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NOVA LAW REVIEW



THE 1998 SURVEY OF FLORIDA LAW

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Appellate Practice: 1998 Survey of Florida Law

Anthony C. Musto *

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I. INTRODUCTION

This article will discuss recent developments in the field of appellate practice in Florida.¹ Although this article will focus primarily on cases decided between July 1, 1997 and June 30, 1998, it will also deal with certain cases decided shortly before and after that period which are either of particular interest to the appellate practitioner or which provide the background for, or the culmination of, issues that were addressed by cases decided throughout that period.

In a broad sense, every appellate decision falls within the scope of appellate practice. Decisions relating to substantive areas of the law, however, are more properly dealt with in articles relating to those substantive areas and therefore will not be discussed here. Rather, this

1. For a discussion of developments in appellate practice for 1993, 1995, 1996, and 1997, see Anthony C. Musto, *Appellate Practice: 1997 Survey of Florida Law*, 22 NOVA L. REV. 29 (1997) [hereinafter *1997 Survey*]; Anthony C. Musto, *Appellate Practice: 1996 Survey of Florida Law*, 21 NOVA L. REV. 13 (1996) [hereinafter *1996 Survey*]; Anthony C. Musto, *Appellate Practice: 1995 Survey of Florida Law*, 20 NOVA L. REV. 1 (1995) [hereinafter *1995 Survey*]; Anthony C. Musto, *Appellate Practice: 1993 Survey of Florida Law*, 18 NOVA L. REV. 1 (1993) [hereinafter *1993 Survey*].

article will focus on matters relating to practice in the appellate courts and will examine those areas. Additionally, this article will not discuss cases relating to the preservation of particular issues, nor will it discuss the question of whether particular errors were harmless.

II. ADMINISTRATIVE ORDERS

Chief Justice Major B. Harding of the Supreme Court of Florida issued two administrative orders of significance to appellate practitioners. One dealt with the impact of modern technology on *Florida Rule of Appellate Procedure* 9.210, which states that the text of briefs “shall be printed in type of no more than 10 characters per inch.”² The order noted that “[w]hile this requirement may have made eminent sense in the early days of computerization, it is difficult to justify, and sometimes impossible to honor, in a day when computers instantaneously perform typographic functions once available only to the most skilled manual typesetters.”³ The order went on to state that “[f]oremost among these functions is the ability to adjust spacing so that individual characters take up only so much horizontal space as is necessary” and that “[w]e are nearing the day when these proportionately spaced fonts will be the only ones installed on most computers.”⁴ The order indicated that the problems created by the new technology are twofold: 1) because the number of characters per inch will vary throughout the document, attorneys and court clerks are “left in a quandary about whether briefs actually meet the rules’ standards;” and 2) “briefs should not circumvent the page-length requirements through the simple expedient of adjusting fonts.”⁵

Noting that the supreme court had referred the matter to the Florida Appellate Court Rules Committee for modifications to the existing rule, the order adopted “a clear-cut interim solution to this problem.”⁶ It did so by stating that no typed brief shall be rejected for failure to comply with the font requirements if it meets the following criteria:

2. FLA. R. APP. P. 9.210(a)(2).

3. Order on Rule 9.210, *Florida Rules of Appellate Procedure*, Chief Justice Major B. Harding (on file with author).

4. *Id.*

5. *Id.*

6. *Id.*

- (1) It is reproduced in a font that is:
 - (a) 12 point type or larger if the font is not proportionately spaced, provided the font does not exceed ten characters per inch, or
 - (b) 14 point Times Roman (or similar) type or larger if the font is proportionately spaced; and
- (2) It includes a statement certifying the size and style of type used in the brief (e.g., 14 point proportionately spaced Times Roman; 12 point Courier New, a font that is not proportionately spaced).⁷

The order further notes that its criteria are modeled after the requirements of the United States Court of Appeals for the Eleventh Circuit⁸ and may be interpreted in light of them.⁹

The other order established a uniform case numbering system for the Florida court system.¹⁰ It directs that the appellate courts are to implement the new system by January 1, 2000, and that trial courts may implement it as early as January 1, 1999.¹¹ Furthermore, the courts must implement a uniform case numbering system before providing the public with access to court data via the Internet or by January 1, 2003, whichever occurs first.¹² Supreme court case numbers will begin with "SC," while district court cases will begin with the number of the district, followed by the letter "D."¹³ The court designation will be followed by the year and then by sequential five-digit numbers that will start with "00001" each year.¹⁴ For example, the first case in the First District Court of Appeal in 2000 will be numbered 1D200000001. A similar approach will be taken with regard to county and circuit court cases, with each county being identified by an assigned two-digit code at the beginning of the case number and with the addition of two-

7. *Id.*

8. 11th Cir. FED. R. APP. P. 28-2(d) & 32-4.

9. Order on Rule 9.210, *Florida Rules of Appellate Procedure*, Chief Justice Major B. Harding (on file with author).

10. Order, Chief Justice Major B. Harding (on file with author).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

letter designations for court types.¹⁵ There will also be optional branch location and party/defendant identifiers.¹⁶

The order stated:

[s]uch a system is required to ensure that, in this age of technology, case numbers include unique identifiers that easily distinguish the origin of a case, type of case, year of filing, and numerical sequence of a case when case numbers are displayed externally in an automated format for public access.¹⁷

III. JURISDICTION OF THE SUPREME COURT OF FLORIDA

In *State v. Matute-Chirinos*,¹⁸ the State sought certiorari in the third district to review a pretrial ruling in a capital murder prosecution.¹⁹ Pursuant to a request by the state, the district court certified the case as one having great effect on the administration of justice throughout the state requiring immediate resolution by the supreme court.²⁰

The supreme court noted that the provisions of Article V, section 3(b)(5) of the Florida Constitution, which allow it to review trial court decisions that are passed through district courts by certification, states that the court:

[m]ay review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.²¹

The court then found that “[t]his provision does not give this [c]ourt jurisdiction to accept a certification by a district court except in cases in which an appeal is pending.”²² Since the case at issue had been before the district court on a petition for a writ of certiorari, the court found that the

15. Order, Chief Justice Major B. Harding (on file with author).

16. *Id.*

17. *Id.*

18. 713 So. 2d 1006 (Fla. 1998).

19. *Id.* at 1007.

20. *Id.*

21. *Id.* at 1007 (quoting FLA. CONST. art. V, § 3(b)(5)).

22. *Id.*

constitutional provision did not provide it with jurisdiction.²³ The court noted that it had previously accepted jurisdiction under similar circumstances in *State v. Hootman*²⁴ and concluded that the decision to do so had been erroneous.²⁵

IV. APPEALS FROM COUNTY COURTS TO DISTRICT COURTS

In *State Farm Mutual Automobile Insurance Co. v. U.S.A. Diagnostics, Inc.*,²⁶ a county court denied a motion to compel arbitration but certified to the fourth district, pursuant to *Florida Rule of Appellate Procedure* 9.030(b)(4), a question of great public importance.²⁷ The appellate court asked the parties to address the question of whether it had jurisdiction and both responded by seeking to have the court rule on the merits of the case and to answer the certified question.²⁸ “We can do so only if we have jurisdiction,” the court stated.²⁹ “We do not,” it concluded.³⁰

The court recognized that its jurisdiction under *Florida Rule of Appellate Procedure* 9.030(b)(4) to review county court orders certified to be of great public importance is limited to final orders³¹ and to non-final orders otherwise appealable to the circuit court under Rule 9.140(c),³² which deals with appeals by the state in criminal cases.³³ Since the order on the motion to compel arbitration was neither final nor an order under Rule 9.140(c), the court found that it “does not have discretionary jurisdiction to review this certified question.”³⁴ Rather, the court pointed out, “appellate jurisdiction of non-final orders [entered by county courts] that determine entitlement to arbitration lies in the circuit courts.”³⁵ Accordingly, the appeal was transferred to the appropriate circuit court.³⁶

23. *Matute-Chirinos*, 713 So. 2d at 1007.

24. 709 So. 2d 1357 (Fla. 1998).

25. *Matute-Chirinos*, 713 So. 2d at 1007.

26. 696 So. 2d 1334 (Fla. 4th Dist. Ct. App. 1997).

27. *Id.* at 1334.

28. *Id.*

29. *Id.*

30. *Id.*

31. FLA. R. APP. P. 9.030(b)(4)(A).

32. FLA. R. APP. P. 9.030(b)(4)(B).

33. FLA. R. APP. P. 9.030(b)(4)(B).

34. *State Farm*, 696 So. 2d at 1335.

35. *Id.*

36. *Id.*

V. APPELLATE REVIEW BY CIRCUIT COURTS

The third district held in *Metropolitan Dade County v. Hernandez*³⁷ that the circuit court lacked jurisdiction to consider an appeal from a hearing officer's order upholding a citation for a county animal control violation.³⁸ The court relied on the fact that the county code provided that a violator or the county could seek to overturn the order of the hearing officer by making application to the county court for a trial de novo on the merits.³⁹ The court found that the county was authorized by sections 162.13 and 162.21(8) of the *Florida Statutes* to adopt such a method of review.⁴⁰

In quashing a circuit court decision that had reversed the hearing officer's determination, the third district stated that while it "sympathize[d] with and appreciate[d] both Mr. Hernandez's and the County's frustration with the amount of time, energy and heartache this case has caused," it "believe[d] that the proper course will at last be followed, which will clear this matter up for both parties."⁴¹

In *Oceania Joint Venture v. Ocean View of Miami, Ltd.*,⁴² a petitioner sought certiorari review in the third district of an order from the appellate division of the Eleventh Circuit Court of Appeals denying a motion for reinstatement of an appeal.⁴³ The petitioner asserted that a prior order of dismissal based on the failure to join an indispensable party was void because it had been entered by only one circuit judge, rather than by a three-judge panel as required by a local rule.⁴⁴

The petitioner did not raise the issue regarding the local rule at the time the motion to dismiss was considered, neither in a certiorari petition that sought review of the dismissal order in the third district, nor in a subsequent certiorari petition that requested the supreme court to order the district court to accept jurisdiction and reverse the circuit court's order.⁴⁵ The third district rejected the petitioner's contention that the local rule was jurisdictional in nature and that a claim that it was violated could therefore be raised at any time.⁴⁶ In denying certiorari, the court said:

37. 708 So. 2d 1008 (Fla. 3d Dist. Ct. App. 1998).

38. *Id.* at 1009.

39. *Id.* at 1010.

40. *Id.*

41. *Hernandez*, 708 So. 2d at 1011.

42. 707 So. 2d 917 (Fla. 3d Dist. Ct. App. 1998).

43. *Id.* at 918.

44. *Id.* at 919.

45. *Id.* at 917.

46. *Id.* at 918.

[T]he three-judge panel requirement . . . is a rule of court that is procedural rather than jurisdictional in nature. Consequently, Oceania's failure to timely challenge, in its prior appeals, the order of dismissal on the grounds that it was entered by one circuit judge has resulted in a waiver of this issue.⁴⁷

VI. NONAPPEALABLE ORDERS

In *Polk County v. Sofka*,⁴⁸ a plaintiff obtained a verdict against the county in a suit to recover for injuries sustained in an automobile accident.⁴⁹ Subsequent to the county's motion for a new trial being granted, the parties executed a settlement agreement which provided for a judgment in the plaintiff's favor.⁵⁰ The agreement also provided that the county might seek review of two appellate issues relating to the trial court's refusal to dismiss, enter summary judgment for the county, or grant a directed verdict against the plaintiff.⁵¹ The agreement further provided:

that the intermediate appellate court ha[d] jurisdiction to hear [the] [county's] appeal . . . ;” that “[t]he record on appeal [would] be the record as it exist[ed] at the time of the entry of the Stipulated Final Judgment;” and that, “if the intermediate appellate court, for any reason, determine[d] [that] there [was] no jurisdiction or standing, or if the appeal [was] not dispositive of the issue of [the county's] liability . . . , the Stipulated Final Judgment [would] be void, and the parties [would] be entitled to again proceed to trial.⁵²

The second district affirmed the judgment and certified a question relating to the merits of the case.⁵³ The supreme court declined to answer the question, concluding that the district court had lacked jurisdiction to hear the appeal.⁵⁴ The court noted that neither side had requested that the order granting a new trial be set aside and that the county be permitted to withdraw its motion.⁵⁵ The court therefore found that the county, “having requested

47. *Oceania Joint Venture*, 707 So. 2d at 918–19.

48. 702 So. 2d 1243 (Fla. 1997).

49. *Id.* at 1244.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Polk County v. Sofka*, 675 So. 2d 615 (Fla. 2d Dist. Ct. App. 1996).

54. *Sofka*, 702 So. 2d at 1245 (Fla. 1997).

55. *Id.* at 1244.

and received a new trial,” was “deemed to have waived its right immediately to seek appellate review of rulings made prior to, or during, the previous trial.”⁵⁶

The court recognized that the parties had stipulated to the district court’s jurisdiction, but pointed out that “parties cannot stipulate to jurisdiction over the subject matter where none exists.”⁵⁷ The court also agreed with a statement made by the parties in a joint brief on the jurisdictional question that the court’s conclusion “will result in a waste of judicial resources.”⁵⁸ In light of the fact that courts are bound to take notice of the limits of their authority and to notice jurisdictional defects and enter appropriate orders,⁵⁹ however, the court found the waste of judicial resources to be regrettable but unavoidable.⁶⁰

In *Hastings v. Demming*,⁶¹ the supreme court found that “[n]onfinal orders denying summary judgment on a claim of workers’ compensation immunity are not appealable unless the trial court order specifically states that, as a matter of law, such a defense is not available to a party.”⁶² The decision approved the district court decision under review⁶³ and disapproved the decisions in *Breakers Palm Beach, Inc. v. Gloger*⁶⁴ and *City of Lake Mary v. Franklin*⁶⁵ to the extent that they are inconsistent with the reasoning expressed in the opinion.⁶⁶

Cases in which district courts held that orders were not appealable include *Health Care Associates, Inc. v. Brevard Physicians Group, P.A.*,⁶⁷ (confirming in part and modifying or vacating in part an arbitration award); *State Farm Mutual Automobile Insurance Co. v. Bravender*,⁶⁸ (assessing attorney’s fees as the result of discovery misconduct); *Rowell v. Florida Department of Law Enforcement*,⁶⁹ (refusing of the Florida Department of

56. *Id.*

57. *Id.* at 1245 (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)).

58. *Id.* at 1244.

59. *Sofka*, 702 So. 2d at 1244 (quoting *West 132 Feet v. City of Orlando*, 86 So. 197, 198–99 (Fla. 1920)).

60. *Id.*

61. 694 So. 2d 718 (Fla. 1997).

62. *Id.* at 720.

63. *Hastings v. Demming*, 682 So. 2d 1107 (Fla. 2d Dist. Ct. App. 1996).

64. 646 So. 2d 237 (Fla. 4th Dist. Ct. App. 1994).

65. 668 So. 2d 712 (Fla. 5th Dist. Ct. App. 1996).

66. *Hastings*, 694 So. 2d at 720.

67. 701 So. 2d 118 (Fla. 5th Dist. Ct. App. 1997).

68. 700 So. 2d 796 (Fla. 4th Dist. Ct. App. 1997).

69. 700 So. 2d 1242 (Fla. 2d Dist. Ct. App. 1997).

Law Enforcement to certify an individual's eligibility to have her criminal record sealed); *Park Imaging, Inc. v. Steadfast Insurance Co.*,⁷⁰ (granting partial summary final judgment providing that the amount of money an insured's insurance company had to spend on costs and expenses in defending the insured, including attorney's fees, would reduce the insurance company's monetary limit of liability insurance by the amount of those costs and expenses); *Gomez v. Gomez*,⁷¹ (non-final order granting wife's motion to join her brother-in-law as a defendant in her dissolution action); *Kalantari v. Kalantari*,⁷² (granting interlocutory order denying a motion to set aside an antenuptial agreement); *Estate of Nolan v. Swindle*,⁷³ (authorizing previously appointed administrator ad litem to file an action seeking to set aside will and revocable living trust on the ground that beneficiaries had exercised undue influence); *Lynbrook Court Condominium Ass'n. v. Arana*,⁷⁴ (determining that a case had not been dismissed, entered subsequent to an order stating that the case shall stand dismissed thirty days from the date of the order unless it appeared that the matter was diligently being prosecuted within that thirty day period); *Caribbean Transportation, Inc. v. Acevedo*,⁷⁵ (order staying action and retaining jurisdiction pending arbitration); *Salzverg v. Salzverg*,⁷⁶ (bifurcating order which simply dissolved the parties' marriage); and, *Thomas v. Silvers*,⁷⁷ (denying motion to dismiss for failure to serve complaint within 120 days as required by *Florida Rule of Civil Procedure* 1.070(i)).⁷⁸

VII. FINAL ORDERS

In *Hills v. State*,⁷⁹ the first district rejected a claim that an order approving mental treatment pursuant to section 916.107(3) of the *Florida Statutes* was non-final because it was only effective for a period of ninety days, and the appellee could once again petition to continue treatment once this period had expired.⁸⁰ The court determined "that this potentiality does

70. 700 So. 2d 185 (Fla. 4th Dist. Ct. App. 1997).

71. 702 So. 2d 255 (Fla. 3d Dist. Ct. App. 1997).

72. 711 So. 2d 1368 (Fla. 3d Dist. Ct. App. 1998).

73. 712 So. 2d 421 (Fla. 2d Dist. Ct. App. 1998).

74. 711 So. 2d 249 (Fla. 3d Dist. Ct. App. 1998).

75. 698 So. 2d 604 (Fla. 3d Dist. Ct. App. 1997).

76. 696 So. 2d 1278 (Fla. 3d Dist. Ct. App. 1997).

77. 701 So. 2d 389 (Fla. 3d Dist. Ct. App. 1997).

78. The court certified conflict with *Mid-Florida Assoc., Ltd. v. Taylor*, 641 So. 2d 182 (Fla. 5th Dist. Ct. App. 1994) and *Comisky v. Rosen Management Serv., Inc.*, 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc).

79. 699 So. 2d 735 (Fla. 1st Dist. Ct. App. 1997).

80. *Id.* at 736.

not render the order at issue nonfinal, since it clearly marked an end to judicial labor as to the matters then pending before the trial court.”⁸¹

The fourth district, in *Roshkind v. Roshkind*,⁸² addressed the issue of whether a post-dissolution final order in a modification proceeding “is a final judgment, to be appealed by plenary appeal, or an order entered after final judgment, reviewable as a non-final appeal under *Florida Rule of Appellate Procedure* 9.130(a)(4).”⁸³

The court noted that although case law “would support an argument that petitions for modification are not independent actions, the orders entered in modification proceedings have all the aspects of final judgments.”⁸⁴ The court therefore concluded that such orders are final judgments, subject to motions for rehearing under the *Florida Rule of Civil Procedure* 1.530(a), and appealable as plenary appeals.⁸⁵

The fourth district also examined the question of finality in the context of appeals taken by persons who were not parties to the proceedings in the lower tribunal. In *Shook v. Alter*,⁸⁶ a lawyer representing a party in the trial court sought certiorari review of an order holding him in indirect civil contempt.⁸⁷ The district court entered an order redesignating the petition for writ of certiorari as a final appeal.⁸⁸ The court noted that the distinction was important because a petitioner seeking certiorari carries “a heavier burden than an appellant must carry on appeal.”⁸⁹ The court indicated that it was publishing its order “so that the Bar will know that, where a final order is entered against a non-party such as, for example, a lawyer or a witness, the appropriate method for review of that order is by final appeal.”⁹⁰

The petitioners in *Borja v. Nationsbank of Florida*⁹¹ sought mandamus to compel the trial court to amend a final judgment that inadvertently omitted the names of some of the parties to the action.⁹² Due to the omission, the petitioners claimed that a final judgment was never entered

81. *Id.*

82. 717 So. 2d 544 (Fla. 4th Dist. Ct. App. 1997).

83. *Id.* at 544.

84. *Id.*

85. *Id.*

86. 715 So. 2d 1082 (Fla. 4th Dist. Ct. App. 1998).

87. *Id.* at 1082–83.

88. *Id.* at 1083.

89. *Id.*

90. *Id.*

91. 698 So. 2d 280 (Fla. 3d Dist. Ct. App. 1997).

92. *Id.* at 280.

against the omitted parties.⁹³ The respondents maintained that the omissions were merely technical errors that did not affect the finality of the judgment.⁹⁴ The third district found the omissions to be “a mere clerical error” that would not affect the judgment’s finality.⁹⁵ Accordingly, the court directed the trial court to amend the judgment to include the names of the omitted parties *nunc pro tunc* on the date of the original final judgment.⁹⁶

VIII. NOTICE OF APPEAL

In *Raysor v. Raysor*,⁹⁷ the first district encountered a situation in which a notice of appeal was mailed to the post office box maintained by the clerk of the lower tribunal five days prior to the expiration of the thirty-day period established by *Florida Rule of Appellate Procedure* 9.130(b) for the filing of such notices.⁹⁸ The notice was not filed with the clerk, however, until the morning after the thirty day period expired.⁹⁹

The court rejected the appellant’s argument that the facts established that the notice of appeal was delivered to the clerk’s post office box on the final day of the thirty day period.¹⁰⁰ The court went on to indicate that even if it was assumed that the notice did reach the post office box on the thirtieth day, “we would conclude that [the appellant] nonetheless failed to timely ‘file’ the notice of appeal with the clerk of the trial court.”¹⁰¹ The court further noted that “[g]enerally, a paper is deemed to be ‘filed’ when it is delivered to the proper official and received by that official to be kept on file,” and concluded that “merely mailing the notice or having the notice placed in a post office box within the required time period is not sufficient.”¹⁰²

The court then went on to state:

By publishing this opinion, our intent is not to single out counsel for appellant, who by all appearances mailed the notice of appeal in

93. *Id.*

94. *Id.*

95. *Id.*

96. *Borja*, 698 So. 2d at 281.

97. 706 So. 2d 400 (Fla. 1st Dist. Ct. App. 1998).

98. *Id.* at 400.

99. *Id.*

100. *Id.* at 401.

101. *Id.*

102. *Raysor*, 706 So. 2d at 401 (citing *Blake v. R.M.S. Holding Corp.*, 341 So. 2d 795 (Fla. 3d Dist. Ct. App. 1977)).

a manner that under ordinary circumstances would have resulted in timely receipt by the clerk. On the contrary, given the relative frequency with which situations such as this occur, our purpose is to reiterate the point that one who foregoes the opportunity to personally deliver time critical documents to the clerk, and instead elects to entrust those documents to postal authorities or some other delivery mechanism, does so at his or her own peril.¹⁰³

The fourth district in *Bove v. Ocwen Financial Corp.*,¹⁰⁴ denied a motion to amend a notice of appeal that timely sought review of a final judgment.¹⁰⁵ Some two months after the filing of the notice, the trial court entered a judgment taxing costs.¹⁰⁶ After the time for appealing the cost judgment had expired, the appellants moved to amend the notice of appeal so as to allow them to appeal the cost judgment.¹⁰⁷ In the motion, the appellants stated that they were not seeking reversal of the cost judgment except in the event the final judgment was to be reversed.¹⁰⁸

The court found that it “must deny the motion to amend the notice of appeal on jurisdictional grounds because no notice of appeal was filed within [the time for appealing] the cost judgment.”¹⁰⁹ The court went on to suggest an alternative method of dealing with similar situations:

Having to file a separate notice of appeal from a judgment for costs or attorney’s fees, entered after a notice of appeal has already been filed from the main judgment, requires, of course, the payment of an additional filing fee. Where, as here, the only reason for appealing the second judgment is in the event the main judgment is reversed, parties should consider stipulating that the second judgment would be vacated if the main judgment were reversed. Such a stipulation would not only save the appellant the additional filing fee, but would also save both parties attorneys’ fees and would not expose the appellee to having to bear the cost of that filing fee in the event the cost judgment is reversed.¹¹⁰

103. *Id.*

104. 23 Fla. L. Weekly D564 (4th Dist. Ct. App. Feb. 25, 1998).

105. *Id.* at D564.

106. *Id.*

107. *Id.*

108. *Id.* at D564–65.

109. *Bove*, 23 Fla. L. Weekly at D565.

110. *Id.* (footnote omitted).

In *Turner v. City of Daytona Beach Shores*,¹¹¹ the fifth district dismissed an appeal in which the notice of appeal was untimely, rejecting the appellant's claim that he had filed an earlier, premature, notice of appeal.¹¹² The document referred to by the appellant was a pleading entitled "Motion to Strike the Sham Pleadings by Defendants Objection to Plaintiffs Notice of Hearing and Defendant's Entry of a Order for Final Summary Judgment In the Alternative, A Notice of Appeal," the last paragraph of which stated, "The Plaintiff herein is providing a Notice of Appeal, if the Court issues an Order in favor of the contemptuous Attorney and the Defendants."¹¹³

The court found, the purported notice "does not even come close to complying with the requirements of *Florida Rules of Appellate Procedure* 9.110(d) and 9.900(a), and glaringly omits 'the name of the court to which the appeal is taken.'"¹¹⁴ The court recognized that *Florida Rule of Appellate Procedure* 9.110(m) "allows for some leeway for premature appeals," but interpreted the rule to require "some previous action by the trial court about which an appellant wishes to complain."¹¹⁵ The purported notice having been filed "before any appealable decisions were rendered by the trial court and five months before any of the defendants filed a motion leading to the final judgment from which the appellant tardily filed an appeal," the appeal was dismissed.¹¹⁶

Several cases dealt with the question of whether the filing of particular motions in the trial court delayed the rendition of an order, so as to make timely a notice of appeal filed within thirty days of the order denying the motion, but more than thirty days after the order appealed from.

Some examples include: 1) motion for clarification directed to final order of dismissal did not delay rendition;¹¹⁷ 2) motion to set aside final judgment was intended to operate as a motion for rehearing and suspended rendition;¹¹⁸ 3) pending motion to amend complaint, filed prior to entry of summary final judgment, did not stay rendition of the judgment, despite the fact that the trial court had reserved ruling on the motion;¹¹⁹ 4) motion for rehearing directed to a circuit court order granting a stay of a driver's license

111. 702 So. 2d 632 (Fla. 5th Dist. Ct. App. 1997).

112. *Id.* at 632-33.

113. *Id.* at 633.

114. *Id.*

115. *Id.*

116. *Turner*, 702 So. 2d at 633.

117. *Tyler v. State*, 718 So. 2d 811 (Fla. 2d Dist. Ct. App. 1997).

118. *Olson v. Olson*, 704 So. 2d 208 (Fla. 5th Dist. Ct. App. 1998).

119. *DiPaolo v. Rollins Leasing Corp.*, 700 So. 2d 31 (Fla. 5th Dist. Ct. App. 1997).

suspension did not delay rendition because motions for rehearing are not authorized with regard to non-final orders;¹²⁰ 5) motion for reconsideration after a final summary judgment, although mislabeled, was in substance a proper motion for rehearing and thus suspended rendition;¹²¹ 6) motion for rehearing was unauthorized, and rendition was not delayed by its filing because order denying arbitration was non-final;¹²² and 7) post-judgment contempt order in a dissolution proceeding, although reviewable as an appeal from a non-final order under *Florida Rule of Appellate Procedure* 9.140(a)(4) is actually a final order and motion for rehearing therefore delays its rendition.¹²³

IX. STAYS

In *St. Mary's Hospital, Inc. v. Phillipe*,¹²⁴ the fourth district found to be constitutional section 766.212 of the *Florida Statutes* which allows a district court, in order to prevent manifest injustice, to stay an arbitration award entered pursuant to section 766.207 of the *Florida Statutes*.¹²⁵ The defendants in the case claimed that the statute infringed on the supreme court's exclusive authority to prescribe rules of procedure, in that it abrogates the automatic stay provision of *Florida Rule of Appellate Procedure* 9.310.¹²⁶ The court disagreed, finding that in enacting the statute, the legislature "created a modified right to judicial review of arbitration awards,"¹²⁷ review that "includes an equally substantive right to payment of the award during review unless the court finds that a stay is necessary to prevent manifest injustice."¹²⁸

In light of its interpretation of the statute, the court stated, "[w]e cannot say that such substantive legislation infringes on the supreme court's power to regulate procedures in appellate proceedings."¹²⁹ The court went on to

120. Department of Highway Safety & Motor Vehicles v. Bond, 696 So. 2d 949 (Fla. 5th Dist. Ct. App. 1997).

121. Magnum Towing, Inc. v. Sunbeam Television Corp., 23 Fla. L. Weekly D850 (Fla. 3d Dist. Ct. App. Apr. 1, 1998).

122. Josephthal Lyon & Ross, Inc. v. C & A Fin. Programs, Inc., 709 So. 2d 1384 (Fla. 4th Dist. Ct. App. 1998).

123. Remington v. Remington, 705 So. 2d 920 (Fla. 4th Dist. Ct. App. 1997).

124. 699 So. 2d 1017 (Fla. 4th Dist. Ct. App. 1997).

125. *Id.* at 1019.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Phillipe*, 699 So. 2d at 1020.

certify “the question of constitutionality to the supreme court for its definitive resolution.”¹³⁰

The fifth district, in *Department of Safety v. Stockman*,¹³¹ dealt with the issue of whether a circuit court has the authority to stay the administrative suspension of a driver’s license pending certiorari review by the circuit court.¹³²

The court found that “the circuit court, as the direct reviewing court, has the inherent power and discretion to suspend the administrative order, pending certiorari review.”¹³³ Not according the circuit court this discretionary power, the court recognized, would likely render review of such orders “meaningless.”¹³⁴ To illustrate its point, the court noted that the license suspension in the case under review was for six months.¹³⁵ “If this order could not be stayed pending review,”¹³⁶ the court said, “the suspension time, or a great deal of it, would likely run before the circuit court ruled on the petition for certiorari review.”¹³⁷

The court rejected arguments based on sections 322.2615(13), 322.272, and 322.28(6) of the *Florida Statutes*, interpreting those provisions as simply providing no automatic stay pending review of a license suspension.¹³⁸

In *State Department of Environmental Protection v. Pringle*,¹³⁹ the first district granted a motion to reinstate an automatic stay imposed by *Florida Rule of Appellate Procedure* 9.310(b)(2)¹⁴⁰ and vacated by the trial court.¹⁴¹

The case involved an order enjoining state agencies from arresting commercial fishermen for possessing and/or using certain fishing nets.¹⁴² The appellees’ motion to vacate the automatic stay was based on a sheriff’s affidavit which stated that he and other sheriffs were concerned about “rising

130. *Id.* (footnote omitted).

131. 709 So. 2d 179 (Fla. 5th Dist. Ct. App. 1998).

132. *Id.* at 180.

133. *Id.* (footnote omitted).

134. *Id.*

135. *Id.*

136. *Stockman*, 709 So. 2d at 180.

137. *Id.* at 180–81.

138. *Id.* at 180.

139. 707 So. 2d 387 (Fla. 1st Dist. Ct. App. 1998).

140. The rule provides that the timely filing of a notice of appeal automatically operates “as a stay pending review, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review.” FLA. R. APP. P. 9.310(b)(2).

141. *Pringle*, 707 So. 2d at 389.

142. *Id.* at 388.

tensions”¹⁴³ regarding the issue and setting forth what the appellate court termed “clear implication of possible violence” between fishermen and law enforcement officers.¹⁴⁴

The court noted that the fourth district, in *St. Lucie County v. North Palm Beach Development Corp.*,¹⁴⁵ had explained that the automatic stay is based on a policy rationale and that automatic stays “should be vacated only under the most compelling circumstances.”¹⁴⁶

After considering the evidence, the court found “no compelling reason to vacate the . . . stay.”¹⁴⁷ Indeed, the court indicated that granting a stay for the reasons asserted “would impermissibly reward those citizens who would use threats (implicit or otherwise) of violence in response to an unpopular law, at the expense of those who would follow or attempt to lawfully challenge or change the law within this state’s democratic institutions.”¹⁴⁸

X. INDIGENCY

In *Quigley v. Butterworth*,¹⁴⁹ a prisoner serving a life sentence appealed a circuit court’s dismissal of his declaratory judgment action.¹⁵⁰ He moved the district court of appeal to allow him to proceed in forma pauperis, and the court transferred the motion to the circuit court for a determination of the prisoner’s indigency status.¹⁵¹ The circuit court denied the motion because the prisoner failed to meet the requirements of section 57.085 of the *Florida Statutes*, which calls for prisoners seeking waiver of prepayment of court costs and fees due to indigency to file an affidavit of indigency with the court.¹⁵² As a result of this ruling, the district court ordered the prisoner to pay the appellate filing fee of \$250.¹⁵³

The prisoner then filed a second motion with the district court, entitled “Appellant’s Second Motion for Leave to Proceed on Appeal without

143. *Id.* at 389.

144. *Id.* at 390.

145. 444 So. 2d 1133 (Fla. 4th Dist. Ct. App. 1984).

146. *Pringle*, 707 So. 2d at 390 (quoting *St. Lucie County v. North Palm Beach Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th Dist. Ct. App. 1984)).

147. *Id.*

148. *Id.*

149. 708 So. 2d 270 (Fla. 1998).

150. *Id.* at 270.

151. *Id.*

152. *Id.* at 270–71.

153. *Id.* at 271.

Payment of Costs.”¹⁵⁴ The court again transferred the request to the circuit court, which again denied the motion.¹⁵⁵ Subsequently, the district court dismissed the appeal for failure to pay the filing fee.¹⁵⁶

The prisoner petitioned the Supreme court of Florida for mandamus to compel the district court to reinstate his appeal and permit him to proceed in forma pauperis.¹⁵⁷ The supreme court agreed with the prisoner that his second motion should have been treated as a motion for review of the circuit court’s initial denial under *Florida Rule of Appellate Procedure* 9.430.¹⁵⁸ Relying on Rule 9.040(c),¹⁵⁹ which provides that “[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought,” the court transferred the cause to the district court “for consideration of the denial of indigency status.”¹⁶⁰

In *Willis v. State*,¹⁶¹ a criminal defendant who was represented by the Public Defender at trial, was convicted of possession of cocaine with intent to sell and filed a notice of appeal.¹⁶² Ruling on the defendant’s motion for an order of insolvency applicable to the appeal, the trial court appointed the Public Defender but required the defendant to pay the appellate filing fee and the cost of the trial transcripts.¹⁶³ Nothing in the record reflected that the defendant had the ability to pay those costs.¹⁶⁴

After the first district dismissed the appeal for failure to pay the filing fee, the defendant filed a financial affidavit showing that he had only twenty-five dollars and sixty-three cents in his prison account and twice petitioned the court to reinstate the appeal.¹⁶⁵ The district court directed the trial court to reconsider the defendant’s indigency status.¹⁶⁶ That court reiterated its prior order, stating that the defendant’s affidavit was invalid because, although it was sworn to and subscribed before a notary public, it was not sworn to under penalty of perjury;¹⁶⁷ that the defendant was unresponsive in

154. *Quigley*, 708 So. 2d at 271.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. FLA. R. APP. P. 9.040(c).

160. *Quigley*, 708 So. 2d at 271 (quoting FLA. R. APP. P. 9.040(c)).

161. 708 So. 2d 939 (Fla. 1998).

162. *Id.* at 940.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Willis*, 708 So. 2d at 940.

167. *Id.*

answering the questions on the affidavit;¹⁶⁸ and that because the defendant ““was not homeless, destitute or totally without assets’ before his arrest and because he was a known and convicted drug dealer, he must produce ‘credible evidence to support the proposition that he was then or now totally insolvent.’”¹⁶⁹ Pursuant to the trial court’s order, the district court again required the defendant to pay the filing fee to maintain his appeal.¹⁷⁰

The defendant then petitioned the Supreme court of Florida for a writ of habeas corpus to enable him to pursue his appeal.¹⁷¹ The court granted the petition, stating:

[W]e find it difficult, if not illogical, to conclude that the trial court could find the financial affidavit in this case to be valid and sufficient to prove that Willis was insolvent for the purpose of hiring appellate counsel but find the affidavit to be invalid and insufficient to prove that he was insolvent for the purpose of paying the filing fee and the transcript costs. If a financial affidavit was properly executed for the purpose of granting the defendant public assistance of counsel, it necessarily follows that the affidavit was properly executed for all purposes. While a defendant may be found indigent for the purpose of receiving public assistance of counsel, yet solvent to pay other costs and fees, the record must justify the order of partial indigency. Merely noting that a defendant is a convicted drug dealer and not homeless is not, in our view, a sufficient justification for declaring that person to be solvent to pay filing fees and other costs.¹⁷²

In *Ferenc v. State*,¹⁷³ a criminal defendant’s motion to proceed in forma pauperis in his appeal from the denial of a motion for post-conviction relief was denied based on the trial court’s finding that the appeal was frivolous.¹⁷⁴ On appeal, the fifth district found this denial, apparently based on section 57.085(8) of the *Florida Statutes* (1995),¹⁷⁵ which authorizes trial courts to dismiss frivolous proceedings instituted by indigent prisoners under certain

168. *Id.* at 940–41.

169. *Id.* at 941.

170. *Id.*

171. *Willis*, 708 So. 2d at 941.

172. *Id.*

173. 697 So. 2d 1262 (Fla. 5th Dist. Ct. App. 1997).

174. *Id.* at 1263.

175. *Id.*

circumstances, to be improper because the statute does not apply to criminal proceedings or collateral criminal proceedings.¹⁷⁶

A criminal defendant in *Martin v. State*¹⁷⁷ argued that he should be considered indigent for purposes of appeal based on his testimony that he had a Chapter 7 personal bankruptcy case pending and that certain property he owned was the subject of an action to foreclose a mortgage.¹⁷⁸ The fourth district disagreed.

As to the bankruptcy claim, the court stated:

The mere fact that one has filed for relief under chapter 7 of the Bankruptcy Code does not by itself establish indigency for purposes of an appeal under section 27.52 [of the *Florida Statutes*]. For one thing, income earned by a debtor after filing for relief under the bankruptcy law is not part of the bankruptcy estate. For another Martin's unadorned claim of bankruptcy fails to address exempt property under bankruptcy law.

* * *

Moreover, bankruptcy connotes insolvency. Under the Bankruptcy Code, insolvency means that one's debts exceed the value of one's property. In contrast, indigency under section 27.52 is related to income or, alternatively, the ability of a defendant to pay for an attorney without substantial hardship to the defendant's family. Thus, without more, mere insolvency under bankruptcy law cannot be equated with indigency under section 27.52.¹⁷⁹

The court also addressed the foreclosure claim.

So too with the foreclosure. Knowing that a foreclosure proceeding is pending with regard to real property owned by a defendant in a criminal case hardly establishes the section 27.52(2)(b) standard for indigency. The record in this case does not tell us, for example, the amount of the claimed debt in the foreclosure proceeding; nor does it tell us the value of the property to be foreclosed. For all we know, the value greatly exceeds the debt, and [the] defendant has equity which he could use to pay for an attorney. And even that, of course, fails to consider whether it is

176. *Id.*

177. 711 So. 2d 117 (Fla. 4th Dist. Ct. App. 1998).

178. *Id.* at 119.

179. *Id.* at 120 (footnotes omitted).

apparent that the mortgagee will ultimately prevail in the foreclosure action.¹⁸⁰

The court also discussed “the question of transfers of property and income by Martin to family members, including his mother.”¹⁸¹ The court stated:

We do not believe that section 27.52 allows transfers of property and money by a defendant to family members in order to create the insolvency required for court-appointed counsel. To do so would require the public to pay for lawyers for defendants whose appearance of need was specifically created for that purpose. That amounts to a fraud on the courts as well as the taxpayers. Voluntary transfers of property to family members to create indigency for the appointment of counsel are just as much fraudulent conveyances as are such transfers by debtors to avoid payment to their creditors.¹⁸²

In light of the above factors, and the existence of evidence that the defendant’s real property had been used for income producing purposes, the fourth district upheld a circuit court determination that the defendant was not indigent.¹⁸³

XI. FILING FEES

In *Milligan v. Palm Beach County Board of County Commissioners*,¹⁸⁴ the Supreme court of Florida upheld a circuit court’s conclusion¹⁸⁵ that Florida’s counties do not have to pay appellate filing fees on behalf of indigent criminal defendants.¹⁸⁶

The court pointed out that “Article VIII, section 1(b) of the Florida Constitution provides that disbursement of county funds must be by general law.”¹⁸⁷ The court found “no provision in . . . any . . . statute which mandates that counties disburse funds to pay appellate filing fees on behalf

180. *Id.*

181. *Id.*

182. *Martin*, 711 So. 2d at 120–21.

183. *Id.* at 121.

184. 704 So. 2d 1050 (Fla. 1998).

185. The fourth district had certified that the circuit court order passed on an issue of great public importance requiring immediate resolution by the supreme court. *Id.* at 1051.

186. *Id.*

187. *Id.*

of indigent criminal defendants.”¹⁸⁸ Rejecting the comptroller’s argument that such disbursement was required upon an *in pari materia* reading of certain statutes, the court found “that when the legislature has intended counties to pay certain costs, it has expressly provided for such disbursements.”¹⁸⁹

The court found that its decision would only have prospective application, “meaning that refunds of filing fees which counties have paid before issuance of this opinion are not required.”¹⁹⁰ The court also, by separate administrative order, “directed the clerks of the appellate courts to stop collecting filing fees for cases filed on behalf of indigents beginning on the date this opinion is issued [January 8, 1998].”¹⁹¹

The fourth district, in *In re Payment of Filing Fees*,¹⁹² discussed the situation that exists when a notice of appeal is filed without the payment of the appellate filing fee.¹⁹³ The court recognized that “[b]ecause there is a strict time deadline for filing a notice of appeal, . . . lawyers for parties taking an appeal may be forced to act quickly to preserve the right but without prepayment of these costs to the attorney by the client.”¹⁹⁴ The court indicated that as a result, it often receives notices of appeal unaccompanied by the fee,¹⁹⁵ and that, in such cases, it routinely enters “an order directing the attorney who filed the appeal to pay the filing fee or file a determination of indigency.”¹⁹⁶ In an increasing number of cases, the court indicated, attorneys have been failing to respond to these orders,¹⁹⁷ and the court wrote on the subject “to make a point in the hope that the practice will cease.”¹⁹⁸

The court stated that “[t]he mere fact that the client is obligated to reimburse the attorney for the costs advanced does not relieve the attorney of the duty to tender the filing fees to this court when the appeal is initiated.”¹⁹⁹

The court continued, “consequently, we rightfully look to the attorney initiating the appellate process to pay the filing fees due this court.”²⁰⁰

188. *Id.*

189. *Milligan*, 704 So. 2d at 1052 (footnote omitted).

190. *Id.*

191. *Id.*

192. 22 Fla. L. Weekly D2341 (4th Dist Ct. App. Oct. 8, 1997).

193. *Id.* at D2341.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Payment of Filing Fees*, 22 Fla. L. Weekly at D2341.

198. *Id.*

199. *Id.* at D2342.

200. *Id.*

The court went on to dispel the “mistaken assumption that a later decision by the client not to pursue the appeal, and the filing of a voluntary dismissal, will relieve the attorney of responding to our order for payment.”²⁰¹ The court noted “[t]he filing fee is an entry fee to the appellate process, not a fee for prosecuting the appeal to a final result,”²⁰² and stated that “[w]hen the appeal is later abandoned, that is the decision of the litigant and does not affect the liability for the fees due to commence the process.”²⁰³

The court also said:

We wish to make clear that we do not “bill” anyone, most especially not clients, for payment of our filing fees. We instead enter an order to the person filing the notice of appeal to *pay* the filing fee (or produce an order of indigency) within 10 days or sanctions will be imposed. The continued failure to pay is then a failure to comply with an order of the court, not a mere failure to respond to a bill from a creditor.²⁰⁴

XII. COUNSEL

In *Davis v. Meeks*,²⁰⁵ the first district dealt with a situation in which two attorneys jointly instituted an appeal on behalf of a client.²⁰⁶ Subsequently, a third attorney, who represented the client in related litigation, filed a notice of appearance and a notice voluntarily dismissing the appeal.²⁰⁷ The two attorneys who instituted the appeal moved to strike the notice of voluntarily dismissal and to disqualify the third attorney, asserting that due to factors pertaining to the related litigation, the attorney stood to gain if the judgment against the client was upheld and that he therefore had a conflict of interest.²⁰⁸ The third attorney responded that he had discussed with the client the benefits and detriments of proceeding with the appeal and that they had jointly determined that the client’s best interests were served by dismissal of the case.²⁰⁹ This response was accompanied by a sworn

201. *Id.*

202. *Payment of Filing Fees*, 22 Fla. L. Weekly at D2342.

203. *Id.*

204. *Id.*

205. 709 So. 2d 184 (Fla. 1st Dist. Ct. App. 1988).

206. *Id.* at 185.

207. *Id.*

208. *Id.*

209. *Id.*

affidavit of the client, in which the client stated that she approved of the filing of the notice of dismissal as it was her wish to have the appeal dismissed.²¹⁰

The court found that although it was undisputed that the two attorneys were at one time authorized to pursue the case, it was clear that any such authorization had been revoked.²¹¹ The court concluded that “[u]nder these circumstances, determining who best represents her interests in this case is not the province of this court, but rather of [the client] herself.”²¹² “The wisdom of her choice is not for us to decide,” the court continued, “and the consequences of that choice present issues for resolution in another forum on another day.”²¹³

XIII. RECORD ON APPEAL

In *Fleming v. State*,²¹⁴ a criminal defendant moved for rehearing of the second district’s summary affirmance of his appeal, brought pursuant to *Florida Rule of Appellate Procedure* 9.140(i),²¹⁵ claiming that he was denied an opportunity to file a brief.²¹⁶ The defendant cited *Summers v. State*,²¹⁷ in which the court ruled that summary records contemplated by the rule must be paginated and indexed by the circuit court clerks according to the requirements of Rule 9.200(d),²¹⁸ and asserted that his case was decided while he was awaiting the index from the clerk to use in providing proper record citations in his brief.²¹⁹

The court noted that, subsequent to *Summers*, the rule at issue was amended to require that briefs be filed within fifteen days of the filing of the notice of appeal.²²⁰ The court then stated:

We decline to apply the requirements of *Summers* under this amended version of the rule because to do so would require that the

210. *Davis*, 709 So. 2d at 185.

211. *Id.*

212. *Id.*

213. *Id.*

214. 709 So. 2d 135 (Fla. 2d Dist. Ct. App. 1998).

215. The rule sets forth the procedures to be used in appeals from summary denials of motions for post-conviction relief.

216. *Fleming*, 709 So. 2d at 135.

217. 570 So. 2d 990 (Fla. 1st Dist. Ct. App. 1990).

218. *See Fleming*, 709 So. 2d at 135.

219. *Id.*

220. *Id.*

clerk index and paginate the record and send it to appellant, who would then be required to file a brief, all within fifteen days of the filing of the notice of appeal. No clerk in the district regularly prepares summary records in this fashion and we do not believe the rules intend that summary records be paginated and indexed.²²¹

Noting that the defendant had conceded that the fifteen day requirement postdated *Summers* and the defendant neither sought an extension of time for his brief nor filed a motion asking the court how to reconcile the fifteen day requirement with *Summers*, the court determined that the defendant had waived his right to file a brief and denied rehearing.²²²

XIV. TRANSCRIPTS

In *Guardianship of Halpert v. Rosenbloom, P.A.*²²³ the fourth district “reluctantly”²²⁴ reversed an award of attorney’s fees because it failed to “set forth findings as to the time reasonably expended, the hourly rate, or other factors, if any, considered.”²²⁵ The court’s reluctance stemmed from the fact that the trial court proceedings were not transcribed,²²⁶ meaning that a new hearing would be required.²²⁷ The lack of a transcript did not preclude appellate review, the court found, because the reversible error appeared on the face of the order.²²⁸

Although considering itself compelled by precedent to reverse, the court stated that “[w]ere we writing on a clean slate, we might consider this error harmless” or “[a]t a minimum, . . . impose a waiver by the offended party’s failure to draw the error to the attention of the trial court.”²²⁹

In *Estopinan v. State*,²³⁰ there was a transcript of the trial proceedings, albeit one that the second district termed as being “full of errors and inaccuracies due to the poor performance of the court reporter.”²³¹ Because

221. *Id.* at 135–36.

222. *Id.* at 136.

223. 698 So. 2d 938 (Fla. 4th Dist. Ct. App. 1997).

224. *Id.* at 939.

225. *Id.*

226. *Id.*

227. *Id.* at 940.

228. *Halpert*, 689 So. 2d at 939.

229. *Id.* at 940.

230. 710 So. 2d 994 (Fla. 2d Dist. Ct. App. 1998).

231. *Id.* at 995.

the appellant was “precluded from meaningful appellate review” due to the “abysmal” transcript, the case was reversed and remanded for a new trial.²³²

XV. EXTENSIONS OF TIME

In *Publix Supermarkets, Inc., v. Arnold*,²³³ an attorney filed a motion for an extension of time, stating in the motion that he had contacted the opposing counsel and that no objection to the request had been made.²³⁴ After the opposing counsel did file an objection which indicated that she had not been contacted, the court ordered the attorney who filed the motion to respond.²³⁵ The attorney indicated that when he signed his motion, he believed that his assistant had contacted the opposing counsel and had received no objection.²³⁶

The court first pointed out that *Florida Rule of Appellate Procedure* 9.300(a) “contemplates that counsel, not a secretary or an assistant, shall contact opposing counsel regarding an extension of time.”²³⁷ The court found that “[t]he problem here is that appellant’s counsel delegated this important function to his assistant and then misrepresented to this court that it was he who had made the contact.”²³⁸

Because of counsel’s failure to comply with the appellate rule and his erroneous representations, the court, by separate order, directed counsel to pay \$250 to the clerk of the court.²³⁹ “In closing,” the court stated, “we note that, if a lawyer is too busy to personally contact opposing counsel to determine whether there is an objection to a motion for an extension of time for filing a brief, perhaps that lawyer is overextended.”²⁴⁰

The first district, in *Stoutamire v. State*,²⁴¹ granted a motion for extension of time to file an appellant’s initial brief in an appeal from an order summarily denying a motion for post-conviction relief.²⁴² The court

232. *Id.* at 996.

233. 707 So. 2d 1161 (Fla. 5th Dist. Ct. App. 1998).

234. *Id.* at 1161.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Publix*, 707 So. 2d at 1161.

239. *Id.*

240. *Id.* at 1161–62.

241. 703 So. 2d 1065 (Fla. 1st Dist. Ct. App. 1997).

242. *Id.* at 1066.

wrote “only to explain a change in the Rules of Appellate Procedure concerning briefs in such cases.”²⁴³

The court noted that effective January 1, 1997, *Florida Rule of Appellate Procedure* 9.140(g), which governed such appeals, was redesignated as Rule 9.140(i) and amended to provide in pertinent part that “no briefs . . . shall be required, but any appellant’s brief shall be filed within 15 days of the filing of the notice of appeal.”²⁴⁴

The court then stated that although it was granting the motion for extension of time despite the fact that it had been filed well after the fifteen day period contemplated by the rule,²⁴⁵ “we remind litigants that normally motions for extensions of time to file a brief filed after the time for filing the brief has expired, will not be granted.”²⁴⁶ Although most appeals governed by the rule involved in the case “are handled by litigants pro se,”²⁴⁷ the court stated that it “will not hesitate”²⁴⁸ to apply its normal approach in such proceedings.²⁴⁹ “The fact that [litigants] are not represented by a lawyer does not excuse them from complying with the procedural rules,”²⁵⁰ and, the court continued, “[l]itigants should be on notice that in appeals pursuant to Rule 9.140(i), the initial brief is due within 15 days from the filing of the notice of appeal.”²⁵¹

XVI. DISQUALIFICATION OF APPELLATE JUDGES

In *5-H Corp. v. Padovano*,²⁵² the Supreme Court of Florida considered a petition for a writ of prohibition that sought to prevent all of the judges of the first district from presiding over the petitioner’s appeal that was pending in that court.²⁵³ The petitioners’ attorney had handled a prior, related appeal in the first district, in which a panel of the court ruled against the attorney’s clients.²⁵⁴ The attorney filed a motion for rehearing in which he “suggested that the panel not only disfavored one of his clients, but also favored

243. *Id.*

244. *Id.*

245. *Id.*

246. *Stoutamire*, 703 So. 2d at 1066.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Stoutamire*, 703 So. 2d at 1066.

252. 708 So. 2d 244 (Fla. 1997).

253. *Id.* at 244.

254. *Id.*

opposing counsel.”²⁵⁵ In addition, in referring to opposing counsel’s argument, the attorney argued that “what is *truly* appalling is that . . . the panel in the instant appeal would buy such nonsense and give credence to such “total b[---]s[---].”²⁵⁶ Moreover, in a footnote, the attorney stated that “the use of the term “total b[---]s[---]” without the inclusion of at least 2 or 3 intervening expletives is very kind and generous under the circumstances.”²⁵⁷

The court denied the rehearing motion,²⁵⁸ and then had its clerk forward a copy of the motion to The Florida Bar to review the appropriateness of its comments and language and to determine whether disciplinary proceedings should be instituted against the attorney.²⁵⁹ Subsequently, The Florida Bar filed a formal complaint against the attorney, who in turn reported the matter to the Judicial Qualifications Commission (JQC).²⁶⁰ The complaint against the attorney was dismissed upon a finding of no probable cause, while the petition before the supreme court was silent as to what action, if any, was taken on the report to the JQC.²⁶¹

In the appeal giving rise to the prohibition proceeding, the attorney, on behalf of his clients, moved to disqualify the judges of the first district from presiding over the case.²⁶² The motion asserted that such disqualification was mandated in light of the circumstances of the prior appeal.²⁶³

Each judge on the court not otherwise disqualified considered the motion in accordance with *In re Estate of Carlton*,²⁶⁴ which calls for appellate judges to determine for themselves “both the legal sufficiency of a request seeking [their] disqualification and the propriety of withdrawing in any particular circumstances.”²⁶⁵ Some of the judges voluntarily recused themselves, but four of the remaining judges denied the disqualification motion as legally insufficient.²⁶⁶

The supreme court denied the petition for prohibition, holding “that a Florida judge’s report of perceived attorney unprofessionalism to The

255. *Id.*

256. *Id.* at 245 (citations omitted).

257. *5-H Corp.*, 708 So. 2d at 245 (citations omitted).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *5-H Corp.*, 708 So. 2d at 245.

263. *Id.*

264. 378 So. 2d 1212 (Fla. 1979).

265. *Id.* at 1216.

266. *5-H Corp.*, 708 So. 2d at 24546.

Florida Bar (or, conversely, an attorney's report of perceived judicial unprofessionalism to the JQC) is, in and of itself, legally insufficient to support that judge's disqualification."²⁶⁷

The court pointed out that under the applicable ethical rules and canons, "Florida judges, just like every other Florida attorney, have an obligation to maintain the integrity of the legal profession and report to the Florida Bar any professional misconduct of a fellow attorney."²⁶⁸ It stated that the petitioner's argument that the court should disqualify the district court judges was "untenable,"²⁶⁹ because "such a holding would not only contradict both the letter and spirit of the canons and rules discussed above, but also discourage Florida judges from reporting questionable attorney behavior to the Florida Bar for fear of the possible repercussions (such as those sought in the present case)."²⁷⁰ The court continued, "Encouraging such reporting also eliminates any incentive for an attorney to seek a Florida judge's disqualification by intentionally provoking that judge into filing a report with the Florida Bar. Simply stated, encouraging such reporting discourages underhanded 'judge shopping' and 'forum shopping.'"²⁷¹

In concluding that disqualification would not be compelled in the context of an attorney filing a report with the JQC, the court relied on the specific wording of *Florida Code of Judicial Conduct*, Canon 3E.(1) cmt.,²⁷² as well as district court decisions holding that neither a party's expressed intent to file a JQC complaint,²⁷³ nor the institution of a civil suit against a judge,²⁷⁴ constitutes a legally sufficient ground for recusal. The court explicitly disapproved of other district court decisions that were inconsistent with the court's opinion.²⁷⁵

"Of course," the court added, "regardless of whether such reports to The Florida Bar or the JQC have been filed, disqualification remains available where it can be shown that 'the judge has a *personal* bias or prejudice concerning a party or a party's lawyer.'"²⁷⁶

267. *Id.* at 246.

268. *Id.*

269. *Id.* at 247.

270. *Id.*

271. *5-H Corp.*, 708 So. 2d at 247 (footnote and citations omitted).

272. *Id.* at 248.

273. *Cherradi v. Andrews*, 669 So. 2d 326 (Fla. 4th Dist. Ct. App. 1996).

274. *Dowda v. Salfi*, 455 So. 2d 604 (Fla. 5th Dist. Ct. App. 1984).

275. *5-H Corp.*, 708 So. 2d at 248.

276. *Id.* (citing Fla. Code Jud. Conduct Canon 3E(1)(a) (emphasis added by the court)).

XVII. MOOTNESS

In *Kay v. Erskine*,²⁷⁷ an appeal was taken from a circuit court order vacating a county judge's blanket order of recusal in all cases in which certain attorneys appeared as counsel.²⁷⁸ The fourth district reversed, finding that the judge's resignation from the bench prior to the circuit court's entry of the order had rendered moot the relief sought.²⁷⁹

In *Bostic v. State*,²⁸⁰ the first district dismissed a criminal appeal as moot due to the death of the appellant.²⁸¹ The appellant's estate argued that the appeal was not moot because the trial court had imposed a fine on the appellant that the State could attempt to collect from the estate.²⁸² In light of the State's representation that it would not attempt to collect the fine, however, the court concluded that the appellant had not shown good cause why the appeal should not be dismissed.²⁸³

The first district also found the death of a litigant to render an appeal moot in *Lund v. Department of Health*.²⁸⁴ There, a doctor who was appealing the suspension of his medical license died while the appeal was pending.²⁸⁵ His personal representative urged the court to decide the case for the sole purpose of determining the appellant's right to prevailing party attorney's fees under section 120.595(5) of the *Florida Statutes* (Supp. 1996).²⁸⁶

The court noted that "[a] generally recognized exception precluding dismissal of an otherwise moot case occurs in situations wherein collateral legal consequences affecting the rights of a party may flow from the issues to be decided."²⁸⁷ This exception, the court continued, "applies to cases in which the consequences consist of property, advantages or rights that the appellant would lose as a collateral result of the lower court's decision if the appellate court were to dismiss the appeal and allow the lower court's decision to stand."²⁸⁸ By contrast, the court found, the appellant hoped "to

277. 710 So. 2d 751 (Fla. 4th Dist. Ct. App. 1998).

278. *Id.* at 752.

279. *Id.* at 753.

280. 708 So. 2d 695 (Fla. 1st Dist. Ct. App. 1998).

281. *Id.* at 696.

282. *Id.*

283. *Id.*

284. 708 So. 2d 645 (Fla. 1st Dist. Ct. App. 1998).

285. *Id.* at 646.

286. *Id.*

287. *Id.* (citing *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992)).

288. *Id.*

obtain a ‘collateral legal benefit’ that would arise . . . if the appeal were to be decided in appellant’s favor.”²⁸⁹

Concluding that the appeal was not moot simply to determine whether the appellant was entitled to attorney’s fees after prevailing on appeal “would be a broad expansion of the concept of ‘collateral legal consequences,’” the court stated.²⁹⁰ Declining to so expand the concept, the court concluded “that the possibility of an attorney’s fee award under section 120.595(5) is not a collateral legal consequence which would preclude dismissal when the death of a party renders the appeal moot.”²⁹¹

Another first district decision involving mootness was *Physicians Health Care Plans, Inc. v. State of Florida, Agency for Health Care Administration*.²⁹² There, an appeal was taken from a final administrative order denying a petition to initiate rulemaking.²⁹³ Approximately one week before oral argument, the agency that had denied the petition instituted a proceeding to develop a proposed rule on the subject of the petition.²⁹⁴ The agency candidly acknowledged that it was “not a coincidence that the proposed rule development was initiated shortly prior to the date of oral argument.”²⁹⁵

The court recognized that the agency’s institution of the rulemaking process came well after it was required by law.²⁹⁶ Because the appellant’s proposed rule could be considered by the agency in the newly instituted rule development proceeding, however, the court found that the agency’s belated initiation of rulemaking granted the appellant all the relief that would have been available on appeal.²⁹⁷ Accordingly, the case was dismissed as moot.²⁹⁸

A mootness claim was rejected by the fourth district in *Taxpayers Ass’n. of Indian River County, Inc. v. Indian River County*.²⁹⁹ In that case, a circuit court dismissed petitions for certiorari that sought review of action of a county commission regarding the purchase of a number of residential lots.³⁰⁰ The circuit court’s decision was based on the fact that the county had

289. *Lund*, 708 So. 2d at 647.

290. *Id.*

291. *Id.*

292. 706 So. 2d 113 (Fla. 1st Dist. Ct. App. 1998).

293. *Id.* at 113.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Physicians Health Care Plans, Inc.*, 706 So. 2d at 113–14.

298. *Id.* at 114.

299. 701 So. 2d 897 (Fla. 4th Dist. Ct. App. 1997).

300. *Id.* at 898.

already closed on the lots.³⁰¹ The fourth district agreed with the petitioners' claim that the issue was capable of repetition because the county might purchase additional lots, a contention which the county did not deny.³⁰² Accordingly, the court found that "the dismissals for mootness were improper."³⁰³

In *Khazaal v. Browning*,³⁰⁴ a default final judgment of foreclosure was entered but shortly thereafter was redeemed.³⁰⁵ On appeal, the appellees contended that the case was moot because the payment resulting in redemption was voluntary due to the fact that the appellant could have moved for a stay pending review or posted a supersedeas bond.³⁰⁶ The fifth district, after first reiterating the concept it expressed in *Great American Insurance Co. v. Stolte*³⁰⁷ that "there does not appear to be a rationale underlying the rule that voluntary payment of the judgment renders the case moot, precluding appeal while involuntary payment does not," disagreed.³⁰⁸ The court stated, "payment by appellant in this case was involuntary in that no stay was issued and payment was not made as part of a compromise, but rather to preclude a foreclosure sale."³⁰⁹

XVIII. STANDING

In *Save Anna Maria, Inc. v. Department of Transportation*,³¹⁰ the second district concluded that an environmental group had standing to appeal from a Department of Environmental Protection ("DEP") denial of a request by the Department of Transportation ("DOT") for a dredge and fill permit.³¹¹ Although the order under review actually granted the group's motion to dismiss, DEP rejected a hearing officer's finding with respect to the public interest, concluding instead that DOT did provide reasonable assurance that the proposed project was clearly in the public interest.³¹² The

301. *Id.*

302. *Id.*

303. *Id.*

304. 707 So. 2d 399 (Fla. 5th Dist. Ct. App. 1998).

305. *Id.* at 400.

306. *Id.*

307. 491 So. 2d 352 (Fla. 4th Dist. Ct. App. 1986).

308. *Khazaal*, 707 So. 2d at 400.

309. *Id.*

310. 700 So. 2d 113 (Fla. 2d Dist. Ct. App. 1997).

311. *Id.* at 16.

312. *Id.* at 115.

environmental group argued that, left unchallenged, the decision would become *res judicata* when the issue is revisited in court.³¹³

Recognizing the general rule that parties cannot file proceedings to review an order of judgment in their favor, the court indicated that the question of whether the environmental group's appeal should be permitted was "not an easy question to answer."³¹⁴ The environmental group urged the view expressed in *State Road Department of Florida v. Zetrouer*³¹⁵ that "[t]he mere fact that a litigant secures a judgment in his favor does not necessarily mean that there may not be some aspect of said judgment at which he would be aggrieved and which would present grounds for review by an appellate court."³¹⁶ Noting that *res judicata* and collateral estoppel concerns had been addressed in the context of a similar issue in *General Development Utilities, Inc. v. Florida Public Service Commission*,³¹⁷ the court found that "[o]n balance, these authorities compel the conclusion that [the environmental group] should be permitted to prosecute this appeal."³¹⁸

In *Barnett v. Barnett*,³¹⁹ the fourth district dismissed an appeal arising from a dissolution action.³²⁰ A bank had moved, in the trial court, to establish the priority of its lien over that of the parties' attorneys with respect to the proceeds of the sale of a sculpture.³²¹ It did not, however, move to intervene or to consolidate its pending foreclosure case with the dissolution action.³²² The bank assigned to the wife any rights it might have to appeal the order denying it priority, and the wife filed an appeal in her capacity as assignee.³²³

The court found that since the bank was not a party to the trial court proceeding, it had no standing to appeal the adverse order.³²⁴ The court noted that *Florida Rule of Appellate Procedure* 9.020(f)(1) defines "[a]ppellant" as a "party who seeks to invoke the appeal jurisdiction of a

313. *Id.* at 114.

314. *Id.* at 115 (citing *Employers Fire Ins. Co. v. Blanchard*, 234 So. 2d 381 (Fla. 2d Dist. Ct. App. 1970)).

315. 142 So. 217 (Fla. 1932).

316. *Save Anna Maria, Inc.*, 700 So. 2d at 115 (quoting *State Road Dep't v. Zetrouer*, 142 So. 217, 218 (Fla. 1932)).

317. 385 So. 2d 1050 (Fla. 1st Dist. Ct. App. 1980).

318. *Save Anna Maria, Inc.*, 700 So. 2d at 116.

319. 705 So. 2d 63 (Fla. 4th Dist. Ct. App. 1997).

320. *Id.* at 64.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Barnett*, 705 So. 2d at 64.

court,”³²⁵ and that “[t]he general rule is that a non-party is a ‘stranger to the record’ who cannot ‘transfer jurisdiction to the appellate court.’”³²⁶ The court distinguished the case from *In re Receiverships of Guarantee Security Life Insurance Co.*³²⁷ based on the fact that in that case, “even though the litigants were not parties to the statutory receivership proceeding, they had standing on appeal to challenge the order that directly impacted the development of the case in which they were named defendants.”³²⁸

The fifth district dismissed an appeal in *Cocoa Academy for Aerospace Technology v. School Board of Brevard County*³²⁹ when the appellant was not a legal entity, but simply the name of a program at a high school.³³⁰ The court found that “[i]t is a basic premise that unless an *in rem* proceeding is before the court, a cause of action must be conducted by or opposed by a ‘person’ recognized under the laws of this state.”³³¹ Dismissing the appeal, the court found that “[i]n the instant matter, only one party, the appellee, School Board, is visible to this court, and Cocoa Academy of Aerospace Technology, although designated as the appellant, is not.”³³²

XIX. PRESERVATION OF ERROR

The fourth district, in *Murphy v. International Robotics Systems, Inc.*,³³³ discussed at length the subject of improper closing arguments that were not objected to during trial, “in the hopes that a litigant considering an appeal to this court, whose best hope for reversal is unobjected-to argument of counsel, will carefully consider whether it is worth the cost.”³³⁴ The opinion noted that “[i]n the thirty-three years since this court was created, it has never granted a new trial in a civil case grounded solely on improper argument when there was no objection during trial.”³³⁵ It also pointed out that “[a]lthough the Florida Supreme court has reversed for a new trial based

325. *Id.* (quoting FLA. R. APP. P. 9.020(f)(1)) (emphasis added by the court).

326. *Id.* (quoting *Forcum v. Symmes*, 133 So. 88, 89 (1931)).

327. 678 So. 2d 828 (Fla. 1st Dist. Ct. App. 1996).

328. *Barnett*, 705 So. 2d at 64.

329. 706 So. 2d 397 (Fla. 5th Dist. Ct. App. 1998).

330. *Id.* at 398.

331. *Id.*

332. *Id.*

333. 710 So. 2d 587 (Fla. 4th Dist. Ct. App. 1998).

334. *Id.* at 588.

335. *Id.* at 587.

on unobjected-to closing argument, the last time it did so in a civil case was in 1956.”³³⁶

The court provided an extensive overview of Florida case law relating to the issue. It stated that “we do not think improper, but unobjected-to, closing argument in a civil case is something so fundamental that there should be an exception to the rule requiring an objection.”³³⁷ The court further stated that “we do not think we are being inconsistent with our supreme court when we all but close the door on allowing this issue to be raised for the first time on appeal.”³³⁸

XX. ORAL ARGUMENT

In *Whitehead v. Dreyer*,³³⁹ counsel for one of the appellees was denied the opportunity to present oral argument on behalf of his client.³⁴⁰ Prior to a decision by the court, that attorney filed a motion for rehearing, contending that he was entitled to participate in oral argument because he filed a brief as an appellee.³⁴¹

The fifth district recognized that “[a]lthough *Florida Rule of Appellate Procedure* 9.020 defines an appellee as every party other than the appellant, the committee notes to that rule observe the term appellee ‘has been defined to include the parties against whom relief is sought and all others necessary to the cause.’”³⁴² Pointing out that relief was not being sought against the appellee represented by the attorney who moved for rehearing and that the appellee was not a necessary party to the appealed judgment, the court denied the motion.³⁴³

XXI. SANCTIONS

In *Mercade v. State*,³⁴⁴ the second district concluded that a *pro se*, incarcerated appellant had brought a frivolous appeal from a trial court order denying a motion to correct an illegal sentence.³⁴⁵ The court consequently

336. *Id.* at 589 (citing *Seaboard Air Line R.R. v. Strickland*, 88 So. 2d 519 (Fla. 1956)).

337. *Id.*

338. *Murphy*, 710 So. 2d at 590.

339. 698 So. 2d 1278 (Fla. 5th Dist. Ct. App. 1997).

340. *Id.* at 1280.

341. *Id.*

342. *Id.* (citing 1973 Amendments to Committee Notes, FLA. R. APP. P. 9.020(g)).

343. *Id.*

344. 698 So. 2d 1313 (Fla. 2d Dist. Ct. App. 1997).

345. *Id.* at 1313.

recommended that the Department of Corrections exercise its discretion to subject the appellant to the forfeiture of gain time in accord with section 944.28 of the *Florida Statutes* (Supp. 1996).³⁴⁶

The court stated:

We use this case . . . to send a message to prisoners collaterally attacking sentences imposed by the trial courts of this district that we fully intend to invoke the applicable provisions of section 944.28, Florida Statutes (Supp. 1996), governing the forfeiture of gain time and the right to earn gain time in the future, when we are confronted with a frivolous appeal, such as this one, from the denial of a motion for postconviction relief.³⁴⁷

The court went on to discuss the statute to which it had referred. It noted that effective July 1, 1996, section 944.28(2)(a) was amended in part to provide that “[a]ll or any part of the gain time earned by a prisoner according to the provisions of law *is* subject to forfeiture if such prisoner . . . is found by a court to have brought a frivolous suit, action, claim, proceeding or appeal in any court.”³⁴⁸ It also pointed out that the legislature in section 944.28 (2)(c) “vested sole discretion in the Department of Corrections to declare a forfeiture of a prisoner’s gain time for any violation of section 944.28(2)(a), including the bringing of a frivolous appeal.”³⁴⁹

The court went on to state:

It is manifestly clear to us that by amending section 944.28(2)(a), the Florida Legislature sent a definite message to prisoners such as the appellant that the initiation of frivolous legal proceedings before the courts of this state, including the bringing of frivolous appeals, will no longer be tolerated as a matter of public policy and that the consequence of bringing such proceedings may result in the Department of Corrections imposing the harshest of sanctions available to punish a prisoner—a longer period of incarceration through the forfeiture of gain time. We fully intend to implement this legislative policy expression.³⁵⁰

The court also noted that it was not the first appellate court “to rely on the provisions of section 944.28(2)(a) in an attempt to stem the flow of

346. *Id.*

347. *Id.* at 1314.

348. FLA. STAT. § 944.28(2)(a) (Supp. 1996).

349. *Mercade*, 698 So. 2d at 1315.

350. *Id.*

frivolous post-conviction appeals,”³⁵¹ citing to three fifth district cases, two of which provided a warning to defendants that further pursuit of frivolous appeals would subject them to sanctions as provided in 944.28(2)(a),³⁵² and one of which³⁵³ “direct[ed] the Department of Corrections to forfeit the applicable gain time” of one of the individuals who had been previously warned.³⁵⁴

The *Mercade* court stated that “[a]lthough we share the same frustrations over frivolous post-conviction appeals as do our colleagues on the Fifth District, we conclude that we do not have the authority to simply direct the Department of Corrections to forfeit a prisoner’s gain time after finding that the prisoner’s appeal is frivolous.”³⁵⁵ The court therefore declined to follow the “‘direct’ approach” taken by the fifth district.³⁵⁶ The court then stated:

We express our confidence, however, that if we consistently implement the legislative policy expressed in section 944.28(2)(a) in the manner we have done in this case, and if the Department of Corrections consistently invokes the procedures of section 944.28(2)(c) when notified that a particular prisoner has brought a frivolous appeal before us, then prisoners will be dissuaded from bringing frivolous postconviction appeals because of the looming specter of the loss of a prisoner’s most precious commodity—gain time.³⁵⁷

XXII. EXTRAORDINARY WRITS

A. *Certiorari*

In *North Beach Association of St. Lucie County, Inc. v. St. Lucie County*,³⁵⁸ a landowner filed a petition for a writ of certiorari in the circuit court to challenge a rezoning order.³⁵⁹ After the landowner amended the

351. *Id.* at 1316.

352. *Ferenc v. State*, 697 So. 2d 1262 (Fla. 5th Dist. Ct. App. 1997); *Hall v. State*, 690 So. 2d 754 (Fla. 5th Dist. Ct. App. 1997).

353. *Hall v. State*, 698 So. 2d 576 (Fla. 5th Dist. Ct. App. 1997).

354. *Id.*

355. *Mercade*, 698 So. 2d at 1316.

356. *Id.*

357. *Id.*

358. 706 So. 2d 62 (Fla. 4th Dist. Ct. App. 1998).

359. *Id.* at 63.

petition to allege additional grounds, the circuit court dismissed the petition, concluding that it lacked jurisdiction to consider the substantive arguments in the amended petition.³⁶⁰

Reviewing the dismissal, the fourth district granted certiorari, stating that “[a] petition for certiorari may be amended to include additional substantive arguments when the interests of justice are served thereby.”³⁶¹ The court noted that it is “not entirely uncommon” for appellants to move to file amended briefs to raise additional issues and that the court grants such motions when appellants gave satisfactory explanations as to why they did not raise the issues in their initial briefs and when there is no prejudice to opposing parties.³⁶² “We see no reason not to extend the same reasoning to the amendment of petitions for extraordinary relief,” the court stated.³⁶³

District court decisions involving requests for certiorari included *Patton v. State*,³⁶⁴ (certiorari proper method of seeking review of order committing criminal defendant to custody of Department of Health and Rehabilitative Services after a determination that he was incompetent to proceed); *Taxpayers Ass’n. of Indian River County, Inc. v. Indian River County*,³⁶⁵ (certiorari granted by district court when circuit court improperly concluded that petition for certiorari filed in circuit court to review action of county commission was moot); *Larkin v. Pirthauer*,³⁶⁶ (order disqualifying attorney from representing personal representative of an estate reviewable by certiorari); *Billings, Cunningham, Morgan & Boatwright, P.A. v. Isom*,³⁶⁷ (certiorari proper to review law firm’s motion to withdraw as counsel); *Board of County Commissioners v. Brabham*,³⁶⁸ (certiorari is appropriate method of reviewing order which awards counsel fees to court-appointed attorneys in criminal cases); *Lerner v. Lerner*,³⁶⁹ (certiorari granted to quash order granting a motion to compel the listing of a marital home for immediate sale); *Rutherford, Mulhall & Wargo, P.A. v. Antidormi*,³⁷⁰ (certiorari granted to quash order requiring law firm, that had imposed a restraining lien on its office file for a former client who disputed the fee charged, to turn the file over to the client before the fee was paid); *Okaloosa*

360. *Id.*

361. *Id.*

362. *Id.*

363. *North Beach Ass’n of St. Lucie County*, 706 So. 2d at 63.

364. 712 So. 2d 1206 (Fla. 1st Dist. Ct. App. 1998).

365. 701 So. 2d 897 (Fla. 4th Dist. Ct. App. 1997).

366. 700 So. 2d 182 (Fla. 4th Dist. Ct. App. 1997).

367. 701 So. 2d 1271 (Fla. 5th Dist. Ct. App. 1997).

368. 710 So. 2d 230 (Fla. 4th Dist. Ct. App. 1998).

369. 708 So. 2d 1029 (Fla. 2d Dist. Ct. App. 1998).

370. 695 So. 2d 1300 (Fla. 4th Dist. Ct. App. 1997).

County v. Custer,³⁷¹ (certiorari appropriate to review denial of motion to dismiss complaint for failure to comply with medical malpractice presuit requirements); *Gunning v. Brophy*,³⁷² (certiorari granted to vacate an order compelling a petitioner to respond to interrogatories that was entered after a notice was filed removing the case to federal court); *Code Enforcement Board v. Bustamont*,³⁷³ (appellate decision of circuit court quashed on petition for writ of certiorari when circuit court had reversed a decision on an appeal which was untimely and as to which the appellant had waived not only the grounds of but the right to appeal in the first place); *Leveritt & Associates, P.A. v. Williamson*,³⁷⁴ (certiorari granted to quash circuit court's affirmance of trial court's final judgment when circuit court refused to review issue of whether the trial court erred in denying motion to disqualify trial court); and, *WFTV, Inc. v. Hinn*,³⁷⁵ (certiorari granted to quash order denying motion to strike a punitive damages claim).

B. Prohibition

In *Valltos v. State*,³⁷⁶ a criminal defendant sought prohibition after a trial judge denied a motion for disqualification based on the fact that the judge, in acceding to a request to order a presentence report on the propriety of youthful offender sanctions, announced that doing so would be a "waste of the Court's time."³⁷⁷ A response to the petition, filed by the Attorney General on behalf of the trial judge, stated that the "trial court merely indicated she did not think it would be appropriate to sentence petitioner as a youthful offender, but she nonetheless would consider sentencing petitioner as such."³⁷⁸ The response concluded that there "has been no showing that petitioner would not receive a fair hearing and sentence before this judge."³⁷⁹

The second district noted that in reviewing motions for disqualification, trial judges may look only at the facial sufficiency of the motions and that attempts to refute charges of partiality exceed the scope of the inquiry and establish grounds for disqualification.³⁸⁰ The court further stated that "[t]his

371. 697 So. 2d 1297 (Fla. 1st Dist. Ct. App. 1997).

372. 22 Fla. L. Weekly D2167 (Fla. 2d Dist. Ct. App. 1997).

373. 706 So. 2d 1383 (Fla. 3d Dist. Ct. App. 1998).

374. 698 So. 2d 1316 (Fla. 2d Dist. Ct. App. 1997).

375. 705 So. 2d 1010 (Fla. 5th Dist. Ct. App. 1998).

376. 707 So. 2d 343 (Fla. 2d Dist. Ct. App. 1997).

377. *Id.* at 344.

378. *Id.*

379. *Id.*

380. *Id.*

principle applies with equal force to a response filed in a prohibition proceeding in the appellate court by the trial judge whose partiality is questioned, and the response refutes factual allegations or conclusions.”³⁸¹ Based on these principles, the court found that “[t]he response filed on behalf of the trial judge in this proceeding creat[ed] ‘an intolerable adversary atmosphere between the trial judge and the litigant’” and consequently granted prohibition.³⁸²

C. *Effects on Appeals of Prior Denials of Petitions for Writs of Prohibition*

In *Sumner v. Sumner*,³⁸³ the second district declined to follow the lead of the third and fourth districts, holding that denials of petitions for writs of prohibition will not bar subsequent, post-trial review unless the order of denial states that it is with prejudice or otherwise evinces an unequivocal determination by the court that the merits were considered.³⁸⁴ The court’s conclusion was consistent with its historical approach to the issue, an approach that was rejected by the third district in *Obanion v. State*.³⁸⁵ In *Obanion*, the court determined that petitions which are denied without comment will be deemed to constitute determinations on the merits, barring the issues raised from being litigated on subsequent appeals.³⁸⁶ The fourth district adopted the *Obanion* approach in *Hobbs v. State*.³⁸⁷ In *Barwick v. State*,³⁸⁸ the supreme court approved of the use by the third and fourth districts of the *Obanion* approach, but declined to adopt it for itself, concluding instead that petitions filed in the supreme court would preclude subsequent review only when the order denying the petition specifically stated that the denial was with prejudice.³⁸⁹

D. *Mandamus*

In *Sheley v. Florida Parole Commission*,³⁹⁰ an inmate appealed from a circuit court order denying his petition for a writ of mandamus to review an

381. *Valltos*, 707 So. 2d at 344.

382. *Id.* at 345.

383. 707 So. 2d 934 (Fla. 2d Dist. Ct. App. 1998).

384. *Id.* at 934.

385. 496 So. 2d 977 (Fla. 3d Dist. Ct. App. 1986).

386. *Id.* at 980.

387. 689 So. 2d 1249 (Fla. 4th Dist. Ct. App. 1997).

388. 660 So. 2d 685 (Fla. 1995).

389. *Id.* at 691.

390. 703 So. 2d 1202 (Fla. 1st Dist. Ct. App. 1997) (criminal division en banc).

order suspending his presumptive parole release date.³⁹¹ The first district acknowledged that “final judgment on a complaint for writ of mandamus is reviewable by appeal,” but concluded that this principle did not apply to the case under review because the circuit court petition was filed “as an appellate remedy to review quasi-judicial action of a lower tribunal.”³⁹² Under such circumstances, the court concluded, circuit court orders denying mandamus are “reviewable in the district court by certiorari under rule 9.030(b)(2)(B), and not by a subsequent plenary appeal on the merits of the case.”³⁹³

In *Orange County v. Love*,³⁹⁴ a criminal defendant was acquitted of the charges brought against her in county court.³⁹⁵ Subsequently, that court certified some, but not all, of the defendant’s claimed costs.³⁹⁶ She then filed a petition for mandamus in the circuit court to compel certification of all claimed costs.³⁹⁷ At the hearing on the petition, the county, which was responsible for reimbursing the costs allowed, appeared and objected to a majority of the costs.³⁹⁸ The circuit court granted the petition, finding that the county court should certify all costs incurred by the defendant, except those which she conceded were not reimbursable, and the county appealed.³⁹⁹ The fifth district noted that the county was never a proper party to either the criminal case or the mandamus and that there was no order requiring the county to pay the costs.⁴⁰⁰ Accordingly, the court found that the county lacked standing to bring the appeal.⁴⁰¹

E. *Habeas Corpus*

In *McCray v. State*,⁴⁰² a criminal defendant, who had received a death penalty that was reduced on appeal to life imprisonment without parole for twenty-five years, filed a petition for a writ of habeas corpus, challenging the

391. *Id.* at 1204.

392. *Id.* at 1204–05.

393. *Id.* at 1205.

394. 703 So. 2d 1138 (Fla. 5th Dist. Ct. App. 1997).

395. *Id.* at 1139.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Love*, 703 So. 2d at 1139.

400. *Id.*

401. *Id.*

402. 699 So. 2d 1366 (Fla. 1997).

effectiveness of his appellate counsel.⁴⁰³ The petition was filed fifteen years after the original appeal.⁴⁰⁴

The court found the petition to be barred by laches.⁴⁰⁵ Noting that “[t]he unwarranted filings of such delayed claims unnecessarily clog the court dockets and represent an abuse of the judicial process,”⁴⁰⁶ the court stated:

To remedy this abuse, we conclude, as a matter of law, that any petition for a writ of habeas corpus claiming ineffective assistance of appellate counsel is presumed to be the result of an unreasonable delay and to prejudice the state if the petition has been filed more than five years from the date the petitioner’s conviction became final. We further conclude that this initial presumption may be overcome only if the petitioner alleges under oath, with a specific factual basis, that the petitioner was affirmatively misled about the results of the appeal by counsel.⁴⁰⁷

In *Lewis v. Florida Parole Commission*,⁴⁰⁸ the appellant filed a petition for a writ of habeas corpus in the tenth circuit in Polk County, where he was incarcerated, claiming that there was insufficient evidence to support the revocation of his parole.⁴⁰⁹ On motion of the parole commission, the court transferred the case to the second circuit on the theory that the commission is located in Leon County, within that circuit.⁴¹⁰ That court dismissed the petition as an abuse of the writ based on the conclusion that the appellant had filed a petition for a *writ of mandamus* in the second circuit challenging his presumptive parole release date and could and should have raised the issues from the *habeas corpus* petition in the mandamus action.⁴¹¹

403. *Id.* at 1366.

404. *Id.* at 1367. The petition was not barred by the two-year limitation period under *Florida Rule of Appellate Procedure* 9.140(j)(3)(B) for petitions alleging ineffective assistance of appellate counsel because Rule 9.140(j)(3)(C) provides that the two-year period “shall not begin to run prior to the effective date of this rule” and the petition at issue was filed within two years of the effective date.

405. *Id.* at 1386.

406. *Id.*

407. *McCray*, 699 So. 2d at 1368 (Fla. 1997).

408. 697 So. 2d 965 (Fla. 1st Dist. Ct. App. 1997).

409. *Id.* at 965.

410. *Id.*

411. *Id.* at 965–66.

On appeal, the first district reversed,⁴¹² holding that the second circuit “did not have territorial jurisdiction to rule on such petitioning”⁴¹³ because “a habeas petition challenging a parole revocation must be filed in the county where the prisoner is incarcerated.”⁴¹⁴ The court went on to state that “[o]n the other hand, the proper method of challenging a presumptive parole release date is by a petition for writ of mandamus, filed in the Circuit Court of Leon County.”⁴¹⁵ Simply put, the court found that the appellant had instituted each of his two proceedings in the proper court.

The court rejected the Parole Commission’s argument that the issue of venue was moot because the appellant did not appeal the change of venue to the second district, where Polk County is located.⁴¹⁶ The court found that even if it were to accept that argument, the order under review would still have to be reversed because the circuit court in Leon County lacked “territorial jurisdiction”⁴¹⁷ over the action. The court also declined the Parole Commission’s request to “engage in a harmless-error analysis”⁴¹⁸ because “[a]s this is a matter for the courts of another district, we believe it would be improper for this court to in any way comment on the meritoriousness of appellant’s claim.”⁴¹⁹ Finally, the court also rejected the Parole Commission’s “fallback position” that the matter be remanded with instructions to dismiss the petition without prejudice to refile in the appropriate court.⁴²⁰ The court felt that such a result would be “unjust and inappropriate” since the appellant had “already filed the matter in the proper court, and the Parole Commission improperly moved to change venue.”⁴²¹ The court therefore remanded with instructions to transfer the petition back to the tenth circuit.⁴²²

Venue was also at issue in *Calloway v. State*.⁴²³ There, a defendant appealed from the denial of his petition for habeas corpus that had been filed

412. *Id.* at 965.

413. *Lewis*, 697 So. 2d at 965.

414. *Id.* at 966.

415. *Id.* (citing *Porter v. Florida Parole and Probation Comm’n*, 603 So. 2d 31 (Fla. 1st Dist. Ct. App. 1992)).

416. *Id.*

417. *Id.*

418. *Lewis*, 697 So. 2d at 966.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. 699 So. 2d 849 (Fla. 3d Dist. Ct. App. 1977).

in Dade County, which constitutes the eleventh circuit.⁴²⁴ The defendant had been convicted in the seventeenth circuit and could no longer file a timely motion for post conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850 in that circuit.⁴²⁵ He admitted that he filed his petition in Dade County in an attempt to avoid the limitations period of rule 3.850.⁴²⁶

The third district dismissed the appeal on two grounds. First, the court stated that “[a] petition for habeas corpus cannot be used to circumvent the two-year period for filing motions for post-conviction relief.”⁴²⁷ The court then went on to say, “[a] more significant reason for our dismissal of this appeal, however, is that the trial court in Dade County was without jurisdiction to entertain defendant’s petition. ‘[A] circuit court has no jurisdiction to review the legality of a conviction in another circuit . . .’”⁴²⁸

The fifth district relied on *Calloway* in dismissing an appeal from the denial of a habeas corpus petition in *McLeroy v. State*.⁴²⁹ In that case, the petitioner, who had been convicted in the eleventh circuit, filed his petition in the fifth circuit, where he was incarcerated.⁴³⁰ The fifth district pointed out that “[g]enerally, a petition for writ of habeas corpus should be filed in the jurisdiction where the petitioner is incarcerated.”⁴³¹ The court went on to state, however, that “petitions for writ[s] of habeas corpus which allege ineffective assistance of counsel are properly filed in the court where the original sentence was imposed.”⁴³²

F. *Coram Nobis*

In *Peart v. State*,⁴³³ the third district receded from *Beckles v. State*,⁴³⁴ and held that coram nobis is not an available remedy to defendants who were not advised of the deportation consequences of their pleas in criminal

424. *Id.* at 849.

425. *Id.*

426. *Id.*

427. *Id.* (citing *Scott v. Dugger*, 604 So. 2d 465, 470 (Fla. 1992); *Leichtman v. Singletary*, 674 So. 2d 889, 891–92 (Fla. 4th Dist. Ct. App. (1996)).

428. *Calloway*, 699 So. 2d at 849–50 (quoting *State v. Broom*, 523 So. 2d 639, 641 (Fla. 2d Dist. Ct. App. 1988)).

429. 704 So. 2d 151 (Fla. 5th Dist. Ct. App. 1997).

430. *Id.* at 152.

431. *Id.*

432. *Id.*

433. 705 So. 2d 1059 (Fla. 3d Dist. Ct. App. 1998) (en banc).

434. 679 So. 2d 892 (Fla. 3d Dist. Ct. App. 1996).

cases.⁴³⁵ The court pointed out that the function of a writ of coram nobis is to correct errors of fact, and that the failure to advise of deportation consequences is an error of law.⁴³⁶ The court therefore concluded that the proper remedy for defendants to pursue is post-conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850.⁴³⁷

The court recognized that because defendants who are not in custody cannot seek post conviction relief under the rule, such relief is “never available” to defendants who are released on “time served,” without any period of probation or community control.⁴³⁸ The court recognized that “this may be a *harsh and unfair result*” as to such defendants.⁴³⁹ “However,” the court continued, “there is no present mechanism that provides relief under these circumstances, and it is beyond this Court’s authority to alter the procedural rules to provide this relief.”⁴⁴⁰ The court went to suggest that the supreme court “consider whether a rule should be adopted to address the issue.”⁴⁴¹ The court also certified that its decision conflicted with the decisions in *Marriott v. State*⁴⁴² and *Wood v. State*.⁴⁴³

XXIII. APPEALS IN CRIMINAL CASES

A. Trial Court Jurisdiction During Pendency of Appeal

In *Daniels v. State*,⁴⁴⁴ a defendant who had a pending appeal from an order revoking community control filed a motion for post conviction relief in the trial court.⁴⁴⁵ The motion was denied and the first district affirmed, despite finding that the trial court lacked jurisdiction to consider the post conviction motion during the pendency of the appeal.⁴⁴⁶ The Supreme Court of Florida quashed the district court’s decision and remanded with directions that the trial court’s order on the motion be vacated.⁴⁴⁷ The court stated:

435. *Peart*, 705 So. 2d at 1062.

436. *Id.*

437. *Id.*

438. *Id.* at 1063.

439. *Id.*

440. *Id.*

441. *Peart*, 705 So. 2d at 1063.

442. 605 So. 2d 985 (Fla. 4th Dist. Ct. App. 1992).

443. 698 So. 2d 293 (Fla. 1st Dist. Ct. App. 1997).

444. 712 So. 2d 765 (Fla. 1998).

445. *Id.* at 765.

446. *Id.*

447. *Id.*

[D]uring the pendency of a defendant's direct appeal, the trial court is without jurisdiction to rule on a motion for postconviction relief.

Consistent with *Meneses* and *Hall*, we hold that a ruling on the merits of the postconviction motion rendered by the trial court is a nullity, and, consequently, a decision by the appellate court that affirms or reverses the trial court's ruling is also a nullity.⁴⁴⁸

The fourth district, in *Griner v. State*,⁴⁴⁹ also addressed the impact of a pending appeal on the trial court's jurisdiction to consider a motion for post conviction relief.⁴⁵⁰ There, a defendant sought such relief with regard to convictions for certain charges while an appeal was pending from convictions on other charges that had been included in the same information, but had been severed for trial.⁴⁵¹ Noting that the State cited no authority in support of its argument that the trial court lacked jurisdiction, the appellate court found that the defendant had "clear legal right to a ruling on his motion for post conviction relief."⁴⁵²

B. *Flight*

The State moved to dismiss a defendant's appeal in *Griffis v. State*⁴⁵³ on the ground that the defendant had absconded after jury selection, was tried and convicted *in absentia* and was not returned to custody for six years, at which time he was adjudicated and sentenced.⁴⁵⁴ Relying on *State v. Gurican*,⁴⁵⁵ the State asserted that the defendant's flight constituted a waiver of the right to appellate review.⁴⁵⁶ Finding the case to be "materially indistinguishable" from *Gurican*, the first district granted the State's motion.⁴⁵⁷ The court noted, however, the defendant's argument that many of the policy considerations underlying the decision in *Gurican* were subsequently rejected by the United States Supreme Court in *Ortega-Rodriguez v. United States*.⁴⁵⁸ The court recognized that the decision in

448. *Daniels*, 712 So. 2d at 765 (citing *State v. Meneses*, 392 So. 2d 905 (Fla. 1981); *Hall v. State*, 697 So. 2d 237 (Fla. 5th Dist. Ct. App. (1997)).

449. 705 So. 2d 650 (Fla. 4th Dist. Ct. App. 1998).

450. *Id.* at 650.

451. *Id.*

452. *Id.* (citing *Moore v. Kaplan*, 640 So. 2d 199 (Fla. 4th Dist. Ct. App. 1994)).

453. 703 So. 2d 522 (Fla. 1st Dist. Ct. App. 1997).

454. *Id.* at 523.

455. 576 So. 2d 709 (Fla. 1991).

456. *Griffis*, 703 So. 2d at 523.

457. *Id.*

458. 507 U.S. 234 (1993).

Ortega-Rodriguez was based on the Supreme Court's exercise of its supervisory powers over the federal courts as opposed to any federal constitutional principle, and that the Supreme Court of Missouri in *State v. Troupe*,⁴⁵⁹ had declined to follow *Ortega-Rodriguez*, adhering instead to an approach consistent with *Gurican*.⁴⁶⁰ Nonetheless, the court certified to the Supreme Court of Florida the question of whether *Gurican* should be re-evaluated in light of *Ortega-Rodriguez*.⁴⁶¹

C. Appeals After Pleas of Guilty or *Nolo Contendere*

The defendant in *Harriel v. State*⁴⁶² pled guilty and was sentenced pursuant to a negotiated plea.⁴⁶³ After his appointed counsel filed a notice of appeal, a State motion to dismiss the appeal was denied without prejudice.⁴⁶⁴ The Public Defender handling the appeal then filed a brief pursuant to the dictates of *Anders v. California*,⁴⁶⁵ which allows court appointed counsel to satisfy their ethical obligations when they can identify no meritorious issues to raise on appeal.⁴⁶⁶ In reconsidering and granting the State's motion to dismiss, the court wrote an opinion "to establish a procedure for reviewing motions to dismiss appeals from convictions and sentences based on voluntary pleas of guilty or *nolo contendere* without reservation" of the right to appeal a dispositive issue.⁴⁶⁷

The court pointed out that under *Florida Rule of Appellate Procedure*, 9.140(b)(2)(B) which incorporates the dictates of *Robinson v. State*,⁴⁶⁸ defendants who plead guilty or *nolo contendere* without reservation may appeal only:

- (i) the lower tribunal's lack of subject matter jurisdiction;
- (ii) a violation of the plea agreement, *if preserved by a motion to withdraw plea*;

459. 891 S.W.2d 808 (Mo. 1995).

460. *Griffis*, 703 So. 2d at 523 n.1.

461. *Id.* at 523.

462. 710 So. 2d 102 (Fla. 4th Dist. Ct. App. 1998) (en banc).

463. *Id.* at 102-03.

464. *Id.* at 103.

465. 386 U.S. 738 (1967).

466. *Harriel*, 710 So. 2d at 103.

467. *Id.*

468. 373 So. 2d 898 (Fla. 1979).

- (iii) an involuntary plea, *if preserved by a motion to withdraw plea*;
- (iv) a sentencing error, *if preserved*; or
- (v) as otherwise provided by law.⁴⁶⁹

Given this fact, the court stated:

[W]e hold that the state may move to dismiss an appeal from a plea of guilty or nolo contendere without reservation, on the basis that the issues identified in *Robinson* are not implicated, with sufficient references to the record to support its position, and the appellant may file a response. We can then review the record to determine whether the appellant made a motion to withdraw the plea to preserve the issues of voluntariness of the plea and violation of the plea agreement or filed a motion to correct a sentencing error. If no motions have been filed, we will determine whether the other *Robinson* issues of subject matter jurisdiction or illegality of sentence exist. If they do not, we will dismiss the appeal as frivolous. If they do, we will deny the motion to dismiss, and the appellant can file a brief, *Anders* or otherwise.⁴⁷⁰

The court added that if the state does not move to dismiss appeals from guilty or nolo contendere pleas, it will still examine the record and brief to determine whether a properly preserved *Robinson* issue exists.⁴⁷¹ If no such issue exists, the court will summarily affirm.⁴⁷² If one does, it will “treat the issue as in any other comparable appeal.”⁴⁷³

In *Vaughn v. State*,⁴⁷⁴ the defendant pled nolo contendere and reserved the right to appeal the denial of his motion to suppress, which the trial court had found to be dispositive.⁴⁷⁵ The trial court’s determination as to dispositiveness was based on its belief that the state would not have been able to convince the jury of the defendant’s guilt without the evidence that was the subject of the suppression motion.⁴⁷⁶

469. *Harriel*, 710 So. 2d at 104 (citing FLA. R. APP. P. 9.140(b)(2)(B)).

470. *Id.* at 106.

471. *Id.*

472. *Id.*

473. *Id.*

474. 711 So. 2d 64 (Fla. 1st Dist. Ct. App. 1998).

475. *Id.* at 64.

476. *Id.* at 65.

The first district court noted that it had previously held on several occasions that issues are dispositive only if there will be no trial of the case regardless of the result of the appeal.⁴⁷⁷ The court therefore concluded that the trial court had applied an incorrect legal rule in finding the issue to be dispositive.⁴⁷⁸ Since, under the facts of the case, there existed ample evidence, independent of that to which the motion was directed, for the State to proceed to trial, the court found that the issue was not dispositive and dismissed the appeal.⁴⁷⁹

D. *Appellate Review of the Sufficiency of the Evidence*

In *Barton v. State*,⁴⁸⁰ the first district agreed with a defendant that certain evidence was improperly admitted at trial.⁴⁸¹ The court went on to review the defendant's sufficiency of the evidence claim and, in doing so, faced the question of whether it could consider the improperly admitted evidence in deciding the sufficiency issue.⁴⁸² "It does not follow," the court found, "that the defendant is entitled to a judgment of acquittal merely because evidence that is critical to the court's finding of sufficiency was improperly admitted."⁴⁸³ Relying on the decision in *Lockhart v. Nelson*,⁴⁸⁴ the court pointed out that some procedural errors might be corrected on remand, thereby allowing the evidence to be used again.⁴⁸⁵ "Consequently," the court concluded, "the appellate courts must consider the sufficiency of the evidence and alleged trial errors separately."⁴⁸⁶

E. *Reviewable Orders*

Numerous cases passed on the question of whether particular orders in criminal cases were reviewable by appellate courts. These cases included: *State v. Allen*,⁴⁸⁷ (state may appeal from order partially denying claim for

477. *Id.*

478. *Id.* at 66.

479. *Vaughn*, 711 So. 2d at 66.

480. 704 So. 2d 569 (Fla. 1st Dist. Ct. App. 1997).

481. *Id.* at 573.

482. *Id.*

483. *Id.*

484. 488 U.S. 33 (1988).

485. *Barton*, 704 So. 2d at 573 (citing *Lockhart v. Nelson*, 488 U.S. 33 (1988)).

486. *Id.*

487. 22 Fla. L. Weekly D2155 (Fla. 1st Dist. Ct. App. Sept. 12, 1997).

restitution); *Downs v. State*,⁴⁸⁸ (defendant may appeal from order designating him a sexual predator); *Thomas v. State*,⁴⁸⁹ (same); *Torres v. State*,⁴⁹⁰ (defendant cannot appeal from order denying motion for violation of probation hearing, proper procedure is to seek a habeas corpus in the circuit of incarceration); *Oser v. State*,⁴⁹¹ (defendant cannot appeal from order denying motion to mitigate); *Brown v. State*,⁴⁹² (defendant cannot appeal from order denying motion to mitigate, but when circuit court's denial was based on an erroneous determination that the defendant's motion was untimely, court treated appeal as a petition for writ of certiorari, granted petition, and remanded for proper consideration of the motion).

F. *Belated Appeals*

In *Trowell v. State*,⁴⁹³ the first district examined the trial court's denial of a defendant's motion for a belated appeal,⁴⁹⁴ citing *Thomas v. State*⁴⁹⁵ and concluding that the defendant was not entitled to an appeal because he had entered a negotiated plea of guilty and waived his right to appeal matters relating to the judgment.⁴⁹⁶

The appellate court noted that *Thomas* was inconsistent with a substantial body of case law from the first district as well as other district courts.⁴⁹⁷ Thus, the court receded from *Thomas* to the extent that the decision in that case required defendants seeking belated appeals to state what issues they would have raised on appeal, whether or how those issues would have been dispositive, or how they were otherwise prejudiced.⁴⁹⁸ The court went on to state:

[T]here should be no difference between a defendant's right to a belated appeal, if the evidence discloses that the delay was not attributable to his or her own neglect, and the right to a timely appeal, insofar as any requirement that the defendant make a preliminary showing of merit. In both cases, a statement of

488. 700 So. 2d 789 (Fla. 2d Dist. Ct. App. 1997).

489. 22 Fla. L. Weekly D2541 (4th Dist. Ct. App. Nov. 5, 1997).

490. 700 So. 2d 1247 (Fla. 5th Dist. Ct. App. 1997).

491. 699 So. 2d 844 (Fla. 4th Dist. Ct. App. 1977).

492. 707 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1998).

493. 706 So. 2d 332 (Fla. 1st Dist. Ct. App. 1998) (en banc).

494. *Id.* at 333.

495. 626 So. 2d 1093 (Fla. 1st Dist. Ct. App. 1993).

496. *Trowell*, 706 So. 2d at 333.

497. *Id.* (citations omitted).

498. *Id.*

meritorious issues is irrelevant to one's entitlement to appeal. Similarly, there should be no difference between a defendant's right to a belated appeal from a conviction following trial or after a plea, because, in either instance, if the appeal had been timely filed, an initial statement of arguable points would be irrelevant to the right to appeal.⁴⁹⁹

Thus, the court said:

[W]e are of the firm belief that the only relevant inquiry, once a request for a belated appeal is made, is whether the defendant was informed of his or her right to an appeal and thereafter timely made a request for an appeal to his or her attorney or other appropriate person. If the appeal proceeds from the entry of an unconditional guilty or nolo contendere plea, it may, due to appellant's failure to submit any issue cognizable under *Robinson* [v. State],⁵⁰⁰ eventually result in dismissal by an *appellate* court, but issues of merit are not required as a precondition to the appeal.⁵⁰¹

Recognizing that subsequent to the trial court's ruling, *Florida Rule of Appellate Procedure* 9.140(j)(1) was amended to provide that petitions seeking belated appeals are to be filed in the appellate courts, the court construed the motion in the case as a properly filed petition and granted it.⁵⁰² The court noted that its decision conflicted with several decisions from other district courts⁵⁰³ and certified the conflict.⁵⁰⁴

In *Denson v. State*,⁵⁰⁵ the fifth district discussed how to deal with factual questions relating to requests for belated appeals.⁵⁰⁶ The petitioner there sought a belated appeal and the State, despite not specifically disputing the petitioner's allegations, argued that in the absence of a sworn affidavit from trial counsel or supporting documentation, neither of which had been

499. *Id.* at 334–35.

500. 373 So. 2d 898 (Fla. 1979). For a discussion of the issues that can be raised under *Robinson* after a plea of guilty or nolo contendere, see Section XXIII (C) of this article.

501. *Trowell*, 706 So. 2d at 337 (citing *Baggett v. Wainwright* 229 So. 2d 239 (Fla. 1969); *Amendments to the Florida Rule of Appellate Procedure*, 685 So. 2d 773 (Fla. 1996)).

502. *Trowell*, 706 So.2d at 338.

503. *Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d Dist. Ct. App. 1997); *Loadholt v. State*, 683 So. 2d 596 (Fla. 3d Dist. Ct. App. 1996); *Zduniak v. State*, 620 So. 2d 1083 (Fla. 2d Dist. Ct. App. 1993); *Bridges v. Dugger*, 518 So. 2d 298 (Fla. 2d Dist. Ct. App. 1987).

504. *Trowell*, 706 So. 2d at 338.

505. 710 So. 2d 144 (Fla. 5th Dist. Ct. App. 1998).

506. *Id.*

provided, an evidentiary hearing should be required.⁵⁰⁷ The court disagreed, noting that *Florida Rule of Appellate Procedure* 9.140(j), which governs belated appeals, does not require a petitioner to provide an affidavit from trial counsel and stated that, “[i]nstead, the state must dispute the petitioner’s sworn claim, if not by affidavit, at least by specific allegations.”⁵⁰⁸ Where there is an absence of disputed fact, the court stated, “the petition will be granted without an evidentiary hearing.”⁵⁰⁹

G. Appeals By the State

In *State v. Rincon*,⁵¹⁰ as authorized by section 924.07(1)(j) of the *Florida Statutes*,⁵¹¹ the State appealed from a judgment of acquittal entered after the jury had returned a guilty verdict.⁵¹² The defendant asserted that notwithstanding the statutory authority, the appeal ran afoul of double jeopardy.⁵¹³ The court rejected the defendant’s argument, concluding that “double jeopardy is a consideration only when a *retrial* of the defendant would be necessitated by a reversal of the trial court’s ruling.”⁵¹⁴ Since reversal in the case under review would result not in a retrial, but in the reinstatement of the jury verdict, the court considered the merits of the case.⁵¹⁵

H. Cross-Appeals

In *Hudson v. State*,⁵¹⁶ a defendant appealed from convictions for trafficking in and conspiracy to traffic in 200 or more, but less than 400, grams of cocaine.⁵¹⁷ The State, on cross-appeal, asserted that the trial court erred in granting a motion for judgment of acquittal as to charges that the defendant was guilty of offenses involving 400 or more grams of cocaine.⁵¹⁸

507. *Id.*

508. *Id.* at 145.

509. *Id.*

510. 700 So. 2d 412 (Fla. 3d Dist. Ct. App. 1997).

511. *Id.*

512. *Id.* at 412.

513. *Id.* at 414.

514. *Id.* (quoting *Ramos v. State*, 457 So. 2d 492, 494 (Fla. 3d Dist. Ct. App. 1984) (emphasis added by the court)).

515. *Rincon*, 700 So. 2d at 413.

516. 711 So. 2d 244 (Fla. 1st Dist. Ct. App. 1998).

517. *Id.* at 245.

518. *Id.*

The first district examined section 924.07 of the *Florida Statutes*, which confers on the state the right to appeal certain orders in criminal cases.⁵¹⁹ First, the court looked to section 924.07(1)(j),⁵²⁰ which allows the state to appeal from a “ruling granting a motion for judgment of acquittal after a jury verdict.”⁵²¹ Reading this provision in the context of the double jeopardy clauses of the federal and state constitutions, the court found that “this statutory provision plainly contemplates appeal from a judgment of acquittal only if the judgment of acquittal follows a guilty verdict.”⁵²²

The court went on to consider section 924.07(1)(d), which authorizes state appeals from rulings on questions of law when defendants are convicted and appeal from the judgment.⁵²³ The court determined that “[i]n keeping with precedent” and with the rule of statutory construction that specific statutes control over general ones on the same subject,⁵²⁴ it would “decline to construe the general language of subsection (1)(d) as overriding the specific provision in subsection (1)(j).”⁵²⁵ The state’s cross-appeal was therefore dismissed.⁵²⁶

In *State v. Fedor*,⁵²⁷ the State appealed from an order excluding certain evidence and the defendant filed a cross-appeal directed to another portion of the order appealed from.⁵²⁸ Subsequently, the State voluntarily dismissed its appeal and the fifth district faced the issue of whether it had jurisdiction to hear the cross-appeal.⁵²⁹

The court noted that a cross-appeal can continue after a main appeal is dismissed “if the cross-appeal could have been appealed on its own merits, independent of the [sic] main appeal.”⁵³⁰ Since a criminal defendant has no independent right to appeal a pretrial order, but can do so only by cross-appeal to review a related issue which was resolved in the same order that the state is appealing, the court concluded that it lacked jurisdiction and dismissed the case.⁵³¹

519. *Id.* at 246; see FLA. STAT. § 924.07 (1995).

520. *Id.*

521. *Hudson*, 711 So. 2d at 246 (quoting FLA. STAT. § 924.07(1)(j) (1995)).

522. *Id.*

523. *Id.* at 247.

524. *Id.*

525. *Id.*

526. *Hudson*, 711 So. 2d at 247.

527. 714 So. 2d 526 (Fla. 5th Dist. Ct. App. 1998).

528. *Id.* at 526.

529. *Id.*

530. *Id.*

531. *Id.* at 526–27.

I. *Public Defenders*

The Supreme Court of Florida, in *In re Public Defender's Certification of Conflict*,⁵³² approved an order of the second district which addressed the large number of criminal appeals involving indigent defendants represented by the Public Defender's Office for the tenth circuit who were "not receiving timely appellate review."⁵³³ The second district's order had been precipitated by a motion from the Public Defender to withdraw in 248 cases "due to what the Public Defender deemed to be 'an excessive caseload.'"⁵³⁴ The order indicated that the second district was reviewing cases in which the defendants had served their prison sentences or had completed their probation before the Public Defender filed its briefs with the court.⁵³⁵ At oral argument, the supreme court was advised that the number of cases then delinquent exceeded 640.⁵³⁶ The order required the Public Defender to accept no appellate cases until further order and mandated that the chief judges of the circuits within the district "appoint qualified attorneys to represent indigents in appeals arising in their respective circuits."⁵³⁷

The order acknowledged that it was placing an enormous financial burden on the counties, but explained that without such a drastic step, the court would be unable to fulfill its "constitutional duty to provide meaningful review to indigent criminal defendants."⁵³⁸ In approving the order, the supreme court stated:

The facts in this record establish a significant problem of constitutional magnitude that must immediately be addressed. We do not want to face a situation where a significant number of defendants convicted of felony offenses must be released on bond because their appeals of right are not being timely addressed due to the lack of counsel required to be provided under the United States Constitution. We must provide an immediate short-term solution to this crisis.⁵³⁹

532. 709 So. 2d 101 (Fla. 1998).

