneficiaries of the trust, consented. Daniel, Constance's co-trustee, objected out of concern that Constance might unwisely dissipate the trust assets. The trial court terminated the trust over Daniel's objection. On appeal, Daniel argued that the Trust could not be terminated because the statutory judicial modification requirements under Fla. Stat. § 736.04113 had not been met. The Second DCA held that these statutory

requirements do not need to be met to terminate or modify a trust when a settlor and all beneficiaries consent to the termination or modification. Under Florida's common law, a court must allow termination or modification of a trust if the settlor and all beneficiaries agree to the requested termination or modification. See *Preston v. City Nat'l Bank of Miami*, 294 So. 2d 11 (Fla. 3d DCA 1974). The Court held that the common law governing trusts is still applicable to the extent it is not modified by the Florida Trust Code. The Florida Trust Code states in F.S. Sec. 736.0106 that the common law of trusts and principles of equity supplement the code, except to the extent modified by the code. The Court further noted that statutes in derogation of common law are strictly construed and that a court will presume that such a statute was not intended to alter the common law other than by what was clearly and plainly specified in the statute.

Application: Be careful in your reading of the Florida Trust Code to remember that the common law governing trusts, including the common law governing fiduciary duties, is still applicable to the extent it is not expressly modified by the Florida Trust Code.

12. **"The Protector." Fourth DCA affirms use of trust protectors. *Minassian v. Rachins*, 152 So.3d 719 (Fla. 4th DCA 2014).**

The *Minassian* case is the first Florida appellate court decision affirming the use of trust protectors in a domestic trust proceeding. In this case the authority for resolving any ambiguities in the trust agreement was shifted by a provision of the trust from the court to a trust protector. Specifically, the settlor named his estate planning attorney as his trust protector. When the settlor died, litigation ensued between his children against his wife (as trustee) alleging she'd breached her fiduciary duties. The trial court made certain rulings against the wife so she triggered the trust protector clause to allow the protector to re-write the trust agreement in a way that ultimately favored her litigation position. The beneficiaries filed a supplemental complaint to declare the trust protector's modifications invalid. The Fourth DCA first held that trust protectors are authorized by Florida law. See F.S. Sec. 736.0808(3). It then held that the trust protector was empowered pursuant to the trust itself to modify or amend the trust provisions to correct ambiguities that might otherwise require court construction or to correct a drafting error that defeats the settlor's intent, as determined by the trust protector in its sole and absolute discretion. These powers were deemed authorized by Florida law. The Court rejected the argument that use of the protector was an invalid delegation of the trustee's powers and found that the protector provision was a delegation of settlor's power. The Court also rejected the argument that F.S. Secs. 736.0410-736-04115 provide the exclusive means of modifying a trust, noting that F.S. Sec. 736.0808 supplements and overrides common law means of modifying and terminating trusts. Finally, as an aside, the case has some strange discussion about entitlement to accountings (one of the contested issues) which seem to indicate confusion on the part of the Court with regard to accounting requirements to qualified beneficiaries under the Trust Code.

Application: The case will likely lead to more widespread use of trust protectors as a way of protecting trusts in litigation contexts and as a means of non-judicial modification and termination. A trust protector is now authorized, under the holding of this case, to

resolve trust construction ambiguities by amending or terminating the trust after the settlor's death without any court proceedings being required. This leads to interesting questions such as: (1) is the trust protector a fiduciary; (2) what are the specific powers of the protector; (3) what is reasonable compensation for a protector; (4) what standards govern disputes between trustees and protectors, etc.?

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