533. *Id.* at 102.

534. *Id.*

535. *Id.*

536. *Id.*

537. *Public Defender's Certification of Conflict*, 709 So. 2d at 102.

538. *Id.* at 103.

539. *Id.*

The supreme court additionally required the chief judge of the second district, the Public Defender, and the Attorney General to provide status reports on September 1, 1998, (about five months after the date of the opinion) “as to whether the order should be continued, modified, or terminated,” and requested that the legislature consider providing an emergency fund to help the affected counties.⁵⁴⁰ In concluding, the court said:

We strongly believe that there needs to be a long-term as well as a short-term solution, and, in this regard, we would encourage the creation of a special committee or commission by the legislature to examine the structure and funding of indigent representation in criminal cases. We firmly believe that this type of delay in the criminal justice process, as illustrated in this case, can be eliminated by a joint effort of all interested parties. This Court is very willing to participate and provide necessary resource assistance to develop a viable solution to this ongoing problem.⁵⁴¹

In a specially concurring opinion that was joined in by Justice Wells, Justice Overton suggested “that the time has come to reevaluate the structure of how we provide Public Defender representation.”⁵⁴² He set forth some proposed structural changes: the elimination of the five district appellate offices and the representation by each Public Defender’s office of the defendants from its jurisdiction, the creation within each Public Defender’s office of a separate section for conflict cases for both trial and appeal, and that these conflict sections be funded to handle the capital collateral representation of defendants sentenced to death in other circuits.⁵⁴³ Justice Overton ended his opinion by stating:

In conclusion, these structural changes should provide better representation for indigent defendants, assist in alleviating problems counties are facing in paying for the cost of conflict counsel, provide a unified administrative structure for funding, and provide more effective administration of collateral representation in capital cases. With the implementation of such changes, the legislature should be better able to focus on other problems

540. *Id.* at 104.

541. *Id.*

542. *Public Defender’s Certification of Conflict*, 709 So. 2d at 104 (Overton, J., concurring specially).

543. *Id.* at 105.

confronting the effective administration of our criminal justice system.⁵⁴⁴

XXIV. APPEALS IN JUVENILE CASE

In *State v. T.M.B.*,⁵⁴⁵ the Supreme Court of Florida reviewed several cases in which the respondents pled either guilty or nolo contendere in juvenile delinquency proceedings and attempted to appeal the final orders of delinquency.⁵⁴⁶ The State had opposed the appeals, arguing that the respondents were required by sections 924.051(3) and (4) of the *Florida Statutes*, to preserve their claims for review.⁵⁴⁷ The first district rejected the state's argument, concluding that section 924.051 applies only to criminal cases, not juvenile matters,⁵⁴⁸ but certified the issue to the supreme court.⁵⁴⁹ In approving the district court's conclusion, the supreme court found that because "the terms and conditions of juvenile appeals are addressed exhaustively in chapter 39 [of the *Florida Statutes*] . . . [i]t is . . . clear that the legislature intended chapter 39 to govern juvenile appeals . . . [and] that section 924.051 is inapplicable to juvenile proceedings."⁵⁵⁰

In *A.G. v. Department of Children and Family Services*,⁵⁵¹ the fourth district examined the issue of whether an order adjudicating a child dependent is a final appealable order or whether it is a non-final order that can be reviewed in a subsequent appeal from a later disposition order.⁵⁵² The court concluded that such orders are final and certified conflict with the fifth district's decision in *Moore v. Department of Health and Rehabilitative Services*.⁵⁵³

544. *Id.*

545. 716 So. 2d 269 (Fla. 1998).

546. *Id.* at 269.

547. *Id.*

548. *Id.* at 270.

549. *Id.* at 269.

550. *T.M.B.*, 716 So. 2d at 271.

551. 707 So. 2d 972 (Fla. 4th Dist. Ct. App. 1998).

552. *Id.* at 972.

553. 664 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1995). The court noted that both *Moore* and *G.L.S. v. Department of Children and Families*, 700 So. 2d 96 (Fla. 1st Dist. Ct. App. 1997), which the first district certified as conflicting with *Moore*, dealt with termination of parental rights. "[W]e view the issue of appealability, vel non, of an adjudicatory order to be the same in dependency proceedings," the court said. *A.G.*, 707 So. 2d at 972. For a discussion of the decision in *G.L.S.*, see *supra* Part XXV. at 96.

In *Department of Juvenile Justice v. J.R.*,⁵⁵⁴ the Department of Juvenile Justice (“DJJ”) appealed from an order adjudicating “a juvenile as a delinquent and committing him to a specific treatment program.”⁵⁵⁵ The juvenile moved to strike DJJ’s notice of appeal and brief, which argued that the trial court exceeded its authority by specifying the detention program placement.⁵⁵⁶ The juvenile pointed to the fact that section 985.234(1)(b) of the *Florida Statutes* (1997), provides that in appeals by the state, the State Attorney is to file the notice of appeal and the fact that other provisions of chapter 985 call for the State Attorney to represent the state in the trial court and for the Attorney General to do so on appeal.⁵⁵⁷ The Attorney General also appeared and took the position that the juvenile’s motions should be granted.⁵⁵⁸

The first district disagreed, noting that “[s]ection 985.23(1)(d) provides that parties to the case shall include representatives of DJJ” and found that DJJ was “not the prosecuting authority (*i.e.*, ‘the state’), but rather appear[ed] in its capacity as the legal custodian of the child committed to its care.”⁵⁵⁹ The court determined that “the right DJJ seeks to vindicate on appeal is unique to its role as the custodian charged with the care of a delinquent child,” and denied the juvenile’s motions.⁵⁶⁰

In *E.P.H. v. Wright*,⁵⁶¹ the fourth district found that habeas corpus is the proper method for reviewing orders of secure detention.⁵⁶² The court recognized that section 985.215(5)(a) of the *Florida Statutes*, states that such orders shall be deemed final orders reviewable by appeal, but agreed with the first district in *T.L.W. v. Soud*⁵⁶³ that “this statute is unconstitutional as a legislative attempt to provide for appeal of non-final orders.”⁵⁶⁴ Judge Farmer dissented, expressing the belief that the legislature’s power to establish substantive rights includes “the power to say when a right is so important that the judicial determination of it is final for purposes of

554. 710 So. 2d 211 (Fla. 1st Dist. Ct. App. 1998).

555. *Id.* at 212.

556. *Id.*

557. *Id.*

558. *Id.* at 213.

559. *Department of Juvenile Justice*, 710 So. 2d at 213.

560. *Id.* at 214.

561. 708 So. 2d 673 (Fla. 4th Dist. Ct. App. 1998).

562. *Id.* at 674.

563. 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994).

564. *E.P.A.*, 708 So. 2d at 674 (citing *T.L.W. v. Soud*, 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994)).

appellate review” and indicating that he “would certify conflict with *T.L.W.*”⁵⁶⁵

XXV. APPEALS FROM ORDERS TERMINATING PARENTAL RIGHTS

In *G.L.S. v. Department of Children and Families*,⁵⁶⁶ a father appealed from two orders, an order terminating his parental rights, and a disposition order committing the minor children to the legal care, custody, and control of the Department of Health and Rehabilitative Services.⁵⁶⁷ The order terminating parental rights was entered eighteen days before the disposition order, and the notice of appeal was filed twenty-four days after the disposition order.⁵⁶⁸ Thus, although the notice was timely as to the disposition order,⁵⁶⁹ the first district was faced with the issue of whether the notice was timely with regard to the termination order.

The father argued only the disposition order was a final order and that had he filed a notice of appeal from the termination order, it would have been premature and thus “held in abeyance until the entry of the final disposition order.”⁵⁷⁰ The court disagreed, holding that “an adjudication order in which parental rights are actually terminated is a final, appealable order, subject to immediate review.”⁵⁷¹ Because the notice of appeal was not timely as regards to the termination order, the appeal was dismissed.⁵⁷² The court noted that its dismissal was without prejudice to the father’s right to seek a belated appeal⁵⁷³ and certified that the decision was in conflict⁵⁷⁴ with two fifth district cases.⁵⁷⁵

565. 708 So. 2d at 674.

566. 700 So. 2d 96 (Fla. 1st Dist. Ct. App. 1997).

567. *Id.* at 97.

568. *Id.*

569. Under *Florida Rule of Appellate Procedure* 9.110(b), a notice of appeal must be filed within 30 days of rendition of the order from which review is sought. FLA. R. APP. P. 9.110(b).

570. *G.L.S.*, 700 So. 2d at 98.

571. *Id.*

572. *Id.* at 99.

573. *Id.*

574. *Id.*

575. *Lewis v. Department of Health and Rehabilitative Services*, 670 So. 2d 1191 (Fla. 5th Dist. Ct. App. 1996); *Moore v. Department of Health and Rehabilitative Services*, 664 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1995).

XXVI. ATTORNEYS' FEES

In *Berry v. Scotty's, Inc.*,⁵⁷⁶ an appellant requested attorney's fees after prevailing in an appeal from an order of the Unemployment Appeals Commission.⁵⁷⁷ The second district noted that when statutes provide for awards of appellate attorneys' fees, and the lower tribunals are circuit or county courts, the court grants entitlement to an award of fees and remands for the trial court to determine the amount of the award.⁵⁷⁸ The court noted, however, that the statute at issue in the case, section 443.041(2)(b) of the *Florida Statutes*, was "unusual," in that it directs the appellate court to "'fix' the award."⁵⁷⁹

The court recognized that the third district had observed in *Cheung v. Executive China Doral, Inc.*,⁵⁸⁰ that since the statute offers no criteria for determining the amount of an award, the common law principles in *Florida Patient's Compensation Fund v. Rowe*,⁵⁸¹ were applicable.⁵⁸² The second district agreed with the analysis of *Cheung*, but decided that rather than appoint a judge as a commissioner to determine the fee, as the third district had in *Cheung*, it preferred "to relinquish jurisdiction to the appeals referee to conduct further proceedings on the matter."⁵⁸³

XXVII. COSTS

In *Porter v. State*,⁵⁸⁴ a criminal defendant under a sentence of death, who was represented by the Capital Collateral Representative ("CCR") appealed from the denial of a motion for post-conviction relief.⁵⁸⁵ Incident to that appeal, the defendant filed a motion that sought to have the county pay the cost of transcribing the various hearings in the trial court.⁵⁸⁶ In denying the motion, the supreme court noted that in *Hoffman v. Haddock*,⁵⁸⁷ it had held that CCR is statutorily required "to provide for the collateral

576. 23 Fla. L. Weekly D930 (2d Dist. Ct. App. Apr. 8, 1998).

577. *Id.* at D930.

578. *Id.*

579. *Id.*

580. 638 So. 2d 82 (Fla. 3d Dist. Ct. App. 1994).

581. 472 So. 2d 1145 (Fla. 1989).

582. *Berry*, 23 Fla. L. Weekly at D930.

583. *Id.*

584. 700 So. 2d 647 (Fla. 1997).

585. *Id.* at 648.

586. *Id.*

587. 695 So. 2d 682 (Fla. 1997).

representation of any person convicted and sentenced to death in this state and is to be responsible *for the payment of all necessary costs and expenses.*"⁵⁸⁸ The court went on to "clarify that [its *Hoffman*] decision includes court reporter fees for transcription of the proceedings to be included in the record on appeal."⁵⁸⁹ The court further stated:

We rule on this motion by this opinion to express our conclusion that payment of all postconviction costs out of CCR's budget is not only statutorily required but is necessary to carry out the legislative intent expressed in section 27.7001, Florida Statutes (Supp. 1996). Moreover, we believe it will further the goal of accounting for and controlling costs in postconviction proceedings and further the efficient processing of postconviction capital cases.⁵⁹⁰

Because postconviction costs were historically paid by the counties, the court urged CCR and the Commission on Administration of Justice in Capital Cases "to immediately assess the impact of these costs on CCR's budgets in each of the CCR offices and at an early time do what is necessary to make the legislature aware of the need to appropriate the funds to cover these costs."⁵⁹¹

The fifth district, in *Rehman v. ECC International Corp.*,⁵⁹² rejected a claim that lost interest on a cash bond posted on appeal was a recoverable cost. The court noted *Florida Rule of Appellate Procedure* 9.400(a) which indicates that "taxable costs" shall include certain things, including the catch-all phrase "other costs permitted by law," but does not specifically refer to lost interest.⁵⁹³ The court subsequently stated:

Courts do not allow as taxable costs interest which theoretically accrued on other kinds of costs expended by a party to an appeal, such as the payments for transcripts, depositions, exhibits and the like. Without an express authorization in the rules to treat theoretical lost interest on a cash bond posted by an appellant, we agree it should not be a taxable cost.⁵⁹⁴

588. *Porter*, 700 So. 2d at 648 (Fla. 1997) (quoting *Hoffman v. Haddock*, 695 So. 2d 682, 684 (Fla. 1997)).

589. *Id.* at 648.

590. *Id.*

591. *Id.* at 648-49.

592. 707 So. 2d 752 (Fla. 5th Dist. Ct. App. 1998).

593. *Id.* at 752-53.

594. *Id.* at 753.

In *Okeelanta Corp. v. Bygrave*,⁵⁹⁵ the plaintiffs brought a class action and obtained a final summary judgment in their favor.⁵⁹⁶ The defendants appealed and the judgment was reversed for further proceedings.⁵⁹⁷ On remand, four defendants moved for, and received an order taxing appellate costs, while a fifth agreed to defer hearings on its motion for a cost judgment until there was an ultimate prevailing party in the underlying case.⁵⁹⁸

On appeal from the order taxing costs, the fourth district agreed that “at this point in the proceedings, absent members of the class may not be liable for costs.”⁵⁹⁹ The court noted that “[a] judgment cannot be entered without knowing against whom it may operate” and that “[a]t the present time, an impediment to entering a cost judgment is the inability to identify who, besides the class representatives, may be judgment debtors.”⁶⁰⁰ The court therefore concluded that “because it has not been established which members of the class might ultimately be liable for these costs, we reverse the order and direct that it be deferred until the conclusion of the case.”⁶⁰¹

In *Fleitman v. McPherson*,⁶⁰² a petitioner sought certiorari to quash a trial court order denying a motion to disqualify the respondents’ attorney and that attorney’s law firm from representing the defendant.⁶⁰³ After the order was quashed with respect to the disqualification of the attorney at trial, but upheld with respect to the disqualification of the law firm, the petitioner moved to tax costs.⁶⁰⁴ The trial court determined that since the appellate court’s “ruling affirmed in part and reversed in part, it could not be determined which side prevailed.”⁶⁰⁵ It “further found it must consider the results of the entire litigation, not merely an interlocutory certiorari review, and that it would be inappropriate to tax costs at this time.”⁶⁰⁶

The petitioner sought review of the trial court’s order, asserting that he had prevailed in the certiorari proceeding, that he had timely moved to tax appellate costs, that the trial court did not need to take any additional action on the issues involved in the certiorari action, and that the applicable rules

595. 22 Fla. L. Weekly D1769 (4th Dist. Ct. App. June 16, 1997).

596. *Id.* at D1769.

597. *Id.*

598. *Id.*

599. *Id.*

600. *Okeelanta*, 22 Fla. L. Weekly at D1770.

601. *Id.*

602. 704 So. 2d 587 (Fla. 1st Dist. Ct. App. 1997).

603. *Id.* at 588.

604. *Id.*

605. *Id.*

606. *Id.*

and case law precluded the trial court from deferring its ruling.⁶⁰⁷ The respondent replied that since there had been no ruling by the trial court, there was nothing for the appellate court to review, other than the question of whether the trial court abused its discretion in taking the motion under advisement.⁶⁰⁸

The first district found that in the certiorari proceeding, the “petitioner prevailed on the question of disqualification of the attorney, while respondents prevailed on the question of disqualification of the law firm.”⁶⁰⁹ The court went on to state that

[s]ince no further action need be taken by the trial court with respect to the attorney disqualification issue, it appears the trial court failed to apply the correct law, and abused its discretion, in declining to make a determination as to the prevailing party for purposes of an award of appellate costs with respect to the petition for certiorari.⁶¹⁰

Further, the court found that the “trial court also erred in delaying a decision as to costs pertaining to an interlocutory appeal, based on a determination that the court must consider the results of the entire litigation.”⁶¹¹ The court noted that while “[a]n attorney’s fee award cannot be made until the prevailing party in the underlying litigation is determined[,] . . . the prevailing party under rule 9.400(a) is the party who prevailed in the appellate proceeding that was the subject of the motion to tax costs.”⁶¹² Therefore, the court reversed the order deferring ruling and remanded “with directions to make a determination as to the party who prevailed on the *significant* issue in the petition for certiorari review, and for an award of costs.”⁶¹³

XXVIII. BOARD CERTIFIED APPELLATE LAWYERS

In *The Florida Bar re Ash*,⁶¹⁴ the Supreme Court of Florida upheld the denial of an attorney’s application for certification as a Board Certified

607. *Fleitman*, 704 So. 2d at 588–89.

608. *Id.* at 589.

609. *Id.*

610. *Id.*

611. *Id.*

612. *Fleitman*, 704 So. 2d at 590.

613. *Id.*

614. 701 So. 2d 552 (Fla. 1997).

Appellate Lawyer. The denial had been based on the applicant's failure to disclose the fact that an appellate court had ordered her to show cause why sanctions should not be imposed on her for the manner in which she handled a particular case.⁶¹⁵ On her certification application, the applicant had stated "N/A" in response to two questions that asked her to list and explain "all cases in which your competence or conduct was raised as a basis for [] relief . . . by the court" and "all cases in which your conduct was adversely commented upon in writing by a judge."⁶¹⁶

In upholding the denial of the application, the court found that the show cause order was a document that the applicant "was unequivocally required to disclose on her application."⁶¹⁷ The court went on to state, "Indeed, it is difficult to conceive of a clearer violation of the oath of truthfulness at the conclusion of the application."⁶¹⁸ The court also submitted the matter to The Florida Bar to determine whether any disciplinary rules were violated.⁶¹⁹

XXIX. A LOOK INTO THE FUTURE

The Supreme Court of Florida Judicial Management Council has established a committee to study issues relating to *per curiam* affirmances without opinions. The committee will make recommendations as to whether written opinions should be required in all cases, whether a system should be adopted under which some opinions are not published, and other concerns.

The Florida Appellate Court Rules Committee has recommended to the supreme court that *per curiam* affirmances that do no more than provide citations to authorities be published only in table form. The committee has also recommended adopting a rule that would provide that the denial of an extraordinary writ would not constitute a determination on the merits unless the court order specifically indicates otherwise or evinces an unequivocal determination by the court that the merits were considered. As discussed in Part XXII.C of this article, such a rule would incorporate the conclusion reached by the supreme court and the second district and would require the third and fourth districts to change their approach regarding such matters. Both the committee and the Florida Courts Technology Commission continue to study the concept of adopting a vendor-neutral citation system.

615. *Id.* at 553.

616. *Id.*

617. *Ash*, 701 So. 2d at 554.

618. *Id.*

619. *Id.*

Of course, the courts over the coming year will provide answers to many of the questions raised by the cases discussed in this article. These answers, as they frequently do, will likely generate new questions. These questions, and others, will continue to provide the large number of court decisions that shape the field of appellate practice.

Community Associations:¹ 1998 Survey of Florida Law

Joseph E. Adams *

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1. The reference to "community associations" means any mandatory membership corporation tied to the ownership of real property, which corporation has a right of lien for the collection of assessments. See FLA. STAT. § 468.431(1) (1997). The most common forms of community associations are condominium associations, cooperative associations, and homeowners' associations. This survey covers legislation and cases from July 1, 1997 to June 30, 1998. Condominium related arbitration decisions; Declaratory Statements; and 1998 Division of Florida Land Sales, Condominiums and Mobile Home penalty guidelines, which are found at Rules 61B-20, 21 and Rule 61B-78, *Florida Administrative Code*, should also be examined by readers for a comprehensive review of legal authorities affecting Florida community associations for the period covered by this Survey.

I. LEGISLATION

A. *Condominiums*

Amending Florida's governing statute for condominiums, section 718 of the *Florida Statute*,² seems to be one of the Florida Legislature's favorite pastimes. Before a legislative session begins, no one seems to know what ideas will be thrown into the caldron. After the session ends, many wonder why the changes were needed, and in many cases, what they mean.

There are approximately two million condominium residents in the State of Florida,³ whose communities are operated by some twenty thousand associations. Not surprisingly, the "condo vote" is a potent force in Florida's political climate. The perceived need to address individual constituent problems through legislation results in the state's condominium laws almost being in a constant state of change.

Florida's first Condominium Act was enacted in 1963, and was basically an enabling statute that allowed developers to create a condominium.⁴ When first written, the Condominium Act occupied six pages in the statute book.⁵ Today it occupies forty-seven pages with double columns on each page.⁶

During the 1970's, significant consumer reforms were written into the Condominium Act.⁷ Notwithstanding the changes, the condominium development boom continued. Quite naturally, legislative efforts began to focus on operational areas. The Condominium Act was substantially rewritten in 1976, and renumbered from section 711 to section 718, with an effective date of January 1, 1977.⁸ The 1977 Act is still the basic format of today's Condominium Act.

In 1986, substantial amendments were again made to the Condominium Act.⁹ These amendments largely focused on operational issues, which

2. FLA. STAT. § 718 (Supp. 1998). Hereinafter referred to as "The Condominium Act" or "the Act."

3. Letter from Bureau Chief Philip Nowicki, Bureau of Condominiums, to former State Senator Dudley (Apr. 2, 1998 on file with the *Nova Law Review*).

4. FLA. STAT. § 711 (1963).

5. *Id.*

6. FLA. STAT. § 718 (Supp. 1998).

7. *See, e.g.*, 1972 Fla. Laws ch. 72-201; 1974 Fla. Laws ch. 74-104. All citations to Florida's session laws in this article refer to the changes to the Condominium Act currently found at FLA. STAT. § 718 (Supp. 1998).

8. 1976 Fla. Laws ch. 76-222 (codified as amended at FLA. STAT. § 718 (1977)).

9. 1986 Fla. Laws ch. 86-175 (codified as amended at FLA. STAT. § 718 (Supp. 1986)).

arguably tried to make it easier for boards of directors to operate associations.¹⁰

Again, in 1990, there were a substantial number of amendments to the Act, adopted largely due to the initiative of the Florida Bar's Committee on Real Property, Subcommittee on Condominiums and Planned Unit Developments.¹¹ In general, these amendments focused on technical glitches in the statute, and were generally favorable to the facilitation of association operations.

Then, in 1991, the legislative philosophical pendulum radically shifted. The 1990 Legislature created a "Condominium Study Commission"¹² that went to nine cities around the State of Florida and listened to public comment about perceived problems in condominium living.¹³ In February of 1991, the Study Commission generated a 143-page report, which recommended numerous and significant changes to the condominium statute.¹⁴ The end result was the legislature's adoption of a major amendment package to the Condominium Act (a thirty-nine page bill),¹⁵ which fundamentally altered the philosophical underpinning of condominium operations.

After publication, the law raised considerable furor, particularly with board members. As a result, the legislature, in a special session convened to address a budget crisis, decided to suspend implementation of the law,¹⁶ which (after removal of some of the most controversial provisions) became law in 1992.¹⁷ Thus, it is plausible to state that the "progression" of the Condominium Act has gone from a developer's enabling statute, to a consumer protection statute, to a "pro-board" statute, to a "pro-unit owner" (or "anti-board") code of procedures.

The 1990's have been described as the "zenith of legislative micromanagement for Florida's condominium and cooperative communities."¹⁸ Although there has been no evidence of legislative intent to re-evaluate the regulatory excesses, which burden condominium communities, there remains an apparently irresistible urge to "open up" the

10. *Id.*

11. 1990 Fla. Laws ch. 90-151 (codified as amended at FLA. STAT. § 718 (Supp. 1990)).

12. 1990 Fla. Laws ch. 90-218.

13. *See Final Report of The Condominium Study Commission*, February 1991.

14. *Id.*

15. 1991 Fla. Laws ch. 91-103 (codified as amended at FLA. STAT. § 718(1991)).

16. 1992 Fla. Laws ch. 91-426.

17. 1992 Fla. Laws ch. 92-49 (codified as amended at FLA. STAT. § 718 (Supp. 1992)).

18. Joseph E. Adams, *Community Associations*, 21 NOVA L. REV. 69, 70 (1996).

Condominium Act each year for some “improvement.” The legislature likewise remains willing to satiate those desires.

There were two condominium bills which passed out of the 1998 Legislative Session, both becoming law without the Governor’s signature.¹⁹ The first is chapter 98-195, of the *Laws of Florida*.²⁰ Chapter 98-195 became a law on May 24, 1998.²¹ The main thrust of chapter 98-195 was the statutory codification of various regulations that had been previously adopted by the Division of Florida Land Sales, Condominiums, and Mobile Homes (“the Division”), and which still are a part of chapter 61B of the *Florida Administrative Code*.²²

In 1996, the Florida Legislature directed each state agency to review its rules by no later than October 1, 1997, and to provide the “Administrative Procedures Committee [with] a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by” the Administrative Procedures Act.²³ This mandate, codified in section 120.536(2), of the *Florida Statutes*, further directed the 1998 Legislature to consider whether specific legislation authorizing the rules so identified, or portions thereof, should be enacted.²⁴ The statute also requires each agency, by January 1, 1999, to “initiate proceedings pursuant to [section] 120.54, [of the] *Florida Statutes*, to repeal each rule, or [a] portion thereof, identified as exceeding the rulemaking authority permitted by” the Administrative Procedures Act, and for which no legislative grant of authority was given to the agency by the 1998 Legislature. The Department of Business and Professional Regulation identified twenty rule provisions which the Department believed exceeded the scope of its rulemaking authority under the Administrative Procedures Act.²⁵ The Department recommended legislative treatment of fifteen of the identified rules. Most of the provisions found in chapter 98-195 emanate from that request.²⁶

Section 718.104(2) of the Condominium Act was amended to codify a Division rule providing that a developer must file the recording information for a declaration of condominium within thirty “business days” of the date of

19. 1998 Fla. Laws ch. 98-195; 1998 Fla. Laws ch. 98-322.

20. 1998 Fla. Laws ch. 98-195.

21. Ch. 98-195, § 9, 1998 Fla. Laws 1726, 1733 (codified as amended at FLA. STAT. § 718 (1998)).

22. FLA. ADMIN CODE ANN. r. 61B (1998).

23. Ch. 96-159, § 9, 1996 Fla. Laws 159, 159 (codified as amended at FLA. STAT. § 120.536(2) (1997)).

24. *See id.*

25. *Id.*

26. 1998 Fla. Laws ch. 98-195.

filing the declaration of condominium in the county public land records.²⁷ The statute further requires the Division to prescribe a form for filing such information.²⁸ A similar provision has been added to Section 718.403(8) of the Condominium Act, dealing with recordation of phase amendments.²⁹ A developer is likewise required to notify the Division within thirty “business days” of filing a phase amendment, again on a form to be prescribed by the Division.³⁰

Sections 718.502 and 718.503 of the Act have been amended regarding a condominium unit purchaser’s right to void a contract for the purchase of a condominium unit (from a developer) within fifteen days of the execution of the purchase and sale agreement.³¹ Unfortunately, these changes add additional confusion to the law. The amendment to section 718.502(b) of the Act is a rule codification and states that a “developer may not close on any contract for sale or contract for a lease period of more than [five] years until the developer prepares and files with the [D]ivision documents complying with the requirements of” the Condominium Act and Division rules, and the “[D]ivision notifies the developer that the filing is proper and the developer prepares and delivers all documents required by [the Condominium Act] to the prospective buyer.”³²

The amendment to section 718.503(b) of the Condominium Act introduces the confusion.³³ The new clause provides that although a developer may not close for fifteen days following the execution of a purchase and sale agreement, and delivery of required disclosure documents must be made to the buyer, a developer now is permitted to close if the “buyer is informed in the 15-day voidability period and agrees to close prior to the expiration of the 15 days.”³⁴ This clause, in addition to containing an apparent typographical error (should “in” be “of” or “within”), or at least confusing grammar, seems to conflict with the disclosure language found in section 718.503 of the Condominium Act which provides: “ANY

27. *Id.* § 1, 1998 Fla. Laws 1727, 1727 (codified as amended at FLA. STAT. § 718.104(2) (Supp. 1998)).

28. *See id.* § 1, 1998 Fla. Laws at 1727 (amending FLA. STAT. § 718.104(2) (Supp. 1998)).

29. *See id.* § 5, 1998 Fla. Laws at 1730 (amending FLA. STAT. § 718.403(8) (Supp. 1998)).

30. *Id.*

31. Ch. 98-195, §§ 6-7, 1998 Fla. Laws at 1730-33 (codified as amended at FLA. STAT. §718.502-503 (Supp. 1998)).

32. *Id.* § 6, 1998 Fla. Laws at 1730 (codified as amended at FLA. STAT. § 718.502(b) (Supp. 1998)).

33. *Id.* § 7, 1998 Fla. Laws at 1730-33 (codified as amended at FLA. STAT. § 718.503(b) (Supp. 1998)).

34. *Id.*

PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT.”³⁵

Further, in the case of *Asbury Arms Development Corp. v. Florida Department of Business Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes*,³⁶ the Second District Court of Appeal held that the above quoted language in the statute means what it says, and that the fifteen day voidability period could not be waived.³⁷ Given the holding of this case, it might be questioned whether the legislature intended to remove this language from section 718.503(1)(a)1 of the Condominium Act.

Section 718.117 of the Condominium Act has been amended to codify another Division rule regarding notification to the Division relative to the termination or merger of condominiums, or the dissolution or merger of condominium associations.³⁸ Pursuant to the new law, a board of directors must notify the Division “before taking any action” to terminate, merge, or dissolve.³⁹ Within thirty “business days” after recordation of the action, the Division must likewise be notified.⁴⁰ These reporting requirements apply to all associations, not only those operated by developers.

Section 718.301 of the Condominium Act has been amended with the addition of a new subsection (6),⁴¹ which specifically empowers the Division with the “authority to adopt rules pursuant to the Administrative Procedure Act to ensure the efficient and effective transition from developer control of a condominium to the establishment of a unit owner controlled association.”⁴²

Likewise, a new provision of the “Roth Act”⁴³ section of the Condominium Act was added.⁴⁴ New section 718.621 of the Condominium Act specifically empowers the Division to adopt rules “to administer and ensure compliance with developers’ obligations with respect to condominium conversions concerning the filing and noticing of intended

35. FLA. STAT. § 718.503(1)(a)1 (Supp. 1998).

36. 456 So. 2d 1291 (Fla. 2d Dist. Ct. App. 1984).

37. *Id.* at 1293.

38. Ch. 98-195, § 3, 1998 Fla. Laws 1729, 1729 (codified as amended at FLA. STAT. § 718.117 (Supp. 1998)).

39. *Id.*

40. *Id.*

41. *Id.* § 4, 1998 Fla. Laws at 1726, 1729 (codified as amended at FLA. STAT. § 718.301(6) (Supp. 1998)).

42. *Id.* See also, Ch. 98-200, § 221, 1998 Fla. Laws 1892, 1892 (codified as amended at FLA. STAT. § 718.501(1)(f) (Supp. 1998)).

43. FLA. STAT. § 718.604 (1997).

44. Ch. 98-195, § 8, 1998 Fla. Laws 1726, 1733 (codified as amended at FLA. STAT. § 718.621 (Supp. 1998)).

conversion, rental agreement extensions, rights of first refusal, and disclosure and postpurchase protections.”⁴⁵

The final changes of chapter 98-195 deal with operational details of condominium associations.⁴⁶ Perhaps the most nonsensical clause of the 1998 amendments to the Condominium Act is a new provision found at section 718.112(2)(b)4 of the Act.⁴⁷ This new law permits a member of the board of directors, or a committee, who is not present at a board or committee meeting, to “submit in writing his or her agreement or disagreement with any action taken” by the board or the committee, after the meeting has occurred.⁴⁸ The statutory clause goes on to say that this expression of “agreement or disagreement may not be used as a vote for or against the action taken and may not be used for the purposes” of constituting a quorum for the board or committee.⁴⁹ There is nothing in prior law which would have prohibited such written expressions of “agreement or disagreement.” Since the law specifically states that these expressions cannot be used as a vote for or against the action, nor for the purpose of creating a quorum, it is certainly unclear as to the intended significance of this provision.

Another operational issue embodied in chapter 98-195 involves statutory codification of a Division rule permitting telephonic conference call meetings for association boards of directors.⁵⁰ Since most condominium associations are not-for-profit corporations governed by section 617 of the *Florida Statutes*, it should be noted that section 617.0820(4) has, for a number of years, permitted associations to participate in regular or special board meetings by telephone conference calls.⁵¹ Section 617.0825(2) of the Not-For-Profit-Corporation Act would also extend such a right to committees.⁵² In any event, the Condominium Act now clearly states that the board or any committee may conduct meetings by telephone.⁵³ The statute also codifies a Division rule, which requires that a speaker phone must be used at the situs of the meeting, so that the conversation of those board or committee members attending by telephone may be heard by the

45. FLA. STAT. § 718.621 (Supp. 1998).

46. 1998 Fla. Laws ch. 98-195.

47. *Id.* § 2, 1998 Fla. Laws at 1727–28 (codified as amended at FLA. STAT. § 718.112(2)(b)4) (Supp. 1998)).

48. *Id.*

49. *Id.*

50. Ch. 98-195, § 2, 1998 Fla. Laws 1727, 1728 (codified as amended at FLA. STAT. § 718.112(2)(b)5) (Supp. 1998)).

51. FLA. STAT. § 617.0820(4) (1997).

52. FLA. STAT. § 617.0825(2) (1997).

53. Ch. 98-195, § 2, 1998 Fla. Laws 1726, 1728–29 (codified as amended at FLA. STAT. § 718.112(2)(b)5) (Supp. 1998)).

board or committee members attending the meeting in person, as well as by any unit owners present at the meeting.⁵⁴

The final operational amendment of chapter 98-195, new section 718.112(2)(c) of the Act codifies a Division rule,⁵⁵ which requires that any association rule regulating unit owner statements at board or committee meetings must be in writing.⁵⁶ Presumably, if there is no written rule, a board cannot limit the “frequency, duration, and manner” of unit owner statements at board or committee meetings.

The much more significant condominium bill that passed out of the 1998 Legislative Session is found at chapter 98-322 of the *Laws of Florida*, which became law without the Governor’s signature on May 30, 1998.⁵⁷ Chapter 98-322 is actually an amalgamation of several pre-filed bills, which were combined during the legislative process. One of the more significant topics in the pre-filed legislation, relating to the governance of “master associations,”⁵⁸ was withdrawn from consideration by the legislation’s sponsors, at the request of the Division.⁵⁹

Perhaps the most significant legislative enactment from the 1998 Session was an amendment to section 718.111(6) of the Act, having to do with consolidated financial operations of pre-1977 “phase” condominiums.⁶⁰

As has been the case from topics as wide-ranging as trimming mangrove trees to conducting bingo games, the language now engrafted into the Act by the 1998 amendment to section 718.111(6) arose out of the perceived plight of a single condominium community,⁶¹ which sought to address its apparently questioned consolidated financial operations by seeking statutory

54. *Id.*

55. FLA. ADMIN. CODE ANN. r. 61B-23.002(10) (1998).

56. Ch. 98-195, § 2, 1998 Fla. Laws 1727, 1728 (codified as amended at FLA. STAT. § 718.112(2)(c) (Supp. 1998)).

57. 1998 Fla. Laws ch. 98-322.

58: *See, e.g.,* Downey v. Jungle Den Villas Recreation Ass’n, 525 So. 2d 438 (Fla. 5th Dist. Ct. App. 1988).

59. The Division has recently appointed a “study group” to consider the advisability of “master association” and related legislative initiatives for the 1999 Legislative Session.

60. Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2757 (codified as amended at FLA. STAT. § 718.111(6) (Supp. 1998)). The reference to “phase” condominiums in section 718.111(6) of the Act is a misnomer. True “phase” condominiums are developed under section 718.403 of the Act, and are sometimes known as “expandable” or “flexible” condominiums. The “phase” condominium for purposes of section 718.111(6) consolidated operations are more accurately described as “series” condominiums. *See also* Gary A. Poliakoff, *Condominiums, The Assessment Dilemma*, 54 FLA. B.J. 268 (1980).

61. The Innisbrook condominium community in the Tarpon Springs area (on file with the author).

change.⁶² The bill initially introduced into the legislature would have been limited to condominiums that were operated “as part of a rental pool in a hotel or resort-type setting, where each unit of a similar type and square footage receives a uniform rental income . . . [and where] the condominium units were registered and sold as securities with the Securities and Exchange Commission (SEC)” (i.e., the initial bill would have probably only applied to this particular community).⁶³

According to information obtained by this author,⁶⁴ another multi-condominium community, with the Division support, requested that the Bill’s sponsors expand the statutory language, and allow any pre-1977 multi-condominium community to provide for consolidated financial operations in the declaration or in the bylaws, upon less than unanimous approval of the unit owners.⁶⁵ The Division’s stated reason for supporting such legislation was that there are a significant number of older “phase” projects that are operating in an “illegal” consolidated financial fashion anyway, with many cases involving such operations going back twenty years or more.⁶⁶

Although there is undoubtedly adequate public policy to support this amendment, particularly in the case of associations that have always operated on a consolidated financial basis, the law presents some ambiguity, and also some constitutional concerns. The new statute provides that an association that has operated on a consolidated financial basis “may continue to so operate,” as long as the authority for same is contained in the applicable declarations of condominium, or the bylaws.⁶⁷ The reference to such authority having to be in the original version of the declarations or bylaws was omitted by the amendment.⁶⁸

Accordingly, associations that have been operating on a consolidated financial basis may legitimize such actions by amending the declaration of condominium or bylaws. The statute goes on to state that an association “for such condominiums”⁶⁹ may provide for consolidated financial operations by

62. Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2757 (codified as amended at FLA. STAT. § 718.111(6) (Supp. 1998)).

63. H.R. 3321, 15th Leg. Sess., Reg. Sess. (Fla. 1998).

64. As Vice-Chair and Condominium Committee Chair of Community Associations Institute’s Florida Legislative Alliance during the 1998 Legislative Session.

65. *Id.*

66. *Id.*

67. Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2757 (codified as amended at FLA. STAT. § 718.111(6) (Supp. 1998)).

68. *Id.*

69. It is unclear whether “such condominiums” means multi-condominium associations that have heretofore operated on a consolidated financial basis or any multi-condominium association where the first declaration was recorded prior to January 1, 1997, although the latter interpretation seems more plausible.

“amending its declaration pursuant to [section] 718.110(1)(a) or by amending its bylaws and having the amendment approved by not less than two-thirds of the total voting interests.”⁷⁰ It is unclear whether the two-thirds standard is applied only to bylaw amendments (regardless of the percentage vote stated in the bylaws to amend them), or whether the two-thirds standard also serves to qualify the vote necessary to amend the declaration of condominium (regardless of the vote required in the declaration for amendment of the declaration). By reference to section 718.110(1)(a) of the Act, which incorporates a two-thirds standard, as well as the lack of a comma in the text of the amendment,⁷¹ it is reasonable to conclude that a two-thirds vote of all voting interests is required whether the declaration or bylaws is used as the vehicle for the amendment.

Although valid public policy may be served by legitimizing long-standing “illegal” consolidated financial operations for certain communities, it is submitted that the “invitation” which has been extended to other multi-condominium associations (which had found a way to comply with the previous law) may also result in unintended consequences. The Condominium Act requires the declaration of condominium to specify the percentage of, “and manner of sharing common expenses and owning common surplus” in a residential condominium, which must be the same as the ownership of undivided shares in the common elements.⁷² The Condominium Act further states that any amendment to the declaration, which changes the percentage of sharing common expenses, must receive unanimous approval of all unit owners and lienors.⁷³

Additionally, the provision in the declaration regarding the sharing of common expenses is a contractual right,⁷⁴ and the law in effect when those contracts were entered into (recording of the declarations of condominium), “is controlling as if engrafted onto the condominium documents.”⁷⁵ In addressing a somewhat analogous issue, the Second District Court of Appeal held that changes to the Condominium Act could not be applied to alter assessment allocation provisions in the declaration, even where the declaration incorporated future amendments to the

70. Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2757 (codified as amended at FLA. STAT. § 718.111(6) (Supp. 1998)).

71. FLA. STAT. § 718.110(1)(a) (1997).

72. FLA. STAT. § 718.104(4)(g) (1997).

73. FLA. STAT. § 718.110(4) (1997).

74. *Pepe v. Whispering Sands Condominium Ass’n*, 351 So. 2d 755 (Fla. 2d Dist. Ct. App. 1977).

75. *Suntide Condominium Ass’n v. Division of Fla. Land Sales, and Condominiums, Dep’t of Bus. Regulation*, 463 So. 2d 314, 317 (Fla. 1st Dist. Ct. App. 1984).

Condominium Act.⁷⁶ Further, since the declaration of condominium is a contract,⁷⁷ it is certainly arguable that the retroactive application of the 1998 amendments to section 718.111(6) of the Act will create an unconstitutional impairment of vested contract rights.⁷⁸

Another significant (and regrettably ambiguous) 1998 change to the condominium statute involves the insurance requirements of section 718.111(11)(a) of the Act⁷⁹ and the “budget guarantee” provision of section 718.116(9) of the Act.⁸⁰ As a result of Hurricane Opal, certain developers found they had unanticipated exposure arising out of uninsured or underinsured storm damage.⁸¹

The premise of a “budget guarantee” is that, during the initial sales phase, a developer should be excused from paying assessments on its inventory units, so as to not bear a disproportionate burden in maintenance of the community, when its “units” are typically unsold, and thus not “consuming” services of the condominium association.⁸² The “budget guarantee” language in section 718.116(9) of the Act permits the developer to excuse itself from the payment of common expenses on developer-owned units, so long as the developer guarantees in the purchase contracts, the prospectus, or the condominium documents, that assessments against non-developer unit owners will not exceed a stated dollar amount during the guarantee period.⁸³ In exchange for this excusal from paying assessments, the developer agrees to “cap” the nondeveloper unit owner’s assessments, and must further undertake to fund any deficit incurred in the operation of the condominium (including funding of reserves, unless properly waived) during the guarantee period.⁸⁴ Obviously, reconstruction of condominium property after a catastrophic storm event is a common expense of the condominium. If insufficient proceeds from insurance exist to reconstruct the community, then the developer would be called upon to fund any

76. *Island Manor Apartments, Inc. v. Division of Fla. Land Sales, Condominiums, and Mobile Homes*, 515 So. 2d 1327, 1329 (Fla. 2d Dist. Ct. App. 1987).

77. *Pepe*, 351 So. 2d at 757.

78. *Fleeman v. Case*, 342 So. 2d 815, 818 (Fla. 1976).

79. Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2757-59 (codified as amended at FLA. STAT. § 718.111(11)(a) (Supp. 1998)).

80. *Id.* § 7, 1998 Fla. Laws at 2780-81 (codified as amended at FLA. STAT. § 718.116(9)(a) (Supp. 1998)).

81. *Sun-Sentinel*, July 16, 1998, at § 1D, available in 1998 WL 12822301; *Tampa Tribune*, Aug. 18, 1997, at 1, available in 1997 WL 10802497; *Tampa Tribune*, May 31, 1997, at 4, available in 1997 WL 10789835, at *8.

82. Ch. 98-322, § 7, 1998 Fla. Laws 2780, 2780-81 (codified as amended at FLA. STAT. § 718.116(9) (Supp. 1998)).

83. *Id.*

84. FLA. ADMIN. CODE ANN. r. 61B-22.004 (1998).

reconstruction costs not covered by the nondeveloper unit owners' assessments, at the guaranteed level. While some might argue that with the rewards come the risks, the 1998 Legislature apparently decided to let developers "have their cake and eat it too."⁸⁵

Section 718.111(11)(a) of the Condominium Act now provides that "[a] unit-owner controlled association shall use its best efforts to obtain and maintain adequate insurance."⁸⁶ Previously, the law required all associations to use "best efforts" to obtain such insurance.⁸⁷ As to developer-controlled associations, the law now requires the association to use "due diligence" in obtaining and maintaining such insurance.⁸⁸ Neither the term "best efforts" nor "due diligence" are defined in the statute.⁸⁹ There is no expression of legislative intent, at least from the language of the statute itself, as to whether "due diligence" is intended to be a higher or lower standard than "best efforts."⁹⁰ Section 718.111(11)(a) of the Act, as amended, goes on to provide that a developer's "[f]ailure to obtain and maintain adequate insurance during any period of developer control shall constitute a breach of fiduciary responsibility by the developer appointed members of the board of directors of the association, unless said members can show that despite such failure, they have exercised due diligence."⁹¹ At least, this legislative pronouncement will soften the impact of a 1992 appellate court decision, which exonerated developer appointees to the board of directors in a claim of breach of fiduciary duty involving the failure to renew a fire insurance policy, when fire destroyed common area buildings.⁹²

The provisions of section 718.116(9) of the Act, which further implements this new policy, provides that "if a developer-controlled association has maintained all insurances required the common expenses incurred during the guarantee period resulting from a natural disaster or an act of God, which are not covered by insurance proceeds" may be assigned against all unit owners, as well as their successors and assigns, "on the date of such natural disaster or act of God."⁹³ The developer's units are, of

85. Similar legislation was introduced in the 1997 Legislative Session and failed to progress through the process.

86. FLA. STAT. § 718.111(11)(a) (Supp. 1998).

87. FLA. STAT. § 718.111(11)(a) (1997).

88. FLA. STAT. § 718.111(11)(a) (Supp. 1998).

89. *Id.*

90. *Id.*

91. Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2757 (codified as amended at FLA. STAT. § 718.111(11)(a) (Supp. 1998)).

92. *Munder v. Circle One Condominium, Inc.*, 596 So. 2d 144, 145 (Fla. 4th Dist. Ct. App. 1992).

93. Ch. 98-322, § 7, 1998 Fla. Laws 2781 (codified as amended at FLA. STAT. § 718.116(9) (Supp. 1998)).

course, included in any such assessment. It is interesting to note that the developer-controlled association is permitted to levy an assessment for "the common expenses incurred during the guarantee period," providing they "result" from a natural disaster or an act of God.⁹⁴ Therefore, not only would the actual cost of reconstruction be assessable against the unit owners, but also any other costs "resulting" from the natural disaster, which would presumably include engineering fees, attorney's fees, insurance consultant/adjuster fees, and perhaps more.

The new law does not clarify how the expenses are to be "assigned," and no treatment is given to the issue of whether the assessments would be booked to the units on an "accrual" basis, when the damage occurs, or on a "cash" basis, when the work is actually done.⁹⁵ The latter approach, cash basis, seems more practical and will possibly result in further developer excusal, since a developer will most likely have transferred title to units between the time of a casualty and the repair work being done.

Another insurance related change to the Condominium Act effectuated by the 1998 Legislature involves the issue of "fidelity bonding," which is also a misnomer, since there is typically no "bond" purchased, but rather an insurance policy, sometimes called an "employee dishonesty" or "crimes coverage" policy.⁹⁶ There have been previous legislative attempts to address this issue. For instance, in 1992, the Act was amended to implement a minimum schedule of fidelity bonds based upon the association's annual gross receipts.⁹⁷ The 1992 statute required "bonding" of any person who could "control or disburse" association funds, and specifically identified such persons as the association president, secretary, the treasurer, and any other person with check signing authority.⁹⁸ The new statute also requires "bonding" of persons who "control or disburse," using the same definitional scheme, but also stating that persons who "control or disburse" include, but are not limited to the president, secretary, treasurer, and any person with check signing authority.⁹⁹ It is unclear who else was intended to be covered.

Most significantly, the new law requires that the bond or insurance policy must cover "the maximum funds that will be in the custody of the

94. *Id.* § 7, 1998 Fla. Laws at 2781 (codified as amended at FLA. STAT. § 718.116(9)(a)(1) (Supp. 1998)).

95. *Id.*

96. *Id.* § 2, Fla. Laws at 2758 (codified as amended at FLA. STAT. § 718.111(11)(d) (Supp. 1998)).

97. Ch. 92-49, § 3, 1992 Fla. Laws 435, 444 (codified as amended at FLA. STAT. § 718.112(2)(j) (Supp. 1998)).

98. *Id.*

99. Ch. 98-322, § 2, 1998 Fla. Laws 2753, 2758 (codified as amended at FLA. STAT. § 718.111(11)(d) (Supp. 1998)).

association or its management agent at any one time.”¹⁰⁰ This language creates a potential ambiguity as to whether an association must obtain a fidelity bond for all of the funds that would be in the “custody . . . of its management agent,” when a large management company may control millions of dollars, for many different associations. It is doubtful that this was the legislative intent, or that the statute would be applied in that fashion.

Although this legislation is founded upon legitimate policy objectives, and perhaps reiterates advice that most community association legal practitioners would give to their clients anyway, whether the benefits outweigh the burdens remains to be seen. If an association levies a major special assessment for a significant repair project, it will have a large sum of money under its “control” at one time, although it may spend that money very quickly. It is unknown how the insurance market will adjust to the need for flexibility that will be necessary for associations in obtaining adequate insurance in such cases. Also, the law of supply and demand being what it is, it further remains to be seen whether insurance companies will adjust rates for “fidelity bonding,” which has heretofore been a fairly insignificant aspect of most associations’ insurance premiums, to account for increased exposure and/or its new “captive market.” It should also be noted that the Division has taken the position that the 1998 amendment to the fidelity bonding section of the statute will not be enforced by the Division as to pre-existing insurance contracts, until such contracts are up for renewal.¹⁰¹

Section 718.111(12)(c) of the Act has been amended to include the year-end financial reporting information required by the Act as part of the disclosure documents that are to be made available to prospective unit purchasers.¹⁰² Section 718.111(12) of the Act requires the association to maintain an “adequate number” of these year-end reports, along with copies of the declaration of condominium, articles of incorporation, bylaws, and rules, and all amendments to the foregoing, as well as the “Question and Answer Sheet.”¹⁰³ The “adequate number of copies” must be maintained “on the condominium property to ensure their availability to unit owners and prospective purchasers.”¹⁰⁴ This segment of the statute, which is not new, does not take into account that many condominium communities do not have on-site office facilities and, instead, a management company or other agent serves as the repository of official records.

100. *Id.*

101. See Memorandum from Bureau of Condominium Legal Department to Bureau Chief (June 19, 1998) (on file with the *Nova Law Review*).

102. Ch. 98-322, § 2, 1998 Fla. Laws 2753, 2759 (codified as amended at FLA. STAT. § 718.111(12)(c) (Supp. 1998)).

103. See FLA. STAT. § 718.111(12) (Supp. 1998).

104. See *id.*

The inclusion of the year-end financial reporting information as a required disclosure document is also enunciated in section 718.503(2) of the Act as part of the documents that a nondeveloper seller must give to a prospective buyer prior to closing.¹⁰⁵ Likewise, these year-end reports now also comprise part of the disclosure documents that a developer must append to the prospectus prior to the sale of a unit, as provided in section 718.504 of the Act.¹⁰⁶ This change is clearly an improvement to the statute, at least for those who believe that prospective condominium unit purchasers should “know what they are getting into” prior to the purchase of a unit. Providing year-end financial reports (although the statute is not clear, it presumably means the latest year-end report) will permit prospective purchasers to review the association’s reserve funding policy, and other assessment spending trends, such as special assessments.

Another financially oriented change to the Act was approved by the 1998 Legislature. There has been an ongoing debate within the condominium industry as to whether associations should be allowed to “commingle” operating funds and reserve funds. Proponents of “commingling” argue that associations should be allowed to maximize investment returns, which can usually be accomplished by obtaining the higher account balances affiliated with “commingling” all of the association funds in a single account.¹⁰⁷ Opponents of commingling investment and reserve funds argue that reserve funds are sacrosanct under the law, and should be kept out of “harm’s way,” lest the board of directors be tempted to spend money set aside for capital expenditures on operational needs.¹⁰⁸

The 1991 amendments to the Condominium Act prohibited an association from commingling investment and operating funds.¹⁰⁹ Prior to the effective date of this change, the 1992 Legislature changed section 718.111(15) of the Act to permit commingling of operating and reserve funds “for purposes of investment.”¹¹⁰ The game of “legislative ping-pong” continued when the 1995 Legislature once again absolutely prohibited

105. Ch. 98-322, § 5, 1998 Fla. Laws 2769, 2770 (codified as amended at FLA. STAT. § 718.503 (2) (Supp. 1998)).

106. Ch. 98-322, § 6, 1998 Fla. Laws 2770, 2770 (codified as amended at FLA. STAT. § 718.504 (Supp. 1998)).

107. Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2759 (codified as amended at FLA. STAT. § 718.111(15) (Supp. 1998)).

108. *Id.*

109. Ch. 91-103, § 4, 1991 Fla. Laws 724, 728 (codified as amended at FLA. STAT. § 718.111(15) (1991)).

110. Ch. 92-49, § 2, 1992 Fla. Laws 437, 440 (codified as amended at FLA. STAT. § 718.111(15) (Supp. 1992)).

commingling.¹¹¹ In the latest volley, associations may now, once again “commingle,” so long as the commingling is done for “investment purposes.”¹¹² Of course, only the future will tell whether the “anti-commingling” forces will once again have their way.

The 1998 Legislative session produced two amendments involving the election of condominium directors.¹¹³ The first is another example of a law of statewide application that exists to address the concerns of one Florida condominium association.¹¹⁴ Apparently, it was discovered that a condominium director in Dade County had been convicted of a felony.¹¹⁵ After the association determined that Florida law would not prohibit a convicted felon from serving on its board, legislative reform was sought to address this.¹¹⁶ During the session, proposed legislation was introduced that would prohibit any “felon” from serving on the board of directors of a condominium association.¹¹⁷ When it was pointed out to the legislation’s sponsors that this might prohibit expatriates of oppressive foreign governments (e.g., Cuba, Libya, etc.) from serving on a condominium board, the legislation’s sponsors wrote an amendment providing that the conviction must have occurred in a court of record in the United States.¹¹⁸ It was pointed out to the sponsors that an association only has ten to twenty days to mail out election ballots after receipt of unit owners’ self-nomination forms.¹¹⁹ Thus, they could not be expected to conduct criminal background checks within that time period. Therefore, sponsors approved further amendatory language for the Bill, which provided that an association’s election of a convicted felon would not affect the validity of any action of the association’s board of directors taken prior to the discovery of the conviction.¹²⁰

As a result, section 718.112(2)(d)1 of the Condominium Act now provides that in order to be eligible for board membership, a person must

111. Ch. 95-274, § 35, 1995 Fla. Laws 2524, 2525 (codified as amended at FLA. STAT. § 718.111(15) (1995)).

112. Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2759 (codified as amended at FLA. STAT. § 718.111(15) (Supp. 1998)).

113. Ch. 98-322, § 3 1998 Fla. Laws 2759, 2762–64 (codified as amended at FLA. STAT. §§ 718.112(2)(d)1, (2)(d)8 (Supp. 1998)).

114. Ch. 98-322, § 3, Fla. Laws 2759, 2762 (codified as amended at FLA. STAT. § 718.112) (Supp. 1998)).

115. *Id.*

116. *Id.*

117. *Id.*

118. H.R. 3321, 15th Leg. Sess., Reg. Sess. (Fla. 1998).

119. *Id.* See also FLA. STAT. § 718.112(2)(d)3 (1997).

120. H.R. 3321, 15th Leg., Reg. Sess. (Fla. 1998).

meet the requirements "set forth in the declaration."¹²¹ Further, the law provides that "[a] person who has been convicted of any felony by any court of record in the United States and who has not had his or her right to vote restored . . . is not eligible for board membership."¹²² Finally, this clause in the statute now provides that "[t]he validity of an action by [a] board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony."¹²³

Although this statute is certainly an instructive case study on how condominium legislation in Florida is sometimes conceived and enacted, it is doubtful that this law will have any practical effect on the operation of most condominium associations. Perhaps the most problematic aspect of the law, and presumably an unintended consequence, is the language in the new statute which states that in order to be eligible for board membership, a person must meet the requirements "set forth in the declaration."¹²⁴ As a practical matter, very few declarations of condominium associations contain qualifications for board membership, and the Condominium Act does not require the declaration to contain such information.¹²⁵ In fact, the Act requires the bylaws to set forth the manner of selection of boards of directors.¹²⁶ It could now be argued that the failure of a declaration of condominium to establish board membership requirements results in any person, whether or not a unit owner, being eligible to run for the board, with qualifications contained in the articles of incorporation or bylaws having no consequence. It is submitted that the legislature did not intend this result.

The other statutory change involving board elections involves a long-standing conflict between provisions of the Not-For-Profit Corporations Act,¹²⁷ and a Division rule¹²⁸ involving whether vacancies on condominium boards are filled for the unexpired term thereof, or only until the next annual election.¹²⁹ Notwithstanding the general precedence that the statute should be afforded over an agency rule, the Division has historically adopted the position that the rule stating that vacancies are filled only through the next general election is enforceable and would be enforced.¹³⁰ The 1998 amendment eliminates any potential inconsistency, and clearly negates the

121. FLA. STAT. § 718.112(2)(d)1 (Supp. 1998).

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* FLA. STAT. § 718.104 (1997).

126. *See* FLA. STAT. § 718.112(2)(a)(1) (1997).

127. FLA. STAT. § 617.0809 (1997).

128. FLA. ADMIN. CODE ANN. r. 61B-23.0021(13) (1998).

129. *Id.*

130. *Id.*

Division's rule.¹³¹ The statute now provides that vacancies occurring on a board of directors, before the expiration of a term, may be filled by the remaining directors or sole director, or the directors may elect to hold an election in conformance with statutory procedures.¹³² In either case, "[u]nless otherwise provided in the bylaws, a board member appointed or elected . . . shall fill the vacancy for the unexpired term of the seat being filled."¹³³

In another game of "legislative ping-pong,"¹³⁴ the legislature has once again attempted to address the percentage vote required to waive or spend "reserve" funds.¹³⁵ There are two issues involved in this subject. First, is the vote required to waive or reduce the funding of reserves for a given year's budget,¹³⁶ and second, the vote required to spend those statutory reserves (or the interest earned thereon) for a nonscheduled purpose, after the funds have been so designated.¹³⁷ The 1977 version of the Act did not even mandate the establishment of reserves.¹³⁸ In 1979, the Act was amended to require the funding of reserves for roof replacement, building painting, and pavement resurfacing.¹³⁹ The 1979 statute further permitted waiver of reserves by a "two-thirds vote at a duly called meeting of the association."¹⁴⁰ The two-thirds standard was reduced to a majority in 1980.¹⁴¹ The 1991 amendment to the statute added the clause that "[r]eserve funds and any interest accruing thereon must remain in the reserve account for authorized reserve expenditures, unless their use for other purposes is approved in advance by a vote of the majority of the voting interests present at a duly called meeting of the association."¹⁴²

131. FLA. STAT. § 718.112(2)(d)1 (Supp. 1998).

132. *Id.*

133. Ch. 98-322, § 3, 1998 Fla. Laws 2759, 2764 (codified as amended at FLA. STAT. § 718.112) (Supp. 1998)).

134. See *supra* Part I.A for a discussion regarding "commingling."

135. Ch. 98-322, § 3, 1998 Fla. Laws 2759, 2765 (amending FLA. STAT. § 718.112).

136. See FLA. STAT. § 718.112(2)(f)2 (Supp. 1998).

137. See FLA. STAT. § 718.112(2)(f)3 (Supp. 1998).

138. See FLA. STAT. § 718.112(2)(f)2 (1977).

139. Ch. 79-314, § 6, 1979 Fla. Laws 1666, 1667 (codified as amended at FLA. STAT. § 718.112(2) (k) (1979)). A later amendment added any other component with a deferred maintenance expense or replacement cost exceeding \$10,000.00. Ch. 86-175, § 6, 1986 Fla. Laws 1207, 1207 (codified as amended at FLA. STAT. § 718.112(2)(f)(2) (Supp. 1986)).

140. Ch. 79-314, § 6, 1979 Fla. Laws 1666, 1667 (codified as amended at FLA. STAT. § 718.112(2)(k) (1979)).

141. Ch. 80-323, § 2, 1980 Fla. Laws 1391, 1392 (codified as amended at FLA. STAT. § 718.112(2)(k) (Supp. 1980)).

142. Ch. 91-103, § 5, 1991 Fla. Laws 728, 731 (codified as amended at FLA. STAT. § 718.112(2)(f)(3) (1991)).

In 1994, the statute was amended to eliminate the reference to “members present” for votes to waive reserves, with the required vote being a majority “of the total voting interests voting in person or by limited proxy . . . at a duly called meeting of the association.”¹⁴³ However, the parallel provision of section 718.112(2)(f)3 of the Act, relating to use of reserves for nonscheduled purposes, was not amended, so reserves could still be used for nonscheduled purposes by a vote of the majority “of the voting interests present at a duly called meeting.”¹⁴⁴

The 1995 Legislature did not help matters when it addressed these voting requirements. Section 718.112(2)(f)2 of the Act was amended to strike the reference to “majority of the total voting interests voting in person or by limited proxy” and to replace same with the standard “by a majority vote at a duly called meeting of the association.”¹⁴⁵ It would be fair to conclude that the 1995 version of the statute stood for the proposition that waiver of reserves could be effectuated by a “majority of a quorum” vote. Unfortunately, the 1995 Legislature also amended section 718.112(2)(f)3 of the Act, and specifically struck the word “present” from the statute, leaving this subsection of the statute saying that use of reserve funds or interest accruing thereon for nonscheduled purposes could only be authorized by “a vote of the majority of the voting interests, voting in person or by proxy at a duly called meeting of the association.”¹⁴⁶ Many commentators perceived this as a “flip-flop” of the previous year’s law¹⁴⁷ to mean that reserves could now be waived by a majority of a quorum, but once established, use of reserves for nonscheduled purposes would require approval of a majority of the entire voting interests.

Although the 1998 Legislature certainly chose a worthwhile candidate for statutory clarification, its amendment to section 718.112(2)(f)3 of the Act falls short of the mark.¹⁴⁸ The reference to “a vote of the majority of the voting interests voting in person or by limited proxy at a duly called meeting of the association” is replaced by the standard of “a majority vote at a duly called meeting of the association.”¹⁴⁹ It is submitted that the difference

143. Ch. 94-350, § 7, 1994 Fla. Laws 2505, 2508 (codified as amended at FLA. STAT. § 718.112(2)(f)(2) (Supp. 1994)).

144. Ch. 94-350, § 7, 1994 Fla. Laws 2505, 2508 (codified as amended at FLA. STAT. § 718.112(2)(f)(3) (Supp. 1994)).

145. Ch. 95-274, § 36, 1995 Fla. Laws 2525, 2528-29 (codified as amended at FLA. STAT. § 718.112(2)(f)(2) (1995)).

146. Ch. 95-274, § 36, 1995 Fla. Laws 2525, 2529 (codified as amended at FLA. STAT. § 718.112(2)(f)(3)).

147. See FLA. STAT. § 718.112(2)(f)3 (Supp. 1994).

148. Ch. 98-322, § 3, 1998 Fla. Laws 2759, 2765-66 (codified as amended at FLA. STAT. § 718.112(2)(f)(3) (Supp. 1994)).

149. *Id.*

between the two concepts, at least based upon the grammar and words used, is difficult to perceive. It is assumed that since the legislature undertook amendment of this section, it was intended to amend prior law, and that the legislature would not engage in a futile act. The Division has espoused this view and has announced its position that both the vote to waive or reduce reserves, as well as the vote to use reserves (or the interest earned thereon) for nonscheduled purposes is now based on the "majority of the quorum" standard.¹⁵⁰

In a relatively minor change to the Act, section 718.112(2)(f)1 now provides that an association no longer needs to list the budget categories specified in section 718.504(20) of the Act, if those expenses do not apply to a particular association.¹⁵¹ Pursuant to a Division rule,¹⁵² an association's budget is required to reflect "n/a" in the column beside items that do not apply to that association (e.g., recreational lease fees, common area taxes, etc.).¹⁵³ Although it is debatable whether the previous statute required such a silly disclosure anyway,¹⁵⁴ the Division was nonetheless pursuing non-adherence to this technicality as a violation of the law. Therefore, although one would hope that matters of greater import should command the attention of our elected and appointed representatives, it appears appropriate to have eliminated this problem.

The final amendment to the Condominium Act that was adopted in 1998 deals with the allocation of bulk cable television service charges to a condominium association.¹⁵⁵ Prior to 1991, it had been held that a condominium association's provision of cable television services, as part of the condominium budget, was not a proper common expense.¹⁵⁶

In 1991, the legislature amended chapter 718.115(b) of the Act to provide that cable television services would be a proper common expense.¹⁵⁷

The 1991 statute provided that "the cost of a master antenna television or duly franchised cable television service obtained pursuant to a bulk contract shall be deemed a common expense" as so provided in the declaration, and if

150. See FLA. ADMIN. CODE ANN. r. 61B-22.005(7) (1998).

151. FLA. STAT. § 718.112(2)(f)1 (Supp. 1998).

152. FLA. ADMIN. CODE ANN. r. 61B-22.003(1)(d) (1998).

153. *Id.*

154. The 1997 version of section 718.112(2)(f)1 of the *Florida Statutes* required the proposed budget to show certain expense classifications "if applicable." FLA. STAT. § 718.112(2)(f)1 (1997).

155. Ch. 98-322, § 4, 1998 Fla. Laws 2768, 2769 (codified as amended at FLA. STAT. § 718.115 (Supp. 1998)).

156. See *In Re: Petition For Declaratory Statement of Becker, Courtyards of Broward Condominium Ass'n, Inc.* DFLSCMH Case No. 89L-75.

157. Ch. 91-116, §3, 1991 Fla. Laws 1241, 1241-42 (codified as amended at FLA. STAT. § 718.115(1)(b) (1991)).

the declaration of condominiums did not so provide, bulk cable television services could still be a proper common expense, "if it is designated as such in a written contract between the board of administration and the company providing . . . cable television service."¹⁵⁸ It seemed that the legislative intent (or the intent of the lobbyists for the cable industry) was that if the board so wished, a condominium association would be able to buy bulk cable television service, and charge all of the members. Obviously, it is not very difficult to designate the service as a common expense in the contract. The perceived inequity created by this law was that many condominiums assess "common expenses" based upon the square footage of the individual units, as opposed to equal assessments for each unit. Accordingly, an apartment a few hundred square feet larger than the unit next door could pay more for the exact same services under a bulk cable arrangement (a specified number of outlets, basic channels, etc.). Of course, in any condominium association with assessments keyed to unit size, the same could be said for all services "consumed" (and paid for) by the larger units on a greater percentage basis than the smaller units.

In an apparent effort to achieve equity, the 1998 Legislature has created an amorphous new category of "common expenses" that may not be equal to a unit's ownership of the common elements, nor its sharing of other "common expenses."¹⁵⁹ The 1998 amendment to section 718.115(1)(b) of the Act provides:

If the declaration [of condominium] does not provide for the cost of . . . cable television . . . as a common expense, the board of administration may [still] enter into . . . a contract [for bulk service] and the cost . . . will be a common expense but allocated on a per-unit basis rather than a percentage basis if the declaration provides for other than an equal sharing of common expenses.¹⁶⁰

The law further provides that any contract entered into before July 1, 1998, and where the cost of services is not divided equally among all unit owners, the internal allocation of the expenses (i.e. to an equal basis), may be made by vote of "a majority of the voting interests present at a regular or special meeting of the association."¹⁶¹ Although the statute presents some of the constitutional and retroactivity issues that pertain to the "phase" condominium associations' consolidated financial operations,¹⁶² it appears

158. *Id.*

159. Ch. 98-322, § 4, 1998 Fla. Laws 2768, 2769 (codified as amended at FLA. STAT. § 718.115) (Supp. 1998)).

160. *Id.*

161. *Id.*

162. *See supra* Part I.A.

that certain associations now have a vehicle to more “fairly allocate cable television charges” (although owners of the smaller units probably do not think so).

B. Cooperatives

Although lip service is usually given to the need to keep changes to the Cooperative Act¹⁶³ in step with changes to the Condominium Act, the reality is that this does not happen. Although the cooperative form of ownership has been statutorily recognized in Florida since 1974,¹⁶⁴ cooperative development in Florida has been limited. The most often stated reason is that the mortgage banking industry is not comfortable with the concept of loaning money secured by a share of stock and a “muniment of title,” as opposed to a fee simple deed to real estate. In the writer’s experience, there are very few residential cooperative apartment buildings throughout the state, and there has been almost no cooperative development for new apartment buildings in Florida for the last fifteen years. The bulk of cooperatives which are still being created are “mobile home cooperatives,” as defined in section 723.0791 of the *Florida Statutes*.¹⁶⁵ The most often stated reason why there is still cooperative development in the mobile home context is that most of these communities are the consequence of residents’ purchase of rental mobile home parks (“park buy-outs”). Since the Cooperative Act¹⁶⁶ does not require lot surveys to create a valid cooperative, as would the Condominium Act,¹⁶⁷ or a platted subdivision,¹⁶⁸ the park owners selling the parks, and the residents buying the parks, can save substantial costs by avoiding a survey requirement.

Like legislative amendments in years past, the 1998 amendments to the Cooperative Act did not keep pace with the 1998 amendments to the Condominium Act. Most of the “Division rule” provisions from chapter 98-195¹⁶⁹ were included, while none of the “substantive” changes from chapter 98-322¹⁷⁰ were included in the Cooperative Act. The clauses that were included are essentially identical to those pertinent to condominiums, discussed above. Some include thirty days notice after recording the

163. FLA. STAT. § 719 (1997).

164. FLA. STAT. § 711.42–47 (Supp. 1974). *See also* Ch. 74-104, § 15, 1974 Fla. Laws 163, 176 (codified as amended at FLA. STAT. §§ 711.41–47 (Supp. 1974)).

165. FLA. STAT. § 723.0791 (1997).

166. FLA. STAT. § 719 (1997).

167. FLA. STAT. § 718.104(4)(e) (1997).

168. *Id.*

169. 1998 Fla. Laws ch. 98-195 (codified as amended at FLA. STAT. § 718 (Supp. 1998)).

170. *See supra* Part I.A.

cooperative documents,¹⁷¹ notice to the Division of dissolution or merger;¹⁷² board and committee member right to “agree or disagree” with board or committee action;¹⁷³ provision for telephonic board and committee conference calls;¹⁷⁴ requirement that unit owner meeting participation rules be in writing;¹⁷⁵ Division rulemaking authority for transfer of control;¹⁷⁶ requirement for filing phase cooperative documents with the Division;¹⁷⁷ prohibition against closing until disclosure documents have been provided to the Division;¹⁷⁸ provision for waiver of fifteen-day voidability;¹⁷⁹ and Division rule making authority with respect to conversion.¹⁸⁰

C. Homeowners' Associations

When Florida first enacted a homeowners' association statute in 1992,¹⁸¹ many felt that the “camel had gotten its nose in the tent” and that the statutory regulation of homeowners' associations would suffer the same politically driven growth that has plagued the condominium community.

Fortunately, at least so far, those prognostications have not come true. The growth of the homeowners' association statute¹⁸² seems to be somewhat more controlled than legislative developments in the condominium industry. What the future holds, of course, remains to be seen. Perhaps indicative of things to come is legislation that was introduced for homeowners' associations in the 1998 Legislative Session, but not passed. One bill,¹⁸³ if passed, would have placed homeowners' associations¹⁸⁴ under the jurisdiction of the Division. The bill would have required, *inter alia*, arbitration of homeowners' association “disputes” in the Division's condominium arbitration program.

171. *See supra* Part I.A.

172. *See supra* Part I.A.

173. *See supra* Part I.A.

174. *See supra* Part I.A.

175. *See supra* Part I.A.

176. *See supra* Part I.A.

177. *See supra* Part I.A.

178. *See supra* Part I.A.

179. *See supra* Part I.A.

180. *See supra* Part I.A.

181. Ch. 92-49, § 34, 1992 Fla. Laws 488, 488 (codified as amended at FLA. STAT. § 617.302 (Supp. 1992)).

182. *See* FLA. STAT. § 617.301 (1997 & Supp. 1998).

183. S. 2068, 15th Leg., Reg. Sess. (Fla. 1998); H.R. 4129, 15th Leg. Reg. Sess. (Fla. 1998).

184. *See* section 617.301(7) of the *Florida Statutes* for the definition of a “homeowners' association.” FLA. STAT. § 617.301(7) (1997).

The legislation which did pass for homeowners' associations is found in chapter 98-261 of the *Laws of Florida*, which became law without the Governor's approval on May 28, 1998 and became effective on October 1, 1998.¹⁸⁵ The original version of the bill contained a right to rescind contracts for the sale and purchase of parcels in homeowners' association communities for failure to comply with disclosure obligations of the statute.¹⁸⁶ At the behest of the developers' and home builders' lobbies, the ultimate bill was substantially watered down, with the rescission remedy being the main casualty of the negotiation process.¹⁸⁷

Section 617.303(8) of the statute has been amended to require developer-controlled associations and developers to maintain association funds separately from the developer's funds, and separately from the funds of any other community association.¹⁸⁸ Similar to the recent changes to the condominium statute,¹⁸⁹ the law for homeowners' associations has been amended to provide that reserve and operating funds of the association shall not be commingled prior to turnover,¹⁹⁰ although the association "may jointly invest reserve funds."¹⁹¹ This language is apparently intended to permit the pre-turnover "commingling" of operating and reserve funds for "investment purposes," as is the case for condominiums. After turnover, there appears to be no prohibition against "commingling," for investment purposes or otherwise.

Section 617.307 of the statute pertaining to homeowners' associations has been amended by the creation of a new sub-section (3).¹⁹² This new clause provides a "laundry list" of items that a developer is required to turn over to the board of directors of the homeowners association within ninety days of transition of control from the developer to the nondeveloper homeowners.¹⁹³ The list is similar to the list for condominiums,¹⁹⁴ with the most notable omission being the requirement for an audit.¹⁹⁵

185. 1998 Fla. Laws 98-261.

186. H.R. 3321, 15th Leg. Sess., Reg. Sess. (Fla. 1998).

187. Ch. 98-261, § 4, 1998 Fla. Laws 2280, 2281 (codified as amended at FLA. STAT. § 689.26 (Supp. 1998)).

188. Ch. 98-261, § 1, 1998 Fla. Laws 2277, 2278 (codified as amended at FLA. STAT. § 617.303 (Supp. 1998)).

189. *See supra* Part I A.

190. Apparently they may be commingled after turnover. Ch. 98-261, § 1, 1998 Fla. Laws 2277, 2278 (codified as amended at FLA. STAT. § 617.307(3) (Supp. 1998)).

191. *Id.*

192. Ch. 98-261, § 2, 1998 Fla. Laws 2278, 2278-79 (codified as amended at FLA. STAT. § 617.303 (Supp. 1998)).

193. *Id.*

194. *See* FLA. STAT. § 718.301(4) (1997).

195. *See* FLA. STAT. § 718.301(4)(c) (1997).

A new section 617.3075 has been added to the law for homeowners' associations, which takes aim at apparent developer abuses involving the inclusion of onerous terms in homeowners' association documents.¹⁹⁶ New section 617.3075 declares that "the public policy of [Florida] prohibits the inclusion or enforcement of certain types of clauses in homeowners' association documents."¹⁹⁷ Among the forbidden clauses are those which have the effect of granting a developer unilateral ability to change homeowners' association documents, including declaration of covenants, articles of incorporation, and by-laws, after transition of control.¹⁹⁸ Also forbidden are clauses that prohibit or "restrict" homeowners' associations from filing a lawsuit against the developer after turnover.¹⁹⁹ Modern practice for many developers includes governing document restrictions against post-turnover suits, usually involving a requirement for supermajority from the property owners.²⁰⁰ Finally, clauses that permit a developer after transition of control to cast votes in an amount that exceed one vote per residential lot are declared to be against public policy.²⁰¹

The new statute declares all such clauses, granting a developer unilateral amendment rights after turnover, lawsuit restrictions or post-transition preferential voting rights, to be "null and void as against the public policy of this state."²⁰² The legislature appears to provide a "grandfathering" clause in section 617.305(2) of the statute,²⁰³ wherein it states that the public policy described above "prohibits the inclusion or enforcement of such clauses created on or after the effective date of this section."²⁰⁴ Since the clauses are presumably "created" when the governing documents are recorded, filed, or created, it appears that the legislature did not intend for this law to apply to pre-existing governing documents for homeowners' associations.

The final amendment to chapter 98-261 of the *Florida Laws* does not actually involve the statute for homeowners' associations,²⁰⁵ but rather chapter 689.26 of the *Florida Statutes*, which somewhat generically

196. Ch. 98-261, § 3, 1998 Fla. Laws 2279, 2279-80 (codified at FLA. STAT. § 617.3075 (Supp. 1998)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Ch. 98-261, § 3, 1998 Fla. Laws at 2279-80 (codified at FLA. STAT. § 617.3075 (Supp. 1998)).

202. *Id.*

203. *Id.*

204. *Id.*

205. FLA. STAT. § 718.301 (1997).

regulates conveyances of land.²⁰⁶ Section 689.26 has been amended²⁰⁷ to require any contract or agreement for sale of a parcel of land in a community operated by a homeowners' association to incorporate a bold faced disclosure summary, as well as "a statement that the potential buyer should not execute the contract or agreement until they have received and read the disclosure summary required [by the law]."²⁰⁸ Unfortunately, the law contained no remedy for its violation.²⁰⁹ As noted above, the right to rescind for statutory noncompliance was removed from the final version of the Bill.²¹⁰

II. APPELLATE COURT DECISIONS

A. *Condominium Dispute Jurisdiction; Arbitration*

One of the most positive effects of the 1991 changes to the Condominium Act²¹¹ was the institution of a mandatory, nonbinding program for the arbitration of condominium disputes,²¹² although the legislative findings "that unit owners are frequently at a disadvantage when litigating against an association"²¹³ and "that the courts are . . . overcrowded with condominium . . . disputes"²¹⁴ are suspect in light of the absence of any known empirical data to support those findings. Nonetheless, it is clear that the arbitration process for the resolution of condominium "disputes" has been a significant improvement to the industry, providing a forum for parties to condominium disputes a reasonable opportunity to be heard. Although each citizen is guaranteed access to the courts,²¹⁵ the simple truth of the matter is that harried circuit court judges are often not the best public servants to hear many condominium disputes. In many cases, the enforcement or interpretation of a house rule or internal policy may seem petty or inconsequential. In other cases, the intricacies of complex or poorly written statutory provisions are foreign to many trial judges, many of whom

206. FLA. STAT. § 689.26 (1997).

207. Ch. 98-261, § 4, 1998 Fla. Laws 2280, 2280-81 (codified as amended at FLA. STAT. § 689.26 (Supp. 1998)).

208. *Id.*

209. *Id.*

210. *Id.*

211. *See supra* Part I A.

212. Ch. 91-103, § 5, 1991 Fla. Laws 728, 732 (codified as amended at FLA. STAT. § 718.112 (1991)); ch. 92-49, § 23, 1998 Fla. Laws 468, 468 (codified as amended at FLA. STAT. § 719.1255 (Supp. 1998)).

213. FLA. STAT. § 718.1255(3)(a) (1997).

214. *Id.* § 718.1255(3)(b).

215. *See* FLA. CONST. art. I, § 21.

do not come from real estate or corporate law backgrounds, and all of whom are called upon to be “experts” in almost any aspect of Florida’s laws, on any given day.

Arbitrators appointed by the Division are accustomed to mundane matters²¹⁶ and are also well schooled in some of the subtle complexities of Florida condominium law, such as the difference between a material modification of appurtenances²¹⁷ and material alterations of common elements.²¹⁸

During the past several legislative sessions, there has been a continuous effort to refine what types of “disputes” will be resolved in the Division’s arbitration program, and what matters must still be referred to court. Likewise, there has been a noteworthy amount of reported appellate litigation involving the topic. For the period covered by this survey, four reported appellate decisions touch upon the issue of what “disputes” are arbitrable or how the court must interact in the process.

In *Cypress Bend Condominium I Ass’n, Inc. v. Dexner*,²¹⁹ the Association and Mr. Dexner entered into arbitration proceedings regarding Dexner’s alleged violation of condominium regulations.²²⁰ Upon entry of an adverse arbitration order, Dexner filed suit seeking a trial *de novo* pursuant to section 718.1255(4) of the *Florida Statutes*.²²¹ “While the order contained a certificate of service by mail dated May 19, 1997, Dexner did not file his action until June 19, 1997, thirty-one (31) days later.”²²²

The Association thereafter filed a motion in the trial court for summary judgment, arguing that the suit was untimely filed pursuant to Rule 61B-45.343(2) of the *Florida Administrative Code*, and parallel provisions of the Act.²²³ The Association argued that the trial court did not have jurisdiction, due to Dexner’s untimely filing of a complaint for trial *de novo*.²²⁴

The circuit court denied the Association’s motion, holding that since Dexner had served a copy of this suit by mail within thirty-five days of the order, it was timely pursuant to Rule 60Q-2.002 of the *Florida Administrative Code*, which allows five days for mailing.²²⁵ The Fourth District Court of Appeal found the thirty day requirement of the statute and

216. For example, the most recent Subject Matter Index published by the Division’s arbitration program discloses some 60 reported Final Orders on pet disputes.

217. FLA. STAT. § 718.110(4) (1997).

218. FLA. STAT. § 718.113(2) (1997).

219. 705 So. 2d 681 (Fla. 4th Dist. Ct. App. (1998)).

220. *Id.* at 681.

221. *Id.* (citing FLA. STAT. § 718.1255(4) (1997)).

222. *Id.*

223. *Id.* (citing FLA. ADMIN. CODE ANN. r. 60Q-2.002 (1998)).

224. *Dexner*, 705 So. 2d at 681.

225. *Id.* at 681 (citing FLA. ADMIN. CODE ANN. r. 60Q-2.002 (1998)).

rule to be jurisdictional.²²⁶ Citing *Markham v. Moriarty*,²²⁷ the fourth district held that the circuit court exceeded its jurisdiction by not granting the Association's motion.²²⁸

In *Summit Towers Condominium Ass'n v. Coren*,²²⁹ a unit owner filed suit against the condominium association regarding the Board's assignment of parking spaces.²³⁰ Although the court characterized the complaint as alleging "multiple theories in several counts,"²³¹ the court stated that the unit owner essentially alleged that the board members preferentially assigned themselves additional parking spaces unavailable to other unit owners.²³² The unit owners' complaint sought declaratory and injunctive relief, as well as damages.²³³

The appellate court ruled that the trial court erred in denying the Association's motion to stay the action pending arbitration under the Condominium Act.²³⁴ The court rejected the unit owner's contention that the dispute involved "title to any unit or common element,"²³⁵ which is excluded from the statutory definition of "dispute", and ruled that the "dispute" involved the board's authority to require a unit owner to "take any action, or not to take any action, involving that owner's unit or the appurtenances thereto,"²³⁶ which is included in the statutory definition.²³⁷ Although the court does not provide an extended analysis of the "multiple theories" asserted by the unit owner, the case is consistent with those cited by the court, which favor sending condominium "disputes" to arbitration wherever possible.²³⁸

The case of *Ruffin v. Kingswood E. Condominium Ass'n*,²³⁹ runs counter to the above noted trend in the cases of "when in doubt, arbitrate."²⁴⁰ The Association brought an arbitration proceeding against unit owner Mary

226. *Id.*

227. 575 So. 2d 1307 (Fla. 4th Dist. Ct. App. 1991).

228. *Dexner*, 705 So. 2d at 682.

229. 707 So. 2d 416 (Fla. 4th Dist. Ct. App. 1998).

230. *Id.* at 417.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Coren*, 707 So. 2d at 417.

235. FLA. STAT. § 718.1255(1)(b) (1997).

236. FLA. STAT. § 718.1255(1)(a)(1) (1997).

237. *Coren*, 707 So. 2d at 417.

238. See *Carlandia Corp. v. Obernauer*, 695 So. 2d 408 (Fla. 4th Dist. Ct. App. 1997); *Blum v. Tamarac Fairways Ass'n*, 684 So. 2d 826 (Fla. 4th Dist. Ct. App. 1996).

239. No. 97-1683, 1998 WL 689766, *1, *1 (Fla. 4th Dist. Ct. App. Oct. 7, 1998). Telephone conversation with Rod Tennyson, Counsel for Appellee Association (Sept. 2, 1998).

240. *Id.*

Ruffin, and her son, Paul Ruffin.²⁴¹ The Association alleged that Paul Ruffin was a tenant, and that because of physical altercations on the Association's premises involving Mr. Ruffin, both Mrs. Ruffin (the mother/unit owner) and Mr. Ruffin (the son/tenant) were in violation of the condominium documents, which prohibited unit owners from "permitting immoral or illegal acts or a nuisance on the property."²⁴² In the arbitration action, the Association requested that the Division issue an order requiring Mr. Ruffin to vacate the premises, and to further restrain Mr. Ruffin from further entry onto the condominium property. Mr. Ruffin, in his answer to the Association's petition, informed the arbitrator that his mother had moved away from the condominium and that the matter was therefore moot.²⁴³ The Association countered that because it still "wanted protection against [Mr. Ruffin's] possible return to the premises," it was entitled to an order stating that "Mr. Ruffin shall remain away and off the condominium property."²⁴⁴ Although not clearly stated in the opinion, it appears that the Division obliged the Association and entered such an order.

Mr. Ruffin filed a complaint for trial *de novo* within the prescribed time frame.²⁴⁵ "The Association moved for summary judgment . . . on the ground that the whole case was moot because [Mrs.] Ruffin had moved from the condominium (and later died)."²⁴⁶ Thus, the Association argued, Mr. Ruffin, who was never a unit owner, and allegedly a "tenant," had no "standing to request a trial *de novo*."²⁴⁷ The trial court accepted the Association's argument, entered summary judgment on this ground, and reserved jurisdiction as to an award of attorney's fees.²⁴⁸

In a surprising decision, the Fourth District Court of Appeal, *sua sponte*, ruled that the Division did not have subject matter jurisdiction in the initial arbitration action as to Mr. Ruffin.²⁴⁹ The court held that subject matter jurisdiction is conferred upon a court by constitution or statute and may not be created by waiver.²⁵⁰ The court ruled that "[t]he Division should have dismissed the petition prior to the entry of the order enjoining" Mr. Ruffin from coming on to the condominium property.²⁵¹ Thus, the fourth

241. *Id.*

242. *Id.*

243. *Id.*

244. *Ruffin*, 1998 WL 689766, at *1.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Ruffin*, 1998 WL 689766, at *2.

250. *Id.*

251. *Id.*

district held that the request for “trial de novo was not moot.”²⁵² The court concluded that since Mr. Ruffin had requested the vacation of the arbitration order in his complaint, and “because the arbitrator had no subject matter jurisdiction to enter the order [in the first instance], . . . the relief [sought] should have been granted.”²⁵³

Although the result in this case will apparently create certain inefficiencies for the litigants therein,²⁵⁴ and although it is unclear why the appellant, Mr. Ruffin, would have an incentive to continue litigating this case if his mother had moved away from the condominium and died assuming he did not intend to return,²⁵⁵ it is submitted that the court’s decision is technically correct if the arbitrator indeed lacked “subject matter jurisdiction.” Curiously, however, the fourth district in *Ruffin* does not consider the decision of its sister court in the third district case of *Sterling Condominium Ass’n v. Herrera*.²⁵⁶ Although *Sterling* arose in a slightly different procedural setting, the third district held “that the statute is not jurisdictional and that, therefore, the circuit court did not lack subject matter jurisdiction to hear this dispute.”²⁵⁷

The third district in *Sterling* also noted that the unit owner waived her right to compel arbitration by filing an answer and otherwise actively participating in circuit court litigation.²⁵⁸ It is unclear from the *Ruffin* case why the same waiver arguments would not apply to Mr. Ruffin’s conduct, unless section 718.1255 of the Condominium Act does invoke “subject matter jurisdiction.”²⁵⁹ It is arguable that a conflict now exists between the third and fourth districts as to this issue.

In *Clark v. England*,²⁶⁰ the unit owner, England, filed a complaint in circuit court against the condominium association and certain individual directors for malicious prosecution, negligence, breach of fiduciary duty, slander, and conspiracy.²⁶¹ The Association and its directors filed a motion

252. *Id.*

253. *Id.* at *3.

254. The Association presumably still has standing under section 718.303(1)(e) of the *Florida Statutes* to pursue court action against a tenant, although the action may be moot. FLA. STAT. § 718.303(1)(e) (1997).

255. The prospect of exposure to the Association’s attorney’s fees seems to be a plausible theory.

256. 690 So. 2d 703 (Fla. 3d Dist. Ct. App. 1997).

257. *Id.* at 704–05.

258. *Id.* at 705.

259. *See Ruffin v. Kingswood E. Condominium Ass’n*, No. 97–1683, 1998 WL 689766, *1, *1 (Fla. 4th Dist. Ct. App. Oct. 7, 1998).

260. 715 So. 2d 365 (Fla. 5th Dist. Ct. App. 1998).

261. *Id.* at 366.

to stay in the circuit court action and to compel arbitration.²⁶² The circuit court denied the motion to refer the matter to arbitration.²⁶³ The Association and its directors appealed.²⁶⁴

In affirming the trial court's ruling, the Fifth District Court of Appeal, after quoting much of the statute, stated that section 718.1255 of the *Florida Statutes* "applies only to disputes between a unit owner and a condominium association."²⁶⁵ The court held that the "prevailing authority's interpretation of the statute" requires that the only litigants entitled to participate in arbitration proceedings are unit owners and associations.²⁶⁶ Without providing much detail as to the underlying facts of the case, the court concluded that "[a]lthough [Mrs. England] was a unit owner when she filed [suit] in September of 1997, she was not a unit owner when [her] causes of action arose, on January 14, 1997."²⁶⁷

The dissenting opinion sheds a little more light on the underlying facts.

Apparently, the owner of the unit in question was a corporation, of which Mrs. England was a director.²⁶⁸ The core of the dispute involved the corporation's right to assign to Mrs. England, individually, the right to run for a seat on the board of directors of the condominium association.²⁶⁹ According to the dissenting opinion, Mrs. England asserted her right to run for the board at a meeting of the board of directors, and when she refused to leave the meeting after the board's request that she do so, she was arrested.²⁷⁰ The dissenting judge reasoned that since the corporation's right to designate Mrs. England as its representative to run for the Board is "within the contemplation of the arbitration provision and has now replaced the corporation as the owner of the unit, it appears that only she can seek the answer."²⁷¹

The majority opinion establishes the principle that when a "cause of action arises" is the benchmark for determining whether a party is entitled to, or required to, submit to the statutorily mandated arbitration process. Although this case can be somewhat limited to its own unique facts, the establishment of a "when the cause of action accrues" standard could have

262. *Id.*

263. *Id.*

264. *Id.*

265. *Clark*, 715 So. 2d at 367.

266. *Id.* (citing *Blum v. Tamarac Fairways Ass'n*, 684 So. 2d 826 (Fla. 4th Dist. Ct. App. 1996)).

267. *Clark*, 715 So. 2d at 367.

268. *Id.* (Harris J., dissenting).

269. *Id.*

270. *Id.*

271. *Id.*

significance in future arbitration decisions, particularly those where a unit owner sells a unit during the pendency of an arbitration proceeding.

B. *Community Association Assessment Cases*

After its third trip through the appellate courts, it is perhaps likely that the dispute over charges for bus rides from the Sheffield and Greenbrier Condominiums in Palm Beach County has generated enough attorneys' fees to provide all of the litigants with chauffeured limousine trips to their shopping excursions for the rest of their lives. In *Sheffield B Condominium Ass'n, v. Scudder*,²⁷² the Fourth District Court of Appeal held that the trial court misinterpreted its mandate in *Scudder v. Greenbrier C Condominium Ass'n*,²⁷³ referred to as "Greenbrier II" in the opinion.²⁷⁴ "In *Greenbrier II*, [the appellate court] reversed the trial court's holding that the 'one-rider rule' imposed by the Association was reasonable."²⁷⁵ The appellate opinion in *Greenbrier II* stated that "while the 'one-rider rule' was unreasonable, . . . the balance of the transportation assessments imposed by the Association was valid."²⁷⁶ The mandate in *Greenbrier II* was "for the trial court to determine the amount of the improper assessment, which would have been the amount charged pursuant to the 'one-rider' rule, and [for the trial court to] adjust the accounting on the transportation assessment accordingly."²⁷⁷

Apparently, "however, on remand the Unit Owners convinced the trial court that the entire transportation assessment was invalid simply because [the fourth district had] determined the 'one-rider' surcharge to be unreasonable" in *Greenbrier II*.²⁷⁸ The trial court's order was thus reversed, with instructions "to enter judgment in favor of the Association on all issues except the 'one-rider' surcharge."²⁷⁹

The fourth district also reversed the trial court's order assessing prevailing party attorney's fees against the association.²⁸⁰ On remand the trial court was directed to "determine the prevailing party of [the] litigation,"

272. 698 So. 2d 1270 (Fla. 4th Dist. Ct. App. 1997).

273. 663 So. 2d 1362 (Fla. 4th Dist. Ct. App. 1995).

274. *Sheffield*, 698 So. 2d at 1271 (citing *Scudder v. Greenbrier C. Condominium*, 663 So. 2d 1362 (Fla. 4th Dist. Ct. App. 1995)). See also Joseph E. Adams, *Community Associations*, 21 NOVA L. REV. 69, 79-81 (1996).

275. *Sheffield*, 698 So. 2d at 1271.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Sheffield*, 698 So. 2d at 1271.

while “being mindful that the Association has prevailed on all but one issue.”²⁸¹

Undoubtedly, the most significant assessment collection case for Florida’s community association practitioners is *Bryan v. Clayton*.²⁸² In its per curiam opinion, the Fifth District Court of Appeal confronted the question of “whether maintenance assessments [for a condominium] homeowner’s association are ‘debts’ for purposes of [compliance with] the Fair Debt Collections Practices Act,”²⁸³ and the Florida Consumer Collection Practices Act.²⁸⁴ Relying on a series of federal district court cases, Florida’s fifth district concluded that the Fair Debt Collection Practices Act did not embrace association assessments.²⁸⁵

Apparently, while the *Bryan* case was still pending on a motion for rehearing, the United States District Court of Appeals for the Seventh Circuit issued the decision of *Newman v. Boehm, Pearlstein, & Bright, Ltd.*,²⁸⁶ which is the first federal appellate decision on the issue.²⁸⁷ In *Newman*, Mr. and Mrs. Newman had received a collection letter from a law firm, which had been sent on behalf of the board of directors of a condominium association.²⁸⁸ “The letter informed the Newmans that they were in default on their obligation to pay” common expenses, and sought past due maintenance fees, late fees, interest, and attorney’s fees.²⁸⁹ “The letter stated that if the amount demanded was not paid within thirty days, the association would commence [foreclosure] proceedings.”²⁹⁰ The Newmans filed suit against the law firm pursuant to the Fair Debt Collections Practices Act²⁹¹ (“FDCPA”), alleging that the law firm failed to provide a “validation notice”²⁹² and specifically alleging that the letters did not disclose that the “defendants were attempting to collect a debt and that any information obtained would be used for that purpose.”²⁹³ The unit owners also “asked the district court to certify a class comprised of all individuals who had

281. *Id.*

282. 698 So. 2d 1236 (Fla. 5th Dist. Ct. App. 1997).

283. *Id.* at 1237 (citing 15 U.S.C. § 1692 (1994)).

284. *Bryan*, 698 So. 2d at 1237 (citing FLA. STAT. § 559.55 (1997)).

285. *Id.* (citing *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995) *aff’d*, 66 F.3d 342 (11th Cir. 1995)).

286. 119 F.3d 477 (7th Cir. 1997).

287. *Id.* at 480. A companion case was also consolidated in this appeal. *Id.* at 477.

288. *Id.* at 479.

289. *Id.*

290. *Newman*, 119 F.3d at 479.

291. *Id.* See 15 U.S.C. § 1692 (1984).

292. *Newman*, 119 F.3d at 479 (citing *Avila v. Rubin*, 84 F.3d 222, 226 (7th Cir. 1996)).

293. *Id.*

received similar letters from the defendant law firms and to appoint plaintiffs as class representatives” (and their counsel as class counsel).²⁹⁴

Relying on several federal district court decisions, the trial court dismissed the action.²⁹⁵ Upon appeal, the Seventh Circuit Court of Appeals acknowledged that “no federal court ha[d] yet concluded that the obligation to pay a condominium assessment constitutes a ‘debt’ under the FDCPA,” and went on to specifically hold that association assessments do constitute a “debt.”²⁹⁶ The court noted that the “credit requirement” from the case of *Zimmerman v. HBO Affiliate Group*²⁹⁷ had been recently rejected by another Seventh Circuit panel in the case of *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*²⁹⁸ The Seventh Circuit, in *Newman*, held that the obligation to pay assessments arose upon the purchase of a unit, thereby satisfying the requirement of a “transaction” to create the “debt.”²⁹⁹ The Court also found it undebatable that the assessments were used for “personal, family, or household purposes.”³⁰⁰

Notwithstanding the opinion of the federal Seventh Circuit, Florida’s fifth district, in *Bryan*, declined to change its ruling, after due consideration of the appellee’s motion to stay or recall mandate.³⁰¹ The fifth district noted that although “part of the text of our opinion might have been different,” had it had the opportunity to consider the opinion of the federal Seventh Circuit in *Newman*, its “decision to affirm would not have been different.”³⁰² The *Bryan* court remained unconvinced, notwithstanding the opinion of the *Newman* court, that condominium assessments constitute a “consumer debt.”³⁰³

Since the FDCPA is a federal statute, it seems reasonably clear that the opinion of the federal Seventh Circuit Court of Appeals will take precedence over a decision from a state intermediate appellate court. Although the *Bryan* court reaches the better decision in terms of policy,³⁰⁴ prudent practitioners are well-advised to comply with the FDCPA.

294. *Id.*

295. *Id.* at 479–80.

296. *Id.* at 480.

297. 834 F.2d 1163 (3d Cir. 1987).

298. *Newman*, 119 F.3d at 479 (citing *Bass v. Stulper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997)).

299. *Id.*

300. *Id.*

301. *Bryan*, 698 So. 2d at 1237.

302. *Id.*

303. *Id.* at 1237–38.

304. Community association interest groups should urge Congress to review this matter.

The case of *Southeast & Associates, Inc. v. Fox Run Homeowners Ass'n*,³⁰⁵ involves foreclosure of a condominium association lien, and the adequacy of constructive service of process.³⁰⁶ A \$90.00 "assessment for semi-annual maintenance became due on July 1, 1995," which Mr. and Mrs. Love, the unit owners, failed to pay.³⁰⁷ "The association sent a notice of delinquency by certified mail to the Loves' [unit at the condominium], warning that the association could file a lien" if payment was not made.³⁰⁸ "The notice was accepted by someone on behalf of the Loves, who signed the return receipt card."³⁰⁹

After nonpayment, the association filed a lien, sending a thirty-day notice of intent to foreclose to the same address, which was again accepted on the Loves' behalf.³¹⁰ "Just before the expiration of this thirty-day period, a partial payment was sent to the association."³¹¹ The association notified the Loves that full payment would be necessary to avoid foreclosure.³¹²

The association subsequently initiated a foreclosure action, and hired a process server to serve the foreclosure complaint on the Loves.³¹³ The process server could not locate the Loves at the unit, and made nine attempts to serve them there.³¹⁴ "Unbeknownst to the association, the Loves were residing at their New York address."³¹⁵ "The process server [also] performed two skip traces and . . ." asked the neighbors on both sides of the property if they knew where the Loves had been.³¹⁶ Other efforts, including tracing a business address, were also fruitless.³¹⁷

Subsequently, the association served the Loves by publication.³¹⁸ "[A]fter filing an affidavit of diligent search by the process server and an affidavit of constructive service executed by the association's counsel," a default was entered in the suit.³¹⁹ A foreclosure judgment was subsequently entered.³²⁰

305. 704 So. 2d 694 (Fla. 4th Dist. Ct. App. 1997).

306. *Id.* at 695.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Southeast & Assocs., Inc.*, 704 So. 2d at 695.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Southeast & Assocs., Inc.*, 704 So. 2d at 695.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Southeast & Assocs., Inc.*, 704 So. 2d at 695.

“Southeast and Associates was the successful bidder at the foreclosure sale.”³²¹ Nine days after a certificate of title was issued, the “Loves moved to set aside the sale based on an insufficient service of process.”³²² The sale was set aside when the trial court entered an order finding lack of diligent search and inquiry by the association.³²³ The Fourth District Court of Appeal reversed, finding that the association had made a diligent search.³²⁴

The court analyzed the policies served by the constructive service statute, the doctrine of void versus voidable titles, and the impact on marketability of title that uneven judicial treatment of the adequacy of constructive service can have.³²⁵ The court distinguished other association cases where lack of diligence was shown, concluding that the association’s process server had demonstrated “diligent search and inquiry.”³²⁶ The court implicitly concluded that, at best, voidable title had passed, which by virtue of Southeast’s unquestioned status as a bona fide purchaser, would have extinguished any claim by the Loves. In concluding, the court noted that the Loves “could easily have provided the association with their New York address,” and further found it relevant that “someone on their behalf kept signing for the certified letters, sending in a partial payment.”³²⁷

The case of *Limner v. Country Pines Condominium Ass’n*,³²⁸ touches upon a very important issue to many condominium associations; the relationship between the association’s assessment lien and the lien of a foreclosing mortgagee.³²⁹ Unfortunately, the reported decision is largely devoid of a discussion of the facts underlying the particular litigation.³³⁰

The court begins its opinion by ruling that section 718.116 of the *Florida Statutes* “limits the mortgagee’s liability in [that] case to the lesser of six months of unpaid assessments or one per cent of the original mortgage debt.”³³¹ The court goes on to state that “[t]he amendment to the statute does not apply to this lawsuit,” because the suit was filed before the effective date of the statute.³³² The court does not specify which “amendment to the statute” it is discussing. It is presumably the 1994 amendment to section

321. *Id.*

322. *Id.* at 696.

323. *Id.*

324. *Id.* at 696–97.

325. *Southeast & Assocs., Inc.*, 704 So. 2d at 696.

326. *Id.*

327. *Id.* at 697.

328. 709 So. 2d 154 (Fla. 4th Dist. Ct. App. 1998).

329. *Id.* at 154.

330. *Id.*

331. *Id.* (citing FLA. STAT. § 718.116(1)(b)(1) (1997)).

332. *Id.*

718.116 of the Act,³³³ because that is the only amendment to the relevant portions of the Act since the 1993 version, which the court cites as the controlling authority.³³⁴

The court held that there is nothing in the statute to indicate that the provisions of section 718.116, dealing with a mortgagee's liability for six months of unpaid assessments or one percent of the original mortgage debt, do not equally apply to a former unit owner who has taken back a first mortgage as part of a sale of a unit, apparently the issue in this case.³³⁵

Although the opinion's failure to recite the facts hampers the ability to more thoroughly analyze the logic of the decision, it is not evident how the 1994 amendment to the Act would have benefited either party to the litigation. Further, although the court's unembellished statement that "[a]pplication of the statute does not amount to a constitutional violation"³³⁶ raises one's curiosity, the lack of proper recitation of facts (when the mortgage was recorded, when the foreclosure judgment was taken, who bid at the foreclosure sale or whether a deed in lieu of foreclosure was involved, the parties' theories and arguments, etc.) unfortunately render this case to one of limited precedential value for community association legal practitioners.

The case of *Gainer v. Fiddlesticks Country Club, Inc.*,³³⁷ involved a homeowners' association's ability to require a purchaser at a tax sale to buy an "equity certificate" in the country club/homeowners' association.³³⁸ The relevant declaration of covenants required every purchaser of a lot in the subdivision to purchase an equity certificate, thus becoming a member of the country club, which also served as the governing homeowners' association for the development.³³⁹ "On November 7, 1994 Mr. Gainer purchased a tax deed for a lot in Fiddlesticks."³⁴⁰ After the association's demand that Mr. Gainer purchase an equity certificate, and his refusal to do so, lien and foreclosure proceedings were commenced.³⁴¹ At trial, Mr. Gainer argued that the declaration provision requiring purchase of the equity certificate did not survive the tax sale pursuant to section 197.573 of the *Florida Statutes*.³⁴² This statute "has long provided that a covenant does not survive a tax sale if it requires 'the grantee to expend money for any purpose, except

333. Ch. 94-350, § 10, 1994 Fla. Laws 2511, 2511 (codified as amended at FLA. STAT. § 718.116(1)(b)(1) (1997)).

334. *Limmer*, 709 So. 2d at 154.

335. *Id.*

336. *Id.*

337. 710 So. 2d 76 (Fla. 2d Dist. Ct. App. 1998).

338. *Id.* at 76.

339. *Id.* at 77.

340. *Id.*

341. *Id.*

342. *Gainer*, 710 So. 2d at 77 (citing FLA. STAT. § 197.573 (1993)).

one that may require that the premises be kept in a sanitary or slightly condition or one to abate nuisances or undesirable conditions."³⁴³ The second district concluded that there was no dispute that the purchase of an equity certificate did not fall within the quoted exception to the law.³⁴⁴

Section 617.312 of the *Florida Statutes* was enacted in 1995.³⁴⁵ This section provides that restrictions contained in a declaration of covenants survive a tax sale.³⁴⁶ The association was able to convince the court that although the 1995 amendment to the law was not binding *per se*, the amendment was an effort to clarify exemptions previously contained in the statute, recognizing that homeowners' associations were not commonplace when the exceptions to the statute were written into the law, and the fact that homeowners' associations were not subject to statutory regulation at all until 1992.³⁴⁷ Citing *State Farm Mutual Auto Insurance, Inc. v. Laforet*³⁴⁸ and *Landi v. Nationwide Mutual Fire Insurance Co.*,³⁴⁹ the second district, in *Gainer*,³⁵⁰ rejected the notion that there was an ambiguity in section 197.573 of the *Florida Statutes*, or that it was clarified by the subsequent enactment of section 617.312.³⁵¹

Had the 1995 amendment to section 617.312³⁵² not occurred, this decision would have a devastating impact on homeowners' associations in Florida. Purchasers at tax sales could essentially accept the benefits of the association's maintenance of their property, and the consequent enhancement of their property's value, but would not be called upon to contribute to the expenses of doing so. Fortunately, the 1995 amendment to section 617.312 of the statute for homeowners' associations should substantially limit the application of this case.

343. *Id.* at 76.

344. *Id.*

345. Ch. 95-274, § 62, 1995 Fla. Laws 2553, 2553 (codified as amended at FLA. STAT. § 617.312 (1995)).

346. FLA. STAT. § 617.312 (1995).

347. Although these arguments do not appear in the reported opinion, the writer is familiar with the arguments made to the court both at trial and on appeal, as a consequence of having served as general corporate counsel to Fiddlesticks Country Club, Inc. during the period of the litigation.

348. 658 So. 2d 55 (Fla. 1995).

349. 529 So. 2d 1170 (Fla. 2d Dist. Ct. App. 1988).

350. *Gainer v. Fiddlesticks Country Club, Inc.*, 710 So. 2d 76 (Fla. 2d Dist. Ct. App. 1998).

351. *Id.* at 77 (citing *State Farm Mut. Auto Ins., Inc. v. Laforet*, 658 So. 2d 55 (Fla. 1995)); *Landi v. Nationwide Mutual Fire Ins. Co.*, 529 So. 2d 1170 (Fla. 2d Dist. Ct. App. 1988).

352. FLA. STAT. § 617.312 (1995).

C. *Community Association Litigation Pleading Cases; Class Actions*

The case of *Concerned Class Members v. Sailfish Point, Inc.*³⁵³ presented “an issue of first impression for [the] Florida state courts [to-wit]: whether individual, non-named class members who have not formally intervened in a class action have standing to appeal a final judgment binding on all class members.”³⁵⁴ The court announced:

Prior to approval of a settlement agreement ending [the underlying] class action litigation between the 524 residents of the Sailfish Point development and the developer, Mobil Land Development Corporation, a group of fourteen class members calling themselves “Concerned Class Members” sought to be named as additional party plaintiffs and to intervene in the litigation as a subclass.³⁵⁵

The trial court denied the “Concerned Class Members” motion to intervene and be named as party plaintiffs, but did allow them to be heard on a separate motion which would require a vote from the residents on the proposed settlement with Mobile Land Development Corporation.³⁵⁶

The residents voted, and, by majority vote, approved the settlement agreement, which was ultimately approved by the court.³⁵⁷ “Twelve of the fourteen Concerned Class Members filed a notice of appeal from the order approving the settlement.”³⁵⁸ The original class representatives, the Sailfish Point Owners representatives, moved to dismiss the “Concerned Class Members” appeal.³⁵⁹

The fourth district, noting the lack of authority in Florida, found it appropriate to look at applicable federal cases as persuasive authority.³⁶⁰ The court noted that the “[f]ederal courts addressing the issue are split, with the Eleventh Circuit joining the majority of federal courts in holding [that] non-named class members must intervene formally in the class action to [have] standing to appeal.”³⁶¹

The fourth district found particularly persuasive the rationale of *Guthrie v. Evans*,³⁶² which held, *inter alia*, that “class actions could become

353. 704 So. 2d 200 (Fla. 4th Dist. Ct. App. 1998).

354. *Id.* at 201.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Sailfish Point*, 704 So. 2d at 201.

359. *Id.*

360. *Id.*

361. *Id.*

362. 815 F.2d 626 (11th Cir. 1987).

unmanageable and non-productive if each member could individually decide to appeal.”³⁶³ The fourth district concluded that “because the Concerned Class Members did not intervene [in the trial of the case], nor did they appeal the trial court’s denial of their motion to establish a subclass,” they lacked standing to appeal approval of the settlement agreement.³⁶⁴

The case of *Arvida/JMB Partners v. Council of Villages, Inc.*,³⁶⁵ dealt with the elements parties seeking class action certification in community association litigation need to establish.³⁶⁶ The Council of Villages, Inc. (Council), the Country Club Maintenance Association, Inc. (CCMA), the Master Homeowners’ Association for the [Broken Sound PUD (Planned Urban Development)], and six residents filed suit against various developer entities (Arvida) and the Broken Sound Club, a private country club.³⁶⁷ The Council is an organization formed by some of the homeowners in the Broken Sound PUD for the purpose of seeking turnover of the Club to the property owners in Broken Sound.³⁶⁸ Count I of the plaintiff’s complaint claimed that:

Arvida violated Boca Raton city ordinances by (1) not turning over ownership of certain open spaces to an organization of property owners, (2) arranging that members be charged for use of this open space, and (3) obtaining park credit for facilities that became the property of a private club, when, according to the ordinance, they should have been the property of an organization of the property owners.³⁶⁹

Count II of the suit was for civil theft.³⁷⁰ Count III sounded in constructive trust and Count IV pled unjust enrichment.³⁷¹ The trial court granted class certification on Count I, violation of city ordinance, denied class certification on Count III, constructive trust, while omitting to make a determination respecting Count II, civil theft and Count IV, unjust enrichment.³⁷²

363. *Sailfish Point*, 704 So. 2d at 202 (citing *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987)).

364. *Id.*

365. 23 Fla. L. Weekly D1766 (4th Dist. Ct. App. July 29, 1998).

366. *Id.* at D1767.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Arvida*, 23 Fla. L. Weekly at D1767.

371. *Id.*

372. *Id.*

The case was also complicated by the fact that there were certain non-defendant appellants who were given leave to intervene in the trial proceedings relative to class certification.³⁷³ These nondefendant appellants were the owners of apartment complexes, which might be converted into condominiums.³⁷⁴ The apartment building owners argued that the single family homeowners' interests were antagonistic to those of the apartment building owners,³⁷⁵ and so the Council should not serve as the class representative.³⁷⁵ The trial court added "to the proposed class . . . [of] single family homeowners in the PUD,"³⁷⁶ the apartment building owners, and all other property owners within the Broken Sound PUD to its certification of a class for Count I violation of city ordinance. "The court concluded [that] the issue was essentially whether there was violation of an ordinance requirement that all of the open space reserved for common use be owned in fee simple by an organization of property owners within the PUD."³⁷⁷

On appeal, the plaintiffs/appellees/cross-appellants sought certification of two classes: "Class A, consisting of all resident single family homeowners, to assert the objective of turnover of ownership of the Club, and Class B, consisting of equity owners in the Club, to seek rescision of past Club membership purchases and [a] refund of amounts paid as membership fees."³⁷⁸ The Fourth District Court of Appeal concluded that since certain defendants in the suit, namely the developers, were also property owners within the PUD, a class of all property owners would have interests adverse to those of the other members of the class certified by the trial court, and thus these property owners should not be included in the class.³⁷⁹ The court also applied the same rationale to the Broken Sound Club, which it found would have an interest directly adverse to the interests of the individual property owner-members of the class.³⁸⁰ In attempting to sort out the various classes, the court noted that the dispute *sub judice* presented "the quintessential scenario for class action treatment."³⁸¹ The court found it improbable that individual members of the class would have the resources to pursue their common interests individually, or alternatively that the courts "would be clogged *ad infinitum* with the individual suits."³⁸² Noting that "Florida Rule of Civil Procedure 1.220(a)(2) requires only that the resolution

373. *Id.*

374. *Id.*

375. *Arvida*, 23 Fla. L. Weekly at D1767.

376. *Id.* Count I alleged a violation of Boca Raton city ordinances. *Id.*

377. *Id.*

378. *Id.*

379. *Arvida*, 23 Fla. L. Weekly at D1767.

380. *Id.*

381. *Id.*

382. *Id.*

of common questions of law and fact affect all or a substantial number of class members," the court held that the adequacy of representation requirement can be met where the named representatives of the class have interests in common with the proposed class members.³⁸³

Moving to a discussion of the various counts in the complaint, the court held that the issue involving an alleged violation of a city ordinance does not sound in fraud, and was thus properly certified as a class action count.³⁸⁴ As to the remaining three counts, the court assumed that the two counts not certified by the trial court, Counts II and IV, were rejected for class certification, the trial court also specifically rejected count III, constructive trust for class certification.³⁸⁵

The fourth district ruled that Count II, sounding in civil theft, charges "willful, intentional and wrongful diversion of the golf course open space, and refusal to return the property or the proceeds obtained as a result of the diversion of the ownership rights."³⁸⁶ Stating that an action for civil theft is not tantamount to an allegation of misrepresentation or fraud, the fourth district held that the civil theft count should have been certified as a class action count.³⁸⁷

Likewise, the appellate court held that the trial court erred in refusing to certify Count III, constructive trust, for class certification.³⁸⁸ The court noted that "[f]raud claims which have been considered unamenable to class action [treatment] arise from circumstances in which each defrauded party has a legally distinct claim, each depending on its own facts."³⁸⁹ Notwithstanding the fact that the count in the complaint alleged that the developer failed to disclose the inadequacy of the golf facilities to accommodate the entire ultimate population of Broken Sound, the appellate court found that "a substantial number of the members of the class . . . [would] have a common interest in the remedy."³⁹⁰ Thus, the court also reinstated Count III, constructive trust, as amenable to class action treatment.³⁹¹ Finally, in consideration of Count IV, unjust enrichment, the court summarily held that the common interests of a substantial number of members of the class would be adequately represented in the count for compensatory damages.³⁹²

383. *Id.* at D1767 (citing FLA. R. Civ. P. 1.220(a)(2)).

384. *Arvida*, 23 Fla. L. Weekly at D1768.

385. *Id.*

386. *Id.* at D1768.

387. *Id.*

388. *Id.*

389. *Arvida*, 23 Fla. L. Weekly at D1768.

390. *Id.*

391. *Id.*

392. *Id.*

Graves v. Ciega Verde Condominium Ass'n,³⁹³ arose out of the foreclosure of a construction lien.³⁹⁴ “Fred Graves (Graves) was a licensed general contractor who performed repair work to the exterior siding of the” Ciega Verde Condominium buildings.³⁹⁵ A dispute erupted, resulting in Graves’ filing of a lien for approximately \$52,000, the unpaid contract amount.³⁹⁶ Graves subsequently sought to foreclose the construction lien, by filing a foreclosure suit.³⁹⁷ “In the foreclosure action, Graves alleged that each unit owner was liable for a proportionate share of the expenses of” maintaining the common elements.³⁹⁸ “Graves recorded a notice of lis pendens against all of the unit owners,” sued each unit owner individually, and named the association as the class representative.³⁹⁹ “Service of process was issued against Ciega Verde, both individually and as the class representative.”⁴⁰⁰ The association answered both individually and as class representative, and discovery ensued.⁴⁰¹ “Thereafter, the contract portion of the action was set for binding arbitration,” in which the association participated.⁴⁰² Graves prevailed in the arbitration, recovering his total demand.⁴⁰³ Graves served the association with “a motion to confirm the arbitration award and to set [the] cause for trial on the foreclosure action.”⁴⁰⁴ The trial court entered a judgment foreclosing thirty of the thirty-two units because two had been released during the pendency of the litigation.

Some two years after the initial filing of the suit, the association retained new counsel, who filed a motion to set aside the foreclosure judgment, claiming that the trial court did not have jurisdiction to order foreclosure.⁴⁰⁵ The trial court granted the motion and required Graves to personally serve each individual unit owner. Graves complied with the order. “[T]he unit owners [then] moved to dismiss the amended complaint claiming that Graves filed the amended complaint on May 23, 1994, and therefore, service on the unit owners had not been accomplished within 120

393. 703 So. 2d 1109 (Fla. 2d Dist. Ct. App. 1997).

394. *Id.* at 1110. For applicable law on construction liens see FLA. STAT. §§ 713.001–.37 (1997).

395. *Graves*, 703 So. 2d at 1110.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Graves*, 703 So. 2d at 1111.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Graves*, 703 So. 2d at 1111.

days from filing the original complaint.”⁴⁰⁶ “The trial court granted the motion to dismiss, and entered an order dismissing the individual unit owners from the action. Because the applicable statute of limitations had expired, Graves was precluded from bringing a new foreclosure action against the unit owners.”⁴⁰⁷

At issue on appeal was whether the trial court obtained jurisdiction over the individual unit owners through service of process on the association.⁴⁰⁸ Citing Rule 1.221 of the *Florida Rules of Civil Procedure*, the fourth district held that the unit owners, “as members of the class, have a common interest regarding the maintenance of the common elements of the condominium property.”⁴⁰⁹ In addressing the unit owners’ arguments that they should have received individual service to satisfy “due process concerns,”⁴¹⁰ the Fourth District responded that the association has “a fiduciary and statutory duty to give notice of a lawsuit to the unit owners.”⁴¹¹

The result in *Graves* certainly seems equitable on the merits. Clearly, the association has the fiduciary duty to represent the interests of all unit owners in the litigation. Additionally, any unit owner who does not wish to subject his or her unit to a potential foreclosure action may relieve his or her condominium parcel of the lien by exercising any of the rights of a property owner under Chapter 713,⁴¹² or “by payment of the proportionate amount attributable to his or her condominium parcel.”⁴¹³ The courts’ imposition of a new “fiduciary and statutory duty to give notice of a lawsuit to the unit owners”⁴¹⁴ is cause for concern. Although most associations will routinely report on the nature and status of pending litigation, an association is only obligated by statute to “give notice” of a lawsuit if the association’s liability in an action exceeds insurance coverage,⁴¹⁵ when the association is contesting ad valorem taxation for all units in a condominium project,⁴¹⁶ when the association is involved in litigation with exposure of more than

406. *Id.*; see also FLA. R. CIV. P. 1.170(I).

407. *Graves*, 703 So. 2d at 1111.

408. *Id.*

409. *Id.*

410. *Id.* at 1112 (citing *Kesl, Inc. v. Racquet Club of Deer Creek II Condominium*, 574 So. 2d 251 (Fla. 4th Dist Ct. App. 1991)).

411. *Id.*

412. FLA. STAT. §§ 713.001-37 (1997).

413. FLA. STAT. § 718.121(3) (1997).

414. *Graves*, 703 So. 2d at 1112.

415. FLA. STAT. § 718.119(3) (1997).

416. FLA. STAT. § 194.011(3)(e) (1997).

\$100,000.00;⁴¹⁷ and when the association is named as class representative of the unit owners in an eminent domain proceeding.⁴¹⁸

D. *Community Association Litigation-Attorney's Fees*

Undoubtedly, the prospect of exposure for payment of an adversary's attorney's fees serves to discourage the litigation of cases without substantial merit. The Florida Condominium Act has long evinced a prevailing party attorney's fees approach to dispute resolution.⁴¹⁹ The case of *Ares v. Cypress Park Gardens Homes I Condominium Ass'n, Inc.*,⁴²⁰ involves a condominium unit owner's suit against his association for "production of [official] records, injunctive relief, and an accounting."⁴²¹ The parties settled the unit owner's claims in mediation but apparently decided to defer resolution of entitlement to attorney's fees.⁴²² According to the opinion, the parties agreed that a special master would be appointed to determine which party prevailed on each issue.⁴²³ "The [special] master issued a report and recommendation finding that [the unit owner] succeeded on one claim, that the Association prevailed on three claims, and that one of the claims did not support an award of fees to either party under the statute."⁴²⁴ Over the unit owner's objection, the trial court confirmed the master's recommendations and awarded the fees accordingly.⁴²⁵

After concurring (without recitation of the facts of the case) that the association prevailed on the count for production of official records, the court further held that there was no error in the trial court's ruling that section 718.303(1) of the Condominium Act does "not authorize attorney's fees in an action for an accounting."⁴²⁶ This aspect of the decision is curious, since section 718.303(1) confers a right of action by a unit owner against the association.⁴²⁷ Although a suit for accounting is typically a two-stage proceeding, first establishment of the right to an accounting and then the actual accounting itself,⁴²⁸ an "accounting" is essentially an equitable

417. FLA. STAT. § 718.504 (1997).

418. FLA. STAT. § 73.073(3) (1997).

419. FLA. STAT. § 718.1255(4)(k) (1997).

420. 696 So. 2d 885 (Fla. 2d Dist. Ct. App. 1997).

421. *Id.* at 886.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Ares*, 696 So. 2d at 886.

426. *Id.*

427. FLA. STAT. § 718.303(1) (1997).

428. *See A-1 Truck Rentals, Inc. v. Vilberg*, 222 So. 2d 442, 444 (Fla. 3d Dist. Ct. App. 1969).

remedy⁴²⁹ that is based upon a legal relationship directly established by the Condominium Act, which establishes a fiduciary relationship between the officers and directors of an association and the unit owners.⁴³⁰

With respect to Mr. Ares' request for injunctive relief, the second district concluded that the lower court erred in finding that the association prevailed on the unit owner's request that the trial court enjoin the association from further violations of its bylaws and the Condominium Act.⁴³¹ While agreeing that a perpetual mandatory injunction, requiring an association to abide by its documents and comply with the law is inappropriate,⁴³² the second district noted that the issue before the master was not whether Mr. Ares would have prevailed on a claim for such an injunction.⁴³³ Rather, the court noted that the master was called upon to determine whether the unit owner had been successful on his claim as it was resolved in the settlement agreement.⁴³⁴ The second district, noting the association's admission of various statutory and documentary violations in its answer, held that the unit owner prevailed in his endeavor to require the association's adherence to its bylaws and the Condominium Act.⁴³⁵ In apparent dicta, the court also noted that the unit owner's complaint, seeking an injunction which prohibited the association from conducting its affairs "in violation of the law and condominium documents" is distinguishable from "perpetual prohibitory injunctions," and apparently enforceable.⁴³⁶

In *Cuervo v. West Lake Village II Condominium Ass'n, Inc.*,⁴³⁷ various "ousted directors" appealed the ultimate award of attorney's fees to the association.⁴³⁸ The genesis of the dispute was a contested condominium election.⁴³⁹ The appellants, claiming to be victorious, seized control of the association's bank account and transferred funds to a different bank.⁴⁴⁰ The association contested the validity of the election.⁴⁴¹ The appellants filed for

429. See *Manning v. Clark*, 56 So. 2d 521, 524 (Fla. 1951).

430. FLA. STAT. § 718.111(1)(a) (1997).

431. *Ares v. Cypress Park Garden Homes I Condominium Ass'n*, 696 So. 2d 885, 887 (Fla. 2d Dist. Ct. App. 1997).

432. *Id.* See also *Indian Trail Homeowners Ass'n, Inc., v. Roberts*, 577 So. 2d 998 (Fla. 4th Dist. Ct. App. 1991).

433. *Ares*, 696 So. 2d at 887.

434. *Id.*

435. *Id.*

436. *Id.*

437. 709 So. 2d 598 (Fla. 3d Dist. Ct. App. 1998).

438. *Id.* at 598.

439. *Id.*

440. *Id.*

441. *Cuervo*, 709 So. 2d at 598.

arbitration pursuant to section 718.1255 of the Act.⁴⁴² “During the arbitration proceeding, the association was represented by [a] law firm.”⁴⁴³ During the pendency of the arbitration proceedings, the same law firm “filed a three-count complaint against [the] appellants and the association’s former management company,” seeking return of the association’s funds, damages for conversion, and damages for “breach of fiduciary duty for its role in the subject election.”⁴⁴⁴ “The association pled an entitlement to attorney’s fees” as well.⁴⁴⁵ The action was stayed “pending the resolution of the arbitration proceeding.”⁴⁴⁶

The arbitrator ruled in favor of the association.⁴⁴⁷ The lower court entered a temporary injunction requiring the appellants to relinquish the association’s funds.⁴⁴⁸ The appellants also filed an answer and affirmative defenses to the complaint, as well as a counterclaim. The same law firm that had been representing the association up to this point in the proceedings filed an answer and affirmative defenses to the counterclaim.⁴⁴⁹ In response to the filing of a counterclaim against the association, the association’s insurance carrier retained a second law firm to represent the association in the litigation.⁴⁵⁰ The second firm filed an answer to, and thereafter defended, the counterclaim.⁴⁵¹ The two law firms continued to represent the association’s interests in the matter, although “the gravamen of both the main action and the counterclaim action centered around the issue of the validity of the appellants’ election as directors.”⁴⁵² Before trial, the association prevailed in obtaining partial summary judgment and was determined to be the prevailing party. The law firm initially retained by the association was awarded approximately \$45,000 in fees.⁴⁵³ There is no mention of an award of fees to the firm retained by the insurance carrier.

On appeal, noting that the issues raised in the main action and counterclaim “were inextricably intertwined such that a determination of the issues in one action would necessarily be dispositive of the issues raised in the other,”⁴⁵⁴ the court ruled that the trial court erred when it failed to

442. *Id.*; see also FLA. STAT. § 718.1255 (1997).

443. *Cuervo*, 709 So. 2d at 599.

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Cuervo*, 709 So. 2d at 599.

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. *Cuervo*, 709 So. 2d at 599–600.

454. *Id.*

consider and reduce the attorney's fees awarded to the first firm for the duplication of their legal efforts with the second firm.⁴⁵⁵ Finding it undoubtable that the actions of the two firms were "duplic[ative] and overlapping," the court concluded that "the most appropriate way of accomplishing [the] task [would be] to reduce the fee awarded to the [first firm] by the reasonable value of all of the [second firm's] services in this cause."⁴⁵⁶ Although the court was undoubtedly justified in reducing the fees awarded to the extent they were duplicitous or overlapping, it is submitted that it is unfair to the association to reduce the fees payable to its primary counsel by the reasonable value of services performed by insurance-appointed counsel.

First, there is no suggestion in the opinion that the fees charged by the association's primary law firm were unreasonable. Second, there is no statement in the opinion that the association (or its insurance carrier) sought compensation for the fees incurred by the insurance company-appointed counsel. Therefore, recognizing that "a party has the absolute right to hire as many attorneys as it desires,"⁴⁵⁷ there is no evidence that the appellants were called upon to compensate for overlapping efforts. The reality is that many community associations are more comfortable having their general counsel represent the association's interests in litigation matters. When insurance company-selected counsel is brought into the case through the filing of counterclaims, or in cases where the association is sued as a defendant, the association should retain the option of keeping its general counsel in the case without being penalized by an arbitrary standard that reduces fees payable to the association's general counsel by the amount reasonably incurred by the insurance company-appointed firm.

E. *Covenant Enforcement*

Mora v. Karr,⁴⁵⁸ involves the doctrines of waiver and estoppel.⁴⁵⁹ Mr. Karr wished to purchase a home in a deed restricted community.⁴⁶⁰ He desired to tear down the existing residence and build a "larger home with a three-car garage."⁴⁶¹ The "deed restrictions [permitted] only a two-car garage and [required] a thirty-five foot setback."⁴⁶² Prior to buying the property, Mr. Karr obtained an agreement from the original developer, "as

455. *Id.* at 599.

456. *Id.*

457. *Id.* at 600.

458. 697 So. 2d 887 (Fla. 4th Dist. Ct. App. 1997).

459. *Id.* at 887.

460. *Id.* at 888.

461. *Id.*

462. *Id.*

well as the adjacent property owners on either side, the Xaviers and the Moras, waiving the two deed restrictions.”⁴⁶³

During construction of his new home, Mr. Karr received a letter from Mr. Mora threatening suit over violation of the restrictive covenants.⁴⁶⁴ Mora filed suit and sought a temporary injunction.⁴⁶⁵ “The day before the hearing [on the motion for temporary injunction,] the Moras moved to amend to add the Moores as additional plaintiffs, which was granted.”⁴⁶⁶ Mr. Moore testified that although he was being represented in the action by the same attorney as the Moras, he was not obligated to pay any attorney’s fees to the Moras’ counsel.⁴⁶⁷

The trial court denied the temporary injunction, holding that “the waiver, . . . the change in conditions in the neighborhood since the imposition of the restrictive covenants, and the fact that there was little likelihood that the appellants would prevail on the merits,”⁴⁶⁸ justified denial of their motion for a temporary injunction. Citing *Enegren v. Marathon Country Club Condominium West Ass’n, Inc.*⁴⁶⁹ the court held that the Moras’ claim was barred by the doctrine of waiver.⁴⁷⁰ As to the Moores’ claim, the appellate court, citing a Supreme Court of Florida case from 1930,⁴⁷¹ held that the Moores’ delay in “seeking relief until eight or nine months after construction commenced would warrant denial” of their request for injunctive relief.⁴⁷²

*Miami Lakes Civic Ass’n v. Encinosa*⁴⁷³ is the latest in a series of cases⁴⁷⁴ which grant associations the right to interpret or apply deed restrictions beyond the four corners of the deed restriction and its verbiage itself.⁴⁷⁵ Mr. Encinosa constructed a deck in the back yard of his home “without the prior approval of the Miami Lakes Architectural Control Committee [ACC] as required by certain restrictive covenants.”⁴⁷⁶ The

463. *Mora*, 697 So. 2d at 888.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Mora*, 697 So. 2d at 888.

469. 525 So. 2d 488 (Fla. 3d Dist. Ct. App. 1988). The *Enegren* case is actually most often cited as an estoppel case.

470. *Mora*, 697 So. 2d at 888 (citing *Enegren*, 525 So. 2d at 488).

471. *Mercer v. Keynton*, 127 So. 859 (Fla. 1930).

472. *Mora*, 697 So. 2d at 888 (citing *Mercer v. Keynton*, 127 So. 859 (Fla. 1930)).

473. 699 So. 2d 271 (Fla. 3d Dist. Ct. App. 1997).

474. *See, e.g.*, *Europco Management Co. of Am. v. Smith*, 572 So. 2d 963 (Fla. 1st Dist. Ct. App. 1990); *Coral Cables Inv., Inc. v. Graham Cos.*, 528 So. 2d 989 (Fla. 3d Dist. Ct. App. 1988).

475. *Encinosa*, 699 So. 2d at 271.

476. *Id.*

covenants permitted the ACC to refuse approval of plans “on any ground, including purely aesthetic grounds, which in the sole and uncontrolled discretion of said Architectural Control Committee shall seem sufficient.”⁴⁷⁷

After completion of the deck, Mr. Encinosa submitted plans to the ACC, which denied the after-the-fact submittal.⁴⁷⁸ The ACC found that “the deck was too large and ‘out of context with what was going on in the surrounding properties and on the lake as a whole.’”⁴⁷⁹

The trial court held that the association could not enforce the covenant, as it had engaged in selective enforcement by “allow[ing] other violations to go unchecked.”⁴⁸⁰ The trial court “also determined that there was a lack of criteria or guidelines for construction of decks.”⁴⁸¹

However, the appellate court held that once “[t]he association . . . put on a prima facie case demonstrating Encinosa’s violation of the restrictive covenants, the burden shifted to Encinosa to show that the association had acted in an unreasonable or arbitrary manner.”⁴⁸² On the selective enforcement issue, the appellate court held that Encinosa had not provided “competent substantial evidence to support such a finding.”⁴⁸³ Although no other suits had been filed against homeowners for alleged deed restriction violations, the appellate court was satisfied that the record reflected that all other disputes were resolved by voluntary compliance.⁴⁸⁴ With respect to the homeowner’s argument that the deed restrictions contained insufficient guidelines, the court held that the ACC’s disapproval was based upon the fact that Encinosa’s dock was “much larger in scale than the other structure on the lake.”⁴⁸⁵ Thus, the appellate court implicitly found that “the look” of the neighborhood constituted a sufficient criteria for the ACC’s review of dock construction plans. Although it was certainly a challenge for the court to balance the free use of one’s property with the collective aesthetic needs of a deed restricted community, it seems that the court recognized that not every conceivable construction request will be addressed through a written covenant. The general character of the neighborhood can be used as a legally valid basis by an architectural committee in reviewing construction plans and requests.

477. *Id.*

478. *Id.* at 272.

479. *Id.*

480. *Encinosa*, 699 So. 2d at 272.

481. *Id.*

482. *Id.* at 272 (citing *Killearn Acres Homeowners Ass’n v. Keever*, 595 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1992)).

483. *Encinosa*, 699 So. 2d at 272.

484. *Id.*

485. *Id.* at 273.

F. Various Tort Liabilities

Although most community associations are not for profit corporations generally engaged in a cooperative effort to enable residents to provide for each others' health, safety, and welfare, the Florida courts have nonetheless applied premises liability duties to associations, which are similar to those of a landlord in the landlord/tenant context.⁴⁸⁶ *Lotto v. Point East Two Condominium Corp.*,⁴⁸⁷ involves a suit by a condominium resident, Mrs. Lotto, who sued the association after "[s]he tripped and fell on a portion of an exterior sidewalk which [was] cracked and partially uneven."⁴⁸⁸ Mrs. Lotto admitted that she had regularly "walked over [the] same stretch of sidewalk" on many occasions.⁴⁸⁹ The association acknowledged that the sidewalk was cracked and deteriorated, but that it was not unreasonably dangerous.⁴⁹⁰ "The association argued that it had no duty to warn [Mrs. Lotto] of the condition of the sidewalk because [its] deteriorated condition was obvious."⁴⁹¹ The trial court agreed with the association and entered summary judgment in the association's favor.⁴⁹²

On appeal, the third district agreed with the trial court, holding that the association did not have a duty to warn Mrs. Lotto.⁴⁹³ However, the court went on to state that the obviousness of the condition did not relieve the association of the duty to repair the sidewalk.⁴⁹⁴ Applying duties from the *Second Restatement of Torts* relative to invitees, the court held that there remained a factual issue as to "whether the association should anticipate" that residents would use the sidewalk and thus encounter the cracked and uneven concrete, "notwithstanding that the condition was obvious" and that the invitee "would be harmed thereby."⁴⁹⁵ Based upon the necessity of this inquiry, the court concluded that summary judgment was not appropriate.⁴⁹⁶ The court did note that Mrs. Lotto's familiarity with the condition of the sidewalk, and "her decision to proceed to encounter the risk," would raise the question of "whether she was comparatively negligent."⁴⁹⁷

486. See, e.g., *Czerwinski v. Sunrise Point Condominium*, 540 So. 2d 199, 200-01 (Fla. 3d Dist. Ct. App. 1989).

487. 702 So. 2d 1361 (Fla. 3d Dist. Ct. App. 1997).

488. *Id.* at 1361.

489. *Id.*

490. *Id.*

491. *Id.*

492. *Lotto*, 702 So. 2d at 1361.

493. *Id.* at 1362.

494. *Id.*

495. *Id.*

496. *Id.*

497. *Lotto*, 702 So. 2d at 1362.

The case of *The Ocean Ritz of Daytona Condominium v. G.G.V. Associates, Ltd.*,⁴⁹⁸ addresses the issue of “whether the economic loss rule bars a negligence action in the context of a third-party beneficiary of a professional consultant’s contract when the plaintiff is seeking to recover only economic [damages].”⁴⁹⁹

The condominium association sued the developer, the engineering company employed by the developer, and an architectural firm employed by the engineering company “for economic damages resulting from the faulty conversion of an apartment complex into a condominium project.”⁵⁰⁰ The asserted liability of the consultant was based on “its alleged faulty inspection and inaccurate disclosure and [the] report [it] prepared pursuant to its contract with the engineering company.”⁵⁰¹ It was alleged that the report was intended to meet the developer’s obligation pursuant to section 718.616 of the Condominium Act, and that the report was therefore “intended to inure to the benefit of the condominium [unit] purchasers.”⁵⁰² “The trial court granted summary judgment in favor of the consultant, holding that the association’s negligence action was barred by the economic loss rule.”⁵⁰³

In ultimately affirming the trial court’s decision, the Fifth District Court of Appeal engages in a thorough review of Florida’s “economic loss rule” case law.⁵⁰⁴ The court held that “purely economic expectations arising from of the relationship between a condominium association and the parties responsible for the construction of the condominium” are not the types of interests intended to be protected by tort law.⁵⁰⁵ Although this case is clearly consistent with the progeny of “economic loss rule” cases, it is this writer’s opinion that the denial of a remedy to innocent and often unsophisticated condominium home buyers is the single worst disservice done by Florida’s courts to Florida’s community association citizens. As most succinctly observed by former Chief Justice Barkett:

If the allegations of the homeowners in this case are true, their homes are literally crumbling around them The courts, including this one, have said “too bad.” I find that answer unacceptable in light of the principle underlying Florida’s access to

498. 710 So. 2d 702 (Fla. 5th Dist. Ct. App. 1998).

499. *Id.* at 702.

500. *Id.*

501. *Id.*

502. *Id.*

503. *G.G.V. Assocs.*, 710 So. 2d at 702–03.

504. *Id.* at 703–05.

505. *Id.* at 704 (quoting *Sandarac Ass’n, v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349 (Fla. 2d Dist. Ct. App. 1992)).

courts provision: that absent compelling, countervailing public policies, wrongs must have remedies.⁵⁰⁶

One of the most common fears expressed by potential community association volunteers is the exposure to personal liability. Fortunately, the courts have once again emphasized that individual directors of condominium associations cannot be held liable for a negligence action, even when such actions were clearly wrong.⁵⁰⁷ One such case involved a suit by Mr. Perlow, "individually and as the trustee for a group of condominium [unit] owners. . . against two directors of the condominium association, [Mr.] Goldberg and [Ms]. Leb."⁵⁰⁸ "The alleged breach of fiduciary duty was the directors' failure to properly administer insurance proceeds from Hurricane Andrew."⁵⁰⁹ In considering the interplay of the Condominium Act,⁵¹⁰ the Florida Business Corporation Act,⁵¹¹ and the Florida Not-for-Profit Corporation Act,⁵¹² the court concluded that more than simple negligence must be pled and proved before personal liability can be successfully asserted against an association director.⁵¹³ Fraud, criminal activity, and self-dealing/unjust enrichment are the only situations in which a director of an association may be held personally liable for his or her acts or omissions emanating from service on the board.⁵¹⁴ The court distinguished *B & J Holding Corp v. Weiss*,⁵¹⁵ "where the initial directors of a condominium association were held individually liable for failure to collect maintenance payments on unsold units."⁵¹⁶ The court found that *B & J* was distinguishable because that case involved self-dealing by a developer's appointees to the board of directors in the form of the directors not collecting assessments from the developer, to the detriment of the association, and giving greater loyalty to the director's relationship to the development entity.⁵¹⁷

506. *Casa Clara Condominium Ass'n, v. Charlie Toppino & Sons, Inc.*, 620 So. 2d 1244, 1248 (Fla. 1993) (Barkett, C.J., concurring in part, dissenting in part).

507. *See Perlow v. Goldberg*, 700 So. 2d 148 (Fla. 3d Dist. Ct. App. 1997).

508. *Id.* at 149.

509. *Id.*

510. FLA. STAT. § 718 (1997).

511. FLA. STAT. § 607 (1997).

512. FLA. STAT. § 617 (1997).

513. *Perlow*, 700 So. 2d at 149.

514. *Id.* at 150.

515. 353 So. 2d 141 (Fla. 3d. Dist. Ct. App. 1977).

516. *Perlow*, 700 So. 2d at 150 (citing *B & J Holding Corp. v. Weiss*, 353 So. 2d 141 (Fla. 3d Dist. Ct. App. 1977)).

517. *Id.*

Estates, Trusts, and Guardianships: 1998 Survey of Florida Law

Michael D. Simon* and William T. Hennessey**

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I. INTRODUCTION

This topic was last surveyed in 1996 by Rohan Kelley.¹ Although this survey does include some material from late 1996, its main focus is on cases, statutes, and rules from 1997 through the middle of 1998.

Once again, attorneys’ fees and creditors’ claims lead the list of the most active topics. There was also a substantial amount of activity in the homestead area. In addition, two 1998 cases on Florida’s deadman’s statute,² demonstrate the need for a legislative reform of this arcane statute. Recent legislation and rule changes are addressed in separate sections. While the authors elected to discuss some of these changes in detail, the majority of the changes are covered in a summary fashion. Finally, there were a number of cases worthy of discussion, but which did not fit neatly into any particular category. These cases are addressed under the heading “Cases of Interest.”

II. ATTORNEYS’ FEES

Could it be true? Have we finally reached some semblance of stability (and sanity) in the arena of attorney compensation? Over the past eight years, Florida courts and the legislature have completely overhauled our attorneys’ fee statute on at least three separate occasions.³ After all of the changes, we ended up, for the most part, exactly where we were when the journey began; attorneys’ fees are presumed reasonable if they are tied to a certain percentage of the estate assets.⁴

This circuitous journey has, however, itself produced additional problems for the practitioner. Practitioners have encountered three entirely different methods for computing a “reasonable fee” in the 1990’s: 1) the

1. Rohan Kelley, *Trusts & Estates: 1996 Survey of Florida Law*, 21 NOVA L. REV. 385 (1996). Mr. Kelley’s survey addressed case law and statutory changes from 1994 through the first half of 1996. *Id.*
 2. FLA. STAT. § 90.602 (1997).
 3. See FLA. STAT. § 733.6171 (1997); FLA. STAT. § 733.6171 (1995); FLA. STAT. § 733.6171 (1993).
 4. See FLA. STAT. §§ 733.617, 733.6171 (1997).

Supreme Court of Florida's 1991 decision in *In re Estate of Platt*;⁵ 2) the 1993 version of section 733.6171 of the *Florida Statutes*;⁶ and 3) the 1995 version of section 733.6171 of the *Florida Statutes*.⁷ Each of these methods is capable of producing substantially different amounts in attorneys' fees.⁸ Thus, one of the most important questions for the practitioner is which statute governs the computation of fees for any particular estate.

The 1993 and 1995 statutes specifically provided that they were to apply to all estates which remained open as of the statute's effective date.⁹ Almost immediately, however, these provisions providing for retroactive application of the statute came under constitutional attack.¹⁰ The

5. 586 So. 2d 328 (Fla. 1991). In *Platt*, the Supreme Court of Florida held that attorneys' fees could not be computed as a percentage of the estate. *Id.* at 336-37. Instead, the *Platt* court required that fees be computed using the hourly-based lodestar method set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). *Platt*, 586 So. 2d at 336-37.

6. FLA. STAT. § 733.6171 (1993). The 1993 version of section 733.6171 provided for a bifurcated computation of a "presumed reasonable" fee based on the sum of the following two parts: a) the first part was tied to the liability or "risk" assumed by the attorney and was: an amount equal to [two] percent of the inventory value of the estate assets and the income earned by the estate during the administration and, if the estate is required to file an estate tax return, an additional [one] percent on the balance of the gross estate as finally determined for federal estate tax purposes . . . [and b) the second part compensated] the attorney for the professional time expended and was based upon the hourly based lodestar method (similar to that in *Platt*).

Id. § 733.6171(3).

7. FLA. STAT. § 733.6171(3) (1995). The 1995 version of the statute, still in effect today, provides for the computation of a "presumed . . . reasonable" fee for ordinary services based upon a percentage of probate assets. *Id.* § 733.6171(3). The percentage varies depending upon the size of the estate with a smaller actual percentage due for larger estates. *Id.*

8. See Kelley, *supra* note 1, at 390-400 for an excellent discussion of the changes in the fee statutes throughout the 1990's.

9. FLA. STAT. § 733.6171(8) (1993) (providing that "[t]his section shall apply to estates in which an order of discharge has not been entered prior to its effective date but not to those estate in which attorneys' fees have previously been determined by order of [the] court after notice"); FLA. STAT. § 733.6171(10) (1995) (providing for retroactive application with a provision identical to the 1993 statute).

10. The Fifth District Court of Appeal was the first to address the issue in *Williams College v. Borne*, 656 So. 2d 622 (Fla. 5th Dist. Ct. App. 1995) ("Williams College II") and *Williams College v. Borne*, 670 So. 2d 1118 (Fla. 5th Dist. Ct. App. 1996) ("Williams College III"). The *Williams College* courts held that retroactive application of the statute would be unconstitutional. See *Williams College III*, 670 So. 2d at 1121. Without discussing *Williams College II* or *III*, and without addressing the constitutionality of retroactive application, the Fourth District Court of Appeal reached the opposite result in *Bitterman v. Bitterman*, 685 So. 2d

Supreme Court of Florida ultimately addressed these constitutional issues in *Bitterman v. Bitterman*.¹¹

An abbreviated version of the facts of *Bitterman* is worth repeating. Stephen Bitterman, the decedent's son and co-personal representative, raised objection to the administration of the estate at almost every turn.¹² According to the fourth district, Stephen "either object[ed], or threatened to object, to items such as his mother's petition for family allowances, her continued use of an automobile titled in the decedent's name, her petition for homestead . . . to the home in which she was living, and her retention of certain personal property."¹³ Stephen also attempted to void both his mother's and brother's gifts under the will. He became "intimately involved with every detail" of the case.¹⁴ In fact, Stephen directed that all correspondence and pleadings be sent to him for review. Moreover, a review of his attorney's phone records showed over 350 calls between Stephen and the firm.¹⁵ Stephen took the liberty of calling his attorney at home, in his car, and even while he was on vacation.¹⁶ After all of this, Stephen furiously contested the fees for his attorney, and for the administrator ad litem who was appointed to assist in the administration of the estate.¹⁷

The issue before the *Bitterman* court was which statute would govern the computation of fees.¹⁸ The attorneys in *Bitterman* commenced representation prior to the effective date of the 1993 statute.¹⁹ The attorneys argued that their compensation was to be computed under the 1993 statute per section 733.6171(8) of the *Florida Statutes*.²⁰ The *Bitterman* court held that retroactive application of the 1993 statute would be unconstitutional.²¹ The court reasoned that the attorneys' right to receive fees and the corresponding obligation to pay those fees vests at the time the attorney begins his representation of the estate, and that the Florida Legislature could not retroactively enhance this substantive right or obligation by legislative

861, 866 (Fla. 4th Dist. Ct. App. 1996). The *Bitterman* case was appealed to the Supreme Court of Florida, setting the stage for one of the most important trust and estate decisions of 1998. *Id.*

11. 714 So. 2d 356 (Fla. 1998).

12. *Id.* at 358.

13. *Id.*

14. *Id.* at 360.

15. *Id.*

16. *Bitterman*, 714 So. 2d at 360.

17. *Id.* at 361.

18. *Id.* at 358.

19. *Id.* at 359.

20. *Id.* See also FLA. STAT. § 733.6171(8) (1993).

21. *Bitterman*, 714 So. 2d at 364–65.

enactment.²² Accordingly, the fees for the attorneys in *Bitterman* were to be computed under the 1991 statute.²³

For the practitioner, this means: 1) if representation was commenced prior to October 1, 1993, fees are computed under *Platt*; 2) if representation was commenced after October 1, 1993 but before July 1, 1995, fees are computed under the 1993 version of section 733.6171 of the *Florida Statutes*; and 3) if representation was commenced after July 1, 1995, fees are computed under the 1995 version of section 733.6171 of the *Florida Statutes*.²⁴

Many commentators have focused as much on what the *Bitterman* court did *not* say as what it did say. The Real Property, Probate, and Trust Law Section of the Florida Bar filed an amicus brief with the Supreme Court of Florida in support of retroactive application of the statute.²⁵ The section's apparent loss before the court, however, actually produced several smaller victories. First, many attorneys were quick to point out that the court could have struck down the *entire* statute and found that computing attorneys' fees on the basis of a percentage of the estate was impermissible as explained in *Platt*.²⁶ By not striking down the statute as a whole or even discussing this option, the court may have tacitly acknowledged the constitutionality of the new statute and that fees can be computed as a percentage of the probate estate.²⁷ In addition, the *Bitterman* case may actually provide a windfall for an attorney who commenced representation after the effective date of the 1993 statute but before the 1995 statute. The *Bitterman* case would place the attorney under the 1993 statute that generally permits much higher fees.²⁸

22. *Id.* at 364 (adopting and quoting extensively the fifth district's decision in *Williams College III*). The *Williams College III* court (and consequently the *Bitterman* court) relied upon the reasoning of the Supreme Court of Florida in *Young v. Altenhouse*, 472 So. 2d 1152 (Fla. 1985), which held that the right to attorneys' fees is governed by the statute in effect at the time a cause of action accrues. *Id.* at 1154.

23. *Bitterman*, 714 So. 2d at 364.

24. See FLA. STAT. § 733.6171 (1995).

25. *Bitterman*, 714 So. 2d at 358.

26. 586 So. 2d 328 (Fla. 1991).

27. See, e.g., Robert Goldman, *Bitterman v. Bitterman* and Section Amicus Activity, Remarks at 18th Annual Legislative Update and Recent Case Law Review of the Real Property, Probate, and Trust Law Section of the Florida Bar (July 24, 1998).

28. *Bitterman*, 714 So. 2d at 364. This advantage, however, may be more theoretical than real. As explained by Mr. Kelley in his 1996 survey of this topic, the bifurcated computation produced by the 1993 statute was widely perceived by the bench, the media, and the bar as resulting in grossly excessive fee. Kelley, *supra* note 1, at 395. In fact, most courts would scoff at the notion of awarding a presumed reasonable fee under the 1993 statute.

An additional intriguing aspect of the *Bitterman* case was the Supreme Court of Florida's holding concerning the "inequitable conduct doctrine."²⁹ Surprisingly, neither the *Bitterman* nor the *Williams College v. Borne*³⁰ case arose in the context of the method of computing a reasonable fee. Rather, the issue before both courts was whether the attorney for the personal representative could recover fees for litigating over fees ("fees on fees") pursuant to section 733.6171(7) of the *Florida Statutes*.³¹ The 1991 version of the statute did not permit an attorney to recover fees on fees.³² Because the attorneys in *Bitterman* commenced representation prior to the effective date of the 1993 statute, the *Bitterman* court held that they were not entitled to recover fees on fees under the statute.³³

The *Bitterman* court nevertheless allowed recovery of fees on fees based upon the "inequitable conduct" of Stephen Bitterman.³⁴ The court held that "[t]he inequitable conduct doctrine permits the award of fees [when] one party has exhibited egregious conduct or acted in bad faith."³⁵ The court noted that "'bad faith may be found not only in the actions that led to the lawsuit, but also in the conduct of litigation,'" and that inequitable conduct can be found when a party acts "vexatiously, wantonly, or for oppressive reasons" or with "recalcitrance and callous attitude."³⁶

The standard of "recalcitrance" or "egregious conduct" is much different than the standards we are accustomed to under section 57.105 of the *Florida Statutes*, such as no "justiciable issue of either law or fact."³⁷ The *Bitterman* court specifically found that section 57.105 did not apply because the arguments concerning retroactive application of the fee statutes raised justiciable issues.³⁸ In fact, Stephen Bitterman ultimately prevailed.³⁹

29. See *Bitterman*, 714 So. 2d at 365.

30. 670 So. 2d 1118 (Fla. 5th Dist. Ct. App. 1996).

31. See *Williams College III*, 670 So. 2d at 1120-21; *Bitterman*, 714 So. 2d at 358, 364. See also FLA. STAT. § 733.6171(7).

32. See FLA. STAT. § 733.6171 (1991); See also *In re Platt*, 586 So. 2d 328 (Fla. 1991) (noting that an attorney cannot recover fees on fees under the 1991 statute).

33. See *Bitterman*, 714 So. 2d at 364.

34. See *id.* at 365.

35. *Id.*

36. *Id.* (quoting *Dogherra v. Safeway Stores, Inc.*, 679 So. 2d 1293, 1298 (9th Cir. 1982) (citations omitted)).

37. FLA. STAT. § 57.105(1) (1997). Under section 57.105 of the *Florida Statutes*, fees can only be awarded where there is "a complete absence of a justiciable issue of either law or fact raised by the . . . losing party." *Bitterman*, 714 So. 2d at 364-65 (quoting *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982)); see also FLA. STAT. § 57.105(1) (1997).

38. *Bitterman*, 714 So. 2d at 364-65 (noting that the uncertainty of the application of the 1993 changes was sufficient to place this *Bitterman* case outside of section 57.105).

The court found, however, that Stephen's conduct during the course of the administration of the estate and the fee dispute was "the type the conduct for which the inequitable conduct doctrine was intended to apply."⁴⁰

The *Bitterman* court tempered its holding by noting that the doctrine is "rarely applicable."⁴¹ However, the threat of attorneys' fees under *Bitterman's* inequitable conduct doctrine should still prove to be a valuable tool for any litigator, including a probate litigator faced with spurious estate or trust litigation. Prior to *Bitterman*, there was generally little risk for a recalcitrant will contestant, especially one who had his or her attorney on a contingency fee, in continuing with litigation in the hopes of extracting a settlement. The chance of a beneficiary being charged with fees individually, beyond his or her share of the estate,⁴² under section 57.105 is remote because will contests almost always raise justiciable issues of fact.⁴³ The inequitable conduct doctrine should, at the very least, provide another "arrow in the quiver" of personal representatives who are forced to defend groundless litigation.

The issue of "fees on fees" also arose in other contexts over the past year. In *In re Estate of Good*,⁴⁴ the attorney for the personal representative hired a law firm to litigate the reasonableness of his attorneys' fees.⁴⁵ The issue before the Fourth District Court of Appeal in *Good* was whether the law firm representing the personal representative's attorney could recover its fees from the estate.⁴⁶ The *Good* court held that the attorney for the attorney for the personal representative could not recover fees under section 733.6171(7) of the *Florida Statutes*.⁴⁷ The court reasoned that "the scenario could be extended to an absurd degree in that the attorney for the personal

39. *Id.* at 364.

40. *Id.* at 365.

41. *See id.*

42. It is well-settled that a beneficiary's share of the estate can be charged with attorneys' fees under section 733.106(4) of the *Florida Statutes*, which provides "the court may, in its discretion, [determine] from what part of the estate [fees] shall be paid." *See* FLA. STAT. § 733.106(4) (1997).

43. *See, e.g., Williams v. King*, 711 So. 2d 1285, 1286 (Fla. 5th Dist. Ct. App. 1998) (holding that beneficiary shouldn't have been charged for fees individually under section 57.105 even though the trial court found her claims "frivolous and without merit" because "there was some small . . . basis to file the suit in good faith").

44. 696 So. 2d 876 (Fla. 4th Dist. Ct. App. 1997).

45. *Id.* at 877.

46. *Id.*

47. *Id.* at 877-78. *See also* FLA. STAT. § 733.6171(7) (1997).

representative's attorney could hire a third law firm to litigate over the reasonableness of its fees."⁴⁸

In so holding, the *Good* court itself may have created an absurd dichotomy. According to the court, if the attorney for the personal representative represents himself and litigates to recover fees, the attorney can recover his litigation fees from the estate under section 733.6171(7) of the *Florida Statutes*.⁴⁹ However, if the attorney hires another lawyer to proceed with that same litigation, the attorney is forced to pay the attorneys fees out of his own pocket. This is true regardless of the fact that the fees could be the same in either case.

In *Zepeda v. Klein*,⁵⁰ the Fourth District Court of Appeal held that an attorney could not recover fees on fees in a guardianship case.⁵¹ Section 744.108(1) of the *Florida Statutes* allows an attorney to recover fees for "services rendered . . . on behalf of the ward."⁵² The court reasoned that in a contested fee hearing the interests of the attorney and the ward are adverse.⁵³ The court also relied upon the *Platt* case, which had held that the 1991 version of probate statute did not permit an attorney to recover for time obtaining a fee award.⁵⁴

Most practitioners are familiar with the concept that an attorney who provides a benefit to the estate is entitled to recover fees from the estate. This concept is codified in section 733.106 of the *Florida Statutes*.⁵⁵ In *In re Estate of Paris*,⁵⁶ the question before the second district was whether the attorney for an interested person was required to plead entitlement to attorneys' fees in his initial pleading filed with the court, or at the very least prior to trial.⁵⁷ The attorney in *Paris* had successfully litigated a will contest to conclusion, but failed to request attorneys' fees in his response to the petition for administration. In denying fees from the estate, the trial court held that the Supreme Court of Florida's decision in *Stockman v. Downs*⁵⁸ required the request for attorneys' fees to be pled.⁵⁹ The *Paris* court

48. *Id.* at 877.

49. *See Hurley*, 480 So. 2d at 877; *see also* FLA. STAT. § 733.6171(8) (1997).

50. 698 So. 2d 329 (Fla. 4th Dist. Ct. App. 1997).

51. *Id.* at 330.

52. FLA. STAT. § 744.108(1) (1997).

53. *Zepeda*, 698 So. 2d at 330.

54. *Id.*

55. *See* FLA. STAT. § 733.106(3) (1997).

56. 699 So. 2d 301 (Fla. 2d Dist. Ct. App. 1997).

57. *Id.* at 302.

58. 573 So. 2d 835 (Fla. 1991).

59. *Paris*, 699 So. 2d at 302.

reversed, holding that section 733.106 allows the attorney to apply for fees at any time during the pendency of the estate.⁶⁰ Accordingly, the attorney could petition for fees after the will contest had ended.⁶¹

What may come as surprise to some is that the “benefit to the estate” concept does not necessarily carry over into trust law. In *Frymer v. Brettschneider*,⁶² a trust beneficiary sought to recover attorney’s fees and costs from trust assets for successfully defending the validity of a trust.⁶³ The trial court allowed the beneficiary to recover her fees from the trust under section 737.402(2)(u) of the *Florida Statutes*, which provides: “[u]nless otherwise provided in the trust instrument, a trustee has the power . . . [t]o pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust.”⁶⁴

The Fourth District Court of Appeal reversed.⁶⁵ Relying on principles of statutory construction, the court found that section 737.402(2)(u) applied only to expenses incurred by a trustee.⁶⁶ The court reasoned that if the legislature had intended a beneficiary to recover his or her attorney’s fees after upholding the validity, they could have so provided.⁶⁷

The *Frymer* court also refused to allow the beneficiary to recover under the “common fund” rule, holding that she did not satisfy all of the elements of the rule.⁶⁸ The common fund rule requires that a “class,” who did not contribute to the lawsuit, “receive substantial benefits as a result of the

60. *See id.* The court relied upon its prior decision in *Carmen v. Gilbert*, 615 So. 2d 701 (Fla. 2d Dist. Ct. App. 1992).

61. *See Paris*, 699 So. 2d at 302 (citing *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991)).

62. 710 So. 2d 10 (Fla. 4th Dist. Ct. App. 1998).

63. *Id.* at 11.

64. *Id.* at 11–12.

65. *Id.* at 12.

66. *Id.*

67. *Frymer*, 710 So. 2d at 12.

68. *Id.* at 13. The common fund rule generally permits the award of fees from a fund or estate which has been benefitted by the rendering of legal services. *See generally* *Hurley v. Slingerland*, 480 So. 2d 104, 107 (Fla. 4th Dist. Ct. App. 1985). There are five prerequisites which must be met: a) the existence of a fund over which the court has jurisdiction and from which fees can be awarded; b) the commencement of litigation by one party which is terminated successfully; c) the existence of a class which received, without otherwise contributing to the lawsuit, substantial benefits as a result of the litigation; d) the creation, preservation, protection, or increase of the fund as a direct and proximate result of the efforts of counsel for that party; and e) a reasonable relationship between the benefit established and the fees incurred. *Id.* at 107–08.

litigation.”⁶⁹ The *Frymer* court found that the only beneficiary benefitted by the litigation was the beneficiary who defended the suit.⁷⁰

Another recent case shows that not every attorney, rendering a benefit to an estate, is entitled to recover fees from a probate estate under section 733.106 of the *Florida Statutes*.⁷¹ In *Suntrust Bank v. Nichols*,⁷² the Fifth District Court of Appeal refused to award fees to the attorney for the decedent’s court-appointed guardian after the guardian successfully petitioned the court for revocation of a prior will and had a second will admitted to probate.⁷³ The court found that the guardian was an “interloper” in the estate case because he did not have an interest in the outcome and therefore was not an “interested person” under sections 731.201(21)⁷⁴ and 733.109(1)⁷⁵ of the *Florida Statutes*.⁷⁶ The *Nichols* court also refused to award fees to the guardian’s attorney for work performed on behalf of the guardian, which was tainted with a conflict of interest.⁷⁷

This conflict of interest aspect of the *Nichols* holding was consistent with another 1997 case, *In re Estate of Montanez*.⁷⁸ In *Montanez*, the court reversed a fee award to an attorney who had represented a personal representative which the court found was not qualified to serve and had engaged in a conflict of interest transaction with the estate.⁷⁹ The personal representative in *Montanez* was the decedent’s professional guardian.⁸⁰ The guardian was not a trust company, a banking corporation, savings association, or Savings and Loan and therefore was not qualified to serve under sections 733.305 and 660.41 of the *Florida Statutes*.⁸¹ More importantly, the guardian had a conflict of interest in that the decedent’s estate had a potential claim against the guardian and the decedent’s nursing

69. *Frymer*, 710 So. 2d at 12 (citing GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS & TRUSTEES* § 972 (2d ed. 1983)).

70. *Id.* at 12.

71. *Suntrust Bank v. Nichols*, 701 So. 2d 107 (Fla. 5th Dist. Ct. App. 1997).

72. *Id.*

73. *Id.* at 109–10.

74. FLA. STAT. § 731.201(21) (1997). “Interested Person” is defined generally to mean “any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved.” *Id.*

75. FLA. STAT. § 733.109(1) (1997). Section 733.109 provides in relevant part that “any interested person . . . may . . . petition the court . . . for revocation of probate.” *Id.*

76. *Nichols*, 701 So. 2d at 109–10.

77. *Id.* at 108.

78. 687 So. 2d 943 (Fla. 3d Dist. Ct. App. 1997).

79. *Id.* at 946–47.

80. *Id.* at 945.

81. *Id.* at 946.

home for neglect.⁸² The guardian entered into a settlement releasing itself and the nursing home from liability on this claim.⁸³ In a scathing opinion directed to the guardian's attorney, the court found that neither the attorney nor the guardian could recover any fees for their voidable acts.⁸⁴

In *Teague v. Hoskins*,⁸⁵ the Supreme Court of Florida addressed the statutory priority of attorneys' fees in a situation where the assets of the estate are insufficient to pay all of the claims of creditors.⁸⁶ The question certified from the lower court was:

ARE ATTORNEY'S FEES ASSESSED AGAINST THE PERSONAL REPRESENTATIVE OF AN ESTATE AN EXPENSE OF ADMINISTRATION AND THUS CLASS 1 PRIORITY OR ARE THEY "OTHER CLAIMS" GRANTING THEM CLASS 8 STATUS?⁸⁷

In *Teague*, the personal representative brought an action against a guardian for a beneficiary, alleging that the guardian breached a contract with the estate to waive the beneficiary's rights to homestead and elective share.⁸⁸ "The personal representative rejected an offer of judgement . . . to resolve the action" and ultimately lost at trial.⁸⁹ The guardian was awarded attorneys' fees under the offer of judgment statute.⁹⁰ The trial court and district court held that the guardian's attorney's fees were a Class eight priority under section 733.707 of the *Florida Statutes*.⁹¹ The Supreme Court of Florida reversed.⁹² The court found that the fees were generated because of "the affirmative action of the personal representative" and were therefore "entitled to inclusion in Class one [as] costs and expenses of administration."⁹³

82. *Id.* at 945-46.

83. *Montanez*, 687 So. 2d at 945-46.

84. *Id.* at 947 (noting that the attorneys, "better than anyone else, knew or should have known that the personal representative's attempt to settle the creditor's claim was self-dealing, and created an inherent conflict.").

85. 709 So. 2d 1373 (Fla. 1998).

86. *Id.* at 1374.

87. *Id.* at 1373.

88. *Id.*

89. *Id.* at 1374.

90. *Teague*, 709 So. 2d. at 1374.

91. *Id.*; see also FLA. STAT. § 733.707 (1997).

92. See *Teague*, 709 So. 2d at 1374.

93. *Id.* at 1374-75.

The *Teague* court noted that if the “personal representative exceeded [its] authority in bringing the action or in rejecting the offer of judgment, then the trial court should surcharge the personal representative, not deny Class 1 priority status to the obligation.”⁹⁴ The court also distinguished the *Teague* case from cases in which a third party prevails on a claim against the estate predicated on the decedent’s liability.⁹⁵ In those cases, fees of the third party remain Class eight status because they are not generated by affirmative action of the personal representative.⁹⁶

The final case in this section should serve as reminder to all probate attorneys to draft their fee agreements carefully. In *Brooks v. Degler*,⁹⁷ the attorney had a signed contingency fee agreement with an estate beneficiary in a will contest.⁹⁸ The agreement provided that the attorney would represent the beneficiary “in a claim for damages” against the personal representative and other estate beneficiaries.⁹⁹ The attorney was successful in getting the “will admitted to probate and [his client] appointed as personal representative.”¹⁰⁰ The court held, however, that the attorney was not entitled to recover fees under the contingency agreement.¹⁰¹ The court reasoned that the fee agreement only applied to “a claim for damages” and recovery from that claim.¹⁰² Although the attorney was successful “in getting the will admitted to probate and [his client] appointed personal representative; [a] claim for damages [never] materialized.”¹⁰³ However, the attorney was permitted to recover fees under section 733.106.¹⁰⁴

III. CREDITORS’ CLAIMS

During the past ten years, there has been quite a bit of activity in the area of creditors’ claims. The 1997 case of *United States Trust Co. of*

94. *Id.* at 1375.

95. *Id.* at 1374.

96. *Id.*

97. 712 So. 2d 419 (Fla. 5th Dist. Ct. App. 1998).

98. *Id.* at 420.

99. *Id.* (emphasis omitted).

100. *Id.*

101. *Id.* at 421. The actual issue in *Brooks* was whether the attorney was entitled to recover fees from the estate under section 733.106 and then again from his client under the terms of his fee agreement (i.e., double-dip). *Brooks*, 712 So. 2d at 420–21. The Court never addressed this issue, finding instead that the contract was invalid. *Id.*

102. *Id.* at 421.

103. *Id.*

104. *Id.*

Florida Savings Bank v. Haig,¹⁰⁵ continued this trend and seems to be a mixed bag for the probate practitioner.¹⁰⁶ It appears that the *Haig* case may have raised more questions about creditors' claims than it answered.

Prior to the 1988 United States Supreme Court decision in *Tulsa Professional Collection Services, Inc. v. Pope*,¹⁰⁷ it was generally accepted among most states,¹⁰⁸ and certainly well-settled in Florida,¹⁰⁹ that notice by publication barred the claims of known creditors if such claims were filed later than the time period allowed by section 733.702 of the *Florida Statutes*.¹¹⁰ The Supreme Court's decision in *Pope* was a substantial change in the law with regard to creditors' claims. The *Pope* court held that if a creditor's identity is "known or reasonably ascertainable" by the personal representative, due process requires that the creditor be given notice by mail or such other means which will ensure actual notice of the claims period.¹¹¹

As a result of the *Pope* decision, Florida's rules and statutes were revised to comply with the due process requirements mandated by the Supreme Court.¹¹² Unfortunately, both *Pope* and Florida's rules and statutes left us with many unanswered questions. For example, what is a "reasonably ascertainable" creditor under section 733.212(4)(a) of the *Florida Statutes*? Is an individual with a judgment recorded in the public records of the decedent's home county a "reasonably ascertainable" creditor? What is a "diligent search" for creditors as required by section 733.212(4)(a)? What would constitute an "impractical and extended" search for creditors, which is not required of the personal representative under section 733.212(4)(a)?

105. 694 So. 2d 769 (Fla. 4th Dist. Ct. App. 1997).

106. *Id.* at 770.

107. 485 U.S. 478 (1988).

108. See David T. Smith & Robert M. Winick, *Known or Ascertainable Estate Creditors: The Pope Decision*, FLA. B. J. 66 (Oct. 1988).

109. See *Public Health Trust v. Estate of Jara*, 521 So. 2d 309 (Fla. 3d Dist. Ct. App. 1988); *Coley v. Estate of Odom*, 500 So. 2d 188 (Fla. 1st Dist. Ct. App. 1986). After *Pope*, a new opinion was issued in *Jara*, finding notice by publication to known creditors was constitutionally insufficient. *Public Health Trust v. Estate of Jara*, 526 So. 2d 745 (Fla. 3d Dist. Ct. App. 1988).

110. See Smith, *supra* note 108, at 66.

111. *Pope*, 485 U.S. at 491.

112. See *In re Rules of Probate and Guardianship Procedure*, 537 So. 2d 500 (Fla. 1988); *Estate of Gleason v. Gleason*, 631 So. 2d 321 (Fla. 4th Dist. Ct. App. 1994); *In re Estate of Hill*, 582 So. 2d 701 (Fla. 1st Dist. Ct. App. 1991). For example, section 733.212(4)(a) of the *Florida Statutes* includes a requirement for a "diligent search" for "reasonably ascertainable" creditors. See also *In re Estate of Puzzo*, 637 So. 2d 26, 29 (Fla. 4th Dist. Ct. App. 1994) (relying on *Pope*, and now requires that all known creditors actually be served with a copy of the Notice of Administration before the claims period to begin to run as to that creditor).

The Fourth District Court of Appeal of Florida attempted to answer some of these questions in the *Haig* opinion.¹¹³ In *Haig*, the decedent sold a house and provided the purchaser with a written guarantee that “a portion of the house would be free of leaks and cracks.”¹¹⁴ The house did, in fact, leak and the purchaser attempted to make a claim against the decedent’s estate but missed the claims period by eight days.¹¹⁵ Finding that the purchasers were “reasonably ascertainable creditors,” the trial court granted their petition to extend time to file a claim in the estate.¹¹⁶ The Fourth District reversed, and in doing so, attempted to provide some guidance to practitioners who remained confounded by some of *Pope’s* unanswered questions.¹¹⁷

The district court held that because “contingent” or “conjectural” claimants are not “ascertainable” creditors, *Pope* does not require that they receive actual notice of the claims period.¹¹⁸ The court defined a “contingent claim” as “one where the liability depends upon some future event, which may or may not happen, which renders it uncertain whether there will ever be a liability.”¹¹⁹

The *Haig* court commented on the search for creditors required of the personal representative under section 733.212(4)(a) of the *Florida Statutes*, by quoting with approval the case of *Mullane v. Central Hanover Bank & Trust Co.*,¹²⁰ which stated: “[n]or do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, *although they could be discovered upon investigation, do not in due course of business come to the knowledge of the common trustee.*”¹²¹

Although its language is far from clear, it is the opinion of the authors that *Haig* represents a small but significant retreat from *Pope* and could prove extremely troublesome to contingent creditors, especially to

113. *United States Trust Co. of Florida Sav. Bank v. Haig*, 694 So. 2d 769 (Fla. 4th Dist. Ct. App. 1997).

114. *Id.* at 770.

115. *Id.*

116. *Id.*

117. *Id.* at 770–71.

118. *Haig*, 694 So. 2d at 771 (citing *Tulsa Professional Collection Servs. Inc. v. Pope*, 485 U.S. 478 (1988)).

119. *Id.* (citing *Fowler v. Hartridge*, 24 So. 2d 306, 309 (1945) (citations omitted)).

120. 339 U.S. 306, 317 (1950).

121. *Haig*, 694 So. 2d at 771 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950)). *See also* *Jones v. SunBank/Miami, N.A.*, 609 So. 2d 98 (Fla. 3d Dist. Ct. App. 1992).

individuals or entities such as lenders, who rely on guarantees. For example, assume a bank loaned money to "A" relying upon the guarantee of "B." If "B" dies while "A" is current on the loan, "B's" guarantee is only a contingent liability. Thus, when "B" dies, the bank is only entitled to publication notice of the creditor's period. Therefore, if the bank is untimely in filing its claim, it may be barred from seeking relief against the decedent's estate based exclusively upon the published notice.

Solutions to this new dilemma are far from simple. Perhaps after *Haig*, lenders, or those relying upon guarantees, will be required to define a guarantor's death as an event of default under the note, which would require the borrower either to pay off the loan or secure a new guarantor.

The final, and probably most disturbing consequence of *Haig*, is that it may encourage a personal representative to avoid providing actual notice to certain creditors other than what little, if any, notice they receive from publication.¹²² This is especially true for personal representatives who are also beneficiaries of the estate. This case should certainly put contingent creditors on notice that a lack of vigilance may now prove fatal to their collection efforts.

IV. WILLS

The only place to start any discussion on the recent law relating to wills is the case of *Raimi v. Furlong*.¹²³ This case should be in the law files of every probate practitioner. The *Raimi* case is an excellent source of authority for Florida law on undue influence, testamentary capacity and civil conspiracy.¹²⁴ In addition, this case is a "must read" for anyone concerned with liability issues relating to banks or trust companies.

The essential facts of *Raimi* are as follows. The decedent, Evelyn Gruber, died on March 3, 1995.¹²⁵ Her nephew, Manuel Raimi, filed a petition for administration over her last will ("Raimi Will").¹²⁶ The decedent's stepdaughter, Estelle Furlong ("Furlong"), filed a separate petition for administration seeking to admit an earlier will to probate.¹²⁷ In addition, Furlong filed a petition to set aside the Raimi Will on the grounds

122. *Haig*, 694 So. 2d at 771.

123. 702 So. 2d 1273 (Fla. 3d Dist. Ct. App. 1997) (known to some as the "Evelyn Gruber" case).

124. This article will not specifically address the civil conspiracy issue.

125. *Raimi*, 702 So. 2d at 1283.

126. *Id.*

127. *Id.*

of undue influence, duress, and lack of testamentary capacity.¹²⁸ In her petition, Furlong alleged that the Raimi Will was the product of a conspiracy between some of the decedent's relatives, Sun Bank/Miami and certain employees of Sun Bank.¹²⁹

In a surprising opinion, the trial court declined to admit the Raimi Will to probate, finding that it was procured by the undue influence of Manuel Raimi and that the decedent lacked testamentary capacity.¹³⁰ In addition, the trial court found that a "reprehensible conspiracy" had been formed "between the decedent's relatives, Sun Bank/Miami and certain Sun Bank employees."¹³¹ The trial court also ruled that the bank was "negligent in its hiring, training, retention and supervision of [some of] its employees."¹³² Based on the foregoing, the court entered judgment against all defendants, jointly and severally, in the amount of \$1,533,689.55.¹³³ The court further assessed punitive damages against Sun Bank in the amount of \$4,500,000, against Manuel Raimi in the amount of \$2,000,000 and against two Sun Bank employees in the amount of \$1,000,000 each.¹³⁴ In what was surely a relief to the banking industry, as well as to all of the defendants, the appellate court reversed on all counts.¹³⁵

In the *Raimi* opinion, the Third District Court of Appeal provided an excellent recitation of Florida law on undue influence,¹³⁶ even though it did not really reveal any new law in this area. The court provided a good definition of undue influence,¹³⁷ outlined the elements that must be established to raise a presumption of undue influence,¹³⁸ including a list of

128. *Id.*

129. *Id.*

130. *Raimi*, 702 So. 2d at 1283.

131. *Id.* at 1284.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Raimi*, 702 So. 2d at 1285 (as to judgments against defendants); *id.* at 1285 (as to the will contest); *id.* at 1286 (as to testamentary capacity); *id.* at 1288 (as to undue influence).

136. *Id.* at 1286-87.

137. *Raimi*, 702 So. 2d at 1287 (stating that "[i]nfluence must amount to over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and will power of the testator"). See also *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971); *Estate of Brock*, 692 So. 2d 907 (Fla. 1st Dist. Ct. App. 1996); *In re Estate of Dunson*, 141 So. 2d 601 (Fla. 2d Dist. Ct. App. 1962) (stating mere affection, kindness, or attachment of one person for another does not itself constitute undue influence).

138. *Raimi*, 702 So. 2d at 1287. The elements are: 1) "a substantial beneficiary under the will;" 2) "occupied a confidential relationship with the testator;" and 3) "was active in procuring

factors for a court's consideration with regard to the element of "active procurement,"¹³⁹ explained the shifting of the burden to come forward with evidence¹⁴⁰ and restated the standard of proof in an undue influence case.¹⁴¹ The court also noted that any undue influence, which may have been used to procure earlier wills is wholly irrelevant on the issue of whether a subsequent will is also the product of undue influence.¹⁴²

On the subject of testamentary capacity, the court gave every defendant in a will contest a great statement of Florida public policy¹⁴³ and a good definition of testamentary capacity, also known as "sound mind."¹⁴⁴ This case is a strong reminder that the legal standard for testamentary capacity is surprisingly low. As the court pointed out, even an insane person may execute a valid will during a lucid interval.¹⁴⁵ In fact, the court stated that "[a] testator may still have testamentary capacity to execute a valid will even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, [or] vacillating judgment."¹⁴⁶ For those who practice in the estate area, it is significant to note the court's statement that

the contested will." See *In re Estate of Carpenter*, 253 So. 2d at 701; *Estate of Brock*, 692 So. 2d at 911; *Elson v. Vargas*, 520 So. 2d 76 (Fla. 3d Dist. Ct. App. 1998).

139. *Raimi*, 702 So. 2d at 1207. The court listed the following non-exclusive list of factors:

- a) presence of the beneficiary at the execution of the will; b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; c) recommendation by the beneficiary of an attorney to draw the will; d) knowledge of the contents of the will by the beneficiary prior to execution; e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; f) securing of witnesses to the will by the beneficiary; and g) safekeeping of the will by the beneficiary subsequent to execution.

Id. at 1287.

140. *Id.*

141. *Id.* The contestant must establish undue influence by a preponderance of the evidence. *Id.* (citing *Tarsagian v. Watt*, 402 So. 2d 471 (Fla. 3d Dist. Ct. App. 1981)).

142. *Raimi*, 702 So. 2d at 1287-88 n.13.

143. *Id.* at 1286. "It has long been emphasized that the right to dispose of one's property by will is highly valuable and it is the policy of the law to hold a last will and testament good wherever possible." *Id.*

144. *Id.* To execute a valid will, the testator need only have "the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed." *Id.*

145. *Raimi*, 702 So. 2d at 1286.

146. *Id.* (quoting *In re Estate of Weihe*, 268 So. 2d 446, 448 (Fla. 4th Dist. Ct. App. 1972)).

testamentary capacity is determined *solely* by the testator's mental state *at the time the will was executed*.¹⁴⁷

Finally, two other points from the *Raimi* case are of particular significance. First, the third district determined that the evidence of the decedent's incapacity was insufficient *as a matter of law*.¹⁴⁸ Specifically, the court found that the neurologist's testimony was insufficient as a matter of law to establish the decedent's incapacity because the neurologist could not offer any opinion as to the decedent's testamentary capacity at any given time nor did he "allow for the possibility of the decedent having a lucid interval."¹⁴⁹

The second point of particular interest is the trial court's ruling as to Sun Bank. Although the appellate court reversed the judgment against Sun Bank, it did so on a technicality¹⁵⁰ without addressing the substantive merits of the claims against them. This case should be a wake-up call to those who are concerned with fiduciary liability issues relating to banks and trust companies doing business in Florida. Perhaps this case was an anomaly, but it is now in the Reporters and definitely worthy of consideration.

Another case from the Third District Court of Appeal, *American Red Cross v. Estate of Haynsworth*,¹⁵¹ is instructive on two points.¹⁵² First, it is a good example of the proper use of partial revocation under section 732.5165 of the *Florida Statutes*. Second, it provides guidance as to the burden of proof in testamentary capacity cases involving a will executed *after* a judicial determination of incapacity.¹⁵³

The decedent, John Haynsworth, Jr., executed three wills in 1993: the first in February, the second in July, and the third in November.¹⁵⁴ On July 31, 1993, a probate judge entered an order, *nunc pro tunc* to May 18, 1993, which adjudicated Mr. Haynsworth totally incapacitated.¹⁵⁵ After Mr. Haynsworth's death on December 29, 1995, competing petitions for administration were filed by his relatives seeking to probate his February will and his July will.¹⁵⁶

147. *Id.* See also *Coppock v. Carlson*, 547 So. 2d 946, 947 (Fla. 3d Dist. Ct. App. 1989).

148. *Raimi*, 702 So. 2d at 1286.

149. *Id.*

150. *Id.* at 1285. The judgment against Sun Bank was reversed based on a finding that the claims of negligent hiring, retention and supervision were never pled or tried by consent. *Id.*

151. 708 So. 2d 602 (Fla. 3d Dist. Ct. App. 1998).

152. *Id.* at 603-04.

153. *Id.* at 604.

154. *Id.*

155. *Id.*

156. *Haynsworth*, 708 So. 2d at 604.

The trial court found the February will invalid as a result of undue influence¹⁵⁷ and the November will invalid because the decedent lacked the testamentary capacity to execute that will.¹⁵⁸ Thus, the trial court admitted the July will to probate.¹⁵⁹

The appellate court answered three questions in disposing of this case: “(1) what is required to establish testamentary capacity in the presence of a prior adjudication of incompetency, (2) what party bears the burden of demonstrating testamentary capacity . . . and, (3) if one part of a will is invalid as the product of undue influence, is the entire will rendered void?”¹⁶⁰

As to testamentary capacity, the court set forth its definition,¹⁶¹ and then found an adjudication of incapacity creates a presumption of a lack of testamentary capacity as to any will executed during the period of such adjudication, but such presumption may be overcome by proof that the will was executed during a lucid interval.¹⁶²

As to the question of the burden of proof, the court held that “an adjudication of incompetency shifts the burden of going forward with the evidence on testamentary capacity to the proponent of the will.”¹⁶³ Finally, as to the issue of partial invalidity, the court held that a finding that a portion of a will is invalid, should not render the entire document void.¹⁶⁴

Three other 1997 cases deserve a brief discussion. In *Larkin v. Pirthauer*,¹⁶⁵ the fourth district held that under Rule 4-3.7 of the *Rules Regulating The Florida Bar*, an attorney who prepared and witnessed a

157. *Id.* at 605. The trial court invalidated the February will based on a fee award under the will to the decedent’s attorney of approximately five percent of the estate, which the court determined was obtained by the undue influence of the attorney. *Id.*

158. *Id.*

159. *Id.*

160. *Haynsworth*, 708 So. 2d at 605.

161. *Id.* The court used the same definition of testamentary capacity as the *Raimi* court. *Rami v. Furlong*, 702 So. 2d 1273 (Fla. 3d Dist. Ct. App. 1997).

162. *Haynsworth*, 708 So. 2d at 606. The court defined “lucid moment” to be “a period of time during which the testator returned to a state of comprehension and possessed actual testamentary capacity.” *Id.*

163. *Id.* (quoting *In re Estate of Ziy*, 223 So. 2d 42, 43 (Fla. 1969)). Although an individual declared incapacitated may execute a valid will, an adjudication of incapacity creates a prima facie case against the proponent of the will. *Id.*

164. *Id.* See also Fla. STAT. § 732.5165. The assets ineffectively disposed of by the invalid portion of the will would pass either through the residuary clause or, if there is no residuary clause, by intestacy. *Haynsworth*, 708 So. 2d at 606. See also Fla. STAT. § 732.604 (1995) (failure of testamentary provisions) and Fla. STAT. § 732.101 (1997) (“intestate estate”).

165. 700 So. 2d 182 (Fla. 4th Dist. Ct. App. 1997).

contested will, may not represent the personal representative in the litigation aspects of the will contest.¹⁶⁶ Although the attorney was disqualified with regard to the litigation, the court held that rule 4-3.7 did not disqualify the lawyer from representing the personal representative with regard to other matters pertaining to the administration of the estate.¹⁶⁷

The second case, *Sun Trust Bank, Nature Coast v. Nichols*,¹⁶⁸ involved aspects of both probate and guardianship law.¹⁶⁹ In the *Nichols* case, John Jones was the court-appointed guardian for Donald Nichols.¹⁷⁰ After Nichols' death, his daughter-in-law submitted Nichols' purported last will for probate.¹⁷¹ Jones filed a petition to revoke the will and submitted a second will for probate.¹⁷² The trial court revoked probate of the first will and admitted the will submitted by Jones to probate.¹⁷³ Jones requested attorneys' fees from the court, arguing that he benefited the estate by submitting the proper will for probate.¹⁷⁴

The fifth district held that because the ward, Nichols, was deceased at the time the guardian, Jones, sought to revoke probate of the first will, Jones was an interloper in the estate case.¹⁷⁵ The court stated that Jones did not have standing to contest the will under section 733.109(1)¹⁷⁶ or section 731.201(21) of the *Florida Statutes*.¹⁷⁷ As an "interloper" in the estate case, in which he had no standing, Jones was not entitled to attorneys' fees.¹⁷⁸

166. *Id.* at 183. The court's ruling was based on the fact that rule 4-3.7 generally prohibits attorneys from being advocates at trials where they may be witnesses on substantive matters. *Id.*

167. *Id.*

168. 701 So. 2d 107 (Fla. 5th Dist. Ct. App. 1997). See *infra* Part I for further discussion of this case.

169. See *id.*

170. *Id.* at 107.

171. *Id.* at 109.

172. *Id.*

173. *Nichols*, 701 So. 2d at 109.

174. *Id.*

175. *Id.* at 109-10.

176. *Id.* at 110. Section 733.109(1) of the *Florida Statutes* states that any interested person may petition the court in which a will is admitted for probate for revocation of probate. FLA. STAT. § 733.109(1) (1997).

177. *Nichols*, 701 So. 2d at 109-10. Section 731.201(21) of the *Florida Statutes* defines "interested person" as "any person who may reasonably be expected to be affected by the outcome of a particular proceeding involved." FLA. STAT. § 731.201(21) (1997).

178. *Nichols*, 701 So. 2d at 110.

The final case in this section, *Kelsey v. Pewthers*,¹⁷⁹ deals with the remedy for a breach of a contract to make a will.¹⁸⁰ This case is unique because the court had to fashion a remedy against a promisor who was still alive. Florida law clearly allows individuals to make contracts which set forth how their assets will pass upon their death.¹⁸¹ In addition, Florida case law had already established that under the circumstances involving mutual promises to make a will while both promisors were still alive, either of them could rescind the contract by revoking his or her will, or making a different disposition of their property after providing proper notice to the other party.¹⁸² The *Kelsey* case provides a new twist in Florida law because the plaintiffs had provided *independent consideration* for the contract, not just a simple promise to make a reciprocal will. Thus, the Fourth District Court of Appeal found that the plaintiffs had a viable cause of action for breach of contract against the promisor upon her repudiation of the contract.

The promisor, Floraine Kelsey, was a ninety-one year old widow when she entered into a contract to make a will with her nephew, Troy Pewthers, and his wife, Martha.¹⁸³ Under the contract, the Pewthers were required to take care of Kelsey for the remainder of her life and as their sole compensation, the Pewthers were entitled to receive all of the real and personal property owned by Kelsey at the time of her death.¹⁸⁴ The Pewthers provided services to Kelsey for sixteen months, after which Kelsey terminated the relationship.¹⁸⁵

Finding that Kelsey had breached her contract with the Pewthers, the trial court awarded the Pewthers damages against Kelsey in the amount of \$242,000 plus prejudgment interest of \$37,267.20.¹⁸⁶ The amount of the damage award, which was based on a "benefit of the bargain" theory, actually exceeded the amount of Kelsey's total assets as of the date of the judgment.¹⁸⁷ The appellate court reversed the portion of the trial court

179. 685 So. 2d 953 (Fla. 4th Dist. Ct. App. 1996).

180. *Id.* at 953.

181. See FLA. STAT. § 732.701 (1997). For an excellent discussion of contracts to make a will, see DAVID T. SMITH, FLORIDA PROBATE CODE MANUAL, Ch. 2, at 49 (1998).

182. See *Boyle v. Schmitt*, 602 So. 2d 665 (Fla. 3d Dist. Ct. App. 1992); Smith, *supra* note 181, at 49.

183. *Kelsey*, 685 So. 2d at 954.

184. *Id.*

185. *Id.* Kelsey called her daughter at 5:30 a.m. and told her she was afraid that Troy Pewther was trying to kill her. *Id.*

186. *Id.* at 955.

187. *Kelsey*, 685 So. 2d at 955. The judgment amount was comprised of the present value of the Pewthers's expected inheritance from Kelsey, as estimated by the Pewther's expert, plus

judgment relating to contract damages and took on the difficult task of fashioning an appropriate remedy for the promisor's breach.¹⁸⁸ Given the language of the contract and the fact that the case involved a living promisor, the court determined that a benefit of the bargain damages were not available to the plaintiffs.¹⁸⁹

There were several reasons for the court's decision. First, because the contract did not involve specific property but only property "owned by Kelsey at the time of her death," the property to which the plaintiff had a claim could not be identified until the promisor's death.¹⁹⁰ Second, the promisor may have no property left at her death.¹⁹¹ Finally, a living promisor is entitled to the full, unrestricted, use of her property during her lifetime as long as that use does not constitute a fraud on her agreement.¹⁹²

Under the circumstances of this case, the court held that the appropriate measure of damages was either quantum meruit during the promisor's life or the imposition of a constructive trust on the promisor's property, allowing full and unrestricted use on such property during her lifetime, absent proof of fraud.¹⁹³

V. HOMESTEAD

During the past two years, the Florida courts were moderately active in the area of homestead law. In the most interesting case, *Snyder v. Davis*,¹⁹⁴ the Supreme Court of Florida may even have engaged in a bit of legislating from the bench.¹⁹⁵ Florida attorneys practicing in the area of estate planning would be well-advised to review the *Snyder* case. The three cases we will address in this section deal with the constitutional protections provided to Florida homestead. The *Florida Constitution* protects homestead property in three ways: 1) Article VII, section 6 provides the homestead with an exemption from property taxes; 2) Article X, sections 4(a) and (b) protect

several lifetime gifts, less an adjustment for a ten percent life interest to Kelsey's daughter, as required by the contract. *Id.* The judge failed to account for the costs of litigation and certain other of Kelsey's expenses. *Id.*

188. *Id.* at 956-57.

189. *Id.* at 956.

190. *Kelsey*, 685 So. 2d at 954-55.

191. *Id.* at 955.

192. *Id.*

193. *Id.* at 956.

194. 699 So. 2d 999 (Fla. 1997).

195. *Id.* at 1007 (Harding, J., dissenting). In his dissent, Justice Harding accused the majority of "creating law, which is more properly the office of the legislature." *Id.*

the homestead from forced sale by creditors; and 3) Article X, section 4(c) sets forth the restrictions upon a homestead owner's right to devise homestead property.¹⁹⁶

In the case of *Knadle v. Estate of Knadle*,¹⁹⁷ the First District Court of Appeal provided a clear, albeit harsh, reminder that in order to avail oneself of the homestead protections provided by Article X, section 4 of the *Florida Constitution*, one must closely adhere to the law regarding the devise of homestead property.¹⁹⁸ The decedent, Evangeline Knadle, died testate at age eighty survived by two adult children, no spouse and no minor children.¹⁹⁹ Her will directed her personal representative to sell her homestead and add the net proceeds from the sale to the residue of her estate for ultimate distribution to her two adult children.²⁰⁰ The appellate court held in a previous case that where a testator directed in her will that her homestead be sold and the proceeds placed in the residue of the estate for distribution along with other assets, the property lost its homestead character and was, therefore, "subject to the claims of creditors."²⁰¹ Perhaps as a "look what you could have done" remark, the court took the time to specifically mention the case of *In re Estate of Tudhope*.²⁰² Because the homestead property in *Tudhope* was not converted to dollars before it passed and vested in the decedent's adult children, the property retained its homestead character and was not subject to creditors' claims.²⁰³

In what was more of a new application of existing law than a new concept, the Fourth District Court of Appeal, in *Crain v. Putnam*²⁰⁴ preserved the homestead status of an elderly woman's home despite the fact that she was not actually living in the house.²⁰⁵ Mrs. Crane suffered extensive brain damage as a result of an illness and in 1992, was placed in a nursing home in a vegetative state.²⁰⁶ In 1994, the county property appraiser

196. *Id.* at 1001-02.

197. 686 So. 2d 631 (Fla. 1st Dist. Ct. App. 1996).

198. *Id.* at 632. *See also* Estate of Price v. West Fla. Hosp., Inc., 513 So. 2d 767 (Fla. 1st Dist. Ct. App. 1987).

199. *Knadle*, 686 So. 2d at 632.

200. *Id.*

201. *Id.* (citing Estate of Price v. West Fla. Hosp., Inc., 513 So. 2d 767 (Fla. 1st Dist. Ct. App. 1987)).

202. *Id.* (citing *In re Estate of Tudhope*, 595 So. 2d 312 (Fla. 2d Dist. Ct. App. 1992)).

203. *Estate of Tudhope*, 595 So. 2d at 313.

204. 687 So. 2d 1325 (Fla. 4th Dist. Ct. App. 1997).

205. *Id.* at 1325.

206. *Id.*

denied a homestead exemption²⁰⁷ on her house because she had not lived in the house for over two years.²⁰⁸ The trial court agreed and concluded, as a matter of law, that if the taxpayer “was not actually residing on the property, for whatever reason, no exemption is available.”²⁰⁹

The fourth district reversed, and held that Mrs. Crain was entitled to the homestead exemption even though she was not physically residing in the house.²¹⁰ The issue before the court was whether the property was being “used” within the meaning of section 196.101(1) or (2) of the *Florida Statutes*.²¹¹ The court found it significant that Mrs. Crain had been involuntarily removed from her home due to illness, that she was unable to communicate any intention regarding her residency, that all of her furniture, clothing and most of her possessions were in the house and that she continued to receive mail there.²¹² Florida courts have made similar rulings with regard to Article X protections, but this appears to be the first case involving Article VII and section 196.101 of the *Florida Statutes*.²¹³

The big news in homestead law came from the Supreme Court of Florida in the case of *Snyder v. Davis*.²¹⁴ In *Snyder*, the Supreme Court of Florida may have even engaged in a bit of legislating from the bench.²¹⁵ The facts in *Snyder* are simple. Betty Snyder died testate survived by an adult son, Milo Snyder, an adult granddaughter, Kelli Snyder (Milo’s daughter), no spouse and no minor children.²¹⁶ In her last will, Mrs. Snyder devised her home to her granddaughter, Kelli.²¹⁷ The personal representative of Mrs. Snyder’s estate sought to sell the homestead to fund specific bequests, to pay the cost of administration of the estate and to pay creditors.²¹⁸ Kelli objected to the sale and claimed the homestead property passed to her free of claims

207. *Id.* Under section 196.101 of the *Florida Statutes*, Mrs. Crain’s son sought an exemption from taxes on real estate used and owned as a homestead, as described by Article VII, Section 6(a) of the *Florida Constitution*, by totally and permanently disabled persons. *Id.* See also FLA. STAT. § 196.101 (1993).

208. *Crain*, 687 So. 2d at 1325.

209. *Id.* at 1326.

210. *Id.*

211. *Id.* at 1325–26. See also FLA. STAT. § 196.101(1). Section 196.012(4) of the *Florida Statutes* defines “use” as “the exercise of any right or power over real or personal property incident to the ownership of the property.” *Id.*

212. *Crain*, 687 So. 2d at 1325.

213. *Id.* at 1326.

214. 699 So. 2d 999 (Fla. 1997).

215. *Id.* at 1007 (Harding, J., dissenting). See *supra* note 195.

216. *Snyder*, 699 So. 2d at 1000.

217. *Id.*

218. *Id.* at 1000.

under the protections of Article X, section 4 of the *Florida Constitution*.²¹⁹ The trial judge ruled that the homestead provisions applied to the devise to Kelli and, as such, the homestead property was protected from creditor's claims.²²⁰ The Second District Court of Appeal reversed and held that because the decedent's son, Milo, would have been the sole heir had the decedent died intestate, Kelli, the granddaughter, could not benefit from the homestead's protection against creditors.²²¹

The district court's position was based on a strict reading of the *Florida Constitution* and *Florida Statutes*.²²² Under Article X, section 4(b), the homestead exemption inures *only* to a "surviving spouse or heirs of the owner."²²³ Because the *Florida Constitution* does not define "heirs," the district court looked to section 731.201(18) of the *Florida Statutes*, which states: "heirs . . . means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent."²²⁴ As the district court explained:

If Betty Snyder had died *intestate*, Milo Snyder would have inherited everything as her "heir," i.e., next lineal descendant in line, and Kelli Snyder, under any construction of section 732.103, would have inherited nothing. This would be so because inheritance in Florida is "per stirpes." § 732.104, Fla. Stat. (1993). Because Milo Snyder survived, Kelli Snyder is not an intestate "heir" of her grandmother.²²⁵

In an opinion sprinkled with classic quotes and not so subtle irony, the Supreme Court of Florida quashed the opinion of the second district.²²⁶ The Supreme Court of Florida's opinion focused on two primary issues. First, the court held that, where there is no surviving spouse or minor children, the constitutional homestead protection against creditors "may inure to the

219. *Id.*

220. *Id.* at 1001.

221. *Snyder*, 699 So. 2d at 1001.

222. *Id.*

223. FLA. CONST. art. X, § 4(b); *see Snyder*, 699 So. 2d at 1000.

224. FLA. STAT. § 731.201(18) (1997).

225. *Snyder*, 699 So. 2d at 1001. The Second District Court of Appeal followed this reasoning two more times in 1997 in *In re Estate of Farrior*, 694 So. 2d 804 (Fla. 2d Dist. Ct. App. 1997) and *In re Estate of Hinterleiter*, 692 So. 2d 234 (Fla. 2d Dist. Ct. App. 1997). However, the first district took the opposite view in *Walker v. Mickler*, 687 So. 2d 1328 (Fla. 1st Dist. Ct. App. 1997). This conflict among the districts precipitated the appeal of *Snyder* to the Supreme Court of Florida. *Snyder*, 699 So. 2d at 1001.

226. *Id.* at 1005-06.

benefit of [a] person to whom the homestead property is devised by a will.”²²⁷ Surprisingly, the issue of whether the term “heirs” in the homestead provisions of the *Florida Constitution* included devisees under a will had never before been addressed by the court.²²⁸ In reaching its conclusion, the court stated “if we defined the term ‘heirs’ in the homestead provision by its strict common-law definition, the very act of devising the homestead would abolish the homestead protections against creditors.”²²⁹

The second portion of the court’s ruling will certainly be a bit more controversial. Rejecting a narrow definition of the term “heirs” that would include only those individuals who would inherit under Florida’s intestacy statute at the death of the testator, the court held that the homestead provision of the *Florida Constitution* allows an individual with no surviving spouse or minor children to devise, by will, homestead property, along with its protection from creditors, to *any family member within the “class”* of persons categorized in the Florida intestacy statute.²³⁰

The upside of this ruling is that it allows the testator, rather than fate or the Florida intestacy statute, to choose who will best preserve and protect the family homestead property.²³¹ The downside of this opinion is that the millionaire second cousin of the testator’s dead fourth wife could receive the homestead, with all its accompanying protections from creditors, while the doctor who treated the testator’s last illness remained unpaid. Apparently, the majority was willing to accept this consequence of their ruling and stated that they would not be deterred “‘simply because ‘financially independent heirs may receive’ a windfall.”²³² In fact, the court stated that the “homestead protection has never been based on principles of equity.”²³³ Whether the Supreme Court of Florida’s opinion in *Snyder* furthers the public policy considerations behind the homestead protections will certainly be a matter of some debate in the coming years.

227. *Id.* at 1003.

228. *Id.* at 1002.

229. *Id.* at 1003.

230. *Snyder*, 699 So. 2d at 1005.

231. *Id.* The court said that to adopt a narrow definition of “heirs” would turn will-making into an “act of prophecy” because in order to preserve the homestead protections, the testator would have to predict which of his family would survive him. *Id.*

232. *Id.* at 1002 (quoting *Public Health Trust v. Lopez*, 531 So. 2d 946, 950 (Fla. 1988)).

233. *Id.*

VI. DEADMAN'S STATUTE

The mere mention of the deadman's statute is enough to make most practitioners shudder. So much so, in fact, that many practitioners inadvertently waive the deadman's statute and ignore the potential impact it could have on their cases. Two recent cases in this area, *In re Estate of Stetzko*²³⁴ and *Tarr v. Cooper*,²³⁵ provide some insight into how the deadman's statute can be a determining factor in the outcome of a case.

In the *Stetzko* case, the Fourth District Court of Appeal delivered what could be a fatal blow to the deadman's statute in will contests and other similar litigation. In *Stetzko*, the personal representative filed an action to set aside lifetime transfers of the decedent, which were alleged to be the product of undue influence and duress.²³⁶ The fourth district held that the statute is waived if the protected person introduces any documentary evidence concerning the subject matter of the oral communication.²³⁷ The court specifically recognized "that in most, if not all, will contests, the statute will be waived because the person attempting to uphold the will must first introduce it and show that it was properly executed. Similarly, in other contests where a protected person must first prove an *inter vivos* act . . . waiver will likely result."²³⁸

If the *Stetzko* case is a good example of when the statute is inapplicable, the *Tarr* case is a perfect example of how the deadman's statute should be used to protect an estate from creditors' claims. In the *Tarr* case, the trial court entered a summary judgment against a creditor due, in large part, to the deadman's statute.²³⁹ The creditor in *Tarr* attempted to prove the contents of an oral contract with the decedent.²⁴⁰ The *Tarr* court held that without the creditor's testimony, which was barred by the deadman's statute, the material terms of the contract could not be established.²⁴¹ Hence, summary judgment in favor of the estate was appropriate.²⁴²

The *Stetzko* and *Tarr* cases, combined, show the opposite ends of the spectrum on the deadman's statute and provide recent examples of how

234. 714 So. 2d 1087 (Fla. 4th Dist. Ct. App. 1998).

235. 708 So. 2d 614 (Fla. 3d Dist. Ct. App. 1998).

236. *Stetzko*, 714 So. 2d at 1088.

237. *Id.* at 1090.

238. *Id.* (quoting CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 602.1, at 358-59 (1997 ed.)).

239. *See Tarr*, 708 So. 2d at 615.

240. *Id.*

241. *Id.*

242. *Id.*

courts apply this confusing statute. These cases are further evidence of the need for legislative action on the deadman's statute. The Probate Litigation Committee of the Real Property, Probate and Trust Law Section of The Florida Bar has recently formed a committee to examine Florida's deadman's statute and to make a recommendation regarding its amendment or repeal.²⁴³ Perhaps this committee can make some sense of this terribly confusing statute.

VII. CASES OF INTEREST

There were numerous cases decided in 1997 and 1998 which do not fit well into any of the topic areas delineated in this article, but which merit discussion nonetheless. The first of these cases is the Third District Court of Appeal's decision in *Martin v. Martin*.²⁴⁴ Many practitioners may be familiar with the 1981 case of *DeWitt v. Duce*,²⁴⁵ in which the Florida Supreme Court held that if a plaintiff has an adequate remedy in probate, that remedy must be exhausted before the plaintiff can pursue a claim for tortious interference with an inheritance.²⁴⁶ Until 1997, however, there were no cases which discussed the application of this potential bar to an action for tortious interference as it related to an inter vivos trust.

In *Martin*, the decedent's children sued their stepmother alleging that she tortiously interfered with their right to inherit by unduly influencing the decedent into making gifts to an inter vivos trust which effectively disinherited them.²⁴⁷ The trial court entered summary judgment in favor of the stepmother and held that the claim for tortious interference was barred because the children had not pursued their claim in the probate proceedings as required by *DeWitt*.²⁴⁸ The *Martin* court reversed and held that the bar to recovery in *DeWitt* was not applicable to the case before it.²⁴⁹ The court reasoned that the assets contained in the trust, which was substantially funded prior to death, were not part of the probate estate and not subject to

243. *Id.*

244. 687 So. 2d 903 (Fla. 4th Dist. Ct. App. 1997).

245. 408 So. 2d 216 (Fla. 1981).

246. *Id.* at 220.

247. *Martin*, 687 So. 2d at 904.

248. *Id.*

249. *Id.* at 905-08. The *Martin* court was careful to point out that it was only deciding the particular case based upon the particular facts before it. *See id.* at 907-08. There may be other trust cases when *DeWitt* will serve as a bar to recovery. For example, if the revocable trust is simply an unfunded trust, into which the will pours over, the result could be different. *See id.* at 907 (noting specifically that the trust was ninety-five percent funded).

administration.²⁵⁰ Even if the children had successfully contested the will, they would not have received the trust assets.²⁵¹ Accordingly, the court permitted the children to proceed with their tortious interference claim relating to the trust.²⁵²

The *Martin* case also included an excellent procedural point regarding a challenge to a will and trust.²⁵³ Many practitioners proceed under the misconception that it is always permissible to file their trust actions as part of the petitions for revocation of probate. The *Martin* case serves as a reminder that the proper practice is to file a separate trust complaint under sections 737.201 and 737.206 of the *Florida Statutes*.²⁵⁴ Thereafter, the trial court can consolidate the two actions if it is appropriate to do so.²⁵⁵

In *Stept v. Paoli*,²⁵⁶ the Fourth District Court of Appeal held that the “face of the will doctrine,” which essentially sounded the death knell for malpractice actions against the scrivener of a will by estate beneficiaries, applies with equal force to revocable trusts.²⁵⁷ The “face of the will doctrine” generally prevents an estate beneficiary from recovering on a malpractice claim against the attorney who drafted the will unless he or she can show that the testator’s intent *as expressed in the will* is frustrated, and the beneficiary’s legacy is lost or diminished as a direct result of the attorney’s negligence.²⁵⁸ The Supreme Court of Florida has interpreted the “face of the will doctrine” as placing a major limitation on malpractice actions against drafting attorneys.²⁵⁹

The *Stept* case provides a prime example of how the “face of the will doctrine” can serve as a bar to a beneficiary’s suit. In *Stept*, the trust beneficiaries filed a malpractice action against the drafting attorney claiming

250. *Martin*, 687 So. 2d at 907.

251. *Id.*

252. *Id.*

253. *Id.* at 907.

254. *Id.*

255. *Martin*, 687 So. 2d at 908.

256. 701 So. 2d 1228 (Fla. 4th Dist. Ct. App. 1997).

257. *Id.* at 1229.

258. *See Espinosa v. Sparber*, 612 So. 2d 1378, 1380 (Fla. 1993); *Miami Beach Community Church, Inc. v. Stanton*, 611 So. 2d 538, 538 (Fla. 3d Dist. Ct. App. 1992).

259. *Espinosa*, 612 So. 2d at 1380. Finding the privity exception to be “a limited one,” the court held an action only lies when the testator’s intent as expressed in the will itself, not as shown by extrinsic evidence, is frustrated due to the negligence of the testator’s attorney. *Id.* The court reasoned that to allow such evidence would dramatically increase the risk of misinterpreting the testator’s intent, as well as “heighten[ing] the tendency to manufacture false evidence that could not be rebutted due to the unavailability of the testator.” *Id.* This limitation often proves very difficult, if not impossible, to overcome. *Id.*

that his drafting error in the decedent's revocable trust cost the estate approximately \$100,000 in additional estate taxes.²⁶⁰ The trial court dismissed the action with prejudice finding that the revocable trust "did not contain the expressed intent of the testator to avoid or minimize taxes."²⁶¹ On appeal, the beneficiaries acknowledged that the "face of the will doctrine" would prevent recovery if it applied, but argued that the doctrine was not applicable to revocable trusts.²⁶² The *Stept* court disagreed, holding that there is "no reason to expand the limited privity exception" in cases of revocable trusts.²⁶³

In the last case, *Nayee v. Nayee*,²⁶⁴ one of the issues addressed by the Court was whether certain informal documents would qualify as "other statements" within the meaning of section 737.307 of the *Florida Statutes*, thus barring a beneficiary from bringing an action against a trustee.²⁶⁵ The *Nayee* case is both interesting and important because it is the first to explain what needs to be included in an "other statement" in order to start the statute of limitations running under section 737.307. The trustee in *Nayee* was sued for an accounting of a family trust by the trust beneficiaries, which consisted of his brother and two nephews.²⁶⁶ The trust had commenced in 1979.²⁶⁷ The trustee claimed that the beneficiaries were barred from bringing their actions because he disclosed his trust dealing in a 1987 meeting.²⁶⁸ The trustee had notes from the meeting and copies of handwritten accounts, which he had provided to the beneficiaries.²⁶⁹ The handwritten statements showed a list of payments to various persons and entities, such as the IRS

260. *Stept*, 701 So. 2d at 1229.

261. *Id.*

262. *Id.*

263. *Id.*

264. 705 So. 2d 961 (Fla. 5th Dist. Ct. App. 1998).

265. *See id.* at 965. *See also* FLA. STAT. § 737.307 (1997). Pursuant to section 737.307 of the *Florida Statutes*, a beneficiary who has received a final, annual, or periodic account or "other statement fully disclosing the matter" is barred from bringing an action against the trustee unless a proceeding to assert the claim is commenced within six months after receipt of the account or statement. FLA. STAT. § 737.307 (1997). There are no other Florida cases defining the meaning of "other statement."

266. *Nayee*, 705 So. 2d at 961-62.

267. *Id.* at 961.

268. *Id.* at 962. The trustee argued that the beneficiaries were barred under section 95.11(3)(p) of the *Florida Statutes*. *See id.*

269. *Nayee*, 705 So. 2d at 963.

but no explanation for any of the payments was offered.²⁷⁰ The trial court granted a motion for summary judgment in favor of the trustee.²⁷¹

The *Nayee* court reversed, finding, among other things, that the “informal statements” did not contain sufficient information to start the statute of limitations running under section 737.307 of the *Florida Statutes*.²⁷² The court noted that the “informal statements did not include the most basic accounting information [and] provided no explanation for any of the payments.”²⁷³

VIII. 1997 AND 1998 STATUTORY CHANGES

The years of 1997 and 1998 were relatively quiet for new legislation in the areas of estates, trusts, and guardianships. Instead, the legislature focused its efforts on general housekeeping to resolve ambiguities and potential problem areas within the statutes. Rather than discuss all of the changes to the statutes in 1997 and 1998, this article will highlight significant legislation that is of interest to most practitioners.²⁷⁴

270. *Id.* at 965.

271. *Id.* at 963. The trial court found that the beneficiaries were barred under the general four-year statute of limitations under section 95.11 of the *Florida Statutes*. *Id.* at 962.

272. *Id.* at 965. *See also* FLA. STAT. § 737.307 (1997). The court also held that, unless an accounting is provided to the beneficiaries pursuant to section 737.307 of the *Florida Statutes*, which is sufficient to start the six-month period running, an action for an accounting is governed by common-law laches not by section 95.11 of the *Florida Statutes*. *Nayee*, 705 So. 2d at 963. The court noted that “laches requires a showing of an unreasonable delay in asserting a known right which causes undue prejudice to the party against whom a claim is asserted.” *Id.* Moreover, laches does not begin to run until the beneficiary has actual knowledge of an unequivocal act in repudiation of the trust or actual knowledge of adverse possession by the trustee. *Id.* at 964. The court held that the repudiation must be open and “brought home” to the beneficiary. *Id.* at 964.

273. *Id.* at 965.

274. In addition to the changes set forth in the text to this article, the legislature also amended: 1) the homestead exemptions to provide that Roth IRAs and medical savings accounts are exempt from creditors, FLA. STAT. §§ 222.21–.22 (1997); 2) the statutes concerning Viatical Settlements to include detailed disclosure provisions, misrepresentation penalties, and provisions for “related provider trusts,” FLA. STAT. § 626.9911; 3) the list of property exempt from probate creditors under section 732.402 to include Florida Prepaid College Program contracts; and 4) numerous provisions concerning anatomical gifts. FLA. STAT. §§ 732.910–.922 (Supp. 1998).

A. *Florida Intangibles Tax*²⁷⁵

Earlier this year, the Florida Legislature considered a number of bills related to the intangibles tax ranging from proposals to repeal the tax in its entirety to measures designed to close perceived loopholes in the tax. The Florida Legislature ultimately passed several statutory changes relating to the intangibles tax, including provisions which: 1) increased the filing threshold for individuals from five dollars of tax to sixty dollars of tax, effectively increasing the tax exemption for single individuals from \$25,000 to \$80,000 and for married individuals from \$45,000 to \$100,000;²⁷⁶ 2) repealed the intangibles tax on one-third of otherwise taxable accounts receivable;²⁷⁷ 3) exempted certain compensatory stock options as well as stock received pursuant to the exercise of such options from the intangibles tax;²⁷⁸ and 4) reduced penalties for failing to timely file an intangibles tax return.²⁷⁹

Significantly, the “anti-avoidance” measures never received serious consideration. Rather than remove the incentives to implement planning strategies, the legislature actually made such planning more palatable to many by enacting a provision which allows taxpayers who transfer their intangibles to out-of-state trusts or partnerships to maintain their existing asset management relationships with Florida based banks and trust companies.²⁸⁰ Prior to the 1998 legislation, assets managed under discretionary arrangements by a Florida bank or trust company would technically be subject to intangibles tax even if such assets were owned by a non-Florida entity.

In addition to the legislative changes enacted this year, the Department of Revenue completed an extensive rule-making project dealing specifically with the application of the intangibles tax to out-of-state trusts and partnerships.²⁸¹ The new rules set forth several “safe-harbor” requirements

275. The authors would like to thank Stephen G. Vogelsang, Esq., a shareholder in the law firm of Gunster, Yoakley, Valdes-Fauli & Stewart, P.A. for his insight and analysis into the impact of the Florida Intangible Tax changes.

276. Ch. 98-132, § 2, 1998 Fla. Laws 885, 886 (to be codified at FLA. STAT. § 199.052(2)).

277. Ch. 98-132, § 6(1), 1998 Fla. Laws 885, 889 (to be codified at FLA. STAT. § 199.185).

278. *Id.* § 6(m), 1998 Fla. Laws at 889 (to be codified at FLA. STAT. § 199.185).

279. Ch. 98-132, § 9, 1998 Fla. Laws 891 (to be codified at FLA. STAT. § 199.282).

280. Ch. 98-132, § 2, 1998 Fla. Laws 886 (to be codified at FLA. STAT. § 199.052). (permitting a bank or savings association to act as a fiduciary or agent of the trust).

281. *See* FLA. ADMIN. CODE ANN. r. 12C-2.006 – 12C-2.0063 (1998).

for transfers to out-of-state trusts and partnerships which, if complied with, ensure that such arrangements effectively remove the transferred assets from Florida for intangibles tax purposes.²⁸² Although the new rules were intended to merely restate the Department's existing position with respect to out-of-state trusts and partnerships, the rules actually create several new planning complexities that must be addressed when considering transfers to out-of-state entities.²⁸³ In sum, although the intangibles tax has received increased scrutiny over the past year, opportunities to reduce or eliminate liability for the tax are still available to many individuals.

B. Chapter 97-240: Omnibus Trust, Estate, and Guardianship Legislation

In 1997, the Florida Legislature passed chapter 97-240, which effected numerous unrelated provisions of the trust, estate, and guardianship laws.²⁸⁴ Chapter 97-240 was geared toward closing up what were perceived as potential problem areas within the statutes relating to estate tax issues, trust and estate administration issues, including fiduciary investments, and, to a lesser extent, trust attorneys' fees issues.²⁸⁵

The first item addressed by chapter 97-240 was the adoption of a technical amendment to the Florida's Statutory Rule Against Perpetuities ("FSRAP") which is intended to preserve Generation-Skipping Transfer tax exemption for certain Florida trusts.²⁸⁶ Prior to the amendment, a trust would lose its Generation-Skipping Transfer tax exemption if the donee of a special power of appointment in a pre-1986 (grandfathered) trust exercises the power so as to violate the common law rule against perpetuities by extending the trust beyond lives in being plus twenty-one years.²⁸⁷ Accordingly, drafting to allow the maximum period under the FSRAP could result in loss of tax-exempt status.²⁸⁸ The FSRAP now includes a section, which provides that language in a trust or other property arrangement, which would allow the exercise of the power beyond the common law period, is

282. *Id.*

283. Unfortunately, a detailed analysis of these rules is beyond the scope of this survey.

284. 1997 Fla. Laws ch. 97-240. This survey will only highlight the more significant changes effected by Chapter 97-240.

285. *Id.*

286. Ch. 97-240, § 1 1997 Fla. Laws 4404, 4404 (to be codified at FLA. STAT. § 689.225).

287. Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP., PROB. TR. J. 185, 189 (1995).

288. *Id.*

inoperative.²⁸⁹ As most probate lawyers will recall, the Florida Legislature enacted section 737.111 in 1995 that generally provides that the testamentary aspects of a trust are invalid unless the trust is executed with the formalities of a will.²⁹⁰ The 1995 version of the statute failed to include a grandfathering provision for those trusts executed prior to its effective date. Chapter 97-240 added section 737.111(6), which provides that the section will not apply to trusts executed prior to October 1, 1995.²⁹¹ Chapter 97-240 also exempts from the execution requirements of the statute trusts established as part of employee annuity described in section 403 of the *Internal Revenue Code*, IRAs, Keogh Plans, and qualified plans under section 401 of the *Internal Revenue Code*.²⁹²

Chapter 97-240 also helped alleviate the confusion that had arisen in connection with the amount of fees payable to an attorney who renders services in connection with the initial administration of a revocable trust after the death of the settlor. Prior to the amendment, section 737.511(5) provided that the presumptively reasonable compensation under section 737.2041(3) would not apply when a corporate fiduciary was serving as trustee or co-trustee of the revocable trust.²⁹³ Instead, the fees were to be determined under the particular facts and circumstances of the trust.²⁹⁴ Under Chapter 97-240, the language requiring disparate treatment was removed from section 737.2041.²⁹⁵ Accordingly, the presumptively reasonable fee is the same regardless of whether the trustee is a corporate fiduciary or an individual.²⁹⁶ Chapter 97-240 also added a new section, 737.2041(3), which provides that an attorney who is hired to perform limited or specially defined services is entitled to receive fees per their fee agreement, or an hourly-based fee under section 737.2041(6).²⁹⁷

Section 737.303 of the *Florida Statutes* was amended to provide that the trustee's duty to account or provide a statement of accounts, with respect to a revocable trust, applies only to the grantor or the legal representative of

289. Ch. 97-240, § 1 1997 Fla. Laws 4404, 4404 (to be codified at FLA. STAT. § 689.225).

290. See FLA. STAT. § 737.111 (1997).

291. See Ch. 97-240, § 4, 1997 Fla. Laws 4404, 4407 (to be codified at FLA. STAT. § 737.111).

292. *Id.*

293. See FLA. STAT. § 737.2041 (1995).

294. See *id.*

295. See Ch. 97-240, § 5, 1997 Fla. Laws 4404, 4407 (to be codified at FLA. STAT. § 737.2041).

296. See *id.*

297. *Id.*

the grantor during the grantor's lifetime.²⁹⁸ In other words, the beneficiary of a revocable trust no longer has a right to review the trust statements during the grantor's lifetime. Of particular note, however, is the fact that the beneficiary may still have a right to receive a complete copy of the trust agreement and "relevant information about the assets of the trust and the particulars relating to administration."²⁹⁹

Another change contained in chapter 97-240 is related to Florida's Prudent Investor Rule.³⁰⁰ Section 518.112 of the *Florida Statutes*, concerning the delegation of investment functions to an investment agent, was amended to clarify that the fiduciary does not simply give up responsibility for investments once it chooses to delegate.³⁰¹ The new bill requires that the fiduciary exercise reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of the delegation, and in reviewing the agent's actions in order to monitor overall performance and compliance with the scope and terms of the delegation.³⁰² These new requirements appear to add no real substance to the duties of a fiduciary as these requirements were arguably always implicit within the statute.³⁰³ Chapter 97-240 also adds a new subsection 518.112(c), which provides that a fiduciary who administers life insurance contracts (such as the trustee of an irrevocable life insurance trust) is not obligated to diversify or allocate assets relative to the contract until the contract matures and the policy proceeds are received.³⁰⁴

The legislature clarified two ambiguities in section 738.12 of the *Florida Statutes*, Florida's Underproductive Property Statute, in chapter 97-240.³⁰⁵ Section 738.12 generally provides that an income beneficiary is

298. See Ch. 97-240, § 6, 1997 Fla. Laws 4404, 4411 (to be codified at FLA. STAT. § 737.303).

299. See FLA. STAT. § 737.303(3) (1997).

300. See Ch. 97-240, § 8, 1997 Fla. Laws 4404, 4413 (to be codified at FLA. STAT. § 518.112).

301. *Id.*

302. *See id.*

303. *See generally* Lyman W. Welch, *How the Prudent Investor Rule May Affect Trustees, TR. & EST.*, at 18 (Dec. 1991) (noting that a trustee who decides to delegate has a duty to exercise reasonable care, skill and caution in selecting agents, and in reviewing the agents actions).

304. Ch. 97-240, § 8, 1997 Fla. Laws 4404, 4413 (to be codified at FLA. STAT. § 518.112).

305. Ch. 97-240, § 10, 1997 Fla. Laws 4404, 4422 (to be codified at FLA. STAT. § 738.12).

entitled to receive at least a three percent return per year.³⁰⁶ If the net income of the trust is less than three percent, the trustee is required to pay the income beneficiary the three percent out of principal.³⁰⁷ Prior to the amendment, a literal reading of the statute required the trustee to distribute the three percent in addition to the amounts received by the beneficiary during the course of the year.³⁰⁸ The new amendment clarifies that the trustee is only required to distribute the difference between three percent and the income paid to the beneficiary during the course of the year.³⁰⁹ Chapter 97-240 also adds a new subsection 738.12(1)(c), which makes the statute applicable only to mandatory income interests in irrevocable trusts.³¹⁰ Accordingly, a beneficiary who is entitled to receive income at the discretion of the trustee is not entitled to the benefit of the statute.

Many institutions (and probate practitioners) will be surprised to find that chapter 97-240 added additional requirements for both the personal representative and the institution holding a safe-deposit box in the name of a decedent.³¹¹ Sections 655.936 and 733.604 of the *Florida Statutes* were amended to provide that “[t]he initial opening of any safe-deposit box of the decedent must be conducted in the presence of an employee of the institution where the box is located and the personal representative.”³¹² An inventory of the contents of the box must be conducted and signed by the employee and the personal representative.³¹³ The personal representative has a duty to file the safe-deposit box inventory within ten days after the box is opened.³¹⁴

The final and perhaps most important “problem area” addressed by chapter 97-240 was section 733.817, Florida’s tax apportionment section of the statute.³¹⁵ The legislature made wholesale revisions to this statute effective as of October 1, 1998 intending to effect a more equitable

306. FLA. STAT. § 738.12(1)(a) (1997).

307. *Id.*

308. *See id.*

309. Ch. 97-240, § 10, 1997 Fla. Laws 4404, 4422 (to be codified at FLA. STAT. § 738.12).

310. *See id.*

311. Ch. 97-240, §§ 12, 1997 Fla. Laws 4404, 4423–24 (to be codified at FLA. STAT. § 655.936).

312. *Id.*

313. *Id.*

314. *Id.*

315. Ch. 97-240, § 9, 1997 Fla. Laws 4404, 4415 (to be codified at FLA. STAT. § 733.817).

apportionment, including the enactment of a detailed definitions intended to resolve ambiguities.³¹⁶

C. Chapter 97-161: Professional Guardians

Unlike the broad spectrum of changes encompassed within chapter 97-240, chapter 97-161, also enacted by the legislature in 1997, was directed specifically to the regulation of professional guardians.³¹⁷ Section 744.1085 of the *Florida Statutes* was created to provide that “[e]ach professional guardian who files a petition for appointment after October 1, 1997, shall post a blanket fiduciary bond with the clerk of the circuit court in the county in which the guardian’s primary place of business is located.”³¹⁸ This new requirement does not apply to attorneys in good standing, financial institutions, or public guardians.³¹⁹ Section 744.1085(3) requires that all professional guardians, other than an attorney, must receive a minimum of forty hours of instruction and training by October 1, 1998, or within one year after becoming a professional guardian, whichever occurs later.³²⁰ Chapter 97-161 also amended section 744.3135 of the *Florida Statutes* to require that all professional guardians submit to a credit check and a criminal investigation. Finally, section 744.454 was amended to forbid professional guardians from borrowing or purchasing property from the ward.³²¹

IX. FLORIDA PROBATE AND GUARDIANSHIP RULES

A. Appeals

In 1996, the Supreme Court of Florida amended two rules of procedure regarding the appeal of orders entered in probate and guardianship proceedings. Both of these amendments were effective as of January 1,

316. *Id.* Because a meaningful discussion of these changes is beyond the scope of this article, the authors suggest that interested practitioners see Pamela O. Price, *Determination of Beneficiaries and Their Interests*, in PRACTICE UNDER FLORIDA PROBATE CODE § 11.40 (1997).

317. 1997 Fla. Laws Ch. 97-161.

318. Ch. 97-161, § 2, 1997 Fla. Laws 3048, 3049 (to be codified at FLA. STAT. § 744.3135).

319. *Id.*

320. *Id.* at 3048–49.

321. Ch. 97-161, § 5, 1997 Fla. Laws 3048, 3049 (to be codified at FLA. STAT. § 744.454).

1997.³²² Rule 9.110(a)(2) of the *Florida Rules of Appellate Procedure* was amended to specifically authorize appeals of “orders entered in probate and guardianship matters that finally determine a right or obligation of an interested person as defined in the Florida Probate Code.”³²³ Prior to this amendment, jurisdiction for appeals of probate and guardianship matters was found in Rule 5.100 of the *Florida Probate Rules*. Probate rule 5.100 was also amended to delete the majority of its text, leaving the revised rule to simply read “[a]ll orders and judgments of the court that finally determine a right or obligation of an interested person may be appealed as provided by Florida Rule of Appellate Procedure 9.110(a)(2).”³²⁴

The impact of these rule changes is minor, and there are several cases that provide guidance on this topic to the practitioner. The best overview of these rules and their recent amendments is provided by *Estate of Nolan v. Swindle*.³²⁵

The prerequisites for appellate jurisdiction of probate and guardianship matters have not changed under amended rule 9.110(a)(2). For a district court to have jurisdiction to review an order or judgment relating to probate or guardianship matters, that order or judgment must finally determine a right or obligation of an interested person.³²⁶ The *Swindle* court stated that although the prior version of Probate rule 5.100 “did not expressly limit appeals to final determinations,” case law under that rule recognized such a restriction.³²⁷ The court in *Swindle* pointed out that “if there is any difference concerning the need for finality between the current rule and the former rule, the requirement of finality is stronger under the current rule.”³²⁸

For example, in *Larkin v. Pirthauer*,³²⁹ the fourth district held that an order disqualifying counsel in a will contest did not finally determine a right or obligation of an interested person under rule 9.110(a)(2).³³⁰ However, the

322. See *In re Amendments to Fla. R. App. P.*, 685 So. 2d 773, 792 (Fla. 1996), superseded by rule as stated in *Lynn v. State*, 23 Fla. L. Weekly D2199 (Fla. 1st Dist. Ct. App. September 23, 1998); *In re Amendments to Fla. Prob. R.*, 683 So. 2d 78 (Fla. 1996).

323. *Amendments to Fla. R. App. P.*, 685 So. 2d at 792.

324. *Amendments to Fla. Prob. R.*, 683 So. 2d at 84.

325. 712 So. 2d 421 (Fla. 2d Dist. Ct. App. 1998).

326. *Id.* at 422.

327. *Id.* (citing *Tyler v. Huggins*, 175 So. 2d 239 (Fla. 2d Dist. Ct. App. 1965); *In re Estate of Baker*, 327 So. 2d 205 (Fla. 1976); and *In re Estate of Bierman*, 587 So. 2d 1163 (Fla. 4th Dist. Ct. App. 1991)).

328. *Swindle*, 712 So. 2d at 423.

329. 700 So. 2d 182 (Fla. 4th Dist. Ct. App. 1997).

330. *Id.* at 183.

court noted that orders disqualifying counsel are reviewable by certiorari.³³¹ In addition, at least three appellate courts have held that the amendment to rule 9.110(a)(2) does not affect prior case law holding that one's right to appeal does not arise until all judicial labor is complete on the issue appealed as to the appellant.³³²

The *Swindle* court stressed that the finality of an order, for the purpose of appellate jurisdiction, is specific to the individual seeking the appeal.³³³ In other words, the court must determine whether the order finally determines the issue on appeal as to the appellant.³³⁴ In *Swindle*, the court entered an order which authorized a previously appointed administrator *ad litem* to file an action to set aside a will based on the undue influence of the decedent's caretaker.³³⁵ The caretaker appealed. The court dismissed the appeal and held that, although the order being appealed may have finally determined a right or obligation of the administrator *ad litem*, such as to file a will contest, it did not do so as to the caretaker.³³⁶ As to the caretaker, the order simply allowed the administrator *ad litem* to bring a lawsuit which may or may not be adverse to her interests.³³⁷

Finally, in *Pearson v. Cobb*,³³⁸ the Fifth District Court of Appeal addressed the timing of filing an appeal. The *Pearson* court held that, under Rule 9.020(h) of the *Florida Rules of Appellate Procedure*, a timely motion for rehearing tolled the time to file a notice of appeal.³³⁹

B. Other Significant Amendments

The following changes were also made to the *Florida Probate Rules* effective January 1, 1997:³⁴⁰ 1) Rule 5.040. Formal Notice. It is now

331. *Id.* (citing *Hilsenroth v. Burstyn*, 432 So. 2d 640 (Fla. 4th Dist. Ct. App. 1983)).

332. *See Swindle*, 712 So. 2d at 423; *see also* *Rehman v. Frye*, 692 So. 2d 956, 957 (Fla. 5th Dist. Ct. App. 1997); *In re Estate of Walters*, 700 So. 2d 434, 436 n.1 (Fla. 4th Dist. Ct. App. 1997).

333. *See Swindle*, 712 So. 2d at 423.

334. *Id.*

335. *Id.* at 422.

336. *Id.* at 423.

337. *Id.*

338. 701 So. 2d 649 (Fla. 5th Dist. Ct. App. 1997).

339. *Id.* at 650. The court went on to note that Rule 5.020(d) of the *Florida Probate Rules* authorizes the filing of a motion for rehearing on *any* order or judgment entered in a probate proceeding. *Id.*

340. *See In re Amendments to Fla. Prob. R.*, 683 So. 2d 78, 79 (Fla. 1996). There were no changes to the Florida Probate and Guardianship Rules in 1998.

permissible to serve formal notice by any commercial delivery service which requires a signed receipt and which is approved by the chief judge of the judicial circuit in which the proceeding is pending;³⁴¹ 2) Rule 5.041. Service of Pleadings and Papers. The probate rules now permit service by facsimile. Note, however, that service by delivery or facsimile after 4:00 p.m., not 5:00 p.m. as provided in Rule 1.080(b) of the *Florida Rules of Civil Procedure*, is deemed to have been made on the next day that is not a Saturday, Sunday, or legal holiday;³⁴² 3) Rule 5.180. Waiver and Consent. Rule 5.180 was amended to include specific fee disclosure requirements found in section 733.6171(9) of the *Florida Statutes*, relating to waivers in connection with the amount and manner of determining compensation;³⁴³ 4) Rule 5.210. Probate of Wills. Rule 5.210(a)(4) was amended to delete the requirement that a will be admitted to probate in another state or country in order to have an authenticated copy of the will admitted in Florida;³⁴⁴ 5) Rule 5.240. Notice of Administration. A trustee of a trust described in section 733.707(3) of the *Florida Statutes* is now specifically listed as one of the persons on whom the personal representative is required to serve Notice of Administration;³⁴⁵ 6) Rule 5.400. Distribution and Discharge. Rule 5.400 was amended to require that the Petition for Discharge disclose the manner of determining compensation as required by section 733.6171(9) of the *Florida Statutes*;³⁴⁶ 7) Rule 5.401. Objection to Petition for Discharge or Final Accounting. Subsection 5.401(d) was amended to clarify that notice of the hearing must be served with ninety days of filing the objection. The actual hearing date can occur after the ninety day period;³⁴⁷ 8) Rule 5.405. Proceedings to Determine Homestead Real Property. Rule 5.405(c) was amended to require that an order on a petition to determine homestead include (i) the description of the real property which is the subject of the petition, (ii) a determination of whether the real property is homestead, and (iii) a definition of the specific interests of the persons entitled to the homestead real property;³⁴⁸ 9) Rule 5.470. Ancillary Administration. Rule 5.470(c) no longer requires a will to be “probated” in a foreign jurisdiction before an authenticated copy can be admitted to probate in Florida. This

341. *Id.* at 79.

342. *Id.* at 82.

343. *Id.* at 85.

344. *Id.*

345. *Amendments to Fla. Prob. R.*, 683 So. 2d at 87.

346. *Id.* at 100.

347. *Id.* at 101.

348. *Id.* at 102.

amendment addresses situations in which the will was merely deposited or filed in a foreign jurisdiction but not offered for probate. Failure to offer the will for probate in the foreign jurisdiction should not prevent its probate in Florida;³⁴⁹ and 10) Rule 5.560. Petition for Appointment of Guardian of an Incapacitated Person: The social security number of the alleged incapacitated person is no longer required in a Petition for Appointment of a Guardian. Rule 5.560(b) was also amended to provide that the petition must be served a reasonable time before the hearing on the petition.³⁵⁰

X. CONCLUSION

As evidenced by this survey, lawyers practicing in the area of probate and trust law must remain current on a wide variety of topics. Hopefully, this survey will assist practitioners in their efforts to keep abreast of the latest changes in the law.

349. *Id.* at 104.

350. *Amendments to Fla. Prob. R.*, 683 So. 2d. at 106.

Professional Responsibility: 1998 Survey of Florida Law

Timothy P. Chinaris* and Elizabeth Clark Tarbert**

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I. INTRODUCTION

Continuing a trend, 1998 included a number of important developments in the area of professional responsibility law in Florida.¹ Significant appellate court decisions, rule changes,² and disciplinary actions potentially affect the practices of more than 58,000 members of The Florida Bar.³

This article reports and summarizes those developments by placing them in the framework of the various relationships in which lawyers typically operate.⁴ Part II looks at decisions affecting what must be viewed as the central relationship in this context: the relationship between lawyer and client. Part III examines developments pertaining to what may be the dominant relationship: the lawyer's relationship with the court and the

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1. This article surveys professional responsibility developments in Florida from July 15, 1997, through July 14, 1998.

2. Of primary interest here are changes to the *Florida Rules of Professional Conduct* ("RPC"), which comprise Chapter 4 of the Rules Regulating The Florida Bar.

3. Florida has a unified bar. Therefore, in order to regularly practice law in the state, lawyers must be admitted to, and thus be members of, The Florida Bar. See RPC 1-3.1; Petition of Fla. State Bar Ass'n, 40 So. 2d 902 (Fla. 1949).

4. Cases and ethics opinions are discussed in the section to which they have the most significant connection.

judicial system. Part IV reviews the lawyer's relationship with third parties. Part V deals with the lawyer's relationship with disciplinary authorities, particularly The Florida Bar.

II. THE LAWYER'S RELATIONSHIP WITH CLIENTS

The relationship between lawyer and client contains a variety of ethical dimensions. These include: the 1) establishment of the relationship; 2) scope of authority and representation; 3) confidentiality; 4) handling of property relating to clients; 5) conflicts of interest; 6) fees; and 7) legal duties owed to clients as they relate to professional ethics. Decisions in 1998 addressed these issues.

A lawyer is a client's agent and advocate, but there are ethical limits on the scope of actions that lawyers may take on behalf of their clients. Exceeding these limits resulted in the dismissal of an appeal and an imposition of monetary sanctions on the lawyer in *Wood-Cohan v. Prudential Insurance Co. of America*.⁵ The trial court below granted a directed verdict to the plaintiff's claims, but the judgment was not final because the defendants' counterclaim was still pending.⁶ Nevertheless, plaintiff's counsel filed a notice of appeal. In error, the trial court signed the proposed final judgments submitted by the plaintiff.⁷ Plaintiff's counsel then filed the judgments with the appellate court.⁸ When the trial court rescinded the erroneous judgments, the lawyer failed to properly notify the appellate court.⁹ Furthermore, the lawyer vigorously opposed defendants' motion to dismiss the appeal.¹⁰ In granting the motion and sanctioning the lawyer, the Fourth District Court of Appeal declared that he had violated both RPC 4-3.1 and 4-3.2 of the *Florida Rules of Professional Conduct*.¹¹

5. 715 So. 2d 999, 1001 (Fla. 4th Dist. Ct. App. 1998).

6. *Id.* at 1000.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Wood-Cohan*, 715 So. 2d at 1001.

11. *Id.* at 1001. RPC 4-3.1, "MERITORIOUS CLAIMS AND CONTENTIONS,"

provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 4-3.1.

In the lawyer-client relationship, it is axiomatic that lawyers, as agents, draw their authority from clients. This principle is reflected in the *Florida Rules of Professional Conduct*.¹² The First District Court of Appeal considered this issue in *Davis v. Meeks*.¹³ Meeks sued Davis for injuries resulting from an auto accident and obtained a judgment of more than \$1.8 million. Subsequently, Davis sued her insurer in a Georgia state court for bad faith. She was represented in the Georgia action, and in a malpractice claim against her counsel in the original case, by attorney Levin. In the Georgia proceedings, Levin authorized the insurer's counsel to move for relief from the \$1.8 million judgment. Florida attorneys Henry M. Coxe and Michael I. Coulson filed the motion. The trial court denied the motion and Coxe and Coulson filed an appeal of that decision.¹⁴

Levin noticed his appearance in the matter and filed a notice of voluntary dismissal of the appeal. Coxe and Coulson responded by moving to strike the notice of dismissal and to disqualify Levin. Levin's response included an affidavit from Davis indicating her wish to have Levin represent her interests. In denying the motions to strike the notice of voluntary dismissal and to disqualify Levin, the court reaffirmed the basic principles that lawyers act through the authorization of their clients and the clients decide who will represent them:

Under these circumstances, determining who best represents [the client's] interests in this case is not the province of this court, but rather of [the client] herself. . . . The wisdom of her choice is not

RPC 4-3.2, "EXPEDITING LITIGATION," requires reasonable efforts to expedite litigation and provides that: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." RPC 4-3.2.

12. Subdivisions (a) and (c) of RPC 4-1.2, "SCOPE OF REPRESENTATION," provide:

(a) **Lawyer to Abide by Client's Decisions.** A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to subdivisions (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(c) **Limitation of Objectives of Representation.** A lawyer may limit the objectives of the representation if the client consents after consultation.

RPC 4-1.2(a), (c).

13. 709 So. 2d 184 (Fla. 1st Dist. Ct. App. 1998).

14. *Id.* at 184-85.

for us to decide, and the consequences of that choice present issues for resolution in another forum on another day.¹⁵

The lawyer-client relationship is a unique one that is grounded on agency principles, as well as fiduciary and ethical principles. The Supreme Court of Florida recognized this in *Forgione v. Dennis Pirtle Agency, Inc.*¹⁶ In response to a certified question from the Eleventh Circuit, the supreme court held that a negligence claim by an insured against the insurance agent (for failure to obtain proper coverage) is assignable.¹⁷ In contrast, Florida law provides that a legal malpractice claim is *not* assignable.¹⁸ The court explained this contrast by reviewing what it considered to be significant distinctions between the insured-agent relationship and the lawyer-client relationship.¹⁹ Unlike the relationship between insured and insurance agent, the lawyer-client relationship is a confidential relationship,²⁰ a “fiduciary

15. *Id.* at 185.

16. 701 So. 2d 557 (Fla. 1997).

17. *Id.* at 560.

18. *Id.* at 559.

19. *Id.* at 559–60.

20. RPC 4-1.6, “CONFIDENTIALITY OF INFORMATION,” provides:
Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client’s interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
- (5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

RPC 4-1.6.

relation[ship] of the very highest character²¹ in which the lawyer owes a duty of undivided loyalty to the client,²² and under RPC 4-1.9, a personal relationship.²³

21. *Forgione*, 701 So. 2d at 560. See FLA. STAT. § 90.502 (1997). Section 90.502 of the *Florida Statutes*, “LAWYER-CLIENT PRIVILEGE,” provides:

(1) For purposes of this section:

(a) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(b) A “client” is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.

(c) A communication between lawyer and client is “confidential” if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.

2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) The lawyer, but only on behalf of the client. The lawyer’s authority to claim the privilege is presumed in the absence of contrary evidence.

(4) There is no lawyer-client privilege under this section when:

(a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.

(b) A communication is relevant to an issue between parties who claim through the same deceased client.

(c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.

(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

(5) Communications made by a person who seeks or receives services from the Department of Revenue under the child support enforcement program to the attorney representing the department shall be confidential and privileged as provided for in this section. Such communications shall not be disclosed to anyone other than the agency except as provided for in this section. Such disclosures shall be protected as if there were an attorney-client relationship between the attorney for the agency and the person who seeks services from the department.

FLA. STAT. § 90.502 (1997).

22. *Forgione*, 701 So. 2d at 560. See RPC 4-1.7, “**CONFLICT OF INTEREST; GENERAL RULE**,” which provides:

(a) **Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer’s responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

(b) **Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer’s exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person or by the lawyer’s own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

(c) **Explanation to Clients.** When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) upon consent by the client after consultation regarding the relationship.

RPC 4-1.7. See also RPC 4-1.8, “**CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS**,” which provides: **Lawyers Related by Blood or Marriage.** A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except:

(a) **Business Transactions With or Acquiring Interest Adverse to Client.**

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer’s fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by rule 4-1.6.

(c) Gifts to Lawyer or Lawyer's Family. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Acquiring Literary or Media Rights. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) Compensation by Third Party. A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by rule 4-1.6.

(g) Settlement of Claims for Multiple Clients. A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first

One of the cornerstones of the lawyer-client relationship is the lawyers' duty of confidentiality concerning all information relating to the representation of their clients. This duty was discussed by the Supreme Court of Florida in the disciplinary case of *Florida Bar v. Lange*.²⁴ The lawyer represented a defendant in a federal criminal case. The prosecution listed the lawyer's former client as a witness. The lawyer filed a "Motion to Notice Actual Potential Conflict of Interest" in which he disclosed confidential communications previously received from his former client, the witness. When later charged by The Florida Bar with violating the lawyer-client confidentiality under RPC 4-1.6,²⁵ the lawyer defended by asserting that his actions were justified by the "crime-fraud" exception to the confidentiality rule.²⁶ Rejecting this defense, the court explained the scope of this portion of the rule.²⁷ While lawyers ordinarily are required to hold in confidence all "information relating to representation of a client," an exception to this rule requires disclosure of confidential information to prevent the client's commission of a crime.²⁸ However, the disclosure by Lange related to crimes that had already occurred and, thus, was not authorized by the rule.²⁹ In a footnote, the court noted how the distinction between the evidentiary lawyer-client privilege and the ethical duty of

advising that person in writing that independent representation is appropriate in connection therewith.

(i) **Acquiring Proprietary Interest in Cause of Action.** A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee.

RPC 4-1.8.

23. RPC 4-1.9, "Conflict of Interest; Former Client," provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

RPC 4-1.9.

24. 711 So. 2d 518 (Fla. 1998).

25. See *supra* note 20 and accompanying text.

26. *Lange*, 711 So. 2d at 519.

27. *Id.* at 519-20.

28. *Id.* at 519 (quoting RPC 4-1.6).

29. *Id.* at 520.

confidentiality related to this case: "Even if respondent believed that no attorney-client privilege existed under [*Florida Statutes* section] 90.502, his actions nevertheless were guided by [RPC] 4-1.6, which forbids attorneys to disclose client confidences unless disclosure is necessary to prevent a crime from occurring."³⁰

A lawyer's handling of property relating to the representation of a client can not only implicate the confidentiality rule, but other ethical principles as well. The disagreements between lawyers and their clients often arise in connection with a client's request to review or obtain materials from case files, particularly after the parties terminate the representation. Florida reported two cases on this subject in 1998.³¹

The Supreme Court of Florida reviewed the standards relating to a client's access to file material in *Long v. Dillinger*.³² Although files maintained by lawyers on their clients' cases are commonly referred to by the client's name, the court endorsed the position, previously expressed in Florida case law³³ and ethics opinions,³⁴ that "such referral simply means that the file relates to a particular client; the file and its contents are the personal property of the attorney."³⁵ In *Long*, a former client of the public defender's office was represented by the capital collateral representative ("CCR"). The former client sought possession of the public defender's file on his case. The court concluded that a public defender's file on a client is the property of the public defender.³⁶ The court further concluded, however, that the public defender must allow CCR to view the file and must provide, "for adequate compensation, copies of all useful information contained in the file."³⁷ The supreme court echoed the Fifth District Court of Appeal's view that "under certain circumstances, an ethical duty may exist to communicate information regarding a case to a successor counsel."³⁸

30. *Id.* at 520 n. 2.

31. *See* Guetzloe v. Hartley, 710 So. 2d 1044 (Fla. 5th Dist. Ct. App. 1998); Marcus v. Sullivan, 701 So. 2d 660 (Fla. 3d Dist. Ct. App. 1997).

32. 701 So. 2d 1168 (Fla. 1997).

33. *See, e.g.*, Woodson v. Durocher, 588 So. 2d 644 (Fla. 5th Dist. Ct. App. 1991); Dowda & Fields v. Cobb, 452 So. 2d 1140 (Fla. 5th Dist. Ct. App. 1984).

34. *See, e.g.*, Fla. Bar Comm. on Professional Ethics, Op. 88-11 (1993) (Reconsideration); Fla. Bar Comm. on Professional Ethics, Op. 88-11 (1988); Fla. Bar Comm. on Professional Ethics, Op. 71-57 (1971); Fla. Bar Comm. on Professional Ethics, Op. 71-57 (1971).

35. *Long*, 701 So. 2d at 1169 (citing Dowda & Fields v. Cobb, 452 So. 2d 1140, 1142 (Fla. 5th Dist. Ct. App. 1984)).

36. *Id.*

37. *Id.*

38. *Id.*

Finally, the court noted that any transcripts or records that the public defender prepared at the public's expense should be surrendered to CCR for the former client at no charge.³⁹

This latter proposition was central to the Fifth District Court of Appeal's decision in *McCaskill v. Dees*.⁴⁰ The former client of a court-appointed private lawyer sought a writ of mandamus to compel counsel to furnish him with certain materials from the file, including depositions and witness statements. The court held that, in this situation, mandamus would lie to compel the lawyer to furnish the requested documents.⁴¹ In support of its decision, the court cited two cases deciding that, as an exception to the general rule reiterated in *Long*⁴² regarding lawyer ownership of the case file, documents prepared at public expense must always be furnished by court-appointed counsel to their clients.⁴³ The court also referred to RPC 4-1.16(d).⁴⁴

Fees charged by lawyers are often the topic of litigation, and 1998 included its share of cases in this sensitive area. Negotiating a fee agreement with a client presents a lawyer with a potential, but largely unavoidable, conflict of interest. Terms favorable to the lawyer may be seen as unfavorable from the client's point of view. The specific terms of the agreement may, themselves, create a conflict situation. In *Cole v. State*,⁴⁵ the lawyer-client employment agreement in a felony criminal case provided that the flat fee paid by the client would include all discovery and investigative fees, as well as the fee for the lawyer's services.⁴⁶ The court noted that an "inherent conflict" was presented because the arrangement provided that the out-of-pocket discovery and investigative costs came from the lawyer's

39. *Id.*

40. 698 So. 2d 628 (Fla. 5th Dist. Ct. App. 1997).

41. *Id.* at 628.

42. See *supra* notes 35-39 and accompanying text.

43. *McCaskill*, 698 So. 2d at 628 (citing *Bermed v. Tacher*, 565 So. 2d 833 (Fla. 3d Dist. Ct. App. 1990). See also *Dubose v. Shelnett*, 566 So. 2d 921 (Fla. 5th Dist. Ct. App. 1990)).

44. *McCaskill*, 698 So. 2d at 628. (citing RPC 4-1.16(d)). Subdivision (d) of RPC 4-1.16, "DECLINING OR TERMINATING REPRESENTATION," provides:

(d) **Protection of Client's Interest.** Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

RPC 4-1.16(d).

45. 700 So. 2d 33 (Fla. 5th Dist. Ct. App. 1997).

46. *Id.* at 37.

pocket rather than from the client's.⁴⁷ Although not discussed by the court, this type of fee agreement, if not structured properly, could also violate the lawyer trust accounting rules.⁴⁸

Fee related conflict issues also are presented when a client's fee is paid by a third party.⁴⁹ *Marcus v. Sullivan*⁵⁰ was a civil case concerning a promissory note for a client's legal fees executed by the client's girlfriend.⁵¹

She was not represented by independent counsel in making the note. When the lawyer sued on the note, the girlfriend defended by asserting that she signed it under duress. The trial judge agreed, finding that a conflict existed due to the circumstances and relationships involved and that, as a result, the lawyer should have advised the client's girlfriend to have independent counsel regarding signing the promissory note.⁵² The trial court held that duress was present and declared the note to be unenforceable.⁵³ The appellate court reversed, stating that it was "aware of no law that an attorney need require the payee of a note to secure counsel prior to signing a note to

47. *Id.* The conflict was particularly pronounced, and deception appeared to be present, in view of the lawyer's stated "policy" of not conducting discovery in these types of cases. *Id.*

48. See Fla. Bar Comm. on Professional Ethics, Op. 93-2 (1993).

49. Subdivision (f) of RPC 4-1.8, "**CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS,**" provides:

(f) **Compensation by Third Party.** A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by RPC 4-1.6.

RPC 4-1.8(f).

50. 701 So. 2d 660 (Fla. 3d Dist. Ct. App. 1997).

51. *Id.* at 660.

52. *Id.* at 662 (citing RPC 4-4.3). RPC 4-4.3, "**DEALING WITH UNREPRESENTED PERSONS,**" provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

RPC 4-4.3.

53. *Marcus*, 701 So. 2d at 662.

secure the legal fees of another.”⁵⁴ The trial court’s legal conclusion of duress was deemed incorrect.⁵⁵

In addition to maintaining sensitivity to ethical questions of conflicts and legal issues such as duress in the making of fee contracts, Florida lawyers must adhere to the specific provisions of the rule that regulate first party fee agreements and payments. Decisions in the past year continued the recent trend of requiring strict adherence to these rules in the civil, as well as in the disciplinary, context.⁵⁶ *Guetzloe v. Hartley*⁵⁷ concerned lawyers who had defended a client in a replevin action and had filed counterclaims on the client’s behalf for breach of contract, quantum meruit, and several torts (including assault).⁵⁸ The original lawyer-client fee agreement provided for payment of an hourly fee plus a percentage of any recovery obtained for the client. When the client became seriously delinquent in his hourly fee obligations, the parties renegotiated the fee agreement. The client still did not pay the fees charged, and the firm sued to collect.⁵⁹

One of the defenses raised by the client was the lawyer’s alleged noncompliance with RPC 4-1.5.⁶⁰ This rule contains ethical regulations

54. *Id.* at 663.

55. *Id.* at 662.

56. *See, e.g., Foodtown Inc. v. Argonaut Ins. Co.*, 102 F.3d 483 (11th Cir. 1996) (holding oral contingent fee agreements that do not comply with ethics rules governing contingent fee contracts cannot be considered by a court in determining fees recoverable under the Florida Fee-Shifting Statute); *Florida Bar v. Rubin*, 709 So. 2d 1361 (Fla. 1998) (holding discipline warranted against lawyer who filed a complaint against another lawyer on alleged verbal referral fee agreement which did not comply with ethics rules); *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180 (Fla. 1995) (holding contingent fee agreements that do not comply with the *Code of Professional Responsibility* or *Rules Regulating The Florida Bar* are not enforceable by an attorney who claims fees based upon a noncomplying agreement). *See also infra* notes 57–58 and accompanying text.

57. 710 So. 2d 1044 (Fla. 5th Dist. Ct. App. 1998).

58. *Id.* at 1044.

59. *Id.* at 1044–45.

60. Subdivision (f) of RPC 4-1.5, “FEES FOR LEGAL SERVICES,” provides:

(f) **Contingent Fees.** As to contingent fees:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

(3) A lawyer shall not enter into an arrangement for, charge, or collect:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

(A) The contract shall contain the following provisions:

(i) The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s).

(ii) This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client.

(B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33 1/3% of any recovery up to \$1 million; plus
2. 30% of any portion of the recovery between \$1 million and \$2 million; plus
3. 20% of any portion of the recovery exceeding \$2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to \$1 million; plus
2. 30% of any portion of the recovery between \$1 million and \$2 million; plus
3. 20% of any portion of the recovery exceeding \$2 million.

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33 1/3% of any recovery up to \$1 million; plus
2. 20% of any portion of the recovery between \$1 million and \$2 million; plus
3. 15% of any portion of the recovery exceeding \$2 million.

d. An additional 5% of any recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.

(ii) If any client is unable to obtain an attorney of the client's choice because of the limitations set forth in (f)(4)(B)(i), the client may petition the circuit court for approval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. The application for authorization of such a contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(iii) In cases where the client is to receive a recovery that will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall only be calculated on the cost of the

structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less. If the damages and the fee are to be paid out over the long term future schedule, then this limitation does not apply. No attorney may separately negotiate with the defendant for that attorney's fee in a structured verdict or settlement where such separate negotiations would place the attorney in a position of conflict.

(C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5).

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee-in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply for circuit court authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

(5) In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client,

governing all fees charged or collected by lawyers.⁶¹ The rule includes both provisions generally applicable to contingent fees and additional, detailed regulations (e.g., a maximum fee schedule, a requirement that attorneys furnish clients written "Statements of Client's Rights") that apply to contingent fees for claims involving "personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims."⁶² The client asserted that the lawyers' failure to provide him with the "Statement of Client's Rights" violated RPC 4-1.5 and, thus, rendered the entire fee agreement void and unenforceable. Rejecting this contention, the Fifth District Court of Appeal noted that the client's tort claims arose in the context of the replevin case, which was a *commercial* action.⁶³ The comment to RPC 4-1.5 expressly states that the provisions of the rule governing contingent fees in personal injury type tort cases "should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context."⁶⁴

The failure to observe the requirements of the ethics rules for fee divisions, in the referral fee situation, led to the imposition of discipline in *Florida Bar v. Rubin*.⁶⁵ Lawyer Rubin filed a grievance complaint with The Florida Bar, alleging that another lawyer had acted unethically by failing to pay him an allegedly agreed upon referral fee in a contingent fee matter. Rubin sued the other lawyer for the fee. Turning the tables, the Bar filed disciplinary charges against Rubin.⁶⁶ RPC 4-1.5(f)(2) requires that every lawyer or law firm who participates in a contingent fee sign the contract with the client.⁶⁷ Rubin had not signed the contract in the case in question. The Supreme Court of Florida ordered him publicly reprimanded, explaining:

and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

RPC 4-1.5(f).

61. *Id.* at 4-1.5(f)(4)(B).

62. *Id.* at 4-1.5(f).

63. *Guetzloe*, 710 So. 2d at 1045.

64. *Id.* (RPC 4-1.5(f)).

64. *Id.* at 4-1.5(f)(4)(B).

64. *Id.* at 4-1.5(f).

64. *Guetzloe*, 710 So. 2d at 1045 (quoting RPC 4-1.5 cmt.).

65. 709 So. 2d 1361 (Fla. 1998).

66. *Id.* at 1362.

67. RPC 4-1.5(f)(2). *See supra* note 60 and accompanying text.

This Court expects strict compliance with this rule and similar rules requiring a client's written consent to an attorney's fee regardless of the circumstances involved. These requirements must be diligently adhered to and enforced in order to avoid the troublesome situation which arose in this case and, more importantly, to preserve public confidence in the legal profession.⁶⁸

In not complying with the rule requiring a written fee agreement, negative consequences arose for the lawyer in *D.H. Blair & Co. v. Johnson*.⁶⁹ A National Association of Securities Dealers ("NASD") arbitration panel awarded the claimants damages.⁷⁰ Moreover, the panel also awarded attorneys' fees in an amount to be determined by a court of competent jurisdiction.⁷¹ The trial court determined and awarded the amount of fees for the work of two lawyers, Tepper and Weissman.⁷² On appeal, the Fourth District Court of Appeal overturned the award of attorneys' fees on an issue of law.⁷³ Additionally, however, the court concluded that the award of fees for Weissman's work was improper because he had not signed the fee agreement with the clients, as required by RPC 4-1.5(f)(2).⁷⁴ Interestingly, the court's opinion did not cite *Chandris, S.A. v. Yanakakis*.⁷⁵

*Noris v. Silver*⁷⁶ was a case in which a Florida court cited and discussed *Chandris*.⁷⁷ Client Noris sued lawyer Silver for legal malpractice and negligent referral. Noris alleged that he was injured while visiting another state. He contacted Silver, who referred him to lawyer Falk. In the past, Silver had referred clients to Falk and received a share of Falk's fee. Noris

68. *Rubin*, 709 So. 2d at 1364 (citing *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180 (Fla. 1995) (holding that a contingent fee agreement is void if not in compliance with the rules)). Regarding the import of *Chandris*, see Timothy P. Chinaris, *Professional Responsibility: 1996 Survey of Florida Law*, 21 NOVA L. REV. 231, 260-65 (1996) (hereinafter "Chinaris").

69. 697 So. 2d 912 (Fla. 4th Dist. Ct. App. 1997).

70. *Id.* at 913.

71. *Id.*

72. *Id.*

73. *Id.*

74. *D.H. Blair & Co.*, 697 So. 2d at 914 (citing RPC 4-1.5(f)(2)). See *supra* note 60 and accompanying text.

75. *D.H. Blair & Co.*, 697 So. 2d at 914 (referring to *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180 (Fla. 1995)). The court, however, did cite *Perez v. George, Hartz, Lundeen, Flagg & Fulmer*, 662 So. 2d 361 (Fla. 3d Dist. Ct. App. 1995), which held that a law firm not entitled to fee where the "client" did not sign contract with firm or agree to formal affiliation between his counsel and firm. *Id.*

76. 701 So. 2d 1238 (Fla. 3d Dist. Ct. App. 1997) (opinion on rehearing).

77. *Id.* at 1240-41.

retained Falk to handle his injury claim. The Noris-Falk employment agreement did not mention Silver, and Silver and Falk did not execute a written fee division agreement. Falk let the statute of limitations lapse without filing suit. Noris then sued Silver.⁷⁸

The trial court entered an order of summary judgment for Silver on the legal malpractice claim, and ordered the negligent referral claim dismissed.⁷⁹ The Third District Court of Appeal reversed the summary judgment order on the malpractice claim.⁸⁰ The court concluded that a genuine issue of material fact existed regarding whether Silver had retained a financial interest in Noris's case by expressly or impliedly agreeing to divide the legal fee with Falk.⁸¹ According to the court, this issue was material because "pursuant to Rules Regulating The Florida Bar 4-1.5(g), if Falk and Silver agreed to divide the attorney's fee, Silver would be liable for the malpractice committed by Falk."⁸² RPC 4-1.5(g)(2) allows a lawyer to receive what is commonly called a "referral fee" — that is, a fee that one attorney receives for referring a client to another attorney.⁸³ The fee is "earned" primarily as a

78. *Id.* at 1239.

79. *Id.* at 1239–40. Dismissal of the negligent referral claim was affirmed "because Noris' claim for negligent referral did not allege that Silver had knowledge of any facts that would indicate that Falk would commit malpractice and because Noris' counsel conceded during oral argument that Silver had no such knowledge." *Id.* at 1241.

80. *Noris*, 701 So. 2d at 1240.

81. *Id.*

82. *Id.* (citing to RPC 4-1.5(g)). The court's decision that a fee division agreement, which apparently did not comply with the relevant ethics rule, thereby creates malpractice liability because of that rule seems questionable. Furthermore, the Preamble to the RPC states that breach of the rule "should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." RPC preamble. The court acknowledged the existence of this language, but did not consider it controlling in light of the reasoning underlying the supreme court's decision in *Chandris*. *Noris*, 701 So. 2d at 1240.

83. Subdivision (g) of RPC 4-1.5, "FEES FOR LEGAL SERVICES," provides:

(g) **Division of Fees Between Lawyers in Different Firms.** Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is in proportion to the services performed by each lawyer; or

(2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

RPC 4-1.5(g).

Prior to the adoption of the *Rules of Professional Conduct* (effective Jan. 1, 1987), the ethics rules did not permit division of fees among attorneys in different firms except on the basis of work performed. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107

result of the referral, rather than from any work performed on the case by the referring attorney.

The Third District Court of Appeal noted that, pursuant to *Chandris*, Silver could not have enforced an oral fee division against Falk.⁸⁴ Nevertheless, the court believed that noncompliance with the governing ethics rule should not be allowed to shield a lawyer from the responsibilities and liabilities that the court believed the rule imposes.⁸⁵ However, believing this issue to be one of great public importance, the court certified it to the Supreme Court of Florida.⁸⁶

Another important case in which a Florida court cited *Chandris* is *King v. Young, Berkman, Berman & Karpf, P.A.*⁸⁷ Central to this case was the applicability of RPC 4-1.5(f)(3)(A), which prohibits lawyers from charging or collecting a contingent fee "in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof."⁸⁸ In *King*, a man retained a law firm to represent him in a dissolution of marriage case.⁸⁹ The written fee agreement provided for a \$25,000 nonrefundable retainer, set hourly rates for the firm's lawyers (ranging from \$165 to \$325), and provided for a payment of a "bonus" fee at the conclusion of the case.

(1986). Thus, the rules did not permit referral fees. In adopting the *Rules of Professional Conduct*, the Supreme Court of Florida permitted referral fees, subject to certain regulations (i.e., written agreement signed by all participating attorneys and the client, in which all attorneys accepted joint legal responsibility for the case and agreed to be available to consult with the client). The Florida Bar re: Rules Regulating The Florida Bar, 494 So. 2d 977 (Fla. 1986). Effective January 1, 1998, the court amended the rules to restrict the amount of the fee which the referring attorney court receive in the absence of court approval to 25%. The Florida Bar re: Amendments to the Rules Regulating The Florida Bar, 519 So. 2d 971 (Fla. 1987).

84. *Noris*, 701 So. 2d at 1240.

85. *Id.*

86. *Id.* at 1241.

87. 709 So. 2d 572, 574 (Fla. 3d Dist. Ct. App. 1998).

88. *Id.* at 573. Subdivision (f)(3) of RPC 4-1.5, "FEES FOR LEGAL SERVICES,"

provides:

(3) A lawyer shall not enter into an arrangement for, charge, or collect:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(B) a contingent fee for representing a defendant in a criminal case.

RPC 4-1.5(f)(3).

89. *King*, 709 So. 2d at 573.

This “bonus” fee was to be determined by “taking into consideration the *results achieved* and the complexity of the matter.”⁹⁰

The client paid the retainer fee and the firm’s hourly charges. After the case was concluded, however, the client refused to pay the \$750,000 bonus fee demanded by the firm. The firm then sued, seeking a bonus fee of \$1,150,000. The client argued, and the Third District Court of Appeal agreed, that the bonus fee was contingent on the “results obtained.”⁹¹

90. *Id.* at 573 (quoting fee agreement).

91. *Id.* Subdivision (b) of RPC 4-1.5, “**FEES FOR LEGAL SERVICES**,” provides:

(b) **Factors to Be Considered in Determining Reasonable Fee.** Factors to be considered as guides in determining a reasonable fee include:

(1) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, *and the results obtained*;

(5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(8) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client’s ability to pay rested to any significant degree on the outcome of the representation.

RPC 4-1.5(b) (emphasis added).

It can be argued that a fee based to any significant degree on the “results obtained” for the client is, in effect, a contingent fee. Regarding the definition of “contingent fee,” Florida case law has stated that “[t]he controlling substantive character of a contingency fee agreement is the feature that the attorney gets paid in one event and not in another.” *Quanstrom v. Standard Guaranty Ins. Co.*, 519 So. 2d 1135, 1136 n.1 (Fla. 5th Dist. Ct. App. 1988), *rev. on other grounds*, 555 So. 2d 828 (Fla. 1990). If a “results obtained” fee is indeed a contingent fee, lawyers may not ethically charge it in most domestic relations cases or in criminal defense cases. RPC 4-1.5(f)(3). Persons who argue that the rules permit “results obtained” fees in domestic and criminal cases point out that RPC 4-1.5(b) explicitly lists “the results obtained” as a factor lawyers should consider in setting a reasonable fee. RPC 4-1.5(b)(4).

Consequently, the court held that the bonus fee clause called for a prohibited contingent fee, and thus was unenforceable under the holding in *Chandris*.⁹²

Another domestic relations case involving a “results obtained” fee is *May v. Sessums & Mason, P.A.*⁹³ A law firm had represented a client in a contested dissolution matter, with a fee agreement for hourly billing as well as a provision stating that, upon conclusion of the case, “an additional attorney’s fee may be requested” based on factors including “results obtained.”⁹⁴ The fee contract further stated that this additional fee would be “subject to discussion and agreement with [the client] prior to such bill being tendered.”⁹⁵ At the end of the case, and without an agreement by the client, the law firm billed the client for an additional \$1,000,000. The client refused to pay, the law firm sued to collect, and the firm ultimately obtained a judgment of \$564,500.⁹⁶

On appeal, the client argued that the “additional fee” provision was an unethical, unenforceable contingent fee because it was based, at least in part, on “results obtained.”⁹⁷ The Second District Court of Appeal did not reach this question.⁹⁸ Rather, it reversed the lower court’s judgment on other grounds.⁹⁹ The client had *not* contracted to pay the additional fee; the language of the contract only stated that an additional fee might be requested by the firm.¹⁰⁰ Regarding the possible effect on the public’s perception of the legal system, however, the court observed:

This is an unfortunate case for the legal profession. Regardless of the outcome of these proceedings, this case, in all likelihood, will, justifiably or not, cause some segments of the legal profession to suffer further disrepute. This is particularly unfortunate because the disputes at issue could clearly have been avoided by a more carefully drawn document which the experienced attorneys involved were fully capable of preparing.¹⁰¹

92. *King*, 709 So. 2d at 573. After voiding the noncomplying fee agreement, the court limited the firm’s quantum meruit recovery to the amount of fees already received, \$342,989. *Id.* at 574.

93. 700 So. 2d 22 (Fla. 2d Dist. Ct. App. 1997).

94. *Id.* at 23–24.

95. *Id.* at 24.

96. *Id.* at 23.

97. *Id.* at 25.

98. *May*, 700 So. 2d at 25.

99. *Id.* at 26.

100. *Id.*

101. *Id.* at 28.

A third case on the subject of “results obtained” fees was *Martin L. Haines, III, Chartered v. Sophia*.¹⁰² A law firm had represented a client in a family law matter. Throughout the representation the client paid fees charged on an hourly basis. At the conclusion of the case, the firm sought additional fees. In the employment contract, the client had agreed that the parties could determine the amount of fee owed in a summary proceeding to enforce the firm’s charging lien and, consequently, the firm moved to enforce its charging lien.¹⁰³

The employment agreement also provided that the firm’s final fee, to be determined at the conclusion of case, would be based on stated criteria, which were identical to most of the “factors to be considered as guides in determining a reasonable fee” set out in RPC 4-1.5(b) including the “results obtained” provision.¹⁰⁴ The Fourth District Court of Appeal construed the agreement to mean that the “entire fee will be based solely on the hours billed, unless the client agrees later to an additional amount.”¹⁰⁵ The court harmonized this decision with its opinion in *Franklin & Marbin, P.A. v. Mascola*,¹⁰⁶ which ruled that the rights and duties of the parties ordinarily are determined by the fee agreement.¹⁰⁷ The court affirmed the trial court’s judgment which held that the client owed no further fees to the law firm.¹⁰⁸ As in *May*, the court did not address whether the “results obtained” provision ran afoul of the *Florida Rules of Professional Conduct*.¹⁰⁹

Other cases have addressed different fee related issues. *Hollub v. Clancy*¹¹⁰ was an appeal of an attorney’s fee award in a commercial dispute.¹¹¹ Appellants argued that the trial court erred by awarding fees for time charged under an unreasonable unit billing arrangement.¹¹² The questionable charges included, for example, twelve instances in which a lawyer claimed one hour or more to review a one or two page document. As a result, the Third District Court of Appeal determined the amount of fees

102. 711 So. 2d 209 (Fla. 4th Dist. Ct. App. 1998).

103. *Id.* at 209–10.

104. *Id.* at 209 n.1 (citing RPC 4-1.5(b)). See *supra* note 90 and accompanying text.

105. *Haines*, 711 So. 2d at 210.

106. 711 So. 2d 46 (Fla. 4th Dist. Ct. App. 1998).

107. *Id.* at 47.

108. *Id.*

109. *Id.* at 47 n.1.

110. 706 So. 2d 16 (Fla. 3d Dist. Ct. App. 1997).

111. *Id.* at 16.

112. *Id.* at 19 (citing *Browne v. Costales*, 579 So. 2d 161, 162 (Fla. 3d Dist. Ct. App. 1991) (stating that “[u]nit billing is a practice where the attorney bills a predetermined number of minutes for a given task.”)). See also *Nickerson v. Nickerson*, 608 So. 2d 835 (Fla. 3d Dist. Ct. App. 1992).

awarded to be excessive.¹¹³ The court remanded the case with directions for the trial court to eliminate the unreasonable unit billing amounts.¹¹⁴

Another Third District Court of Appeal case, *Girten v. Andreu*,¹¹⁵ mentioned excessive fees.¹¹⁶ The case was a paternity action in which a major issue of contention was whether the child would bear the surname of the mother or of the father. Paternity of the child was uncontested. The trial court ordered the father to pay the mother's attorney fees.¹¹⁷ The appellate court affirmed this award.¹¹⁸ Total fees incurred by the parties exceeded \$165,000. The appellate court agreed with the trial court's description of the total fees incurred in the case as "shocking," but found no abuse of discretion.¹¹⁹ A concurring opinion went further, declaring that the adjective "shocking" "gravely understates the reality."¹²⁰ Judge Sorondo thought that "unconscionable" was a more accurate description.¹²¹ A review of the RPC 4-1.5(a)(1), 4-1.5(b)(1) and 4-1.5(b)(4) led him to the conclusion that the fees generated in the case were "grossly excessive."¹²²

Several 1998 cases addressed various aspects of a useful fee collection tool for lawyers, the charging lien.¹²³ A lawyer's charging lien is perfected

113. *Hollub*, 706 So. 2d at 19.

114. *Id.* at 19.

115. 698 So. 2d 886 (Fla. 3d Dist. Ct. App. 1997).

116. *Id.* at 889.

117. *Id.* at 888.

118. *Id.* at 887.

119. *Id.* at 888-89.

120. *Girten*, 698 So. 2d at 889 (Sorondo, J., concurring specially).

121. *Id.*

122. *Id.* (Jorgenson, J., concurring specially) (citing RPC 4-1.5(a)). Subdivision (a) of RPC 4-1.5, "FEES FOR LEGAL SERVICES," provides:

(a) **Illegal, Prohibited, or Clearly Excessive Fees.** An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

RPC 4-1.5(a).

123. *See, e.g., Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1384 (Fla. 1983) ("charging lien is an equitable right to have costs and fees

by providing timely notice to the affected parties.¹²⁴ In *Gaebe, Murphy, Mullen & Antonelli v. Bradt*,¹²⁵ the court addressed the question of what constituted timely notice.¹²⁶ A law firm withdrew from representing a plaintiff in a wrongful death action and filed a charging lien. The firm sent a notice of the charging lien to its former client and to the lawyer for the defendant, although the defendant's lawyer asserted that he never received it. The firm apparently did not send a notice to the defendant's insurer. New counsel took over the plaintiff's case and settled it. When the law firm attempted to enforce its charging lien, the trial court allowed enforcement against only the firm's former client, ruling that the defendant's counsel and insurer had not received notice of the lien.¹²⁷ The Fourth District Court of Appeal reversed, agreeing with the law firm that "the filing of the charging lien prior to the dismissal of the case and/or entry of judgment constituted timely notice and, thus, perfected the lien against [defense counsel and the insurer]."¹²⁸

*Cohen & Cohen, P.A. v. Angrand*¹²⁹ also addressed the issue of sufficient notice of a claimed charging lien.¹³⁰ In *Angrand*, a law firm represented a client in a case involving three separate lawsuits. Eventually the client discharged the firm without cause.¹³¹ The firm then filed a charging lien, but used the wrong case number. The court clerk noticed the error and filed the lien in one of the cases, but not in the other. Later, when the firm sought to enforce its charging lien, a general master ruled that the typographical error rendered the lien a nullity and denied its claim of fees.¹³² Reversing, the appellate court concluded that the lien was enforceable

due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit"). *Id.*

124. *Id.* at 1385.

125. 704 So. 2d 618 (Fla. 4th Dist. Ct. App. 1997).

126. *Id.* at 618.

127. *Id.*

128. *Id.* at 619.

129. 710 So. 2d 166 (Fla. 3d Dist. Ct. App. 1998).

130. *Id.* at 166.

131. *Id.* at 167. A discharged lawyer's right to a fee for services performed prior to discharge can differ greatly, depending on whether the discharge was with or without cause. Compare *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982) (holding that a lawyer discharged *without* cause was entitled to a reasonable value of services performed, limited by a maximum contract fee), with *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller*, 629 So. 2d 947 (Fla. 4th Dist. Ct. App. 1993) (holding that a lawyer discharged *with* cause was entitled to quantum meruit value of services rendered minus the damages suffered by client as result of the lawyer's breach of contract). See also *Kushner v. Engelberg, Cantor & Leone, P.A.*, 699 So. 2d 850 (Fla. 4th Dist. Ct. App. 1997).

132. *Angrand*, 710 So. 2d at 167.

because the firm's intent was obvious and there was no claim that the firm misled any of the parties or that any of the parties failed to receive notice.¹³³

In *Kushner v. Engelberg, Cantor & Leone, P.A.*,¹³⁴ the proper method of calculating the amount of fees due under a claimed charging lien was at issue.¹³⁵ In an estate matter, a personal representative discharged his lawyer with cause.¹³⁶ Citing *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller*,¹³⁷ the Fourth District Court of Appeal concluded that the discharged lawyer was entitled to the "quantum meruit value of the services rendered less any damages which the client incurred due to the attorney's conduct and discharge."¹³⁸

Another charging lien case concerning fee calculation was *Carbonic Consultants, Inc. v. Herzfeld & Rubin, Inc.*,¹³⁹ in which a law firm represented a client on a contingent fee basis in an antitrust case.¹⁴⁰ The firm moved to withdraw from the case because the lawyer who actually was handling the case resigned from the firm. The trial court granted the motion to withdraw and the firm's motion for a charging lien.¹⁴¹ However, the Third District Court of Appeal reversed the order granting the charging lien.¹⁴² The court recited the rule, established by the Supreme Court of Florida in *Faro v. Romani*,¹⁴³ that a lawyer who voluntarily withdraws from a contingent fee case before the contingency occurs ordinarily is not entitled to any fee.¹⁴⁴ An exception to this "no fee rule" occurs when the client's conduct makes the representation legally impossible or will result in ethical violations by the lawyer.¹⁴⁵

Applying the principles of *Faro*, the Third District Court of Appeal held that the trial court erred in granting the charging lien.¹⁴⁶ The firm, not the client, created the firm's ethical problem of remaining in the case

133. *Id.*

134. 699 So. 2d 850 (Fla. 4th Dist. Ct. App. 1997).

135. *Id.* at 851.

136. *Id.* For the distinction between a discharge with cause and a discharge without cause for purposes of calculating fees owed, see *supra* note 130 and accompanying text.

137. 629 So. 2d 947 (Fla. 4th Dist. Ct. App. 1993).

138. *Kushner*, 699 So. 2d at 851. See *supra* note 91 and accompanying text.

139. 699 So. 2d 321 (Fla. 3d Dist. Ct. App. 1997).

140. *Id.* at 322.

141. *Id.* at 323.

142. *Id.* at 322.

143. 641 So. 2d 69 (Fla. 1994).

144. *Carbonic*, 699 So. 2d at 323 (citing *Faro v. Romani*, 641 So. 2d 69, 71 (Fla. 1994)).

145. *Faro*, 641 So. 2d at 71.

146. *Carbonic*, 699 So. 2d at 322.

without the necessary subject matter expertise. The client had not engaged in any conduct that would have made the firm's continued representation unethical. Accordingly, the firm forfeited its right to a fee when it withdrew from the case.¹⁴⁷

At least one charging lien case addressed broader issues relating to fee agreements between lawyer and client. In *Franklin & Marbin, P.A. v. Mascola*,¹⁴⁸ a client in a paternity case hired a law firm and entered into a fee contract providing, inter alia, that the client would: 1) pay the firm a "reasonable attorney's fee against which [the firm] will bill [the client] in accordance with our established hourly rates;" and 2) read all billing statements and notify the firm in writing within fifteen days of any objections, with failure to do so presumed to be agreement with the "correctness, accuracy and fairness" of the bill.¹⁴⁹ Prior to conclusion of the case, the firm withdrew and filed a notice of charging lien. Evidence adduced by the firm in support of its claim of lien included unobjected to bills sent to the client totaling more than \$19,000. The trial court entered judgment for the firm, but in the amount of only \$6800.¹⁵⁰

The law firm appealed, contending that the trial court erred because the fee contract, in particular, the provision waiving client objections to the bill if not presented within fifteen days, was controlling.¹⁵¹ The client, on the other hand, argued that the court should uphold the judgment because the law required the court only to award a reasonable fee, as opposed to the fee the law firm actually billed.¹⁵²

The Fourth District Court of Appeal's opinion reviewed Florida law concerning client liability to his or her lawyer under various circumstances.¹⁵³ Relying on cases concluding that the lodestar formula of *Florida Patients Compensation Fund v. Rowe*¹⁵⁴ is inapplicable to a lawyer's claim for fees directly from the lawyer's client, as well as RPC 4-

147. *Id.* at 321. The fact that the firm procured an informal advisory opinion from the staff of The Florida Bar Ethics Department was not, in the court's opinion, determinative. *Id.* at 324. Although the Bar staff opinion correctly concluded that the law firm's continued representation of the client would be unethical under these circumstances, this did not change the fact that the firm, not the client, created the ethical dilemma. *Id.* Regarding issuance of informal advisory opinions, see *Florida Bar Procedures for Ruling on Questions of Ethics*, 70 FLA. B. J. 684, 864-85 (Sept. 1996).

148. 711 So. 2d 46 (Fla. 4th Dist. Ct. App. 1998). See also *supra* note 105 and accompanying text.

149. *Franklin*, 711 So. 2d at 47-48 (emphasis omitted).

150. *Id.* at 48.

151. *Id.* at 49.

152. *Id.*

153. *Id.* at 49-50.

154. 472 So. 2d 1145 (Fla. 1985).

1.5(d),¹⁵⁵ the court concluded that, under the facts of this case, “[i]n the absence of a legal determination by the court that the fee contract is illegal, prohibited or excessive, under a *periodic* fee agreement for services already performed the lawyer is entitled to a money judgment for the amount of fees due under the contract.”¹⁵⁶

Despite what appeared to be a favorable construction of law, the firm ended up with a disappointing result. Although it might have prevailed in an action at law seeking a money judgment, the firm was seeking to recover on a charging lien theory. A basic tenant of Florida law is that a charging lien can attach only to funds or property recovered in the case at issue.¹⁵⁷ In this case, there had been no such recovery to which a lien could attach and, thus, the court reversed the judgment.¹⁵⁸

Application of the ethics rules prohibiting clearly excessive fees was a central issue in another charging lien case. In *Kerrigan, Estess, Rankin & McLeod v. State*,¹⁵⁹ lawyers who represented the state in litigation against tobacco companies attempted to enforce their claimed charging lien.¹⁶⁰ The state moved to quash the lien under the doctrine of sovereign immunity and under other grounds. The trial court ultimately quashed the lien, but on grounds neither pleaded nor argued by the parties.¹⁶¹ Relying on the

155. Subdivision (d) of RPC 4-1.5, “ENFORCEABILITY OF FEE CONTRACTS,” provides:

(d) **Enforceability of Fee Contracts.** Contracts or agreements for attorney’s fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

RPC 4-1.5(d).

In prefacing its reference to RPC 4-1.5(d), the court cited *Chandris, supra* notes 67 and 81, for the proposition that “fee contracts that do not comply with the lawyer disciplinary rules are subject to being held void as against public policy.” *Franklin*, 711 So. 2d at 51 n.8. The court noted that there was “no evidence that the present agreement was obtained through noncomplying advertising or solicitation.” *Id.* at 51.

156. *Id.* at 52 (citing *Lugassy v. Independent Fire Ins. Co.*, 636 So. 2d 1332 (Fla. 1994); *Pierce v. Issac*, 184 So. 509 (Fla. 1938); *Stabinski, Funt & De Oliveira, P.A. v. Law Offices of Frank H. Alvarez*, 490 So. 2d 159 (Fla. 3d Dist. Ct. App. 1986)).

157. *See, e.g.*, *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So. 2d 88, 92 (Fla. 3d Dist. Ct. App. 1987).

158. *Franklin*, 711 So. 2d at 52.

159. 711 So. 2d 1246 (Fla. 4th Dist. Ct. App. 1998).

160. *Id.* at 1247.

161. *Id.* at 1249.

rationale of *Chandris*,¹⁶² the Fourth District Court of Appeal ruled that the amount of fee claimed by the law firms was violative of the RPC 4-1.5 as unreasonable and unconscionable.¹⁶³

The law firms appealed the order, asserting that the court raised the issue of unconscionability of the claimed fee *sua sponte* without proper notice, and that the firms had no opportunity to present evidence or argument relating to this issue. Holding that the trial court's action denied the law firms due process, the appellate court reversed the order and remanded the case for further proceedings.¹⁶⁴

As seen above, the majority of attorney's lien cases reported in 1998 dealt with charging liens. Florida law recognizes a second type of common law attorney's lien, called a "retaining lien."¹⁶⁵ *Rathburn v. Policastro*¹⁶⁶ involved an interesting application of the retaining lien doctrine.¹⁶⁷ Despite a lawyer's assertion of a retaining lien, the trial court ordered the lawyer to disclose during her testimony all statements made to others by her.¹⁶⁸ In addressing the matter on appeal, the Fourth District Court of Appeal noted that, as it stated in a prior decision, "the value of a retaining lien rests entirely upon the attorney's right to retain possession until the bill is paid" and that, consequently, "courts may not impair that lien by compelling disclosure of the paper or items" upon which the attorney asserts the lien.¹⁶⁹ Although the court had not ordered the lawyer to reveal her file or any items in it, the appellate court reasoned that the order compelling testimonial disclosure of the statements in question could result in disclosure of work product information and thus could "improperly impinge upon [the lawyer]'s retaining lien, just as forced disclosure of her file's contents could do."¹⁷⁰ Accordingly, the court quashed the order.¹⁷¹

Florida courts addressed a final aspect of the lawyer-client relationship in cases where that relationship was broken down as a result of the lawyer's

162. 668 So. 2d 180 (Fla. 1995). See *supra* note 67 and accompanying text.

163. *Kerrigan*, 711 So. 2d at 1249 (citing RPC 4-1.5(a)). See *supra* note 154 and accompanying text.

164. *Kerrigan*, 711 So. 2d at 1249.

165. A retaining lien is a possessory lien, asserted as security for payment of accrued but unpaid fees or costs, that a lawyer has on papers, funds, and other property of his or her client that comes into the lawyer's possession in the course of the lawyer's professional employment. See, e.g., *Daniel Mones, P.A. v. Smith*, 486 So. 2d 559 (Fla. 1986); *Wintter v. Fabber*, 618 So. 2d 375 (Fla. 4th Dist. Ct. App. 1993); *Dowda & Fields, P.A. v. Cobb*, 452 So. 2d 1140 (Fla. 5th Dist. Ct. App. 1984).

166. 703 So. 2d 537 (Fla. 4th Dist. Ct. App. 1997).

167. *Id.* at 537.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Rathburn*, 703 So. 2d at 537.

alleged legal malpractice.¹⁷² Although the preamble to the *Florida Rules of Professional Conduct* states that the violation of a rule “should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached,”¹⁷³ there are instances in which the rules are relevant to issues of alleged malpractice.¹⁷⁴ Rule 4-1.8(h), for example, sets parameters within which lawyers who wish to limit their liability to clients for legal malpractice must operate.¹⁷⁵

In *Florida Bar v. Jordan*,¹⁷⁶ a lawyer had represented a client in a civil action that the trial court ultimately dismissed.¹⁷⁷ The lawyer did not notify the client of the dismissal. When the client became aware of the dismissal and confronted the lawyer, the lawyer offered to pay the client for her damages by entering into a contract with her. The lawyer, however, “never advised [the client] that she should seek independent representation in connection with a claim for professional malpractice.”¹⁷⁸ The Supreme Court of Florida concluded that this conduct violated RPC 4-1.8(h) and, for this and other violations, suspended the lawyer from practice for one year.¹⁷⁹

Another case, *Kozich v. Shahady*,¹⁸⁰ discussed the lawyer-client relationship in the context of a legal malpractice action.¹⁸¹ A law firm represented a client in a civil matter. Four days before the jury rendered its verdict, the client assigned his right to the jury award to his brother. Unhappy with the amount of the verdict, the client sued the law firm for malpractice. In its defense, the firm argued that the client was not the real party in interest because of the assignment that he executed in favor of his

172. See *infra* notes 173, 177.

173. RPC preamble.

174. *Id.*

175. *Rathburn*, 703 So. 2d at 537. Subdivision (h) of RPC 4-1.8, “CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS,” provides:

(h) **Limiting Liability for Malpractice.** A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

RPC 4-1.8(h).

176. 705 So. 2d 1387 (Fla. 1998).

177. *Id.* at 1389.

178. *Id.* at 1390.

179. *Id.*

180. 702 So. 2d 1289 (Fla. 4th Dist. Ct. App. 1997).

181. *Id.* at 1289.

brother in the underlying suit.¹⁸² If this argument was valid, the firm would have been insulated from malpractice liability in the case because Florida law does not recognize assignments of legal malpractice claims.¹⁸³

Reversing the summary judgment that the trial court had granted in favor of the firm, the Fourth District Court of Appeal noted that the client had assigned only his right to “the jury award,” *not* his entire interest in the case.¹⁸⁴ This limited assignment did not constitute an assignment of his subsequent claim against the firm for malpractice.¹⁸⁵ “[T]he effect of assigning only his right to any future award was to retain in [the client] the ability to control the conduct of the trial, to accept or reject any settlement offers, and to maintain the attorney-client relationship, with any corresponding obligations.”¹⁸⁶ The bar against assigning malpractice claims arises from the highly personal and confidential nature of the lawyer-client relationship,¹⁸⁷ and, for purposes of the question presented, had not been affected by the limited assignment.¹⁸⁸

*Turner v. Anderson*¹⁸⁹ was an unusual case indicating that clients cannot evade responsibility for their actions by asserting that they took those actions at the direction of their lawyers.¹⁹⁰ The client had committed perjury, allegedly on the advice of the law firm that represented him and his employer in a securities arbitration matter. The matter resulted in an award against the client and, in a lesser amount, against the employer.¹⁹¹ The client sued the law firm for malpractice and for breach of its fiduciary duty. He claimed that the firm breached its duty to him by advising him to testify untruthfully, and that he followed this advice to his detriment. The firm defended by arguing that the doctrine of *in pari delicto*¹⁹² barred the claim and that the client’s claims were an impermissible collateral attack on the award. The trial court granted summary judgment for the firm on both grounds.¹⁹³

182. *Id.* at 1290.

183. *See, e.g.,* *Washington v. Fireman’s Fund Ins. Co.*, 459 So. 2d 1148 (Fla. 4th Dist. Ct. App. 1984).

184. *Kozich*, 702 So. 2d at 1290.

185. *Id.*

186. *Id.*

187. *Washington*, 459 So. 2d at 1149.

188. *Kozich*, 702 So. 2d at 1291.

189. 704 So. 2d 748 (Fla. 4th Dist. Ct. App. 1998).

190. *Id.* at 749.

191. *Id.*

192. *In pari delicto* has been defined as “[in] equal fault; equally culpable or criminal; in a case of equal fault or guilt.” BLACK’S LAW DICTIONARY 543 (6th ed. 1991).

193. *Turner*, 704 So. 2d at 749.

Reversing without much discussion on the collateral attack ground, the Fourth District Court of Appeal spent the bulk of its opinion explaining why it affirmed the lower court on the *in pari delicto* ground.¹⁹⁴ The court began by noting that the “question of whether a client who does an illegal act on advice of counsel can sue counsel for damages resulting therefrom” was a matter of first impression in Florida.¹⁹⁵ After reviewing authorities from other jurisdictions, the court ultimately concluded that, under the facts in the case before it, the client’s misconduct precluded him from recovering damages for the perjury that he allegedly committed on the advice of counsel.¹⁹⁶

III. THE LAWYER’S RELATIONSHIP WITH THE COURT AND THE JUDICIAL SYSTEM

One of the most important, yet difficult, relationships that lawyers have is with the courts, of which they are officers, and with the judicial system. Cases in 1998 addressed various aspects of this relationship: 1) the propriety of a lawyer’s dual role as advocate and witness in the same matter; 2) the lawyer’s obligation of candor toward a tribunal;¹⁹⁷ 3) the lawyer’s withdrawal from a matter in litigation;¹⁹⁸ 4) a lawyer’s disqualification from a litigated matter;¹⁹⁹ and 5) the appropriateness of a lawyer’s trial conduct, particularly in the context of real or perceived professionalism obligations.²⁰⁰

In the course of representing a client a lawyer can act in many roles, and this often does not implicate professional responsibility issues. One area in which the *Florida Rules of Professional Conduct* specifically addresses the multiplicity of roles is in the context of a lawyer who wishes to act as both an advocate and a witness on behalf of a client.²⁰¹ Rule 4-3.7 ordinarily precludes the same lawyer from acting in both of these roles at trial.²⁰²

194. *Id.* at 750.

195. *Id.*

196. *Id.* at 752.

197. *See* *Conquest v. Auto-Owners Ins. Co.*, 23 Fla. L. Weekly D928 (2d Dist. Ct. App. Apr. 6, 1998).

198. *See* *Garcia v. Manning*, 717 So. 2d 59 (Fla. 3d Dist. Ct. App. 1998).

199. *See* *Billings, Cunningham, Morgan & Boatwright, P.A. v. Isom*, 701 So. 2d 1271 (Fla. 5th Dist. Ct. App. 1997).

200. *See* *J.M. Lumber, Inc. v. M.L. Builders, Inc.*, 706 So. 2d 84 (Fla. 4th Dist. Ct. App. 1998).

201. *See* *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997).

202. RPC 4-3.7, “LAWYER AS WITNESS,” provides:

In *Conquest v. Auto-Owners Insurance Co.*,²⁰³ the Second District Court of Appeal expressed its concern about a lawyer being both an advocate and a witness.²⁰⁴ The court noted that “neither Conquest nor her attorney” had testified regarding the willingness of the client, Conquest, to accept an offer below policy limits.²⁰⁵ In a footnote, the court acknowledged that it was “puzzled by the fact that Conquest’s trial counsel became a significant witness in the trial.”²⁰⁶ This, stated the court, appeared to be a “clear violation” of rule 4-3.7.²⁰⁷

The purpose of rule 4-3.7 was clearly articulated by the Supreme Court of Florida in *Scott v. State*.²⁰⁸ In appealing from the denial of postconviction relief, a lawyer’s former client argued that the trial court had erred by allowing an assistant state attorney to serve as both prosecutor and as a witness at the postconviction relief hearing. The lawyer in question represented the state in that matter, in which his former client called him as a witness to testify regarding alleged *Brady*²⁰⁹ violations by the state in the original trial. In his appeal from the postconviction proceeding, the former client claimed that the prosecutor’s dual role violated ethical and constitutional considerations. Rejecting this argument, the supreme court provided some helpful clarification regarding the scope and purpose of rule 4-3.7:

(a) **When Lawyer May Testify.** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- (3) the testimony relates to the nature and value of legal services rendered in the case; or
- (4) disqualification of the lawyer would work substantial hardship on the client.

(b) **Other Members of Law Firm as Witnesses.** A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9 [concerning conflicts of interest].

RPC 4-3.7.

203. 23 Fla. L. Weekly D928 (2d Dist. Ct. App. Apr. 6, 1998).

204. *Id.* at D930.

205. *Id.* at D929.

206. *Id.* at D930 n.3.

207. *Id.*

208. 717 So. 2d 908 (Fla. 1998).

209. *Brady v. Maryland*, 373 U.S. 83 (1963).

[A] purpose of the rule is to prevent the evils that arise when a lawyer dons the hats of both an advocate and witness *for his or her own client*. Such a dual role can prejudice the opposing side or create a conflict of interest. These concerns are not implicated in the present case where the state attorney was called as a witness *for the other side* on a *Brady* claim in a post conviction evidentiary hearing before a judge.²¹⁰

The Fourth District Court of Appeal addressed the scope of RPC 4-3.7 in *Larkin v. Pirthauer*,²¹¹ when a personal representative of an estate sought certiorari review of an order disqualifying her lawyer.²¹² The lawyer in question apparently had been involved in the preparation and execution of the testator's will. The personal representative for the testator's estate engaged that lawyer to represent her. It became clear that the lawyer would be a witness in a will contest in which testamentary capacity and undue influence were issues. The Fourth District Court of Appeal denied certiorari, but in doing so limited the scope of the disqualification order.²¹³ The court stated, "[a]lthough the order of disqualification does not so provide, we interpret it to disqualify counsel only from the litigation, and not from other matters pertaining to the administration of the estate."²¹⁴ The court's view of the proper scope of a disqualification order founded on RPC 4-3.7 is consistent with the language of the rule and with the result reached in a recent First District Court of Appeal case which disqualified a lawyer from trial representation but not from pretrial or posttrial representation in the case.²¹⁵

When acting as an advocate, one of the most important obligations that a lawyer has is that of candor to the tribunal.²¹⁶ Two 1998 cases specifically addressed this obligation as it applied to prosecuting attorneys. *Garcia v. Manning*²¹⁷ was an appeal arising from a civil contempt proceeding.²¹⁸ The appellate court held that the trial judge had improperly applied the law

210. *Scott*, 717 So. 2d at 908.

211. 700 So. 2d 182 (Fla. 4th Dist. Ct. App. 1997).

212. *Id.* at 182.

213. *Id.* at 183.

214. *Id.*

215. *Fleitman v. McPherson*, 691 So. 2d 37 (Fla. 1st Dist. Ct. App. 1997). See Timothy P. Chinaris & Elizabeth Clark Tarbert, *Professional Responsibility: 1997 Survey of Florida Law*, 22 NOVA L. REV. 215, 249 (1997), for a discussion of *Fleitman v. McPherson*.

216. See, e.g., RPC 4-3.3, "CANDOR TOWARD THE TRIBUNAL."

217. 717 So. 2d 59 (Fla. 3d Dist. Ct. App. 1998).

218. *Id.* at 59.

regarding the contemnor's ability to pay.²¹⁹ Additionally, however, in a lengthy footnote, the court criticized the prosecutor's conduct in encouraging the judge to incarcerate the unrepresented contemnor, despite his apparent inability to pay.²²⁰ Agreeing with the Fourth District Court of Appeal's opinion in *Dilallo By and Through Dilallo v. Riding Safely, Inc.*,²²¹ the court noted that RPC 4-1.1²²² and 4-3.3(3)²²³ "imply a duty to know and disclose to the court adverse legal authority" and that it "construe[d] these rules to also require an attorney to provide full information to the trial court such that the court has all necessary information to determine the issue presented to it."²²⁴ This obligation, the court stated, is particularly important when the opposing party is unrepresented.²²⁵

The second case, *State v. James*,²²⁶ did not consider silence in the face of an obligation to speak, but, rather, affirmative misrepresentations by the prosecutor.²²⁷ The prosecutor had represented to the court that the state would call a certain witness, but rested without calling her.²²⁸ When questioned about this after the defense moved for a mistrial, the prosecutor stated that he knew when the case began that he would not be calling the witness.²²⁹ The Third District Court of Appeal court "heartily endorse[d]" the trial court's expression of "utmost concern" regarding the prosecutor's "lack of candor and professionalism" in misleading the court regarding his intentions concerning the witness.²³⁰

Issues relating to a lawyer's withdrawal from a litigated matter were discussed in several 1997 and 1998 cases. *Billings, Cunningham, Morgan &*

219. *Id.*

220. *Id.* at 60 n.4. The court closed its note by stating that further conduct of the same type would "require a referral to The Florida Bar for disciplinary action." *Id.*

221. 687 So. 2d 353, 355 (Fla. 4th Dist. Ct. App. 1997). See Chinaris & Tarbert, *supra* note 177, at 242-43 for a discussion of *Dilallo By and Through Dilallo v. Riding Safely, Inc.*

222. RPC 4-1.1, "COMPETENCE," provides that: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." RPC 4-1.1.

223. Subdivision (a)(3) of RPC 4-3.3, "CANDOR TOWARD THE TRIBUNAL," provides that:

"A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]"

RPC 4-3.3(a)(3).

224. *Garcia*, 707 So. 2d at 60 n.4 (citing RPC 4-1.1, 3.3(3)).

225. *Id.*

226. 710 So. 2d 180 (Fla. 3d Dist. Ct. App. 1998).

227. *Id.* at 181.

228. *Id.*

229. *Id.*

230. *Id.* at 182 n.4.

*Boatwright, P.A. v. Isom*²³¹ turned on the trial court's application of RPC 4-1.16(c),²³² which recognizes the long standing rule that a judge has the inherent authority to determine whether a law firm will be permitted to withdraw from litigation, regardless of the existence of ethical elements that would militate in favor of withdrawal.²³³ In *Isom*, a law firm settled a case for its personal injury client, who signed a release.²³⁴ The client later moved to set aside the settlement due to allegedly incorrect advice from the firm's associate regarding the effect of the release. Concluding that there was a conflict between its interests and those of the client, the firm moved to withdraw.²³⁵ After "analyz[ing] the complex factors in this case," the Fifth District Court of Appeal ruled that the trial court did not depart from essential requirements of law by denying the firm's motion to withdraw.²³⁶ Referencing RPC 4-1.16(c), the court viewed this as a situation in which the trial court had the authority to order continued representation "even when potential ethical conflicts are presented."²³⁷

An interesting contention regarding a perceived duty to withdraw appeared in *Remeta v. State*.²³⁸ Capital Collateral Regional Counsel ("CCRC") moved to withdraw as counsel for a death row inmate. The trial court denied the motion, and CCRC appealed.²³⁹ CCRC alleged that a conflict existed as a result of statements and questions from members of an oversight committee, the Commission on the Administration of Justice, in capital cases regarding the handling of related litigation involving the client. In affirming the order, the supreme court agreed with the trial judge that "if the facts as set forth by CCRC constitute conflict, the entire legal system would collapse because there is not a public defender who does not

231. 701 So. 2d 1271 (Fla. 5th Dist. Ct. App. 1997).

232. Subdivision (c) of RPC 4-1.16, "DECLINING OR TERMINATING REPRESENTATION," provides that: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." RPC 4-1.16(c).

233. *Isom*, 701 So. 2d at 1272.

234. *Id.*

235. *Id.* In moving to withdraw, the firm stated that it had been advised by The Florida Bar that its withdrawal was mandatory pursuant to RPC 4-1.16(a). Presumably the firm sought an informal advisory opinion from the Bar ethics staff. *Id.*

236. *Id.*

237. *Isom*, 701 So. 2d at 1272 (citing RPC 4-1.16(c)).

238. 707 So. 2d 719 (Fla. 1998).

239. *Id.* at 719.

have the same asserted 'conflict.'²⁴⁰ Every government official must account to some governing body as to how it allocates it[s] [sic] resources."²⁴¹

Public defenders see certain recurring issues relating to withdrawal. One of these issues is the ethically and procedurally proper method of handling the situation that arises when a criminal defense client wishes to move to withdraw his or her guilty plea on the basis that counsel advised improperly or negligently concerning the plea. In two Florida cases, *Karg v. State*²⁴² and *Holifield v. State*,²⁴³ the First District Court of Appeal reaffirmed that in this situation counsel is faced with a conflict of interest that requires the appointment of conflict free counsel for the purpose of representation on the motion to withdraw the plea.²⁴⁴ The Fourth District Court of Appeal discussed this procedure, and the rationale supporting it, more fully in *Roberts v. State*.²⁴⁵

Another recurring withdrawal issue for public defenders relates to the likelihood that one of their former clients will testify against a current client. *Costa v. State*²⁴⁶ arose from a trial court's denial of an assistant public defender's motion to withdraw.²⁴⁷ The motion certified the existence of an irreconcilable conflict between the lawyer's current client and a former client based on confidential communications with the former client concerning issues relevant to the present case.²⁴⁸ In quashing the order and remanding with directions to grant the motion, the Fourth District Court of Appeal cited authority, including *Guzman v. State*,²⁴⁹ holding that a public defender should be permitted to withdraw upon certifying the existence of a conflict.²⁵⁰

Similarly, the denial of an assistant public defender's motion to withdraw was reversed in *Cankur v. State*.²⁵¹ The public defender's former client was identified as a prosecution witness.²⁵² When the public defender moved to withdraw, the state attempted to eliminate the problem by offering

240. *Id.*

241. *Id.* at 719–20.

242. 706 So. 2d 124 (Fla. 1st Dist. Ct. App. 1998).

243. 717 So. 2d 69 (Fla. 1st Dist. Ct. App. 1998).

244. *Id.*; *Karg*, 706 So. 2d at 125.

245. 670 So. 2d 1042, 1045 (Fla. 4th Dist. Ct. App. 1996); *see Chandris*, 668 So. 2d 180, 253–54 (Fla. 1995) and *supra* note 55 and accompanying text.

246. 712 So. 2d 455 (Fla. 4th Dist. Ct. App. 1998).

247. *Id.* at 456.

248. *Id.*

249. 644 So. 2d 996 (Fla. 1994). *See also Babb v. Edwards*, 412 So. 2d 859 (Fla. 1982).

250. *Costa*, 712 So. 2d at 456 (citing *Guzman v. State*, 644 So. 2d 996, 999 (Fla. 1994)).

251. 706 So. 2d 944 (Fla. 4th Dist. Ct. App. 1998).

252. *Id.* at 944.

to refrain from calling the witness.²⁵³ The court then denied the motion.²⁵⁴ Citing *Guzman*²⁵⁵ as well as other cases,²⁵⁶ the appellate court reversed, stating that “under the circumstances of this case, the trial court was required to grant the motion to withdraw without reweighing the facts considered by the public defender in determining and certifying that a conflict exists.”²⁵⁷

In a concurring opinion, *Crowe v. State*²⁵⁸ criticized *Guzman*.²⁵⁹ Judge Dauksch argued that trial judges should have discretion to analyze the nature of the conflict and the surrounding circumstances in ruling on motions to withdraw filed by public defenders.²⁶⁰

In contrast to cases involving a lawyer’s attempted voluntary withdrawal from a litigated matter, a number of cases deal with the *involuntary* removal of a lawyer or law firm from litigation. These cases include conflicts involving a lawyer’s current clients,²⁶¹ a lawyer’s former clients,²⁶² imputed disqualification resulting from the movement of nonlawyer employees between law firms,²⁶³ and the involvement of lawyers with former employees of opposing parties.²⁶⁴

A basic principle of conflicts law is that, in the same litigated matter, one lawyer or law firm may not represent both a plaintiff and a defendant.²⁶⁵

253. *Id.*

254. *Id.*

255. *See supra* note 147 and accompanying text.

256. *Cankur*, 706 So. 2d at 945 (citing *Hope v. State*, 654 So. 2d 639 (Fla. 4th Dist. Ct. App. 1995); *Crowe v. State*, 701 So. 2d 431 (Fla. 5th Dist. Ct. App. 1997)). *See also infra* note 151.

257. *Cankur*, 706 So. 2d at 944–45.

258. 701 So. 2d 431, 431–32 (Fla. 5th Dist. Ct. App. 1997) (Dauksch, J., specially concurring).

259. *Id.* at 432.

260. *Id.* at 431–32.

261. *Cardasis v. HP America, Inc.*, 710 So. 2d 146 (Fla. 3d Dist. Ct. App. 1998); *Henry v. Entertainment Design, Inc.*, 711 So. 2d 179 (Fla. 4th Dist. Ct. App. 1998).

262. *J.M. Lumber, Inc. v. M.L. Builders, Inc.*, 706 So. 2d 84 (Fla. 4th Dist. Ct. App. 1998); *Rodell v. Narson*, 706 So. 2d 392 (Fla. 3d Dist. Ct. App. 1998); *King v. Byrd*, 23 Fla. L. Weekly D1173 (4th Dist. Ct. App. May 13, 1998), *withdrawn and superseded on reh’g*, 716 So. 2d 831 (Fla. 4th Dist. Ct. App. 1998).

263. *City of Apopka v. All Corners, Inc.*, 701 So. 2d 641 (Fla. 5th Dist. Ct. App. 1997); *Esquire Care, Inc. v. Maguire*, 532 So. 2d 740 (Fla. 2d Dist. Ct. App. 1988); *Lackow v. Walter E. Heller & Co. Southeast*, 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).

264. *Carnival Corp. v. Romero*, 710 So. 2d 690 (Fla. 5th Dist. Ct. App. 1998); *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 43 F.3d 1439 (11th Cir. 1995).

265. RPC 4-1.7 cmt. (discussing prohibition representing opposing parties in litigation).

In *Cardasis v. HP America, Inc.*,²⁶⁶ the Third District Court of Appeal ruled that “the trial court departed from the essential requirements of law” by denying the defendants’ motion to disqualify the plaintiff’s lawyers from also representing one of the defendants in the pending case below.²⁶⁷ The matter was remanded with directions to grant the motion and to disqualify the lawyers in question from representing *any* party in the case.²⁶⁸

An unusual conflicting scenario was present in *Henry v. Entertainment Design, Inc.*²⁶⁹ A law firm opposed an individual who was represented on unrelated matters by another office of that law firm. This conflict became known to the client after rendition of an unfavorable jury verdict in a case where the firm opposed him.²⁷⁰ Upon discovery of the conflict, the client sought relief from the verdict. Clearly this situation presented a conflict of interest; the trial court faced the question of how to deal with the conflict problem at the juncture at which it arose in the case.²⁷¹ The Fourth District Court of Appeal affirmed the trial court’s denial of requested relief, holding that the client was unable to demonstrate actual prejudice as a result of the conflict.²⁷²

*J.M. Lumber, Inc. v. M.L. Builders, Inc.*²⁷³ is a disqualification case based on conflicts involving a lawyer’s former clients.²⁷⁴ The decision in this case focused on the proper application of RPC 4-1.9,²⁷⁵ governing conflicts with *former* clients.²⁷⁶ The plaintiff’s lawyer, in post judgment execution proceedings, formerly represented one of the defendants in various matters. Defendants moved to disqualify the lawyer. At the evidentiary hearing on the motion, the trial court found that plaintiff’s counsel had not breached his duty of lawyer-client confidentiality and that the matter in question was not related to any knowledge gained in representing his former client.²⁷⁷ The court nevertheless concluded that an appearance of impropriety existed and disqualified the lawyer, “finding simply that it was too close in time to the prior representation which had ceased three years earlier.”²⁷⁸

266. 710 So. 2d 146 (Fla. 3d Dist. Ct. App. 1998).

267. *Id.* at 146.

268. *Id.*

269. 711 So. 2d 179 (Fla. 4th Dist. Ct. App. 1998).

270. *Id.* at 180.

271. *Id.*

272. *Id.* at 181.

273. 706 So. 2d 84 (Fla. 4th Dist. Ct. App. 1998).

274. *Id.* at 84–85.

275. *See* RPC 4-1.9 *supra* note 23.

276. *J.M. Lumber*, 706 So. 2d at 85.

277. *Id.*

278. *Id.*

The Fourth District Court of Appeal reversed the order of disqualification.²⁷⁹ Referencing RPC 4-1.9, the court stated that the trial court's order departed from the essential requirements of law because it did not make a specific finding that the matters involved in the lawyer's representation of the plaintiff were substantially related to the matters covered by his previous representation of the defendant.²⁸⁰ The court thus recognized that RPC 4-1.9 contains two independent and distinct tests that must be examined in a former client conflict situation: 1) whether the former and current matters are substantially related; and 2) whether, regardless of any relationship between the matters, there are issues of client confidentiality present.²⁸¹

Another case in which RPC 4-1.9 was central did not concern disqualification, but the propriety of awarding attorney's fees under section 57.105 of the *Florida Statutes*.²⁸² In *Rodell v. Narson*,²⁸³ a party hired a lawyer who had previously been consulted by another party about certain property that was the subject of litigation.²⁸⁴ During the earlier consultation, confidential information regarding the property was disclosed to the lawyer. Subsequently, the party who originally consulted the lawyer moved to disqualify the lawyer based on an alleged violation of RPC 4-1.9. On appeal, the Third District Court of Appeal ruled that the motion to disqualify

279. *Id.*

280. *Id.* (citing RPC 4-1.9).

281. *See supra* note 23 and accompanying text.

282. FLA. STAT. § 57.105 (1997). Section 57.105 of the *Florida Statutes* provides:

(1) The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client. If the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense, the court shall also award prejudgment interest.

(2) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This act shall take effect October 1, 1988, and shall apply to contracts entered into on said date or thereafter.

FLA. STAT. § 57.105 (1997).

283. 706 So. 2d 392 (Fla. 3d Dist. Ct. App. 1998).

284. *Id.* at 393.

was a “meritorious claim” that was not subject to *Florida Statutes* section 57.105 award of fees.²⁸⁵

As noted above, the protection of client confidentiality is one of the key elements of RPC 4-1.9. However, this protection is not absolute. The rule provides that a lawyer who now opposes a former client may not use confidential information to the disadvantage of the former client “except as rule 4-1.6 would permit with respect to a client *or when the information has become generally known.*”²⁸⁶ Although some lawyers equate “generally known” information with information that is a matter of public record, the district court in *King v. Byrd*²⁸⁷ made clear that these two terms are *not* synonymous for purposes of conflict of interest analysis.²⁸⁸ A lawyer defended a doctor in a medical malpractice action.²⁸⁹ One of the plaintiff’s expert witnesses was a doctor whom the lawyer had represented in an administrative grievance proceeding filed by a patient. The lawyer attempted to attack the expert with, *inter alia*, the existence of this grievance proceeding. On appeal, the court ruled that it was error to allow this cross-examination.²⁹⁰ Replying to the lawyer’s contention that this proceeding was a matter of public record and therefore “generally known” under RPC 4-1.9, the court commented, “[w]e are not prepared to state that all information contained in any public document is ‘generally known’ within the meaning of the rule.”²⁹¹ Although not expressly stated in the opinion, the court implicitly recognized that the real question when analyzing a “generally known” question is not whether the information is a matter of public record, but whether, but for the lawyer’s prior representation of the client, the lawyer would know of the existence and location of that information.²⁹²

In *Carnival Corp. v. Romero*,²⁹³ two expert witnesses for the plaintiff were former employees of the defendant cruise line.²⁹⁴ The defendant moved to disqualify the experts on the ground that they had information protected by the attorney-client and work product privileges. Additionally,

285. *Id.*

286. RPC 4-1.9(b) (emphasis supplied). *See supra* note 23 and accompanying text.

287. 23 Fla. L. Weekly D1173 (4th Dist. Ct. App. May 13, 1998), *withdrawn and superseded on reh’g*, 716 So. 2d 831 (4th Dist. Ct. App. 1998).

288. *Id.* at D1175.

289. *Id.* at D1174.

290. *Id.* at D1175.

291. *Id.*

292. *See King*, 23 Fla. L. Weekly at D1175. Interestingly, the defendant’s lawyer complained that plaintiff’s counsel had unfairly questioned his ethics. *Id.* at D1174. The court, however, expressed “substantial concerns as to the ethics of defense counsel’s attacks on his former client.” *Id.* at D1175.

293. 710 So. 2d 690 (Fla. 5th Dist. Ct. App. 1998).

294. *Id.* at 691.

the defense moved to disqualify plaintiff's counsel on the basis of allegedly improper contact with the defendant corporation's former employees and because of an alleged appearance of impropriety. The trial court denied the motions, and the Third District Court of Appeal ruled that the trial court did not depart from the essential requirements of law in denying the motions.²⁹⁵

Regarding potential disqualification of the plaintiff's counsel, the appellate court cited the Supreme Court of Florida's decision in *H.B.A. Management, Inc. v. Estate of Schwartz*²⁹⁶ holding that RPC 4-4.2²⁹⁷ did not prohibit a lawyer from *ex parte* contacts with former employees of a represented corporation.²⁹⁸ Although in making such contacts a lawyer is not ethically permitted to inquire into matters subject to attorney-client privilege, the defendant had not shown that its former employees, the experts, had access to any protected communications.²⁹⁹

Moreover, the defendant cruise line did not succeed in demonstrating that the law firm had engaged in the appearance of impropriety.³⁰⁰ The defendant relied on *Rentclub, Inc. v. Transamerica Rental Finance Corp.*,³⁰¹ in which a law firm was disqualified from representing its client in litigation after the firm hired a former high ranking officer of its represented corporate

295. *Id.* at 695.

296. 693 So. 2d 541 (Fla. 1997). The *Carnival* court noted that *H.B.A. Management* relied on Florida Bar Professional Ethics Committee Opinion 88-14, (1989) which concluded that it was not unethical for a lawyer to contact former employees of a represented organization, provided the lawyer did not inquire into privileged matters. *Carnival*, 710 So. 2d at 692-93 (citing *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997)).

297. *Schwartz*, 693 So. 2d at 546. See RPC 4-4.2, "COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL," which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

RPC 4-4.2.

298. *Carnival*, 710 So. 2d at 693; see *Lackow v. Walter*, 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).

299. *Carnival*, 710 So. 2d at 693.

300. *Id.* at 692-93.

301. 43 F.3d 1439 (11th Cir. 1995).

opponent as a “trial consultant.”³⁰² In rejecting this argument, the court distinguished *Rentclub* in several ways: 1) the Supreme Court of Florida decided *H.B.A. Management* after the federal court’s decision in *Rentclub*; 2) the experts in the instant case had not been high-level, managerial employees; and 3) importantly, there was no showing that either had access to any confidential or privileged information.³⁰³ Thus, the court stated, “[w]e do not think this case is one which requires disqualification based on the attorney having gained access to an adversary party’s privileged communications or documents, thereby gaining an informational advantage.”³⁰⁴

Disqualification of the experts was not required because it was not established that either expert had access to privileged information or materials protected by the work product doctrine.³⁰⁵ The court acknowledged that the “prospect of paying [one of the experts] for this fact testimony [relating to information gathered during employment regarding other, unrelated incidents] could pose a possible violation under [RPC] 4-3.4,” but stated that “any payments made in this case are also intertwined with his expert opinion.”³⁰⁶

*City of Apopka v. All Corners, Inc.*³⁰⁷ addressed the question of imputed disqualification when *nonlawyer* employees of law firms move from one employing firm to another.³⁰⁸ Rule 4-1.10(a) provides that most conflict problems of one *lawyer* in a law firm are imputed to the other lawyers in that firm, but is silent with respect to how these rules apply to nonlawyer firm employees such as secretaries or paralegals.³⁰⁹

302. *Carnival*, 710 So. 2d at 693 (citing *Rentclub*, 43 F.3d at 1439–40).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 695. Subdivision (b) of RPC 4-3.4, “**FAIRNESS OF OPPOSING PARTY AND COUNSEL**,” provides that:

A lawyer shall not:

fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for the professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

RPC 4-3.4(b).

307. 701 So. 2d 641 (Fla. 5th Dist. Ct. App. 1997).

308. *Id.* at 642.

309. Subdivision (a) of RPC 4-1.10, “**IMPUTED DISQUALIFICATION; GENERAL RULE**,” provides that “[w]hile lawyers are associated in a firm, none of them

Two earlier Florida cases, as well as an opinion of the Florida Bar Professional Ethics Committee, addressed the nonlawyer issue.³¹⁰ In *Lackow v. Walter E. Heller & Co.*,³¹¹ the Third District Court of Appeal disqualified a law firm that hired a secretary from another law firm that opposed the hiring firm in a litigated matter.³¹² While with her former employer, the secretary clearly had access to confidential information and trial preparation materials. In fact, she had worked on the case in question. No showing that a breach of confidentiality had occurred was required.³¹³ However, a different approach was taken by the Second District Court of Appeal in *Esquire Care, Inc. v. Maguire*.³¹⁴ There the court declined to adopt a presumption that confidentiality was breached.³¹⁵ Rather, the court required a hearing to determine “not just whether a potential ethical violation has occurred, but whether as a result one party has obtained an unfair advantage over the other which can only be alleviated by removal of the attorney.”³¹⁶

The Professional Ethics Committee’s Opinion 86-5 expressed the view that the rules governing the movement of *lawyers* between opposing law firms did not apply to nonlawyers.³¹⁷ The opinion focused instead on the ethical obligations of the law firms to advise the moving nonlawyer not to breach confidentiality and to refrain from seeking any confidential information from the moving nonlawyer.³¹⁸ After discussing the varied approaches in Florida case law, the *All Corners* court stated, “we align ourselves with the Second District and hold that disqualification is required only when there is evidence that the law firm obtained confidential information, thereby gaining an unfair advantage, from its new personnel.”³¹⁹

Attorneys are often most visible to the public in their role as advocates at trial. An attorney’s behavior at trial is subject to the *Rules of Professional Conduct*, rules of court, and case law. Therefore, it is not surprising that the conduct of attorneys during trial is subject to close scrutiny and criticism.

shall knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7, 4-1.8(c), 4-1.9, or 4-2.2.” RPC 4-1.10(a).

310. *See supra* notes 304, 305; Fla. Bar Comm. on Professional Ethics, Op. 86-5 (1986).

311. 466 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1985).

312. *Id.* at 1123.

313. *Id.*

314. 532 So. 2d 740 (Fla. 2d Dist. Ct. App. 1988).

315. *Id.* at 742.

316. *Id.* at 741.

317. Fla. Bar Comm. on Professional Ethics, Op. 86-5 (1986).

318. *Id.* at 1119–20.

319. *All Corners*, 701 So. 2d at 644.

There have been many 1998 cases dealing with improper argument,³²⁰ a frequent circumstance over the years.³²¹ Courts most often refer to RPC 4-3.4(e)³²² when analyzing improper arguments.³²³ Although most appeals based on improper argument do not succeed due to a failure to properly preserve the objection on the record, the cases do provide examples of what does and does not constitute impermissible argument.³²⁴ In *Airport Rent-a-Car v. Lewis*,³²⁵ the Fourth District Court of Appeal found a counsel's comments regarding the opposing party's state of mind and reporting the matter to the IRS to be outside the record, prejudicial, and in violation of RPC 4-3.4(e).³²⁶ In *Cooper v. State*,³²⁷ the district court found that a prosecutor's suggestion in closing that "the defendant suborned perjury or that a defense witness manufactured evidence" was improper since they had

320. See, e.g., *Urbin v. State*, 714 So. 2d 411 (Fla. 1998); *CAC-Ramsay, Inc. v. Mull*, 706 So. 2d 928 (Fla. 3d Dist. Ct. App. 1998); *Lewis v. State*, 711 So. 2d 205 (Fla. 3d Dist. Ct. App. 1998); *Palazon v. State*, 711 So. 2d 1176 (Fla. 2d Dist. Ct. App. 1998); *Williams v. State*, 707 So. 2d 1204 (Fla. 3d Dist. Ct. App. 1998).

321. In fact, in two cases published this year, the court commented with frustration on the large number of improper argument cases. In *Murphy v. International Robotics Systems, Inc.*, 710 So. 2d 587 (Fla. 4th Dist. Ct. App. 1998), Judge Klein stated that "[i]t seems as though, in every week in which we sit, we get at least one appeal in which we are asked to reverse because of improper, but unobjected-to, closing argument of counsel." *Id.* at 587. In *Palazon v. State*, 711 So. 2d 1176 (Fla. 2d Dist. Ct. App. 1998), a judge wrote a concurrence "because of my concern with the number of criminal cases we review that involve improper argument by the State[.]" and suggested distribution of earlier decisions regarding improper argument on trial benches and counsel tables in every courtroom. *Id.*

322. Subdivision (e) of RPC 4-3.4 provides that:

A lawyer shall not:

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

RPC 4-3.4(e).

323. *Davis v. South Fla. Water Management Dist.*, 715 So. 2d 996 (Fla. 4th Dist. Ct. App. 1998); *Sawczak v. Goldenberg*, 710 So. 2d 996 (Fla. 4th Dist. Ct. App. 1998); *Airport Rent-A-Car, Inc. v. Lewis*, 701 So. 2d 893 (Fla. 4th Dist. Ct. App. 1997); *Hooper v. State*, 703 So. 2d 1143 (Fla. 4th Dist. Ct. App. 1997); *Goutis v. Express Transp. Inc.*, 699 So. 2d 757 (Fla. 4th Dist. Ct. App. 1997); *Murphy v. International Robotics Sys., Inc.*, 710 So. 2d 587 (Fla. 4th Dist. Ct. App. 1998).

324. *Murphy*, 710 So. 2d at 587 (discussing the case law requiring contemporaneous objection to improper argument).

325. 701 So. 2d 893 (Fla. 4th Dist. Ct. App. 1997).

326. *Id.* at 896-97.

327. 712 So. 2d 1216 (Fla. 3d Dist. Ct. App. 1998).

no basis in the facts presented.³²⁸ The court gave a scathing criticism of the prosecutor in this case, stating:

The prosecutor's comments here—impugning the defense witnesses and the defendant without any record basis—were improper, unethical and unprofessional; we hereby voice our strong disapproval of them. The trial judge undoubtedly recognized the impropriety of the comments because he sustained defense counsel's objection to them. We urge trial courts to supplement such rulings, in the future, with an admonishment to the offending attorney, if not disciplinary sanctions.³²⁹

Other examples of improper argument by a prosecutor can be found in *Urbin v. State*,³³⁰ an appeal from a capital case.³³¹ The court found that an invitation for the jury to disregard the law, criticism of the defendant's mother for failure to show sympathy for the victim's family, and his "show no mercy" argument about sentencing were all impermissible.³³² The court likewise found counsel's statement in closing to the jury to be an improper "conscience of the community" argument.³³³

In *Davis v. South Florida Water Management District*,³³⁴ the appellate court stated that an attorney improperly "bolstered" credibility and expressed his own opinion of the evidence when he stated "as a lawyer and an officer of the court, and an attorney who is proud to represent South Florida Water Management District and other condemning authorities and private property owners, I will tell you that \$18 million" was overcompensation for a person's property which was taken in a condemnation action.³³⁵ On the other hand, the court in *Goutis v. Express Transport*,³³⁶ found that the mere use of verbal tics such as "I would propose" or "I submit"³³⁷ do not amount to a comment by the attorney of his or her own opinion.

Courts are often critical of trial conduct even if they do not find that it rises to the level of a violation of the *Rules of Professional Conduct*. The Fourth District Court of Appeal rigorously criticized the conduct of two

328. *Id.* at 1217.

329. *Id.*

330. 714 So. 2d 411 (Fla. 1998).

331. *Id.* at 411.

332. *Id.* at 413.

333. *Id.* at 421.

334. 715 So. 2d 996 (Fla. 4th Dist. Ct. App. 1998).

335. *Id.* at 998.

336. 699 So. 2d 757 (Fla. 4th Dist. Ct. App. 1997).

337. *Id.* at 763-64 (emphasis omitted).

attorneys throughout the course of a medical malpractice trial in *Myron v. Doctors General Hospital*.³³⁸ The court, after reversing on other grounds, stated the following regarding the attorneys' behavior:

[W]e feel compelled to comment on the lawyers' conduct in this trial. The trial lawyers on this case are all highly professional, skilled lawyers with excellent reputations. Yet, from reading this entire transcript, we cannot help but cringe at the exchanges between them and with the court. The argument, both in front of the jury and at sidebar, reflected a disrespect of each other and exasperation with the proceedings. Even the trial court commented several times that things were getting way out of hand. At one point, after heated argument, the court said "[y]ou know, the public is here. There are members of the public here who have not been perhaps associated with this. . . . Let's keep it a profession, if we could please."³³⁹

The court then admonished the lawyers to behave themselves in the retrial.³⁴⁰

IV. THE LAWYER'S RELATIONSHIP TO THIRD PARTIES

In addition to their duties to clients and the court, attorneys also have duties to opposing parties, attorneys, and other third persons. Among the most important of these duties is that of honesty. Although an attorney is not required and sometimes not permitted to reveal information,³⁴¹ an attorney may not engage in conduct involving dishonesty or misrepresentation.³⁴²

Thus, the Supreme Court of Florida suspended an attorney for ninety days in a matter in which the attorney stopped payment on a check to a travel agency.³⁴³ The referee found, based on the fact that the attorney immediately stopped payment on the check, that the attorney intended to deceive the travel agency, who had already extended the time for payment on a bill of over \$2000 for 120 days.³⁴⁴ The referee stopped short of finding that the attorney made misrepresentations to the court by declining to find by the

338. 704 So. 2d 1083 (Fla. 4th Dist. Ct. App. 1997).

339. *Id.* at 1092-93.

340. *Id.* at 1093.

341. *See* RPC 4-1.6. *See supra* note 20 and accompanying text.

342. Subdivision (c) of RPC 4-8.4 provides that "[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" RPC 4-8.4(c).

343. Florida Bar v. Schultz, 712 So. 2d 386 (Fla. 1998).

344. *Id.* at 388.

clear and convincing standard that the check stubs presented by the respondent attorney to prove payment to the travel agency were false.³⁴⁵

Probably the most grievous misrepresentation an attorney can make is to the court.³⁴⁶ In addition to dishonesty, misrepresentations to the court may impact the fair and impartial administration of justice.³⁴⁷ The Supreme Court of Florida found just such an impact in *Florida Bar v. Vining*.³⁴⁸ Vining represented the wife in a marriage dissolution matter and in her appeal regarding alimony and attorneys' fees.³⁴⁹ The appeals court reversed the trial court's denial of alimony and fees, and a hearing was held on attorneys' fees.³⁵⁰ In the hearing, Vining did not disclose to the court that he had been paid by the client in the dissolution matter.³⁵¹ The court awarded a fee to be deposited into a supersedeas account, which was disbursed in a check made out to both Vining and his client.³⁵² The client refused to sign the check over to Vining because she had paid him for his services in the dissolution.³⁵³ The attorney's motion to disburse the funds on his signature only, filed without notice to the client, was denied.³⁵⁴ Vining then filed an action against the bank to disburse the funds, without informing the opposing attorney that the client opposed disbursement of the funds to Vining.³⁵⁵ The opposing counsel then stipulated to the release of the money to Vining.³⁵⁶ The client, on discovery that Vining had obtained the funds, sued, and recovered for theft.³⁵⁷ Oddly, although the court upheld the referee's finding that Vining engaged in "dishonest, fraudulent, and deceitful conduct" before the trial judge, Vining was not found to have violated RPC

345. *Id.* at 387.

346. RPC 4-3.3.

347. *See Schultz*, 712 So. 2d at 387. Subdivision (d) of RPC 4-8.4 provides that: "A lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice." RPC 4-8.4(d).

348. 707 So. 2d 670 (Fla. 1998).

349. *Id.* at 671.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Vining*, 707 So. 2d at 671.

354. *Id.*

355. *Id.*

356. *Id.* at 672.

357. *Id.*

4-3.3(a) concerning candor to the tribunal.³⁵⁸ Vining was suspended for three years for violations of RPC 4-8.4(c) and (d).³⁵⁹

However, the court did find a violation of RPC 4-3.3 in *Florida Bar v. Hmielewski*.³⁶⁰ Hmielewski represented a client in a Minnesota wrongful death and medical malpractice matter.³⁶¹ The client informed Hmielewski that he had stolen medical records from the facility being sued.³⁶² Hmielewski failed to provide the documents when a discovery request was made and indicated that all documents in the possession of the client had already been turned over to the medical facility.³⁶³ He also told the court that an issue in the case was the failure of the facility to properly maintain their records, and that the facility had lost the records.³⁶⁴ Opposing counsel discovered these misrepresentations during a deposition of Hmielewski's client.³⁶⁵ The court, in sanctioning Hmielewski, found that his "violations made a mockery of the justice system and flew in the face of [his] ethical responsibilities as a member of The Florida Bar."³⁶⁶ The court suspended Hmielewski for three years, stating that "[i]f it were not for [the absence of selfish motive], the extremely strong character evidence, and Hmielewski's relatively unblemished record (one admonishment for minor misconduct in twenty-one years of practice), this [c]ourt would have no hesitation in imposing disbarment."³⁶⁷

In another case involving candor toward the tribunal, an attorney was suspended for ninety days in *Florida Bar v. Corbin*.³⁶⁸ The attorney

358. *Vining*, 707 So. 2d at 673.

359. *Id.* at 674. Subdivisions (c) and (d) of RPC 4-8.4 prohibit conduct involving dishonesty and conduct prejudicial to the administration of justice, respectively. RPC 4-8.4(c), (d).

360. 702 So. 2d 218, 220 (Fla. 1997).

361. *Id.* at 219.

362. *Id.*

363. *Id.*

364. *Id.* at 219-20.

365. *Hmielewski*, 702 So. 2d at 220.

366. *Id.*

367. *Id.* at 221. It is odd that the court found no selfish motive. The referee, as noted by the court, found that "[t]here was no motive of personal gain behind the respondent's actions. If anything, the respondent was overzealous in his efforts to promote his client's interests. The respondent appeared to adopt his client's belief that the Mayo Clinic would falsify or fabricate medical records regarding his client's father's demise." *Id.* However, the case was, in all likelihood, taken on a contingency fee basis. Therefore, the attorney had a financial interest in the outcome of the case. If the attorney's fee is based on a percentage of the recovery, the attorney's fee increases proportionately with the size of the award to his client. If the attorney could establish bad faith on the part of the medical facility, he could have claimed and received punitive damages.

368. 701 So. 2d 334, 337 (Fla. 1997).

represented plaintiffs in a civil landlord-tenant dispute.³⁶⁹ The defendants, representing themselves, provided the attorney with copies of canceled checks and told her that some of the rent was paid in cash and some with the canceled checks.³⁷⁰ Nevertheless, the attorney filed a motion for summary judgment, stating that there were no material facts in issue and that the defendants had paid no rent during the time period covered by the canceled checks.³⁷¹ In recommending suspension of Corbin, the referee noted the larger issue facing the court involving pro se litigants:

The Referee fully appreciates that attorneys and judges have no responsibility to pro se litigants to assist them in preparing their case. At the same time, the [c]ourt and the Bar have a responsibility not to mislead or undermine the efforts of pro se litigants to represent themselves. This is a critical issue for the future of our Bar.³⁷²

Dishonesty can have broad ranging consequences for an attorney. In *Florida Bar v. Ash*,³⁷³ an attorney was denied board certification after a determination that she made false statements on her application for certification.³⁷⁴ The attorney, in answering a question of whether a court had ever questioned her conduct in writing, listed "N/A." The committee on certification determined that a court had issued a show cause order for sanctions in an earlier case of the attorney which indicated that she argued case law which had been quashed.³⁷⁵ *Ash* cited case law which was in conflict with case law in that jurisdiction, and failed to disclose a Supreme Court of Florida case which was in conflict with the case she argued.³⁷⁶ The supreme court, in upholding the denial of the certification, indicated that "it is difficult to conceive of a clearer violation of the oath of truthfulness at the conclusion of the application" in referring the matter to The Florida Bar for investigation.³⁷⁷

An attorney also owes duties to other lawyers in some circumstances. Often, questions of a lawyer's relationship to another lawyer revolve around the division of attorney fees. The Fifth District Court of Appeal, in *Miller v.*

369. *Id.* at 334.

370. *Id.* at 335.

371. *Id.*

372. *Id.*

373. 701 So. 2d 552 (Fla. 1997).

374. *Id.* at 553-54.

375. *Id.*

376. *Id.* at 554.

377. *Id.*

Jacobs & Goodman, P.A., found that an employment contract requiring departing lawyers to pay the attorneys' prior firm 75% of fees earned from clients taken when they left the firm is valid and enforceable.³⁷⁸ The case involved enforcement of an employment contract signed by associates of the firm. The contract called for the payment of 75% of the fees earned by the associates in their own private practice after they left the firm for clients who were initially clients of the law firm. All of the clients involved had personal injury cases with the firm prior to departing and accepting representation by the former associates of the firm. The former associates argued that the employment contract was void against public policy since it infringed on the client's right to choose her own attorney by placing an economic disincentive on the attorney. Ordinarily, the former firm would be entitled to some fee for the value of services performed by the firm prior to the client's departure.³⁷⁹ The court declined to find the contract void as to public policy but overturned the case on other grounds.³⁸⁰ In doing so, the court cited two Florida ethics opinions which discuss division of fees between a departing lawyer and the law firm.³⁸¹ The court failed to even mention Florida Ethics Opinion 93-4,³⁸² in which the Florida Bar Professional Ethics Committee opined that an employment contract which required payment of 50% of fees generated by a former client of the law firm violated RPC 4-5.6,³⁸³ regulating restrictions on the right to practice.³⁸⁴ Ironically, shortly before the *Miller* case was decided, the Supreme Court of Florida clarified the rule against restrictions against the right to practice by adding language to the comment discussing law firm employment

378. 699 So. 2d 729 (Fla. 5th Dist. Ct. App. 1997).

379. An attorney in a contingent fee case who is discharged by the client without cause prior to a recovery is usually entitled to quantum meruit for the value of services provided prior to discharge. *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982).

380. *Miller*, 699 So. 2d at 732.

381. *Id.* (citing Fla. Bar Comm. on Professional Ethics, Op. 94-1 (1994) and Fla. Bar Comm. on Professional Ethics, Op. 84-1 (1984, rev. 1993) (concluding that such a division of fees is a matter of contract, not ethics)).

382. Fla. Bar Comm. on Professional Ethics, Op. 93-4 (1995).

383. *Miller*, 699 So. 2d at 732. RPC 4-5.6 provides:

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

RPC 4-5.6.

384. *Miller*, 699 So. 2d at 732.

contracts.³⁸⁵ The court added the following discussion to comment to the RPC 4-5.6:

This rule is not a per se prohibition against severance agreements between lawyers and law firms. Severance agreements containing reasonable and fair compensation provisions designed to avoid disputes requiring time-consuming quantum meruit analysis are not prohibited by this rule. Severance agreements, on the other hand, that contain punitive clauses, the effect of which are to restrict competition or encroach upon a client's inherent right to select counsel, are prohibited.³⁸⁶

Following the decision in the *Miller* case, the Professional Ethics Committee was asked to review enforcement of a contract, found to be unethical in an earlier ethics opinion,³⁸⁷ in light of the court decision.³⁸⁸ The committee declined to answer the question because it involved past conduct of the attorney.³⁸⁹ The inquirer appealed the Professional Ethics Committee decision to the Florida Bar Board of Governors. The committee declined to issue an advisory opinion in response to an inquiry regarding enforcement of a contract involving restrictions on an attorney's right to practice.³⁹⁰ At its meeting on April 3, 1998, the Florida Bar Board of Governors reviewed the decision and voted to overturn the decision of the committee, but declined to recede from Florida Ethics Opinion 93-4 (approved by the Board of Governors in February, 1995), notwithstanding the *Miller* case, as the inquiry related to a contract regarding hourly fees.³⁹¹

385. Florida Bar re: Amendments to Rules Regulating The Florida Bar, 697 So. 2d 115, 130 (Fla. 1997).

386. *Id.*

387. Fla. Bar Comm. on Professional Ethics, Op. 93-4 (1995).

388. Florida Bar Professional Ethics Committee Minutes, January 23, 1998, on file at The Florida Bar.

389. *Id.* See also Rule 2(d) of the *Florida Bar Procedures for Ruling on Questions of Ethics*, which provides:

Ethics counsel shall decline to issue a staff opinion to anyone who either inquires about another lawyer's conduct or asks a question of law and may decline to issue a staff opinion when the inquiry raises a question for which there is no previous precedent or underlying bar policy upon which to base an opinion. When ethics counsel declines to issue an opinion pursuant to this rule, ethics counsel shall advise the inquirer of the provisions of rule 3.

Fla. Bar Procedures for Ruling on Questions of Ethics, 2(d)(1998).

390. Minutes of the Florida Bar Board of Governors, (April 3, 1998) (on file at The Florida Bar).

391. *Id.*

The court has continued its efforts in support of the professionalism movement.³⁹² Although declining to find a violation of the *Rules of Professional Conduct*, in *Florida Bar v. Martocci*,³⁹³ the Supreme Court of Florida chided the attorneys for the “patently unprofessional” conduct.³⁹⁴ The attorney directed epithets at another attorney at a deposition and made other personal remarks about him. The court stated that these actions did not rise to the level of discipline, but published details of the exchange to point out the lack of professionalism involved, opining:

As noted in our opening paragraph we find the conduct of the lawyers involved in the incident giving rise to these proceedings to be patently unprofessional. We would be naive if we did not acknowledge that the conduct involved herein occurs far too often. We should be and are embarrassed and ashamed for all bar members that such childish and demeaning conduct takes place in the justice system. It is our hope that by publishing this opinion and thereby making public the offending and demeaning exchanges between these particular attorneys, that the entire bar will benefit and realize an attorney’s obligation to adhere to the highest professional standards of conduct no matter the location or circumstances in which an attorney’s services are being rendered.³⁹⁵

Relationships with the public are often evidenced through the attorney’s conduct at trial. The Second District Court of Appeal affirmed that misbehavior by an attorney in the course of a trial results in sanctions to the attorney in the case of *Elder v. Norton*.³⁹⁶ The court reversed a dismissal based on misconduct of the attorney during the discovery process, stating that the client should not suffer for the sins of the attorney, particularly since there are many sanctions available to the court which directly affect the attorney.³⁹⁷

Supreme Court of Florida Justice Wells criticized the conduct of both attorneys and judges through both the trial and the appellate process in his dissent in *Valle v. State*.³⁹⁸ *Valle* involved an appeal of a capital case in which the defendant, having been convicted of murder, filed an ineffective

392. See *supra* n. 60 and accompanying text (discussing the court’s activities in the professionalism movement).

393. 699 So. 2d 1357 (Fla. 1997).

394. *Id.* at 1358.

395. *Id.* at 1360.

396. 711 So. 2d 586, 587 (Fla. 2d Dist. Ct. App. 1998).

397. *Id.*

398. 705 So. 2d 1331, 1337 (Fla. 1997) (Wells, J., dissenting).

assistance of counsel claim.³⁹⁹ The defendant claimed that his counsel should have filed for recusal of the sentencing judge who allegedly kissed the victim's wife and conversed with the victim's friends in front of the jury.⁴⁰⁰ The court found that the allegations were sufficient to warrant an evidentiary hearing.⁴⁰¹ However, most interesting was the dissent by Justice Wells, which was highly critical of the delay which occurred in the case.⁴⁰² Wells stated that "[a]voidance of the delay and the kind of mistake made here requires only the level of professional competence and attention of judges and counsel that defendants and the public have a right to expect and receive in these cases."⁴⁰³ He then pointed out that, although the defendant was arrested nearly twenty years before, the case has yet to be resolved.⁴⁰⁴ Wells specifically condemned delay in the capital case, noting that "I do not believe that a knowing refusal to disclose or failure to have the information at a hearing are proper tactics. A game of "hide the evidence" has no appropriate place in these proceedings and should not be tolerated."⁴⁰⁵

However, advocacy is not the only role that attorneys play in the courtroom. Attorneys, like all qualified citizens, sometimes play the role of juror. Attorneys are subject, as are all qualified citizens of the State of Florida, to a summons for jury service.⁴⁰⁶ Unlike most citizens, however, attorneys may be excused from service by the court.⁴⁰⁷ The Supreme Court of Florida, in *Hoskins v. State*,⁴⁰⁸ determined that discretion of the court to excuse attorneys and others from jury service is not delegable to other court

399. *Id.* at 1332-33.

400. *Id.* at 1333.

401. *Id.*

402. *Id.* at 1336.

403. *Valle*, 705 So. 2d at 1336 (Wells, J., dissenting).

404. *Id.* at 1337.

405. *Id.*

406. *See generally* FLA. STAT. § 40.01 (1997).

407. FLA. STAT. § 40.013(5) provides:

A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service, except that no person shall be excused from service on a civil trial jury solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby. However, nothing in this subsection shall affect a litigant's right to exercise a peremptory challenge.

FLA. STAT. § 40.013(5) (1997).

408. 702 So. 2d 202 (Fla. 1997).

personnel.⁴⁰⁹ The case, which involved an appeal from a capital conviction, addressed an issue regarding the selection of the jury.⁴¹⁰ In that particular circuit, the chief judge had issued an administrative order which permitted the clerk to excuse jurors based on the *Florida Statutes*, including a statute which gave discretion to the presiding judge to excuse practicing attorneys from jury service.⁴¹¹ Although the court denied the appeal for failure to raise the objection to the jury panel in a timely manner, the court was careful to note that the procedure permitted by the administrative order was impermissible.⁴¹² In so opining, the court stated:

In reaching this decision, however, we emphasize that we are in no way sanctioning any process whereby a clerk of court is to carry out statutory mandated judicial responsibilities. We conclude that trial judges may not delegate their discretionary authority under section 40.013(5) to clerks of court or any other official.⁴¹³

Justice Anstead, in dissent, would have upheld the appeal on the jury panel issue because the jury panel was not “selected or drawn according to law.”⁴¹⁴ Justice Anstead pointed out that the clerk excused classes of people without having the presiding judge hear their request and rationale for excusal.⁴¹⁵ Justice Anstead also noted his concern that the statute excluded entire groups of people from service merely because of their profession, “discarding traditional notions of fairness and public duty.”⁴¹⁶

Attorneys also have a relationship with the State of Florida. An attorney has responsibilities, not only as a private citizen, but often also in the course of his or her conduct as an attorney. For example, attorneys are the subject of legislation specific to their roles as attorneys.⁴¹⁷ The Supreme Court of Florida found such a statute unconstitutionally vague in *State v. Mark Marks, P.A.*⁴¹⁸ The state charged a law firm and several of its employees with filing false or incomplete insurance claims. The state claimed that the attorneys failed to reveal “medical records or statements

409. *Id.* at 206.

410. *Id.* at 205.

411. *Id.*

412. *Id.* at 206.

413. *Hoskins*, 702 So. 2d at 206.

414. *Id.* at 211 (Anstead, J., dissenting) (quoting Rule 3.290 of the *Florida Rules of Criminal Procedure*).

415. *Id.* at 212.

416. *Id.*

417. *See, e.g.*, FLA. STAT. § 817.234 (1987).

418. 698 So. 2d 533, 539 (Fla. 1997).

that were unfavorable to the claim.”⁴¹⁹ The relevant statute provided that one who prepares written statements in connection with an insurance claim that “contains any false, incomplete, or misleading information . . . material to such claim” is guilty of a felony.⁴²⁰ The statute also provided that an attorney who assists in such a claim is guilty of a felony as well.⁴²¹ The court found use of the term “incomplete” in the statute unconstitutionally vague as applied to attorneys in the representation of their clients.⁴²² The court pointed out the special role that attorneys serve and the nature of their obligations to clients, in stating that “[b]ecause attorneys, pursuant to statute, case law, procedural rules, and rules of professional regulation, are customarily required to withhold certain types of information throughout the representation of a client, the term ‘incomplete’ without more does not give attorneys an ascertainable standard of guilt by which to measure their conduct.”⁴²³

The court disagreed with the state’s argument that the specific intent portion of the statute, coupled with the term “incomplete,” sufficiently put attorneys on notice of the behavior penalized by the statute, concluding that the attorneys “were under no clear duty to disclose the information they allegedly withheld.”⁴²⁴

An attorney may not assist in the unlicensed practice of law.⁴²⁵ The Supreme Court of Florida enjoined an individual and his business from the practice of law where the individual and his business prepared, among other things, a dissolution complaint without using a form approved by the supreme court, prepared bankruptcy petitions, gave legal advice regarding bankruptcy, and put his name in an “Attorney” slot on petitions.⁴²⁶ The referee’s report, adopted by the Supreme Court, found that preparing the complaint and drafting a letter for the complainant “would be the unlicensed practice of law even if an attorney had drafted the complaint as Respondent Davide would have been the conduit for obtaining and relaying the

419. *Id.* at 536.

420. *Id.* at 535–36 n.9 (citing FLA. STAT. § 817.234(1) (1987)).

421. *Id.* at 536 n.10 (citing FLA. STAT. § 817.43(3) (1987)).

422. *Id.* at 533.

423. *Marks*, 698 So. 2d at 537.

424. *Id.* at 539.

425. RPC 4-5.5(b) provides that: “A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law.” RPC 4-5.5(b).

426. *Florida Bar v. Davide*, 702 So. 2d 184, 185 (Fla. 1997).

information, without the client ever having spoken with the attorney.”⁴²⁷ Most notably, however, the court found that the use of the name “Florida Law Center, Inc.,” and the advertising of that name, constituted the unlicensed practice of law since “the use of the name is misleading and gives the public the expectation that Florida Law Center, Inc. [sic] has expertise in the field of law.”⁴²⁸ The court then enjoined the respondent from use of the name or any similar name from which the public could infer that the business offered legal services.⁴²⁹

Not only may a lawyer not engage in the unlicensed practice of law, but a lawyer may not assist in the unlicensed practice of law.⁴³⁰ The court disbarred an attorney without leave to reapply for five years when he engaged in the practice of law after resigning from The Florida Bar.⁴³¹ The attorney, after resignation, undertook a two and one-half year litigation in county court on behalf of his son, who had reached majority and was engaged in a dispute with his insurance company over an auto accident.⁴³² Although the court noted a lack of selfish motive in the representation, having received no payment for the representation, the court found that he “intentionally violated this Court’s order granting his resignation from the Bar . . . and this misconduct caused injury to the legal system and the profession.”⁴³³ The court therefore found an appropriate sanction to be disbarment without leave to reapply for readmission for five years.⁴³⁴

V. THE LAWYER’S RELATIONSHIP TO THE FLORIDA BAR AND THE DISCIPLINARY SYSTEM

This section focuses on attorneys’ relationship to The Florida Bar and the grievance process. The section reports on cases which determine the effect of the grievance process on other proceedings. Grievance cases that are not easily defined by the relationships that attorneys have with clients, the court, or third parties are also analyzed. Finally, this section discusses

427. *Id.* at 184. See Fla. Bar Comm. on Professional Ethics, Op. 88-6 (1988) for a discussion of the ethical considerations involved in having nonlawyer employees gather information for an attorney.

428. *Davide*, 702 So. 2d at 184–85.

429. *Id.* at 185.

430. RPC 4-5.5(a) provides that: “A lawyer shall not . . . practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.” RPC 4-5.5(a).

431. *Florida Bar v. Weisser*, 23 Fla. L. Weekly S269, S271 (May 14, 1998).

432. *Id.* at S269.

433. *Id.* at S270.

434. *Id.* at S271.

significant changes to the *Rules Regulating The Florida Bar* and the *Rules of the Florida Board of Bar Examiners*.

The Supreme Court of Florida decided that a complainant in a grievance proceeding enjoys absolute immunity from a defamation claim by the respondent attorney for all statements made privately within the grievance process.⁴³⁵ In *Tobkin v. Jarboe*,⁴³⁶ the Jarboes, clients of a Florida attorney, filed complaints about his conduct.⁴³⁷ The Florida Bar Grievance Committee unanimously found no probable cause for the complaint and dismissed it.⁴³⁸ The attorney then filed a defamation claim against the Jarboes which was based upon their complaint to the Bar.⁴³⁹ The trial court dismissed the claim, and under a theory of absolute immunity, the Fourth District Court of Appeal affirmed.⁴⁴⁰ The Supreme Court of Florida upheld the decision of the Fourth District Court of Appeal, finding that "Bar complainants are protected by an absolute privilege in so far as the complainant makes no public announcement of the complaint outside of the grievance process, thus allowing the grievance procedure to run its natural course."⁴⁴¹ The court dismissed Tobkin's argument that, in opening up the grievance process to the public in 1990, the court also afforded a complainant qualified immunity as opposed to the absolute immunity previously enjoyed by complainants.⁴⁴² The court recognized public policy against the "chilling" effect on complainants if they did not have absolute immunity in filing a complaint.⁴⁴³ Justice Wells dissented, noting that the Florida Bar Disciplinary Review Commission that recommended opening up the grievance process also recommended only qualified immunity from defamation claims.⁴⁴⁴ In his argument for qualified immunity, Justice Wells noted the following:

[M]alicious grievance filings are actually a fact of the present practice of law. Such filings can be and have been used as tactical weapons against attorneys to accomplish purposes that have nothing to do with violation of the rules of professional conduct. Attorneys should not be defenseless against this tactic nor should

435. *Tobkin v. Jarboe*, 710 So. 2d 975, 978 (Fla. 1998).

436. *Id.* at 975.

437. *Id.* at 976.

438. *Id.*

439. *Id.*

440. *Tobkin*, 710 So. 2d at 976.

441. *Id.*

442. *Id.* at 976-77.

443. *Id.* at 977.

444. *Id.* at 978 (Wells, J., dissenting).

the grievance process be freely available to those who employ this tactic.⁴⁴⁵

Justice Wells also noted that the “public exoneration” that the majority found to be a “suitable remedy for any negative effects created” by a baseless complaint “ignores the reality” of the effect a complaint can have on the life and career of the lawyer complained about.⁴⁴⁶

An attorney also has certain rights during the grievance process. The Third District Court of Appeal found in *State v. Spiegel*⁴⁴⁷ that an attorney’s statements during the course of a Florida Bar investigation did not waive his Fifth Amendment privilege during a subsequent criminal prosecution.⁴⁴⁸ During the course of their divorce, the attorney’s wife, also a lawyer, filed a bar complaint against him.⁴⁴⁹ A member of the Florida Bar Grievance Committee interviewed Spiegel. At the time of the interview, both the Grievance Committee member and Spiegel believed that the *Rules of the Florida Bar* compelled Spiegel to answer the questions posed.⁴⁵⁰ The wife filed for a domestic violence injunction against Spiegel, and later accused him of violating the injunction.⁴⁵¹ The Grievance Committee then held a hearing, at which Spiegel asserted his Fifth Amendment privilege. Spiegel then sought the suppression of his earlier statements made to the Grievance Committee member in his criminal case.⁴⁵² The court granted the motion to suppress and certified the question to the Third District Court of Appeal.⁴⁵³ Citing to the public interest, the Third District Court of Appeal found that not invoking the privilege in a grievance proceeding did not waive the privilege for the purpose of other proceedings in Spiegel’s case:

Primarily, we are concerned that a ruling allowing such statements to be admissible would interfere with the Bar’s truth-seeking and disciplinary functions. Bar Grievance proceedings play an important role in protecting the public from improper professional conduct by attorneys. In order to carry out this important function, grievance committee members must be able to conduct meaningful investigations to ascertain all facts relating to the grievance. Requiring an attorney to plead the Fifth as soon as possible in order

445. *Tobkin*, 710 So. 2d at 978.

446. *Id.*

447. 710 So. 2d 13 (Fla. 3d Dist. Ct. App. 1998).

448. *Id.* at 18.

449. *Id.* at 15.

450. *Id.* at 18.

451. *Id.* at 15.

452. *Spiegel*, 710 So. 2d at 15.

453. *Id.* at 16.

to preserve the privilege would directly conflict with the Bar Grievance committee's truth-seeking function.⁴⁵⁴

Since the results can be so severe, it is appropriate to safeguard attorneys' constitutional rights within the grievance process. The Supreme Court of Florida disbarred an attorney for a felony conviction in *Florida Bar v. Grief*.⁴⁵⁵ The attorney was convicted in federal court of filing documents in immigration cases that the attorney knew to be false.⁴⁵⁶ The referee recommended a three-year suspension due to mitigation established during the hearing.⁴⁵⁷ The court, in disbarring the attorney, affirmed its position that a felony conviction does not automatically lead to disbarment.⁴⁵⁸ In this instance, however, the court found a pattern of misconduct in the filing of false documents, which warranted disbarment.⁴⁵⁹

Not only may an attorney not violate the law, an attorney may not violate a court order. In *Florida Bar v. Gersten*,⁴⁶⁰ the Supreme Court of Florida suspended an attorney indefinitely for refusing to comply with a court order that he answer questions of the state attorney's office.⁴⁶¹ The state granted the attorney immunity from testifying regarding the reported theft of his car.⁴⁶² When the attorney refused to testify, the trial court entered a civil contempt order.⁴⁶³ The attorney exhausted the appellate process and maintained his silence.⁴⁶⁴ When the trial court ordered him jailed, the attorney refused to report and went to Australia.⁴⁶⁵ Gersten claimed that refusal to testify is permitted under RPC 4-3.4(c), which provides that "[a] lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."⁴⁶⁶ The Supreme Court of Florida concluded that, under such a reading of the rule, any attorney could evade discipline for violating a court order "indefinitely by asserting a subjective belief that no valid obligation exists. Such a result invites disrespect for the judicial

454. *Id.* at 17.

455. 701 So. 2d 555, 557 (Fla. 1997).

456. *Id.* at 555.

457. *Id.*

458. *Id.* at 556-57.

459. *Id.*

460. 707 So. 2d 711 (Fla. 1998).

461. *Id.* at 714.

462. *Id.* at 712.

463. *Id.*

464. *Id.*

465. *Gersten*, 707 So. 2d at 712.

466. *Id.* (quoting RPC 4-3.4(c)).

system.”⁴⁶⁷ The court then suspended Gersten indefinitely until he testified under the court order and for one year following his compliance with the court order.⁴⁶⁸

The supreme court disciplined several attorneys for trust accounts violations during the year.⁴⁶⁹ The court suspended an attorney for one year for misappropriating client funds in the settlement of a claim.⁴⁷⁰ The attorney settled a claim in a products liability matter, which would be divided between the client, the attorney, and the client’s health care providers.⁴⁷¹ The attorney deposited the settlement check and wrote a check to the client on the agreed upon amount, without sending a closing statement.⁴⁷² The attorney kept money to pay the health care providers, but used the money for his own purposes instead. The client filed a complaint after being contacted by the health care providers for payment.⁴⁷³ In another case, the court suspended an attorney for ninety days for having fifty-nine checks returned for insufficient funds.⁴⁷⁴ The attorney indicated that he was currently being treated for a substance abuse problem and had ceased the practice of law. The court placed the attorney on probation for three years with the conditions that the attorney hire a certified public accountant to report to The Florida Bar on the attorney’s trust and operating accounts, that he be subject to random drug testing, and that he remain on under contract to

467. *Id.* at 713.

468. *Id.* at 714.

469. *See, e.g.*, *The Florida Bar v. Krasnove*, 697 So. 2d 1208 (Fla. 1997).

470. *Id.* at 1209–10.

471. *Id.* at 1209.

472. *Id.* *See* subdivision (f)(5) of RPC 4-1.5, which provides:

In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

RPC 4-1.5(f)(5).

473. *Krasnove*, 697 So. 2d at 1209. Subdivision (a) of RPC 4-1.15 provides that “[a] lawyer shall hold in trust, separate from the lawyer’s own property, funds and property of clients or third persons that are in a lawyer’s possession in connection with a representation.” RPC 4-1.15(a). Subdivision (a) of RPC 5-1.1 provides that “[m]oney or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose.” RPC 5-1.1(a).

474. *Florida Bar v. Valladares*, 698 So. 2d 823, 824–25 (Fla. 1997).

Florida Lawyer's Assistance, Inc.⁴⁷⁵ Finally, the court suspended another attorney for ninety days for trust account violations which were similar to those for which the attorney was previously placed on probation.⁴⁷⁶ The attorney was found to have collected into and disbursed from his trust account during his period of suspension and to have commingled client funds with personal funds.⁴⁷⁷

Often, complaints filed against attorneys alleging trust account violations also contain other allegations as well. In *Florida Bar v. Pelligrini*,⁴⁷⁸ The Florida Bar accused an attorney of charging an excessive fee as well as misappropriating client funds.⁴⁷⁹ Pelligrini represented a client in a personal injury matter and filed a complaint a week after the settlement check was mailed (one day before the client signed the release).⁴⁸⁰ An answer was never filed.⁴⁸¹ Nevertheless, Pelligrini collected 40% of the fee, in violation of RPC 4-1.5(f)(4)(B)(i)(a)(1).⁴⁸² After upholding the referee's findings of the trust account and excessive fee violations, the court suspended Pelligrini for three years.⁴⁸³

As is usual, attorneys were disciplined this year for neglect of their clients' matters. The Supreme Court of Florida suspended an attorney for thirty days for lack of diligence when the attorney requested three extensions of time in a criminal appeal and then failed to file a brief.⁴⁸⁴ In *Florida Bar v. Kassier*,⁴⁸⁵ the court suspended an attorney for one year and placed him on probation for three years for violations including neglect and trust account violations.⁴⁸⁶ The attorney accepted a retainer from a client to represent her in a contract matter, did nothing on her case, did not return her retainer, and did not refer her to another lawyer.⁴⁸⁷ Finally, in *Florida Bar v. Nowacki*,⁴⁸⁸ the court suspended an attorney for ninety-one days in a neglect case in

475. *Id.* at 825.

476. *Florida Bar v. Pipkins*, 708 So. 2d 953, 954 (Fla. 1998).

477. *Id.* at 954.

478. 714 So. 2d 448 (Fla. 1998).

479. *Id.* at 450.

480. *Id.*

481. *Id.*

482. *Id.* See also RPC 4-1.5(f)(4)(B)(i)(a)(1), which provides for 33 1/3% of a recovery up to \$1 million which is made prior to the filing of an answer by the defendant.

483. *Pelligrini*, 714 So. 2d at 453.

484. *Florida Bar v. Nesmith*, 707 So. 2d 331, 332-33 (Fla. 1998). See RPC 4-1.3, which requires that an attorney act with diligence relating to client matters. RPC 4-1.3.

485. 711 So. 2d 515 (Fla. 1998).

486. *Id.* at 517.

487. *Id.* at 516.

488. 697 So. 2d 828 (Fla. 1997).

which the court also found the attorney guilty of dishonesty⁴⁸⁹ and failure to supervise an associate of her firm.⁴⁹⁰ In addition to chiding the attorney's neglect of client matters, the court condemned her "wholesale delegation of her caseload to a new associate."⁴⁹¹ The court, in suspending the attorney for ninety-one days, noted that "[t]his case involves a persistent pattern of client neglect and mismanagement by the respondent."⁴⁹²

Competence is another area in which courts may discipline attorneys.⁴⁹³

An attorney who repeatedly failed to follow the *Florida Rules of Civil Procedure* and the *Florida Rules of Appellate Procedure* received a ninety-one day suspension in *Florida Bar v. Solomon*.⁴⁹⁴ The Supreme Court of Florida affirmed The Florida Bar's argument that "actual harm or prejudice is not an element of incompetence or lack of diligence under the Rules Regulating The Florida Bar," although they noted that Solomon's numerous errors in his cases must have affected the clients.⁴⁹⁵ The supreme court also disciplined an attorney for incompetence, among other violations, in the case of *Florida Bar v. Boland*.⁴⁹⁶ A client hired the attorney to obtain a restraining order against the client's husband and to transfer a custody case to Florida. The client stated that, after the court awarded the husband custody in the other jurisdiction and the court ordered the client to turn the children over to the sheriff, attorney Boland advised the client to remove the children from the jurisdiction while Boland dealt with the matter.⁴⁹⁷ He also advised others to deny knowledge of the whereabouts of the children. The court stated that "[u]pon becoming her lawyer, Boland was charged with representing his client competently, which would include informing his client of the legal consequences of her behavior, notifying her of the various proceedings in the case, and giving her competent legal advice."⁴⁹⁸

An attorney must also avoid representations involving conflicts of interest. The court found a clear conflict of interest in *Florida Bar v. Wilson*.⁴⁹⁹ Wilson represented a couple in a declaratory action to share lottery winnings of the wife.⁵⁰⁰ He then represented them in additional

489. *Id.* at 833. See RPC 4-8.4(c).

490. *Nowacki*, 697 So. 2d at 831. See RPC 4-5.1(b).

491. *Nowacki*, 697 So. 2d at 831.

492. *Id.* at 833.

493. RPC 4-1.1 mandates that: "A lawyer provide . . . competent representation to a client." RPC 4-1.1.

494. 711 So. 2d 1141, 1143-47 (Fla. 1998).

495. *Id.* at 1146 (citing *Florida Bar v. Littman*, 612 So. 2d 582 (Fla. 1993)).

496. 702 So. 2d 229, 232 (Fla. 1997).

497. *Id.* at 229.

498. *Id.* at 232.

499. 714 So. 2d 381, 383 (Fla. 1998).

500. *Id.* at 382.

matters involving their home.⁵⁰¹ Some time later, the husband requested that Wilson represent him in a dissolution matter, which Wilson declined.⁵⁰² The husband filed a dissolution action with the representation of another lawyer.⁵⁰³ Wilson then represented the wife in the dissolution matter and in an action to set aside the declaratory judgment regarding the lottery winnings.⁵⁰⁴ After the court disqualified him in an oral hearing, Wilson then filed a motion to recuse the judge, as well as a motion for rehearing on the disqualification.⁵⁰⁵ In addition to agreeing with the referee's finding of a "clear conflict of interest in violation of rule 4-1.9,"⁵⁰⁶ the court also found that Wilson had violated RPC 4-8.4(d),⁵⁰⁷ since he continued the representation by filing the motion to recuse after the court disqualified him from the representation, and suspended him for one year.⁵⁰⁸

Violation of the attorney advertising rules may also result in discipline, as evidenced by *Florida Bar v. Greenspan*.⁵⁰⁹ The attorney failed to file a yellow page advertisement for review with The Florida Bar.⁵¹⁰ Not only did the attorney refuse to file the advertisement, but he also failed to respond to the Bar's inquiries regarding both the filing and the investigation of the

501. *Id.*

502. *Id.*

503. *Id.*

504. *Wilson*, 714 So. 2d at 382.

505. *Id.*

506. *Id.* See RPC 4-1.9, which provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

RPC 4-1.9.

507. *Wilson*, 714 So. 2d at 382-83. Subdivision (d) of RPC 4-8.4 provides, in pertinent part, that "A lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice." RPC 4-8.4(d).

508. *Wilson*, 714 So. 2d at 384.

509. 708 So. 2d 926 (Fla. 1998).

510. *Id.* at 926-27. See Subdivision (b) of RPC 4-7.5 which requires that an attorney file any nonexempt advertisement for review with the standing committee on advertising. RPC 4-7.5(b).

complaint filed by the Bar.⁵¹¹ The Supreme Court of Florida publicly reprimanded the attorney and placed him on probation for one year.⁵¹²

The Supreme Court of Florida's authority over attorneys goes beyond discipline. The supreme court affirmed its ability to place an attorney on the inactive list over the attorney's objections in *Florida Bar v. Arthur*.⁵¹³ The Florida Bar requested that the attorney undergo an evaluation by Florida Lawyers Assistance, Inc., regarding her competency after she was involuntarily hospitalized and medicated for "expressing paranoid ideations."⁵¹⁴ After the attorney refused the request, the Grievance Committee held a hearing, determined that she was incompetent to practice, and directed the Bar to request that the court place the attorney on the inactive list.⁵¹⁵ The court appointed a referee, who ordered the attorney to undergo a mental evaluation.⁵¹⁶ When she refused, the court placed her on the inactive list.⁵¹⁷ Relying on RPC 3-7.13,⁵¹⁸ the court found that although there was no proof of any misconduct of the attorney, her refusal to undergo psychiatric evaluation ordered by the referee warranted her placement on the inactive list.⁵¹⁹

Attorneys and judges have an obligation under the *Rules of Professional Conduct* to report the violations of the rules by others.⁵²⁰ In 5-

511. *Greenspan*, 708 So. 2d at 927.

512. *Id.* at 928.

513. 22 Fla. L. Weekly S551, S551-52 (Sept. 4, 1997).

514. *Id.* at S551.

515. *Id.*

516. *Id.*

517. *Id.*

518. Section (a) of RPC 3-7.13 permits an attorney who has been found incompetent to practice law to be placed on the inactive list even without proof of misconduct. RPC 3-7.13(a).

519. *Arthur*, 22 Fla. L. Weekly at S552.

520. RPC 4-8.3 provides:

(a) **Reporting Misconduct of Other Lawyers.** A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

(b) **Reporting Misconduct of Judges.** A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) **Confidences Preserved.** This rule does not require disclosure of information otherwise protected by rule 4-1.6.

RPC 4-8.3.

H Corp. v. Padovano,⁵²¹ the supreme court held that reporting professional misconduct does not give cause to disqualify a judge.⁵²² The First District Court of Appeal reported an attorney for using expletives and specious argument in a motion for rehearing.⁵²³ The complaint was dismissed for no probable cause.⁵²⁴ The attorney then came before the court in a related appeal, and moved for disqualification because of the prior referral to The Florida Bar.⁵²⁵ The supreme court found that Florida judges have a duty to report unprofessional conduct under RPC 4-8.3, and ruled that the discharge of that obligation did not give rise to good grounds for disqualification.⁵²⁶ A finding of good cause for disqualification would invite attorneys to forum shop by misbehaving in court, then disqualify judges who reported the conduct to the Bar.⁵²⁷

The Supreme Court of Florida also regulates the activities of The Florida Bar as an organization. In *Florida Bar v. Schwarz*,⁵²⁸ the supreme court affirmed that The Florida Bar's activity regarding lobbying is restricted.⁵²⁹ A member of The Florida Bar sought to enjoin it from lobbying in association with the Florida Lawyers Association for the Maintenance of Excellence, Inc. ("FLAME").⁵³⁰ Schwarz claimed that employees of the Bar organize and work for FLAME in violation of case law and rules which restrict the Bar's activity regarding legislative action.⁵³¹ The court found that although the Bar enters contracts with FLAME to provide administrative services, and that employees of the Bar act as agents to hold money contributed to FLAME, such activity does not constitute impermissible lobbying activity.⁵³² In so deciding, the court pointed out that contributions to FLAME are voluntary, unlike mandatory membership fees to the Bar, and that the Bar has no control over actions taken by FLAME.⁵³³

521. 708 So. 2d 244 (Fla. 1997).

522. *Id.* at 246-47.

523. *Id.* at 245.

524. *Id.*

525. *Id.*

526. *5-H Corp.*, 708 So. 2d at 246.

527. *Id.* at 247.

528. 708 So. 2d 589 (Fla. 1998).

529. *Id.*

530. *Id.*

531. *Id.* (citing *The Florida Bar re Schwarz*, 552 So. 2d 109 (Fla. 1989) and RPC 2-9.3 (containing provisions for a Florida Bar member to receive a refund after timely objection to a legislative position taken by the Bar)).

532. *Id.* at 589-90.

533. *Schwarz*, 708 So. 2d at 589.

In addition to its responsibilities in discipline, the Supreme Court of Florida also made several changes to the *Rules Regulating The Florida Bar*. Among the most important is a change to RPC 1-3.8, dealing with inventory attorneys. An inventory attorney reviews the files of an attorney who is suspended, disbarred, or otherwise incapacitated to practice law, and protects the clients of that attorney.⁵³⁴ The court clarified the role of the inventory attorney, by adding subsection (c) to rule 1-3.8, which provides that “[n]othing herein creates an attorney and client, fiduciary, or other relationship between the inventory attorney and the subject attorney.”⁵³⁵ The court also indicated that “[t]he purpose of appointing an inventory attorney is to avoid prejudice to clients of the subject attorney.”⁵³⁶ The supreme court also approved a change to the rules which permits resolution of problems between attorneys and clients without resort to grievance proceedings.⁵³⁷ The Florida Bar proposed removal of certain cases from discipline to a mediation process to resolve client complaints.⁵³⁸ Such removal would occur only if “the public interest is satisfied by the resolution of the private rights of the parties to the mediation.”⁵³⁹ The court approved the mediation program, stating that:

The mediation program should benefit the public by providing an alternative means to promptly and efficiently resolve grievances filed against members of the Bar. This Court commends The Florida Bar Board of Governors for their efforts in encouraging alternative dispute resolution methods as a means to enhance the efficacy of the grievance process.⁵⁴⁰

The Supreme Court of Florida also made changes to the rules regulating admissions to The Florida Bar, mainly codifying existing policy of the Florida Board of Bar Examiners.⁵⁴¹ However, the changes also include shortening the time period for response to a Board inquiry from 120 to ninety days and “raising the passing score on the [Multistate Professional

534. RPC 1-3.8.

535. Florida Bar re: Amendments to Rules Regulating The Florida Bar., 697 So. 2d 115, 119–20 (Fla. 1997).

536. *Id.* at 120.

537. Amendments to Rules Regulating The Florida Bar - Florida Bar Grievance Mediation Program, 717 So. 2d 498, 498 (Fla. 1998).

538. *Id.*

539. *Id.* (quoting RPC 3-8.1(d)).

540. *Id.* at 499.

541. Amendments to the Rules of the Supreme Court Relating to Admissions to the Bar, 712 So. 2d 766 (Fla. 1998).

Responsibility Examination].”⁵⁴² Notably, the court did not amend RPC 4-13 to allow law students to take the Multistate Professional Responsibility Examination, since the matter is under review by The Florida Supreme Court Commission on Professionalism.⁵⁴³

VI. CONCLUSION

Florida authorities addressed a wide range of professional responsibility issues in 1998. Practicing lawyers can look to civil cases, criminal cases, ethics opinions, and amendments to rules in order to understand the changing scope of their obligations toward each other, clients, third parties, and the judicial system of which they are an integral part. With such a wide range of sources generating important decisions that affect the practice of law, it can truly be said that we have moved beyond a concern for only the black letter rules into an arena where activities of bar members are governed by the wider, more encompassing “law of lawyering.”

542. *Id.* at 766.

543. *Id.* at 767.

Property Law: 1998 Survey of Florida Law

Ronald Benton Brown* and Joseph M. Grohman**

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I. INTRODUCTION

In this survey, we have discussed those judicial decisions and legislation produced between July 1, 1997 and June 30, 1998 that we believed would be of particular interest to Florida real estate practitioners and others interested in Florida real estate law. Not every case or statutory change could be included. As in past years, the volume was significant. Real property law continued to evolve in interesting ways. Our goal was to inform the reader, but on occasion we have felt called upon to voice disagreement.

II. ATTORNEYS' FEES

A. Attorneys' Fees in General

*Cuervo v. West Lake Village II Condominium Ass'n.*¹ A new board of directors was elected and took control of the Association's books and accounts. The Association, however, contested the election. It filed a non-binding arbitration pursuant to section 718.1255 of the *Florida Statutes* and also filed suit for injunctive relief and damages.² The Association won the arbitration, and the court ordered the books and accounts returned.³ The new board then filed an answer and affirmative defenses. It also filed a counterclaim. Up until this point, the Association had been represented by the Siegfried firm. However, the counterclaim against the board stimulated the involvement of the Association's insurance carrier who brought in its own lawyers, the Pyska firm, to defend against the counterclaim. The Association won a partial summary judgment and successfully moved for attorneys' fees.⁴ The amount of the attorneys' fees was at issue in this appeal.⁵

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1. 709 So. 2d 598 (Fla. 3d Dist. Ct. App. 1998).
 2. *Id.* at 598; see FLA. STAT. § 718.1255 (1993).
 3. *Cuervo*, 709 So. 2d at 599.
 4. *Id.*

The essence of the argument was that having different firms handle the claim and the counterclaim produced a duplication of efforts. Therefore, they should not have to pay two law firms to do what could have been done by one. The court agreed, finding that “the gravamen of both the main action and counterclaim action centered around the issue of the validity of the appellants’ election as directors of the association and their actions of taking control of the association’s funds and records.”⁶ On remand, the trial court would have to determine the attorneys’ fees based on the reasonable efforts of one law firm, which was to be calculated by reducing the amount awarded to the Siegfried firm by the value of the services performed by the Pyska firm.⁷

Jarvis v. Papineau.⁸ A real estate broker sued for a commission or, in the alternative, for unjust enrichment. Following a nonjury trial, the court found for the plaintiff and awarded \$5000 plus interest and attorneys’ fees.⁹ On appeal, the Second District Court of Appeal reversed the attorneys’ fees award.¹⁰ The court recited the familiar rule that “[a]ttorney’s fees cannot be taxed in any cause unless authorized by contract or statute,” but there was nothing in the record to suggest either basis for awarding fees in this case.¹¹ The following cases are organized in reference to that rule. The next section covers attorneys’ fees agreements, and the sections that follow focus on particular statutes under which attorneys’ fees may be awarded.

B. Attorneys’ Fees Recoverable by Agreement

*Careers USA, Inc. v. Sanctuary of Boca, Inc.*¹² This case involved a lease. A dispute arose over the meaning of the rent provision. The tenant filed suit for declaratory judgment and reformation. The trial court found the lease to be unambiguous and awarded summary judgment to the landlord.¹³ The landlord then filed a motion for attorney’s fees under the lease provision that stated: “[i]n any litigation between the parties hereto to enforce the terms and conditions of this Lease, the prevailing party shall be entitled to recover all costs incurred in such action, including attorneys’ fees.”¹⁴ Following the lead of the Third and Fifth District Courts of

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5. *Id.*
 6. *Id.*
 7. *Id.* at 600.
 8. 708 So. 2d 1035 (Fla. 2d Dist. Ct. App. 1998).
 9. *Id.* at 1035.
 10. *Id.*
 11. *Id.*
 12. 705 So. 2d 1362 (Fla. 1998).
 13. *Id.* at 1362–63.
 14. *Id.* (quoting the lease agreement).

Appeal,¹⁵ the trial court denied the motion on the theory that the declaratory judgment action was an action to interpret rather than to enforce the terms of the lease, but the Fourth District reversed.¹⁶

The Supreme Court of Florida approved in an unanimous opinion written by Senior Justice Grimes.¹⁷ He reasoned that the landlord needed to defend against the declaratory judgment action in order to enforce the terms of the lease.¹⁸ Consequently, whether the landlord should recover the costs should not be decided by the form of action chosen.¹⁹ The court rejected the policy argument that litigants should be encouraged to utilize declaratory judgment proceedings rather than have one party sue claiming the other had already breached.²⁰ The court went on to acknowledge that the numerous possible wordings of an attorneys' fees clause makes scrutinizing the language used critical.²¹ It is, however, disappointing that the court did not pursue that point; it could have emphasized this was a matter of contract interpretation and the tools of contract interpretation should have been brought to bear.

Hollub v. Clancy.²² The buyer successfully sued the seller of a warehouse for failing to disclose that the warehouse would have to be connected to the municipal sewer system within ninety days at considerable expense. The buyer then filed a motion for attorneys' fees pursuant to the attorneys' fees clause in the contract. This appeal challenged the amount of attorneys' fees awarded.²³

The buyer had paid its attorneys a \$20,000 nonrefundable fee and entered into a contingent fee agreement with its attorneys providing, to the extent the recovery exceeded \$50,000, buyer's attorneys would get forty percent in addition to the original \$20,000, but if the recovery were less than \$50,000, the attorneys would have to be satisfied with \$20,000. Later, the agreement was amended to provide that the buyer's attorney would get the greater of a reasonable attorneys' fee as awarded by the trial court or the contingent fee described above.²⁴ The trial court awarded reasonable attorneys' fees in excess of forty percent of the recovery. The sellers argued

15. *Martin L. Robbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd.*, 608 So. 2d 844 (Fla. 3d Dist. Ct. App. 1992); *Ocala Warehouse Inv., Ltd. v. Bison Co.*, 416 So. 2d 1269 (Fla. 5th Dist. Ct. App. 1982).

16. *Careers*, 705 So. 2d at 1363.

17. *Id.* at 1362, 1364.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Careers*, 705 So. 2d at 1364.

22. 706 So. 2d 16 (Fla. 3d Dist. Ct. App. 1997).

23. *Id.* at 17.

24. *Id.* at 18 (citing the agreement).

this required them to pay buyer's attorneys more than the buyer had been obligated to pay them.²⁵ The district court rejected this argument because it was indistinguishable from a fee arrangement upheld by the Supreme Court of Florida in *Kaufman v. MacDonald*.²⁶

Sellers were, however, successful with their second point on appeal. They argued that the buyer had hired too many lawyers and could not collect reasonable attorneys' fees for all their work.²⁷ The case was factually simple, but buyers had hired both a sole practitioner and a small law firm. The seller's expert had testified that a single lawyer would have sufficed during the pretrial stages, but admitted that an additional lawyer would not be impermissible for the trial. The court rejected any claim that additional lawyers were needed due to the fact that the general partners of the buyer brought the action on its behalf; the record did not reveal any hint of conflict of interest between the partners, among themselves, or between them and the partnership.²⁸ The court concluded that there was simply no need for more than one lawyer at hearings, depositions, or to work on the pleadings.²⁹ However, there is something odd about the losing sellers arguing that the buyer could have won the case against them with less time and effort. After all, if their case were so weak, why did they go to trial? Nonetheless, the case was remanded to limit a reasonable attorneys' fee to one lawyer in the pretrial stages.³⁰

In addition, some of the billing seemed to be based on units of one hour or more. In twelve instances, the sole practitioner billed for an hour or more to review a one- or two-page order or pleading. The court found this unacceptable and it ordered that bills based on unreasonable billing units be eliminated on remand.³¹

C. Attorneys' Fees Recoverable under Section 57.105 of the Florida Statutes

Kelly v. Tworoger.³² Two years after the closing, the buyer of a condominium unit sued the sellers based on the claim that roof leaks were latent defects that the sellers had failed to disclose. Eventually, the buyer took a voluntary dismissal, and the sellers moved for attorneys' fees. The contract provided: "[i]n connection with any arbitration or litigation arising

25. *Id.*

26. *Id.* (citing *Kaufman v. MacDonald*, 557 So. 2d 572 (Fla. 1990)).

27. *Hollub*, 706 So. 2d at 18.

28. *Id.* at 18-19.

29. *Id.* at 19.

30. *Id.*

31. *Id.*

32. 705 So. 2d 670 (Fla. 4th Dist. Ct. App. 1998).

out of this Contract, the prevailing party . . . shall be entitled to recover all costs incurred including attorney's fees."³³ Concluding that the provision applied, the trial court granted the motion, and the Fourth District Court of Appeal affirmed.³⁴

The court, in an opinion written by Judge Gross, reasoned that the nature of this action was for breach of the duty to disclose that is implied by law into the contract based on *Johnson v. Davis*.³⁵ Consequently, this litigation did arise out of the contract as contemplated by the attorneys' fees provision.³⁶ It was not like an action for fraud in the inducement which would be based on the inducer's fraudulent conduct rather than the contract.³⁷

Attorneys' fees could not, however, be assessed under the contractual provision against a person who had unsuccessfully sought to be joined as a plaintiff in this action because the dismissal with prejudice of his joinder petition established that he was not a party to the contract.³⁸ That did not mean attorneys' fees could not be recovered. Because this claim was frivolous, they could be assessed under Florida statute.³⁹ The case was remanded for specific findings as to the number of hours involved in dealing with each unsuccessful plaintiff and the reasonable hourly rate for the attorneys.⁴⁰

The court also offered some interesting *dicta* on the fraud in the inducement situation.⁴¹ It suggested that it was time to reject the denial of attorneys' fees where the contract has been rescinded due to fraud in the inducement based upon *Katz v. Van Der Noord*.⁴² Such a change might be emotionally satisfying, based upon a vague claim of doing justice, but it would be illogical and expand contractual liability for fees beyond what might have been reasonably expected by the parties. This author⁴³ hopes that no court will take that leap. If such a change is appropriate, then the legislature should decide prospectively that it is time to expand the right to

33. *Id.* at 671 (quoting the contract).

34. *Id.*

35. *Id.* at 672 (citing *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)).

36. *Id.*

37. *Kelly*, 705 So. 2d at 672 (distinguishing the fraudulent inducement cases such as, *Location 100, Inc. v. Gould S.E.L. Computer Sys., Inc.* 517 So. 2d 700 (Fla. 4th Dist. Ct. App. 1987) and *Dickson v. Dunn*, 399 So. 2d 447 (Fla. 5th Dist. Ct. App. 1981)).

38. *Id.* at 673.

39. *Id.*; see FLA. STAT. § 57.105(1) (1995).

40. *Kelly*, 705 So. 2d at 673.

41. *Id.* at 672-73.

42. *Id.* at 672 (citing *Katz v. Van Der Noord*, 546 So. 2d 1047 (Fla. 1989)).

43. Professor Ronald Benton Brown.

recover attorneys' fees to a situation where there is no contract and the defense was not frivolous.

Judge Klein specially concurred.⁴⁴ He noted that an appellate court can only review the trial court's judgment on attorneys' fees by means of common law certiorari if the case were voluntarily dismissed.⁴⁵ The standard of review under common law certiorari is higher than for matters that are reviewed on appeal. Judge Klein expressed the opinion that there did not appear to be a good reason for the different treatment, so he hoped that the Appellate Rules Committee would consider the incongruity produced and recommend that the supreme court amend the rules to produce a uniform standard of review regarding the grant of attorneys' fees.⁴⁶

Shahan v. Listle.⁴⁷ The Johnsons sought to have a city ordinance invalidated. In such cases, section 163.3215 of the *Florida Statutes* required that the complainants file a verified copy of the complaint with the city no later than thirty days after the conduct that was the basis of the complaint.⁴⁸ The city had thirty days to respond and, the complainants had to institute their action in court no later than thirty days after the end of the city's thirty-day response time. The Johnsons filed a copy of the complaint with the city, but it was not verified. The city did not respond, so the Johnsons filed for administrative review by the Department of Community Affairs, which ruled in the Johnsons' favor.⁴⁹ Then the Johnsons filed a *pro se* complaint for a temporary injunction.⁵⁰

After receiving a motion for summary judgment and a request for attorneys' fees, the Johnsons retained a lawyer, John Shahan. Based on the Johnsons' failure to file the verified complaint with the city as required by the statute, the trial court granted summary judgment against them.⁵¹ It also awarded attorneys' fees under section 57.105 of the *Florida Statutes* and divided the payment obligation between the Johnsons and Shahan, their lawyer. Shahan appealed.⁵²

The Second District Court of Appeal reversed.⁵³ It reasoned that the action was not frivolous because the Johnsons' failure to comply with the statutory condition precedent to filing their action could have been waived

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44. *Kelly*, 705 So. 2d at 673 (Klein, J., concurring).
 45. *Id.* at 673.
 46. *Id.* at 673-74.
 47. 703 So. 2d 1090 (Fla. 2d Dist. Ct. App. 1997).
 48. *Id.* at 1091; *see* FLA. STAT. § 163.3215 (1995).
 49. *Shahan*, 703 So. 2d at 1091.
 50. *Id.*
 51. *Id.*
 52. *Id.*; *see* FLA. STAT. § 57.105 (1995).
 53. *Shahan*, 703 So. 2d at 1092.

by the defendants.⁵⁴ If it had been waived, then the Johnsons might have won. After all, they did have standing and they had won the administrative hearing. This seems far-fetched. If the point of the statute is to eliminate litigation that should not have been brought, it seems counterproductive to encourage litigation that is based upon the hope that the defendants will be incompetent enough to waive a valid and obvious defense, but this decision is consistent with earlier district court cases.⁵⁵

Whitehead v. Dreyer.⁵⁶ This is another case where the court mandated the imposition of attorneys' fees against a plaintiff and his attorney based upon section 57.105 of the *Florida Statutes*.⁵⁷

D. Attorneys' Fees Under the Construction Lien Act

Hollub Construction Company v. Narula.⁵⁸ When a dispute arose during the building of a home, the owner stopped paying the contractor. The contractor filed a construction lien, filed a suit to enforce its lien, and made a demand for arbitration. The homeowner filed counterclaims in the arbitration. The arbitration award provided \$192,000 for the contractor against the owner and \$150,000 for the owner against the contractor. The contractor was ordered to pay forty percent of the arbitration costs and the owner sixty percent. However, the arbitration award did not specifically proclaim either to be the prevailing party or specify what part of the award was interest. When the parties went back to court, each claimed attorneys' fees under the construction lien statute as the prevailing party.⁵⁹ The trial court declared it could not determine who was the prevailing party and denied attorneys' fees to both.⁶⁰ The Third District Court of Appeal reversed.⁶¹ It held that the award of attorneys' fees was mandatory under the statute, so the court was required to determine who prevailed.⁶² The owners had not filed their counterclaim in the suit to enforce the construction lien; they had only filed it in the arbitration. Consequently, in the construction lien suit, the contractor had prevailed on the only significant issue, its claim

54. *Id.* at 1091-92.

55. *Id.* at 1092. *See Solimando v. Aloha Med. Ctr.*, 594 So. 2d 850 (Fla. 2d Dist. Ct. App. 1992); *see also Piancone v. Engineering Design, Inc.*, 534 So. 2d 896 (Fla. 5th Dist. Ct. App. 1988).

56. 698 So. 2d 1278 (Fla. 5th Dist. Ct. App. 1997).

57. *Id.* This case is discussed in detail in the section on brokerage agreements and commissions. *See discussion infra* Part III.B.

58. 704 So. 2d 689 (Fla. 3d Dist. Ct. App. 1997).

59. *Id.* at 690; *see* FLA. STAT. § 713.29 (1995).

60. *Narula*, 704 So. 2d at 690.

61. *Id.* at 691.

62. *Id.* at 690.

against the owner. Under the statute, that made the contractor entitled to attorneys' fees.⁶³

E. Attorneys' Fees in Eminent Domain Proceedings

Pierpont v. Lee County.⁶⁴ The Supreme Court of Florida reviewed three district court decisions together.⁶⁵ In each case, the condemning authority did a quick take, i.e., opted to take possession of the property prior to the final judgment in the condemnation case.⁶⁶ Under the procedure provided by statute,⁶⁷ the authority must have an appraisal done.⁶⁸ Then the authority must make a good faith estimate based upon the appraisal.⁶⁹ If the quick take petition is approved by the court, the authority must deposit the amount of the good faith estimate into the registry of the court.⁷⁰ In each case, following the deposit, the condemning authority made a written offer that was significantly greater than the good faith estimate. When it came time to calculate the attorneys' fees due to the landowners' lawyers, the question arose how those figures should be used in the calculation.⁷¹

The statute provided that attorneys' fees were to be calculated based upon the benefits the attorneys achieved for their clients.⁷² The statute defined the benefit as the difference between the first written offer made by the condemning authority and the final condemnation judgment or settlement amount.⁷³ Here, the landowners' attorneys claimed that the betterment should be calculated using the good faith estimate as the first written offer.⁷⁴

The Supreme Court of Florida rejected that argument.⁷⁵ The unanimous opinion pointed out the difference between an offer and an estimate.⁷⁶ The

63. *Id.* at 691; see FLA. STAT. § 713.29 (1995).

64. 710 So. 2d 958 (Fla. 1998).

65. *Id.*; *Lee County v. Pierpont*, 693 So. 2d 994 (Fla. 2d Dist. Ct. App. 1997); *Lee County v. A & G Invs.*, 693 So. 2d 999 (Fla. 2d Dist. Ct. App. 1997); *Lee County v. Barnett Banks, Inc.*, 711 So. 2d 34 (Fla. 2d Dist. Ct. App. 1997). See Ronald Benton Brown and Joseph M. Grohman, *Property Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 269, 275-77 (1997).

66. *Pierpoint*, 710 So. 2d at 959.

67. FLA. STAT. § 74.031 (1993).

68. *Pierpoint*, 710 So. 2d at 960; see FLA. STAT. § 74.031 (1993).

69. *Pierpoint*, 710 So. 2d at 960; see FLA. STAT. § 74.031 (1993).

70. *Pierpoint*, 710 So. 2d at 960; see FLA. STAT. § 74.031 (1993).

71. *Pierpoint*, 710 So. 2d at 959-60.

72. *Id.* at 960-61; see FLA. STAT. § 73.092 (Supp. 1994).

73. *Pierpoint*, 710 So. 2d at 960-61.

74. *Id.* at 960.

75. *Id.*

76. *Id.* at 960-61.

court reasoned that the legislature also knew the difference.⁷⁷ Critically, nothing in the statutes gave the landowner the power to accept the good faith estimate.⁷⁸

Moreover, there was no constitutional mandate to use the good faith estimate in calculating attorneys' fees.⁷⁹ The *Florida Constitution* requires the payment of "full compensation" to a person whose private property has been taken for public use,⁸⁰ but the Justices saw no denial of "full compensation" in these situations.⁸¹ The rule is that the legislature has the power to enact reasonable attorneys' fees provisions, and there was nothing inherently unreasonable about calculating attorneys' fees on the first written offer rather than the good faith estimate.⁸² The court pointed out, however, that this does not allow the condemning authority to minimize or avoid payment of attorneys' fees by failing to make a timely written offer.⁸³ Such conduct might result in the statute being unconstitutional as applied.⁸⁴

Justice Wells wrote a brief concurrence.⁸⁵ He urged the legislature to amend the statute to allow calculation of attorneys' fees based on the good faith estimate.⁸⁶ It would be bad policy to allow the authority to make a good faith estimate and then deviate from it in making an offer to settle the case.⁸⁷ That position had been argued by Judge Blue in his district court dissent,⁸⁸ which also pointed out that there was nothing in the statute to prevent the landowner from accepting the good faith estimate as an offer.⁸⁹

Boulis v. Department of Transportation.⁹⁰ The condemnee claimed prejudgment interest on the costs expended in preparing for trial. His theory was that if he did not receive interest, he would be deprived of his property without due process of law. The Fifth District Court of Appeal rejected the claim because there was no legal precedent for it.⁹¹ However, noting that the claim for prejudgment interest seemed supported by logic and fair play, the

77. *Id.*

78. *Pierpoint*, 710 So. 2d at 961.

79. *Id.* at 960.

80. FLA. CONST. art. X, § 6.

81. *Pierpoint*, 710 So. 2d at 960.

82. *Id.*

83. *Id.*

84. *See supra* note 2 and accompanying text. *See also Pierpoint*, 710 So. 2d at 961.

85. *Pierpoint*, 710 So. 2d at 961 (Wells, J., concurring).

86. *Id.*

87. *Id.*

88. *Lee County v. Pierpont*, 693 So. 2d 994, 997-98 (Fla. 2d Dist. Ct. App. 1997) (Blue, J., dissenting).

89. *Id.* at 998.

90. 709 So. 2d 206 (Fla. 5th Dist Ct. App. 1998).

91. *Id.* at 206-07.

court certified the question to the supreme court “as being one of great public importance.”⁹²

*Department of Transportation, State of Florida v. Robbins and Robbins, Inc.*⁹³ The parties settled the eminent domain action following mediation. The problem was in the calculation of the attorneys’ fees. The expert testified that the reasonable hourly rate for the landowners’ attorneys should be higher than what they actually billed. Then the expert used those rates to establish the lodestar figure. The trial judge then doubled the lodestar, using the risk multiplier to reflect the complexity of the case.⁹⁴ The district court reversed because it considered this procedure as an “improper ‘double-decker’ award.”⁹⁵ The proper procedure would be to establish a reasonable hourly rate which did not exceed what the attorneys requested in their testimony. That should be applied to the hours worked to reach the lodestar. Then, the benefit obtained by the attorneys for their client could be used to adjust the fee.

The trial court had made two other errors. It “improperly included the paralegal hours as part of the attorneys’ hours to get a ‘blended’ effective hourly rate.”⁹⁶ The attorneys’ fees should include hours expended by paralegals and legal assistants, but those hours should be billed at a reasonable rate.⁹⁷ As the court noted, “it is not logical to use a paralegal to help on a client’s case because it is cheaper for the client, then seek to recoup the paralegal time at an attorney rate from the condemning authority.”⁹⁸ Moreover, the trial court should not have awarded attorneys’ fees for time preparing for the attorneys’ fees hearing.⁹⁹ The condemning authority is obligated only to pay the condemnee’s reasonable attorneys’ fees and not attorneys’ fees incurred by the attorneys in collecting those fees.¹⁰⁰

*State Department of Transportation v. Hall.*¹⁰¹ In this quick taking, the department filed a good faith estimate of \$20,000 and deposited that amount in the registry of the court. The landowner objected because the estimate did not include business damages. The department later presented an offer of judgment for \$126,400 to “settle all claims including business damages.”¹⁰² The parties eventually settled for \$147,500. However, in

92. *Id.* at 207.

93. 700 So. 2d 782 (Fla. 5th Dist. Ct. App. 1997).

94. *Id.* at 784.

95. *Id.* at 784–85.

96. *Id.* at 785.

97. *Id.*

98. *Robbins*, 700 So. 2d at 785.

99. *Id.*

100. *Id.*

101. 707 So. 2d 1163 (Fla. 1st Dist. Ct. App. 1998).

102. *Id.* at 1164 (quoting department’s offer).

calculating attorneys' fees, the question was the betterment achieved by the landowner's attorney. The trial court calculated attorneys' fees based on the betterment of \$127,500 that the landowner's attorney had achieved, i.e., the difference between the good faith estimate and the eventual settlement.¹⁰³ The court refused to base betterment on the difference between the settlement price and the offer of judgment because it found the offer of judgment to be defective for failing to provide an itemization, including specifying what portion was attributable to business damages.¹⁰⁴ The department appealed and the First District Court of Appeal reversed.¹⁰⁵

Offers of judgment in eminent domain actions were covered in section 73.032(1)(a) of the *Florida Statutes*.¹⁰⁶ It did not require the offer of judgment to itemize the damages. It required that the offer settle all pending claims, summarize relevant conditions, and state the total amount of the offer.¹⁰⁷ This offer of judgment satisfied the statute, and it was not ambiguous.¹⁰⁸ It contained no defect that would have prevented the court from concluding the case, including calculating the attorneys' fee.¹⁰⁹ Consequently, the attorneys' fee should have been calculated from the betterment achieved above this offer.¹¹⁰

*State Department of Transportation v. Interstate Hotels Corp.*¹¹¹ The trial court awarded prejudgment interest on an award of attorneys' fees in an eminent domain case, but the Third District Court of Appeal reversed.¹¹² The only district court precedent was from the second district,¹¹³ so the trial court was bound to follow it and committed reversible error by not doing so.¹¹⁴ While not similarly bound to follow another district, the third district panel decided to do so, expressing their entire agreement with the earlier opinion.¹¹⁵

*State Department of Transportation v. Labelle Phoenix Corporation.*¹¹⁶ After the Department of Transportation's offer was refused,

103. *Id.* at 1163.

104. *Id.*

105. *Id.* at 1164.

106. *Hall*, 707 So. 2d at 1164; *see* FLA. STAT. § 73.032(1)(a) (1993).

107. *Hall*, 707 So. 2d at 1164.

108. *Id.*

109. *Id.*

110. *Id.*

111. 709 So. 2d 1387 (Fla. 3d Dist. Ct. App. 1998).

112. *Id.* at 1387.

113. *Id.* (citing *State Dep't of Transp. v. Brouwer's Flowers, Inc.*, 600 So. 2d 1260 (Fla. 2d Dist. Ct. App. 1992)).

114. *Id.*

115. *Id.*

116. 696 So. 2d 947 (Fla. 2d Dist. Ct. App. 1997).

the Department utilized the quick take procedure.¹¹⁷ Finally, the parties stipulated to the worth of the property, and a judgment was entered accordingly.¹¹⁸ Then it was time to award attorneys' fees. Because a quick take appears in Chapter 74 of the *Florida Statutes*, which is entitled "PROCEEDINGS SUPPLEMENTAL TO EMINENT DOMAIN," the trial court utilized section 73.092(2) reasoning that it expressly applied to "other supplemental proceedings."¹¹⁹ Under subsection (2), which used the lodestar method of calculating attorneys' fees, the court awarded \$3,672.50 even though the stipulated price was only \$3,800 above what the Department had originally offered.¹²⁰ The Department appealed, arguing that section 73.092(1), which calculated attorneys' fees based upon the benefits achieved for the client, should have been used.¹²¹ The Second District Court of Appeal agreed.¹²²

The fact that the quick take chapter was entitled a "supplemental proceeding" was not the controlling factor.¹²³ Section 73.092(1) was intended for cases in which a monetary award was the object.¹²⁴ In contrast, section 73.092(2) was intended for use in such cases as defeating an order of taking or proceedings to determine the parties' respective rights.¹²⁵ Therefore, it was inappropriate to use the latter subsection method in this case which produced a monetary award.¹²⁶ Accordingly, the attorney's fee was reduced to one-third of the benefit, \$1,254.¹²⁷

F. *Attorneys' Fees in Landlord-Tenant Litigation*

*Florida Department of Health and Rehabilitative Services v. Morse.*¹²⁸ The tenant vacated at the end of the lease period. Based on the claim that the tenant had breached the lease by leaving the premises in an "extensively damaged condition," the landlord successfully sued for property damage and

117. *Id.* at 948.

118. *Id.*

119. *Id.*; see FLA. STAT. § 73.092(2) (1995).

120. *Labelle*, 696 So. 2d at 948; see FLA. STAT. § 73.092(2) (1995).

121. *Labelle*, 696 So. 2d at 948; see FLA. STAT. § 73.092(1) (1995).

122. *Labelle*, 696 So. 2d at 948.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Labelle*, 696 So. 2d at 948.

128. 708 So. 2d 640 (Fla. 3d Dist. Ct. App. 1998).

lost rent.¹²⁹ The trial court also awarded attorneys' fees to the landlord although the lease did not have any provision for attorneys' fees.¹³⁰

The landlord had argued that it was entitled to attorneys' fees under section 82.231 of the *Florida Statutes*.¹³¹ However, the district court pointed out that this section only authorizes the court to award attorneys' fees in an action by the landlord for possession where attorneys' fees are authorized by law.¹³² Consequently, the attorneys' fees award in this case was wrong on two counts. First, the action here was not an action for possession of the premises.¹³³ Secondly, even in actions to which it applies, section 82.231 is not an independent basis for awarding attorneys' fees.¹³⁴ It merely authorizes the award of those fees in that procedural setting when there is an independent basis for the award.¹³⁵ In this case, there was no contractual basis for awarding attorneys' fees, and there had been no finding of fact below that would justify awarding attorneys' fees based on section 57.105(1) of the *Florida Statutes* on the theory that the losing party had failed to raise a "justiciable issue of law or fact."¹³⁶ Therefore, the attorneys' fees award was reversed.¹³⁷

III. BROKERS

A. *Discipline and Licensing*

Arias v. State Department of Business & Professional Regulation.¹³⁸ A couple was interested in leasing a house shown to them by the licensee. The licensee called the owner to finalize the deal, but the owner asked her, "[a]re they Black?" The licensee answered, "[y]es." The owner then refused to approve the lease, even though the licensee told her that she was not supposed to discriminate. After talking with her broker, the licensee explained the situation to the prospective tenants and suggested they hire a lawyer. A complaint was filed with the Department of Housing and Urban Development ("HUD"), and the owner was ordered to pay a \$10,000 civil fine and \$35,000 compensatory damages to each of the prospective

129. *Id.* at 641.

130. *Id.*

131. *Id.*; see FLA. STAT. § 82.231 (1995).

132. *Morse*, 708 So. 2d at 641; see FLA. STAT. § 82.231 (1995).

133. *Morse*, 708 So. 2d at 641.

134. *Id.*; see FLA. STAT. § 82.231 (1995).

135. *Morse*, 708 So. 2d at 641-42; see FLA. STAT. § 82.231 (1995).

136. *Morse*, 708 So. 2d at 642; see FLA. STAT. § 57.105(1) (1995).

137. *Morse*, 708 So. 2d at 642.

138. 710 So. 2d 655 (Fla. 3d Dist. Ct. App. 1998).

renters.¹³⁹ The licensee was also found to have violated the law, fined \$100, and ordered to attend fair housing training.¹⁴⁰

Then the Department of Business and Professional Regulation filed an administrative complaint against the licensee.¹⁴¹ Based on the same facts, which the licensee did not dispute, the Florida Real Estate Commission ("FREC") fined her \$1,000, suspended her license for two years, and sentenced her to one year of probation.¹⁴² She brought this appeal, and the Third District Court of Appeal reversed.¹⁴³

A licensee can be disciplined for violating a duty imposed on her by law.¹⁴⁴ However, the board is required by statute to adopt disciplinary guidelines that "*specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses.*"¹⁴⁵ FREC had failed to adopt guidelines for violation of duties imposed by law. Lack of guidelines "left the licensee in a predicament ripe for arbitrary and erratic enforcement, and obviously provided no standards sufficiently governed by the legislature as to constitute a judicially reviewable discretion."¹⁴⁶

[T]he legislature could not have intended section 475.25(1)(b) to be a carte blanche for the Commission to suspend real estate professionals [*sic*] license for the violation of any legal duty without meaningful notice of likely penalties and without a mechanism in place to ensure that such penalties would be consistently applied by the Commission.¹⁴⁷

The gross discrepancy between the penalty imposed by HUD and the penalty imposed by FREC illustrated the problem with lack of standards. Of course, communicating information to the owner about race was improper, but absent appropriate guidelines, so was FREC's disciplinary order.

*Milliken v. Department of Business and Professional Regulation.*¹⁴⁸

Milliken was convicted of criminal possession of cocaine with the intent to distribute.¹⁴⁹ The FREC held an informal hearing, found him guilty of

139. *Id.* at 656.

140. *Id.*

141. *Id.* at 657.

142. *Id.*

143. *Arias*, 710 So. 2d at 661.

144. *Id.* at 657; *see* FLA. STAT. § 475.25(1)(a) (1997).

145. *Arias*, 710 So. 2d at 658 (citing FLA. STAT. § 455.2273 (1997)).

146. *Id.* at 659.

147. *Id.*

148. 709 So. 2d 595 (Fla. 5th Dist. Ct. App. 1998).

149. *Id.* at 597.

violating section 475.25(1)(f) of the *Florida Statutes*,¹⁵⁰ and suspended his real estate license.¹⁵¹ Milliken raised five points on appeal.¹⁵² Three merit discussion here.

First, section 475.25(1)(f) of the *Florida Statutes* provided for suspension or revocation of the real estate license where the licensee had been convicted or found guilty of a crime relating to brokerage activities or involving moral turpitude or fraudulent or dishonest dealings.¹⁵³ Milliken claimed that the cocaine possession conviction did not fit any of these categories. The district court found otherwise.¹⁵⁴ “We have no problem with concluding [cocaine possession with the intent to sell] is a crime involving moral turpitude.”¹⁵⁵

Milliken challenged the use of an informal hearing, but the district court found that Milliken had never objected to the informal procedure.¹⁵⁶ Milliken also challenged the panel’s decision because no testimony or documentation had been presented at the hearing.¹⁵⁷ However, Milliken had asked for permission to speak to the FREC panel. When asked if there were anything he wanted to tell the panel, he had freely admitted being convicted of the crime.¹⁵⁸ Consequently, the panel had an adequate basis for its decision.¹⁵⁹

Finally, FREC suspended his license until his criminal probation ended, and he paid FREC’s investigative costs.¹⁶⁰ Suspensions under section 475.25(1) may not exceed ten years, so a suspension order should not be written in a way that the period might possibly exceed that period.¹⁶¹ Consequently, the matter was remanded to FREC so that the suspension period would explicitly be prevented from exceeding the ten-year period.¹⁶²

150. He was also found to have violated section 475.25(1)(n) of the *Florida Statutes* which states: “confined in any county jail, postadjudication . . . confined in any state or federal prison.” *Id.*; see FLA. STAT. § 475.25(1)(n) (1997). However, that subsection is not addressed in this opinion. *Milliken*, 709 So. 2d at 597.

151. *Milliken*, 709 So. 2d at 596.

152. *Id.* at 596–97.

153. *Id.*; see FLA. STAT. § 475.25(1)(f) (1997).

154. *Milliken*, 709 So. 2d at 596.

155. *Id.* at 597.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Milliken*, 709 So. 2d. at 597–98.

160. *Id.* at 596.

161. *Id.* at 597.

162. *Id.* at 597–98. On remand, the order was also to be corrected to reflect that it was to last for his period on parole rather than on probation. *Id.*

*Nelson v. Department of Business and Professional Regulation.*¹⁶³ A licensed real estate broker allegedly set off a smoke bomb in a public office as an act of political protest. Adjudication was withheld when he pled *nolo contendere* to charges of battery and criminal mischief, but he was placed on eighteen months of probation.¹⁶⁴ Then, the Department of Business and Professional Regulation brought disciplinary proceedings against him. The department fined him and placed him on probation for ninety days because it concluded that he had been found guilty of “a crime which directly relates to the activities of a licensed real estate salesperson or involves moral turpitude or fraudulent or dishonest dealings.”¹⁶⁵ The broker appealed.¹⁶⁶

The Fifth District Court of Appeal focused on the question of moral turpitude because this crime obviously did not involve brokerage activities, “or a fraudulent or dishonest dealing.”¹⁶⁷ Examples it found of moral turpitude included a physician selling bogus diplomas, bookmaking, and manslaughter by criminal negligence.¹⁶⁸ It held that reversal was required because this crime “d[id] not show a ‘baseness or depravity’ that [would] impugn his ability to deal fairly with the public to the extent that suspension of his broker’s license is warranted.”¹⁶⁹

Judge Sharp concurred specially.¹⁷⁰ She agreed that reversal was required, but challenged the legislature to spell out what categories of crimes warranted sanctions under this category because the term “moral turpitude” was essentially meaningless and its application might lead to capricious results.¹⁷¹ Furthermore, it might be constitutionally infirm, as it is a term that fails to provide sufficient warning as to what activities are proscribed.¹⁷²

*Walker v. Florida Department of Business and Professional Regulation.*¹⁷³ A real estate salesperson needed to complete fourteen hours of classroom instruction in order to renew her license. To satisfy this requirement, she took a correspondence course.¹⁷⁴ At the end of the course,

163. 707 So. 2d 378 (Fla. 5th Dist. Ct. App. 1998).

164. *Id.* at 378.

165. *Id.*; see FLA. STAT. § 475.25(1)(f) (1993). Note that this subsection allows the licensee to be disciplined if he has “been convicted or found guilty of, or entered a plea of *nolo contendere* to, regardless of adjudication, a crime.” FLA. STAT. § 475.25(1)(f) (1993).

166. *Nelson*, 707 So. 2d at 378.

167. *Id.* at 379.

168. *Id.*

169. *Id.*

170. *Id.* at 379 (Sharp, J., concurring specially).

171. *Nelson*, 707 So. 2d at 380.

172. *Id.* at 379–80.

173. 705 So. 2d 652 (Fla. 5th Dist. Ct. App. 1998).

174. How a correspondence course qualified as hours of classroom instruction was not addressed by the court.

she did not submit the examination answer sheet for grading, but she represented on her license renewal application that she had completed the educational requirement. The FREC sent her application back because it lacked evidence that she had completed the educational requirement. Then she sent in the examination answer sheet to be graded. She passed the exam and submitted the scored sheet, but the irregularities in the application were noticed, and an investigation was begun. FREC held an informal hearing. Despite the licensee's uncontradicted testimony that she thought she had sent in the exam sheet at the end of the course and that her failing to submit the exam sheet was an explainable oversight caused by distracting events in her personal life,¹⁷⁵ her license was revoked.¹⁷⁶

On appeal, the licensee challenged the use of an informal hearing.¹⁷⁷ The district court found no irregularity because the licensee had specifically requested an informal hearing and had never requested that the informal hearing be terminated and a formal hearing begun in its place.¹⁷⁸ Thus, she had waived her right to a formal hearing.¹⁷⁹

The licensee also claimed that the license revocation was too severe a penalty for the conduct involved, but the district court concluded that this would not be a valid basis for relief.¹⁸⁰ In reviewing agency action, the court is expressly prohibited from substituting its own judgment on matters that are within the agency's discretion.¹⁸¹ FREC is specifically empowered by statute to revoke a license that was obtained by "fraud, misrepresentation, or concealment."¹⁸²

The case really turned on whether there was sufficient evidence that the license renewal had been obtained by "fraud, misrepresentation, or concealment." FREC had the burden of proving intent. The majority, after reviewing the record, concluded that there was sufficient circumstantial evidence of intent to satisfy the competent substantial evidence standard.¹⁸³ To emphasize that point, Judge Dauksch wrote a special concurrence.¹⁸⁴ The agency panel saw and heard the witnesses, so it had the job of judging credibility.¹⁸⁵ It had the prerogative of believing or disbelieving any witness,

175. Walker had stated that the distracting events in her life were that her father had died and she had changed jobs. *Walker*, 705 So. 2d at 655 (Sharp, J., dissenting).

176. *Id.* at 653.

177. *Id.*

178. *Id.* at 653-54.

179. *Id.* at 654.

180. *Walker*, 705 So. 2d at 654.

181. *Id.*; see FLA. STAT. § 120.68(12) (1995).

182. *Walker*, 705 So. 2d at 654; see FLA. STAT. § 475.25(1) (1995).

183. *Walker*, 705 So. 2d at 654.

184. *Id.* at 655 (Dauksch, J., concurring specially).

185. *Id.*

even one who was uncontradicted.¹⁸⁶ Judge Sharp disagreed.¹⁸⁷ In her dissent, she asserted that the clear and convincing evidence standard had not been met by FREC because the licensee had given an uncontradicted and credible explanation of her conduct in submitting the inaccurate application.¹⁸⁸

B. *Brokerage Agreements and Commissions*

The Florida Legislature has now made it possible for a broker to have two of his salespeople act as sole agents for different parties to a real estate transaction.¹⁸⁹ The broker can designate the salespersons assigned to each party.¹⁹⁰ Designated salespersons are allowed only when the property involved is nonresidential¹⁹¹ and only where the parties have assets exceeding one million dollars.¹⁹² The parties must sign disclosure statements indicating that their assets are sufficient and requesting designated salespersons to act as their agents.¹⁹³ The act provides language to be included in the disclosure form, including the warning that the salesperson is allowed to tell the broker confidential information; but, the broker cannot reveal it to the other party or use it to the detriment of the confidante.¹⁹⁴ This may be acceptable in a commercial setting where the parties are likely to be sophisticated and represented by legal counsel, but it may well prove impossible to keep confidences from being violated in most brokerages, where the emphasis is on completing the transaction. Worse, it may be impossible to allay public fears that confidences are being violated. The benefits brokers get from this act may not justify the suspicions generated.

*Century 21 Real Estate of South Florida, Inc. v. Braun & May Realty, Inc.*¹⁹⁵ Braun & May was a franchisee of Century 21. The franchise

186. *Id.*

187. *Id.* at 655 (Sharp, J., dissenting).

188. *Walker*, 705 So. 2d at 655.

189. Brokerage Relationship Disclosure Act, ch. 98-250, §10, 1998 Fla. Laws 2199, 2199 (to be codified at FLA. STAT. § 475.2755).

190. *Id.*

191. Nonresidential property is property that is not residential as defined in section 475.276 (1)(a) of the *Florida Statutes* as "improved residential property of four units or fewer . . . unimproved residential property intended for [the] use of four units or fewer, or the sale of agricultural property of 10 acres or fewer." FLA. STAT. § 475.276(1)(a) (1997) (citations omitted).

192. Brokerage Relationship Disclosure Act, ch. 98-250, §10, 1998 Fla. Laws 2199, 2199 (to be codified at FLA. STAT. § 475.2755).

193. *Id.*

194. *Id.*

195. 706 So. 2d 878 (Fla. 3d Dist. Ct. App. 1997).

agreement provided that it would last for a specific duration and, if not renewed, would be "deemed to be operating on a month-to-month basis."¹⁹⁶ The original term ended, and it was not renewed. Braun & May continued to operate as a Century 21 franchisee for some time before it gave notice of its intent to discontinue the relationship. This dispute arose over what commissions Century 21 was entitled to under the franchise agreement.¹⁹⁷

Paragraph eighteen of the agreement provided that Century 21 was entitled to commissions on: 1) revenues from transactions in process on the date of termination; 2) revenues produced by referrals from other Century 21 offices prior to termination; and 3) revenues produced by listings procured while a Century 21 franchisee.¹⁹⁸ The critical phrase was "termination."¹⁹⁹ Braun & May argued that the agreement had never been "terminated."²⁰⁰ It had simply not been renewed, so no commissions were due under paragraph eighteen.²⁰¹ Convinced by this argument, the trial court granted summary judgment, but the district court reversed.²⁰²

Judge Shevin's opinion concluded that a month to month franchise agreement operates like a month to month tenancy.²⁰³ It automatically renews until terminated by one of the parties.²⁰⁴ Braun & May's notice that it intended to discontinue the franchise relationship was such a termination notice.²⁰⁵ That termination triggered application of paragraph eighteen regarding commissions.²⁰⁶

*Easton-Babcock & Associates, Inc. v. Fernandez.*²⁰⁷ The broker had a listing for a building owned by Fernandez. The broker showed the property to Noriega in 1992, and the parties reached an agreement in principle that was memorialized in the confirmation letter of October 28, 1992.²⁰⁸ Then Fernandez informed the broker that he would be unable to go through with the sale because a foreclosure was pending. In fact, a foreclosure action had been brought against the property, but it had already been resolved and voluntarily dismissed. Believing Fernandez's statement that the threatened foreclosure prevented the sale, the broker did not insist on its commission

196. *Id.*

197. *Id.* at 878-79.

198. *Id.* (citing paragraph 18 of the franchise agreement).

199. *Id.* at 879.

200. *Century 21*, 706 So. 2d at 879.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Century 21*, 706 So. 2d at 879.

206. *Id.*

207. 706 So. 2d 916 (Fla. 3d Dist. Ct. App. 1998).

208. *Id.* at 917.

and let the matter drop until it discovered that the sale had been consummated eleven months later based on identical terms. Then, the broker demanded a commission, and, when Fernandez refused, he brought this suit.²⁰⁹

The jury rendered a verdict in favor of the broker.²¹⁰ When the trial judge granted the seller's motion for a judgment notwithstanding the verdict, the broker appealed.²¹¹ The trial judge apparently relied upon the Supreme Court of Florida's opinion in *Richland Grove & Cattle Co. v. Easterling*²¹² for the proposition that it was a question of law whether the broker had abandoned the listing contract.²¹³ This reliance on *Easterling* was misplaced. That case dealt with a listing contract that did not have an expiration date.²¹⁴ The supreme court had decided that whether the reasonable time implied into such contracts had expired was a question of law.²¹⁵

The case at bar, however, turned on the question of whether the seller had intentionally excluded the broker from the negotiations that produced the sale.²¹⁶ Under the listing contract, the broker was entitled to a commission if it was the procuring cause of the sale. To be the procuring cause, the broker must have brought the buyer and seller together and effectuated the sale through continuous negotiations that the broker initiated unless the broker has been intentionally excluded from the negotiations.²¹⁷ The evidence in the record was susceptible to a reasonable inference that this broker had been intentionally excluded, so it was error for the trial judge to substitute his conclusion for that of the jury.²¹⁸

*Mays v. Hadden.*²¹⁹ The owner of a radio station entered into a listing agreement with a broker that provided for a commission if: 1) the station were sold during the term of the agreement; 2) the broker presented an offer for the asking price which the owner rejected; or 3) a contract of sale were entered into within twelve months after the listing agreement was terminated. The listing agreement did not have a specific duration, but provided it would last at least 180 days. However, after two months the owner entered into a lease management agreement with a third party and

209. *Id.* at 917-18.

210. *Id.* at 918.

211. *Id.*

212. 526 So. 2d 685 (Fla. 1988).

213. *Fernandez*, 706 So. 2d at 918.

214. *Easterling*, 526 So. 2d at 686.

215. *Id.* at 687-88.

216. *Fernandez*, 706 So. 2d at 919.

217. *Id.*

218. *Id.* at 919-20.

219. 709 So. 2d 132 (Fla. 5th Dist. Ct. App. 1998).

canceled the listing.²²⁰ The broker sued. Apparently accepting the argument that a lease management agreement is generally the first step in the eventual sale of a radio station, the trial court awarded him the brokerage commission.²²¹ On appeal the district court reversed.²²²

The court held that there was both competent and substantial evidence that the contract had been breached by the owner's premature cancellation,²²³ but the contract explicitly provided only three situations in which the broker would be entitled to a commission and premature cancellation was not one of them.²²⁴ The contract had been drafted by the broker who was experienced in this type of sale.²²⁵ The court seemed to have been invoking the rule that a contract should be interpreted against the drafter who had the opportunity to choose the wording most in his own favor.²²⁶ Furthermore, the court seemed to have been suggesting that there was no reason to find an agreement to pay a commission implied in favor of a broker with this level of expertise. He should have anticipated this possible outcome and made sure that the agreement expressly provided for a commission in these circumstances if that is what the parties agreed upon. The majority concluded that the broker's damages in breach of this contract were limited to his out of pocket expenses.²²⁷

Judge Dauksch carried this logic one step further in his dissent.²²⁸ He reasoned that the lease management agreement was reasonably foreseeable and not a breach of the contract because the broker could still have produced a buyer and earned his commission.²²⁹ Unfortunately, the dissent does not mention the owner's having canceled the listing agreement. The majority opinion seems to focus on that as the breach,²³⁰ while the dissent does not explain why the owner's unilateral cancellation would not be a breach entitling the broker to damages.

*Whitehead v. Dreyer.*²³¹ A real estate broker and a ranch owner entered into a written brokerage contract that provided a commission would be paid "if the ranch [were] sold to either the State of Florida, The Trust for Public

220. *Id.* at 133.

221. *Id.*

222. *Id.* at 134.

223. *Id.*

224. *Mays*, 709 So. 2d at 134.

225. *Id.* at 133.

226. *Id.* at 134.

227. *Id.*

228. *Id.* at 134 (Dauksch, J., dissenting).

229. *Mays*, 709 So. 2d at 134.

230. *Id.*

231. 698 So. 2d 1278 (Fla. 5th Dist. Ct. App. 1997).

Lands, the CARL Program or the St. Johns Management District.”²³² None of these bought the land and the agreement was canceled. Eighteen months later, an officer of the Audubon Society informed the Walt Disney World Company that the ranch was available for wetlands mitigation purposes. Disney pursued the lead and bought the ranch. The broker then brought this action claiming a brokerage contract.²³³ The broker claimed to be the procuring cause because he had first suggested the strategy of finding a corporate buyer who could use the land for mitigation. The trial court, finding the complaint to be without merit, granted summary judgment against the broker and then assessed attorneys’ fees against both the broker and his attorneys.²³⁴

The Fifth District Court of Appeal affirmed.²³⁵ To be the procuring cause, the broker “must bring the parties together and effect a sale through continuous negotiations inaugurated by him.”²³⁶ There was no allegation in the complaint that this broker had introduced the parties or inaugurated negotiations between them. Nor was there any allegation that would qualify the broker for the exception to that rule, i.e., that the parties had “intentionally excluded” him from negotiations after he had introduced them.²³⁷ The broker’s having suggested what turned out to be a successful marketing strategy would not be a sufficient basis for claiming a commission in the absence of an express contract to the contrary.

IV. CONDOMINIUMS

*Graves v. Ciega Verge Condominium Ass’n.*²³⁸ Nancy Graves, the “personal representative” to Fred Graves’ estate, appealed the trial court’s non-final order vacating an amended final judgment of foreclosure and canceling judicial sale against Ciega Verde Condominium Association and its unit owners in this foreclosure and construction lien action.²³⁹

Decedent Fred Graves, as a general contractor, performed repair work to the condominium pursuant to a contract. The association later refused to pay Graves for his services and denied Graves access to the property.²⁴⁰ Graves served both a claim of lien and a contractor’s affidavit. Subsequently, Graves filed an amended complaint which sought to “foreclose the

232. *Id.* at 1279 (citing brokerage contract).

233. *Id.*

234. *Id.*

235. *Id.* at 1280.

236. *Whitehead*, 698 So. 2d at 1280.

237. *Id.*

238. 703 So. 2d 1109 (Fla. 2d Dist. Ct. App. 1997).

239. *Id.* at 1110.

240. *Id.*

mechanic's lien against the unit owners and . . . sought recovery of damages for breach of contract against Ciega Verde."²⁴¹ Graves sued unit owners as a defendant class with the association as class representative. The association, in its individual capacity and as representative of the class, answered the amended complaint.²⁴²

"[T]he contract portion of the [complaint] was set for binding arbitration,"²⁴³ where Graves was the prevailing party.²⁴⁴ "Graves served . . . Ciega Verde [with] a motion to confirm the arbitration award and to set cause for trial on the foreclosure action against the unit owners."²⁴⁵ The trial court entered final judgment in March 1996 and set judicial sale for May 1996.²⁴⁶

"[C]ounsel for the unit owners filed a motion to set aside the amended final judgment" claiming the court did not have jurisdiction over the unit owners.²⁴⁷ Ultimately, the trial court, at hearing, granted the unit owners' motion to dismiss and dismissed the unit owners from the action because Graves failed to serve such unit owners within the 120 day period starting from the date of filing the complaint as per *Florida Rules of Civil Procedure*.²⁴⁸

The appellate court recognized that the trial court erred in vacating the amended final judgment of foreclosure.²⁴⁹ The trial court had jurisdiction over the unit owners because they constituted a class with a common interest based on membership in the Ciega Verde Condominium Association.²⁵⁰

Ciega Verde's Declaration of Condominium stated that each unit owner was a member of the condominium association while he owned the unit.²⁵¹ When the association authorized work to be performed on the common grounds, it was understood that the unit owners consented to that authorization.²⁵² As such, Graves' lien attached to each condo unit and could be foreclosed.²⁵³

Each unit owner was not required to receive individual notice. It was the condominium's board of directors' fiduciary and statutory obligation to

241. *Id.*

242. *Id.* at 1111.

243. *Graves*, 703 So. 2d at 1111.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Graves*, 703 So. 2d at 1111; *see* FLA. R. CIV. P. 1.070(i).

249. *Graves*, 703 So. 2d at 1111; *see* FLA. R. CIV. P. 1.070(i).

250. *Graves*, 703 So. 2d at 1112; *see* FLA. R. CIV. P. 1.221.

251. *Graves*, 703 So. 2d at 1111-12.

252. *Id.* at 1112.

253. *Id.*

give unit owners notice of a lawsuit.²⁵⁴ Graves' service upon the association, the class representative, was sufficient and if the court wanted to require notice to the individual members, it should have provided Graves adequate time to do so.²⁵⁵

Perlow v. Goldberg.²⁵⁶ This court affirmed the order dismissing owner's claims because the facts show that the "directors cannot be held liable in their individual capacity."²⁵⁷ Perlow sought personal judgments for breach of fiduciary duty against Goldberg and Leb, directors of the condominium association, for failure to properly administer insurance proceeds.²⁵⁸

Condominium association directors are immune from individual liability absent fraud, self-dealing, or criminal activity.²⁵⁹ The court below relied on a fourth district case which furthered this rule.²⁶⁰ This court agreed with that holding and stated the directors here were neither unjustly enriched, nor did they commit fraud or a crime.²⁶¹ At the most, the directors were negligent by failing to properly administer insurance proceeds from Hurricane Andrew.²⁶² This negligence is not enough to create personal liability for the condominium directors.²⁶³

The court also recognized that owner's reliance on *B & J Holding Group v. Weiss*²⁶⁴ was unwarranted because the directors in that case deliberately engaged in self-dealing.²⁶⁵ That was not the situation here.²⁶⁶

Ruffin v. Kingswood E. Condominium Ass'n.²⁶⁷ "Kingswood E. Condominium Association, Inc., brought an arbitration proceeding under section 718.1255 [of the] *Florida Statutes*,²⁶⁸ against unit owner Mary Ruffin

254. *Id.*

255. *Id.*

256. 700 So. 2d 148 (Fla. 3d Dist. Ct. App. 1997).

257. *Id.* at 149.

258. *Id.*

259. *Id.* See FLA. STAT. § 718.111(2) (1995); see also FLA. STAT. §§ 607, 617 (1995).

260. *Perlow*, 700 So. 2d at 150 (citing *Munder v. Circle One Condominium, Inc.*, 596 So. 2d 144 (Fla. 4th Dist. Ct. App. 1992)).

261. *Id.*

262. *Id.*

263. *Id.*

264. 353 So. 2d 141 (Fla. 3d Dist. Ct. App. 1977).

265. *Perlow*, 700 So. 2d at 150 (citing *B & J Holding Group v. Weiss*, 353 So. 2d 141 (Fla. 3d Dist. Ct. App. 1977)).

266. *Id.*

267. 23 Fla. L. Weekly D1178 (4th Dist. Ct. App. May 13, 1998), *opinion withdrawn and superseded on reh'g* by No. 97-1683, 1998 WL 689766 (4th Dist. Ct. App. Oct. 7, 1998).

268. FLA. STAT. § 718.1255 (1997).

and her son, appellant Paul Ruffin.”²⁶⁹ The reason for the arbitration was that the association alleged that Mary Ruffin and the appellant were in violation of the condominium declarations.²⁷⁰ “The Association [wanted] the Division of Florida Land Sales, Condominium and Mobile Homes of the Department of Business Regulation to issue an order requiring appellant as tenant to vacate the premises and restraining him from further entry.”²⁷¹ Mr. Ruffin “inform[ed] the arbitrator that his mother had moved . . . therefore the matter was moot.”²⁷² However, the association wanted future protection. So, the arbitrator issued an order that “Mr. Ruffin should remain away and off the condominium property.”²⁷³

Mr. Ruffin filed a complaint for a “trial de novo” in circuit court and the Association moved for summary judgment on the grounds that the case was moot.²⁷⁴ The circuit court entered the summary judgment and reserved jurisdiction to assess attorneys’ fees.²⁷⁵

The appellate court, “*sua sponte*,” considered the subject matter jurisdiction of the arbitrator to have heard this action.²⁷⁶ It looked at section 718.1255(1) of the *Florida Statutes*²⁷⁷ and found that the arbitrator had no subject matter jurisdiction, since the arbitrator may only hear disputes within its statutory authority and disputes that include disagreements involving eviction or other removal are not within the arbitrator’s statutory authority.²⁷⁸ Further, the appellant was not the owner of the unit and, therefore, section 718.1255 did not cover disputes with the appellant.²⁷⁹

Since the arbitrator lacked subject matter jurisdiction, the trial de novo was not moot. If the appellant had not challenged the matter, the arbitrator’s order would have become final. Therefore, this court reversed the final judgment and directed the trial court to “enter an order vacating the arbitrator’s final order.”²⁸⁰

Legislative changes to section 718 include, but are not limited to, the following:

269. *Ruffin*, 1998 WL 689766, at *1.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Ruffin*, 1998 WL 689766, at *1.

275. *Id.* at *1–2.

276. *Id.* at *1.

277. FLA. STAT. § 718.1255(1) (1997).

278. *Ruffin*, 1998 WL 689766, at *2.

279. *Id.* at *2; *see* *Carlandia Corp. v. Obernauer*, 695 So. 2d 408, 410 (Fla. 4th Dist. Ct. App. 1997).

280. *Ruffin*, 1998 WL 689766, at *2.

Section 718.111(11) of the *Florida Statutes* now includes subparagraph (d) which provides for the association to maintain adequate insurance or fidelity bonding for all persons who control or disburse funds for the association.²⁸¹

Section 718.112(d)8 of the *Florida Statutes* provides that, unless the bylaws provide otherwise, any vacancy on the Board of Directors of the association prior to the expiration of a term may be filled by a majority vote of the remaining directors even though they may constitute less than a quorum or by the sole remaining director.²⁸² Alternatively, however, the board may hold an election to fill the vacancy.²⁸³

Section 718.503(2)(a) of the *Florida Statutes* has been amended to require that a unit owner who is not a developer shall include a copy of the financial information required by section 718.111 of the *Florida Statutes* in the disclosure information presented to a prospective purchaser.²⁸⁴ Likewise, a prospectus or offering circular, per section 718.504 of the *Florida Statutes*, requires the same information to be included.²⁸⁵

V. CONSTRUCTION

*City of Miami v. Tarafa Construction, Inc.*²⁸⁶ The contractor sued based on construction delays it alleged were attributable to the city. The case was reversed and remanded due to overly long delay in getting the trial completed and problems with the final judgment, but the court ruled that two claims had to be eliminated because they were not for work under the contract.²⁸⁷ Since the defendant was the city, it was protected by the doctrine of "sovereign immunity."²⁸⁸ While the city could be held liable for breaching the express or implied terms of a contract, it could not be held liable for expenses incurred before the contract was awarded or outside the scope of the construction work.²⁸⁹ Thus, two of the claims cannot stand: 1) the claim for "value engineering damages,"²⁹⁰ which was based on the cost of engineering work in preparing the bid; and 2) the claim for "claim

281. FLA. STAT. § 718.111(11)(d) (1997).

282. FLA. STAT. § 718.112(d)8 (Supp. 1998).

283. *Id.*

284. *Id.* § 718.111.

285. *Id.* § 718.504.

286. 696 So. 2d 1275 (Fla. 3d Dist. Ct. App. 1997).

287. *Id.* at 1277.

288. *Id.*

289. *Id.*

290. *Id.*

preparation damages,"²⁹¹ which the court characterized as pre-litigation costs.²⁹²

*Temple Emanu-El v. Tremarco Industries, Inc.*²⁹³ The contract provided that the contractor would provide a new roof and that the price would include a three year "[g]uarantee against leaks" and a manufacturer's twelve year warranty.²⁹⁴ Based on allegations that the roof was leaking, the owner filed suit against the roofing contractor, the manufacturer, and others involved with the roofing job. The manufacturer, relying on an arbitration clause in its warranty form, moved to require arbitration.²⁹⁵ The owner did not resist. The roofing contractor also moved to require arbitration based upon the arbitration clause in the manufacturer's warranty.²⁹⁶ Despite the owner's objections, the trial court ordered that claim to arbitration as well.²⁹⁷ However, the fourth district reversed.²⁹⁸

The arbitration code puts the burden on the one claiming arbitration to prove an agreement to arbitrate.²⁹⁹ The contract between the roofing contractor and the owner did not contain an arbitration clause.³⁰⁰ The claim for arbitration was based on the argument that the arbitration clause in the manufacturer's warranty had been incorporated by reference into that contract.³⁰¹ In order for a term to be incorporated by reference, the incorporation document must contain an expression of the parties' intent to be bound by the incorporated term.³⁰² A mere reference to another document is not enough to effectuate an incorporation by reference.³⁰³ Here, the fact that the contract required the roofing contractor to provide a manufacturer's warranty was simply not enough to incorporate the terms of that warranty into the roofing contract.³⁰⁴

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291. *Tarafa*, 696 So. 2d at 1277.
 292. *Id.*
 293. 705 So. 2d 983 (Fla. 4th Dist. Ct. App. 1998).
 294. *Id.* at 983 (citing contract).
 295. *Id.* at 984.
 296. *Id.*
 297. *Id.*
 298. *Tremarco*, 705 So. 2d at 984.
 299. FLA. STAT. § 682.03 (1997).
 300. *Tremarco*, 705 So. 2d at 984.
 301. *See id.*
 302. *Id.*
 303. *Id.*
 304. *Id.*

VI. COOPERATIVES

Current legislative changes to section 719 include, but are not limited to, the following:

Section 719.103 of the *Florida Statutes* has added additional definitions including those for “buyers,” “common areas,” and “conspicuous type.”³⁰⁵ A “buyer” is one who purchases a cooperative and the words “purchaser” and “buyer” may be used interchangeably within the act.³⁰⁶ “Common areas” now include, among other things, cooperative property which is not included within the units.³⁰⁷ “Conspicuous type means type in capital letters no smaller than the largest type on the page on which it appears.”³⁰⁸ Also, there are additional definitions for “division,” “limited common areas,” “rental agreement,” and “residential cooperative.”³⁰⁹

Section 719.1035 of the *Florida Statutes* has been amended to require that, upon creating a cooperative, the developer or association shall file the recording information with the division within thirty working days on a form prescribed by the division.³¹⁰

Section 719.104 of the *Florida Statutes* now has a new subpart (10) requiring the board to notify the division before taking any action to dissolve or merge the cooperative association.³¹¹

Section 719.502(1)(a) of the *Florida Statutes* has added a provision that a developer shall not close on any contract for sale or contract for a lease of more than five years until the developer prepares and files with the division, documents complying with both the requirements of chapter 719 and the rules promulgated by the division, and until the division notifies the developer that the filing is proper.³¹² Further, the developer shall not close on any contract for sale or contract for lease period of more than five years until the developer prepares and delivers all documents to the prospective purchaser as required by *Florida Statutes* section 719.503(1)(b).³¹³

Section 719.503(1)(b) of the *Florida Statutes* has an added provision requiring that the developer not close for fifteen days following the execution of the agreement and delivery of documents to the buyer as evidenced by a receipt for the documents signed by the buyer, unless the buyer is informed in a fifteen day voidability period and agrees to close prior

305. FLA. STAT. § 719.103 (Supp. 1998).

306. *Id.* § 719.103(4).

307. *Id.* § 719.103(8).

308. *Id.* § 719.103(11).

309. *Id.*

310. FLA. STAT. § 719.1035 (Supp. 1998).

311. *Id.* § 719.104(10).

312. *Id.* § 719.502(1)(a).

313. *Id.* § 719.503(1)(b).

to the expiration of fifteen days.³¹⁴ The developer must keep in its records a separate signed agreement as proof of the buyer's agreement to close prior to the expiration of the voidability period.³¹⁵

VII. DEEDS

*Mora v. Karr.*³¹⁶ The court affirmed the trial court and denied the temporary injunction to the Moras regarding a violation of deed restrictions.³¹⁷ Karr wished to purchase a home and rebuild it to contain a three car garage and a twenty-five foot setback.³¹⁸ However, deed restrictions only allowed a two car garage and required a thirty-five foot setback.³¹⁹ Karr secured a waiver to those restrictions from the developer and from adjacent property owners prior to the purchase.³²⁰

After closing, Mr. Mora, an adjacent property owner and attorney, wrote Karr a letter that he would sue over the deed restrictions he waived. Karr continued with construction and Mora sued.³²¹ The trial court and the fourth district court both denied injunctive relief to Mora.³²² The most compelling evidence was the fact that Mora waived the deed restrictions prior to the construction and that Karr relied on that waiver in making the purchase.³²³

VIII. EASEMENTS

*Citgo Petroleum Corp. v. Florida East Coast Railway Co.*³²⁴ The trial court entered "final judgment quieting title to certain property in favor of Florida East Coast Railway Company."³²⁵ The appellate court reversed, finding that "Citgo was granted an express easement to construct and maintain a pipeline on the . . . property [and that] . . . Citgo's failure to

314. *Id.*

315. FLA. STAT. § 719.503(1)(b) (Supp. 1998).

316. 697 So. 2d 887 (Fla. 4th Dist. Ct. App. 1997), *replacing original opinion*, 22 Fla. L. Weekly D781 (Fla. 4th Dist. Ct. App., Mar. 21, 1997).

317. *Id.* at 888.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Mora*, 697 So. 2d at 888.

322. *Id.*

323. *Id.*

324. 706 So. 2d 383 (Fla. 4th Dist. Ct. App. 1998).

325. *Id.* at 384.

record this easement [did] not render it ineffectual against [Florida East Coast ("FEC")], since [FEC] was on inquiry notice of its existence."³²⁶

The events giving rise to this dispute involved the expansion of the Ft. Lauderdale Airport and the resulting relocation of various utilities.³²⁷ "Citgo had a licensing agreement with FEC under which Citgo had the 'right and privilege' of operating a pipeline under FEC's main track, across FEC's railroad right-of-way."³²⁸ The right of way and Citgo's pipeline had to be relocated when the airport was expanded. Citgo "reached an agreement" with Florida's Department of Transportation ("Department") to "relocate the pipeline."³²⁹ The agreement recognized "that Citgo own[ed] various property rights along the original pipeline, and provid[ed] for the transfer of those property rights to the [Department] in exchange for allowing Citgo to relocate and operate the pipeline on other property" acquired by the Department.³³⁰

Citgo informed FEC that the pipeline was to be relocated across the proposed relocation of FEC's right of way.³³¹ FEC sent Citgo the appropriate engineering specifications, as well as an application for a new licensing agreement. FEC remained adamant that, until it reached an agreement with Broward County to relocate its right of way, it could not consider granting Citgo a utility crossing permit.³³²

FEC and Broward County reached an agreement to relocate the railroad track.³³³ That agreement provided that FEC would convey to Broward County its existing right of way in exchange for a replacement right of way.³³⁴ The parcels of land comprising the new right of way were conveyed to FEC which promptly recorded the quitclaim deed. Citgo had no easements on record relating to this property.³³⁵

"[T]he new right-of-way property was to be conveyed to FEC 'free and clear of all encumbrances.'³³⁶ However, FEC was required "to grant easements, licenses, and permits to various utility companies . . . to allow storm sewers, fuel lines, and other appurtenances to cross the new right-of-way."³³⁷ No mention was made of the relocated Citgo pipeline.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Citgo*, 706 So. 2d at 384.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Citgo*, 706 So. 2d at 384.

335. *Id.*

336. *Id.* (quoting the agreement).

337. *Id.*

FEC sent Citgo another application for a licensing agreement. As before, this agreement was never executed. After the railroad tracks and pipeline were fully completed, it was evident that FEC's railroad track was built between two of the pipeline's protruding vents. So, FEC brought suit to quiet title.³³⁸

Citgo argued that it had an express easement due to the earlier agreement with the department. After the proceedings were well underway, "Citgo recorded a Notice of Easement."³³⁹ After the court "conclude[d] that FEC was not on inquiry notice of any 'potential unrecorded easement,' . . . that . . . Citgo was never granted an easement,"³⁴⁰ and that Citgo's Notice of Easement was "null and void," Citgo appealed.³⁴¹

Under de novo review, the appellate court was convinced that the 1983 agreement granted Citgo an express easement to operate and maintain the relocated pipeline.³⁴² "An easement is 'the right in one other than the owner of the land to use land for some particular purpose or purposes.'"³⁴³ To determine whether the "[a]greement grant[ed] Citgo an easement, the applicable rule is that 'no particular form and language are necessary to create an easement; rather, any words clearly showing the intention of the parties to create a servitude on a sufficiently identifiable estate is sufficient.'"³⁴⁴

There was no provision in the 1983 agreement which affirmatively established that an easement was not intended. In fact, the court found the other provisions in the agreement manifested an intent by the department to grant Citgo an easement.³⁴⁵

The court also rejected "FEC's argument that Citgo's failure to record its easement render[ed] it ineffectual against FEC."³⁴⁶ In Florida, the recording act subjects "FEC [to] Citgo's preexisting, unrecorded easement unless FEC was 'without notice' of it."³⁴⁷ "If the circumstances known to FEC when it acquired the subject property were 'such as should reasonably suggest inquiry' into Citgo's property rights, then FEC is deemed to be on 'inquiry notice' of — and bound by — those encumbrances which would

338. *Id.* at 385.

339. *Citgo*, 706 So. 2d at 385.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* (quoting *Dean v. Mod Properties, Ltd.*, 528 So. 2d 432, 433 (Fla. 5th Dist. Ct. App. 1988)).

344. *Citgo*, 706 So. 2d at 385 (quoting *Hynes v. City of Lakeland*, 451 So. 2d 505, 511 (Fla. 2d Dist. Ct. App. 1984)).

345. *Id.*

346. *Id.*

347. *Id.*; see FLA. STAT. § 695.01(2) (1995).

have been discovered upon a reasonable inquiry.”³⁴⁸ The district court concluded that Citgo’s actual, open, and obvious possession by construction of a conspicuous pipeline placed FEC on inquiry notice of Citgo’s easement.³⁴⁹

*H & F Land, Inc. v. Panama City - Bay County Airport & Industrial District.*³⁵⁰ The issue before the court was whether the Marketable Record Title Act,³⁵¹ operated “to extinguish an otherwise valid claim of an easement by necessity, when such a claim has not been asserted within 30 years,” as required by the Act.³⁵²

The appellate court recognized the general rule “that a landowner has a right to access his land.”³⁵³ However, it disagreed with H & F, the owner of a land-locked estate, that its claim deserves different treatment from any other claim of an interest in land which does not fall within an exception to the Act and which has not been timely asserted.³⁵⁴

The Marketable Record Title Act was “designed to simplify conveyances of real property, stabilize titles, and give certainty to land ownership.”³⁵⁵ A party only can blame himself if he fails to provide proper notice.³⁵⁶ The legislature intended to afford a means to preserve old claims and interests and to give a reasonable time period to take steps to accomplish the purpose.³⁵⁷

Since the policies underlying the Marketable Record Title Act “conflict with the public policy that ‘lands should not be rendered unfit for occupancy or cultivation,’” the appellate court certified the following question as one of great public importance:

DOES THE MARKETABLE RECORD TITLE ACT, CHAPTER
712, FLORIDA STATUTES, OPERATE TO EXTINGUISH AN
OTHERWISE VALID CLAIM OF A COMMON LAW WAY OF

348. *Citgo*, 706 So. 2d at 386; see *Chatlos v. McPherson*, 95 So. 2d 506, 509 (Fla. 1957).

349. *Citgo*, 706 So. 2d at 386.

350. 706 So. 2d 327 (Fla. 1st Dist. Ct. App. 1998).

351. FLA. STAT. § 712 (1997).

352. *H & F Land*, 706 So. 2d at 327.

353. *Id.*; see *Roy v. Euro-Holland Vastgoed*, 404 So. 2d 410 (Fla. 4th Dist. Ct. App. 1981).

354. *H & F Land*, 706 So. 2d at 328.

355. *Id.* (citing *City of Miami v. Saint Joe Paper Co.*, 364 So. 2d 439, 444 (Fla. 1978)).

356. *Id.*

357. *Id.*

NECESSITY WHEN SUCH CLAIM WAS NOT ASSERTED
WITHIN 30 YEARS?³⁵⁸

*Highland Construction, Inc. v. Paquette.*³⁵⁹ This court affirmed final judgment granting Paquette an implied easement over Highland's property.³⁶⁰ Paquette sued Highland requesting an implied easement be granted over Vickers Street. Once Vickers Street was abandoned, ownership reverted to Highland.³⁶¹

With regard to determining the existence of an implied easement, "Florida has adopted the 'beneficial or complete enjoyment rule.'"³⁶² This rule states that the "grantee receives the right to all streets in the plat beneficial to him."³⁶³ If the grantee can show he will suffer injury differing in degree and kind from everyone else, "he is entitled to receive an implied easement."³⁶⁴

Paquette satisfied the beneficial enjoyment rule. Since he operates two automobile businesses on the property and Vickers Street was the only viable entrance to these establishments, the loss of this access would impair the business.³⁶⁵ Therefore, the implied easement was granted.³⁶⁶

*Sears, Roebuck & Co. v. Franchise Finance Corp. of America.*³⁶⁷ This court reversed a final summary judgment that declared a condition in a nonexclusive easement unenforceable and void.³⁶⁸

Sears owns real property where it operates a retail store, and Bradenton Mall Associates ("Developer") owns a retail shopping center adjacent to Sears' parcel.³⁶⁹ Sears and Developer, having adjacent parcels and parking lots that were connected, "operated their respective parcels under a joint Operating Agreement. Southern Homes Park, Inc. (Southern), a corporate affiliate of the Developer, owned an 'outparcel' adjacent to the [others] but not . . . accessible except through the Sears . . . parking area."³⁷⁰ In 1987, Southern sold its "outparcel" to Suncoast Rax, Inc. on the condition that Southern acquire an ingress and egress easement to the outparcel over a

358. *Id.*

359. 697 So. 2d 235 (Fla. 5th Dist Ct. App. 1997).

360. *Id.* at 236.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Highland*, 697 So. 2d at 236.

365. *Id.* at 237.

366. *Id.*

367. 711 So. 2d 1189 (Fla. 2d Dist. Ct. App. 1998).

368. *Id.* at 1190.

369. *Id.*

370. *Id.*

portion of the Sears parking lot.³⁷¹ Suncoast, at the same time, was contracting to sell the “outparcel” and easement, if acquired, to the appellee, Franchise Finance Corporation of America (“F.F.C.A.”). However, F.F.C.A. agreed to lease the property back to Suncoast. Developer and Sears agreed that Sears would grant the easement to Suncoast and that Developer in return would sweep both the developer parking area and the Sears entire parking area. The easement provided:

The rights granted herein shall be perpetual, but shall expire in the event that:

. . . .

(iii) Developer, . . . shall fail to sweep that portion of Grantor’s parcel devoted to customer parking and which includes the Easement Parcel (“Parking Parcel”) as shown in yellow on Exhibit C hereto. Grantor, its employees, agents or contractors shall upon written notice to both Developer and Grantee, have the right, at its cost and expense, to sweep the Parking Parcel. In the event that after notice Developer and/or Grantee fails to or refuses to cure, Grantor shall have the right to terminate the easements granted herein by filing a Notice of Termination of Easement in the Public Records of Manatee County, Florida, thirty (30) days, after written notice to both Grantee and Bradenton.³⁷²

In 1990, Suncoast went out of business and F.F.C.A. terminated the lease. In November, 1992, “Developer sent F.F.C.A. an invoice for . . . the annual cost of ‘sweeping’ the Sears Parcel parking area.”³⁷³ Developer represented “that if this invoice was not paid, Developer would no longer ‘sweep’ the Sears Parcel parking area.”³⁷⁴ F.F.C.A. declined to pay the invoice and, fearing that Sears may want to terminate the easement, brought its declaratory action to have the sweeping condition declared void and unenforceable. The trial court declared the forfeiture provision unenforceable under *Florida Statutes* section 689.18³⁷⁵ because section 689.18 provides that “reverter or forfeiture provisions . . . in the conveyance of real estate or any interest therein in the state constitute unreasonable restraint on alienation and are contrary to the public policy of the state.”³⁷⁶

371. *Id.*

372. *Sears*, 711 So. 2d at 1190 (citing easement).

373. *Id.*

374. *Id.* at 1191.

375. FLA. STAT. § 689.18 (1987).

376. *Sears*, 711 So. 2d at 1191; *see* FLA. STAT. § 689.18 (1987).

The appellate court rejected this argument “[b]ecause a grant of easement is not a conveyance of a proprietary interest in real property.”³⁷⁷ An easement only grants the right to use property for some particular purpose, and does not convey title to land or dispossess the owner of the land subject to easement.³⁷⁸ Therefore, the district court concluded “that a specified condition to the continuance of an easement agreed upon by the parties is not an encumbrance to the marketability of title to real estate” meant to be protected by section 689.18.³⁷⁹ Easements that end upon the happening of a clearly defined condition have been recognized in the past.³⁸⁰

Furthermore, the district court found that the trial court erred in applying section 689.18 and that even if section 689.18 did apply, the forfeiture provision would not be void for twenty-one years after the granting of the easement, since 689.18 (3) and (4) provide that the provisions do not become void until twenty-one years after the conveyance has passed.³⁸¹

*Shiner v. Baita.*³⁸² The appellant, Shiner wanted to end the real property rights reserved by the appellee, Baita, in a deed given by Baita to Shiner’s predecessor in interest.³⁸³ “Baita, the original grantor of the property, placed a reservation in the deed to Shiner’s predecessor” that provided:³⁸⁴

Grantors reserve to themselves, their heirs and assigns the right to a hook-up to septic tank located on the land herein conveyed, said septic tank being located to the Southeast of the acre being retained by the Grantors herein with the understanding that responsibility of maintaining said septic tank shall remain with the Grantors, their heirs and assigns, and for purposes of maintenance the Grantors, their heirs and assigns, shall have the right to ingress and egress to maintain said septic tank. It is understood this reservation of use of the septic tank is to continue indefinitely but that should Grantee, his successors or assigns determine later that connection to septic tank interferes with use of property herein conveyed, Grantee, his successors or assigns shall have the right to pay expenses necessary to construct a septic tank on the premises which are herein reserved

377. *Sears*, 711 So. 2d at 1191.

378. *Id.*; see *Easton v. Appler*, 548 So. 2d 691 (Fla. 3d Dist. Ct. App. 1989); *Dean v. MOD Properties, Ltd.*, 528 So. 2d 432 (Fla. 5th Dist Ct. App. 1988).

379. *Sears*, 711 So. 2d at 1191.

380. *Id.*; see *Dotson v. Wolfe*, 391 So. 2d 757, 759 (Fla. 5th Dist. Ct. App. 1980).

381. *Sears*, 711 So. 2d at 1192.

382. 710 So. 2d 711 (Fla. 1st Dist. Ct. App. 1998).

383. *Id.* at 711.

384. *Id.*

by the Grantors, and then in that event, this right of hook-up to septic tank shall cease and be of no further force and effect.³⁸⁵

Shiner elected to construct a septic tank on the property still held by Baita because she believed that she had the right to do so after acquiring the property. Shiner felt that this action would end the reserved right for Baita's septic tank hookup. Baita, who intended to develop a mobile home park, disputed Shiner's view.³⁸⁶

The lower court found that the restrictive covenant was ambiguous and that Shiner's septic tank would deprive Baita of using her property. Therefore, the lower court held that Shiner could not take any action regarding the septic tank that would deprive Baita from using and enjoying her property.³⁸⁷

The appellate court reversed the lower court's decision.³⁸⁸ First, the court found that a restrictive covenant did not exist.³⁸⁹ Rather, a reservation existed and that the deed created an easement, not a restrictive covenant.³⁹⁰ Although an easement is often permanent, "an easement does not have to be permanent, [and] may end upon the happening of a condition."³⁹¹

When there is a grant of easement, the intent is determined by a fair interpretation of the language.³⁹² When the language is unambiguous, the court must look at the plain meaning.³⁹³ This court found that there was no ambiguity in the language of the deed and that it clearly shows that, if the grantees determine that the septic tank interferes with their use of the property, they may construct a septic tank on the property, and the hookup septic tank shall cease.³⁹⁴ Therefore, because "the easement holder cannot expand the easement beyond what was contemplated at the time it was

385. *Id.* at 711-12.

386. *Id.* at 712.

387. *Shiner*, 710 So. 2d at 712.

388. *Id.* at 713.

389. *Id.* at 712.

390. *Id.* (citing *Homer v. Dadeland Shopping Ctr., Inc.*, 229 So. 2d 834, 836 (Fla. 1969)).

391. *Id.* (citing *Datson v. Wolfe*, 391 So. 2d 757, 759 (Fla. 5th Dist. Ct. App. 1980)).

392. *Shiner*, 710 So. 2d at 712 (citing *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. 1st Dist. Ct. App. 1984)).

393. *Id.* (citing *Richardson v. Deerwood Club, Inc.*, 589 So. 2d 937, 939 (Fla. 1st Dist. Ct. App. 1991)).

394. *Id.*

granted,”³⁹⁵ the appellate court held that the appellant is entitled to enforce the unambiguous provisions and reversed the lower court’s order.³⁹⁶

IX. EMINENT DOMAIN

A. Condemnation

*Basic Energy Corp. v. Department of Corrections.*³⁹⁷ The condemnation was initiated by the city which planned to give the land to the Department of Corrections (“Department”) for the construction of a prison. The city utilized the quick taking procedure, took possession, and gave possession to the Department. While the Department was constructing the prison, the landowner appealed and won because the court held the stated municipal purpose for the taking was invalid.³⁹⁸ Title reverted to the landowner, but a prison now stood on the land. The Department began its own eminent domain procedure to gain title to the prison it had built.³⁹⁹ The issue on appeal was the appropriate time as of which to figure the compensation. The landowner asserted it should be when the Department acquired title under its condemnation procedure. The Department claimed compensation should be calculated as of the time when the Department took possession under the city’s quick take.⁴⁰⁰

Section 73.041 of the *Florida Statutes* provided that when title had been acquired or perfected after appropriation, the compensation was to be determined as of the date of appropriation.⁴⁰¹ However, the statute did not define “appropriation” and there was no case law interpreting the term as used in this situation. The First District Court of Appeal utilized the plain meaning approach to determine that appropriation was not intended to be synonymous with the time of acquiring title.⁴⁰² Review of the statutory history supported the trial court’s conclusion that “appropriation” meant the time when the condemning authority took possession.⁴⁰³ Moreover, the court noted that this situation was similar to an inverse condemnation situation when calculating damages.⁴⁰⁴ Consequently, the court affirmed the circuit

395. *Id.* (citing *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. 1st Dist. Ct. App. 1984); *Fields v. Nichols*, 482 So. 2d 410, 414 (Fla. 5th Dist. Ct. App. 1985)).

396. *Id.* at 713.

397. 709 So. 2d 124 (Fla. 1st Dist. Ct. App. 1998).

398. *Id.* at 125.

399. *Id.*

400. *Id.*

401. FLA. STAT. § 73.031 (1993).

402. *Basic Energy*, 709 So. 2d at 126.

403. *Id.* at 127.

404. *Id.* at 128.

court's decision to calculate compensation as of the time when the Department first took possession.⁴⁰⁵

City National Bank v. Dade County.⁴⁰⁶ The landowner appealed a jury verdict denying it severance damages on the condemnation of a corner of its land for a road widening project.⁴⁰⁷ The problem was that the land had not yet been developed and was, at the time of the condemnation, being used as an overflow parking lot for a nearby stadium. Years earlier, the landowner had a conceptual site plan prepared showing a retail strip shopping center with out-parcels. The county had rezoned the land from residential use to commercial use, consistent with the site plan.⁴⁰⁸ However, the landowner never proceeded past that point. The landowner had never sought approval for the site plan and had not taken any further steps to implement the plan. At trial, the landowner sought to introduce the site plan into evidence to prove that the condemnation interfered with the plan by reducing the number of out-parcels from four to three or reduce the size of the out-parcels to smaller than normal size, reducing the business value of the mall.⁴⁰⁹ The trial court excluded the conceptual site plan and the Third District Court of Appeal affirmed.⁴¹⁰

The rule is that the amount of damages awarded to a property owner in an eminent domain case is determined by the uses to which the property is then being put or to those which it could reasonably be put.⁴¹¹ “*It is not proper to speculate on what could be done to the land or what might be done to it to make it more valuable and then solicit evidence on what it might be worth with such speculative improvements at some unannounced future date.*”⁴¹² The trial court correctly applied the rule.⁴¹³ The landowner could not have reasonably relied upon the approval of this site plan.⁴¹⁴ Whether this conceptual site plan would ever be approved or implemented was merely speculation.⁴¹⁵ It would not have been proper to base the award on such speculation.⁴¹⁶

Moreover, the fact that the appraiser's report mentioned the conceptual site plan did not open the door to the plan's introduction into evidence. He

405. *Id.* at 126–28.

406. 715 So. 2d 350 (Fla. 3d Dist. Ct. App. 1998).

407. *Id.* at 351.

408. *Id.*

409. *Id.*

410. *Id.* at 352.

411. *City Nat'l Bank*, 715 So. 2d at 352.

412. *Id.* (quoting *Yoder v. Sarasota County*, 81 So. 2d 219, 220–21 (Fla. 1955)).

413. *Id.*

414. *Id.*

415. *Id.*

416. *City Nat'l Bank*, 715 So. 2d at 353.

did not base his appraisal on the conceptual site plan.⁴¹⁷ He merely reported the facts that he had a meeting with the landowner and had analyzed the landowner's concerns which included how the condemnation would affect the plans which the landowner had for the future.⁴¹⁸

*Department of Transportation v. Rogers.*⁴¹⁹ The Department condemned the entire property. At the time of the condemnation, the property was leased to the operator of a restaurant.⁴²⁰ The jury fixed compensation at \$705,000. One of the landowner's appraisers, a self-styled "business appraiser," based his opinion on a residual methodology.⁴²¹ This focused on the sales at the restaurant, and projections of future income, which were significantly above average for the region. The appraiser attributed that to the location.⁴²² The department appealed based on the admission of this testimony and on the theory that the evidence did not support the award. The district court agreed with the department on both points and reversed.⁴²³

Business damages are not part of the full compensation mandated by the *Florida Constitution*.⁴²⁴ Business damages are provided by statute in the case of a partial taking.⁴²⁵ Such statutes granting legislative largess are strictly construed in favor of the state. Since the entire property was taken here, the landowner was not entitled to business damages.⁴²⁶ The district court concluded that the appraisal testimony based on projected sales was, in effect, a calculation of business damages.⁴²⁷ In substance, it was testimony about the value of the business and reflected the degree to which location affected the business's value. The testimony was not about the value of the property itself, so it should not have been admitted.⁴²⁸

As to the final award, the court noted that five appraisers testified at trial.⁴²⁹ The Department's appraisers valued the property at approximately \$314,000. The landowner's appraisers valued the lot at \$450,000 and a new building, to replace the thirty year old building taken, at \$181,000. That total of \$631,000 is far below the \$705,000 the jury awarded.⁴³⁰ "None of

417. *Id.*

418. *Id.*

419. 705 So. 2d 584 (Fla. 5th Dist. Ct. App. 1997).

420. *Id.* at 586.

421. *Id.*

422. *Id.* at 587.

423. *Id.* at 586.

424. *Rogers*, 705 So. 2d at 587.

425. FLA. STAT. § 73.071(3)(b) (1995).

426. *Rogers*, 705 So. 2d at 587-88.

427. *Id.* at 588.

428. *Id.*

429. *Id.*

430. *Id.* at 588-89.

these figures [alone or] in any combination support[ed] the amount awarded."⁴³¹

*Pol v. Pol.*⁴³² As part of the property division in a divorce, the husband agreed to buy the wife's interest in a hotel they owned, but the agreement provided that the wife would receive fifty percent of the profits if the husband sold or transferred ownership within five years.⁴³³ When the hotel was taken in a condemnation action, the wife sought a share of the condemnation proceeds. The trial court held that the husband was not a willing seller and, therefore, reasoned that no sale or transfer had occurred to trigger her right to participate in the profits.⁴³⁴ The Third District Court of Appeal disagreed and reversed.⁴³⁵

Neither "sale" nor "transfer" was necessarily limited to a voluntary transaction. That either could be involuntary was evidenced by the familiar term, "forced sale."⁴³⁶ The rule is that "a court cannot rewrite the clear and unambiguous terms of a voluntary contract."⁴³⁷ Under the unambiguous terms of this contract the wife was entitled to share in this condemnation award.⁴³⁸

*Taylor v. Department of Transportation.*⁴³⁹ The landowner's tract was bisected by a river. Part of his land was taken, so he sought severance damages. He proffered testimony by experts that his remaining land would be devalued by the roadway and bridge that the Department of Transportation was planning to build upstream because the design was flawed.⁴⁴⁰ The general rule is that severance damages are allowed to attach to the remaining property due to use of or activity on the part of the land that has been taken.⁴⁴¹ However, his land was to be used only as a mitigation area. The roadway and bridge were to be built upstream on land that had been taken from others. Invoking the rule, the Department objected to the proffered testimony and the circuit court granted the department's motion in limine to deny severance damages.⁴⁴² The second district, however, reversed.⁴⁴³

431. *Rogers*, 705 So. 2d at 589.

432. 705 So. 2d 51 (Fla. 3d Dist. Ct. App. 1997).

433. *Id.* at 52.

434. *Id.*

435. *Id.* at 53.

436. *Id.*

437. *Pol*, 705 So. 2d at 53.

438. *Id.*

439. 701 So. 2d 610 (Fla. 2d Dist. Ct. App. 1997).

440. *Id.* at 611.

441. *Id.*

442. *Id.*

443. *Id.* at 612.

The general rule is subject to an exception “where the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put.”⁴⁴⁴ In this case, the land was being taken as part of one road and bridge project. Even though the roadway and bridge were not to be located on the land taken from him, the alleged negative effect of the project, according to the proffered testimony, would decrease the value of the parcels the landowner still owned.⁴⁴⁵ Consequently, it was error to exclude that testimony and grant the motion in limine.⁴⁴⁶ A new trial was ordered and the case remanded.⁴⁴⁷

*Night Flight, Inc. v. Tampa-Hillsborough County Expressway Auth.*⁴⁴⁸ Night Flight operated a club on leased premises. Under the terms of the lease, Night Flight had the right to use an adjacent parking lot during certain hours every day. The Authority took the entire building in which the club was located.⁴⁴⁹ Business damages are recoverable by statute in cases where there has been a partial taking.⁴⁵⁰ Night Flight claimed this was a partial taking because it conducted activities like a theme party, a fund raising car wash, an Easter egg hunt, Fourth of July celebrations, a volleyball game, and a birthday party in the adjacent parking lot.⁴⁵¹ The trial judge granted summary judgment against Night Flight, but the district court reversed.⁴⁵²

Under the statute,⁴⁵³ recoverable business damages are limited to reasonable damages to an established business located on the unappropriated land.⁴⁵⁴ Night Flight would have to establish that the activities in the parking lot were authorized by the lease. The most that Night Flight could recover would be lost profits from the activities in the parking lot. Moreover, it would have to prove that its activities in the parking lot were an established and continuing business for a period of at least five years before the taking. However, the record did not preclude recovery in front of a jury, so summary judgment was inappropriate.⁴⁵⁵

444. *Taylor*, 701 So. 2d at 611 (quoting *Lee County v. Exchange Nat'l Bank of Tampa*, 417 So. 2d 268, 269 (Fla. 2d Dist. Ct. App. 1982)).

445. *Id.*

446. *Id.* at 612.

447. *Id.*

448. 702 So. 2d 538 (Fla. 2d Dist. Ct. App. 1997).

449. *Id.* at 538.

450. *Id.* at 539. See FLA. STAT. § 73.017(3)(b) (1991).

451. *Night Flight*, 702 So. 2d at 539.

452. *Id.* at 540.

453. FLA. STAT. § 73.071(3)(b) (1991).

454. *Id.*

455. *Night Flight*, 702 So. 2d at 540.

B. *Inverse Condemnation*

*Associates of Meadow Lake, Inc. v. City of Edgewater.*⁴⁵⁶ When the city built a new park, it lacked a properly functioning storm water management system. Until the problem was corrected, flooding occurred in a residential subdivision. The developer brought this suit for inverse condemnation based on a temporary taking.⁴⁵⁷ The trial court granted summary judgment on the theory that Florida does not provide compensation for temporary takings.⁴⁵⁸ However, the Fifth District Court of Appeal disagreed and vacated the order below.⁴⁵⁹ The court concluded that since the United States Supreme Court decided *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*,⁴⁶⁰ a cause of action for a temporary regulatory taking has been recognized under the United States Constitution.⁴⁶¹ Following suit, the Supreme Court of Florida held that the improper seizure of a truck for a period of two years was compensable as a temporary taking under the *Florida Constitution*.⁴⁶² Consequently, “[i]f substantial periodic flooding occurred and was expected to recur and such flooding denied Associates any reasonable use of its property because Edgewater defectively constructed its project, a cause of action for inverse condemnation does lie.”⁴⁶³

*Coastal Petroleum v. Chiles.*⁴⁶⁴ In 1941, the state signed an oil exploration contract and option to lease. Coastal Petroleum succeeded to the rights of the optionee/lessee in 1947. A dispute arose concerning those rights and the parties reached a settlement in 1976. One part of the settlement was that Coastal would retain a residual royalty for all gas and oil produced from a certain area until the year 2016. However, in 1990, the Governor and Cabinet, sitting as the Board of Trustees of the Internal Development Trust Fund, adopted a policy prohibiting drilling and oil and gas production in the sovereign waters of the state. Likewise, the Florida Legislature passed a statute prohibiting oil and gas leases on Florida’s west coast north of latitude twenty-six degrees. Coastal’s residual royalty area

456. 706 So. 2d 50 (Fla. 5th Dist. Ct. App. 1998).

457. *Id.* at 50.

458. *Hillsborough County v. Gutierrez*, 433 So. 2d 1337 (Fla. 2d Dist. Ct. App. 1983).

459. *Edgewater*, 706 So. 2d at 52.

460. 482 U.S. 304 (1987).

461. *Edgewater*, 706 So. 2d at 52.

462. *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So. 2d 261 (Fla. 1990).

463. *Edgewater*, 706 So. 2d at 52 (citations omitted).

464. 701 So. 2d 619 (Fla. 1st Dist. Ct. App. 1997).

land was in the area covered by the statute.⁴⁶⁵ Since that had the effect of guaranteeing that there would be no oil and gas production from which Coastal could receive royalties, Coastal sued on the theory of inverse condemnation.⁴⁶⁶

After trial without a jury, the circuit court denied recovery and the first district affirmed.⁴⁶⁷ Not every interest obtained from the state rises to the level of a protectable property interest under eminent domain law.⁴⁶⁸ The petitioner here had a right to share in the royalties produced under nonexistent oil and gas leases. Nothing in the settlement agreement explicitly obligated the state to enter into such leases. Any implied covenant of fair dealing which might have been found in a similar agreement between private parties would have to be balanced by the state's obligations under the public trust doctrine to act only in the public interest and the state's obligation to exercise police powers for the public good.⁴⁶⁹ The state's conduct here was to protect the public interest rather than to defeat Coastal's rights to royalties. Nor was there any evidence that the land involved had any potential to produce any oil and gas before the agreement would expire.⁴⁷⁰ Under the circumstances, Coastal's rights were simply too speculative to require compensation under inverse condemnation doctrine.⁴⁷¹

*Gardens Country Club, Inc. v. Palm Beach County.*⁴⁷² When plaintiff bought the land, the county was in the process of actively considering a new comprehensive land use plan. Under the old plan, use was limited to one dwelling per 2.5 acres or one dwelling per two acres in a planned unit development. Under the proposed plan, the area was to be down-zoned to one dwelling per twenty acres. Plaintiff formally applied for certification as a Planned Unit Development ("PUD") under the old plan, but the county commission had directed its staff not to certify any applications for certification that did not comply with the plan then under consideration.⁴⁷³ Plaintiff sued over this denial and eventually won in the district court because the old plan, not yet having been replaced by the enactment of the new one, was still in effect.⁴⁷⁴

465. *Id.* at 622–23.

466. *Id.* at 623.

467. *Id.*

468. *Id.* at 625.

469. *Coastal Petroleum*, 701 So. 2d at 624.

470. *Id.* at 625.

471. *Id.*

472. 712 So. 2d 398 (Fla. 4th Dist. Ct. App. 1998).

473. *Id.* at 400.

474. *Gardens Country Club, Inc. v. Palm Beach County*, 590 So. 2d 488 (Fla. 4th Dist. Ct. App. 1991) (referred to as "Gardens I" by the court to distinguish it from this appeal which the court labeled "Gardens II").

Before the case could be heard on remand, the plaintiff succeeded in having the land annexed by the City of Palm Beach Gardens. The city approved the plaintiff's development plan which the county had refused to consider. Plaintiff then filed a supplemental complaint against the county seeking damages for a temporary taking and violation of the plaintiff's civil rights.⁴⁷⁵

The district court found that the takings claim was ripe for review even though plaintiff had never attempted to get its plan approved under the new comprehensive plan.⁴⁷⁶ The ripeness doctrine has a futility exception and the court concluded this case fit squarely within it.⁴⁷⁷ Any attempt to get approval of one residential unit per two acres under a plan calling for one residential unit per twenty acres would have been futile.⁴⁷⁸ However, there was competent substantial evidence to support the trial court's findings that under the new plan the land still had a significant value at \$3000 per acre.⁴⁷⁹ While this was less than the \$8000 per acre that it would have had under the old plan, the plaintiff had not established that it constituted a taking in light of a reasonable investment backed expectation.⁴⁸⁰

The district court also rejected the civil rights claim under Title 42 section 1983 of the *United States Code*.⁴⁸¹ Such a claim must satisfy a two-prong test: 1) there must be a deprivation of a constitutionally protected interest; and 2) the deprivation must be the result of arbitrary and unreasonable government action.⁴⁸² The right to have its application for certification of its PUD which complied with the existing comprehensive plan was a property right subject to due process protection. However, the county's act was not arbitrary and unreasonable under the circumstances.⁴⁸³ The county was actively considering the new comprehensive plan and it was not unreasonable to avoid approving plans that would be inconsistent with the new plan, even though that proved to be prohibited by the law.⁴⁸⁴

Intracoastal North Condominium Ass'n, Inc. v. Palm Beach County.⁴⁸⁵

The condominium association owned land fronting the Intracoastal Waterway.⁴⁸⁶ At this location, the association operated and owned wooden

475. *Gardens*, 712 So. 2d at 400-01.

476. *Id.* at 401.

477. *Id.*

478. *Id.*

479. *Id.*

480. *Gardens*, 712 So. 2d at 402.

481. *Id.* at 403.

482. *Id.* at 403 (citing 42 U.S.C. § 1983 (1997)).

483. *Gardens*, 712 So. 2d at 403.

484. *Id.* at 403-04.

485. 698 So. 2d 384 (Fla. 4th Dist. Ct. App. 1997).

486. *Intracoastal*, 698 So. 2d at 384.

docks that were used by recreational boaters.⁴⁸⁷ Directly to the north was a bridge over the river.⁴⁸⁸ When the new bridge was built, the channel was widened to make navigation safer on the intracoastal.⁴⁸⁹ However, the channel widening increased the tidal currents along the associations's frontage except during the periods when the tide changed.⁴⁹⁰ These slack periods occurred four times a day and lasted for one-half hour.⁴⁹¹ Only during the slack periods could a recreational boater safely dock or moor at the association's wooden docks. The association claimed that this diminution in its ability to use its docks was a taking for which compensation must be paid. The trial court, however, disagreed and the district court affirmed.⁴⁹²

The district court found itself faced with a case of first impression.⁴⁹³ It concluded that an increase in the speed at which water flowed past riparian land did not constitute a physical invasion or an appropriation of property rights because a riparian landowner's rights to use the water are inherently servient to the public's right to navigation and commerce on the water.⁴⁹⁴ The court noted that this was not a case in which the landowner could claim that the governmental action had rendered the land useless, nor was it a case in which the riparian landowner's access to the water was denied or even substantially diminished.⁴⁹⁵ Consequently, the inverse condemnation action failed.⁴⁹⁶

*Lee County v. Kiesel.*⁴⁹⁷ The landowner bought land on the riverbank and built an expensive home. Later, the county built a bridge that extended at an angle from the adjacent lot across the river so as to obstruct the landowner's view. The bridge was not on any of the landowner's property, and none of the landowner's property was condemned for the bridge construction, but the landowner presented expert testimony that the location of the bridge caused a substantial drop in the value of the property. The trial court granted final judgment to the landowner on the issue of inverse condemnation and the county appealed.⁴⁹⁸

The district court rejected the county's claim that the appropriate test was the one used for regulatory takings, i.e., whether "the bridge

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Intracoastal*, 698 So. 2d at 384.

492. *Id.*

493. *Id.* at 385.

494. *Id.*

495. *Id.*

496. *Intracoastal*, 698 So. 2d at 386.

497. 705 So. 2d 1013 (Fla. 2d Dist. Ct. App. 1998).

498. *Id.* at 1014.

construction substantially ousted them from or deprived them of substantially all beneficial use of their property.”⁴⁹⁹ This was not a regulatory takings case. The owner of shore land along navigable water has “common law riparian rights.”⁵⁰⁰ Florida has long recognized that one of those riparian rights “is the right to an unobstructed view over the water to the channel.”⁵⁰¹ Because navigable waters have irregular paths, no geometric formula governs precisely when activity interferes with that right. The question, to be decided on a case by case basis, is whether the activity, in this case the building of the bridge, “substantially and materially obstruct[s] the land owner’s view to the channel.”⁵⁰² The evidence included testimony by one expert witness that “eighty per cent [sic] of [the] view to the channel was obstructed by [this] bridge.”⁵⁰³ That satisfied the test. Consequently, the district court affirmed the holding that a taking had occurred.⁵⁰⁴

*VLX Properties, Inc. v. Southern States Utilities, Inc.*⁵⁰⁵ Of particular interest in this case was the fact that the mortgagee had made an inverse condemnation claim against the utility that allegedly misused an easement and misused a commonly owned pond. The circuit court held the mortgagee did not have standing, and the mortgagee appealed.⁵⁰⁶ The district court affirmed because in Florida a mortgagee has only a lien on the property and, therefore, is not the landowner.⁵⁰⁷ Under the *Florida Constitution*, compensation is due to only the owner when private property is taken for public use.⁵⁰⁸

This analysis understates the matter. Under the circumstances, this mortgagee was not deprived of any property rights. However, it is conceivable that a mortgagee might be deprived of its security by governmental action so as to have standing to bring an inverse condemnation suit, even though that did not occur in this case.

X. ENVIRONMENTAL LAW

*Jacksonville v. American Environmental Services, Inc.*⁵⁰⁹ The court addressed the lower court “judge’s declaratory statement concerning the

499. *Id.* at 1015.

500. *Id.*

501. *Id.*

502. *Kiesel*, 705 So. 2d at 1016.

503. *Id.*

504. *Id.*

505. 701 So. 2d 391 (Fla. 5th Dist. Ct. App. 1997).

506. *Id.* at 393.

507. *Id.* at 395.

508. *Id.* (citing FLA CONST. art. X, § 6).

509. 699 So. 2d 255 (Fla. 1st Dist. Ct. App. 1997).

applicability and validity of the local certificate of need application ordinances.”⁵¹⁰ This court affirmed the lower court and held American Environmental Services “could not properly be required to obtain a local certificate of need from the City of Jacksonville.”⁵¹¹

“Jacksonville’s CON [Certificate of Need] ordinances, as applied to [American Environmental Services Inc.’s] proposed hazardous waste transfer station . . . conflict[ed] with chapter 403 of the Florida Statutes.”⁵¹² “The Jacksonville ordinances require a determination of local need, and impose a condition that the waste only be of a type generated in Duval County.”⁵¹³

In comparison, chapter 403 of the *Florida Statutes* documents “a statewide need for hazardous waste facilities . . . and contemplate[s] regional . . . facilities for the transfer, storage and treatment of hazardous waste.”⁵¹⁴ The City of Jacksonville cannot prevent the facility by determining lack of local need, even though statutes refer to local assessments of hazardous waste management. Local assessments have the purpose of compiling information for an assessment of need in the state.⁵¹⁵

Local governments cannot enact an ordinance pertaining to the subject of hazardous waste regulation that is more stringent than chapter 403 rules.⁵¹⁶ As per chapter 403, local governments can control the zoning of such hazardous waste and “impose necessary conditions to protect the health, safety, and welfare of their citizens . . . but may not impose an additional obligation to satisfy a test for local need.”⁵¹⁷

*Secret Oaks Owner’s Ass’n v. Department of Environmental Protection.*⁵¹⁸ “[F]inal order of the . . . Department of Environmental Protection . . . den[ied] the Association the right to apply for a permit to construct a dock on sovereignty land.”⁵¹⁹ The Fifth District Court of Appeal concluded that the association had a “sufficient title interest” in the uplands for the purpose of seeking permission to construct a dock and thus, the court reversed the final order.⁵²⁰

510. *Id.* at 256.

511. *Id.*

512. *Id.*

513. *Id.*

514. *American Env’tl.*, 699 So. 2d at 256; *see* FLA. STAT. § 403.7225(8) (1995); FLA. STAT. § 403.7225(7) (1995); FLA. STAT. §. 403.723 (1995).

515. *American Env’tl.*, 699 So. 2d at 256; *see also* FLA. STAT. §. 403.7225 (1995).

516. *American Env’tl.*, 699 So. 2d at 256; *see also* FLA. STAT. §. 403.7225(10) (1995).

517. *American Env’tl.*, 699 So. 2d at 257 (citing *Escambia County v. Trans Pac.*, 584 So. 2d 603, 605 (Fla. 1st Dist. Ct. App. 1991)).

518. 704 So. 2d 702 (Fla. 5th Dist. Ct. App. 1998).

519. *Id.* at 703.

520. *Id.* (citing FLA. ADMIN. CODE ANN. r. 18-21.004(3)(b) (1996)).

This was the third appeal involving the Association and the Parlatos.⁵²¹ This discussion pertains solely to the last appeal. The association through Environmental Services, Inc. filed an application with the Department of Environmental Protection ("DEP") for the permits needed to construct the dock.⁵²² This was the issue of the prior appeal. The application sought a dredge fill permit and permission from the State, as owner of the submerged lands, to construct such dock. Almost a year later, the DEP denied the application and stated that the holder of an easement does not have sufficient title interest to make an application for activities pertaining to submerged lands.⁵²³

In return, Secret Oaks requested a formal hearing. "[T]he hearing officer concluded that there were no material issues of fact and ordered the case back to the agency for an informal hearing."⁵²⁴ At the informal hearing, the Director stated the issue as "whether the Association, as the holder of an easement, is among the class of persons who may file an application to conduct activities on state-owned sovereign submerged lands."⁵²⁵ The Director issued a lengthy order regarding such issue. The DEP framed the issue as follows:

[W]hether the Association, as the holder of recorded contractual rights to construct, maintain and use all docks on lot 10, and, concomitantly, to limit the rights of any owner or lessee of lot 10, is precluded from applying for a permit to construct a dock because the rule requirement of "sufficient title interest in uplands for the intended purpose" means the appellant must have a possessory interest in the upland property.⁵²⁶

In this case, the Owners' Agreement and the recorded easement on lot ten provided that lot owners in the Secret Oaks Subdivision were granted pedestrian access to the St. John's River and to any dock that is situated or may later be situated thereon.⁵²⁷ The association was obligated to improve, repair, or maintain the easement.⁵²⁸

The DEP relies on the definition of "title interest" as set forth "in *Black's Law Dictionary*: Title is defined as, 'the means whereby the owner of lands has the just possession of his property. The union of all the

521. *Id.*

522. *Id.* at 704.

523. *Secret Oaks*, 704 So. 2d at 704.

524. *Id.* at 705.

525. *Id.*

526. *Id.* at 706.

527. *Id.*

528. *Secret Oaks*, 704 So. 2d at 706.

elements which constitute ownership. Full independent and fee ownership. The right to or ownership in land.”⁵²⁹ Just because title can be the means to receive right of possession, that does not dictate that all possessory interests are title interests.⁵³⁰ This case clearly shows “that the Association has recorded contractual rights in lot 10 sufficient to grant it the right to build the dock.”⁵³¹ If the language “sufficient title interest in the uplands” meant only “right of possession,” the agency would have said so.⁵³²

In addition, the DEP “offers no reason why a possessory interest is the only possible ‘title interest’ . . . [or] why a ‘possessory’ interest would be the minimum ‘sufficient title interest’ for dock-building permit application purposes.”⁵³³ This court viewed the “[A]gency’s interpretation [as] illogical and unreasonable.”⁵³⁴ To interpret “title interest” as meaning “right of possession” creates irrational distinctions.⁵³⁵

XI. HOMEOWNERS’ ASSOCIATIONS

Legislative changes to chapter 617 of the *Florida Statutes* include, but are not limited to, the following:

Section 617.303 of the *Florida Statutes* has a new subsection (8).⁵³⁶ This provides that “[a]ll association funds held by a developer shall be maintained separately in the association’s name.”⁵³⁷ There shall be no comingling of reserve and operating funds prior to turnover.⁵³⁸ However, “the association may jointly invest reserve funds; [even though the] invested funds must be accounted for separately.”⁵³⁹

Section 617.307 of the *Florida Statutes* has a new subsection (3).⁵⁴⁰ This subsection is designed to provide for transition of homeowners’ association control in a community.⁵⁴¹ Under this subsection, such shall occur when “[m]embers other than the developer are entitled to elect at least

529. *Id.* at 707 (quoting BLACK’S LAW DICTIONARY 1331 (5th ed. 1979)).

530. *Id.*

531. *Id.*

532. *Id.*

533. *Secret Oaks*, 704 So. 2d at 707.

534. *Id.* at 708.

535. *Id.* at 707.

536. Act of May 27, 1998, ch. 98-261, §1, 1998 Fla. Laws 2277, 2278 (to be codified at FLA. STAT. § 617.303(8)).

537. *Id.*

538. *Id.*

539. *Id.*

540. Act of May 27, 1998, ch. 98-261, §2, 1998 Fla. Laws 2278, 2278 (to be codified at FLA. STAT. § 617.307(3)).

541. *Id.*

a majority of the board of directors of the homeowners' association."⁵⁴²
 "The developer shall, at the developer's expense, within no more than 90 days deliver the [prescribed] documents to the board."⁵⁴³

Section 617.3075 of the *Florida Statutes* has been enacted to create a list of prohibitive clauses to be found in homeowners' association documents.⁵⁴⁴ Subsection (1) and its subparts prohibit provisions to the effect that the developer has the unilateral ability and right to make changes in the homeowners' association documents after the transition of the homeowners' association control in a community to the nondeveloper members; that the association is restricted from filing a lawsuit against the developer; and that the developer is entitled to cast votes in amount that exceeds one vote per residential lot after the transition to the association.⁵⁴⁵ Subparagraph (2) declares the prohibited position stated above as unenforceable as a matter of public policy where those clauses were created on or after the effective date of that section, October 1, 1998.⁵⁴⁶

XII. INSURANCE

*Fassi v. American Fire & Casualty Co.*⁵⁴⁷ The Fifth District Court of Appeal affirmed the final judgment denying Fassi's claim for fire damages.⁵⁴⁸ Fassi's home was destroyed by fire and he filed a claim for damages under his homeowners' policy.⁵⁴⁹ American Fire and Casualty was suspicious as to the cause of the fire and wanted Fassi to submit to examination under oath and provide a sworn claim of loss. The examination was never conducted since Fassi failed to contact the attorneys involved. In addition, Fassi still failed to respond after American Fire and Casualty followed up with a letter. The law firm scheduled the examination on behalf of American. In return, Fassi refused to submit to the sworn examination because of the threat of criminal proceedings.⁵⁵⁰

A claimant cannot recover fire losses under an insurance policy and refuse to comply with policy requirements to submit to sworn examination because criminal charges related to the cause of fire may be pending against

542. *Id.*

543. Act of May 27, 1998, ch. 98-261, §2, 1998 Fla. Laws 2278, 2278 (to be codified at FLA. STAT. § 617.307(3)).

544. FLA. STAT. § 617.3075 (1997).

545. *Id.* § 617.3075(1).

546. *Id.* § 617.3075(2).

547. 700 So. 2d 51 (Fla. 5th Dist. Ct. App. 1997).

548. *Id.* at 52.

549. *Id.*

550. *Id.*

him.⁵⁵¹ So, the examination was again rescheduled and, once again, Fassi failed to appear or respond.⁵⁵² Three months later, Fassi wished to have the examination conducted but American responded that it was too late. The trial court granted summary judgment after Fassi filed suit on the policy.⁵⁵³

The appellate court agreed with American's contentions.⁵⁵⁴ Fassi was given one last chance to explain the refusal to cooperate, and failure to respond would lead to denial of the claim.⁵⁵⁵ Since Fassi did not explain, no further notice was required on American Fire's behalf. The final letter to Fassi was only an opportunity to explain, not a chance to participate. The court concluded that five opportunities to participate were enough.⁵⁵⁶

XIII. LANDLORD AND TENANT

Bell v. Kornblatt.⁵⁵⁷ The circuit court, sitting as an appellate court, had affirmed the county court's final judgment of eviction based upon failure to pay the rent.⁵⁵⁸ The tenant sought certiorari review in the Fourth District Court of Appeal on the theory that the county court lacked subject matter jurisdiction because the three-day notice the tenant received did not comply with the statute.⁵⁵⁹ A number of county and circuit court decisions supported that argument,⁵⁶⁰ but the district court rejected it concluding that compliance with the statute was merely a condition precedent to eviction.⁵⁶¹ The court reasoned that under earlier versions of the statute, the tenant could waive its right to a three-day notice, and such ability to waive would be inconsistent

551. *Id.*

552. *Fassi*, 700 So. 2d at 52.

553. *Id.* at 53.

554. *Id.*

555. *Id.*

556. *Id.*

557. 705 So. 2d 113 (Fla. 4th Dist. Ct. App. 1998).

558. *Id.* at 113-14.

559. *Id.* (citing FLA. STAT. § 83.56(3) (1995)).

560. *Id.* (citing *Cook v. Arrowhead Mobile Home Community*, 50 Fla. Supp. 2d 26 (3d Cir. Ct. 1991); *Johnson v. Kalliainen*, 16 Fla. Supp. 2d 86 (15th Cir. Ct. 1986); *Archer v. Jackson*, 2 Fla. L. Weekly Supp. 225 (Broward Cty. Ct. 1994); *Shapiro v. Puche*, 1 Fla. L. Weekly Supp. 409 (Broward Cty. Ct. 1993); *Pearson v. Sims*, 1 Fla. L. Weekly Supp. 408 (Broward Cty. Ct. 1993); *Pappas v. Kartub*, 2 Fla. L. Weekly Supp. 59 (Broward Cty. Ct. 1993); *Broward Gardens Assocs., Ltd. v. Walker*, 1 Fla. L. Weekly Supp. 155 (Broward Cty. Ct. 1992); *Marcum Management Co. v. Phillips*, 40 Fla. Supp. 2d 198 (Broward Cty. Ct. 1990); *Garcia v. Ruiz*, 50 Fla. Supp. 2d 176 (Dade Cty. Ct. 1991); *Labrada v. Barrios*, 44 Fla. Supp. 2d 140 (Dade Cty. Ct. 1990); *Metropolitan Dade County v. Dansey*, 43 Fla. Supp. 2d 169 (Dade Cty. Ct. 1990); and *Kosta v. Bernstein*, 4 Fla. L. Weekly Supp. 480 (Sarasota Cty. Ct. 1996)).

561. *Bell*, 705 So. 2d at 114.

with the court being deprived of subject matter jurisdiction.⁵⁶² As this appears to be the only district court decision in the state, it is binding throughout the state and has the effect, at least for the time being, of overruling all inconsistent circuit and county court decisions.

Charlemagne v. Francis.⁵⁶³ Injured by a fall allegedly caused by a defective carpet, the roommate of the tenant sued the landlord.⁵⁶⁴ The tenant testified that she had repeatedly notified the landlord about the problems with the carpet. However, the apartment manager testified that he had not been notified. Moreover, he testified that he never saw any problems with the carpet.⁵⁶⁵ The person who cleaned the carpet before the tenancy began also testified that the carpet had no defects.⁵⁶⁶ The landlord, thereafter, conjectured that any defects in the carpet, if they existed at all, might have been caused by the tenant's furniture movers. Over the tenant's objection, the landlord got a jury instruction that, *inter alia*, "the landlord [is] not responsible to the tenant . . . for [defects] created or caused by . . . person on the premises with the tenant's consent."⁵⁶⁷ The jury returned a verdict for the landlord and the tenant appealed.⁵⁶⁸

The fourth district reversed, finding the instruction improper on two grounds.⁵⁶⁹ First, the instruction about the landlord's responsibility to the tenant under section 83.51 of the *Florida Statutes* relates to the statutory warranty of the premises by the landlord to the tenant.⁵⁷⁰ It has no applicability to an action for common law negligence.⁵⁷¹ The only defense would be comparative negligence of the defendant or the superseding negligence of others.⁵⁷² Second, there was no testimony that the defect might have been caused by third parties such as furniture movers.⁵⁷³

*Comptech International, Inc. v. Milam Commerce Park, Ltd.*⁵⁷⁴ This involved a commercial lease. Pursuant to an agreement to lease additional space, the parties agreed that the landlord would build offices in part of the

562. *Id.*

563. 700 So. 2d 157 (Fla. 4th Dist. Ct. App. 1997).

564. *Id.* at 158.

565. *Id.* at 158-59.

566. *Id.* at 159.

567. *Id.* at 158.

568. *Charlemagne*, 700 So. 2d at 158.

569. *Id.* at 159.

570. *Id.* at 160.

571. *Id.*

572. *Id.*

573. *Charlemagne*, 700 So. 2d at 160.

574. 711 So. 2d 1255 (Fla. 3d Dist. Ct. App. 1998), *replacing original opinion*, 22 Fla. L. Weekly D2192 (Fla. 3d Dist. Ct. App., Sep. 17, 1997).

original space.⁵⁷⁵ The tenant, claiming its office space and computers were damaged by the unworkmanlike and untimely construction of the landlord's office space, brought suit against the landlord based on the following theories: 1) negligent construction; 2) violation of the building code; 3) rent had been illegally collected; and 4) negligence in the selection of contractors. The first three were dismissed with prejudice, and the court granted summary judgment for the landlord on the last.⁵⁷⁶ The tenant brought this appeal, which turned on the question of whether the tenant's recovery on the tort theories was barred by the economic loss rule.⁵⁷⁷

The economic loss rule draws the line between recovery in tort and in contract. It provides that tort recovery is prohibited "when a product damages itself, causing economic injury, but does not cause personal injury or damage to any property other than itself."⁵⁷⁸ Thus, if the defective product damages other property, the economic loss rule does not bar recovery. However, the first question here was whether the tenant's office space and computers were "'other' property." The majority, in an extensive opinion written by Judge Gersten, thought not.⁵⁷⁹ Judge Cope, in an equally extensive dissent, reached the contrary conclusion.⁵⁸⁰ It is a close call. Eventually it will have to be resolved by the Supreme Court of Florida, but until that time, tenants would be well advised to provide by contract for protection from this type of harm.

The majority and the dissent also disagreed on the indemnity clause.⁵⁸¹ It provided that the tenant would indemnify the landlord for all claims of every kind arising from the use or occupancy of the premises. The majority found this language supported its conclusion that the tenant should be limited to contract damages because the parties negotiated the allocation of risk and agreed to place it on the tenant.⁵⁸² In contrast, the dissent focused on the omission of specific language of an intent to indemnify the landlord against its own negligence.⁵⁸³ Such language would be necessary to overcome the distaste for agreements that protect a party from its own wrongful conduct.⁵⁸⁴ Thus, it should not protect this landlord.⁵⁸⁵

575. *Id.* at 1256–57.

576. *Id.* at 1257.

577. *Id.*

578. *Casa Clara Condominium Ass'n. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993).

579. *Comptech Int'l*, 711 So. 2d at 1256–63.

580. *Id.* at 1263–68 (Cope, J., dissenting).

581. *Id.* at 1261, 1265.

582. *Id.* at 1261.

583. *Id.* at 1265. (Cope, J., dissenting).

584. *Comptech Int'l*, 711 So. 2d at 1265.

585. *Id.*

There was also disagreement as to whether the economic loss rule barred recovery for the building code violations.⁵⁸⁶ Section 553.84 of the *Florida Statutes* provides: “Notwithstanding any other remedies available, any person or party . . . damaged as a result of a violation [of the Florida Building Codes Act] has a cause of action [in any court of competent jurisdiction] against the [person or] party who committed the violation.”⁵⁸⁷

The dissent interpreted the phrase, “[n]otwithstanding any other remedies” available as creating an exception to the economic loss rule because the rule turns on the availability of the contract remedy.⁵⁸⁸ The majority, however, pointed out that the economic loss rule has been applied to bar statutory tort actions in the same way that it bars common law tort actions.⁵⁸⁹ Unfortunately, the statutory phrase is capable of both interpretations, and only a trip to the supreme court or legislative clarification will settle the question.

*Markell v. Mi Casa, Ltd.*⁵⁹⁰ The tenant sued after being injured when she tripped on the rubber weather stripping on the threshold of her apartment’s front door.⁵⁹¹ Unfortunately, the building had been sold only two weeks before the accident.⁵⁹² In response to the present and former landlords’ motions for summary judgment, she produced the affidavit of an expert in risk analysis. He stated that: 1) the weather stripping was improperly designed, installed and maintained; 2) it constituted a “hidden trap” to someone using that doorway; 3) it would not necessarily have been visible to a person entering or leaving the apartment; 4) it would have been easily noticed by a “minimally experienced maintenance or repair individual during the normal course of inspection at any time after the initial installation;” and 5) the weather stripping area was not regularly inspected.⁵⁹³ The trial court granted summary judgment against the tenant.⁵⁹⁴ She appealed, and the Fourth District Court of Appeal reversed.⁵⁹⁵

Two rules were applicable regarding the landlord’s duty in the absence of a tenant waiver. First, “the owner of a residential dwelling unit, who leases it to a tenant for residential purposes, has a duty to reasonably inspect the premises before allowing the tenant to take possession, and to make therepairs necessary to transfer a reasonably safe dwelling unit to the

586. *Id.* at 1257, 66–68.

587. *Id.* at 1266 (quoting FLA. STAT. § 553.84 (1989)).

588. *Id.*

589. *Comptech Int’l*, 711 So. 2d at 1258.

590. 711 So. 2d 583 (Fla. 4th Dist. Ct. App. 1998).

591. *Id.* at 584.

592. *Id.*

593. *Id.* at 585.

594. *Id.* at 584.

595. *Markell*, 711 So. 2d at 586.

tenant.”⁵⁹⁶ Secondly, once notified of a dangerous defect, the landlord has a continuing duty to exercise reasonable care to make repairs.⁵⁹⁷ The expert’s affidavit left questions of fact as to how these rules should apply to this case. Was the property in an unreasonably dangerous condition? Had it been delivered that way, or had it become dangerous after delivery? Was the prior or new landlord on constructive notice because it should have known? Was the tenant also negligent? If so, how would the parties’ negligence be assessed for comparative negligence analysis purposes? In light of the unanswered questions, summary judgment should not have been granted.⁵⁹⁸

Chief Judge Stone, however, dissented.⁵⁹⁹ He saw no evidence that the landlords had notice of the dangerous condition or that they might have been on constructive notice.⁶⁰⁰ Without notice, they could not be held liable under the above rules.⁶⁰¹

*Morris Investment Partnership v. Figueroa.*⁶⁰² The tenant leased space for an automobile repair shop. Unfortunately, the space did not have enough off-street parking to satisfy the zoning ordinance, so the tenant could not get an occupational license. That did not stop the tenant from opening for business while the landlord tried to solve the zoning problem. After the landlord’s efforts failed, the tenant vacated the premises. The landlord sued for unpaid rent from the period tenant was in possession, accelerated rent, and compensation for the expenses incurred in the zoning dispute. The trial court, following a nonjury trial, granted judgment for the tenant on all counts and declared the lease to be null and void.⁶⁰³ The district court reversed.⁶⁰⁴

The district court reasoned that declaring the lease to be null and void was inappropriate because the tenant had never sought rescission.⁶⁰⁵ Furthermore, tenant’s remaining in possession and opening for business would have been a bar to rescission anyway, and remaining in possession would have prevented tenant from raising constructive eviction as a defense to the rent suit.⁶⁰⁶ Therefore, the landlord was entitled to rent for the period when the tenant was in possession of the premises.⁶⁰⁷ But why only for the time tenant was in possession?

596. *Id.* at 585 (quoting *Mansur v. Eubanks*, 401 So. 2d 1328, 1329–30 (Fla. 1981)).

597. *Id.*

598. *Id.* at 586.

599. *Id.* (Stone, J., dissenting).

600. *Markell*, 711 So. 2d at 586.

601. *Id.*

602. 698 So. 2d 288 (Fla. 3d Dist. Ct. App. 1997).

603. *Id.* at 290.

604. *Id.*

605. *Id.*

606. *Id.*

607. *Figueroa*, 698 So. 2d at 290–91.

Taking the court's reasoning to its logical conclusion, the landlord should have recovered the accelerated rent. The lease had a rent acceleration clause. The lease had not been rescinded. The tenant vacated while the lease was still in effect, so the landlord could exercise the acceleration clause. When the tenant later vacated, it was too late because the accelerated rent was already due; so the tenant could not raise constructive eviction as a defense to a suit for accelerated rent. However, the court failed to explain why the landlord did not win on this point as well.

Allowing rent only until the tenant vacated is consistent with an application of the construction eviction defense, i.e., the landlord was entitled to rent only until the tenant was evicted, constructively, by the landlord and not thereafter.⁶⁰⁸ However, that is inconsistent with what the court said. Perhaps the court was basing its conclusion on failure of consideration or on the doctrine of commercial frustration. Perhaps the court was basing its opinion on an application of the doctrine of mitigation of damages. Perhaps the court was granting the landlord compensation for the use and occupancy of the land, a form of restitution damages, but that would only make sense if the court granted rescission or found the lease to be void *ab initio*. Perhaps . . .

Rodriguez v. Brutus.⁶⁰⁹ On the lot in question were a house and a shed.⁶¹⁰ The tenants had an oral lease for the house that specifically excluded the shed. The tenants were specifically warned that the shed contained a working power saw and that they were not to enter. In turn, the tenants specifically warned their daughter that she was forbidden from entering the shed. There was no problem until the daughter took a wood shop class. Although she had been warned about the dangers of this type of saw by her teacher, she decided to try out the saw in the shed. As there was no door, she had no trouble entering. The experiment went badly, and she lost part of her thumb.⁶¹¹ The jury held the landlord eighty percent negligent and it entered a final judgment of \$300,000 for the tenants.⁶¹² On appeal, the Third District Court of Appeal reversed.⁶¹³

The critical point was that the shed was not part of the leased premises.⁶¹⁴ Consequently, the daughter was in the shed as either an uninvited licensee or as a trespasser. If she was an uninvited licensee, the landlord's duty to her was to refrain from wanton negligence or willful

608. *Id.* at 290.

609. 702 So. 2d 1302 (Fla. 3d Dist. Ct. App. 1997).

610. *Id.* at 1303.

611. *Id.*

612. *Id.*

613. *Id.*

614. *Rodriguez*, 702 So. 2d at 1303.

misconduct.⁶¹⁵ If she were a trespasser, the landlords' only duty to her was to refrain from committing willful or wanton injury so long as the attractive nuisance doctrine does not apply.⁶¹⁶ Unfortunately, the court failed to reveal why the saw was not an attractive nuisance. However, the daughter had been warned of the danger and admittedly was well aware of it, so the landlord had not breached this duty to her. Consequently, they could not be held liable.⁶¹⁷

*Schroeder v. Johnson.*⁶¹⁸ The lease provided the tenant with the right "to extend this lease for successive five (5) year periods," but the lease was silent on how many renewals would be allowed.⁶¹⁹ The trial judge, after hearing parol evidence, interpreted this to mean that the tenant had the right to renew as long as she wished.⁶²⁰ The district court reversed.⁶²¹ It acknowledged that the use of the plural word "periods" indicated more than one renewal, but that was tempered by the policy against perpetual leases.⁶²² The traditional rule is that a court should not find a lease to be perpetual in the absence of unambiguous language indicating that intent, and that language was missing from this lease. Therefore, the district court concluded that the lease gave the tenant the fewest possible number of plural renewals; i.e., two renewals.⁶²³

Judge W. Sharp strongly dissented.⁶²⁴ In this case, the lease provision was not clear.⁶²⁵ The trial judge heard the parol evidence, and evidence in the record supported his conclusions as to the parties' intent.⁶²⁶ The policy against perpetual renewals is an ancient one that has produced strained constructions. It has outlived its original purpose and should not be used to trump the intent of the parties, particularly because interpreting the lease to provide a human tenant with the right to renew during her life would be far less than perpetual.

*Serchay v. NTS Fort Lauderdale Office Joint Venture.*⁶²⁷ The office space was leased to Lane, P.A. and Serchay, P.A. Lane, P.A. was the law firm of Paul Lane. Serchay, P.A. was the accounting firm of Alan Serchay.

615. *Id.*

616. *Id.* at 1304.

617. *Id.* at 1303-04.

618. 696 So. 2d 498 (Fla. 5th Dist. Ct. App. 1997).

619. *Id.*

620. *Id.* at 499.

621. *Id.*

622. *Id.* at 500.

623. *Schroeder*, 696 So. 2d at 499.

624. *Id.* at 500-03 (Sharp, J., dissenting).

625. *Id.* at 503.

626. *Id.*

627. 707 So. 2d 958 (Fla. 4th Dist. Ct. App. 1998).

Lane, P.A. subleased space to Coven, P.A. Both corporate entities were dissolved for failure to file annual reports. Later, Coven and Lane formed a new firm, Coven & Lane, P.A., and Alan Serchay formed a new accounting firm, A. Serchay Accounting Services, P.A.⁶²⁸

After the tenants vacated the premises and stopped paying rent, the landlord brought this action for unpaid rent. The tenants reinstated the defunct corporations to defend on the theory of constructive eviction. Following trial, the jury rendered a verdict in favor of the landlord against the defendants, including Coven & Lane, P.A. and A. Serchay Accounting Services, P.A.⁶²⁹ The district court affirmed the judgment against A. Serchay Accounting Services, P.A., but reversed the decision against Coven & Lane.⁶³⁰

Since these corporations were not parties to the written lease, they could be held liable for the unpaid rent only if they were successor entities or if they had *de facto* merged with the tenant entities.⁶³¹ A successor entity “is merely a continuation or reincarnation of the earlier entity under a different name” or in a different form.⁶³² The key element is “common identity of officers, directors and stockholders” between the original and successor entity.⁶³³ Similarly, to find a *de facto* merger requires “continuity of the selling corporation evidenced by the same management, personnel, assets . . . physical location . . . stockholders, accomplished by paying for the acquired corporation with shares of stock; a dissolution of the selling corporation; and assumption of the liabilities.”⁶³⁴

As to the accounting firm, there appeared to be no question that the essentials of the earlier and later firms were the same. However, there was insufficient evidence that the new law firm, consisting of two lawyers, was a successor to the earlier solo practice of one partner, or that there was a *de facto* merger of the earlier solo practice into the new partnership. Although there was evidence that the new firm used the space of the earlier solo practice and some of the equipment and personnel, it was not enough in that the new firm had a new officer and shareholder, Coven, and there was no evidence that it had acquired the assets and liabilities of the solo practice.⁶³⁵

628. *Id.* at 959.

629. *Id.* at 959.

630. *Id.* at 960.

631. *Id.*

632. *Serchay*, 707 So. 2d at 960 (quoting *Munim v. Azar*, 648 So. 2d 145, 154 (Fla. 4th Dist. Ct. App. 1994)).

633. *Id.* (quoting *Munim v. Azar*, 648 So. 2d 145, 154 (Fla. 4th Dist. Ct. App. 1994)).

634. *Id.* (quoting *Munim v. Azar*, 648 So. 2d 145, 153–54 (Fla. 4th Dist. Ct. App. 1994)).

635. *Id.*

*Siegel v. Deerwood Place Corp.*⁶³⁶ The tenants brought suit for injuries one suffered from a fall down the stairs. They produced the affidavit of an expert that construction staples were found in the area where the victim allegedly tripped on the stairway carpeting. They claimed that such staples led to the inference that the carpet was improperly installed or repaired and that there was a presumption that the landlord knew of the defect. The trial court, however, granted summary judgment to the landlord, and the Third District Court of Appeal affirmed.⁶³⁷

The rule is that, absent a waiver, the landlord has a “continuing duty to exercise reasonable care to repair dangerous defective conditions” of which he has notice.⁶³⁸ The mere existence of the construction staples alone was not enough to establish that the landlord was on notice of the defect or had attempted to conceal it. There was no evidence to establish when the staples were installed, who installed them, or how long they were installed before the accident. Consequently, the district court affirmed the trial court’s granting of summary judgment.⁶³⁹

XIV. LIENS

*Morse Diesel International v. 2000 Island Boulevard, Inc.*⁶⁴⁰ The Third District Court of Appeal reversed a peremptory writ of mandamus authorizing release of a cash bond in favor of 2000 Williams Island (“Williams”), owner and developer of a 280 unit highrise condominium project.⁶⁴¹ The court remanded with directions that Williams redeposit disbursed proceeds from the cash bond pending further orders.⁶⁴²

Morse Diesel sued Williams Island “for money due under a construction contract.”⁶⁴³ The parties entered into an agreement that provided Morse Diesel with a lien on a pool of twenty condo units to secure the claim. Morse agreed to release its lien rights as to the other units.⁶⁴⁴ “Williams . . . posted a bond on a prorated basis as to five of the units.”⁶⁴⁵ Morse asserted additional claims when another dispute arose between the parties. Williams later “filed an emergency motion for the clerk to transfer

636. 701 So. 2d 1190 (Fla. 3d Dist. Ct. App. 1997).

637. *Id.* at 1191.

638. *Id.* (quoting *Mansur v. Eubanks*, 401 So. 2d 1328, 1330 (Fla. 1981)).

639. *Id.* at 1192.

640. 698 So. 2d 309 (Fla. 3d Dist. Ct. App. 1997).

641. *Id.* at 310.

642. *Id.* at 313.

643. *Id.* at 310.

644. *Id.* at 311.

645. *Morse Diesel*, 698 So. 2d at 311.

all of the [existing] liens to its cash bond and to reduce Morse Diesel's amended claim of lien . . . when certain subcontractors were paid."⁶⁴⁶

The trial court allowed the lien transfer to a cash bond but denied Williams' request for reduction of the bond.⁶⁴⁷ Since Williams failed to receive the bond reduction, it filed for a writ of mandamus directing the clerk to disburse the cash bond as per section 713.24(4) of the *Florida Statutes*.⁶⁴⁸ The lower court directed the clerk to release the cash bond.⁶⁴⁹ On appeal, the court concluded the following:

the lower court abused its discretion in granting the writ of mandamus where (1) the record did not disclose Williams Island's clear legal right to the same in that a genuine dispute existed as to whether Morse Diesel's claim of lien had expired by operation of law; (2) Williams Island had another adequate legal remedy to procure the release of these funds; and (3) Morse Diesel was an interested party to the mandamus proceeding who had not been brought before the court.⁶⁵⁰

To receive a writ of mandamus, "petitioner must demonstrate a clear legal right to the performance of a ministerial duty by the respondent and that no other adequate remedy exists."⁶⁵¹ The court found that "Williams Island did not establish a clear legal right to [a] mandamus where the clerk's answer . . . and defenses created a genuine issue of fact about whether Morse[s] . . . claim of lien had expired and/or been satisfied."⁶⁵² Moreover, "Williams did not allege in its complaint that it had no adequate remedy at law."⁶⁵³ Just because Williams was unsuccessful in getting the bond reduced did not signify such remedies were inadequate.⁶⁵⁴

The court also held that the writ should not have been entered when "Morse Diesel was an interested party . . . but was given no notice and opportunity to be heard on the issues."⁶⁵⁵ In addition, it was an abuse of discretion to grant the writ to release the cash bond when the funds were in

646. *Id.*

647. *Id.*

648. *Id.* (citing FLA. STAT. § 713.24(4) (1997)).

649. *Id.* at 312.

650. *Morse Diesel*, 698 So. 2d at 312.

651. *Id.* See also *Pino v. District Court of Appeal*, 604 So. 2d 1232, 1233 (Fla. 1992).

652. *Morse Diesel*, 698 So. 2d at 312.

653. *Id.*

654. *Id.*

655. *Id.*

dispute between the parties in another pending action.⁶⁵⁶ The lower court should have required Williams Island to redeposit disbursed proceeds of the cash bond.⁶⁵⁷

*Robinson v. Sterling Door & Window Co.*⁶⁵⁸ The issue before the court was “whether the trial court erred when applying section 55.10(1) Florida Statutes, to Appellee [Sterling’s] judgment lien on Appellant [Robinson’s] realty.”⁶⁵⁹

The trial court determined that Sterling Door had a valid lien on Robinson’s property.⁶⁶⁰ Robinson claimed the lien was defective because Sterling’s address was lacking as required per section 55.10(1) of the *Florida Statutes*.⁶⁶¹ The trial court held the statute was satisfied since the names of the attorneys involved were included in the judgment lien.⁶⁶²

Section 55.10 of the *Florida Statutes* specifically recognized: “[a] judgment, order, or decree does not become a lien on real estate unless the address of the person who has a lien as a result of such judgment . . . is contained in the judgment.”⁶⁶³ Since courts must give effect to statutory language, the appellee’s address must be on the judgment lien.⁶⁶⁴ Without the address, there was no lien on Robinson’s real estate.

*Wolf v. Spariosu.*⁶⁶⁵ This court reversed final summary judgment of foreclosure which declared the Wolf Group’s lien to be superior to the interests of all appellees except Maysonet Landscape Company’s claim of lien.⁶⁶⁶ The court agreed with Wolf Group that its mortgage gained priority over Maysonet through the doctrine of equitable subrogation or conventional subrogation.⁶⁶⁷

Maysonet and Spariosu entered into a contract for landscaping materials and services for the property.⁶⁶⁸ Maysonet filed and duly recorded a claim of lien. At that time, two existing mortgages were recorded on the property.⁶⁶⁹ A few months later, Spariosu executed a note and mortgage to City First

656. *Id.* at 313.

657. *Morse Diesel*, 698 So. 2d at 313.

658. 698 So. 2d 570 (Fla. 1st Dist. Ct. App. 1997).

659. *Id.* at 571.

660. *Id.*

661. *Id.* See also FLA. STAT. § 55.10 (1997).

662. *Id.*

663. *Robinson*, 698 So. 2d at 571 (emphasis omitted) (quoting FLA. STAT. § 55.10 (1997)).

664. *Id.*

665. 706 So. 2d 881 (Fla. 3d Dist. Ct. App. 1998).

666. *Id.* at 882.

667. *Id.*

668. *Id.* at 882.

669. *Id.*

Mortgage Corp. Two prerequisites existed for the loan to Spariosu. First, the proceeds from City First's loan "were to be used . . . for the purpose of satisfying the two previously recorded mortgages."⁶⁷⁰ Second, "City First's mortgage would be substituted in the place of [the] two prior mortgages."⁶⁷¹ City's mortgage was later assigned to the Wolf Group.

"Maysonet sued the borrowers . . . and recorded its notice of lis pendens."⁶⁷² When the borrowers defaulted on City's loan, Wolf Group sought to foreclose the mortgage, and Maysonet was later named as a defendant in the complaint. "The lower court . . . entered a final judgment of mortgage foreclosure finding the Wolf Group's interest . . . superior to the interests of all defendants except Maysonet."⁶⁷³ Subrogation is defined as:

"substitution of one person to the position of another with reference to a legal claim or right Th[is] doctrine is generally invoked when one person has satisfied the obligations of another and equity compels that the person discharging the debt stand in the shoes of the person whose claim has been discharged, thereby succeeding to the rights and priorities of the original creditor."⁶⁷⁴

This court found that "under the doctrine of conventional subrogation, the Wolf Group's lien should have been . . . superior to Maysonet's lien."⁶⁷⁵ Evidence showed that "the borrowers had an agreement with . . . City First for City First's mortgage to be substituted in the place of the two prior . . . satisfied mortgages."⁶⁷⁶ "Conventional subrogation" is defined by the following:

"[It] arises by virtue of an agreement, express or implied, that a third person or one having no previous interest in the matter involved shall, upon discharging an obligation or paying a debt, be substituted in the place of the creditor with respect to such rights, remedies, or securities as [the creditor] may have against the debtor."⁶⁷⁷

670. *Wolf*, 706 So. 2d at 882.

671. *Id.*

672. *Id.*

673. *Id.* at 883.

674. *Id.* (citation omitted) (quoting *Eastern Nat'l Bank v. Glendale Fed. Savs. & Loan Ass'n*, 508 So. 2d 1323, 1324 (Fla. 3d Dist. Ct. App. 1987)).

675. *Wolf*, 706 So. 2d at 884.

676. *Id.* at 884.

677. *Id.* at 883 (quoting *Forman v. First Nat'l Bank*, 79 So. 742 (1918) (quoting *Kent v. Bailey*, 164 N.W. 852, 853 (Iowa 1917))).

The court concluded that the Wolf Group's lien was entitled to priority over Maysonet's lien under the doctrine of conventional subrogation.⁶⁷⁸

*Zalay v. Ace Cabinets of Clearwater, Inc.*⁶⁷⁹ The court affirmed final judgment in a construction lien action filed by subcontractors and materialmen.⁶⁸⁰ Evidence supported the trial court's decision that all but one of the claims were valid and timely and created liens against the property.⁶⁸¹

In 1992, Zalay contracted with Charles Walker Corporation to build a home for \$360,000. Eventually, Zalay had to make only one final payment in the amount of \$45,267.07. Although most of the work was completed on the home, "[s]everal of the subcontractors and materialmen remained unpaid."⁶⁸² Three lienors recorded claims totaling about \$31,000 and "Artistic Surfaces . . . presented an untimely claim for \$2,600."⁶⁸³

The issue before the court was "whether the language of section 713.06 [of the *Florida Statutes*] permits the attorneys' fees and costs ultimately awarded under section 713.29 to become a lien against the property."⁶⁸⁴ The court concluded "that the limitation in section 713.06(3)(h) is intended to define the extent of the lien for the lienor's materials or services prior to litigation, and is not intended to preclude a lien for costs and attorneys' fees in a lien foreclosure action."⁶⁸⁵ The court found it important to examine section 713.06(1).⁶⁸⁶ This statute provides:

A materialman or laborer, either of whom is not in privity with the owner, or a subcontractor . . . who complies with the provisions of this part and is subject to the limitations thereof, has a lien on the real property improved for any money that is owed to him for labor.⁶⁸⁷

There is nothing in this statute that expressly provides a lien for attorneys' fees and costs.⁶⁸⁸

Construction lien statutes should not be liberally construed in favor of any person.⁶⁸⁹ "[A]ttorneys' fees awarded under section 713.29 are not an

678. *Id.* at 884.

679. 700 So. 2d 15 (Fla. 2d Dist. Ct. App. 1997).

680. *Id.* at 16.

681. *Id.*

682. *Id.*

683. *Id.* at 17.

684. *Zalay*, 700 So. 2d at 17.

685. *Id.*

686. *Id.*

687. *Id.* (quoting FLA. STAT. § 713.06(1) (1993)).

688. *Id.*

689. *Zalay*, 700 So. 2d at 17.

element of damages, but are 'taxed as part of . . . costs.'"⁶⁹⁰ The court saw "no reason why the costs involved in a construction lien action should not be included within the lien."⁶⁹¹

Legislative changes to Chapter 255 of the *Florida Statutes* include, but are not limited to, the following:

With respect to public lands and property, section 255.05(2)(a) now provides that where a claimant is no longer furnishing labor on a project, "a contractor, or [its] agent or attorney may elect to shorten the prescribed time . . . within which an action to enforce any claim against a payment bond" may be made.⁶⁹² This may be done by filing a "NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND."⁶⁹³ The form and procedure for such are set out in the above referenced statute.⁶⁹⁴

Legislative changes to Chapter 713 of the *Florida Statutes* include, but are not limited to, the following:

Section 713.01(12) is amended to include in the definition of "[i]mprove" a provision for solid waste collection or disposal on the site of the improvement.⁶⁹⁵ Likewise, the definitions for "[i]mprovement", "[s]ubcontractor," and "[s]ub-subcontractor" have been amended to reflect the same.⁶⁹⁶

Section 713.23(1)(e) has been amended to provide a shortening of time for a contractor to claim against a payment bond.⁶⁹⁷ This statute provides for a form for filing a "NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND."⁶⁹⁸ Comparatively, section 713.235(1) provides for a form for a "[w]aiver of right . . . against the payment bond."⁶⁹⁹

690. *Id.* at 18 (quoting *Ceco Corp. v. Goldberg*, 219 So. 2d 475 (Fla. 3d Dist. Ct. App. 1969)).

691. *Id.*

692. Act of May 22, 1998, ch. 98-135, § 1, 1998 Fla. Laws 913, 914 (to be codified at FLA. STAT. § 255.05(2)(a)1).

693. *Id.*

694. *Id.*

695. Act of May 22, 1998, ch. 98-135, § 2, 1998 Fla. Laws 917, 917 (amending FLA. STAT. § 713.01(12)).

696. Act of May 22, 1998, ch. 98-135, § 2, 1998 Fla. Laws 917, 917 (amending FLA. STAT. § 713.01(13), (26), (27)).

697. Act of May 22, 1998, ch. 98-135, § 6, 1998 Fla. Laws 920, 921 (amending FLA. STAT. § 713.23(1)(e)).

698. *Id.*

699. Act of May 22, 1998, ch. 98-135, § 7, 1998 Fla. Laws 921, 921 (to be codified at FLA. STAT. § 713.235).

XV. MORTGAGES

*Alafaya Square Ass'n. v Great Western Bank.*⁷⁰⁰ The court granted appellee's motion for rehearing of the opinion dated February 7, 1997.⁷⁰¹ This opinion was entered in place of the previous one.⁷⁰² The court reversed the trial court's order appointing a receiver because "there was no showing that Alafaya wasted or impaired the . . . real property."⁷⁰³ Alafaya owned a shopping center "encumbered by a mortgage in favor of the appellee, WHC-One."⁷⁰⁴ If there was a default on the mortgage, Alafaya agreed to have a receiver appointed. After the loan matured, Alafaya did in fact default on payment, and WHC-One ("WHC") sued to foreclose and requested the appointment of a receiver.⁷⁰⁵

The trial court granted WHC's motion to sequester the rents received from the shopping center's tenants.⁷⁰⁶ All rent collected was placed in escrow, and Alafaya could not expend funds from the account without the court's approval. Alafaya requested use of escrow funds from WHC to do repairs, but after Alafaya received no response, it requested permission from the trial court to expend the funds.⁷⁰⁷ Alafaya later requested WHC's consent to withdraw escrow funds for payment of real estate taxes.⁷⁰⁸ WHC again failed to answer. In response to Alafaya's request for funds to repair, "WHC filed a motion for appointment of receiver alleging an 'apparent waste to the property.'"⁷⁰⁹

The trial court granted WHC's motion for the appointment of a receiver, and Alafaya appealed arguing that evidence failed to show Alafaya wasted or impaired the property.⁷¹⁰ "The appointment of a receiver in a foreclosure action is not a matter of right . . . it is an extraordinary remedy."⁷¹¹ The receiver's role "is to preserve the value of the secured property."⁷¹² The trial court can appoint a receiver, but it can only do so if

700. 700 So. 2d 38 (Fla. 5th Dist. Ct. App. 1997).

701. *Id.* at 39.

702. *Id.*

703. *Id.*

704. *Id.*

705. *Alafaya Square*, 700 So. 2d at 39.

706. *Id.*

707. *Id.*

708. *Id.*

709. *Id.*

710. *Alafaya Square*, 700 So. 2d at 40.

711. *Id.* (citing *Barnett Bank of Alachua County v. Steinberg*, 632 So. 2d 233, 234 (Fla. 1st Dist. Ct. App. 1994)).

712. *Id.* (citing *Barnett Bank of Alachua County v. Steinberg*, 632 So. 2d 233, 235 (Fla. 1st Dist. Ct. App. 1994)).

evidence suggests the secured property was being wasted or subject to serious risk of loss.⁷¹³

The appellate court agreed that “the evidence . . . [did] not constitute waste or impairment.”⁷¹⁴ The only waste could be “the disrepair to the parking lot and the exterior paint.”⁷¹⁵ Alafaya took timely action to get WHC to release the funds. As such, there could be no waste since the failure to repair was due to WHC’s refusal to release the funds.⁷¹⁶ The court reversed because the facts did not justify the remedy of receivership.⁷¹⁷

*Beach v. Ocwen Federal Bank.*⁷¹⁸ In 1986, the appellants, the Beaches, “refinanced their Florida house in 1986 with a loan from Great Western Bank.”⁷¹⁹ In 1991, the appellants stopped making their mortgage payment, and in 1992 Great Western began this foreclosure proceeding.⁷²⁰ The appellants “acknowledged their default but raised affirmative defenses, alleging . . . that the bank’s failure to make disclosures required by the Truth in Lending Act gave them the right under 15 U.S.C. § 1635 to rescind the mortgage agreement.”⁷²¹ The appellee, Ocwen, argued that the right to rescind expired since Section 1635(f) of the *United States Code* provides that the right of rescission shall expire three years after the closing of the loan.⁷²² However, the appellants argued the three years provision only pertains to the actual affirmative right of rescission and that there is no statute of limitations or expiration of permitting rescission by a recoupment defense.⁷²³ The trial court, the Fourth District Court of Appeal, and the Supreme Court of Florida rejected that defense, holding that the right to rescind expired in three years under the plain language of section 1635(f).⁷²⁴ The United States Supreme Court affirmed the decision made by all of the courts below.⁷²⁵

The purpose of the Act is “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various

713. *Id.* (citing *Atco Constr. & Dev. Corp. v. Beneficial Sav. Bank*, 523 So. 2d 747, 750 (Fla. 5th Dist. Ct. App. 1988)).

714. *Id.*

715. *Alafaya Square*, 700 So. 2d at 40.

716. *Id.*

717. *Id.* at 41.

718. 118 S. Ct. 1408 (1998).

719. *Id.* at 1408.

720. *Id.*

721. *Id.*

722. *Id.*

723. *Ocwen*, 118 S. Ct. at 1409.

724. *Beach v. Great W. Bank*, 692 So. 2d 146 (Fla. 1997); *Beach v. Great W. Bank*, 670 So. 2d 986 (Fla. 4th Dist. Ct. App. 1996); see 15 U.S.C. § 1635(f) (1994).

725. *Ocwen*, 118 S. Ct. at 1411.

credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.”⁷²⁶ The Act gives the borrower a right to rescind without being liable for any finance or other charge; however, this right expires three years “after the date of consummation of the transaction or upon the sale of the property, whichever occurs first.”⁷²⁷ The Supreme Court held that the Act does not give the borrower a right of rescission as an affirmative defense after this three-year period.⁷²⁸

The Court stated the question to decide was “whether [section] 1635(f) is a statute of limitation, that is, ‘whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim’ or ‘merely to bar the remedy for its enforcement.’”⁷²⁹ The Court held that “the answer is apparent from the plain language of [section] 1635(f).”⁷³⁰ The Court stated that section 1635(f) states nothing about the time period in bringing an action, but instead speaks only to when the right of rescission terminates; therefore, the Supreme Court held the right was meant to be limited,⁷³¹ and it affirmed the judgment of the Supreme Court of Florida.⁷³²

*Blatchley v. Boatman’s National Mortgage, Inc.*⁷³³ The appellate court affirmed an order denying Blatchley’s motion to vacate the foreclosure sale of his home.⁷³⁴ The summary final judgment in foreclosure stated the sale date was January 9, 1997.⁷³⁵ Boatman’s moved for an order changing the sale date to January 7, because the ninth was a “scrivener’s error” and because the published notice of foreclosure sale contained the correct date of January 7, 1997.⁷³⁶ The court granted the date change.⁷³⁷

However, Blatchley failed to get notice of the new sale date until a day after the actual sale took place.⁷³⁸ In addition, Blatchley only got Boatman’s motion to change the date on January 10, 1997.⁷³⁹ Blatchley sought to

726. *Id.* at 1409–10 (quoting 15 U.S.C. § 1601(a) (1994)); see *Mourning v. Family Publications Serv.*, 411 U.S. 356, 363–68 (1973).

727. *Beach*, 118 S. Ct. at 1410 (quoting 15 U.S.C. § 1635(f) (1994)).

728. *Id.*

729. *Id.* at 1412 (quoting *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 358–59 & n.4 (1943)).

730. *Id.* at 1412. See *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993).

731. *Beach*, 118 S. Ct. at 1412.

732. *Id.* at 1413.

733. 706 So. 2d 317 (Fla. 5th Dist. Ct. App. 1997).

734. *Id.* at 317.

735. *Id.*

736. *Id.*

737. *Id.*

738. *Blatchley*, 706 So. 2d at 317.

739. *Id.*

vacate the sale, since he never got proper notice of the correct sale date. As such, he could not exercise his right of redemption or reinstatement and could not participate in the sale or protect his property interest.⁷⁴⁰ “The trial court denied the motion to vacate the sale,” but gave Blatchley fifteen days from the order date to pay the judgment amount.⁷⁴¹ Instead of taking advantage of the increased redemption period that was offered, Blatchley filed a notice of appeal.⁷⁴²

Section 45.031 of the *Florida Statutes* requires that a “final judgment of foreclosure specify a day for the sale and that the notice of the sale be published for two weeks, the second of which publication ‘shall be at least 5 days before the sale.’”⁷⁴³ This statute was not satisfied. However, even though Blatchley did not receive proper notice, the court remedied the error by extending the redemption period.⁷⁴⁴ “Foreclosure suits are governed by equitable principles.”⁷⁴⁵ The trial court “did equity” by extending the redemption period.⁷⁴⁶ “[N]othing [would] be accomplished by reversing for a new judgment and sale date.”⁷⁴⁷

*Clearman v. Dalton.*⁷⁴⁸ Clearman recovered a judgment for \$150,000 against Dalton. Dalton filed for bankruptcy and revealed two secured mortgages against his homestead. The first was in favor of his son in the amount of \$15,000, and the second was in favor of Monticello Bank for \$50,000.⁷⁴⁹ The mortgage in favor of the son was never recorded, and the bank’s mortgage was recorded but not delivered.⁷⁵⁰ “The trustee . . . obtained an order from the Bankruptcy Court avoiding the mortgages, thus preserving the avoided obligations ‘for the benefit of the estate.’”⁷⁵¹ The trustee assigned the mortgages to the Clearmans who recorded the assignment and judgments avoiding the mortgages and preserving the avoided obligations.⁷⁵²

The trial court denied the foreclosure petition filed by Clearman.⁷⁵³ The appellate court agreed with the trial court that section 544 of chapter 11 of

740. *Id.* at 318.

741. *Id.* at 317–18.

742. *Id.* at 318.

743. *Blatchley*, 706 So. 2d at 318 (quoting FLA. STAT. 45.031 (1997)).

744. *Id.*

745. *Id.* (citing FLA. STAT. § 702.01 (1995)).

746. *Id.*

747. *Id.*

748. 708 So. 2d 324 (Fla. 5th Dist. Ct. App. 1998).

749. *Id.* at 325.

750. *Id.*

751. *Id.*

752. *Id.*

753. *Clearman*, 708 So. 2d at 325.

the *United States Code* did “not place the Trustee (or the Trustee’s assignees) in the place of the former mortgagees with the power to foreclose.”⁷⁵⁴ The court believed the bankruptcy estate had an assignable interest in the mortgage subject to Dalton’s homestead claim.⁷⁵⁵

The assignees could assert their interest and require Dalton to establish “fact of homestead.”⁷⁵⁶ Filing of judgments entered by the Bankruptcy Court did not constitute slander of title.⁷⁵⁷ When the Daltons “filed their bankruptcy petition and submitted their property, subject to provable exemptions,” they could not complain “if the assignee of the estate’s interest requires that they prove entitlement to the homestead exemption.”⁷⁵⁸

*Crane v. Barnett Bank.*⁷⁵⁹ The court affirmed an amended final judgment as to the terms of rescission of the mortgage agreement, except as to the effective date the rate of interest charged to the borrower should run.⁷⁶⁰ The court reversed the denial of the borrower’s motion for partial summary judgment on liability and vacated the provision for foreclosure of the subject mortgage if the borrower failed to satisfy the conditions for rescission within 45 days.⁷⁶¹

“The bank sued for foreclosure when a construction loan matured and the borrower’s wife refused to sign a modification of [their] mortgage agreement.”⁷⁶² The borrower “had not defaulted under the construction loan phase of the agreement” since the borrower’s payments had been refused, thus “preventing [such] borrower from performing under the agreement.”⁷⁶³ The borrower’s bank had no written agreement that required the wife’s signature on the mortgage.⁷⁶⁴ In addition, the bank’s allegations of liability against the borrower did not include the wife’s refusal to sign a mortgage modification.⁷⁶⁵

On appeal, borrower claimed the trial judge erred in denying his motion for summary judgment because the borrower had offered to make payments but was refused.⁷⁶⁶ “The trial court should have granted the borrower’s

754. *Id.*

755. *Id.*

756. *Id.*

757. *Id.*

758. *Clearman*, 708 So. 2d at 325.

759. 698 So. 2d 902 (Fla. 4th Dist. Ct. App. 1997).

760. *Id.* at 905.

761. *Id.* at 905–06.

762. *Id.* at 903.

763. *Id.*

764. *Crane*, 698 So. 2d at 903.

765. *Id.*

766. *Id.* at 904.

motion for partial summary judgment.”⁷⁶⁷ “[T]he bank’s complaint . . . did not include allegations that the borrower defaulted by failing to have his wife sign the mortgage modification.”⁷⁶⁸ “[T]he sole basis for default was the borrower’s failure to pay the mortgage.”⁷⁶⁹ As such, no material issue of fact on the question of liability for foreclosure existed.

The second issue on appeal was “whether the trial court’s order allowing rescission ‘ab initio’ of the parties’ mortgage agreement properly restored each party to status quo.”⁷⁷⁰ “[T]he trial court erred in assessing two different rates of interest as a condition for rescission of the parties’ agreement ‘ab initio.’”⁷⁷¹

[Since] there was only one integrated mortgage agreement . . . and its nullification is “ab initio,” the borrower should not be penalized with a higher rate of interest if it was the bank’s own refusal to accept payments that led to rescission, simply because the mortgage agreement provided for two phases of the loan.⁷⁷²

The appellate court found no error in the imposition of a “costs of funds” rate of interest and payment required by the borrower as a cost of rescission.⁷⁷³ It had “no record establishing the basis for foreclosure within 45 days if the borrower fails to make rescission as required in the amended final judgment.”⁷⁷⁴

Since the trial court “erred in denying the borrower’s motion for partial summary judgment on the bank’s action for foreclosure,” the bank had “no basis for foreclosure under the mortgage agreement of the parties even if the borrower [could not] restore the bank to status quo in 45 days.”⁷⁷⁵ “[F]oreclosure on an accelerated basis may be denied where . . . payment was not made due to . . . excusable neglect, coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due.”⁷⁷⁶ Acceleration of the balance and foreclosure of the mortgage agreement was declared premature on this record.⁷⁷⁷

767. *Id.*

768. *Id.*

769. *Crane*, 698 So. 2d at 904.

770. *Id.*

771. *Id.*

772. *Id.* at 904.

773. *Id.* at 904–05.

774. *Crane*, 698 So. 2d at 904.

775. *Id.* at 905.

776. *Id.* (quoting *Campbell v. Werner*, 232 So. 2d 252, 256–57 (Fla. 3d Dist. Ct. App. 1970) (citing *Lunn Woods v. Lowery*, 577 So. 2d 705 (Fla. 2d Dist. Ct. App. 1991))).

777. *Id.*

*Culpepper v. Inland Mortgage Corp.*⁷⁷⁸ The issue on appeal was “whether a mortgage lender’s payment of a ‘yield spread premium’ to a mortgage broker violates the antikickback provision of the Real Estate Settlement Procedures Act” (“RESPA”).⁷⁷⁹

Inland gave Culpepper a federally insured home mortgage loan⁷⁸⁰ However, rather than dealing direct with Inland, Culpepper dealt only with the mortgage broker, Premiere Mortgage Company.⁷⁸¹ “On December 7, 1995, Premiere received a rate sheet from Inland and informed the Culpeppers that a 30-year loan was available at a 7.5% interest rate.”⁷⁸² Culpepper accepted the rate. However, Culpepper did not know that the rate “was higher than Inland’s par rate on [the] 30-year loans and carried a yield spread premium of 1.675% of the loan amount.”⁷⁸³ Also, Culpepper did not know that, as a result of the spread, Inland would be paying Premiere the premium for the higher rate, even though Culpepper paid Premiere a loan origination fee for its assisting them in obtaining and closing their loan. Once having discovered this, Culpepper challenged “the legitimacy of Inland’s yield spread premium payment under RESPA.”⁷⁸⁴

Noting that no federal circuit court has addressed this issue and the federal district courts that have addressed it are divided, the Eleventh Circuit Court of Appeals presented its own analysis.⁷⁸⁵ In so doing, it determined that the yield spread premium under these facts was a nonexempt referral fee violating RESPA section 2607(a).⁷⁸⁶

The court’s analysis began with the statutory prohibitions and exemptions.⁷⁸⁷ Chapter 12, section 2607(a) of the *United States Code* prohibits kickbacks and referral fees pursuant to an agreement regarding federally related mortgages.⁷⁸⁸ Section 2607(c) exempts from that prohibition payment for goods or services actually performed.⁷⁸⁹

The first question was whether the payment to Premiere was a referral fee. The court noted that it would constitute such if “(1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement

778. 132 F.3d 692 (11th Cir. 1998).

779. *Id.* at 694 (citation omitted); *see also* 12 U.S.C. § 2601 (1994).

780. *Culpepper*, 132 F.3d at 694.

781. *Id.*

782. *Id.*

783. *Id.*

784. *Id.*

785. *Culpepper*, 132 F.3d at 695; *see* 12 U.S.C. § 2607(a) (1994).

786. *Culpepper*, 132 F.3d at 696.

787. *Id.*

788. 12 U.S.C. § 2607(a) (1994)

789. *Culpepper*, 132 F.3d at 696 (citing 12 U.S.C. § 2607(c) (1994)).

business and (3) a referral actually occurs.”⁷⁹⁰ Here, Inland gave Premiere value by paying the spread premium. The payment was pursuant to an agreement to refer settlement business because the premium was to be paid for Premiere’s registering loans with Inland which funded the loans. There was an actual referral when Premiere registered the loan with Inland.⁷⁹¹

The next question was whether section 2607(c) exempted the transaction as a payment for goods or services. As to whether there was a payment for goods, the appellate court noted this was not satisfied since Inland funded the loan from the beginning.⁷⁹² It was not one owned by Premiere and subsequently sold to Inland, as might be done with loans sold in the permitted secondary mortgage market sales. The court noted that even if Premiere were selling to Inland its right to direct the loan’s disposition to a number of wholesale lenders, such would not be an exempt sale of goods, because paying a referral fee for “directing” the business violates RESPA.⁷⁹³ Therefore, the premium did not fit the sale of goods exemption.⁷⁹⁴

As to whether the premium was paid for Premiere’s services, the appellate court first looked at the services Premiere provided Culpepper, obtaining and closing the loan.⁷⁹⁵ It found that the facts clearly showed Culpepper had already paid Premiere for these services.⁷⁹⁶ It also identified logically that the premium for Premiere’s generating a higher loan rate was not a service to Culpepper.⁷⁹⁷ So, the premium could not be for a service to Culpepper.⁷⁹⁸

Next, the court examined whether the premium was for a service to Inland.⁷⁹⁹ However, there was no additional service to Inland. The premium was based solely on the higher interest rate.⁸⁰⁰ Because Premiere provided no additional service to Inland over what it would have provided with a loan of a lower rate, the payment did not fit the sale of services exemption.⁸⁰¹ Having found the transaction violated RESPA’s prohibitions, the court reversed and remanded to the district court noting that the market value test utilized by the trial court was inappropriate, since that test applies only to

790. *Id.* at 695–96.

791. *Id.* at 696.

792. *Id.*

793. *Id.*

794. *Culpepper*, 132 F.3d at 697.

795. *Id.* at 696–97.

796. *Id.* at 696.

797. *Id.* at 697.

798. *Id.*

799. *Culpepper*, 132 F.3d at 697.

800. *Id.*

801. *Id.*

facially permissible transactions, and it directed the trial court to consider *ab initio* Culpepper's motion for class certification.⁸⁰²

*Dove v. McCormick*⁸⁰³ This court affirmed the trial court's order granting final summary judgment in favor of McCormick.⁸⁰⁴ Dove executed a mortgage in favor of The First, F.A. that encumbered Orange County real property.⁸⁰⁵ The transaction was subject to Truth in Lending Act requirements. Later on, The First was declared "troubled," and the Resolution Trust Corporation ("RTC") was appointed receiver to liquidate The First's assets.⁸⁰⁶ "RTC assigned Dove's mortgage to Blazer Financial Services," which later assigned the mortgage to John McCormick.⁸⁰⁷ Since Dove failed to make monthly payments, McCormick sued to foreclose.⁸⁰⁸

"The trial court entered final summary judgment [in McCormick's favor], concluding that Dove's [posed] defenses pertaining to rescission and recoupment were barred by the statute of limitations."⁸⁰⁹ "Dove sought to assert her statutory right to rescission based upon alleged violations of [Truth in Lending Act] and Regulation Z."⁸¹⁰ Dove also argued for recoupment under section 1640(e).⁸¹¹ The appellate court affirmed the trial court's ruling in denying Dove's claim of rescission because "under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f)."⁸¹²

Section 1635(f) provides "when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right."⁸¹³ Dove may not seek the remedy of rescission under the guise of an affirmative defense of recoupment as a means of getting around the three year statute of limitations.⁸¹⁴

*Floyd v. Federal National Mortgage Ass'n.*⁸¹⁵ Floyd "appeal[ed] a post-judgment final order denying [the] 'Motion to Vacate Final Judgment

802. *Id.* at 697.

803. 698 So. 2d 585 (Fla. 5th Dist. Ct. App. 1997).

804. *Id.* at 586.

805. *Id.*

806. *Id.*

807. *Id.*

808. *Dove*, 698 So. 2d at 586.

809. *Id.*

810. *Id.* at 587.

811. *Id.*

812. *Id.* at 588 (quoting *Beach v. Great W. Bank*, 692 So. 2d 146, 153 (Fla. 1997)).

813. *Dove*, 698 So. 2d at 588.; see *Beach*, 692 So. 2d at 152 (quoting *Bowery v. Babbit*, 128 So. 801, 806 (Fla. 1930)).

814. *Dove*, 698 So. 2d at 588; *Culpepper*, 132 F.3d at 695-96.

815. 704 So. 2d 1110 (Fla. 5th Dist. Ct. App. 1998).

and Set Aside Foreclosure Sale.”⁸¹⁶ Federal National filed a complaint seeking to foreclose upon a first mortgage against Pamela Johnson.⁸¹⁷ The mortgage encumbering the home was executed by Pamela and her then husband, Vernon Floyd, in the original principal amount of \$11,000. After their divorce and Pamela’s subsequent death, Vernon resided within the home with the children, and the mortgage went into default with the remaining balance of \$3,045.96.⁸¹⁸

Personal service of the complaint could not be made “because the sheriff’s process server could not locate the property.”⁸¹⁹ The death of Pamela was never confirmed. Federal National filed an amended complaint naming Pamela Johnson or her heirs as defendant. Afterwards, Federal National filed an Affidavit of Constructive Service alleging that the heirs could not be found after diligent search.⁸²⁰

After a second letter was sent to Vernon “specifying the amount necessary to reinstate the mortgage,” the trial court entered final summary judgment in favor of Federal National.⁸²¹ Vernon was notified to vacate the premises after the foreclosure sale. The trial court denied Vernon’s motion to set aside the sale.⁸²² The appellate court agreed with Vernon that Federal National failed to conduct a diligent search.⁸²³

Prior to constructive notice, a plaintiff must first file an affidavit showing “that a diligent search has been made to discover the names and addresses of the defendants.”⁸²⁴ In this case, Federal National’s affidavit stated that the Social Security Administration database was searched for probate records and vital statistics without success.⁸²⁵ The records did confirm that Pamela Johnson was deceased.⁸²⁶ Federal National did not locate the property, inquire into those in possession of the property, or talk with neighbors, relatives, or friends.⁸²⁷

Federal National’s failure to pursue Vernon after his previous inquiries about reinstating the mortgage shows that Federal National never

816. *Id.* at 1111.

817. *Id.*

818. *Id.*

819. *Id.*

820. *Floyd*, 704 So. 2d at 1111.

821. *Id.*

822. *Id.* at 1111–12.

823. *Id.* at 1112.

824. *Id.* (citing FLA. STAT. §§ 49.03(1), .041(1), .071 (1995)).

825. *Floyd*, 704 So. 2d at 1112.

826. *Id.*

827. *Id.*

“reasonably employ[ed] the knowledge at [its] command.”⁸²⁸ Federal National failed to conduct a diligent search and inquiry as required by the constructive notice statute by completely ignoring the parties in possession of the premises.⁸²⁹

“Strict compliance with constructive service statutes is required.”⁸³⁰

The record showed a diligent effort to find the information needed in order to accomplish personal service on those in possession of the property was not made.⁸³¹ The appellate court believed Federal National “would have learned additional facts necessary to accomplish personal service if someone had found” the property and went there to see who had possession.⁸³²

*Kirkland v. Miller.*⁸³³ Kirkland appealed Final Judgment of Ejectment awarded in favor of Sportsmen’s, the “original owner of the subject real property.”⁸³⁴ The trial court stated Kirkland only had “a beneficial interest in an Illinois land trust.”⁸³⁵ Thus, ejectment was a proper remedy. The trial court determined there was only a personal property interest, and foreclosure was unnecessary.⁸³⁶ The appellate court reversed.⁸³⁷

Miller was a trustee with legal and equitable title to the property identified in the trust. Sportsmen’s and Mary Shearer, the principals, only had a beneficial interest. Miller went about explaining the documents for closing to Kirkland, which included a contract showing Sportsmen’s sale of the beneficial interest to Kirkland for \$40,000.⁸³⁸ Kirkland executed a security agreement which assigned the beneficial interest back to Miller as security for the \$40,000 debt recognized as a “Purchase Money Mortgage” and include[ed] a charge for ‘State Documentary Stamps on Deed.’⁸³⁹ Kirkland was to make monthly payments for twenty years, and if default occurred, there would be an “automatic assignment” of the entire beneficial interest to Sportsmen’s.⁸⁴⁰ After default, Miller was to sell the trust property, and after costs and fees were paid out, the balance of the sale

828. *Id.* (quoting *Batchin v. Barnett Bank*, 647 So. 2d 211, 213 (Fla. 2d Dist. Ct. App. 1994) (quoting *Canzoniero v. Canzoniero*, 305 So. 2d 801, 803 (Fla. 4th Dist. Ct. App. 1975))).

829. *Id.*

830. *Floyd*, 704 So. 2d at 1112.

831. *Id.*

832. *Id.* at 1113.

833. 702 So. 2d 620 (Fla. 4th Dist. Ct. App. 1997).

834. *Id.* at 620.

835. *Id.*

836. *Id.*

837. *Id.*

838. *Kirkland*, 702 So. 2d at 620.

839. *Id.* at 621.

840. *Id.*

proceeds was to be delivered to Kirkland. Kirkland believed that a mortgage was created.⁸⁴¹

Pursuant to section 697.01 of the *Florida Statutes*, an instrument is said to be a mortgage if, “when taken alone or in conjunction with surrounding facts, it appears to have been given for the purpose of securing payment of money.”⁸⁴² “Whenever property belonging to one person is held by another as security for [a debt], the transaction is considered a mortgage.”⁸⁴³

The transaction in this case “was not a valid Illinois land trust; it was a mortgage securing indebtedness.”⁸⁴⁴ If there were default, Kirkland’s interest in the property reverted to Sportsmen’s.⁸⁴⁵ As such, the transaction was deemed “a mortgage subject to the rules of foreclosure.”⁸⁴⁶

*Najera v. Nationsbank Trust Co.*⁸⁴⁷ Najera “appeal[ed] from a final summary judgment of foreclosure by NationsBank.”⁸⁴⁸ The appellate court reversed because it believed “issues of material fact” remained on the record “which should not [be] disposed of by summary judgment.”⁸⁴⁹

Najera’s deposition showed that he requested a copy of the property appraisal but never obtained it. General Development Corporation said it would take care of the appraisal because “no bank would loan out more money on a loan . . . than the value of the property.”⁸⁵⁰ Najera paid a fee for the appraisal, with the understanding that it “was being done to verify the property would provide the lending institution with sufficient collateral for the loan.”⁸⁵¹

The appellate court believed “the allegations and [the] record creat[ed] issues of fact concerning whether the Najeras relied upon the existence of a professional appraisal to support the loan values, and whether they would have entered into this transaction had those representations not been made.”⁸⁵² The record here established far more than the assertion of inflated values.

841. *Id.*

842. *Id.* (quoting *Hialeah, Inc. v. Dade County*, 490 So. 2d 998 (Fla. 3d Dist. Ct. App. 1986) (citing *Cinque v. Buschlen*, 442 So. 2d 1034 (Fla. 3d Dist. Ct. App. 1983))); *see* FLA. STAT. § 697.01 (1985).

843. *Kirkland*, 702 So. 2d at 621.

844. *Id.*

845. *Id.*

846. *Id.* at 622.

847. 707 So. 2d 1153 (Fla 5th Dist. Ct. App. 1998).

848. *Id.* at 1154.

849. *Id.*

850. *Id.* (quoting deposition).

851. *Id.*

852. *Najera*, 707 So. 2d at 1155.

G[eneral] D[evelopment] C[orporation] and GDV [Financial Corporation] collectively misrepresented the value of the lot the Najeras already owned, the value of the condo for which they were induced to swap the lot, the fact that they were to have conventional financing (at least a 25% equity-to-loan ratio), that the rental market in the area was sufficiently strong to cover their mortgage payments, that the resale market for GDC properties was strong at the false sales prices, and that there existed and would be provided a professional appraisal to back up the value of the property provided to them.⁸⁵³

The appellate court recognized that “[i]f the alleged course of fraudulent conduct on the part of GDC and GDV [were] established at trial, and if it is shown was reasonably relied upon by the Najeras, these proofs could provide them with a defense to this foreclosure action.”⁸⁵⁴

*Southeast & Associates, Inc. v. Fox Run Homeowners Ass’n.*⁸⁵⁵ The issue before the court was “whether the owners may set aside a foreclosure sale [where constructive service was] based on affidavits of diligent search and inquiry which were facially sufficient and complied with the statutory requirements.”⁸⁵⁶

On July 1, 1995, an association assessment for semiannual maintenance became due. Albert and Rose Love received a notice of delinquency from the association. The notice stated that the association could file a lien against the home and foreclose at a later date.⁸⁵⁷ When the Loves failed to pay the assessment, a lien was filed against the property. A partial payment was made which the association returned with a notice stating that if full payment were not made, a foreclosure suit would be initiated.⁸⁵⁸

When the association planned to foreclose, it hired a process server to serve the Loves. The server failed to recognize that the Loves were at their New York address and attempted numerous times to serve them at their Fox Run address and at another Florida address said to be attributed to them.⁸⁵⁹ Since personal service was not able to be made, the association served by publication after filing an affidavit of diligent search and an affidavit of constructive service.⁸⁶⁰ Final summary judgment of foreclosure was filed

853. *Id.*

854. *Id.*

855. 704 So. 2d 694 (Fla. 4th Dist. Ct. App. 1997).

856. *Id.* at 695.

857. *Id.*

858. *Id.*

859. *Id.*

860. *Fox Run*, 704 So. 2d at 695.

against the Loves.⁸⁶¹ Southeast and Associates, the successful bidder at the foreclosure sale, received a certificate of title. In return, the Loves made a motion “to set aside the sale based on an insufficient service of process.”⁸⁶² “The trial court entered an order finding lack of diligent search and inquiry by Fox Run Association, and [set] aside the foreclosure sale.”⁸⁶³

Section 49.041 of the *Florida Statutes* provides that:

a person may be served by publication upon verified statement showing on its face that [a] “diligent search and inquiry have been made to discover the name and residence” of the [individual] being served. If the court finds that the verified statement is defective, or the diligent search is deficient, the court must [decide] “whether the trial court’s judgment of foreclosure would be void or voidable.”⁸⁶⁴

If voidable, a foreclosure sale resulting from constructive service cannot be set aside as against a bona fide purchaser.⁸⁶⁵

The plaintiff here followed the favored approach. It “filed a detailed affidavit listing the [many] attempts [to deliver] personal service, the contact with the neighbors, the two skip traces, and the trip to a retail establishment where the process server learned that the lessee had moved out in the middle of the night.”⁸⁶⁶

Also, “where one of two innocent parties must suffer a loss as the result of the default of another, the loss shall fall on the party who is best able to avert the loss and is the least innocent.”⁸⁶⁷ The Loves did not make the requisite maintenance payment and could have told the Association of their move to New York.⁸⁶⁸ In addition, someone on the Loves’ behalf kept signing the certified letters and made partial payments.⁸⁶⁹

United Companies Lending Corp. v. Abercrombie.⁸⁷⁰ The issue presented was whether “the circuit court abused its discretion when it declined to set aside a mortgage foreclosure sale of real property.”⁸⁷¹ The

861. *Id.* at 695.

862. *Id.* at 696.

863. *Id.*

864. *Id.* (quoting *Batchin v. Barnett Bank*, 647 So. 2d 211, 213 (Fla. 2d Dist. Ct. App. 1994)).

865. *Fox Run*, 704 So. 2d at 696.

866. *Id.*

867. *Id.* at 697 (quoting *Jones v. Lally*, 511 So. 2d 1014, 1016 (Fla. 2d Dist. Ct. App. 1987)).

868. *Id.*

869. *Id.*

870. 713 So. 2d 1017 (Fla. 2d Dist. Ct. App. 1998).

871. *Id.* at 1018.

appellate court held that the circuit court was mistaken in its view of what its scope of discretion is in such a matter.⁸⁷²

United Companies Lending Corporation sued to foreclose its mortgage on a residence owned by the appellee. "The circuit court entered a final judgment . . . and scheduled a foreclosure sale to be held at the Sarasota County Courthouse."⁸⁷³ United's counsel agreed to attend the sale, but due to an illness in the attorney's family, United sent another attorney to appear. That attorney arrived early for the foreclosure sale at the wrong courthouse, and only five minutes before the sale, the clerk informed him that the sale was to be held in Sarasota. The clerk in Sarasota declined to delay the bidding. By the time another attorney arrived, the property had been sold to Darrell Crane for \$1,000.⁸⁷⁴

United filed an objection to the sale and a motion to have the sale set aside on the grounds that there was a "gross inadequacy of price and the mistaken failure of its agent to attend."⁸⁷⁵ Evidence at the hearing proved that the property was worth over \$125,000.00 and that United was going to bid as high as \$181,898.82.⁸⁷⁶ Crane testified that he would have bid up to \$115,000.00.⁸⁷⁷

The circuit court found that the price paid for the property at the sale was grossly disproportionate.⁸⁷⁸ However, it denied United's motion because the court found that the "inadequate price resulted from the unilateral mistake of United's [counsel], and not from any mistake, misconduct, or irregularity on the part of . . . anyone else who participated in the sale."⁸⁷⁹ The circuit court cited *Wells Fargo Credit Corp. v. Martin*⁸⁸⁰ and *Sulkowski v. Sulkowski*⁸⁸¹ for authority.⁸⁸² The appellate court decided the circuit court mistakenly believed that this appellate court, unlike the third and fourth districts, determined that the mistake cannot be a unilateral mistake by the complaining party.⁸⁸³ However, the law of this appellate district does not differ from the other districts and follows the holding in *Arlt v. Buchanan*.⁸⁸⁴ In *Arlt*, the general rule that came about was

872. *Id.*

873. *Id.*

874. *Id.*

875. *Abercrombie*, 713 So. 2d at 1018.

876. *Id.*

877. *Id.*

878. *Id.*

879. *Id.*

880. 605 So. 2d 531 (Fla. 2d Dist. Ct. App. 1992).

881. 561 So. 2d 416 (Fla. 2d Dist. Ct. App. 1990).

882. *Abercrombie*, 713 So. 2d at 1018.

883. *Id.* at 1018-19.

884. *Id.* (citing *Arlt v. Buchanan*, 190 So. 2d 575 (Fla. 1966)).

that standing alone mere inadequacy of price is not a ground for setting aside a judicial sale. But where the inadequacy is gross and is shown to result from any mistake, accident, surprise, fraud, misconduct, or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result.⁸⁸⁵

This court did not construe "person connected with the sale" to mean that it had to be a person who was physically present at the sale.⁸⁸⁶ So, the circuit court mistakenly read this court's past opinions to the contrary.⁸⁸⁷

Whether the complaining party has made the showing necessary to set aside a foreclosure sale is a discretionary decision that may be reversed only when the court has grossly abused its discretion.⁸⁸⁸ The court found that in the present case, the circuit court's discretion was restricted by a mistaken understanding of the law in this district and reversed and remanded for reconsideration.⁸⁸⁹ The court stated no opinion as to the balance of equities in this case, but stated that, in one set of circumstances, "the fact that the inadequate sale price was caused by the complaining party's own mistake might tip the balance of equities in favor of the successful bidder; in another case, it might not."⁸⁹⁰

XVI. OPTIONS AND RIGHTS OF FIRST REFUSAL

*Holloway v. Gutman.*⁸⁹¹ The evidence presented was that the parties had a three-year lease with a purchase option. When that lease was about to expire, they negotiated a renewal. The landlord tendered a copy of the original with the term "whited-out."⁸⁹² They never did expressly agree to a particular length. The tenant testified that he thought it would be for another three years, but the landlord testified that the tenant had said that he simply did not care; so they never reached an exact length. Because the option lacked an essential term so it was not complete,⁸⁹³ there was no meeting of the minds. There was no contract, oral or written.

885. *Arlt v. Buchanan*, 190 So. 2d 575, 577 (Fla. 1966) (citations omitted).

886. *Abercrombie*, 713 So. 2d at 1019.

887. *Id.* at 1018.

888. *Id.*; see *RSR Investments, Inc. v. Barnett Bank*, 647 So. 2d 874 (Fla. 2d Dist. Ct. App. 1994).

889. *Abercrombie*, 713 So. 2d at 1019-20.

890. *Id.* at 1019.

891. 707 So. 2d 356 (Fla. 5th Dist. Ct. App. 1998).

892. *Id.* at 358.

893. *Id.*

*Pomares v. J. Krantz Enterprises, Inc.*⁸⁹⁴ The purchase option for a business included the building and land where it was located. The price was to be the fair market value. If the parties could not agree on the value, then it would be set by a licensed appraiser. If the parties could not agree on an appraiser, then each was to select a licensed appraiser, and their appraisals were to be averaged. The trial court found this option to be enforceable and the seller appealed.⁸⁹⁵ The Third District Court of Appeal reversed.⁸⁹⁶ It apparently had no difficulty with the price, but held that the option was unenforceably vague and indefinite because it failed to specify the terms or time of payment.⁸⁹⁷

XVII. RIPARIAN RIGHTS

*Lee v. Williams.*⁸⁹⁸ This court resolved the issue of whether the appellant had a “right to construct a boatlift” by looking at which neighbor “owns the nonnavigable tidelands of Florida.”⁸⁹⁹

[The two neighbors’] lots are contiguous. The westerly boundary of the Williams’ lot [Lot 13,] is defined as the centerline of Butler’s Branch, a small waterway shown on the plat of Butler’s Replat. [The] northern boundary of [the Lees’ lot, Lot 12,] is Julington Creek, a navigable body of water. The waters of Butler’s Branch and Julington Creek join at the northwest end of the Lees’ property.⁹⁰⁰

In 1960, the owner of Lot 13 excavated a navigable canal to run through and across Lot 13, and through and across the conflux of Butler’s Branch and Julington Creek and into Julington Creek.⁹⁰¹ In 1961, when the Williams purchased Lot 13, the canal had been excavated. In 1961, if the boatlift had been erected “where it is today, it would have been o[ver] dry land.”⁹⁰² Over the years, the canal bank eroded toward the common boundary line, and in the 1980’s, the owner of Lot 12 constructed a bulkhead along the then existing bank of the canal. Surveys show that a great portion

894. 711 So. 2d 615 (Fla. 3d Dist. Ct. App. 1998).

895. *Id.* at 616.

896. *Id.*

897. *Id.*

898. 711 So. 2d 57 (Fla. 5th Dist. Ct. App. 1998).

899. *Id.* at 57.

900. *Id.* at 57–58.

901. *Id.* at 58.

902. *Id.*

of this bulkhead was built on Lot 13.⁹⁰³ In 1993, the Lees purchased Lot 12 and, without the Williams' knowledge, sometime in 1994 constructed a boat lift "in the canal adjoining the previously constructed bulkhead. The boat lift is located entirely within Lot 13" and the Williams, upon discovering this, protested its construction.⁹⁰⁴

The issue that this court looked at was "whether the canal, which traverses nonnavigable tidelands within the Williams' lot, is privately owned by [the Williams] or whether it is sovereignty land available for public use."⁹⁰⁵ The trial court found that *Clement v. Watson*⁹⁰⁶ was dispositive.⁹⁰⁷ In *Clement*, the court found that Watson was able to exclude Clement from fishing privileges in a cove surrounded by property owned by Watson's wife.⁹⁰⁸ The Supreme Court of Florida affirmed the basis of the decision in *Clement* when it defined navigable waters and emphasized that waters are not navigable merely because they are affected by the tides.⁹⁰⁹

The court distinguished between sovereignty and privately owned lands as follows:

The shore of navigable waters which the sovereign holds for public uses is the land that borders on navigable waters and lies between ordinary high and ordinary low water mark. This does not include lands that do not immediately border on the navigable waters, and that are covered by water not capable of navigation for useful public purposes, such as mud flats, shallow inlets, and lowlands covered more or less by water permanently or at intervals, where the waters thereon are not in their ordinary state useful for public navigation. Lands not covered by navigable waters and not included in the shore space between ordinary high and low water marks immediately bordering on navigable waters are the subjects of private ownership, at least when the public rights of navigation, etc., are not thereby unlawfully impaired.⁹¹⁰

The court concluded in *Clement* that the majority of states, including Florida, base their determination on whether the water is navigable, and not upon whether waters are tidal.⁹¹¹ The appellants, however, argued that

903. *Lee*, 711 So. 2d at 58.

904. *Id.*

905. *Id.*

906. 58 So. 25 (Fla. 1912).

907. *Lee*, 711 So. 2d at 58.

908. *Clement*, 58 So. at 27.

909. *Lee*, 711 So. 2d at 58 (citing *Clement v. Watson*, 58 So. 25 (Fla 1912)).

910. *Id.* at 59.

911. *Clement*, 58 So. at 26 (emphasis omitted).

reliance on *Clement* was an error and that the 1988 decision by the United States Supreme Court in *Phillips Petroleum Co. v. Mississippi*,⁹¹² governed.⁹¹³ Therefore, the appellants concluded that all of Florida's tidelands are sovereignty lands of the state.⁹¹⁴ In *Phillips Petroleum*, the United States Supreme Court held that "[t]he states, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide."⁹¹⁵ However, the Court also held that the states "have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."⁹¹⁶

This court looked to see how Florida law "defined the limits of lands held in public trust and what private rights in tidelands" Florida recognizes.⁹¹⁷ No Supreme Court of Florida case has overruled *Clement*, nor has any case held that "a nonnavigable tideland [is a] sovereignty land."⁹¹⁸ Therefore, the appellate court affirmed the trial court's decision that the land is not to be sovereignty land.⁹¹⁹

XVIII. SALES

Whitehurst v. Camp.⁹²⁰ An agreement for deed provided for "interest at the rate of 10 per centum (10%) per annum payable on the whole sum remaining from time to time unpaid."⁹²¹ The buyers defaulted and sellers brought a successful foreclosure action, but sellers appealed, in part, because the court applied a lower postjudgment interest based on section 55.03(1) of the *Florida Statutes*.⁹²² The statute established a statutory rate for judgments but provided that it did not displace a rate of interest established by a written contract.⁹²³ At issue, therefore, was whether the language in this agreement for deed applied the ten percent interest rate postjudgment as well as prejudgment.⁹²⁴ The Supreme Court of Florida ruled that the contract

912. 484 U.S. 469 (1988).

913. *Lee*, 711 So. 2d at 59.

914. *Id.*

915. *Id.* at 60 (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988)).

916. *Id.* (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988)).

917. *Id.*

918. *Lee*, 711 So. 2d at 62.

919. *Id.* at 64.

920. 699 So. 2d 679 (Fla. 1997).

921. *Id.* at 680 (quoting *Whitehurst v. Camp*, 677 So. 2d 1361 (Fla. 1st Dist. Ct. App. 1996)).

922. *Id.*; FLA. STAT. § 55.03(1) (1995).

923. FLA. STAT. § 55.03(1) (1995).

924. *Whitehurst*, 699 So. 2d at 681.

language did not apply postjudgment.⁹²⁵ To do so would require explicit language. Otherwise, the terms of the contract are extinguished by a judgment in a manner similar to the contract merging into the deed in a real estate sale. In both situations, the contractual term can survive only if the intent of the parties is made clear.⁹²⁶

*Gilchrist Timber Co. v. ITT Rayonier, Inc.*⁹²⁷ The seller of a 22,000 acre tract provided the buyers with a year old appraisal. Unfortunately, the zoning shown on the tract was inaccurate. After unsuccessfully trying to get the zoning changed, the buyers filed suit in federal court seeking damages.⁹²⁸ The jury found for the plaintiffs, but the trial judge granted a judgment notwithstanding the verdict.⁹²⁹ The case was appealed to the eleventh circuit, which certified the following question to the Supreme Court of Florida:

WHETHER A PARTY TO A TRANSACTION WHO TRANSMITS FALSE INFORMATION WHICH THAT PARTY DID NOT KNOW WAS FALSE, MAY BE HELD LIABLE FOR NEGLIGENT MISREPRESENTATION WHEN THE RECIPIENT OF THE INFORMATION RELIED ON THE INFORMATION'S TRUTHFULNESS, DESPITE THE FACT THAT AN INVESTIGATION BY THE RECIPIENT WOULD HAVE REVEALED THE FALSITY OF THE INFORMATION.⁹³⁰

The Supreme Court of Florida answered the question with a qualified "yes," adopting the position of section 552 of the Restatement (Second) of Torts, but subject to Florida's doctrine of comparative negligence.⁹³¹ A party who negligently misinforms another may be held liable if the other party reasonably relies on that information to its detriment.⁹³²

The eleventh circuit would then have to apply that answer in reviewing the judgment notwithstanding the verdict.⁹³³ The jury had been instructed that the buyers had no affirmative duty to investigate the truthfulness of statements made by the seller.⁹³⁴ However, the buyers could have been negligent in not investigating the facts on their own. That presented a

925. *Id.* at 684.

926. *Id.*

927. 696 So. 2d 334 (Fla. 1997).

928. *Id.* at 336.

929. *Id.*

930. *Id.* at 335.

931. *Id.* at 339.

932. *Gilchrist Timber*, 696 So. 2d at 337.

933. *Id.* at 336.

934. *Id.*

question of fact, and reversal would be necessary so that the issue of comparative negligence could be presented to the jury.⁹³⁵

The seller lost on its other points. Most importantly, handing over the appraisal was a representation of the facts contained therein. The zoning was represented incorrectly.⁹³⁶ To establish that this constituted negligent misrepresentation, it would only be necessary to show that the misrepresented fact was material to the buyers.⁹³⁷ However, that did not require the buyers to have communicated to the sellers that such a fact would affect their decision to purchase.⁹³⁸ What was required was only that it would have made a difference in their decision.⁹³⁹

*Kehle v. Modansky.*⁹⁴⁰ Kehle and Peralta signed a purchase contract which required a \$120,000 deposit. Kehle wrote out the check and delivered it to the seller. Due to insufficient funds, the check was "dishonored."⁹⁴¹ It had not been made good by the time of the closing, so the closing never occurred. Seller then brought this suit for breach of contract and for statutory damages for tendering a worthless check.⁹⁴² The trial court granted summary judgment for seller on both counts, \$120,000 for liquidated damages and \$360,000 (treble damages) for the worthless check.⁹⁴³ The defendants appealed, primarily on their defense that they lacked knowledge that the check was worthless, but the district court affirmed.⁹⁴⁴ Lack of knowledge simply was not a defense.⁹⁴⁵ The court also rejected the defenses of "waiver" and "conditional delivery" to the statutory damages claim.⁹⁴⁶ These had not been properly raised as affirmative defenses, but the court noted that these would not have been defenses under the worthless check statute anyway.⁹⁴⁷

*Nelson v. Wiggs.*⁹⁴⁸ Buyers saw a "For Sale By Owner" sign in rural west Dade County. They bought the property because they wanted a place to plant trees and raise animals.⁹⁴⁹ They "requested no inspections of the

935. *Id.*

936. *Id.* at 339.

937. *Gilchrist Timber*, 696 So. 2d at 339.

938. *Id.*

939. *Id.*

940. 696 So. 2d 493 (Fla. 4th Dist. Ct. App. 1997).

941. *Id.* at 494.

942. *Id.*

943. *Id.*

944. *Id.*

945. *Kehle*, 696 So. 2d at 494.

946. *Id.*

947. *Id.*

948. 699 So. 2d 258 (Fla. 3d Dist. Ct. App. 1997).

949. *Id.* at 259.

property and did not [ask any questions of] the neighbors.”⁹⁵⁰ What they missed was that the land, except for the buildings which were built on high ground, flooded every rainy season. While they could still live in the house, it became an island on which animals also sought to escape the waters. It was a very difficult situation. The trial court found that the buyers did not ask about flooding and the seller did not volunteer the information.⁹⁵¹ The critical question was whether the seller was under a duty to disclose the seasonal flooding to the buyers under *Johnson v. Davis*.⁹⁵² The majority of this panel answered the question in the negative.⁹⁵³

Under *Johnson v. Davis*, the seller is required to disclose “facts materially affecting the value of the property which are not readily observable and are not known to the buyer.”⁹⁵⁴ The buyers should have known that Florida’s rainy season might make low lying land near the Everglades subject to flooding. Moreover, the buyer-husband was a contractor who had visited the county building department to review permits and the like.⁹⁵⁵

Judge Sorondo dissented vigorously.⁹⁵⁶ He characterized the buyers as very “simple people” and noted there was nothing in the record to indicate that there were visible signs of flooding of the nearby levee.⁹⁵⁷ The transaction took place during the “dry season.” The usual inspections would not have revealed that flooding was a problem. Nor was there any obligation to question neighbors about unseen problems. Moreover, the seller had been informed of the buyers’ intended use of the land and she must have known that the flooding would make that difficult. The conclusion is that “‘elementary fair conduct’ demanded full disclosure in this case.”⁹⁵⁸

*Ni v. Deltona Corp.*⁹⁵⁹ The buyer was purchasing three undeveloped lots in a subdivision under three separate contracts. Each required the seller to refund part of the money paid⁹⁶⁰ in the event buyer defaulted after having paid fifteen percent of the principal. Buyer defaulted after having paid in excess of fifteen percent of the principal. Having received no refund, buyer sued. The seller defended that it was protected by the two-year statute of

950. *Id.* at 260.

951. *Id.*

952. 480 So. 2d 625 (Fla. 1985).

953. *Nelson*, 699 So. 2d at 260.

954. 480 So. 2d at 629.

955. *Nelson*, 699 So. 2d at 261.

956. *Id.* at 261 (Sorondo, J., dissenting).

957. *Id.* at 263.

958. *Id.* at 265.

959. 701 So. 2d 888 (Fla. 5th Dist. Ct. App. 1997):

960. *Id.* at 889. The seller would have to refund the lesser of either a) the amount the buyer had paid in excess of the 15%; or b) the amount the buyer paid in excess of the seller’s actual damages. *Id.*

repose found in the federal Land Sales Act.⁹⁶¹ It argued that the statute of repose was applicable because the refund provision was mandated by the Act. The district court rejected that argument and reversed.⁹⁶²

The statute provided that a buyer could rescind a contract that did not include a provision for refunding the payments when the buyer had paid more than fifteen percent of the price.⁹⁶³ The two-year statute of repose gave buyer only two years from the date of contracting to rescind the contract.⁹⁶⁴ However, the buyer in this case did not seek rescission; this buyer brought an action for a refund based on the provision in the contract. The federal statute of repose did not apply to such an action.⁹⁶⁵

*Ribak v. Centex Real Estate Corp.*⁹⁶⁶ The residential development was adjacent to a plant that treated both fresh water and wastewater. Twenty-two residential home buyers alleged that they were told that it was a fresh water treatment plant, but not that it treated wastewater. They sued for, inter alia, fraud, conspiracy, negligent supervision, breach of duty to disclose, negligent misrepresentation, and violation of the Florida Land Sales Practices Act.⁹⁶⁷ The trial court granted partial summary judgment because the plant was not located on the land sold, and the buyers appealed.⁹⁶⁸ The district court affirmed the summary judgment in favor of the defendants, e.g., the developer, who had not made the representations, but it reversed and remanded as to the others.⁹⁶⁹ The Fourth District Court of Appeal concluded that the critical question was whether the existence of a wastewater treatment plant nearby was a material fact.⁹⁷⁰ If that fact would have affected the decision to purchase the property, then it was material; and materiality was a question of fact that would have to be decided by the jury.⁹⁷¹

A later decision from the fourth district seems to contradict *Ribak* in regard to the definition of materiality.⁹⁷² In *Billian v. Mobil Corp.*,⁹⁷³ buyers of a condominium unit sued for damages or, in the alternative, rescission

961. 15 U.S.C. § 1703(d)(3) (1994).

962. *Ni*, 701 So. 2d at 889.

963. 15 U.S.C. § 1703(d)(3) (1994).

964. *Id.*

965. *Ni*, 701 So. 2d at 889.

966. 702 So. 2d 1316 (Fla. 4th Dist. Ct. App. 1997).

967. *Id.* at 1316; *see* FLA. STAT. §§ 498.001-.063 (1997).

968. *Ribak*, 702 So. 2d at 1317.

969. *Id.* at 1318.

970. *Id.* at 1317.

971. *Ribak*, 702 So. 2d at 1317-18.

972. *Billian v. Mobil Corp.*, 710 So. 2d 984 (Fla. 4th Dist. Ct. App. 1998).

973. 710 So. 2d 984 (Fla. 4th Dist. Ct. App. 1998).

based on the developer's nondisclosure of construction defects.⁹⁷⁴ The case turned on whether the defects were material. The trial court refused to give the standard jury instruction for a material fact in regard to a fraudulent misrepresentation because it was, "one that is of such importance that [the buyers] either would not have entered into the transaction or would not have paid the same price for the unit."⁹⁷⁵ The jury's verdict was for the developer/seller; the buyers appealed, and the fourth district affirmed.⁹⁷⁶

The court noted that *Johnson v. Davis*,⁹⁷⁷ the seminal case on the duty to disclose, required disclosure of "facts materially affecting the value of the property," not facts materially affecting the value of the property to the buyers.⁹⁷⁸ That eliminates the subjective value of the property to the buyers. It makes the test an objective one. The court admitted that this was a narrower test than the one traditionally used for fraudulent misrepresentation.⁹⁷⁹ Hopefully the Supreme Court of Florida will clarify whether a different standard is appropriate or merely the product of a missing phrase.

The district court also pointed out that the traditional subjective standard should be applied in a rescission action that was not based on *Johnson v. Davis* type nondisclosure.⁹⁸⁰ Consequently, the fact that the jury found the defendants not liable for nondisclosure under *Johnson v. Davis* would not necessarily preclude the court from granting rescission based on facts that had been concealed.⁹⁸¹ The critical factor would be whether those facts, if known to the buyers, would have led to their not making the purchase.⁹⁸²

Stroud v. Crosby.⁹⁸³ The record contained evidence that the seller had owned lots 690 and 691. When he sold 690, a portion of 691 was included. Later, he listed 691 for sale. He advised the listing broker that he did not own all of lot 691 and gave the broker a copy of the survey that correctly showed what part of 691 he did own. The Multiple Listing Service ("MLS") properly portrayed the dimensions of lot 691 as reduced by the earlier sale.⁹⁸⁴

Buyers saw the property. They never requested or obtained any additional evidence, but proceeded to make an offer which the seller accepted.⁹⁸⁵

974. *Id.* at 986.

975. *Id.* at 987.

976. *Id.* at 986.

977. 480 So. 2d 625 (Fla. 1985).

978. *Billian*, 710 So. 2d at 987.

979. *Id.* at 988-89.

980. *Id.* at 992.

981. *Id.*

982. *Id.*

983. 712 So. 2d 434 (Fla. 2d Dist. Ct. App. 1998).

984. *Id.* at 435.

985. *Id.* at 436.

The contract described the property by its street address and as lot 691, but did not include a legal description. Buyers then had a survey made by their own surveyor, but that survey did not reveal that the seller only owned part of lot 691.⁹⁸⁶ At the closing, seller gave buyers a copy of his survey showing the proper dimensions. Buyers then realized their mistake but went through with the closing anyway. The deed had the proper legal description for only part of lot 691.⁹⁸⁷

Some time after the closing, the buyers realized the magnitude of their mistake. The lot was too small for the home they planned to build, so they brought this action for rescission. The trial court entered a final judgment in favor of the buyers on the theory of fraudulent misrepresentation, but the district court reversed.⁹⁸⁸

Reversal is warranted where the appellate court does not find competent substantial evidence to support the trial court's findings of fact.⁹⁸⁹ The trial judge failed to identify what fraudulent misrepresentations the seller had made, and the district court judges could not find any evidence of fraudulent misrepresentation in the record.⁹⁹⁰ Buyers had incorrectly assumed they were buying the entire lot; that alone was not a sufficient basis for rescission.⁹⁹¹

*Sunbank v. Retirement Facility at Palm-Aire, Ltd.*⁹⁹² Buyers sued for damages and specific performance based on an alleged breach of contract. The legal claims were tried to a jury, which delivered a verdict for the buyers.⁹⁹³ After the verdict, the buyers filed notices for a nonjury trial of their specific performance claims, but the judge granted the seller's motion for a directed verdict denying specific performance.⁹⁹⁴ The buyers appealed and the district court reversed.⁹⁹⁵

The seller's motion for the directed verdict was based on the buyers' having failed to introduce sufficient evidence to support their claim for specific performance.⁹⁹⁶ However, that ignored the fact that specific performance is equitable relief. There is a right to have legal claims decided

986. *Id.*

987. *Id.* at 435-36.

988. *Stroud*, 712 So. 2d at 435-36.

989. *Id.* at 436. *See generally* Clegg v. Chipola Aviation, 458 So. 2d 1186, 1187 (Fla. 1st Dist. Ct. App. 1984).

990. *Stroud*, 712 So. 2d at 436.

991. *Id.*

992. 698 So. 2d 392 (Fla. 4th Dist. Ct. App. 1997).

993. *Id.* at 392.

994. *Id.* at 392-93.

995. *Id.* at 392. The damages award to the plaintiff-buyers was, however, affirmed.

Sunbank, 698 So. 2d at 392.

996. *Id.*

by a jury, and a claim for jury trial was made in this case.⁹⁹⁷ Equitable claims are decided by the judge. When claims of legal and equitable relief are made in the same case, the legal claims are usually tried to the jury first with the judge later hearing such additional evidence as might be needed to resolve the equitable claims. In difficult cases, the judge might hold what amounts to two separate trials or might require all evidence be presented before the jury to expedite matters. In this case, however, there was nothing in the record to indicate that the judge had ordered the buyers to present their specific performance evidence at the same time as they presented damages evidence.⁹⁹⁸ Thus, the buyers could have anticipated the opportunity to present more evidence on that claim. To grant the seller's motion for a directed verdict at that point was premature and reversible error.⁹⁹⁹

XIX. SLANDER OF TITLE

Clearman v. Dalton.¹⁰⁰⁰ This opinion resulted from a motion for rehearing or clarification.¹⁰⁰¹ The Clearmans sought rehearing of the court's unpublished order granting attorneys' fees to the Clearmans. This court withdrew the previous opinion and the order awarding the Clearmans appellate fees.¹⁰⁰²

The Clearmans recovered a judgment of \$150,000 against the Daltons. The Daltons filed for bankruptcy and stated there were two secured mortgages against their homestead. The first mortgage in favor of the Daltons' son was never recorded, and the second mortgage to Monticello Bank was recorded but never delivered. The Daltons never amended their bankruptcy petition to correct the "error."¹⁰⁰³

The trustee in bankruptcy elected to avoid the liens and obtained an order from the bankruptcy court avoiding the mortgages and preserving the avoided obligations "for the benefit of the estate."¹⁰⁰⁴ The mortgages were assigned to the Clearmans. After they recorded the assignments and the judgments avoiding the mortgages, the Clearmans "attempted to foreclose on

997. *Id.* at 393.

998. To secure equitable relief, the buyers would have to prove that the remedy at law was inadequate and that the equities balanced in their favor. *Sunbank*, 698 So. 2d at 392. These are not part of the damages action. *Id.*

999. *Sunbank*, 698 So. 2d at 393.

1000. 708 So. 2d 324 (Fla. 5th Dist. Ct. App. 1998), *replacing original opinion*, 22 Fla. L. Weekly D2022a.

1001. *Id.*

1002. *Id.* at 325.

1003. *Id.*

1004. *Id.*

the interest acquired from the [t]rustee."¹⁰⁰⁵ Dalton counterclaimed "to quiet title and for slander of title."¹⁰⁰⁶ The trial court denied foreclosure but found against the Clearmans on Dalton's counterclaim for slander of title and awarded Dalton attorneys' fees.¹⁰⁰⁷

The appellate court agreed with the trial court.¹⁰⁰⁸ Although the obligations evidenced by avoiding the mortgages were preserved for the estate, section 544, chapter 11 of the *United States Code* "does not place the [t]rustee (or the [t]rustee's assignees) in the place of the former mortgagees with the power to foreclose and avoid . . . Dalton's homestead claim."¹⁰⁰⁹ The bankruptcy estate had an assignable interest in the mortgages subject to Dalton's claim of homestead.¹⁰¹⁰ The assignees paid a fair price for the assignment and could assert that interest.¹⁰¹¹ The Daltons could be required to establish the fact of homestead.¹⁰¹²

"[F]iling of judgments [does not] constitute slander of title, even if the assignment of the estate's interest was in the nature of a quit claim [sic] deed."¹⁰¹³ The Daltons willingly filed their bankruptcy petition and submitted their property to bankruptcy.¹⁰¹⁴ Therefore, they could not subsequently "complain if the assignee of the estate's interest requires that they prove their entitlement to the homestead exemption."¹⁰¹⁵

XX. SUBMERGED LANDS

*City of West Palm Beach v. Board of Trustees of Internal Improvement Trust Fund.*¹⁰¹⁶ The court reversed final summary judgment entered in favor of the Board of Trustees of the Internal Improvement Trust Fund that granted fee simple ownership of submerged lands in the Board.¹⁰¹⁷ The Board was to issue a disclaimer to the City for the land beneath the four piers.¹⁰¹⁸

1005. *Clearman*, 708 So. 2d. at 325.

1006. *Id.*

1007. *Id.*

1008. *Id.*

1009. *Id.*

1010. *Clearman*, 708 So. 2d at 325.

1011. *Id.*

1012. *Id.*

1013. *Id.*

1014. *Id.*

1015. *Clearman*, 708 So. 2d at 325.

1016. 22 Fla. L. Weekly D2028 (Fla. 4th Dist. Ct. App. Aug. 27, 1997), *opinion withdrawn and superceded on reh'g* by 714 So. 2d 1060 (Fla. 4th Dist. Ct. App. 1998).

1017. *Id.*

1018. *Id.*

The City claimed ownership of submerged land known as Palm Harbor Marina in a suit to quiet title. The trial court stated that the City was entitled only to a disclaimer as to the land immediately beneath the four piers it constructed before the repeal of the Butler Act.¹⁰¹⁹ The Butler Act was repealed in 1957 and was later replaced by section 253.12 of the *Florida Statutes* that stated “[t]itle to all lands heretofore filled or developed is herewith confirmed in the upland owners and the trustees shall on request issue a disclaimer to each owner.”¹⁰²⁰

The question was whether the improvements made by the City fell within the parameters of the Butler Act. Specifically, the issues before the court were:

[w]hether all the activities of the city in constructing a municipal marina or boat basin including four substantial piers in 1947 and 1948, and the dredging of the boat basins in between and surrounding the piers resulted in a *permanent improvement* so that title vested in accordance with the Butler Act.¹⁰²¹

The court relied on the third district’s opinions in *Internal Improvement Trust Fund v. Key West Conch Harbor, Inc.*¹⁰²² and *Jacksonville Shipyards, Inc. v. Department of Natural Resources*.¹⁰²³ In *Key West*, the court stated the issue as not whether the dredging alone was a sufficient improvement to convey title under the Butler Act, since moorings and a dock were involved.¹⁰²⁴ That court also looked to the other activities involved in the construction of the marina. The court in this case reasoned that the *Key West* case applied because the piers would be useless without the incidental dredging for the piers to be utilized as part of the basin.¹⁰²⁵ As with *Key West*, this case also does not deal with dredging that was done for the sole purpose of filling other land.¹⁰²⁶

The court here adopted the third district’s view that the issue of whether a dredging constituted an improvement should be decided on a case by case

1019. *Id.* at D2029.

1020. *Id.* (citing Act of June 11, 1957, ch. 57-362, §1, 1957 Fla. Laws (codified as amended at FLA. STAT. § 253.12)).

1021. *Board of Trustees*, 22 Fla. L. Weekly at D2029.

1022. 683 So. 2d 144 (Fla. 3d Dist. Ct. App. 1996).

1023. *Id.*; see *Jacksonville Shipyards, Inc. v. Department of Natural Resources*, 466 So. 2d 389 (Fla. 1st Dist. Ct. App. 1985).

1024. *Board of Trustees*, 22 Fla. L. Weekly at D2029; see *Key West*, 683 So. 2d at 145.

1025. *Board of Trustees*, 22 Fla. L. Weekly at D2029.

1026. *Id.*

basis.¹⁰²⁷ The piers would be useless as part of the marina without the dredged area surrounding and in between.¹⁰²⁸ As such, the trial court erred in determining that the title to submerged lands was vested in the Board.¹⁰²⁹

XXI. TAXATION

*Kuro, Inc. v. Department of Revenue.*¹⁰³⁰ Kuro, Inc. (“Kuro”), appealed a final order which assessed an additional documentary stamp tax, collectively, on conveyances of eight unencumbered condominium units.¹⁰³¹ Stock issued by Kuro in exchange for the condominiums was concluded in the final order to constitute consideration and, pursuant to the applicable statutes and rules, this consideration was equal to the fair market value of the condominiums.¹⁰³² The documentary stamp tax was based on the fair market value. This court reversed, finding that levying the additional tax was error.¹⁰³³

The condominiums were owned by a father and son team in 1991. In 1994, the father and son incorporated Kuro. Then, they transferred the titles of the units to the corporation to avoid the potential liability for managing the eight rental units. The father and son transferred each condominium unit to Kuro by warranty deed. Each deed recited nominal consideration of ten dollars and Kuro paid the minimum documentary stamp tax on each transaction.¹⁰³⁴ The Department of Revenue (“DOR”) determined that additional documentary stamp taxes were due. The administrative law judge recommended the assessment of additional documentary stamp taxes, and the DOR entered a final order adopting these recommendations.¹⁰³⁵

The appellate court first looked at section 201.02(1), of the *Florida Statutes*, which states “that a purchaser of real estate is required to pay a documentary stamp tax of \$0.70 on each \$100 of consideration paid for the property.”¹⁰³⁶ It further states that when consideration is given in exchange for real property or any interest therein is other than money, it is presumed that the consideration is equal to the fair market value of the real property.¹⁰³⁷

1027. *Id.*

1028. *Id.*

1029. *Id.*

1030. 713 So. 2d 1021 (Fla. 2d Dist. Ct. App. 1998).

1031. *Id.*

1032. *Id.* at 1021–22.

1033. *Id.* at 1022.

1034. *Id.*

1035. *Kuro*, 713 So. 2d at 1022.

1036. *Id.* (citing FLA. STAT. § 201.02(1) (1993)).

1037. *Id.*; see FLA. STAT. § 201.02(1) (1993).

The court found that Kuro was not a purchaser within the meaning of section 210.02(1).¹⁰³⁸ Therefore, no additional taxes were due. Section 210.02(1) applies to transfers of real estate for consideration to a purchaser, which has been defined by the Supreme Court of Florida as “one who obtains or acquires property by paying an equivalent in money or other exchange in value.”¹⁰³⁹ The DOR’s rule that deals with stock as consideration merely creates a rebuttable presumption.¹⁰⁴⁰ In this situation, Kuro successfully rebutted the presumption.¹⁰⁴¹

The appellate court found the conveyances were for the benefit of the father and son, who were availing themselves of the advantages of incorporation and that the father and son still were the beneficial owners although not the legal owners.¹⁰⁴² At the time the deeds were recorded, the father and son owned all of the real estate and Kuro’s stock.¹⁰⁴³ The father and son did not receive anything that they did not already have.¹⁰⁴⁴ Therefore, all that occurred were book transactions and not sales to a purchaser.¹⁰⁴⁵ The court reversed the DOR’s final order.¹⁰⁴⁶

*S & W Air Vac Systems, Inc. v. Department of Revenue.*¹⁰⁴⁷ The appellate court affirmed the final administrative decision which held S & W liable to the Department of Revenue for use taxes as the licensee of real property, pursuant to section 212.031 of the *Florida Statutes*.¹⁰⁴⁸

S & W owned coin-operated air vac machines used to vacuum cars and add air to tires. Store owners having these machines received monthly compensation in the form of a percentage of the units’ gross receipts. S & W had the responsibility to collect money from the machines, make repairs, and pay licensing fees and taxes on them.¹⁰⁴⁹ S & W described this agreement as a “revenue sharing arrangement.”¹⁰⁵⁰ The hearing officer found that payment was based on the right to place the machine in these stores, and store owners should not be gaining compensation when the

1038. *Kuro*, 713 So. 2d at 1022.

1039. *Id.* (citing Florida Dep’t of Revenue v. De Maria, 338 So. 2d 838, 840 (Fla. 1976)).

1040. *Id.*

1041. *Id.*

1042. *Id.*

1043. *Kuro*, 713 So. 2d at 1023.

1044. *Id.*

1045. *Id.* (citing State ex rel. Palmer-Florida Corp. v. Green, 88 So. 2d 493 (Fla. 1956)).

1046. *Id.*

1047. 697 So. 2d 1313 (Fla. 5th Dist. Ct. App. 1997).

1048. *Id.* at 1314; see FLA. STAT. 212.031 (1995).

1049. *S & W Air Vac*, 697 So. 2d at 1314–15.

1050. *Id.* at 1315.

machines are removed.¹⁰⁵¹ The hearing officer concluded that S & W had been granted licenses for the use of real property. Section 212.031 of the *Florida Statutes* dictated that use taxes were owed to the Department.¹⁰⁵²

First, the facts showed that the air-vac machines were not the subject of a bailment. A "bailment" is a contractual relationship among parties in which the subject matter of the relationship is delivered temporarily to and accepted by one other than the owner.¹⁰⁵³

Next, the arrangement with the store owners could not constitute joint ventures. To establish a joint venture, five elements must be established in addition to those required to form a basic contract. These elements include: 1) a community of interest in the performance of the common purpose; 2) joint control or right of control; 3) joint proprietary interest in the subject matter; 4) a right to share in the profits; and 5) a duty to share in any losses which may be sustained.¹⁰⁵⁴ Although the first element was met, the court recognized that the others were not.¹⁰⁵⁵

S & W also questioned whether convenience stores and gas stations met the use requirement of section 212.031 of the *Florida Statutes*.¹⁰⁵⁶ The statute states, "[i]t is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property"¹⁰⁵⁷ The hearing officer and the Department of Revenue concluded the transactions between S & W and store owners were taxable under section 212.031.¹⁰⁵⁸ That statute defines "business" as "any activity engaged in by any person, or caused to be engaged in by him, with the object of private or public gain, benefit, or advantage."¹⁰⁵⁹

In this situation, "the licensors operated a commercial premises designed to attract customers for revenue-generating purposes."¹⁰⁶⁰ The ventures included income derived from a range of premises activity. So, it was not a clearly erroneous interpretation to determine that store owners

1051. *Id.*

1052. *Id.*

1053. *Id.*; see 5 FLA. JUR. 2D *Bailments* § 1 (1978).

1054. *S & W Air Vac*, 697 So. 2d at 1315; see *Conklin Shows, Inc. v. Department of Revenue*, 684 So. 2d 328 (Fla. 4th Dist. Ct. App. 1996); see also *Kislak v. Kreedian*, 95 So. 2d 510, 515 (Fla. 1957).

1055. *S & W Air Vac*, 697 So. 2d at 1315.

1056. *Id.* at 1316; see FLA. STAT. § 212.031 (1995).

1057. *S & W Air Vac*, 697 So. 2d at 1316 (citing FLA. STAT. § 212.031 (1995)).

1058. *Id.*

1059. *Id.* (citing FLA. STAT. § 212.02(2) (1989)).

1060. *Id.* at 1317.

were in the business of granting a license under section 212.02 of the *Florida Statutes*.¹⁰⁶¹

Smith v. Welton.¹⁰⁶² The issue this court heard on appeal was whether section 193.155(8)(a) of the *Florida Statutes* is facially unconstitutional in light of Article VII, Section (4)(c) of the *Florida Constitution*.¹⁰⁶³ Article VII, Section (4)(c) provides:

Taxation; assessments.—By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

. . . .

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1, [1994]. This assessment shall change only as provided herein.

1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

(A) three percent (3%) of the assessment for the prior year.

(B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

2. No assessment shall exceed just value.

3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided therein.

4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

5. Changes, additions, reductions or improvements to homestead property shall be assessed as provided for by general

1061. *Id.*

1062. 710 So. 2d 135 (Fla. 1st Dist. Ct. App. 1998).

1063. *Id.* at 136; *see* FLA. STAT. § 193.155(8)(a) (1995); *see also* FLA. CONST. art VII, § 4(c).

law; provided, however, after the adjustment for any change, addition, reduction or improvement, the property shall be assessed as provided herein.

6. In the event of a termination of homestead status, the property shall be assessed as provided by general law.¹⁰⁶⁴

However, section 193.155(8)(a) of the *Florida Statutes* provides:

(8) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:

(a) If errors are made in arriving at any annual assessment under this section due to material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.¹⁰⁶⁵

The trial court found that section 193.155(8)(a) is unconstitutional because the constitution states clearly that the assessment of just value shall only change as provided by the statute, and section 193.155(8)(a) permits changes to the assessment that are not found in the constitution.¹⁰⁶⁶ This court found that subsection (8)(a) of section 193.155 of the *Florida Statutes* is facially unconstitutional, because the purported exception to the three percent rule contained in section 193.155(8)(a) is not one provided for in the constitution.¹⁰⁶⁷

The Supreme Court of Florida has held that provisions of the constitution “cannot be altered, contracted or enlarged” by the legislation.¹⁰⁶⁸ It determined the statute in question would defeat the purpose of Article VII, Section (4)(c) by allowing constant reassessments of homesteads when the purpose of section (4)(c) of Article VII is to encourage the preservation of homestead property in the face of increasing real estate development and rising property values and assessments.¹⁰⁶⁹

The district court found no merit to Appellant’s argument that without section 193.155(8)(a), there would be inequitable taxation since the constitution expressly mandates the special or inequitable taxation.¹⁰⁷⁰ Only the homestead property receives the three percent cap, and, therefore, non-homestead property, commercial, agricultural, and noncommercial

1064. *Smith*, 710 So. 2d at 136–37 (quoting FLA. CONST. art. VII, § 4(c)).

1065. *Id.* at 137 (quoting FLA. STAT. § 193.155(8)(a) (1997)).

1066. *Id.* at 136.

1067. *Id.* at 137.

1068. *Id.* at 138 (citing *Osterndorf v. Turner*, 426 So. 2d 539, 544 (Fla. 1982)).

1069. *Smith*, 710 So. 2d at 138.

1070. *Id.* at 137.

recreational land are excluded from the three percent cap.¹⁰⁷¹ Furthermore, the constitution provides that assessments will not exceed just value, but does not imply that assessments will be below just value.¹⁰⁷² Therefore, this court held that the trial court correctly granted summary judgment.¹⁰⁷³

Legislative changes to chapter 98 include, but are not limited to, the following:

The Florida Legislature enacted chapter 98-185 to be retroactive to January 1, 1998 and to be effective until it expires July 1, 1999.¹⁰⁷⁴ This chapter provides for a partial abatement of ad valorem taxation where property has been destroyed or damaged by tornados.¹⁰⁷⁵ The application for such abatement "must be filed by the owner with the property appraiser before March 1, following the tax year in which the destruction or damage occurred."¹⁰⁷⁶ Chapter 98-185 has the details and criteria to be included in the application and what events will occur if the property appraiser determines the applicant to be entitled to such partial abatement.¹⁰⁷⁷

Legislative changes to chapter 196 include, but are not limited to, the following:

Section 196.197 of the *Florida Statutes* and its subparts were created to qualify the continuing care facility established under chapter 651 of the *Florida Statutes*, for exemption under section 196.1975 of the *Florida Statutes*.¹⁰⁷⁸ Continuing care facilities shall have a \$25,000 homestead exemption from the assessed valuation of the property for each apartment occupied on January first of the year for which exemption from ad valorem taxation is requested.¹⁰⁷⁹ These provisions shall take affect January 1, 1999, and shall affect the 1999 tax rolls in each subsequent year's tax rolls.¹⁰⁸⁰

XXII. TIMESHARES

Effective April 30, 1998, amendments to chapter 721 became effective. Those changes include, but are not limited to, the following:

1071. *Id.*

1072. *Id.* at 137-38 (citing Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992)).

1073. *Id.* at 138.

1074. Act of May 23, 1998, ch. 98-185, §2, 1998 Fla. Laws 1617, 1617.

1075. *Id.*, §1, 1998 Fla. Laws at 1617.

1076. *Id.*, §1, 1998 Fla. Laws at 1616.

1077. *Id.*, §1, 1998 Fla. Laws at 1616-17.

1078. FLA. STAT. § 196.197 (1997).

1079. *Id.* § 196.1975(9)(a) (1997).

1080. Act of May 22, 1998, ch. 98-177, §3, 1998 Fla. Laws 1597, 1598 (codified as amended at FLA. STAT. § 196.197).

To section 721.05 of the *Florida Statutes*, the legislature added a definition of “regulated short term product.”¹⁰⁸¹ That term is defined to mean a contractual right, offered by the seller, to use accommodations of a timeshare plan, provided that the agreement is executed in Florida on the same day the purchaser received an offer to acquire an interest in a timeshare plan and does not execute a purchase contract, after attending a sales presentation. The acquisition of the right to use includes an agreement that all or a portion of the consideration the prospective purchaser paid for the right to use will be applied to or credited against the price the purchaser will pay in the future for a timeshare interest, or the future purchase price of a timeshare interest will be locked in.¹⁰⁸²

It is interesting to note that the legislature deleted section 721.075(4) of the 1997 *Florida Statutes* when creating the 1998 supplement.¹⁰⁸³ That paragraph required the developer to file an irrevocable letter of credit, surety bond, or other assurance acceptable to the director of the division where the aggregate represented value of all incidental benefits offered by a developer to a purchaser exceeded five percent of the purchase price paid by that purchaser is no longer a part of the statutory scheme.¹⁰⁸⁴

To section 721.09 of the *Florida Statutes* the legislature added sub paragraph (c).¹⁰⁸⁵ This new provision provides for the seller’s ability to immediately cancel all outstanding reservation agreements, refunding all escrow funds to perspective purchasers, and discontinuing accepting reservation deposits or advertising availability of reservation agreements, where the time share plan subject to the reservation agreement had not been filed with the division as required by Florida law within ninety days after the date the division approved the reservation agreement filing.¹⁰⁸⁶

Subparagraph (d) was also added.¹⁰⁸⁷ This paragraph permits the seller who has filed a reservation agreement and escrow agreement as required by statute to advertise the reservation agreement providing the material meets the criteria prescribed by the subsections to subparagraph (d).¹⁰⁸⁸

To section 721.11 of the *Florida Statutes* the legislature added subparagraph (6) and its subparts.¹⁰⁸⁹ These provisions provide that failing to provide cancellation rights or disclosures required in connection with the sale of a regulated short-term product automatically constitutes a

1081. FLA. STAT. § 721.05(27) (Supp. 1998).

1082. *Id.*

1083. *Id.* § 721.075(4).

1084. *Id.*

1085. *Id.* § 721.09(c).

1086. FLA. STAT. § 721.09(c) (Supp. 1998).

1087. *Id.* § 721.09(d).

1088. *Id.*

1089. *Id.* § 721.11(6).

misrepresentation in accordance with section 721.11(4)(a).¹⁰⁹⁰ Section 721.11(6)(a) requires the filing within ten days prior to use of a standard form of any agreement relating to the sale of a regulated short term product.¹⁰⁹¹ Subparagraph (b) of that statute establishes the right of a purchaser of a regulated short term product to cancel the agreement until midnight of the tenth calendar day following the execution date of the agreement.¹⁰⁹² It also provides that the right of cancellation may not be waived by the prospective purchaser or anyone on its behalf.¹⁰⁹³ Subparagraph (c) and its subparts with respect to this same statute provide for statements that must be included in an agreement for purchase of a regulated short term product.¹⁰⁹⁴ Further, subparagraph (d) of the same statute provides for a series of statements in conspicuous type that must be included in an agreement for the purchase of a regulated short term product.¹⁰⁹⁵

Subparagraph (e) of the foregoing statute also provides for an exemption from the requirements of paragraphs (b), (c), and (d).¹⁰⁹⁶ Where the seller provides the purchaser with the right to cancel the purchase of a regulated short term product for any time up to seven days before the purchaser has reserved use of the accommodations, but certainly in no event less than ten days, and if the seller refunds the total amount of all payments made by the purchaser, although reduced by the proportion of any benefits the purchaser has actually received prior to the effective date of the cancellation, the specific value of which has been agreed to by the purchaser and seller, the short term product offer is exempt from the requirements of the aforementioned paragraphs.¹⁰⁹⁷

To section 721.15 of the *Florida Statutes* the legislature added subparagraph (1)(b).¹⁰⁹⁸ This section provides for allocating total common expenses for a condominium or cooperative timeshare plan and allowing such to vary on a reasonable basis if there is any interest in a common element attributable to each time share parcel or time share cooperative parcel equals to share the total common expenses allocatable to that parcel.¹⁰⁹⁹

1090. *Id.* § 721.11(4)(a).

1091. FLA. STAT. § 721.11(6)(a) (Supp. 1998).

1092. *Id.* § 721.11(6)(b).

1093. *Id.*

1094. *Id.* § 721.11(6)(c).

1095. *Id.* § 721.11(6)(d).

1096. FLA. STAT. § 721.11(6)(e) (Supp. 1998).

1097. *Id.*

1098. *Id.* § 721.15(1)(b).

1099. *Id.*

To chapter 721 the legislature added Part III entitled "Foreclosure of Liens on Timeshare Estates."¹¹⁰⁰ Section 721.80 of the *Florida Statutes* provides that Part III may be cited as the "Timeshare Lien Foreclosure Act."¹¹⁰¹ This part consists of sections 721.80 through 721.86 and should be read in detail to become familiar with the rights and procedures involved.¹¹⁰²

Furthermore, the legislature added Part IV to the chapter.¹¹⁰³ This consists of establishing a Commissioner of Deeds to take acknowledgments, proofs of execution, and oaths outside the United States in connection with the execution of any instruments relating to or being used in connection with a time share estate.¹¹⁰⁴ This part consists of sections 721.96 through 721.98 and should be read in detail.¹¹⁰⁵

XXIII. TITLE INSURANCE

*Security Union Title Insurance Co. v. Citibank N.A.*¹¹⁰⁶ The First District Court of Appeal was asked to review a jury verdict finding the title insurance underwriter vicariously liable for fraud committed by its agent, an attorney, when he made fraudulent representation to the lender to obtain loans, some of which benefited him personally and others of which benefited his clients. Noting that the agent was expressly authorized only to issue title insurance commitments and policies, and that the losses did not occur from his acting in such a capacity, the appellate court found no vicarious liability under that authority.¹¹⁰⁷

Next, it considered whether there might be vicarious liability arising from the agent's acting within his apparent authority.¹¹⁰⁸ In doing so, the appellate court noted that at least one element needed for this liability is that there must have been some representation by the principal.¹¹⁰⁹ Here the facts showed only that the principal made representations that the agent had the authority to issue title commitments and policies. The fraudulent acts involved the agent's representations made to obtain loans. There were no representations by the underwriter that the agent had any authority to make

1100. *Id.* § 721.80.

1101. FLA. STAT. § 721.80-.86 (Supp. 1998).

1102. *Id.*

1103. *Id.* § 721.96.

1104. *Id.* § 721.97.

1105. *Id.* §§ 721.96-.98.

1106. 715 So. 2d 973 (1st Dist. Ct. App. 1998).

1107. *Id.* at 974.

1108. *Id.*

1109. *Id.* at 975. Presumably this representation must be one that would lead the claimant to have relied reasonably on the appearance that the agent had the authority to commit the act that caused the harm.

statements as a closing agent to obtain loans. Also, it was clear that the loans were for his personal benefit and his clients' benefit. Therefore, the appellate court reversed and remanded with instructions to enter a judgment in favor of the underwriter.¹¹¹⁰

XXIV. ZONING AND PUBLIC LAND USE CONTROLS

*Villas of Lake Jackson, Ltd. v. Leon County.*¹¹¹¹ The current landowners, or their predecessors in title, acquired a large tract of land on the shore of a lake. Most of it had been developed with apartment complexes when the county, concerned about the impact of overdevelopment on the lake, rezoned the area to single family housing. The landowners sued in federal court. The United States district court dismissed the Takings Clause claim on ripeness grounds, and they also refused to exercise supplemental jurisdiction over the inverse condemnation claim based on Florida law; these rulings were not appealed.¹¹¹²

The focus of the appeal was the summary judgment against the landowners on their due process and equal protection claims. The United States Court of Appeals for the Eleventh Circuit affirmed the due process decision because there was "undisputed evidence of the County's interest in protecting the water quality at the lake," and the down zoning bore a rational relation to that goal.¹¹¹³ Similarly, denial of the equal protection claim was affirmed because of "the undisputed evidence of the unique aspects of the tract as contrasted to other assertedly similarly situated properties and the lack of evidence of invidious discrimination."¹¹¹⁴ The court devoted most of its energies to explaining why it affirmed the denial of the due process taking claim.¹¹¹⁵ In brief, the court concluded that there was no such cause of action under the *United States Constitution*.¹¹¹⁶ A concise review of United States Supreme Court decisions involving regulatory takings clearly established that the plaintiffs in this case, claiming a violation of federal rights that had vested under an earlier zoning regulation, were limited to actions based on violations of substantive due process, procedural due process, and the Takings Clause.¹¹¹⁷

1110. *Id.* at 976.

1111. 121 F.3d 610 (11th Cir. 1997).

1112. *Id.* at 611.

1113. *Id.* at 614.

1114. *Id.* at 615.

1115. *Id.* at 612-14.

1116. *Villas*, 121 F.3d at 615.

1117. *Id.*

Ammons v. Okeechobee County.¹¹¹⁸ Plaintiffs bought land on which to live and start a construction business. A county zoning officer had advised them that the land could be used for these purposes.¹¹¹⁹ They applied for and received an occupational license at that address and began the business. Later, they applied for a building permit for the house which had space to receive business deliveries.¹¹²⁰ Fifteen months later, the county realized that the business was prohibited by the zoning. The county attorney sent plaintiffs a letter informing them of the error and ordering them to stop business activities at that location.¹¹²¹

Plaintiffs brought this suit to enjoin the county from revoking their occupational license and for damages on a variety of theories. Summary judgment was granted against the plaintiffs, so they brought this appeal.¹¹²² The district court affirmed as to the estoppel and due process claims.¹¹²³ The basis for the injunction claim was that the county should be equitably estopped due to the representations of zoning officials. Landowners are on constructive notice of zoning laws and the limited powers of zoning officials. The zoning officials had no power to permit, either intentionally or through error, a landowner to violate the zoning ordinance. Relief in equity would be inappropriate because “[i]t would not serve public policy well to permit such mistakes to persist when they affect public welfare, like planning and zoning decisions do,” nor could the plaintiffs recover damages under section 1983, chapter 42 of the *United States Code* for a denial of due process of law.¹¹²⁴ An occupational license, being merely a privilege and not involving a fundamental right, may be constitutionally rescinded where procedural due process is observed.¹¹²⁵ Plaintiffs here received a hearing on the revocation.¹¹²⁶

*City of Dania v. Florida Power & Light*¹¹²⁷ and *City of Jacksonville Beach v. Marisol Land Development, Inc.*¹¹²⁸ In the *City of Dania* case, Florida Power and Light (“FPL”) filed an application for a special exception so it could build an electrical substation in an area where that was not

1118. 710 So. 2d 641 (Fla. 4th Dist. Ct. App. 1998).

1119. *Id.* at 642.

1120. *Id.* at 642–43.

1121. *Id.* at 643.

1122. *Id.*

1123. *Ammons*, 710 So. 2d at 643. The summary judgment on the equal protection count was reversed because the county had not filed any affidavits as to that claim. *Id.* Consequently, summary judgment should not have been granted. *Id.*

1124. *Id.* at 645.

1125. *Id.*

1126. *Ammons*, 710 So. 2d at 645.

1127. 23 Fla. L. Weekly D271 (4th Dist. Ct. App. Jan. 21, 1998).

1128. 706 So. 2d 354 (Fla. 1st Dist. Ct. App. 1998).

otherwise allowed. Under the City Code, special exceptions “shall be permitted” based upon compliance with seven requirements, two of which were: the use would not cause substantial injury to other property in the neighborhood; and the use would be compatible with adjoining development and the intended purpose of the district.¹¹²⁹ The Commission held a public hearing. Testimony was presented by members of the public, a property appraiser, and a certified land planner. Then, following the recommendation of the City Planning and Zoning Board, the city commission denied the exception.¹¹³⁰

The circuit court granted FPL’s petition for certiorari, so the City sought certiorari review in the district court of appeal.¹¹³¹ The district court reversed for two reasons.¹¹³² First, the circuit court had ruled that the City had an especially heavy burden of proof to sustain a denial of the application because the exception was being sought to provide for essential services, i.e., electric power.¹¹³³ The district court could find nothing in the case law or the city code to support that ruling.¹¹³⁴ Imposing the wrong burden of proof was a departure from the essential requirements of the law necessitating reversal.¹¹³⁵ Second, the fourth district concluded that the circuit court had departed from the essential requirements of the law by substituting its own view of the evidence for that of the city commission.¹¹³⁶ When reviewing local administrative action on a certiorari petition under rule 9.030(c)(3) of the *Florida Rules of Appellate Procedure*, the circuit court acts as an appellate court.¹¹³⁷ As such, it could not reweigh the evidence.¹¹³⁸ Its role regarding the weight of the evidence was only to determine if the fact finder had substantial competent evidence on which to base its decision.¹¹³⁹ Here, the record revealed the fact finder’s opinion was supported by the presentations of factual evidence by members of the public and testimony from two experts.¹¹⁴⁰ The circuit court’s order did not explain why this was

1129. *Florida Power & Light*, 23 Fla. L. Weekly at D272; see DANIA CITY CODE § 6.40 (1998).

1130. *Florida Power & Light*, 23 Fla. L. Weekly at D271.

1131. *Id.*

1132. *Id.* at D272–73.

1133. *Id.* at D272.

1134. *Id.*

1135. *Florida Power & Light*, 23 Fla. L. Weekly at D273.

1136. *Id.*

1137. *Id.* at D272; see FLA. R. APP. P. 9.030(c)(3).

1138. *Florida Power & Light*, 23 Fla. L. Weekly at D272.

1139. *Id.*

1140. *Id.*

not substantial competent evidence and the district court could not see any reason to agree with that conclusion.¹¹⁴¹

The trial court had made the same mistake in *City of Jacksonville Beach v. Marisol Land Development, Inc.*¹¹⁴² The rezoning petition had been rejected by the city council after a full hearing. Twelve citizens had spoken in opposition to the rezoning, and the city's planning staff's comments, recommending against the rezoning, had been read into the record. The city council concluded that rezoning would be inconsistent with its comprehensive plan. The circuit court had disagreed and overturned the city council's decision.¹¹⁴³ That was, the first district ruled, essentially *de novo* review in which the circuit court substituted its own weighing of the evidence for that of the city council.¹¹⁴⁴ That is not the circuit court's role in certiorari review of administrative action, and in doing so, the circuit court applied incorrect law requiring reversal.¹¹⁴⁵

*City of Miami Beach v. Robbins*¹¹⁴⁶ and *Bird-Kendall Homeowners Ass'n v. County Board of County Commissioners*.¹¹⁴⁷ These third district cases involved opposite sides of spot zoning. Both reached the district court via certiorari review of a circuit court decision. In *City of Miami Beach*, we have reverse spot zoning. The City Commission upzoned the landowner's land and the two adjacent blocks to RM-1 based upon an architectural study and proposed amendments to the comprehensive plan. On review, the court characterized the results as a "veritable island of RM-1 zoning" in "a vast sea of RM-2 and other types of zoning."¹¹⁴⁸ This was characterized as "reverse spot zoning" because it subjects this property to restrictions from which virtually all the neighbors are free.¹¹⁴⁹ It was invalid because it was confiscatory.¹¹⁵⁰ However, the court offered the observation that if circumstances were to change, such as the proposed amendments to the comprehensive plan being adopted and other areas also being rezoned, then the decision might not prevent the City from successfully rezoning this land to RM-1.¹¹⁵¹

1141. *Id.*

1142. 706 So. 2d 354, 355 (Fla. 1st Dist. Ct. App. 1998).

1143. *Id.*

1144. *Id.* at 356.

1145. *Id.*

1146. 702 So. 2d 1329 (Fla. 3d Dist. Ct. App. 1997).

1147. 695 So. 2d 908 (Fla. 3d Dist. Ct. App. 1997), *rev. denied by* Garcia v. Bird-Kendall Homeowners Ass'n, 701 So. 2d 867 (Fla. 1997).

1148. *Robbins*, 702 So. 2d at 1330.

1149. *Id.*

1150. *Id.*

1151. *Id.* at 1330-31.

In *Bird-Kendall*, the county commissioners downzoned “a tiny, 0.23 acre tract,” an area the size of a typical subdivision house lot, to allow the landowner to operate a feed store when that was prohibited in the surrounding area.¹¹⁵² This was characterized as spot zoning “to the nth degree.”¹¹⁵³ In fact, Chief Judge Schwartz wrote, “[t]he extent of the violation of this principal is so pronounced in this case that the term ‘spot zoning’ does not do it justice. Perhaps ‘melanoma zoning’ or, for short, ‘melazoning’ would be more appropriate.”¹¹⁵⁴

G.B.V. International, Ltd. v. Broward County.¹¹⁵⁵ The developer sought site plan approval for a mixed use development. Initially, the plan had been rejected by the city because it had too many units per acre.¹¹⁵⁶ However, the city’s and county’s comprehensive plans allowed for “flex units,” a form of transferred development rights under which the number of units can be transferred from other areas within the borders of that government.¹¹⁵⁷ Utilizing flex units, the developer got approval by the city.¹¹⁵⁸ However, getting approval from the county was another matter. Although it was only reviewing the plan for compatibility with the county’s comprehensive plan, the County Commissioners denied site plan approval, expressly disapproving of the city’s use of the flex units, even though the city was within its authority in using them.¹¹⁵⁹ The developer filed a petition for certiorari review by the circuit court. It denied relief based on estoppel.¹¹⁶⁰ The Fourth District Court of Appeal granted common law certiorari and quashed the circuit court’s order.¹¹⁶¹

The standard for such review is whether there has been a miscarriage of justice due to a violation of a clearly established principle of the law.¹¹⁶² The district court found that it had occurred when the circuit court went beyond the evidence that had been before the County Commissioners and relied on a ground not considered by the Commissioners.¹¹⁶³ Moreover, site plan approval is a quasi-judicial function in which the Commissioners apply policy rather than set it.¹¹⁶⁴ Site plan approval should be granted to all who

1152. *Bird-Kendall*, 695 So. 2d at 909.

1153. *Id.*

1154. *Id.* at 909 n.1.

1155. 709 So. 2d 155 (Fla. 4th Dist. Ct. App. 1998).

1156. *Id.* at 155–56.

1157. *Id.* at 156.

1158. *Id.*

1159. *Id.*

1160. *G.B.V.*, 709 So. 2d at 155.

1161. *Id.*

1162. *Id.*

1163. *Id.*

1164. *Id.* at 156.

meet the requirements of the law.¹¹⁶⁵ In this case, the developer had submitted a plan that complied with the law, so site plan approval was a ministerial function.¹¹⁶⁶ Broward County was ordered to approve the site plan.¹¹⁶⁷

*Poulos v. Martin County*¹¹⁶⁸ and *Florida Rock Properties v. Keyser*.¹¹⁶⁹ These two cases dealt with challenges to government action under section 163.3215 of the *Florida Statutes*.¹¹⁷⁰ In *Poulos*, a developer obtained a development order from the Martin County Commission. The redevelopment order was challenged under this section by a third person. As required, the challengers filed a verified complaint with the county to give it a chance to rectify the alleged inconsistency with the county's comprehensive plan.¹¹⁷¹ Martin County Commission refused to set aside the development order. Following the statutory procedure, the challengers then filed the complaint in the circuit court, commencing this action for declaratory and injunctive relief.¹¹⁷² The question was whether the circuit court should then act as a reviewing court exercising certiorari jurisdiction or grant a trial de novo.¹¹⁷³ The circuit court chose review as under a certiorari petition, but the Fourth District Court of Appeal reversed.¹¹⁷⁴

Section 163.3215 of the *Florida Statutes* provided that the verified complaint must be filed with the local government no later than thirty days after it had taken an action inconsistent with the comprehensive plan.¹¹⁷⁵ Then the local government had thirty days to respond.¹¹⁷⁶ If dissatisfied with the response, the aggrieved person had to file the action in circuit court within thirty days.¹¹⁷⁷ In sum, the action in circuit court could be filed as much as ninety days after the complained of action of the local government.¹¹⁷⁸ However, under the rules,¹¹⁷⁹ a petition for certiorari, the means by which a unsuccessful applicant for approval of a development

1165. *G.B.V.*, 709 So. 2d at 156.

1166. *Id.*

1167. *Id.*

1168. 700 So. 2d 163 (Fla. 4th Dist. Ct. App. 1997).

1169. 709 So. 2d 175 (Fla. 5th Dist. Ct. App. 1998).

1170. FLA. STAT. § 163.3215 (1995).

1171. *Poulos*, 700 So. 2d at 163.

1172. *Id.*

1173. *Id.* at 164.

1174. *Id.* at 163.

1175. FLA. STAT. § 163.3215 (1997).

1176. *Id.*

1177. *Id.*

1178. *Id.*

1179. FLA. R. APP. P. 9.100(c)(1).

order obtains review, must be filed within thirty days.¹¹⁸⁰ By the process of deduction, section 163.3215 of the *Florida Statutes* proceeding could not be certiorari. Therefore, it must be a statutory procedure in the form of an original *de novo* action.¹¹⁸¹

The issue in *Florida Rock* was standing under this statute.¹¹⁸² At the request of the landowner, the County rezoned Florida Rock's 509 acres from agricultural to mining.¹¹⁸³ The challenger had a record as a lifelong activist in environmental and wildlife matters, and he was the owner of land approximately ten miles away.¹¹⁸⁴ He was also an environmental and land use lawyer practicing in the county.¹¹⁸⁵ He claimed that the comprehensive plan required that twenty-five percent be set aside to preserve native vegetation. Florida Rock and the County disagreed, arguing that the set-aside was inapplicable.¹¹⁸⁶ The challenger filed a verified complaint seeking declaratory relief under the statute.

The statute provided that "[a]ny aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order . . . that is not consistent with the comprehensive plan."¹¹⁸⁷ It further defined "aggrieved or adversely affected party" as one who "will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan."¹¹⁸⁸ The statute did not specify the degree to which a protected interest must be affected, other than to provide that "[t]he alleged adverse interest . . . shall exceed in degree the general interest in community good shared by all persons."¹¹⁸⁹ The court concluded that the challenger here had not demonstrated a specific injury.¹¹⁹⁰ Being a property owner in the county was not enough. Owning a business or even a law practice in the county was not enough. In sum, the challenger here had only proved that he was a citizen with an interest in the environment, and that was not enough to establish standing.¹¹⁹¹

Judge Sharp provided a written dissent, pointing out that the statute did not require a challenger to have a property interest injured by the

1180. *Id.*

1181. *Poulos*, 700 So. 2d at 165-66.

1182. *Florida Rock*, 709 So. 2d at 176.

1183. *Id.* at 176.

1184. *Id.*

1185. *Id.*

1186. *Id.*

1187. *Florida Rock*, 709 So. 2d at 176-77; see FLA. STAT. § 163.3215(1) (1995).

1188. *Florida Rock*, 709 So. 2d at 177; see FLA. STAT. § 163.3215(2) (1995).

1189. *Florida Rock*, 709 So. 2d at 177.

1190. *Id.*

1191. *Id.*

governmental action, but that seemed to be the way the majority was reading the statute.¹¹⁹² The challenger had taken an active part in the process by attending Planning Commission hearings, appealing the Planning Commission's decision to the County Commission, arguing the appeal before the Commission, and bringing this case.¹¹⁹³ He had moved to the county because of the wildlife habitat that would be affected by the rezoning decision and had a clear record of defending the environment.¹¹⁹⁴ If he did not have standing under the statute, then standing under it was reduced to those who could show monetary harm.¹¹⁹⁵

XXV. CONCLUSION

The foregoing survey presents selected materials of significance to those involved in real estate. There seems to be no consistent pattern to the case law and legislative development, but there were also few surprises. The law has continued to evolve in interesting ways, and we hope that this survey proves useful in following that evolution.

1192. *Id.* at 178–79 (Sharp, J., dissenting).

1193. *Id.*

1194. *Florida Rock*, 709 So. 2d at 178.

1195. *Id.* at 179.

Using a “Brief Case Plan” Method to Reconcile Kinship Rights and the Best Interests of the Child When an Unwed Father Contests a Mother’s Decision to Place an Infant For Adoption

The Florida Senate Committee on the Judiciary proposed Senate Bill 550 regarding adoption for consideration in the 1998 legislative session. The bill failed in committee in the House of Representatives, but has been pre-filed as Senate Bill 0002 for 1999. This article examines one of the areas of concern addressed by the bill and proposes an alternative approach to the issue.

Cheryl Ryon Eisen^{*}

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I. INTRODUCTION

In most infant adoption cases contested by an unwed biological father, the child remains in the physical custody of the prospective adoptive parents,¹ with no visitation with the birth mother or birth father,² during legal

1. While awaiting termination of their biological parents' rights, prospective adoptive children may be placed in foster care or in a prospective adoptive home. Placement in a prospective adoptive home prior to termination of parental rights creates a "legal risk" situation. Especially in the case of infant adoptions, however, an emphasis on "bonding" drives legal risk placements. *See generally* DOROTHY W. SMITH & LAURIE NEHLS SHERWEN, *MOTHERS AND THEIR ADOPTED CHILDREN: THE BONDING PROCESS* (2d ed. 1988). Adoption practitioners are best advised to require prospective adoptive parents to sign a "legal risk acknowledgement" at the time of placement. Such an acknowledgement is required by administrative rule in agency adoptions. FLA. ADMIN. CODE R. 65C-15.002(5), (6). *See form infra* Appendix A. (Unless otherwise indicated, the forms appearing as appendices to this article are the original work of the author for use by Adoption Advisory Associates and Cheryl R. Eisen, P.A., in agency adoptions. Readers are welcome to adapt and use these forms for their own practices, but no express or implied warranty is made as to their sufficiency or advisability, legal or otherwise.)

2. Technically speaking, one's "birth father," synonymous with the term "natural father," is one's biological father, whether known or unknown, whether married to one's

proceedings which typically last for years.³ Thus, the child lives, during a critical period of his or her life, in a home and in a family from which he or she ultimately may be removed by court order. If removed, the child goes to the custody of a parent or parents⁴ with whom the child has no relationship, save a biological link that has become remote for the child by disconnection and the passage of considerable time. The extent of psychological damage, caused to the child by the emotional uprooting attendant upon such a change in physical custody, can only be hypothesized by the experts.⁵

biological mother or not, whether one is adopted or not. The terms "birth father," "birth mother," and "birth parents" are typically used, however, to distinguish an adoptee's biological parents from his or her adoptive parents. See generally ARTHUR D. SOROSKY, ET AL., THE ADOPTION TRIANGLE 49-50 (1978).

3. See *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992) [hereinafter "*Baby Jessica*"]. In Iowa's *Baby Jessica* case, the child was born in February, 1991. *Id.* at 240. Rehearing on the Iowa Supreme Court's decision, affirming an intermediate appellate court's decision to reverse a juvenile court's termination of parental rights, was denied in November, 1992. *Id.* at 239. The total time elapsed from birth to denial of rehearing (and remand) was twenty-two and one-half months. *Id.* at 239-40.

See also *In re Doe*, 638 N.E.2d 181 (Ill. 1994) [hereinafter "*Baby Richard*"]. In Illinois' *Baby Richard* case, the child was born in March, 1991, and placed with an adoptive family shortly thereafter. *In re Doe*, 627 N.E.2d 648, 650 (Ill. 1st Dist. Ct. App. 1993). The United States Supreme Court's order, denying certiorari to the Illinois Supreme Court on its judgment reversing the trial court's ruling that the father's consent to the adoption was unnecessary, was entered in November, 1994. *Doe v. Kirchner*, 513 U.S. 994, 994 (1994). The total time that elapsed from birth to denial of certiorari was forty-four months. *Id.*

In Arkansas' "*Baby Sam*" case, a procedurally complicated matter involving five separate trial court actions and three appeals in two states (one is still pending), the child, a newborn when litigation began, is over two years old at the time of this writing. Telephone conversation with Anthony R. Marchese, Florida attorney for Mark and Tracy Johnson, petitioners for adoption in the Juvenile Court of Tuscaloosa County, Ala., case no. JU 97-534.01 (July 24, 1998). The court granted custody of Baby Sam to the adoptive parents on April 28, 1998. See also Vitry v. Goronski, no. 96-2908 FD-14 (Fla. 6th Cir. Ct., Apr. 10, 1996) (related paternity action).

See also G.W.B. v. J.S.W., 658 So. 2d 961 (Fla. 1995) [hereinafter "*Baby Emily*"], and *infra* note 9 and accompanying text. In Florida's *Baby Emily* case, the child was born in August, 1992. G.W.B. v. J.S.W., 647 So. 2d 918, 943 (Fla. 4th Dist. Ct. App. 1994). The Supreme Court of Florida's decision, approving an intermediate appellate court's order affirming the trial court's final judgment of adoption, was handed down in July, 1995. *Id.* at 961. Total time elapsed from birth to final decision: thirty-five months. *Id.*

4. Under current Florida law, the child may in fact be put in the custody of another relative or in foster care if the contesting parent or parents cannot or should not have custody of the child. See FLA. STAT. § 39.811(1) (Supp. 1998).

5. Professor Suellyn Scarnecchia, of the Child Advocacy Law Clinic at the University of Michigan Law School, refers to this as "transfer trauma," borrowing the term from O'Bannon v. Town Ct. Nursing Ctr., 447 U.S. 773, 802-03 (1980), where it "was used to

A. "Victimization" of the Child

In Florida's 1995 *Baby Emily* case,⁶ Supreme Court of Florida Justice Gerald Kogan, writing a separate opinion,⁷ characterized the child, whose unwed birth father contested her adoption, as "the most victimized party" in the case.⁸ Baby Emily was *not* removed from her adoptive home, and thus was not subjected to the psychological trauma referred to above.⁹ Rather,

describe the harm a patient was likely to suffer if moved from one nursing home to another." Suellyn Scarnecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41, 47 n.22 (1995). See also Madelyn Simring Milchman, Ph.D., *Bonding Trauma in Termination of Parental Rights Cases*, 175 N.J. LAW. 29 (1996). Non-adoptive foster care during the pendency of a protracted adoption contest compounds the risk to the child, assuring that he or she will suffer at least one psychologically wrenching resettlement no matter who "wins" the lawsuit.

6. *G.W.B. v. J.S.W.*, 658 So. 2d 961 (Fla. 1995). See *supra* note 3 and accompanying text.

7. *Id.* at 971-79 (Kogan, J., concurring in part and dissenting in part).

8. *Id.* at 979.

9. *G.W.B. v. J.S.W.*, 647 So. 2d 918, 944 (Fla. 4th Dist. Ct. App. 1994) (Appendix: original panel majority opinion). In *Baby Emily*, the child was placed for adoption by her birth mother at birth through a Florida attorney/intermediary. *Id.* at 943. The trial court initially found that there was insufficient evidence that the birth father had abandoned the birth mother during her pregnancy, and thus the child was not free for adoption. *Id.* at 944. Upon rehearing, however, the trial judge found that there was clear and convincing evidence that the birth father had financially and/or emotionally abandoned the birth mother during her pregnancy. *Id.* at 945. The court found that the birth mother was "on her own emotionally during the pregnancy" and that the birth father had resumed a sexual relationship with a former girlfriend while the birth mother was pregnant. *Id.* at 922. A three-judge panel of the Fourth District Court of Appeal reversed the trial court's finding of abandonment. *G.W.B.*, 647 So. 2d at 920. Upon rehearing en banc, the district court reversed the panel decision and found that "for the final three months of her pregnancy, there was *no* financial support, *no* physical assistance in obtaining medical care, including pre-natal care, or for any of her other daily living requirements (and thus, as well, those of the unborn infant) and any emotional factor contributed by the father was a negative influence . . . the totality of the circumstances here are . . . in support of a finding of abandonment." *Id.* at 924 (emphasis the court's).

The Supreme Court of Florida held that "[t]he determination of abandonment is fact specific and, absent direction from the Legislature," it could not "dictate to trial courts precisely how to evaluate the factors that go into making this decision." *G.W.B.*, 658 So. 2d at 966. The supreme court ruled that section 63.032(14) of the *Florida Statutes* allowed a trial court to consider emotional support in making its determination of abandonment and that the record revealed that once the birth mother had moved out of the home, the birth father provided no financial or emotional support. *Id.* at 966 (citing FLA. STAT. § 63.032(14) (Supp. 1992)). The supreme court noted the trial court's observation that the evidence suggested that the birth father might have continued his passive stance toward the birth mother and the child had the attorney/intermediary not contacted him regarding the adoption. *Id.* at 965. Even

the impossibility of returning the three-year-old, a newborn when the litigation began, to her *status quo ante*, to allow a dignified, timely, and uncompromised resolution of her future, whatever the outcome, appears to be what the Justice saw as insult to the child. Justice Kogan asked, "Where does the fault lie?"¹⁰ for the victimization of Baby Emily, and answered:

It rests on inadequate laws, procedural rules incapable of recognizing the needs of a small growing child, state agencies too unmindful of the biological father's rights, parties too eager to litigate, judges and lawyers who let the child's fate bog down in a quagmire of legal technicality. We all have failed Baby Emily.¹¹

B. Kinship Rights and the Best Interests of the Child

Proceeding from a discussion of the United States Supreme Court's decision in *Lehr v. Robertson*,¹² Justice Kogan suggested that the "two competing standards" of one, birth parents' biological kinship rights to the child and two, the best interests of the child, "both may actually have some

then, the record showed that the birth father still did not make any move to provide financial or emotional support to the birth mother or the unborn child. *Id.* The Supreme Court of Florida approved the district court's decision affirming the trial court's finding of abandonment. *Id.* at 967.

In her specially concurring opinion, then district court judge, now Supreme Court of Florida Justice Pariente, commented that a majority of the members of the Fourth District Court of Appeal were concerned about the conduct of attorney/intermediary Charlotte H. Danciu during the adoption proceedings. *G.W.B.*, 647 So. 2d at 930-31 (Pariente, J., concurring specially). However, upon a complaint to the Florida Bar by the birth father, Danciu was exonerated of any unethical conduct. Letter from David M. Barnovitz, Branch Staff Counsel, The Florida Bar, to Steven M. Pessa, Esq. (May 3, 1995) (on file with *Nova Law Review*). See *infra* Appendix B for the text of the letter.

10. *G.W.B.*, 658 So. 2d at 979 (Kogan, J., concurring in part, dissenting in part).

11. *Id.*

12. 463 U.S. 248 (1983). In *Lehr*, the United States Supreme Court decided the question of whether a New York putative father's due process and equal protection rights under the Constitution gave him an absolute right to notice and an opportunity to be heard before his child could be adopted. *Id.* at 249-50. Answering in the affirmative, the Court nevertheless held that the putative father's due process rights were not violated because the New York statutory scheme adequately protected his inchoate interest in assuming a responsible role in the future of his child in that the right to receive notice was completely within the putative father's control (by filing in a putative father registry). *Id.* at 256-65. Nor was the putative father's right to equal protection violated by the law, though it accorded different rights to the custodial parent and one who had either abandoned or never established a parental relationship with the child. *Id.* at 265-68.

relevance” to the resolution of unwed father cases.¹³ He referred to the *Lehr* Court as finding that unwed putative fathers possess only what may be called an “opportunity interest” in establishing legal fatherhood, which “matures into a due process right if ‘[they accept] some measure of responsibility for the child’s future.’”¹⁴ Justice Kogan then observed that “[t]he *Lehr* Court regrettably was silent as to how we should balance ‘best interests’ against kinship rights when the two are in irreconcilable conflict”¹⁵

C. *Call for Reform*

Seeking to solve this “legal conundrum,” and seeing “no solution that is free of tragedy,”¹⁶ Justice Kogan entreated the Family Law Rules Committee of The Florida Bar, and the Florida Legislature, to study methods of expediting contested adoption cases,¹⁷ and noted that “[l]awsuits of this type cry out for at least four broad reforms: (1) expedited review in the trial court; (2) expedited appeal; (3) swift and certain finality of court decisions;

13. *G.W.B.*, 658 So. 2d at 973 (Kogan, J., concurring in part, dissenting in part).

14. *Id.* at 974 (emphasis added). *See also*, *Roe v. Doe*, 524 So. 2d 1037 (Fla. 5th Dist. Ct. App. 1988), wherein a Florida District Court certified the following question to the Supreme Court of Florida:

CAN THE FAILURE OF A PUTATIVE UNMARRIED FATHER TO ASSUME SUPPORT RESPONSIBILITIES AND MEDICAL EXPENSES FOR THE NATURAL MOTHER WHEN SHE REQUIRES SUCH ASSISTANCE AND HE IS AWARE OF HER NEEDS, BE A BASIS FOR A TRIAL COURT TO EXCUSE HIS CONSENT TO THE ADOPTION OF THE CHILD, ON THE GROUNDS OF ABANDONMENT OR ESTOPPEL, PURSUANT TO SECTION 63.072(1), FLORIDA STATUTES (1985).

Id. at 1044. In answering the certified question, the Supreme Court of Florida held that “an unwed father’s prebirth conduct in providing or failing to provide support . . . and medical expenses for the natural mother [was] relevant to the issue of abandonment under section 63.072(1) [of the *Florida Statutes*].” In the *Matter of the Adoption of Doe*, 543 So. 2d 741, 746 (Fla. 1989). The court went on to say:

[T]he failure of [a putative] father to provide prebirth assistance to [a] pregnant mother, when he was able and assistance was needed, vested [the] natural mother with the sole parental authority to consent to the adoption of the child and removed from the natural father the privilege of vetoing the adoption by refusing to give [his] consent.

Id. at 749. The holding was subsequently codified within the chapter 63 definition of “abandonment.” *See* FLA. STAT. § 63.032(14) (1997).

15. *G.W.B.*, 658 So. 2d at 974 (Kogan, J., concurring in part, dissenting in part).

16. *Id.* at 979.

17. *Id.*

and (4) reasonable mechanisms to minimize psychological harm to the child during the legal process.”¹⁸

The first three of Justice Kogan’s requested reforms are well within the legislative and judicial branches’ ability to provide. However, what Justice Kogan observed as the silence of the *Lehr* Court as to how to balance “best interests” against kinship rights, resounds in the law’s failure, to date, to meet Justice Kogan’s fourth request, for mechanisms to minimize psychological harm to the child.

D. *Evaluation of Performance*

To protect the interests of both birth parents and children, Justice Kogan suggested a fixed period during which a contesting unwed putative father’s “performance” *vis-à-vis* his newborn (up to six months old) child could be evaluated by the state.¹⁹ Most birth fathers likely would dispute whether the state has the power to so impose upon their parental rights. However, as Justice Kogan reminded: “It deserves emphasis here that the unwed biological father’s constitutional interest over the child is not fully formed at this stage and therefore can be subjected to . . . reasonable restrictions or limitations.”²⁰

The performance approach to unwed father cases proposed by Justice Kogan is of the nature of what is known in child welfare and juvenile law circles as a “case plan” method.²¹ The case plan, a social service model for working through issues of social welfare, is already recognized in chapter 39 of the *Florida Statutes* as a hallmark of child dependency cases.²² As will be seen, this method is particularly well-suited to assist courts in balancing the best interests of children and the kinship rights of their birth parents in contested adoption cases.²³

18. *Id.* at 979 n.21.

19. *Id.* at 976.

20. *G.W.B.*, 658 So. 2d at 976.

21. *See infra* text accompanying notes 23–28. “Case plan” is defined in the Florida Administrative Code as “the goal-oriented, time limited individualized program of action for a child.” FLA. ADMIN. CODE 65C-15.001(13).

22. *See generally* FLA. STAT. § 39.601 (Supp. 1998).

23. *See infra* text accompanying notes 97–138.

II. CHAPTERS 39 AND 63: AN ABBREVIATED OVERVIEW OF CURRENT FLORIDA STATUTES RELATING TO ADOPTION

For the reader unfamiliar with the nature and scope of chapters 39 and 63 of the *Florida Statutes*, a brief summary will be helpful in understanding the issues addressed in this article.

A. *Florida Statutes Chapter 39 ("Proceedings Relating to Children")*

Chapter 39 embraces "status" issues of child welfare. It provides the framework for disposition of cases involving allegations of child dependency due to abuse, neglect, or abandonment. In any dependency case, the parent or parents of the child are entitled to a case plan which includes goals for remediation, means to effectuate those goals, and methods to assess outcomes. The purpose of the case plan is to assist the family to remain intact or, where the child has been removed from the home, to reunify if and when the plan's goals are met.²⁴ A dependency not otherwise resolved ends in an involuntary termination of parental rights²⁵ and commitment of the child to the Florida Department of Children & Family Services ("the Department"), or to a Florida licensed child-placing agency ("licensed agency").²⁶ A chapter 39 proceeding for termination of parental rights is also initiated when a child is voluntarily "surrendered" for adoption to the Department or a licensed agency.²⁷ In the case of a voluntary surrender, the case plan goal is termination of parental rights rather than reunification of the family.²⁸

The procedures established in chapter 39 for termination of parental rights assure parents of constitutional protection against unreasonable government interference with their liberty interest in rearing their children.²⁹ For example, parents must be afforded the right to counsel, including court-appointed counsel if indigent, at every stage of the termination proceedings.³⁰ Both the Department and otherwise "private"

24. See generally FLA. STAT. § 39.601(6) (Supp. 1998).

25. *Id.*

26. The Department is authorized to license agencies and promulgate rules for their operation. FLA. STAT. § 409.175(3)(a), (4)(a) (1997).

27. See FLA. STAT. § 39.806(1)(a) (Supp. 1998).

28. *Id.* § 39.806(3).

29. "[A child's] natural parents have a fundamental liberty interest in the care, custody, and management of their children." *G.W.B.*, 658 So. 2d at 966 (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

30. FLA. STAT. § 39.807(1)(a) (Supp. 1998).

licensed agencies are subject to chapter 39 due process requirements.³¹ Presumably, licensed agencies are included in chapter 39 because they are licensed by the state for the purpose of providing services generally performed by the state itself, i.e., foster care and placement of children for adoption, thus functioning quasi-publicly as state “actors” for due process purposes.³²

31. See generally FLA. STAT. ch. 39.

32. See *In re R. J. C.*, 300 So. 2d 54, 58 (Fla. 1st Dist. Ct. App. 1974).

The [Children’s] Home Society [a licensed agency] contends that . . . [it] is not a ‘foster home or agency of the state’ and that the Order of Permanent Commitment [of the child to Children’s Home Society] was not based on the inability or unfitness of the parents, but, rather, on the voluntary surrender of the child for subsequent adoption. We find these distinctions to be without merit. . . . [I]t is our interpretation . . . that the Home Society should be considered a temporary foster home or, at the very least, an ‘agency of the state.’

Id. at 58. See also *Swayne v. L.D.S. Soc. Servs.*, 795 P.2d 637, 640 (Utah 1990) (holding private adoption agency was a “state actor” for due process purposes where termination of parental rights statute provided for automatic termination of unwed father’s rights unless he had previously filed an acknowledgment of paternity). In *Swayne*, one member of the court did not agree that the self-executing statute rendered the private agency a state actor merely by its participation in the chain of events that rendered the father’s rights terminated by operation of law. *Swayne*, 795 P.2d at 645 (Howe, Assoc. C.J., concurring and dissenting).

Simply because the legislature has provided . . . that the placement of an illegitimate child by his mother with an adoption agency terminates the opportunity for the father to register his claim of paternity does not, *without more*, turn every adoption agency into a “state actor.” . . . It is undisputed that [the agency] receives no state funding and *the state has no control over the agency’s internal affairs*. The cases simply do not support the theory that when a private person exercises a right or privilege granted by state law (such as to receive children for adoption), that person becomes a state actor. If that were so, every person licensed by the state in the various trades, occupations, and professions would become state actors.

Id. at 645 (emphasis added). In Florida, however, private agencies are not only licensed by the state, but their programs are closely regulated in many details. See generally FLA. STAT. § 409.175 (1997) (licensure of child-placing agencies); FLA. ADMIN. CODE, ch. 65C-15 (child-placing agencies); and FLA. ADMIN. CODE, ch. 10M-6 (foster home licensing by child-placing agencies).

Florida’s Second District Court of Appeal, in determining that due process considerations required court-appointed counsel for an indigent father in a stepparent adoption, recently stated that “[u]ndoubtedly, state action is . . . an essential aspect of a contested adoption proceeding under chapter 63. . . . Although such litigation is between private parties, the power to terminate the rights of the nonconsenting parent is vested solely in the judicial branch of the state government.” *O.A.H. v. R.L.A.*, 712 So. 2d 4, 6 (1998). Accord *In re K.L.J.*, 813 P.2d 276 (Alaska 1991); *In re Jay [R.]*, 150 Cal. App. 3d

Though a child whose parents' rights have been terminated in a chapter 39 proceeding is committed to the custody of the Department or a licensed agency for subsequent adoption,³³ chapter 39 does not address the initiation, processing, and finalization of an adoption of the child. These matters are addressed in chapter 63.³⁴

B. *Florida Statutes Chapter 63 ("Adoption")*

Chapter 63 performs two functions in regulating adoption that are relevant to matters addressed in this article.³⁵ First, it establishes the basic requirements for adoption in Florida, including, *inter alia*, who may be adopted,³⁶ who may adopt,³⁷ who must consent,³⁸ jurisdiction,³⁹ and venue.⁴⁰ Second, chapter 63 limits, and imposes limitations upon, the entities, other than the Department and Florida licensed agencies, permitted to perform adoption placement⁴¹ activities in Florida.⁴²

251, 197 Cal. Rptr. 672 (1983); *D.S. v. T.D.K.*, 499 N.W.2d 558 (N.D. 1993). The second district's opinion thus emphasized the nature of the right at issue, and the element of judicial participation in the process to extinguish that right, rather than the nature of the facilitator of the adoption (state agency, private agency, or private attorney) as determinative of the question of whether due process protections apply in proceedings wherein parental rights will be terminated. *O.A.H.*, 712 So. 2d at 6–7. Query: Even where the termination of a parent's rights is consensual, is the right to counsel at least a waiveable right of the consenting parent, the absence of such waiver requiring court appointed-counsel if the parent is indigent?

33. FLA. STAT. § 39.811(2), (4) (Supp. 1998). After termination of parental rights under chapter 39, the Department or licensed agency having custody of the child is the only party who must consent to the child's subsequent adoption. *Id.* § 39.812(1).

34. *See* FLA. STAT. ch. 63 (1997).

35. Chapter 63 also regulates surrogate parent contracts. *See* FLA. STAT. §§ 63.212(1)(i)(1-6) (1997).

36. *Id.* § 63.042(1).

37. *Id.* § 63.042(2), (3), (4).

38. *Id.* §§ 63.062, .072.

39. *Id.* §§ 63.102(2), .207(1).

40. FLA. STAT. §§ 63.102(2), (4).

41. *Florida Statutes* section 63.032(9) defines "to place" or "placement" as "the process of a person giving a child up for adoption and the prospective parents receiving and adopting the child, and includes all actions by any person or agency participating in the process."

42. Limitations imposed on other entities making adoptive placements include the regulation of fees and expenses under section 63.097, and of out-of-state placements under section 63.207. FLA. STAT. §§ 63.097, .207 (1997).

Chapter 63 permits adoptive placements not only by the Department and Florida licensed agencies, but also by “intermediaries.”⁴³ An intermediary is a Florida licensed attorney or physician, or an out-of-state agency that has been qualified by the Department to place in Florida.⁴⁴ As explained above,⁴⁵ the Department and Florida licensed agencies may make adoptive placements upon either an involuntary or voluntary chapter 39 termination of parental rights. Intermediaries facilitate voluntary placements only, though such adoptions are occasionally contested,⁴⁶ thus causing the proceedings to take on an involuntary aspect. Placements by intermediaries are not subject to chapter 39 termination proceedings, but are governed exclusively by the provisions of chapter 63.

In intermediary adoptions, a birth parent “consents” to the adoption of his or her child by either a specific named person or persons, or by a person or persons whose identity is known only to an intermediary.⁴⁷ The form for consent to adoption, created by the Department for use by intermediaries as directed by statute,⁴⁸ was last updated in 1986, and is inadequate in several respects.⁴⁹ Nevertheless, comparison of the consent form with a “surrender” form of the type used by the Department and Florida licensed agencies reflects the organic differences between intermediary and Department/licensed agency adoptions.⁵⁰

Unless a parent’s rights have been previously terminated within a chapter 39 proceeding or otherwise (including by the death of a parent),

43. *Id.* § 63.212(1)(c).

44. *Id.* § 63.032(8).

45. *See supra* notes 24–32 and accompanying text.

46. When adoptions are contested by birth parents, they are usually seeking to revoke a surrender or consent for adoption, or otherwise allege denial of due process. Fraud and duress are presently the only statutory grounds upon which a birth parent may revoke a surrender or consent for adoption. *See infra* note 66. Due process issues typically center on a birth father’s failure to receive notice, or denial of a right to withhold consent. *See supra* notes 9–15 and accompanying text.

47. FLA. STAT. § 63.082(2).

48. *Id.* § 63.082(3)(a).

49. The form is defective in that: 1) it recites that the birth parent “agree[s] to relinquish” the child for adoption, thus giving rise to an argument that execution of the document does not necessarily show a *present* intention to place the child for adoption; 2) the statutorily required printed names, addresses and social security numbers of witnesses are not called for as required by statute, § 63.082(4) of the *Florida Statutes*; and 3) the jurat does not conform to current law requiring the notary to certify the type of identification upon which the notary relied in verifying the identity of the individual executing the instrument. *See* FLA. STAT. § 117.05(5) (1997). *See form infra* Appendix C.

50. *See form infra* Appendix D.

parental rights are not terminated in a chapter 63 adoption proceeding until the final judgment of adoption is entered.⁵¹ Thus, in intermediary adoptions, termination of parental rights to the child to be adopted occurs later and under different rules than in Department and Florida licensed agency adoptions.

C. *A Need for Change*

Dichotomies of law and procedure between chapter 39 and chapter 63 have caused confusion and irrational results in contested Florida adoption cases.⁵² This article suggests that Florida adoptions be processed exclusively as a function of chapter 39 termination of parental rights proceedings, within a unified statutory scheme embracing Department, agency, and intermediary placements.⁵³ Such a revision of the law would promote greater uniformity in adoption actions, while affording optimal safeguards to protect not only the best interests of children, but also those of birth parents and prospective adoptive parents. This is because the law and procedures, as well as the judicial and administrative expertise, already in place for chapter 39 proceedings, form the most appropriate paradigm within which to address the legal issues presented in adoptions generally, and in contested adoptions, specifically.

The Florida Senate's Committee on the Judiciary⁵⁴ ("Judiciary Committee") proposed Senate Bill 550 on adoption for consideration in the

51. See generally FLA. STAT. § 63.085(1)(d) (1997).

52. An example is *Jones v. Children's Home Soc'y.*, 497 So. 2d 1265 (Fla. 5th Dist. Ct. App. 1986), wherein the court held that the chapter 63 provisions that a birth parent's consent to adoption of a child is irrevocable upon signing, *Florida Statutes* section 63.082(5), did not apply to a surrender to the Department or a licensed agency under chapter 39. *Id.* at 1267. (Chapter 39 was amended to preclude this result by chapter 90-309 of the *Laws of Florida* (amending FLA. STAT. 39.464(1)(a)(2)), after the Supreme Court of Florida disapproved *Jones* on this point in *Doe v. Roe*, 543 So. 2d 741, 747-48 (Fla. 1989)). Only recently has a Florida court determined that indigent birth fathers are entitled to court-appointed counsel in chapter 63 proceedings wherein their parental rights are in jeopardy of termination, though right to counsel in such situations is not mandated by statute as in chapter 39 proceedings. See *supra* note 32.

53. See *infra* notes 102-03 and accompanying text.

54. The most active members of the Senate Judiciary Committee on Senate Bill 550 were Senators Dudley (R., S-25, Cape Coral) (chair); Campbell (D., S-33, Tamarac); Ostalkiewicz (R., S-12, Orlando); Rossin (D., S-35, West Palm Beach); and Silver (D., S-38, Aventura). The other members of the Committee were Senators Burt (R., S-16, Ormond Beach); Crist (R., S-20, St. Petersburg); Grant (R., S-13, Tampa); Home (R., S-6, Orange Park); Jones (D., S-40, Miami)(vice-chair); and Williams (D., S-4, Tallahassee). Of these, all

1998 legislative session.⁵⁵ The bill would have moved agency adoptions *out* of chapter 39 and *into* chapter 63.⁵⁶ Senate Bill 550 purported to establish “parity” in private adoptions between Florida licensed agencies and intermediaries, and would have otherwise significantly altered Florida adoption law and practice.⁵⁷ Though it won approval in the Senate, Senate Bill 550 did not garner support in the House of Representatives, and thus failed to pass into law. The bill’s Senate supporters have prefiled the same measure for consideration in the 1999 Legislature.⁵⁸

III. UNWED FATHERS’ RIGHTS AS ADDRESSED BY SENATE BILL 550

Before drafting Senate Bill 550, the Senate Judiciary Committee identified eight “areas of concern” for adoption legislation.⁵⁹ Birth parents’

but Horne and Williams are attorneys, though none is a family law or adoption specialist. Campbell is an adoptive parent and Jones has an adopted sister. It is unclear why the Judiciary Committee’s bill was not referred to the Senate’s Children, Families, & Seniors Committee for review and input.

55. S.B. 550, 15th Leg. Sess., Reg. Sess. (Fla. 1998).

56. See *infra* Appendix E for an analysis of the most significant aspects of the bill, prepared by the law firm of Hausmann & Hickman, P. A., Boynton Beach, Florida.

57. SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 16, 15th Leg. Sess., Reg. Sess. (Fla. 1998).

58. The bill has been filed as Senate Bill 0002 for 1999.

59. STAFF OF SENATE COMM. ON THE JUDICIARY, STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, at 2–5 (Jan. 5, 1998). The eight concerns identified by the Senate Judiciary Committee centered on:

1. bifurcation of adoption proceedings, first determining termination of parental rights issues, then, if the child was determined in the first phase of the proceeding to be available for adoption, finalizing the adoption;
2. banning of “prebirth termination” of birth fathers’ parental rights;
3. improvement of safeguards to assure voluntariness of birth mothers’ consents;
4. assurance that birth parents are aware from their first contact with an intermediary arranging an adoptive placement that the attorney represents the adoptive parents’ interests, not the birth parents’;
5. creation of a centralized state repository for all adoption case records; codification of the present case law rule that “best interests of the child”
6. evidence is not relevant in any adoption proceeding until the birth parents’ rights have been terminated, and the child is thus available for adoption;
7. banning out-of-state placement for adoption of any child not falling within the *Florida Statutes* section 409.166 definition of a “special needs child” unless with a relative or stepparent; and

rights issues are embraced by at least four of the Judiciary Committee's eight concerns.⁶⁰ These concerns are collectively driven by just one immutable underlying principle: that birth parents, including unwed fathers, are entitled to a measure of due process protection in adoption proceedings.⁶¹ However, Senate Bill 550 moved perilously beyond the requirements of due process of law, into the realm of child endangerment, by allowing an unwed father the absolute right to veto a mother's decision to place a child for adoption and, at the father's option, to take custody of the child, regardless of his fitness to parent.⁶²

8. extension of the fee and expense reporting requirements imposed on adoption intermediaries to licensed adoption agencies.

Id.

60. See *supra* note 59, "concerns" listed 1, 2, 4, and 6.

61. The United States Supreme Court has repeatedly identified parental rights as liberty interests protected by the Due Process Clause of the Fourteenth Amendment of the Constitution. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 747 (1982). In *Santosky*, the Court stated:

The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing irretrievable destruction of their family life.

Id. at 753. This principle applies to cases where the parental rights of unwed fathers are being terminated. See *Lehr v. Robertson*, 463 U.S. 248 (1983), *supra* note 12, as well as *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

62. One provision of the bill severely *limited* a biological father's rights where the mother is a married woman and the birth father is not her husband, the bill expressly provides that no notice to the birth father of the proceeding to terminate parental rights is required, whether or not the mother was cohabiting with her husband at the time of conception or birth. SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 11, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.062(1)(b), (c), and (d)(3) (Fla. Leg. 1997)). This concept follows Florida's current paternity law. See *G.F.C. v. S.G.*, 686 So. 2d 1382 (Fla. 5th Dist. Ct. App. 1997). "[T]he trial court properly dismissed G.F.C.'s petition because [the paternity statute] does not afford G.F.C. the statutory right to sue for paternity since the child in question . . . was not born 'out of wedlock' and the paternity of the child had been 'otherwise' established." *Id.* at 1385. "Paternity would 'otherwise' be established when a child is born to an intact marriage and recognized by the husband and the mother as being their child." *Id.*

The second district recently extended the holding of *G.F.C.* to deny an alleged biological father's cause of action to establish paternity where the mother of a child born out of wedlock subsequently married the child's "reputed" father, a man who supported the mother emotionally and financially throughout her pregnancy, and executed the documents necessary to have himself identified as the father of the child on the birth certificate when the child was born, after which he "gave the child his love, attention, and financial support." I.A.

In the typical contested case, an unwed birth mother surrenders her child for adoption, but the child's father, who is alleged to have abandoned the child, objects. Senate Bill 550 proposed to address these circumstances by creating section 63.089 of the *Florida Statutes*, which concludes, in subsection (5), as follows:⁶³

If the court does not find by clear and convincing evidence that parental rights of a birth parent should be terminated pending adoption, the court must dismiss the case with prejudice and *that* birth parent's parental rights remain in full force under the law. . . . The court must enter an order based [on] written *findings* providing for the *placement* of the minor. . . . *Further proceedings, if any*, regarding the minor must be brought in a *separate* custody action under chapter 61, a dependency action under chapter 39, or a paternity action under chapter 742.⁶⁴

Thus, in the posited case, where the father has not consented to adoption of the child, Senate Bill 550 would have required a court to dismiss *with prejudice* a proceeding for termination of parental rights pending adoption ("TPRPA") unless the court were to find sufficient clear and convincing evidence of the birth father's abandonment⁶⁵ of the child. As an incident to dismissal of the case, the court would have been required to make "findings" to support a "placement" for the child, with no statutory guidance as to what subjects such findings were to address, that is, what the criteria for placement would be.

v. H.H., 710 So. 2d 162, 162-63 (Fla. 2d Dist. Ct. App. 1998). The court certified the issue to the Supreme Court of Florida where the case remains pending. *Id.* at 166.

63. SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 16, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.089(5) (1997)).

64. *Id.* (emphasis added).

65. "Abandoned" is defined as:

[A] situation in which the parent or legal custodian of a child, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If, in the opinion of the court, the efforts of such parent or legal custodian to support and communicate with the child are only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. In making this decision, the court may consider the conduct of a father towards the child's mother during her pregnancy.

FLA STAT. § 63.032(14) (1997).

A. *An Irrebuttable Presumption of Fitness to Parent*

However, the question of the child's placement upon dismissal of a Senate Bill 550 TPRPA proceeding may be a nonissue because, under the circumstances, the unwed father arguably would be the only legally available custodian for the child. The mother having signed an unrevoked consent for adoption,⁶⁶ the father would be legally justified in insisting that the mother's rights to the child be terminated before dismissal of the TPRPA action. There being no dependency action underlying the termination of parental rights proceeding, there would be no basis for placing the child in protective care pending an investigation of the father's fitness to assume custody of the child.⁶⁷ Further, there being no termination of the unwed father's parental rights, the prospective adoptive parents would not be parties and would have no standing to request temporary legal custody of the child.⁶⁸ Thus, under

66. Present law provides that a birth parent's surrender or consent to adoption is irrevocable once executed, absent fraud or duress. See FLA. STAT. §§ 39.464(1)(a)(2), 63.082(5) (1997). Senate Bill 550 would have provided a three-day revocation period (or one day after a birth mother's discharge from a hospital in the case of a newborn adoption, whichever occurs later) during which a birth parent could revoke a consent for any reason; thereafter, consent could be withdrawn only if it was obtained by fraud or duress. See SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 12, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.082 (1997)).

67. In chapter 39 of the *Florida Statutes*, unless: a) both birth parents have surrendered the child for adoption; b) the identity of location of a parent is unknown; c) a parent has engaged in conduct toward the child which "threatens the life . . . [or] well-being . . . of the child irrespective of the provision of services" through a case plan; d) a parent is incarcerated under certain conditions; or e) a parent has engaged in "egregious conduct," the only way to proceed to a final judgment of termination of parental rights is by first establishing that the child is "dependent" and then offering the parent(s) a case plan for reunification which fails. See FLA. STAT. § 39.806 (Supp. 1998).

68. The issue of standing of the prospective adoptive parents in the TPRPA proceeding under Senate Bill 550 is not entirely clear, however. One provision which might elevate them to party status states:

The petition must contain all names by which the minor is or has been known, . . . to allow interested parties to the action, including . . . *persons with custodial or visitation rights to the minor, and persons entitled to notice pursuant to the Uniform Child Custody Jurisdiction Act* . . . to identify their own interest in the action.

SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 14, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (creating FLA. STAT. § 63.087(6)(f)(1) (1998) (emphasis added)). Should the prospective adoptive parents somehow fit within one of these classifications, perhaps party status would be theirs. Otherwise, though the prospective adoptive parents would become parties once an adoption petition is filed, the bill specifically provides that "[a] petition for adoption may not be filed until 30 days *after* the date the judge signed the

the language of Senate Bill 550, a court may well have had no alternative but to place the child with the unwed father, not only without regard to the possibility that the mother may have wanted to reclaim her parental rights if her adoption plan for the child was to be frustrated,⁶⁹ but with no permissible antecedent inquiry into the prospective safety and security of the child clearly established by law.

Though it is fundamental that a biological parent enjoys the presumption of fitness to raise his or her child, this is a rebuttable presumption.⁷⁰ Yet, as just seen, implicit in Senate Bill 550 was an *irrebuttable* presumption that an unwed father, *by his mere refusal to agree to adoption of a child*,⁷¹ is not only a fit parent, but is *more* fit than the mother to have custody.⁷²

judgment terminating parental rights pending adoption." *Id.* (creating FLA. STAT. § 63.087(5) (emphasis added)). See also SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 19, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.102) ("[A]fter a court order terminating parental rights has been issued, a proceeding for adoption may be commenced.") (emphasis added). By analogy to the *Florida Rules of Juvenile Procedure*, applicable in chapter 39 termination proceedings, the prospective adoptive parents likely would have no party standing. FLA. R. JUV. P. 8.210(a).

69. It would be easy, and wrong, to suggest that a birth mother who has voluntarily surrendered her child for adoption should not be permitted to reclaim the child if the birth father subsequently objects to the adoption plan. The fact that a mother has surrendered a child does not per se render her an unfit parent. On the contrary, Florida adoption professionals confirm that birth mothers who surrender may well be fit to parent notwithstanding their decision to place. See *infra* Appendix F for "Results of Polling Florida Adoption Professionals Regarding Psycho/Social Backgrounds of Children Placed for Adoption" [hereinafter "Florida Adoption Professionals Poll"]. According to this poll, all responding adoption attorneys and social service professionals agreed that a mother who has surrendered should at least be permitted to request custody in these circumstances; 60% agreed with the following statement: "Matters should go back to the way they stood before the mother surrendered; the mother should have custody unless and until the father proves [she is] unfit." *Id.* This is because some mothers make surrender decisions based upon assumptions or conclusions that have changed or may be subject to change. For example, before placing the child for adoption, birth mothers oftentimes refuse to explore the possibility of family support of parenting their children, often keeping their pregnancies secret for fear of family recrimination or disapproval. If the fact of the birth becomes known to the family during an adoption contest, the birth mother may find support she had not otherwise expected.

70. See, e.g., *Calle v. Calle*, 625 So. 2d 988, 990 (Fla. 3d Dist. Ct. App. 1993).

71. S.B. 550, 15TH LEG. SESS., REG. SESS. (FLA. 1998). It is very significant that Senate Bill 550 did not in fact require the objecting father to request custody of the child in order to stop the mother's adoption plan. *Id.* Thus, he could veto the adoption without offering the child an alternative plan to raise the child himself.

72. See discussion *supra* note 69. A bias against birth mothers who surrender their children for adoption appears evident in the fact that, despite the issue of fathers' fitness being

B. *Children at Risk*

The decisions or actions of adults which bring a child to a court's attention tend to reflect the presence of insecurity, instability, and even the danger of abuse or neglect in the life of the child. There is no reason to expect that the circumstances which bring a child before a court when an unwed father contests the mother's adoption plan for their child are any more pristine or benign than in other cases where child custody is at issue. On the contrary, a child in these circumstances is "at risk" by any criteria used for such assessments in child welfare cases.

"The quality of the research on child abuse and neglect" is considered by social scientists to have advanced "in the 1970s and 1980s," providing improved information through the use of "statistical analyses based [upon] official reports [and] social surveys."⁷³ Theories based on this improved research developed the theme that "'anyone' could abuse [or neglect] his or her child in certain circumstances: when the stresses on them outweigh[] the supports they [have]."⁷⁴ If anyone can abuse or neglect, then it is logical that any child may be abused or neglected if the circumstances are right.

To determine the risk of child abuse or neglect for a given child, various risk assessment models have been developed by social science scholars and social service professionals.⁷⁵ What these models have in common is

repeatedly raised before the Judiciary Committee by this author, the only attention given to parental fitness was in an eleventh hour floor amendment ("FAV 704320") permitting an adoption entity to move a court for emergency relief to at least temporarily deny custody of a child to a *parent revoking consent to adoption* if it is alleged that such a placement would endanger the child. See Memorandum from Maggie A. Moody on C.S./S.B. 550 on Adoption to the Adoption Round Table Members and Interested Parties (Apr. 17, 1998) (on file with the *Nova Law Review*) (citing FAV 704320, 4/15/98). See also SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 12, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (creating FLA. STAT. § 63.082 (7) (1998)). In the majority of cases, consents are executed by mothers only. Thus, Senate Bill 550 would have created the unreasoned policy that a birth mother's fitness may be called into question if she seeks to exercise her statutory right of revocation of consent proposed in the bill, but a putative birth father may have custody without regard to his fitness.

It should be noted that FAV 704320 did not address the issue of to whom an adoption entity should give custody of a child when *both* birth parents revoke their respective consents to adoption.

73. RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* 81-82 (1996).

74. *Id.* at 82.

75. *Id.* at 80-86 (offering a general discussion of risk assessment factors and models).

recognition of the nature of the factors that put children at risk.⁷⁶ Though generalization may offend, experienced Florida adoption professionals confirm that the sociological profiles of children placed for adoption often include many of the commonly recognized risk factors for abuse and neglect.⁷⁷

Furthermore, a mother's surrender of her rights to a child may, in some cases, demonstrate her recognition of the child being at risk in some way. This recognition may arise not only from a mother's belief that she cannot successfully parent the child,⁷⁸ but also from her negative evaluation of the

76. *Id.*

77. See *infra* Appendix F for the Florida Adoption Professionals Poll results. Seventy percent of Florida adoption attorneys and social service professionals responding to a recent survey identified "decreased emotional/mental stability and control, including immaturity due to young age" as a risk factor, one-third responding that this characteristic was "typical" of the psycho-social backgrounds of children under the age of five in whose adoptions the respondents had been professionally involved. *Id.* Eighty percent identified "parent engaging in or having history of alcohol/substance abuse [or] gambling" and "parent having history of perpetrating or being victim of abuse [or] neglect" as risk factors, approximately one in five reporting that the cases with which they were familiar "typically" involved these factors, and half or more seeing these factors present "occasionally." *Id.*

78. Situations with which the public is most familiar are from news stories reporting cases representing the two extremes of birth mother conduct. These two extremes denote scenarios in which the birth mother did not want to parent. They are: 1) where the mother abandons the child at birth, sometimes apparently intending that the child should die; and 2) where the mother asserts, after having surrendered her child for adoption, that she was forced, duped, or otherwise taken advantage of, such that the child should be returned to her.

The vast majority of cases fall somewhere between these two scenarios. The middle ground is populated by mothers generally ranging in age between 15 and 35, who may or may not be married, who may or may not have other children, who may or may not be receiving public assistance, who may or may not have informed their families of their adoption plans, who may or may not have been abused by the birth father of the child, who may or may not be school drop-outs or college educated, who may or may not have a history of incarceration or psychiatric admission, and who may or may not have a history of substance abuse. The birth mother's belief that she cannot successfully parent the child, and thus that an adoption plan is best, is affected by all of these factors, and more, in varying degrees.

It is very important that a birth mother receive meaningful preplacement counseling to enable her to clearly identify for herself her reasons for making an adoption plan for her child. If a birth mother has not been given this opportunity, or has refused to process this question, one of two results may occur: either 1) after committing herself to an adoption plan, the birth mother may come to realize, typically shortly before or immediately after the birth, that she cannot go through with the placement; or 2) the birth mother will place the child for adoption, but will suffer sometimes interminable grief and remorse with no hope of closure. Postplacement counseling to assist in a birth mother's continuing adjustment post-partum is as important as preplacement counseling, to help the birth mother through the mourning period associated with placing a child for adoption.

birth father as a prospective parent.⁷⁹ This is not to say that a mother should be permitted to veto a father's custody of a child. However, there is no good reason for not investigating the grounds for a mother's warning that a child may be at risk if placed with the unwed father.⁸⁰

C. *When and Where to Protect the Child*

It was contended by proponents of Senate Bill 550 that any question of the child's security or safety, if placed with a contesting birth father, could be adequately addressed in a dependency action under chapter 39 of the *Florida Statutes*.⁸¹ However, that contention does not recognize that, under the bill, a dependency action could not be filed under conditions most likely to protect the child. First, because such an action was characterized in the bill as a "further" proceeding,⁸² it appears that the statutory scheme would have required any dependency action to be brought *subsequent* to dismissal of the TPRPA proceeding. Second, the dependency action would have been a "separate" proceeding⁸³ in a different court.⁸⁴ Given these requirements,

79. A birth mother's negative opinion of a birth father, as a prospective parent, may be grounded in any number of observations about the father, including matters ranging from his personal family background, to his present lifestyle (including relationships with and support of his other children, if any), to his stated feelings about parenthood. To be sure, just as in the case of divorce, acrimony between the parents of a child cannot *per se* divest one or the other of their parental rights. Nevertheless, information provided by the parents is generally a useful starting point for custody evaluation.

80. In fact, Florida law would hold a parent criminally responsible for abuse or neglect perpetrated by the other parent which could have been prevented or stopped by the actions of the "innocent" parent. See FLA. STAT. § 827.03(3)(a)(2), (3)(b) (1997); see also *In re B.S.*, 697 So. 2d 914 (Fla. 2d Dist. Ct. App. 1997) (holding that the termination of mother's parental rights was warranted by her knowing failure, despite having the opportunity and capability, to prevent egregious abuse of child perpetrated by father, when mother acquiesced in father's supervision of the child in her absence, notwithstanding father's history of pleading guilty in manslaughter of another child, his four week old son, and repeated suspicious grave injuries previously sustained by the child).

The "at risk" analysis in the text is also applicable, and a case plan method, like the one described and set forth in the text accompanying notes 97–138, *infra*, could be used, where a parent who has surrendered a child for adoption seeks to revoke the surrender under the revocation provisions of the bill. See SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 12, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (creating FLA. STAT. § 63.082(7) (Supp. 1998)).

81. FLA. STAT. § 39 (1997 & Supp. 1998).

82. SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 16, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to create FLA. STAT. § 63.089 (Supp. 1998)).

83. *Id.*

the opportunity to provide preemptive social services⁸⁵ before dismissing the termination proceeding would be lost in favor of requiring a report of suspected abuse, neglect, or abandonment⁸⁶ before intervention. Thus, notwithstanding both what is known of the underpinnings of abuse and neglect and, in given cases, a mother's concerns about a father's fitness to parent, Senate Bill 550 would have permitted unnecessary risk to the children by requiring courts to "look the other way" when dismissing TPRPA proceedings.

D. *Equal Protection of the Laws*

Proponents of Senate Bill 550 also suggested that imposing a "fitness test" upon an unwed father before allowing him custody of a child is irrational and a violation of the constitutional right of equal protection of the laws, because a married father is not subject to the same test on his way out of the hospital with his wife and newborn baby.⁸⁷

Seductively simple, this argument is nevertheless inapt. It completely disregards marriage as a legally significant social contract between society and the participants in the marriage.⁸⁸ One important covenant of that

84. Senate Bill 550 would have established the TPRPA proceeding within chapter 63 of the *Florida Statutes*. SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 16, 15th Leg. Sess., Reg. Sess. (Fla. 1998). Though the bill does not assign chapter 63 matters to the family division of the circuit court, that is where chapter 63 cases have been assigned throughout the state for some time. *Id.* Chapter 39 dependency proceedings, on the other hand, are within the purview of the juvenile division. *Id.* The procedural requirements involved in keeping one judge "on the case," obtaining a consolidation order, waste precious time and effort when a child's welfare is at stake. *Id.*

85. Primary among the social services that should be made available to a parent contesting an adoption should be parenting education such as set forth in the "Outline for Proposed Legislation" beginning *infra* at the accompanying note 112.

86. These are the grounds for government intervention in the parent-child relationship regarding a child not otherwise before a court. *See supra* text accompanying notes 23–31.

87. State statutes often distinguish between the parental rights of unwed mothers and those of unwed fathers. Such statutes have been attacked as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, though such challenges are less successful than those brought under the Due Process Clause. *See supra* note 61 for leading cases.

88. *See Maynard v. Hill*, 125 U.S. 190 (1888).

The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds

contract is that the married couple will be co-responsible for the welfare of children born to the wife or adopted during the marriage.⁸⁹ This being so, it can be said that the parenting of children is seen by society as a cooperative venture between a mother and a father where *each vouches for the continuing fitness of the other* to parent. At any time, one or the other parent, or a government agency, may bring to the attention of society, in a civil or criminal proceeding, that the security and/or safety of the child can no longer be assumed. In such event, a court must ultimately decide what custody disposition will be in the child's "best interests."⁹⁰

the parties to various obligations and liabilities. It is an institution, . . . the foundation of the family and of society.

Id. at 211.

89. Indeed, the fact that a married man suspects he is not the father of a child born to his wife does not automatically entitle him to require paternity testing in support of a challenge of his obligation of support to the child. Such testing must be court ordered, and will not be ordered if not determined by the court to be in the best interests of the child. *See* FLA. STAT. § 742.12(2) (1997) ("the court *may* . . . require the child, mother, and alleged fathers to submit to scientific tests . . . to show a probability of paternity") (emphasis added). *Compare* Department of Health & Rehabilitative Serv. v. Privette, 617 So. 2d 305, 308 (Fla. 1993) (holding that a trial court hearing a petition for paternity must determine "that the child's best interests will be better served [by ordering a blood test] even if the blood test later proves the child's factual illegitimacy"), with *In re* Paternity of Baby Doe, 558 N.W.2d 897 (Wis. Ct. App. 1996) (holding that the putative father of a child born out-of-wedlock has a statutory right to a determination of paternity and the court may not conduct a best interests hearing as a prerequisite for ordering blood tests).

90. For an interesting summary of the history of adoption in America, including the evolution of the concept of "best interest of the child" in the adoption context, *see* 1 JOAN HEIFETZ HOLLINGER, ADOPTION LAW AND PRACTICE, §§ 1.01-1.04 (1998). Hollinger explains:

[A] distinctive feature of America's first adoption statutes was the requirement of a judicial finding that the adopters were 'suitable' and that the 'moral and temporal' or best interests of the child would be served. Until well into the 20th century, however, little was done to breathe life into this requirement. . . . 'Suitability,' if scrutinized at all, was defined primarily in terms of the financial solvency of the adoptive parents. The child's 'moral and temporal' interests, or what would now be called the child's 'best interests,' were similarly defined more in economic than in psychological terms.

Id. § 1.03[2]. "Even as late as 1930, . . . the best interest standard was confined to the economic interest of the child." *Id.* § 1.03[7]. Today, "psychological and social conceptions of children's well-being have displaced the earlier economic and moralistic ones. With this has come a new understanding of why adoption is 'good' for children, adoptive parents and birth parents." *Id.* § 1.04.

Equal protection of the laws would certainly demand that an unwed father not enjoy a *greater* presumption of fitness to parent than a married father. Nevertheless, this would be the result if, as Senate Bill 550 appears to have required, a child *must* be placed with an unwed father, regardless of the fact that the child's unwed mother does not vouch for the father's fitness to parent. On the contrary, where the mother has demonstrated her belief that the child should be placed for adoption rather than be in the unwed father's care,⁹¹ society has no alternative but to take seriously the mother's concern and investigate the fitness of the father to parent *before* giving him custody of the child.⁹²

It might also be argued that a "test" for unwed fathers contesting adoption of a child is irrational in light of the fact that an unwed mother who chooses from the outset to parent, rather than place a child for adoption, is not similarly scrutinized. Such an argument would miss the point that it is not a parent's "unwed" status *per se* which calls his or her fitness into question. Indeed, two unwed parents who agree extrajudicially on custody and other matters regarding their child may never see the inside of a courtroom. Rather, in a contested adoption, it is precisely because the unwed parents have *not* agreed on a plan for their child, for whatever reason,⁹³ that the child has come to public attention. In contrast, society's

91. The fact that the mother could have spared herself of the entire adoption process by giving the child to the father to raise, if she perceived that as a feasible and desirable alternative, should not be discounted in determining whether to heed her negative assessment of the father's fitness to parent.

92. It bears mentioning here that there appears to have been disturbing implicit assumptions about the motivations of birth parents in Senate Bill 550: a) the unsupported *negative* assumption that a birth mother does not usually have valid, compelling reasons for believing that the birth father of her child is or may be unfit to raise the child, or has no real interest in raising the child; and b) the unsupported *positive* assumption that birth fathers who make objections to adoptive placements do so only for the reason that they wish to create homes for their children and raise them themselves. S.B. 550, 15th Leg. Sess., Reg. Sess. (Fla. 1998). Though the occasional birth parent fits one or the other of these stereotypes, these are hardly typical profiles. *Id.* As in so many other matters of human concern, there are very few, if any, hard and fast rules in the sociolegal context of adoption. *Id.*

93. The parents may have reached no agreement regarding the child for any number of reasons, including: 1) that the mother does not know the identity and/or location of the father; 2) that the father informs the mother that he has no interest in the child or denies paternity; 3) that though the father is aware of the pregnancy, the mother informs him of her intention to have an abortion and then relocates such that the father has no means of following up to determine whether the pregnancy was terminated; 4) that there is generalized antipathy between the parents, resulting in their inability to interact for the purpose of making crucial parenting decisions; 5) the parents disagree on fundamental issues regarding custody, support, education, visitation, etc.; or 6) the pregnancy was the result of sexual assault.

social contract with married couples presumes that husbands and wives share jointly the rights and responsibilities of the care, custody, and control of their children.

It should be noted that the imperative to fully protect a child brought within a court's jurisdiction is the reason the law dictates that prospective adoptive parents participate in a "home study" before they can be eligible to adopt.⁹⁴ Further, a court must find a proposed adoption to be in the child's best interests at the time of finalization.⁹⁵ Absent the duty to protect children placed for adoption, there could be no justification for such interference with an infertile couple's plans for building a family. Instead, analogizing to Senate Bill 550's illogic in setting the scene for automatic placement of children surrendered for adoption with contesting unwed fathers, the law would permit just anyone to adopt, and hope for the best.⁹⁶

94. FLA. STAT. § 63.092 (Supp. 1998).

95. Section 63.092 of the *Florida Statutes* provides:

(2) PRELIMINARY HOME STUDY. — Before placing the minor in the intended adoptive home, a preliminary home study must be performed by a licensed child-placing agency, a licensed professional, or agency described in [section] 61.20(2). . . . The preliminary home study must include, at a minimum:

- (a) An interview with the intended adoptive parents;
- (b) Records checks of the department's central abuse registry and criminal records correspondence checks pursuant to [section] 435.045 through the Department of Law Enforcement on the intended adoptive parents;
- (c) An assessment of the physical environment of the home;
- (d) A determination of the financial security of the intended adoptive parents;
- (e) Documentation of counseling and education of the intended adoptive parents on adoptive parenting;
- (f) Documentation that information on adoption and the adoption process has been provided to the intended adoptive parents;
- (g) Documentation that information on support services available in the community has been provided to the intended adoptive parents;
- (h) A copy of the signed statement required by [section] 63.085(1).
- (i) A copy of the written acknowledgment required by [section] 63.085(1).

FLA. STAT. § 63.092 (Supp. 1998).

96. S.B. 550, 15th Leg. Sess., Reg. Sess. (Fla. 1998).

IV. A "BRIEF CASE PLAN" APPROACH TO ADOPTION CONTESTS BY UNWED FATHERS⁹⁷

As previously explained, the United States Supreme Court recognizes a state's right to impose limitations relating to the welfare of children upon unwed fathers' parental rights.⁹⁸ However, because the dynamics of individual cases cannot be assessed in advance, limitations which will safeguard a *particular* child cannot be adequately legislated. Instead, what is reasonable is to establish legislative parameters within which appropriately licensed professionals⁹⁹ may assess specific cases and make recommendations to courts regarding child custody in contested adoptions, while providing concurrent judicial processes to move cases to expeditious conclusion. Building upon Justice Kogan's previously discussed "performance" concept,¹⁰⁰ Senate Bill 550 should be rethought with regard to birth fathers' rights. The "brief case plan" approach outlined at the end of

97. The term "brief case plan" is used to describe the method proposed in this article for resolving contested adoptions by unwed fathers. The move toward alternative dispute resolution based on "brief" models is already recognized among child welfare professionals as demonstrated by the currency of the use of "brief therapy" and "brief evaluation" as case management tools in dependency cases. Though it is anticipated that the situations in which a brief case plan proposal would be brought into operation would be where a birth mother has executed an irrevocable surrender of the child for adoption, such that only birth father issues remain to be resolved, this proposal anticipates: 1) instances where the birth mother seeks to revoke her surrender, either alleging fraud or duress, or revocation pursuant to a statutory revocation provision such as that proposed in Senate Bill 550 (*See SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 12, 15th Leg. Sess., Reg. Sess. (Fla. 1998)* (proposing to amend *FLA. STAT. § 63.082(4)(c)* (1997)); and 2) those instances where the court determines that the birth father's rights cannot be terminated and thus the custody of the child is subject to contest between the biological parents.

98. *See supra* notes 12–23 and accompanying text.

99. Chapter 63 of the *Florida Statutes* incorporates by reference a listing of mental health professionals approved for conducting home study evaluations of prospective adoptive parents in intermediary adoptions. *See FLA. STAT. § 63.092(2)* (Supp. 1998). The listing is contained in section 61.20(2) of the *Florida Statutes* as follows:

A social investigation and study, when ordered by the court, shall be conducted by qualified staff of the court; a child-placing agency licensed pursuant to [section] 409.175; a psychologist licensed pursuant to chapter 490; or a clinical social worker, marriage and family therapist, or mental health counselor licensed pursuant to chapter 491.

FLA. STAT. § 61.20(2) (1997). These professionals, depending upon their experience, may be appropriate for this purpose.

100. *See supra* notes 19–23 and accompanying text.

the next section (“the Outline”) is suggested as a framework for appropriate legislation.¹⁰¹

Parts I through III¹⁰² of the Outline address the basic issues of “who, what, when, where, and how” as to the initial court procedures required to process a birth parent’s surrender of a child for adoption, regardless of the child’s age. Important features of these initial procedures include: 1) adoption proceedings beginning and ending in juvenile courts, where the most judicial experience in balancing child protection issues with the preservation of parents’ rights is concentrated, and where court rules which facilitate such proceedings are already in place;¹⁰³ 2) the possibility of filing prebirth a petition to terminate parental rights to facilitate early identification of interested parties (though termination would occur, if at all, only after birth of the child);¹⁰⁴ and 3) including in all surrenders an agreement to submit to DNA testing, with or without a court order.

101. A detailed outline of suggested legislation is provided rather than a proposal cast in bill form. This is because the proposal is made for revision of chapter 39 (Juvenile Proceedings) to move all adoption matters into Juvenile Court, rather than for amendment of chapter 63 (Adoption), even though the present legislative will appears to be in favor of proposing to amend chapter 63. If the proposed policy were to be amended into chapter 63, it is suggested that it be inserted immediately following section 63.032 (Definitions), and before section 63.042 (Who may be adopted; who may adopt). If placed in chapter 39, it is suggested that a new Part XII be created for adoption.

102. See *infra* notes 112–27 and accompanying text.

103. This proposal conflicts with Senate Bill 550 as to whether termination of parental rights and adoption proceedings should come within the purview of juvenile courts under chapter 39 of the *Florida Statutes*, as advocated here, or within the authority of the family courts under chapter 63, as proposed in the bill.

There is presently only one provision in the family court rules, approved by the Supreme Court of Florida in 1998, relating to adoption. See FLA. FAM. L. R. P. 12.200(a)(2) (requiring the court to order a case management conference within sixty (60) days of the filing of an adoption petition when: a) a waiver of consent is requested; b) “notice of the hearing on the petition . . . is not [to be] afforded a person whose consent is required but has not consented;” c) “an intermediary, attorney, or agency is seeking fees or costs in excess of those provided [by statute];” d) a party is to be served by constructive rather than personal service; or e) “the court is otherwise aware that any person having standing objects to the adoption”). FLA. FAM. L. R. P. 12.200(a)(2).

104. The filing of a prebirth petition for termination of parental rights would create a more satisfactory basis for contacting a prospective father of a child to determine his intentions toward the child once born. Service upon such individuals before birth would tend to reduce the instance of ambiguity in the birth father’s position regarding the child. It sets the stage for a more expedient resolution of the child’s status once born. If all prospective fathers have been served by the time of birth, the case plan proposed can commence immediately, thus reducing considerably the period of time after birth required to resolve the child’s status. See *G.W.B. v. J.S.W.*, 647 So. 2d 918, 931 (Fla. 4th Dist. Ct. App. 1994), *rev’d*, 652 So. 2d

Part IV of the Outline¹⁰⁵ establishes the beginning of “fast track” court proceedings to resolve the child’s future. Unless a court determines that clear and convincing evidence of grounds for termination of the parental rights of both parents already exist at the time of a preliminary hearing, this procedure would provide the child with a brief case plan. The duration of the case plan would be sixty days from the birth of the child, or the date of the plan, whichever is later, or a lesser or greater period, if agreed upon by the parties to the petition to terminate parental rights.

An evidentiary hearing is required to determine contested issues as to termination of parental rights during the pendency of the case plan. Upon expiration of the case plan, and depending upon whether the child was under or over 180 days old, that is, an infant, at the time the petition for termination of parental rights was filed, the proceedings would move in one of several directions. Where an infant is involved, the case would go to a disposition phase. In the case of non-infants, the court would permit, on motion, the filing of a custody action under chapter 61 of the *Florida Statutes*, a dependency action under chapter 39, or a paternity action under chapter 742, within the same proceeding.

The requirements of the case plan, set forth in Part VI¹⁰⁶ of the Outline, are intended to provide positive support to any party, as defined, seeking custody of the child,¹⁰⁷ while allowing an objective study of such person’s desire and ability to parent. The study requirements are comparable to those imposed upon nonparty prospective adoptive parents under current law.¹⁰⁸ The concept of “constructive abandonment,” a parent’s demonstrated unwillingness or gross inability to parent the child prospectively, is created to address situations where the results of the case plan justify termination of parental rights. The proposal also permits an unexpired case plan to be curtailed if a court finds that the plan has become unnecessary due to a change in circumstances.

The timetable established by the case plan proposal for contested cases limits trial court proceedings for termination of parental rights to a maximum

816 (Fla. 1995), *decision approved by* 658 So. 2d 961 (1995) (Pariente, J., concurring) (advocating this concept in theory).

105. *See infra* text accompanying note 128.

106. *See infra* text accompanying notes 133.

107. The “party seeking custody” may be either the mother or the father, or both. The proposal provides that if parental rights are not terminated at an evidentiary hearing, such that the case plan is extended for the purpose of determining a proper placement of the child, the mother’s surrender may be nullified by the court.

108. *See* FLA. STAT. §§ 63.092(2) (Supp. 1998), 63.125 (1997). *See also* FLA. ADMIN. CODE R. 65C-15.028(3).

of 147 days after service of process, with the case plan running concurrently. Review in the district court, and certiorari and appeal to higher courts remain available, though it is expected that *good* social work will minimize the number of cases moving beyond the trial court level.

Finally, the provision for repose suggested in Part XI¹⁰⁹ of the Outline is keyed to the date of final judgment of the adoption of a child, rather than to the date of termination of parental rights as was proposed in Senate Bill 550.¹¹⁰ This is meant to discourage prospective adoptive parents from waiting for repose before psychologically and legally finalizing the child's adoption.¹¹¹ The suggested time for repose is 180 days.

V. OUTLINE FOR PROPOSED LEGISLATION

- I. *Initiation of a Proceeding for Termination of Parental Rights upon Parent's Surrender.* In all cases where a parent ("the Parent") of a child ("the Child") surrenders the Child for adoption to an adoption entity ("Adoption Entity")¹¹² licensed or authorized in this state, a petition ("Petition") for termination of parental rights pending adoption ("TPRPA") shall be filed in the juvenile division of the circuit court ("the Court") of this state, in the county where the Adoption Entity is located,¹¹³ no more than seven (7) days¹¹⁴ after the Parent's surrender is executed. No fee for filing the Petition shall be charged by the Clerk of Court ("the

109. See *infra* text following note 138.

110. See SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 27, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.182) (1997)).

111. *Id.*

112. Senate Bill 550 coined the term "adoption entity" as an umbrella designation for all persons and organizations permitted to place children for adoption in Florida. S.B. 550, 15TH LEG. SESS., REG. SESS. (FLA. 1998). See SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 6, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.032 by adding sub-section (15) which reads as follows: "'Adoption Entity' means the department under chapter 39; an agency under chapter 63 or, at the request of the department, under chapter 39; or an intermediary under chapter 63, placing a person for adoption.").

113. This provision regarding venue adopts current law regarding venue for agency adoptions. See FLA. STAT. § 63.102(2) (1997).

114. This time period accommodates the birth mother's statutory right of revocation of her consent as proposed in SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 12, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.082(4)(c) (1997)).

Clerk").¹¹⁵ If any other proceeding regarding the Child was initiated in the a division of the circuit court of this state prior to the time of filing the TPRPA Petition, the TPRPA action shall be filed in the existing case.¹¹⁶ Any action previously filed in any court in this state other than a juvenile division of the circuit court shall be, if necessary, consolidated into the TPRPA action.

Prebirth Petitions. A prebirth Petition may be filed to facilitate the process of providing notice of the intention of the mother ("the Mother") to surrender the Child for adoption at birth, to any man who may be, or may claim to be, the legal and/or biological father of the Child ("Prospective Father"). Nevertheless, no surrender of a child shall be executed, and no order terminating the parental rights of a child's parent(s) shall be entered, until after the birth of a child.¹¹⁷

Agreement to Provide Biologic Material for Paternity Testing. A surrender of a child for adoption shall contain a provision that the party signing the surrender agrees to provide biologic material necessary for the purpose of establishing the identity of the biological father of the Child, with or without a court order.

II. ***Advisory Hearing; Appointment of Guardian Ad Litem; Temporary Custody.*** At the time of filing the Petition, Petitioner

115. No filing fee is presently charged for chapter 39 termination of parental rights actions. FLA. STAT. ch. 39 (1997 & Supp. 1998). A filing fee may be charged, as is the present case, if and when the adoption proceeding is filed. *See generally* FLA. STAT. § 39.472 (Supp. 1998).

116. Present statutory law provides that in intermediary adoptions, the intermediary must report any intended placement of a minor for adoption before the child is placed in the prospective adoptive home (unless it is a family or stepparent adoption). FLA. STAT. § 63.092(1) (Supp. 1998). Senate Bill 550 would have perpetuated this requirement, and extended it to all "adoption entities." *See* SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 17, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.092(1) (1998)). If this reporting requirement is to be retained, the report should be filed in juvenile court, with the petition for TPRPA being filed in the same proceeding. Section 63.102(5) of the *Florida Statutes* permits the filing of a "petition for declaratory statement" for "prior approval of fees and costs" in connection with a proposed placement. FLA. STAT. § 63.102(5) (1997). If such a petition is to be filed, it would likewise be filed in the juvenile court wherein the notice of intent to place is filed.

117. The "no prebirth surrender" requirement is presently the law, as provided by statute. FLA. STAT. § 63.082(4) (1997).

shall assure that the Clerk will set an advisory hearing (“Advisory Hearing”), to be held within seven (7) days, at which time the Court shall: a) appoint a guardian ad litem (“the GAL”) for the Child;¹¹⁸ b) make a determination of temporary custody of the Child, which may be with the Prospective Adoptive Parents or in foster care, whichever appears to be in the best interests of the Child considering the facts and circumstances of the case; and c) determine who, if anyone, shall have temporary visitation with the Child.

- III. *Parties.* The necessary parties to the TPRPA proceeding shall be: a) the Adoption Entity to which a Parent has surrendered or intends to surrender the Child for adoption, as petitioner (“the Petitioner”); b) the Mother;¹¹⁹ c) any Prospective Father of the Child, including those identifiable through the inquiry outlined in section 39.803 of the *Florida Statutes*;¹²⁰ d) any other person or

118. Section 39.807(2)(b) of the *Florida Statutes* provides:

The guardian ad litem has the following responsibilities:

To investigate the allegations of the petition and any subsequent matters arising in the case and, unless excused by the court, to file a written report.

This report must include a statement of the wishes of the child and the recommendations of the guardian ad litem and must be provided to all parties and the court at least [forty-eight] hours before the disposition hearing.

To be present at all court hearings unless excused by the court.

To represent the interests of the child until the jurisdiction of the court over the child terminates or until excused by the court.

To perform such other duties and undertake such other responsibilities as the court may direct.

FLA. STAT. § 39.807(2)(b) (Supp. 1998).

119. Though the mother’s surrender would be irrevocable except upon a showing of fraud or duress (unless a revocation period for surrender, such as that proposed in Senate Bill 550, were available) the mother’s rights are not terminated automatically, but require judicial action. Where a mother who has surrendered decides to contest on the grounds of revocation, fraud, or duress, her rights would be addressed within the proceeding proposed in the Outline.

120. Section 39.803 of the *Florida Statutes* provides:

(1) If the identity or location of a parent is unknown and a petition for termination of parental rights is filed, the court shall conduct the following inquiry of the parent who is available, or, if no parent is available, of any relative, caregiver, or legal custodian of the child who is present at the hearing and likely to have the information:

(a) Whether the mother of the child was married at the probable time of conception of the child or at the time of birth of the child.

entity having physical or legal custody of the Child; and e) the GAL.

Prospective Adoptive Parents not Parties. The Prospective Adoptive Parent(s) of the Child, notwithstanding that they may be granted temporary physical custody of, or temporary visitation with the Child, shall not be parties to the TPRPA proceeding until, if at all, they are notified by the Court that parental rights have been terminated, the Child is free for adoption, and an adoption petition may be filed.¹²¹ Such notification shall not issue until the

(b) Whether the mother was cohabiting with a male at the probable time of the conception of the child.

(c) Whether the mother has received payments or promises of support with respect to the child or because of her pregnancy from a man who claims to be the father.

(d) Whether the mother has named any man as the father on the birth certificate of the child or in connection with applying for or receiving public assistance.

(e) Whether any man has acknowledged or claimed paternity of the child in a jurisdiction in which the mother resided at the time of or since conception of the child, or in which the child has resided or resides.

(2) The information required in subsection (1) may be supplied to the court or the department in the form of a sworn affidavit by a person having personal knowledge of the facts.

FLA. STAT. § 39.803 (Supp. 1998).

The *Florida Rules of Juvenile Procedure* provide a form which tracks the statute set forth above. FLA. R. JUV. P. Form 8.969 ("Affidavit of Mother Regarding Unknown Father"). It should be modified for use in situations where the father is known, but the possibility of other prospective fathers is to be negated. See Appendix G *infra* for a worksheet to assist the practitioner in assuring the completeness of the birth mother's affidavit regarding the identity of the father.

121. The *Florida Rules of Juvenile Procedure* limits the parties to juvenile proceedings, including proceedings to terminate parental rights, as follows: "**Definitions.** For the purpose of these rules the terms 'party' and 'parties' shall include the petitioner, the child, the parents of the child, the department, and the guardian ad litem, when appointed." Fla. R. Juv. P. 8.210(a). Though, under this definition, prospective adoptive parents are not parties to termination proceedings under current law, they do enjoy at least "participant" status: "**Additional Participants.** 'Participant' means any person who is not a party but who should receive notice of hearings involving the child. Participants include . . . identified prospective parents Participants may be granted leave by the court to be heard without the necessity of filing a motion to intervene." *Id.* at 8.210(b). However, it is arguable that rule 8.210(a), by its very terms, is *definitional* only, and does not circumscribe the entire class of persons who might otherwise *become* parties, even rule 8.210(b) "participants" who, though they may be granted leave to be heard without the "necessity" of intervenor, nevertheless may choose to move to intervene if they might otherwise establish a legal basis for doing so. *Id.*

time for filing motions for rehearing or clarification has expired or, if filed, disposed of as set forth in Part X, below.

Notice of Action and Preliminary Hearing. All necessary parties shall be served with a notice (“the Notice”) of action and preliminary hearing (“Preliminary Hearing”) for TPRPA,¹²² issued by the Clerk, with a copy of the Petition attached, at the earliest possible moment following the filing of the Petition, except that if service of process is waived in writing by any necessary party, notice to that party shall be provided by the Petitioner by certified mail/return receipt requested/restricted delivery,¹²³ and by the Clerk by regular mail, to the address provided by that party in said waiver.¹²⁴ Notice shall not be excused except by order of the Court, for good cause shown, upon written waiver by the party for whom excuse of notice is sought.

Service of Process. Service of the Notice shall be in accordance with the *Florida Rules of Juvenile Procedure* except as otherwise provided herein. Service shall be by personal service if a party is known, located, and residing within this state. Service shall be by constructive service, as provided in chapter 49 of the *Florida Statutes*, if a party is unknown, not locateable, or located but residing outside this state. The affidavit necessary to support constructive service upon any party¹²⁵ shall be in compliance with

122. See Appendix H *infra* for a form for Notice of Action and Hearing.

123. Using the United States Postal Service’s “restricted delivery” certified mail service is advisable for three reasons: 1) the privacy of the addressee is protected by requiring the *addressee’s* signature, not just a *recipient’s* signature, for delivery of the mail; 2) the sender has a written record of actual receipt by the addressee personally, the certified mail receipt being returned to the sender after delivery; and 3) under Senate Bill 550, a court making a determination of abandonment is required to take into consideration “[w]hether other persons prevented the person alleged to have abandoned the child from making the efforts referenced in this subsection [to participate supportively in the birth mother’s prenatal care].” See SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 16, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to create FLA. STAT. § 63.089(4)). Were someone to be found to have intercepted *unrestricted* certified mail to the father, the father would have legitimate grounds on which to avoid a finding of abandonment under the bill.

124. To further assure that the birth parent signing the surrender is on notice of the anticipated TPRPA action, the surrender, a copy of which should be given to the birth parent, should recite the name, address, and phone number of the court where the TPRPA will be filed.

125. See FLA. STAT. § 49.031 (1997).

section 39.803(6) of the *Florida Statutes*.¹²⁶ If residing outside this state, a party shall be mailed a copy of the Notice, with a copy of the Petition attached, by certified mail/return receipt requested/restricted delivery by the Petitioner, and by regular mail by the Clerk.¹²⁷

- IV. ***Response to Notice of Action.*** The Mother and/or a Prospective Father of the Child who has been served with or has otherwise received the Notice, who wishes to assert parental rights to the Child, must respond (“Response”) to the Notice by the date of the Preliminary Hearing indicated on its face, which date may not be less than thirty days nor more than forty-five days after the last date of personal service upon any necessary party, and/or

126. *Florida Statutes* section 39.803(6) (Supp. 1998) provides:

The diligent search required by [these rules] must include, at a minimum, inquiries of all known relatives of the parent or prospective parent, inquiries of all offices of program areas of the department likely to have information about the parent or prospective parent, inquiries of other state and federal agencies likely to have information about the parent or prospective parent, inquiries of appropriate utility and postal providers, and inquiries of appropriate law enforcement agencies.

FLA. STAT. § 39.803(6) (Supp. 1998).

These are minimum requirements. Indeed, a better guide to the parameters of an acceptable diligent search are reflected in *Florida Rules of Juvenile Procedure* Form 8.968 (“Affidavit of Diligent Search”). FLA. R. JUV. P. Form 8.968.

127. Section 49.12 of the *Florida Statutes* provides:

If the residence of any party to be served by publication is stated in the sworn statement with more particularity than the name of the state or country in which the defendant resides, the clerk or the judge shall mail a copy of the notice by United States mail, with postage prepaid, to each defendant within 10 days after making or posting the notice, the date of mailing to be noted on the docket with a copy of the pleading for which the notice was issued.

FLA. STAT. § 49.12 (1997).

Service of process by constructive service is not effective where the pleading is not mailed along with the notice. *See* *Coin Copies, Inc. v. Financial Fed. Sav. & Loan Ass’n*, 472 So. 2d 869 (Fla. 3d Dist. Ct. App. 1985); *Tompkins v. Barnett Bank*, 478 So. 2d 878 (Fla. 5th Dist. Ct. App. 1985). If a notice mailed by the clerk is not returned, it is presumed that it was delivered as addressed. *See* *Lear v. Lear*, 95 So. 2d 519 (Fla. 1957). Because the mailing (and nonreturn) of the notice is jurisdictional, an affidavit by the clerk that the notice was mailed and not returned should be considered an important element of proof of service along with the publication affidavit. *See* Appendix I *infra* setting out a form for “Clerk’s Affidavit of Compliance with Mailing Requirements for Constructive Service of Process.”

commencement of publication for constructive service,¹²⁸ and notify the court clearly and unequivocally of her/his desire to seek custody of the Child. To “respond” shall mean to communicate with the Court in a writing filed in the court file before the time of the Preliminary Hearing, or to attend the Preliminary Hearing.

Postponement and Re-Notice. If the date of the Preliminary Hearing must be rescheduled due to failure to timely serve a necessary party, notice of the new hearing date shall be served by mail upon any party previously personally served, at the same address where personal service occurred, or at any other address subsequently provided to Petitioner in writing by that party, without the necessity of further service of process. Any party who waived service of process shall be notified of the new hearing date at the same address to which notice was previously mailed, or at any other address subsequently provided to Petitioner in writing by that party.

- V. ***Termination of Parental Rights at Preliminary Hearing; Actual Abandonment.*** If at the Preliminary Hearing the Court: a) finds that all necessary parties have been served with the Notice as set forth in Part III or IV, above; and b) finds that the Court has received no Response from the Mother or any Prospective Father notifying the Court of her/his desire to seek custody of the Child; and c) finds by clear and convincing evidence that: 1) the Mother surrendered the Child for adoption freely and voluntarily by an unrevoked¹²⁹ instrument duly executed for that purpose;¹³⁰ and 2) any and all Prospective Fathers surrendered the Child for adoption freely and voluntarily by an unrevoked instrument duly executed

128. This time frame is different than what chapter 49 provides for constructive service, but is within its due process limitations, and thus a scheme not in conflict with chapter 49. See FLA. STAT. ch. 49 (1997 & Supp. 1998).

129. Senate Bill 550 permitted revocation of a consent to adoption within three days of signing under certain circumstances. See SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 12, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing amendments to FLA. STAT. § 63.082 (1997)).

130. See Appendix J *infra* for a sort of self-proving “truth-in-adoption” document developed by this writer to be used as evidence of the “free and voluntary” nature of a birth parent’s surrender.

for that purpose, or executed a denial of paternity of the Child,¹³¹ or actually abandoned the Child, the Court shall enter a judgment (“Judgment”) setting forth its specific findings of fact, terminating the Mother’s and any and all Prospective Fathers’ parental rights to the Child, and freeing the Child for adoption. To “actually abandon” shall mean to abandon a child as defined in section 63.032(14) of the *Florida Statutes*.¹³²

VI. ***Case Plan; Appointment of Supervising Agency; Evidentiary Hearing.*** If at the Preliminary Hearing the Court does not terminate parental rights as provided in Part V, above, but finds that the Mother and/or a Prospective Father by a Response has clearly and unequivocally notified the Court at or before the Preliminary Hearing that she/he wishes to seek custody of the Child (“Party Seeking Custody”), the Court shall at the Preliminary Hearing: a) inform any Party Seeking Custody, if present, of her/his right to counsel;¹³³ b) appoint counsel if any Party Seeking Custody so requests and is indigent; c) direct the Department of Children & Family Services (“the Department”) or a Florida licensed child-placing agency (“Licensed Agency”), as supervising agency (“Supervising Agency”), to prepare and file a proposed case plan (“Plan”) for the Child within five (5) days of the Preliminary Hearing, to be heard for Court approval within ten

131. Senate Bill 550 recognized an “affidavit of nonpaternity” as a substitute for consent by a man identified by a birth mother as the father of her child. See SENATE COMM. ON THE JUDICIARY, COMM. SUBSTITUTE FOR S.B. 550, § 11, 15th Leg. Sess., Reg. Sess. (Fla. 1998) (proposing to amend FLA. STAT. § 63.062 (1997)). The form contents required by this section are inadequate to the form’s purpose. First, though titled an “Affidavit of Nonpaternity,” the form never actually states that the affiant is not the father of the child. Second, although proposed subsection (4)(a) of the same section requiring the affidavit states that the affidavit “shall not be executed before birth of the minor,” the form provides for recitation, in paragraph 4, that affiant has “not supported the birth mother or her child or unborn child with support of any kind.” Most importantly, the form does not require recitation of the child’s birth date or gender, thus leaving open the potential for an attempted withdrawal of the affidavit on the basis of mistake or fraud. A better method for allowing a putative father to “sign off” his rights is by a “denial of paternity.” Such an instrument is identical to a surrender form, see Appendix D *infra*, except it states at the outset that 1) the man executing the denial is not the child’s father; but 2) *even if he is the father*, he surrenders the child and waives all rights. See *id.*

132. FLA. STAT. § 63.032(14) (1997). See *supra* note 65 for text of definition.

133. See *supra* notes 30–32 and accompanying text for a discussion of the right to counsel.

(10) days of the Preliminary Hearing; and **d**) set an evidentiary hearing (“the Evidentiary Hearing”) on all then-contested issues, which hearing must be held and completed no less than ten (10) nor more than twenty (20) days from the date of the Preliminary Hearing, unless good cause is shown to shorten or enlarge this time. Neither the Department nor a Licensed Agency shall be disqualified from serving as Supervising Agency for the Plan because it is also the Petitioner.

Service of Plan; Objections to Plan. A copy of the proposed Plan shall be served by mail by the Supervising Agency on all parties to the proceeding. If any party objects to the Plan, the Court shall determine at the Evidentiary Hearing whether and in what manner the Plan should be modified.

Duration of Plan. The duration of the Plan shall be sixty days from the birth of the Child, or the date of the filing of the Plan, whichever is later, or a lesser or greater period if agreed to by the parties and approved by the Court. The Plan shall be appropriate to the needs of the Child, with the goal of assisting the Court in determining what disposition to make of the Petition, among the alternatives set forth in Part IX, below. Requirements for the Plan are set forth in Part VII, below.

Termination of Parental Rights at Evidentiary Hearing. Should the Court determine at the Evidentiary Hearing that the Mother and any and all Prospective Fathers of the Child are estopped to assert parental rights because they have executed surrenders of the Child voluntarily, without fraud or duress, which surrenders have not been revoked as may be provided by law, or that the Mother has surrendered the Child as aforesaid or actually abandoned the Child, and any and all Prospective Fathers have executed denials of paternity, or actually abandoned the Child prior to filing a Response to the Notice, the Court shall enter a judgment (“Judgment”): a) based upon written findings of clear and convincing evidence, terminating all parental rights to the Child; b) terminating the Plan; and c) freeing the Child for adoption.

Continuation of Plan When Rights Not Terminated at Evidentiary Hearing — Child Under 180 Days of Age. If parental rights are not terminated at the Evidentiary Hearing, the Court shall enter its order a) setting forth all contested issues and

the Court's findings of fact thereon and, if the Child was less than 180 days of age at the time of the filing of the Petition, b) providing that the Plan shall remain in effect pending the Disposition Hearing provided for in Part IX, below.

Child 180 Days Old or Older. If parental rights are not terminated at the Evidentiary Hearing and the Child was 180 or more days of age at the time of the filing of the Petition, the Court shall: a) on proper motion and payment of any applicable filing fee, enter its order allowing the filing of a custody action under chapter 61 of the *Florida Statutes*, a dependency action under chapter 39 of the *Florida Statutes*, or a paternity action under chapter 742 of the *Florida Statutes*, within a time certain, not to exceed ten (10) days from the date of the order, in the same proceeding, and b) enter its order determining temporary custody of the child. If no such action is filed within 10 days, the Court shall proceed as set forth in the preceding paragraph without regard to the Child's age.

VII. *Case Plan Requirements*

A. ***Plan Contents.*** The Plan shall provide for:

1. The expiration date of the Plan;
2. Identification of Plan participants (i.e., the parties and the Prospective Adoptive Parents), the Supervising Agency and agency personnel responsible for the Plan, and outside resources/personnel (including any out-of-state agencies) to be utilized to promote the requirements of the Plan (including names, addresses, telephone numbers, and other pertinent data);
3. care and maintenance of the Child pending disposition of the proceeding, including room and board, provision for the medical, emotional, and social needs of the Child and, if applicable, the educational, religious, and cultural needs of the Child (physical custody of the Child to be with foster parents, unless the GAL requests, the Supervising Agency recommends in the Plan, and the Court orders, that physical custody be with the Prospective Adoptive Parents, and they are agreeable to the arrangement);

4. supervised visitation by non-custodial Plan participants (the Prospective Adoptive Parents, if not physical custodians of the Child under the Plan, having no visitation with the Child unless the GAL requests, the Supervising Agency recommends in the Plan, and the Court orders, that they may visit with the Child, and they are agreeable to the arrangement);
5. modification of the Plan should the needs of the Child change during the pendency of the Petition (including, but not limited to, circumstances resulting in the need for a change of physical custodian of the Child or a change in any visitation schedule);
6. extension of the expiration date of the Plan if necessitated by a motion for rehearing or clarification, or by resort to a higher court;¹³⁴
7. paternity testing for any Party seeking custody who claims to be the biological father (“the Father”) of the Child;
8. counseling support for Plan participants pending final disposition of the Petition;
9. a written psycho-social assessment of any Party seeking custody of the Child including the Party’s strengths, resources, desire and readiness to parent;¹³⁵
10. parenting education for any Party seeking custody of the Child; and
11. weekly assessment by the Supervising Agency as to the Plan’s progress and the Child’s well-being, based on contact with the Plan participants and review of any evaluations made by third parties as required by the Plan;

B. *Obligations of Parties Seeking Custody.* Any Party seeking custody of the Child shall submit to interviews and testing as required by the Plan and shall provide upon the request of the Supervising Agency:

134. *See infra* Parts X, XII.

135. *See infra* note 136.

1. his or her full legal name, maiden name if applicable, aliases if applicable, birth date, birth place, and social security number, as well as the same information for all persons residing in, or anticipated to reside in, the Party's household should Custody of the Child be awarded to him or her;
2. information as to his or her employment history, places and dates of residency, marital history, and familial relationships;
3. a financial affidavit;
4. a blanket authorization for release of information by any source having knowledge of the matters set forth in subsection (c), below, and/or of matters arising from the planning, testing, visitation, education, or any other service or evaluation otherwise contemplated by the Plan; and
5. biologic material necessary for paternity testing at a time and place, and in a manner, specified by the laboratory conducting the testing.

Continuing Duties of Parties Seeking Custody. A Party seeking custody of the Child shall have a continuing duty to keep the Supervising Agency apprised of any changes in the information required to be provided under this subsection (B), to cooperate with the Supervising Agency and its agents, and to facilitate implementation of the Plan.

C. Psycho-Social Assessment. The written psycho-social assessment, referred to in subsection (A)(9), above, as to any Party seeking custody of the Child, shall be prepared by a licensed mental health professional trained and experienced in risk assessment¹³⁶ and shall include data and impressions regarding:

1. the Party's social situation, medical health, mental health, employment, and criminal history, including exposure to or perpetration of child abuse, domestic violence, and/or substance abuse;
2. the Party's current employment, income, other financial resources, housing (a home visit is required), and plan for

136. See *supra* note 99.

child care should Custody of the Child be awarded to him or her;

3. the Party's potential for successful parenting as may be determined by current psychological and/or psychiatric and/or substance abuse and/or domestic violence evaluation(s), parenting education outcomes, and performance as to other of the Party's children, if any; and

4. state and local criminal background checks and child abuse registry checks for the Party and all persons residing in, or anticipated to reside in the Party's household, should Custody of the Child be awarded to him or her.

D. *Parenting Education.* Parenting education shall be provided to any Party seeking custody of the Child, including information to allow the Party:

1. to identify various stages of child development;
2. to understand the emotional, nutritional, and intellectual stimulation requirements of the Child;
3. to appreciate the principles of child safety;
4. to recognize alternatives to physical punishment to accomplish child discipline;
5. to access medical and social services available to the Child and the Parent; and
6. to understand and seek out resources for any existing special medical and/or educational needs of the Child.

E. *Copies of Plan to be Provided.* A copy of the Plan shall be provided to all Plan participants, except that information identifying the Plan participants shall be redacted from the copies to preserve the Plan participants' privacy.

VIII. *Case Plan Status Report.* Ten (10) days prior to expiration of the Plan, the Supervising Agency shall file with the Court a status report detailing the results of the Plan. A copy of the status report shall be served by mail by the Supervising Agency upon all parties to the termination proceeding.

IX. **Disposition Hearing.** No later than the date of expiration of the Plan, the Court shall hold a hearing (“Disposition Hearing”) to determine the final disposition of the Petition, and shall enter its judgment (“Judgment”) setting forth such disposition within five days of the Disposition Hearing. The Court shall take into consideration the report of the Supervising Agency, the recommendation of the GAL, and the presentations and arguments of any other party, and shall dispose of the Petition, based upon written findings, in one of the following ways:

A. **Termination of Parental Rights; “Constructive Abandonment.”** If supported by clear and convincing evidence, confirm the Mother’s and/or the Father’s surrender or denial of paternity, or find the Mother and/or Father to have actually or constructively abandoned the Child, and terminate the Mother’s and Father’s parental rights, freeing the Child for adoption.¹³⁷ To “constructively abandon” a child means to evince unwillingness and/or gross inability, as demonstrated by the outcome of a child’s case plan, to assume care, custody, and control of a child for the purpose of providing a child a safe and stable family life.

- OR -

B. **No Termination of Parental Rights.** If supported by clear and convincing evidence of revocation, fraud, or duress as to the surrender of either of them, void both the Mother’s surrender and the Father’s surrender, if any, rendering the surrenders and the fact of their execution nullities for all purposes, and, depending upon the Court’s findings as to the best interests of the Child:

1. **Shared Parental Responsibility.** The Court shall award shared parental responsibility for the Child to the Mother and the Father, determining primary residential custody of the Child, awarding liberal visitation to the non-residential Parent, and reserving jurisdiction to award child support upon proper motion; or

2. **Sole Custody to Mother.** The Court shall award sole Custody of the Child to the Mother, with or without visitation

137. Actual abandonment may be found at the Disposition Hearing notwithstanding a previous finding of no actual abandonment if the court finds clear and convincing evidence of actual abandonment at the time of the Disposition Hearing.

by the Father, reserving jurisdiction to award child support upon proper motion; or

3. ***Sole Custody to Father.*** The Court shall award sole Custody of the Child to the Father, with or without visitation by the Mother, reserving jurisdiction to award child support upon proper motion.

Continuing Jurisdiction. Should the Court dispose of the Petition pursuant to this subsection (B), the Court shall retain jurisdiction over the Child as in a child custody proceeding under chapter 61 of the *Florida Statutes*.

Change in Physical Custody Following Trial Court's Order. If physical custody of the Child is to change as a result of the Court's Judgment under this Part IX, the Judgment shall set forth with specificity the time, manner, and conditions for transfer of custody, which shall occur no less than five (5) calendar days from the date the Court's order becomes final, as set forth in Part X, below.

X. ***Judgment; Motions for Clarification and/or Rehearing; Finality of Judgment.*** Any Party to the TPRPA proceeding may file a motion for clarification or a motion for rehearing of the Judgment disposing of the Petition under Part IX, above, within seven (7) days of the date of the Judgment, with a courtesy copy of said motion, to be delivered by the moving party on the day of filing, to the judge who entered the Judgment or, in his or her absence, to the chief judge of the Court. If no such motion is filed, the Judgment shall be final.

Disposition of Motions. If a motion for clarification or a motion for rehearing is filed, the judge who entered the Judgment or, in his or her absence, a judge designated by the chief judge of the Court, shall consider the motion and, within five (5) days of the filing of the motion, enter an order either denying the motion or requiring response to the motion by the non-moving party or parties. If required, the response(s) shall be filed within five (5) days of the date of the order, with a courtesy copy delivered as set forth above. Any reply shall be filed within five (5) days of service of the last response, also with a courtesy copy delivered as above. An order disposing of all outstanding motions shall be

entered no later than ten (10) days after the filing of the last permissible reply or response, whereupon the Judgment shall be final as modified, if at all, by the order.

- XI. ***Filing Petition for Adoption.*** A petition for adoption of the Child shall be filed, if at all, only after the entry of a Judgment that is final as set forth in Part X, above. The adoption petition shall be filed within the TPRPA proceeding, accompanied by payment of the appropriate filing fee for adoption cases in that circuit.
- XII. ***Appeal.*** Any party to the TPRPA proceeding may file an appeal from the Judgment disposing of the Petition. Appeal shall be to the district court of appeal and shall be expedited pursuant to the rules of court relating to child welfare cases. Notice of appeal shall be filed within five (5) days of the date of the Judgment of the circuit court becomes final.

En Banc Review. The district court shall consider *en banc* whether the trial court's disposition of the Petition was, a) supported by clear and convincing evidence and b) in the Child's best interests without regard to the Child's prospective adoption.

Motions for Rehearing Prohibited. No motion for rehearing of the district court's decision shall be filed. Motions for clarification are permitted, but may be stricken on the court's own motion if found to be primarily in the nature of a motion for rehearing.

Change in Physical Custody following District Court Decision. If the district court's decision requires a change in physical custody of the Child, the court's order shall set forth with specificity the time, manner, and conditions for transfer of custody, which shall occur no less than five (5) calendar days from the date the court's decision becomes final after disposition of motions for clarification, if any.

- XIII. ***Early Termination of Case Plan and Disposition.*** A court may at any time, on motion of any party to the TPRPA proceeding or on its own motion, terminate the Plan and make final disposition of

the Petition as otherwise provided herein if such is found to be in the best interests of the Child.¹³⁸

- XIV. *Repose.* No action or proceeding of any kind, by any person, to vacate, set aside, or otherwise nullify a final order of termination of parental rights pending adoption on any grounds may be filed after 180 days from entry of a final judgment of adoption of the Child.

VI. CONCLUSION

Statutes and court cases notwithstanding, adoption is not primarily a legal event. When legal mechanisms fail in contested adoption cases, it is because they are not forged in patient understanding of the non-legal circumstances, motivations, needs, and goals of everyone involved in a prospective adoption.¹³⁹ Because the primary imperative of the law is to join the issues and render a decision, and because emotionally-charged matters are at stake, the early circumspection necessary in these cases, which can be accomplished through experienced social work, is not always practiced. Though “wait, watch, and listen” is not in the general legal lexicon, such an approach, properly managed, is precisely what will protect children’s best interests, in both the short term and the long term. At the same time, this approach will also protect the kinship rights of the children’s biological parents, as well as the rightful expectations of prospective adoptive parents.

The essential shortcoming of Senate Bill 550, as it relates to unwed birth fathers’ rights, was its naive refusal to distinguish between fathers who

138. Those circumstances might include, but would not be limited to, a settlement among the plan participants, the development of evidence that the prospective father is not the biological father of the child, or abandonment of the case plan by the birth parent(s).

139. In adoption circles, the primary parties to an adoption are referred to as “the triad,” meaning the birth parents, the adoptive parents and the adoptee. *See generally* ELINOR B. ROSENBERG, *THE ADOPTION LIFE CYCLE* (1992). However, it is important to recognize that because adoption, like procreation itself, is an issue which touches the very core of our lives, there are many other “participants” in an adoption whose thoughts and feelings about adoption may have significant impact on the process. These may include triad members’ friends, family, physicians, religious advisors, and teachers, to name a few, and, indeed, adoption social workers and lawyers. Perhaps in recognition of the expansive nature of the adoption “interest group,” the Evan B. Donaldson Institute uses the term “adoption constellation” to refer collectively to “birth parents, adoptive parents, adopted children and adults, and the professionals who serve them.” EVAN B. DONALDSON ADOPTION INST., ANN. REP., AUG. 1996-JUNE 1997.

wish merely to assert parental rights and those who demonstrate commitment and ability to undertake responsibility for parenting their children. An unwed father's bare objection to the adoption of a child, presented with no substantial intention and fitness to raise the child himself, should not determine the child's fate.

APPENDIX A

**FORM FOR PROSPECTIVE ADOPTIVE PARENTS' ACKNOWLEDGEMENT
OF LEGAL RISK PLACEMENT (AGENCY)**

ACKNOWLEDGEMENT AND AGREEMENT RE: LEGAL RISK PLACEMENT

Prospective Adoptive Parent(s): _____

Child's Adoptive Name: _____

Date of Birth: _____ Date of Placement: _____

THIS IS A "LEGAL RISK PLACEMENT." PARENTAL RIGHTS HAVE NOT YET BEEN TERMINATED.

The birth mother of the child being placed in your home for the purpose of adoption executed a written surrender as provided by law/has stated she will execute a written surrender as provided by law on or about _____. Under Florida law, such a surrender is irrevocable absent a showing of fraud or duress in the surrender process. Nevertheless, the law requires that a judicial termination of the parental rights of both the birth mother and the birth father occur. Papers initiating this proceeding will be filed by the Agency's attorney. (Note: The termination proceeding is separate and apart from, and precedes the filing of, an adoption proceeding on behalf of the prospective adoptive parents.)

The birth father's parental rights are expected to be addressed within the termination proceeding as follows:

Depending upon the complexity of matters relating to the birth father's rights as described above, the termination of parental rights process may involve one (1) to six (6) months. You will be notified in writing of the court's decision. In the event the Agency is unable to obtain judicial termination of parental rights, the Agency may require return of the child to the Agency's physical custody with or without a court order. By execution of this Acknowledgement and Agreement re: Legal Risk Placement, you agree to relinquish physical custody of the child to the Agency if so required.

Date Prospective Adoptive Parent

Date Prospective Adoptive Parent

Date Agency Representative

APPENDIX B

**FLORIDA BAR GRIEVANCE COMMITTEE LETTER
EXONERATING INTERMEDIARY CHARLOTTE DANCIU
OF PROFESSIONAL MISCONDUCT IN *BABY EMILY***

THE FLORIDA BAR

* * *

May 3, 1995

* * *

RE: Complaint of Gary Bjorkland against Charlotte Danciu, Esquire

* * *

Fifteenth Judicial Circuit Grievance Committee "F" has devoted considerable time at several of its meetings to an extensive consideration of the remarks of the Fourth District Court of Appeals [sic] in the Baby Emily adoption case and Mr. Bjorkland's grievance. It has, by unanimous vote, made a determination of no probable cause for findings of violation

In its review, the committee found that the portion of the court's decision entitled "Conduct of the Attorney/Intermediary" appeared to contain many inaccuracies. As an example, the court makes reference to an August 12, 1992, hearing on the adoptive parents' "motion to waive the biological father's consent to adoption". In fact, the motion that was noticed for August 10, 1992, specifically states that the purpose of the hearing was to hear objections. The court further observes:

There is no evidence in the record, nor have we been apprised of any evidence, to indicate that the biological father deliberately avoided service of the notice of this hearing by a duly appointed process server.

It was obvious to the committee that the court simply did not have, as part of the record before it, the transcript of the August 10, 1992, hearing. In fact, the court notes that the adoptive parents brought to its attention the notice of hearing which it observed was not part of the record.

Further, the court noted that Ms. Danciu did not inform the trial court of the July, 1992, conversation with Mr. Bjorkland. That is not accurate. Ms. Danciu informed Judge Vonhof of her telephone conversation with Mr. Bjorkland. It appeared very clear to the committee that it was as a result of that conversation that Ms. Danciu determined to attempt to address Mr. Bjorkland's position as related to her in that call, by scheduling a pre-birth hearing for the purpose of hearing "your [Mr. Bjorkland's] objections".

The committee examined the testimony of the proposed adoptive father regarding when he learned of Mr. Bjorkland's objections. It appeared very clear to the committee that the proposed adoptive father's testimony related to Mr. Bjorkland's post birth actions and did not purport to address when the proposed adoptive parents first learned that Mr. Bjorkland was objecting. The proposed adoptive parents have confirmed that they were aware of Mr. Bjorkland's objections soon after Ms. Danciu's July, 1992, conversation with Mr. Bjorkland.

While the court seemed to criticize the procedure employed by Ms. Danciu, viz., a pre-birth hearing for the purposes of addressing a father's objections, the committee found no ethical impropriety in Ms. Danciu's attempt to proceed in that fashion. In fact, there appeared to the committee a rather considerable

appeal to the concept of addressing all potential impediments to an adoption, pre-birth.

The committee very carefully read and re-read the colloquy between Ms. Danciu and Judge Vonhof at the August 10, 1992, hearing. While there is no question but that Ms. Danciu stated: "There is no objection at all. . .", the committee concluded that when read in context of the events that preceded the hearing and occurred at the hearing, the referenced remark was made in the context of filed objections. It appeared obvious to the committee that there was no purpose for the hearing other than to address the natural father's objections. The notice of hearing specifically so stated. Most persuasive to the committee however, were the remarks of Judge Vonhof, who . . . reviewed the transcript of the August 10, 1992, hearing and advised that "I can only say, once again, that I do not feel that I was in any way lead astray by any comments, or lack of same, by Ms. Danciu." His honor had previously, unsolicited, informed that [sic] committee that " . . . I truly believe that the record that the Fourth District Court of Appeals [sic] reviewed could not have been complete or they would not have made the remarks that they did as to Ms. Danciu's conduct."

Very truly yours,

/s/

DAVID M. BARNOVITZ
Branch Staff Counsel

* * *

APPENDIX C

**FLORIDA DEPARTMENT OF CHILDREN & FAMILY SERVICES' FORM
FOR CONSENT TO ADOPTION FOR USE BY ADOPTION INTERMEDIARIES**

In The Circuit Court Of The
Judicial Circuit
Of Florida, By And For The
County Of _____

Case No. _____

In The Matter Of The Adoption of

CONSENT FOR ADOPTION

STATE OF FLORIDA
COUNTY OF _____

Before me this day personally appeared _____, who, being duly sworn,
deposes and says:

I, the undersigned _____ of a _____ child known as _____

Mother/Father

Sex

First

born the _____ day of _____, 19 _____

Middle

Last

at _____ County, _____,

do hereby agree to relinquish all rights to and custody of the child to a person or persons unknown to me and do further consent to adoption by said person or persons if a Court of competent jurisdiction should approve. The names of the person or persons to whom this Consent is given are known to _____, Intermediary. I hereby waive notice of any proceedings for this adoption.

That this Consent is executed voluntarily and is done so by the undersigned without requiring the identification of the adopting parent or parents.

That the biological, sociological and medical history information regarding the above named child and the natural parents, as required by the Department of Health and Rehabilitative Services pursuant to Section 63.082(3)(a), Florida Statutes, is contained in HRS-CYF Form 5108, BACKGROUND INFORMATION ON PROSPECTIVE ADOPTIVE CHILD, and HRS-CYF Form 5074, FAMILY, SOCIAL AND MEDICAL INFORMATION OF CHILD TO BE ADOPTED.

(SEAL)

Signed, sealed and delivered in the presence of:

STATE OF FLORIDA
COUNTY OF _____

I HEREBY CERTIFY that on this day before me, an officer duly authorized in the state aforesaid and in the county aforesaid to take acknowledgements, personally appeared _____, known to me to be the person described in and who executed the foregoing Consent for Adoption and acknowledged before me that _____ executed the same.

WITNESS my hand and official seal in the county and state last aforesaid this _____ day of _____, 19 _____.

Notary Public, State of Florida at Large
My Commission Expires: _____

(Notarial Seal)

HRS-CYF Form 5110, Jan 88 (Obsoletes HRS-SES Form 4028 which may not be used)
(Stock Number: 5749-000-5110-7)

APPENDIX D

**FORM FOR SURRENDER OF CHILD FOR ADOPTION
TO A FLORIDA LICENSED CHILD-PLACING AGENCY**

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

In the Interest of:

JUVENILE DIVISION

CASE NO.: _____

a Child.

**SURRENDER AND CONSENT FOR ADOPTION
WITH WAIVER OF NOTICE, SERVICE OF PROCESS, AND RIGHT TO COUNSEL**

I, _____, of _____, telephone _____,
age __, the Birth Parent of _____, a _____ child, born to _____
on _____, at _____ Hospital, _____ County, Florida,
desiring to release my said child for the purpose of adoption as provided by law, hereby freely and
voluntarily:

1. **SURRENDER** my child to _____ ("the Agency"), a Florida licensed child-placing agency willing to receive my child for the purpose of placement for adoption, or its designate.
2. **WAIVE NOTICE, SERVICE OF PROCESS AND ANY RIGHT TO COUNSEL** as to any and all hearings and proceedings legally necessary for the termination of my parental rights, commitment of my child to the custody and guardianship of said Agency or any designate of the Agency, and for subsequent adoption proceedings.
3. **CONSENT IRREVOCABLY, UNCONDITIONALLY, AND FINALLY TO:**
 - (a) **the permanent loss, deprivation and forfeiture** of my parental rights to my child as now exist or heretofore existed;
 - (b) **the entry of a court order terminating** my parental rights, committing my child to the custody and guardianship of the Agency or its designate for subsequent adoption and/or any other court orders sought with the consent of the Agency, believing such termination of my parental rights to be in the manifest best interests of my Child;
 - (c) **the placement of my child** by the Agency or its designate in a family home, which may or may not be known to me, for prospective subsequent adoption; and

Page 1 of 2

Initials _____

SURRENDER AND CONSENT FOR ADOPTION WITH WAIVER OF NOTICE, SERVICE OF PROCESS AND RIGHT TO COUNSEL

- (d) the appearance by the Agency or its designate as a party in any court where the legal adoption of my child is pending, to make all necessary consents to such adoption.
- 4. **WAIVE ALL RIGHT** to knowledge at any time hereafter of the whereabouts of my child, or the identity or location of any custodian or adoptive parent of my child, or to have any court compel the Agency, or anyone in its stead, to divulge any such information.
- 5. **ACKNOWLEDGE** that I have been offered the opportunity of receiving independent legal advice at no charge to me before signing this legal document and have either received such advice or have declined it.

BIRTH PARENT'S SIGNATURE: X _____

PRINT NAME: _____

DATE: _____

SIGNED IN THE PRESENCE OF:

X _____
as witness to the voluntary nature of the Birth Parent's acts and waivers herein

Print Name: _____ SS#: _____
Home Add.: _____
Bus. Add.: _____

X _____
as witness to the voluntary nature of the Birth Parent's acts and waivers herein

Print Name: _____ SS#: _____
Home Add.: _____
Bus. Add.: _____

STATE OF FLORIDA

COUNTY OF _____

BEFORE ME, an officer authorized to take acknowledgments, appeared _____, who produced as identification _____, and acknowledged that s/he did execute the foregoing Surrender and Consent for Adoption, Waiver of Notice, Service of Process and Right to Counsel, freely, voluntarily and for the purposes stated therein at _____ AM. PM. on this day.

WITNESS MY HAND AND SEAL in the county and state last aforesaid this _____ day of _____, 19 _____.

NOTARIAL SEAL

Notary Public

APPENDIX E**ANALYSIS OF VARIOUS CHANGES TO FLORIDA'S ADOPTION STATUTE
AS PROPOSED IN THE FLORIDA SENATE JUDICIARY COMMITTEE'S
COMMITTEE SUBSTITUTE FOR SENATE BILL 550
(FLORIDA LEGISLATURE 1998)**

Prepared by Hausmann & Hickman, P. A.
Attorneys at Law
Boynton Beach, Florida

1. Proposed Section 39.464: Child's Right to Petition for Termination of Parental Rights

The proposed bill's impact on Chapter 39 of the Florida Statutes (Juvenile Court Statutes) has the apparent intent of removing agency adoptions from Chapter 39 proceedings and placing agency adoptions within Chapter 63 proceedings. However the additional language proposed for section 39.464 limits the class of individuals who have standing to file a Chapter 39 Termination of Parental Rights Petition from "any person" to the Department, the GAL and "any person related to the child." In practice, this proposed language would limit the child's ability to obtain independent counsel and petition for termination. In the landmark case, In the Interest of Gregory K, the Florida Supreme Court stated that a child could petition for termination of parental rights provided he petitions through a next friend. Traditionally, children file such petitions through professional attorneys who appear in a case as their next friend and attorney ad litem. Most often, such professionals are not related to the child.

2. Proposed Section 63.03: Birth Parent Fraud

Adds a provision within the Adoption Statute which states that any person who accepts benefits related to the same pregnancy from more than one adoption entity commits a second degree misdemeanor, and that any person who knowingly provides false information shall be subject to civil repayment penalties. This is an excellent provision designed to protect adoptive parents from fraud and misrepresentation.

3. Proposed Section 63.039: Liability of Attorneys and Adoption Entities

This proposed section places upon an attorney duties and liabilities outside of the obligations currently imposed by the Florida Bar and potentially holds attorneys liable for malpractice outside of liability insurance and a separate malpractice action.

Subsection (1) is a superfluous and redundant provision which essentially states that each adoption entity shall comply with the law. Such concept is inherent in the law. This subsection requires extensive and repetitive disclosures and repetitive acknowledgement of receipt of disclosure. While written disclosure is important and customarily provided, the provisions of this subsection are onerous and, when read in conjunction with the remaining subsections, are apparently designed to encourage litigation and sanctions against attorneys.

Subsection (2) holds an attorney absolutely liable for any document error. The document provisions of section (1) are so numerous, extensive and redundant that errors, which will not materially affect the child's placement, are likely to occur. These provisions will result in an increase in malpractice insurance premiums, and many errors may not be covered by current malpractice policies. Accordingly, many reputable attorneys may withdraw from adoption practice. Additionally, the small family practitioner preparing a stepparent adoption is also exposed to these extreme liability standards. No other Florida statute holds attorneys strictly liable.

Subsection (3) proposes to hold attorneys liable outside of any malpractice proceeding when a consent is set aside for fraud or duress. Like subsection (2), this provision would render adoption attorneys uninsurable or insurable at high rates. Such an award would most likely not be covered by current malpractice policies. In order to assert any right to insurance coverage in the event of a negative ruling, the attorneys must place their malpractice insurer on notice

of any adoption challenge and allow the insurer to participate in the defense of that challenge. Such an action would violate the privacy and confidentiality provisions of an adoption proceeding.

Subsection (4) holds attorneys and adoptive parents absolutely liable for attorneys' fees and costs of a birth parent who successfully challenges an adoption. No other family law statute holds litigants strictly liable regardless of ability to pay fees and costs. No Florida statute holds attorneys strictly liable. The concerns regarding insurability and integrity within the practice also apply to this subsection.

This section creates liability and malpractice actions within the adoption statute, eliminating privity of contract requirements and the right to a jury trial.

4. Proposed Section 63.052(2) and (3): Foster Care Placements

This section mandates that a child be placed in licensed foster care when an adoptive home is not identified at the time the child is discharged from a medical facility. This would prohibit adoption entities from taking a child into private care, thereby substantially raising the initial costs of such adoptions to adoptive parents, and potentially to the State of Florida, and causing unnecessary complications and delays. A child cannot be placed in State sponsored foster care unless a Court finds that the child has been abandoned, abused or neglected, adjudicates the child dependent and provides for a reunification case plan or adoption case plan. Privately licensed foster care is expensive. Moreover, some birth parents were raised in foster care and specifically choose private adoption for their children to avoid the foster care system. This provision would eliminate a choice for these birth parents.

Proposed Section 63.082 (4) also encourages parents to place their children in foster care. This is an extremely expensive and detrimental provision. Foster care costs are already a large burden upon the State budget and children's advocates are always seeking new funds to improve our currently overburdened foster care system where children are frequently abused and neglected. Moreover, the parental rights of a child placed in foster care cannot be terminated for twelve months. Thus, the location of a permanent home for a child is substantially delayed.

5. Proposed Section 63.062(1)(d)(3): Birth Father Consents

This section requires notice to any man who the birth mother has reason to believe may be the birth father, regardless of whether the man provided financial or emotional support to the birth mother, or assisted her in obtaining medical care. This requirement places an undue burden on birth mothers and adoptive parents and will substantially increase the risk of frivolous, time consuming and expensive litigation, thus raising the costs of an adoption and rendering some adoptions unstable (e.g., if a birth mother lists 12 potential fathers, the adoptive parents must pay expensive investigative and legal costs to search, notify, and obtain consent from each possible father). Any man who had relations with the birth mother around the time of conception could unnecessarily delay or block an adoption, thus prohibiting the birth mother from making decisions in the best interest of her child. This provision could potentially encourage a birth mother to lie about the identity of a potential father after her consent to an adoption is irrevocable, thus providing her an additional avenue to challenge an adoption and disrupt the placement and stability of a child. Unstable and lengthy adoptions do not serve the interests of a child. Currently, the law sets forth a clearly defined class of fathers whose consent is required, i.e. a man married to the mother, a man who has filed with the office of vital statistics and a man who has filed a paternity action. Under the current law, attorneys and adoptive parents may search public records to determine whether a father's consent is necessary for an adoption. As proposed, this stability would be removed from the statute.

6. Proposed Section 63.052(2): Non Paternity Affidavits

This provision allows adoption entities to obtain an affidavit of nonpaternity from any named father prior to the birth of the child. The proposed modification reasonably fills a hole in the current statute and encourages stable and safe adoptions by allowing the adoption entity to advise the adoptive parents, prior to taking the child into their home, of the status and stability of their adoption.

However, proposed section 63.052(4)(a) directly conflicts with this provision as it states that an affidavit of non-paternity may not be executed until after the birth of the child. Many potential birth fathers who deny paternity are difficult to locate and frequently move. Thus, it may take many weeks or even after the placement of the child in the

adoptive home to locate these men to obtain their non-paternity affidavits which may potentially cause uncertain and unstable adoptions. Many of these men have not supported the birth mother and would otherwise have no legal right to object to an adoption.

7. Proposed Section 63.082(3)(a): Social Worker Interviews of Birth Parents

This provision requiring a social worker interview with a birth parent prior to execution of a consent for adoption conforms with current standards of practice and assures that all precautions are taken to obtain a valid consent for adoption.

8. Proposed Section 63.082 (4): Language and Form of Consents

This subsection also requires that all adoption consents contain the following language:

You have the right to:

(A) Consult with and attorney;

(B) Hold, care for, and feed the child;

(C) Place the child in foster care or with any friend or family member you choose who is willing to care for your child;

(D) Take the child home;

(E) Find out about the community resources that are available to you if you do not go through with the abortion.

(THIS IS TYPED IN 16 POINT BOLD FACE).

(Additional language is omitted).

The above language incorporated into a consent would only insult and traumatize a birth parent signing a consent to adoption. Birth parents who voluntarily sign a consent for adoption do so after much thought and contemplation. The staff and social workers at the hospital and the social worker who interviews the birth parent discuss these rights in a private, dignified and personal manner prior to the time that a consent for adoption is presented to the birth parent for signature. Many hospitals require a similar form which is not in which assumes that a birth parent is not intelligent and cannot read normal type.

9. Proposed Section 63.082(4) and (7): Three (3) Day Revocation Period

This subsection allows a three (3) day revocation period which would only serve to promote unstable placements and exploit the emotions of the adoptive parents. The majority of birth mothers are offered or receive counseling prior to executing a consent for adoption and all birth mothers speak with a social worker and other professionals prior to executing a consent for adoption. A birth mother may take as much time as she needs after the birth of her baby before she signs any consent for adoption.

The rescission period would place an adoptive child's home placement at risk, causing the child to be removed from the original home many days after placement. For example, a birth parent who signs a consent on a Friday may withdraw their consent by mail the following Tuesday. Such notification may not be received by the adoption entity some 2 to 5 days after mailing.

Furthermore, many birth parents favor laws which provide that consents are final upon signing as those laws allow them to proceed forward without the emotional burden of having additional days to continuously rethink their decision.

10. Proposed Section 63.082(6): Repetitive Disclosure of Documents

This section requires that the adoption entity provide a copy of each signed consent to each person whose consent is required and the adoption entity must obtain written verification that said copies were received. This provision violates the confidentiality provisions of the statute and would unnecessarily increase the costs incurred by adoptive parents.

11. Proposed Section 63.085(1): Statute of Repose and Appellate Period

Subsection 63.085(1)(8) correctly advises birth parents that any action or proceeding to vacate an adoption must be filed within one year of the final judgment because section 63.182 contains a statute of repose which protects adoption orders from any challenge one year after entry of the final judgment of adoption.

However, subsection 63.085(1)(9) advises the birth parents that they have one year after entry of a final judgment of adoption to appeal any irregularities in the adoption proceeding. While the statute does not technically extend the appellate period, this misleading disclosure read in conjunction with subsections 63.085(1)(10) and 63.089(6)(c) would effectively extend the appeal period from thirty (30) days to one year. Subsection 63.085(1)(10) allows a birth parent to set aside an order terminating rights when their failure to timely assert their rights was the result of misrepresentation and subsection 63.089(6)(c) renders all orders terminating parental rights voidable when a birth parents' failure to act is the result of false information. Subsection 63.085(1)(9) provides this misrepresentation which would allow extension of the appellate period. Currently, all court order are subject to a 30 day appeal period a one year appeal period would only serve to create unstable adoptions.

Pursuant to proposed section 63.142(4) a court is not authorized to enter a judgement for adoption until the applicable appellate period has expired. As the language of this statute may potentially extend the appellate period to one year, this would potentially delay finalization of adoption until the child is approximately eighteen (18) months old. The mandatory disclosure laws advises a birth parent that they have one year to appeal an order terminating parental rights, thereby postponing a final judgment until more than one year post-birth. This is inconsistent with prior sections, which allow finalization within approximately 90-120 days post-birth. This could potentially delay the stability of an adoption by two years thus, placing a child at risk of removal from an adoptive home at the age of two. Such a scenario is detrimental to a child.

12. Proposed Section 63.087(4): Venue

This section requires that all adoption proceedings be filed in the venue where the birth parents reside, thus eliminating the privacy provision which allowed adoptive parents to file their adoption proceeding in the venue where their chosen adoptive entity exists if such choice protected the privacy of the adoptive parents. The privacy provision has served to protect one of the primary and essential elements of an adoption - the identity and location of the adoptive parents. The large majority of adoptions are uncontested. Only an extremely small number are challenged each year. This provision would require that adoptive parents incur the additional expenses of filing outside the venue in every uncontested case. The current law protects birth parents as a common law challenge to venue would allow the birth parents to keep venue in their place of residence.

13. Proposed Section 63.087(6): Termination of Parental Rights Separate from Adoption Proceeding

This procedure is contrary to current law that provides that the birth parent's rights are not terminated until the rights of the adoptive parents are vested. This proceeding would effectively render a child without a legal parent for an extensive period, thus raising concerns on the ability to authorize medical treatment, etc. Leaving a child without a legal parent is contrary to the child's best interests. The juvenile court system is currently experiencing many problems caused by children who do not have a legal parent for long periods of time while they await adoption.

Furthermore, as the petition requires no responsive pleading, the additional proceeding has no effect. The proceeding only creates substantial delay, additional legal expenses which must be borne by the adoptive parents, and increases use of valuable Court resources. Currently, birth parents who seek to challenge a petition for adoption may do so by appearing in court or filing a motion. They gain no further rights under this proceeding.

The time delays caused by this proceeding are substantial. Currently, a petition for adoption may be filed immediately after placement. Provided all consents or waivers are secured, an adoption may be finalized ninety (90) days after placement. Proposed section 63.089 requires thirty (30) days notice after service of process before a hearing on a Petition to Terminate Rights may be held. If the adoptive parents must publish to provide proper service to any man who reasonably may be the father, they must wait sixty (60) days after diligent search and publication prior to holding a hearing to terminate rights. After a delayed order terminating parental right is entered, the adoptive parents must wait an additional thirty (30) days before filing a Petition for adoption. These delayed time periods are unnecessary and potentially harm the best interest of a child. Currently, Chapter 39 provides that parents subject to termination of parental rights petitions are entitled to a hearing as soon as reasonably possible, much earlier than 30 days. If a birth parent seeks to challenge an adoptive placement, the courts should proceed expeditiously, as delays cause a child to further bond with adoptive parents who may lose custody of the child.

Subsection 63.089 requires a full evidentiary hearing in all adoption proceedings. Again, the large majority of such proceedings are uncontested. This additional proceeding requires that the adoptive parents incur additional legal expenses. Currently, the law protects birth parents by requiring a full evidentiary hearing upon challenge to a petition for adoption. In the non-contesting case, the adoptive parents must also bear this additional unnecessary cost.

While these proceedings require the adoptive parent to incur many additional expenses and costs, no requirements are placed upon the birth parents. Proposed section 63.089 does not even require that birth parents appear in court to protect their rights. This section allows written denial of a petition to terminate rights. All other statutes concerning termination of parental rights mandate the personal appearance of the parent. Without a personal appearance, the Court would be unable to proceed in the case and conduct the mandatory inquiries. Moreover, any parent truly serious about maintaining parental rights should personally appear before the Court. These provisions would apply to any man who reasonably may be the father, regardless of his attempts to support the birth mother and the child.

14. Proposed section 63.087(6)(b): Standing to File Petition to Terminate Rights

This subsection allows only a birth parent or legal guardian of a minor to file a petition for termination of parental rights. The proposed law changes the custodial arrangements for a child after a birth parents signs a consent for adoption. Under current law the adoptive parent becomes guardian of the child. As proposed, neither the adoption entity nor the adoptive parents may become the legal guardian of the child. Thus, the birth mother must petition the court to terminate her own legal rights to her child. This procedure makes an adoption extremely stressful and potentially traumatic for the birth parent. Moreover, the birth mother is now a party to the proceeding and could potentially request records which would provide confidential information regarding the adoptive parents.

15. Proposed section 63.088(4) & (5): Diligent Search and Inquiry & Publication

Subsection 63.088(4) mandates a diligent search and inquiry much greater than the burden currently placed upon the Department of Children & Families in Chapter 39 Termination of Parental Rights proceedings. This extensive diligent search requires that the adoptive parents search records to which they may not have standing to gain access: re: pension records, utility company records, tax records. This would be an extensive and expensive search which may be impossible to complete. Unlike the Department of Children & Families, adoption entities may not access certain private records.

Subsection 63.088(5) requires that the adoption entity publish their intent to terminate parental rights by publishing information on the birth mother and the child. This is an affront to the privacy of the birth mother. According to the provision, this must be done as to any man who reasonably may be the father of the child regardless of any history of rape or abuse upon the birth mother, and could be emotionally devastating for the birth mother.

16. Proposed section 63.089(4): Abandonment and Affirmative Duty to Support Child and Birth Mother

This subsection substantially changes affirmative duties which a birth father currently has to provide emotional and financial support to the birth mother during her pregnancy. This provision effectively overturns and ignores United States and Florida Supreme Court precedent on parental rights. Pursuant to this provision, a court may not waive the birth father's consent for failing to provide emotional support to the birth mother, thus stripping the birth mother of the ability to choose an adoption in the best interest of her child when she is emotionally abandoned and abused by the birth father.

The proposed statute also places an additional burden upon the birth mother to prove abandonment by the birth father. In order to make an adoption decision in the best interests of her child, she must affirmatively show that the father or any man who may reasonably be the father:

1. has demonstrated a willful disregard for the safety of the child.
2. has not been prevented from making efforts towards the child by any person.
3. was provided with a request for financial support.
4. has refused to pay for medical treatment when insurance or other State funded resources would not pay for such treatment.
5. provided only nominal funds which were insufficient to provide for the child's needs given the relative ability to pay of the parties.
6. knew her whereabouts and was advised of all medical appointments and tests relating to the child or pregnancy.

The above burden is much greater than the burden placed upon the Department of Children and Families when seeking termination for abandonment in a Chapter 39 proceeding. Most importantly, it is degrading and strips a birth mother of her right to choose adoption as an option for her child, forcing her to parent a child that she cannot afford and prepare for a life of fighting to receive child support from a father who did not support her during her pregnancy. These burdens would require a woman who has been abused by the birth father to initiate constant contact so that she can prove an abandonment claim. She also maintains this burden to contact him even after he moves with no notice to her, causing her to search for him to give him proper notice. The proposed statute allows a father to sit back and wait for the birth mother to come begging for money despite her obvious need. It also allows a birth father to rely on State funds such as Medicaid to pay for his responsibilities, a burden this State cannot afford.

17. Proposed Section 63.089(4)(b): Abandonment by Habitual Criminals

This subsection authorizes a court to determine that a child is abandoned by the birth parent when the parent is incarcerated for a sentence of eight (8) years or more and the parents criminal history meets specific delineated criteria. This is a positive provision which will serve to provide a child permanency when a parent is not available to raise the child. This provision is consistent with similar provisions in Chapter 39.

18. Proposed Section 63.089(5)and(6)(e): Authority to Order Paternity Testing

This subsection provides the Court with authority to order paternity testing. This is an important inclusion into the statute allowing all potential issues to be resolved by the same judge.

19. Proposed Section 63.097(4)(2) : Prohibition Against Payment of Previously Incurred Expenses.

This subsection prohibits the payment of any expenses incurred by the birth mother prior to the time that the adoptive parents contracted with the adoption entity. This provision would prohibit adoptive parents from receiving

reimbursement when a birth mother backs out of a situation and is matched with other adoptive parents through another adoption entity. This would necessarily increase the risk and expense to adoptive parents.

20. Proposed section 63.132(c): Confidential Record Publication by the Florida Department of Children & Families

This subsection requires that the Department of Children & Families retain extensive records on each adoption filed in the State of Florida and pay staff to redact confidential information. This would not only increase the costs to Florida's taxpayers, but creates great risk of unintentional release of confidential information to the public. Historically, the Department of Children & Families fails to comply with the duties imposed upon it under Florida Law. This law would allow birth mothers to comparison shop for the adoption entity which pays the highest living expenses.

21. Proposed Section 63.132(d)(5): Expenses

This section requires an affidavit seeking approval of expenses that could be covered by State sponsored programs. Again, this provision mandates that birth parents access state funds at the expense of Florida's budget and Florida taxpayers.

22. Proposed Section 63.207: Prohibition Against Out of State Placements

This section prohibits any adoption entity from placing a child with a family which resides outside of the State of Florida unless the child is a member of a minority group or is otherwise special needs. This prohibition wrongly treats children as a commodity of the State of Florida and discriminates against minority children by sending a message that they are not a desirable commodity of the State. This provision would limit a birth parent's right to choose an appropriate home for a child and violates the child's constitutional right to travel.

Only one state has a statute which contains similar prohibitions. The case law in that state (South Carolina) creates exceptions to the law which have rendered the law powerless.

APPENDIX F**RESULTS OF POLLING FLORIDA ADOPTION PROFESSIONALS
REGARDING PSYCHO/SOCIAL BACKGROUNDS
OF CHILDREN PLACED FOR ADOPTION**

Twenty-three Florida adoption lawyers and social workers responding to a survey in the summer of 1998 responded as shown to the following queries:

I. Please indicate whether the following are typical of the psycho/social backgrounds of children in whose adoptions you have been professionally involved:

| <u>Typical</u> | <u>Occasional</u> | <u>Atypical</u> | <u>No Response</u> | | |
|----------------|-------------------|-----------------|--------------------|------|---|
| <u>23</u> | <u>0</u> | <u>0</u> | <u>0</u> | (1) | child newborn to age 5 |
| <u>2</u> | <u>13</u> | <u>7</u> | <u>1</u> | (2) | child suffering/likely to suffer physical, developmental, learning or mental disabilities |
| <u>12</u> | <u>11</u> | <u>0</u> | <u>0</u> | (3) | parent lacking planning/follow-through skills |
| <u>8</u> | <u>14</u> | <u>1</u> | <u>0</u> | (4) | parent possessing decreased emotional/mental stability and control, including immaturity due to young age |
| <u>5</u> | <u>16</u> | <u>2</u> | <u>0</u> | (5) | parent engaging in or having history of alcohol/substance abuse/gambling |
| <u>3</u> | <u>10</u> | <u>10</u> | <u>0</u> | (6) | parent having history of mental illness and/or psychiatric admission |
| <u>1</u> | <u>15</u> | <u>7</u> | <u>0</u> | (7) | parent having history of incarceration |
| <u>4</u> | <u>11</u> | <u>8</u> | <u>0</u> | (8) | parent having history of perpetrating or being victim of abuse/neglect |
| <u>4</u> | <u>14</u> | <u>5</u> | <u>0</u> | (9) | parent having negative history as to any other of his/her children (estrangement, nonsupport, abandonment, removal) |
| <u>13</u> | <u>10</u> | <u>0</u> | <u>0</u> | (10) | history of instability in parent's family of origin |
| <u>14</u> | <u>7</u> | <u>2</u> | <u>0</u> | (11) | parent lacking the external support of family and friends |

| <u>Typical</u> | <u>Occasional</u> | <u>Atypical</u> | <u>No Response</u> | | |
|----------------|-------------------|-----------------|--------------------|------|---|
| <u>5</u> | <u>9</u> | <u>9</u> | <u>0</u> | (12) | lack of community resources in location where parent resides or would reside with child |
| <u>3</u> | <u>14</u> | <u>6</u> | <u>0</u> | (13) | parent being socially isolated |
| <u>1</u> | <u>16</u> | <u>6</u> | <u>0</u> | (14) | parent in unstable marriage to party other than child's other parent |
| <u>10</u> | <u>11</u> | <u>2</u> | <u>0</u> | (15) | parent possessing low level of primary education/skills training |
| <u>1</u> | <u>6</u> | <u>16</u> | <u>0</u> | (16) | parent illiterate |
| <u>13</u> | <u>7</u> | <u>3</u> | <u>0</u> | (17) | parent unemployed for more than three months |
| <u>6</u> | <u>14</u> | <u>2</u> | <u>1</u> | (18) | parent highly transient |
| <u>11</u> | <u>11</u> | <u>1</u> | <u>0</u> | (19) | parent housed inadequately |

II. Please list by number which of the above background characteristics, if any, you consider as risk factors for child abuse or neglect based on your professional experience:

(#1) 2 (#2) 8 (#3) 8 (#4) 16 (#5) 18 (#6) 12 (#7) 11 (#8) 18 (#9) 12 (#10) 10 (#11) 13 (#12) 8 (#13) 8 (#14) 11 (#15) 9 (#16) 7 (#17) 10 (#18) 6 (#19) 7 (No Response) 3

III. Please indicate whether you agree or disagree with the following statement: A birth mother who has voluntarily surrendered her child for adoption *should not* be able to reclaim the child herself if the birth father subsequently objects to the adoption and the placement is disrupted.

- 0 Agree: The mother has made her decision about parenting the child and it should be final; the father should get sole custody
- 8 Uncertain: The mother should not get automatic custody, but she should have a right to request custody.
- 14 Disagree: Matters should go back to the way they stood before the mother surrendered; the mother should have custody unless and until the father proves her to be unfit
- 1 No Opinion

APPENDIX G

FORM FOR WORKSHEET FOR BIRTH MOTHER'S AFFIDAVIT

BIRTH MOTHER'S AFFIDAVIT WORKSHEET RE: BIRTH FATHER

DIRECTIONS: TO BE COMPLETED BY BIRTH MOTHER, WITH STAFF ASSISTANCE/REVIEW

I. Does the birth father know you are pregnant and that you believe he is the father of your child? Yes _____ No _____

II. If known, please provide the birth father's:

- A. Full legal name _____
- B. Current address _____
- C. Current telephone _____
- D. Social security number _____
- E. Date of birth _____
- F. Current work telephone _____

III. If the birth father's current location is not known, please provide his:

- A. Last known address _____
- B. Last known telephone _____
- C. Birth father's friends or relatives who may know how to reach him (with their addresses and telephone numbers)

IV. Additional identifying/locating information you may know regarding the birth father:

V. Date you last saw the birth father _____
 Date you last talked on the phone with the birth father _____
 Date you last received any written communication from the birth father _____
 Address at which birth father last knew you to be residing _____

VI. If more than one man may be the birth father, please provide information requested in II. and III. for such other man or men on the back of this sheet.

If none others, please write "none" here: _____

VII. Are you now married or were you married at any time during the past twelve (12) months? Yes _____ No _____

If yes, please provide:

- A. Husband's name
B. Husband's address
C. Husband's telephone
D. Husband's date of birth
E. Husband's social security no.
F. Date of marriage
G. Date of divorce (if applicable)
H. Date of death (if applicable)

VIII. Were you living with any man other than those named in II., VI., and VII., above, within the past twelve (12) months? Yes _____ No _____

If yes, please provide the information requested in II. through V., above, on the back of this page.

IX. Has any man, other than those you have listed in II., VI., VII., and VIII., above, claimed to be the father, given you support, promised you support, or been named as the father of your child in connection with receiving welfare payments? Yes _____ No _____

If yes, please provide the information requested in II. through V., above, on the back of this page.

X. Do you have other children? Yes _____ No _____

If yes, please provide:

- Child's Name _____ Date of Birth _____
Father's Name _____
Child's Name _____ Date of Birth _____
Father's Name _____

XI. Please provide the following information:

- A. City, county, state where child was conceived
B. Cities, counties, states in which you resided/have been residing while pregnant
C. Your permanent address
D. Your next of kin/emergency contact

KNOWING THE IMPORTANCE of providing as much accurate and complete information as I have regarding the identity and location of the birth father of my child, I hereby certify that I have completed the foregoing form to the best of my knowledge.

X _____
Birth Mother

X _____
Agency Representative

Date

APPENDIX H

**FORM FOR NOTICE OF ACTION AND HEARING
FOR PROPOSED TPRPA PROCEEDING**

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

In the Interest of: JUVENILE DIVISION

_____ CASE NO.: _____

a Child.

NOTICE OF ACTION AND HEARING

TO: [names and addresses of all putative fathers and/or unknown claimants, as well as any
any other persons as set forth in Florida Statutes section 39. 462(1) (Supp. 1998)].

YOU ARE HEREBY NOTIFIED that a hearing on a Petition for Termination of Parental
Rights Pending Adoption as to the Child herein, born _____, to _____, will be
held before this Court

AT _____ COUNTY COURTHOUSE, ROOM _____,
_____ [address]

THE HONORABLE _____, PRESIDING, TELEPHONE () _____
ON _____, AT ____ O' CLOCK ____ m.

YOU MUST EITHER APPEAR on the date and at the time specified or send a written response
to the Court before that time, with a copy to attorney for Petitioner, [name and address]. **FAILURE TO
PERSONALLY RESPOND TO THIS NOTICE OR TO APPEAR AT THIS HEARING
CONSTITUTES CONSENT TO TERMINATION OR PARENTAL RIGHTS AS TO THIS
CHILD (OR THESE CHILDREN).**

YOU HAVE THE RIGHT TO BE REPRESENTED BY AN ATTORNEY. IF YOU WANT
AN ATTORNEY AND CANNOT AFFORD ONE, THE COURT WILL APPOINT ONE AT NO
CHARGE TO YOU IF YOU SO REQUEST.

YOU HAVE THE DUTY TO INFORM THE COURT AND ATTORNEY FOR
PETITIONER, BY CERTIFIED MAIL AT THE ADDRESSES SHOWN ABOVE, OF ANY
CHANGE IN YOUR ADDRESS.

WITNESS MY HAND AND THE SEAL OF THIS COURT ____ day of _____, 19 ____.

_____, CLERK

COURT SEAL

By: X _____
Deputy Clerk

APPENDIX I

**CLERK'S AFFIDAVIT OF COMPLIANCE WITH MAILING REQUIREMENTS
FOR CONSTRUCTIVE SERVICE OF PROCESS**

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

In the Interest of: JUVENILE DIVISION

_____, CASE NO.: _____

a Child.

**CLERK'S AFFIDAVIT OF MAILING NOTICE OF ACTION
TO _____**

STATE OF FLORIDA

COUNTY OF _____

BEFORE ME, the undersigned authority, appeared _____, personally known to me or who produced as identification _____, and being first duly sworn, deposes and says:

1. that s/he is a Deputy Clerk of the Office of the Clerk of the Circuit Court in and for _____ County, Florida, Juvenile Division, as such makes this Affidavit from her/his own personal knowledge, and is over the age of eighteen.
2. that s/he did execute a Notice of Action and Hearing ("the Notice") to one _____ on _____, a copy of which is attached hereto as Exhibit "A".
3. that s/he did mail a copy of the Notice by United States mail, with postage prepaid, to said _____, at _____, within 10 days after making the Notice, to wit, on _____, together with a copy of the Petition for Termination of Parental Rights Pending Adoption herein, and noted upon the docket the date of mailing.
4. that, as of the date of this Affidavit, the Notice so mailed to _____ has not been returned by the United States Postal Service as undeliverable.

FURTHER AFFIANT SAYETH NAUGHT.

AFFIANT'S SIGNATURE: X _____

PRINT NAME: _____, Deputy Clerk

DATE: _____

WITNESS MY HAND AND SEAL this _____ day of _____, 19____.

NOTARIAL SEAL

Notary Public

APPENDIX J

BIRTH PARENT'S READINESS ACKNOWLEDGEMENT

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

In the Interest of:

JUVENILE DIVISION

CASE NO.: _____

a Child.

BIRTH PARENT'S READINESS ACKNOWLEDGEMENT

Please read and, if you agree, initial each of the following statements before signing the papers (called "Surrender and Consent for Adoption with Waiver of Notice, Service of Process, and Right to Counsel") allowing your child to be adopted.

1. You have read and understand what you are about to sign and have no questions about the papers or procedures involved. _____
2. You are aware that you have the right to have your own independent lawyer explain these papers to you at no charge to you. _____
3. You understand that when you sign these papers you are permanently ending all your rights as birth parent of this child, and you will not be given notice of any of the court proceedings for the adoption of your child. _____
4. You understand that unless he or she chooses to locate you after age 18, you may never see your child again. _____
5. You are aware that there are choices other than adoption for you and your child, including putting the child into foster care for a while or keeping the child yourself. _____
6. You are aware that you could choose to take more time to decide what to do. _____
7. You are signing these papers of your own free will. _____
8. You feel well enough emotionally and physically to sign these papers. _____
9. You are not under the influence of any prescribed medication or other drugs that would affect your ability to understand what you are doing. _____
10. You are not under the influence of alcohol. _____

BIRTH PARENT'S READINESS ACKNOWLEDGEMENT

Please read and, if you agree, initial each of the following statements before signing the papers (called "Surrender and Consent for Adoption with Waiver of Notice, Service of Process, and Right to Counsel") allowing your child to be adopted.

11. You acknowledge receiving copies of all the papers you are signing. _____

I HAVE READ AND UNDERSTAND THE PREVIOUS 11 STATEMENTS.

BIRTH PARENT'S SIGNATURE: X _____

PRINT NAME: _____

DATE: _____

STATE OF FLORIDA

COUNTY OF _____

BEFORE ME, an officer authorized to take acknowledgments, appeared _____, personally known to me or who produced as identification _____, and acknowledged that s/he did execute the foregoing Birth Parent's Readiness Acknowledgement freely, voluntarily and for the purposes stated therein.

WITNESS MY HAND AND SEAL in the state and county last aforesaid this _____ day of _____, 19 _____.

NOTARIAL SEAL

Notary Public

Recent Developments in Florida Medical Malpractice: A Roadmap for Successful Pre-Trial Practice

Jason L. Gunter*

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I. INTRODUCTION

Scholars and practitioners agree that the path to a successful medical malpractice recovery is a thorny and treacherous one. One commentator characterizes the presuit requirements of Florida's Medical Malpractice Reform Act¹ ("the Act") in Shakespearean parlance, as a "labyrinth" where "[m]inotaurs and ugly treasons lurk."² Another warns of the "pitfalls" involved in bringing a claim for medical malpractice.³ Still another scathingly opines that the Act robs innocent victims of redress, while the perpetrators (i.e., the medical profession) are "getting away with 'murder.'"⁴ However, from this writer's viewpoint, if a homicide has occurred, it has been in the metaphorical sense and probably amounts only to involuntary manslaughter, with the Florida Legislature and courts being the perpetrators and the state of the law of medical malpractice personifying the victim.

Since its inception in 1975, there have been numerous revisions and amendments to the Act and a steady and copious stream of judicial decisions interpreting it. Yet, the legislature and the judiciary have failed to articulate a clear line of demarcation between tort claims that fall within the Act's coverage and those falling outside, or to differentiate adequately, between claims subject to the medical malpractice statute of limitations and those which are not. The result is that presently, plaintiffs' attorneys must proceed at their peril (and obviously that of their clients) in a quagmire of ill-defined terms and internal inconsistencies. Unfortunately, clairvoyant powers may be needed to predict how a court will rule on presuit and/or statute of limitations issues in a given case.

The focus of this article will be upon two questions: first, under what circumstances do the presuit requirements⁵ apply to a tort claim? Secondly, when does the medical malpractice statute of limitations⁶ apply? It will

1. See generally FLA. STAT. §§ 766.101–.316 (1997).

2. John A. Grant, *Florida's Presuit Requirements for Medical Malpractice Actions*, 68 FLA. B.J. 12, 12 (Feb. 1994). The complete quotation, which Mr. Grant sets forth under the title to his article, is as follows: "Thou mayst not wander in the labyrinth; There Minotaurs and ugly treasons lurk." *Id.* (quoting WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE SIXTH act 5, sc. 3).

3. Jeffery L. Blostein, *Judicial Interpretations of Presuit in Florida: How to Avoid the Pitfalls of Bringing or Defending a Claim for Medical Malpractice*, 71 FLA. B.J. 45, 45 (1997).

4. Jessica Fonseca-Nader, *Florida's Comprehensive Medical Malpractice Reform Act: Is it Time for a Change*, 8 ST. THOMAS L. REV. 551, 569 (1995).

5. FLA. STAT. §§ 766.106; .203–.206 (1997). See discussion *infra* Part II.A for an overview of the Act's presuit requirements.

6. FLA. STAT. § 95.11(4)(b) (1997). The statute reads as follows:

An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from

become apparent to the reader that these two questions are intimately related and to an important extent, inextricably intertwined. Yet, inexplicably, the Florida courts have used conflicting criteria in the resolution of each of these two issues. Moreover, critical terms of art have been defined differently by the Florida Legislature and by the courts, depending on whether it is a coverage issue or a statute of limitations issue being addressed.

Following the introduction, Part II of this article will discuss the definition of a claim for medical malpractice under the Act and how the courts have construed and applied this definition, specifically in the context of whether a claim arising out of an injury sustained in a medical setting is subject to the presuit provisions of the Act. Part III will discuss how the courts have resolved whether a claim is subject to the two-year medical malpractice statute of limitations⁷ or the four-year statute of limitations governing claims for ordinary negligence.⁸ Also, both Parts II and III, will analyze why the current statutory and case law is anomalous, inconsistent, and likely to be confusing to the practitioner. Part IV will conclude with a discussion of how the vagaries and inconsistencies relating to coverage and statute of limitations issues can be eliminated and how, until such reform takes place, prudent attorneys may want to proceed.

II. DETERMINING WHEN THE PRESUIT REQUIREMENTS OF THE ACT APPLY

The focus of this part will be upon how the Florida courts have gone about determining whether a given claim is subject to, *inter alia*, the presuit notice, investigation, and screening requirements of the Act ("Presuit Requirements").

A. *An Overview of the Act's Presuit Requirements*

The Act defines a "claim for medical malpractice" as "a claim arising out of the rendering of, or the failure to render, medical care or services."⁹ Prior to filing a claim for medical malpractice, the claimant must satisfy

the time the incident is discovered, or should have been discovered with the exercise of due diligence. . . . An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care.

Id.

7. *Id.*

8. *Id.* § 95.11(3)(a).

9. *Id.* § 766.106(1)(a).

certain presuit requirements. First, the claimant must conduct and complete a "presuit investigation" of the claim pursuant to section 766.203 of the *Florida Statutes*.¹⁰ Upon application to the court by the claimant, an automatic ninety-day extension of statute of limitations will be granted to facilitate this presuit investigation.¹¹ The purpose of the presuit investigation is to ascertain that there are reasonable grounds to believe that any party ultimately named as a defendant in the lawsuit was negligent in the care and treatment of the claimant, and that such negligence resulted in injury to the claimant.¹² Under section 766.203(2), corroboration of reasonable grounds to initiate litigation for medical malpractice "shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert as defined in section 766.202(5) . . . which statement shall corroborate reasonable grounds to support the claim of medical negligence."¹³ After completion of the presuit investigation pursuant to section 766.203 and before filing a claim for medical malpractice, the claimant must notify each prospective defendant of an intent to initiate litigation for medical malpractice.¹⁴ The notice must contain the "date and a summary of the occurrence giving rise to the claim and a description of the injury to the claimant."¹⁵ No suit may then be filed for a period of ninety days after the notice is mailed to any prospective defendant and during this ninety-day period the prospective defendant's insurer must conduct a review to determine liability of the defendant.¹⁶ During the ninety-day period, which the Act denominates as the "presuit screening period,"¹⁷ the parties conduct an informal, but mandatory discovery process¹⁸ during which each prospective defendant's insurer or self-insurer must undertake an investigation and review of the claim in good faith, and both the claimant and prospective defendant must cooperate with the insurer in good faith.¹⁹ Failure of a party to comply with the presuit notice requirement of section 766.103, the reasonable investigation requirements of sections 766.201–212, or the informal discovery requirements of section 766.106(6)–(9), constitutes grounds for dismissal by the court of the claims or defenses.²⁰

10. FLA. STAT. § 766.106(2) (1997).

11. *Id.* § 766.104(2).

12. *Id.* § 766.203(2)(a), (b).

13. *Id.* § 766.203(2).

14. *Id.* § 766.106(2) (1997).

15. FLA. STAT. § 766.106(2) (1997).

16. *Id.* § 766.106(3)(a).

17. *Id.* § 766.106.

18. *Id.* § 766.106(6)–(9).

19. *Id.* § 766.106(3)(a).

20. FLA. STAT. §§ 766.106(3)(a), (6); .206(2). *See also* Community Blood Ctrs., Inc. v. Damiano, 697 So. 2d 948, 952 (Fla. 4th Dist. Ct. App. 1997).

Under the Act, the notice of intent to initiate litigation must be served within the time limits set forth in section 95.11(4)(b) of the *Florida Statutes*.²¹ The notice of intent to initiate litigation must be accompanied by the corroborating opinion.²² “[T]he notice of intent to initiate litigation and the corroborating medical expert opinion, taken together, must sufficiently indicate the manner in which the defendant doctor allegedly deviated from the standard of care, and must provide adequate information for the defendants to evaluate the merits of the claim.”²³ During the ninety-day period following receipt of the notice by the prospective defendants, “the statute of limitations is tolled as to all potential defendants.”²⁴ The parties are free to stipulate to an extension of the ninety-day presuit screening period and the statute of limitations will be further tolled during any such extension.²⁵ Upon receiving notice of termination of negotiations in an extended period or even where there has been no extension, but there has been a rejection of the claim, “the claimant shall have 60 [sixty] days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.”²⁶

The foregoing is by no means an exhaustive discussion of presuit requirements; an in-depth analysis of this issue would be beyond the scope of this article.²⁷ However, the above capsulation has been set forth for context, so that the reader may be mindful of the importance of determining early on whether the claimant and the prospective defendants must comply with presuit requirements. Since noncompliance with these requirements can result in sanctions as drastic as dismissal,²⁸ obviously the prudent attorney will want to be correct in assessing whether the contemplated action is subject to presuit requirements and/or to the two-year limitations period prescribed by section 95.11(4)(b).

21. FLA. STAT. § 95.11(4)(b) (1997). *See supra* text accompanying note 6.

22. *See* FLA. STAT. § 766.203(2).

23. *Duffy v. Brooker*, 614 So. 2d 539, 545 (Fla. 1st Dist. Ct. App. 1993).

24. *See* FLA. STAT. § 766.106(4).

25. *Id.*

26. *Id. See also Tanner v. Hartog*, 618 So. 2d 177, 182 (Fla. 1993).

27. There are several recent well researched articles discussing presuit issues comprehensively. *See* Jeffery L. Blostein, *Judicial Interpretations of Presuit in Florida: How to Avoid the Pitfalls of Bringing or Defending a Claim for Medical Malpractice*, 71 FLA. B.J. 45 (1997); John A. Grant, *Florida's Presuit Requirements for Medical Malpractice Actions*, 68 FLA. B.J. 12 (1994).

28. *See* FLA. STAT. §§ 766.106(3)(a), .106(6), .106(4).

B. *Survey and Legal Analysis of Statutory and Case Law*

As noted above, among the most crucial requirements of the Act are the requirements of presuit notice, investigation, and screening. Section 766.106(2) of the Act provides in pertinent part: “[a]fter completion of presuit investigation . . . and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant . . . of intent to initiate litigation.”²⁹ The above quoted section of 766.106(2) gives rise to two crucial questions. First, what constitutes “a claim for medical malpractice?” Second, what is the meaning of the term “prospective defendant?” For if a claim is “a claim for medical malpractice” and it is against one to whom the legislature was referring when it used the term “prospective defendant,” then the plaintiff must conduct a presuit investigation, procure a corroborating opinion, and give notice to the defendant(s) of intent to initiate litigation for malpractice.³⁰

C. *What Constitutes a “Claim for Medical Malpractice” for Purposes of Presuit?*

This first question is only partially answered by the language of section 766.106(1)(a). Section 766.106(1)(a) defines a “claim for medical malpractice” as “a claim arising out of the rendering of, or the failure to render, medical care or services.”³¹ Still, there is the further question of what constitutes the “rendering of, or the failure to render, medical care or services” for purposes of section 766.106?

In *NME Properties, Inc. v. McCullough*,³² the Second District Court of Appeal attempted to answer this question.³³ The court held that because the complaint did not allege that employees or agents of the defendant nursing home rendered medical care or service³⁴ to the plaintiff, the claim was not a claim for medical malpractice.³⁵ At the outset, the court noted that presuit requirements apply only to “claim[s] for medical malpractice” as defined by section 766.106(1)(a) of the *Florida Statutes*.³⁶ The court went on to assert that the “simplest test” for determining whether a particular claim is one for

29. *Id.* § 766.106(2) (emphasis added).

30. *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993) (citing FLA. STAT. § 766.106(2) (1997)).

31. FLA. STAT. § 766.106(1)(a).

32. 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991).

33. *Id.* at 441.

34. *See* FLA. STAT. § 766.106(1)(a).

35. *McCullough*, 590 So. 2d at 441.

36. *Id.*

medical malpractice subject to presuit requirements is “whether the professional medical negligence standard of care described in section 766.102, Florida Statutes (1989), applies to the active tortfeasor.”³⁷

However, upon thoughtful analysis, this “test” is not a “simple” test at all, but is complicated and circular. Section 766.102(1) provides in pertinent part that “[t]he prevailing professional standard of care . . . shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.”³⁸ Although it articulates the standard of care that is applicable when a claim arises out of the rendering of, or failure to render, medical care or services, section 766.102(1) does not resolve the threshold question of what constitutes “the rendering of, or failure to render medical, care or services.”³⁹ Thus, it does not really answer the question of what constitutes a claim for medical malpractice subject to presuit requirements. Logic would dictate that only after one has first determined that a particular claim is one for medical malpractice, (i.e., one arising out of the rendering of, or failure to render, medical care or services) should section 766.102(1) then come into play to guide the resolution of whether the particular medical care or services rendered fell below the applicable standard of care and thus, constituted a breach of duty. In this commentator’s view, the *McCullough* court put the proverbial cart before the horse. The court suggested that one can discern whether a claim is one for medical malpractice subject to presuit requirements by determining in the first instance whether the professional standard of care set forth in section 766.102(1) “applies to the active tortfeasor.”⁴⁰ However, the reverse actually makes more sense; that is, there must first be a threshold determination as to whether the claim is “a claim for medical malpractice,” to wit, a claim arising out of the rendering of, or the failure to render, medical care or services. This determination having been made, only then should section 766.102(1) be applied to determine whether the medical care or services rendered comported with or fell below the applicable standard of medical care recited in that section.⁴¹ A much simpler and more workable test would be to

37. *Id.*

38. FLA. STAT. § 766.102(1) (1997).

39. *See id.*

40. *McCullough*, 590 So. 2d at 441.

41. *See also* *Broadway v. Bay Hosp., Inc.*, 638 So. 2d 176 (Fla. 1st Dist. Ct. App. 1994). In *Broadway*, the first district noted that “[t]he test for determining whether a defendant is entitled to the benefit of the presuit screening requirements of section 766.106, Florida Statutes, is whether the defendant is directly or vicariously liable under the medical negligence standard of care set forth in section 766.102(1), Florida Statutes.” *Id.* at 177. Again, framing the test in such terms is circular and begs the question. We must first know whether the claim is one which arises out of “the rendering, of or failure to render, medical care or services” and thus, whether it is “a claim for

examine whether the alleged incidents giving rise to the claim involved the professional skill or judgment of the defendant. The *McCullough* court hinted strongly that if the plaintiff had alleged facts indicating negligence in the exercise of medical skill or judgment, then the action would have been deemed a claim for malpractice.⁴² Implicitly, the court equated claims arising out of the exercise of professional skill and judgment with claims arising out of the rendering of, or failure to render, medical services or care, when it noted that the plaintiff failed to allege that the incident involved the defendant's professional skill or judgment.⁴³

In any event, we are still left with the question of how to determine whether a claim is one for medical malpractice for purposes of presuit. To phrase it another way, how can an attorney figure out, with any degree of certainty, when his client's claim "arise[s] out of the rendering of, or failure to render, medical care or services?"⁴⁴ An exploration of some recent case law may help to provide the answer.

In *J.B. v. Sacred Heart Hospital*,⁴⁵ the Supreme Court of Florida addressed the question of when an action constitutes a claim for medical malpractice for purposes of whether presuit notice is required under section 766.106(2).⁴⁶ As the court in *McCullough* had done, the supreme court examined the definition of "a claim for medical malpractice" set forth under section 766.106(1)(a) of the *Florida Statutes*.⁴⁷ However, the *J.B.* court concluded that because the plaintiff's claim did not arise out of the rendering of, or failure to render, medical care or services, presuit notice and screening requirements did not apply.⁴⁸ The gravamen of the plaintiff's claim was that the defendant hospital had asked the plaintiff to transport his brother, a patient at the hospital, to another hospital without telling the plaintiff that his brother had AIDS and without warning him that he could become HIV positive if he came into contact with his brother's wounds.⁴⁹ The court observed that:

According to the allegations in J.B.'s complaint, the Hospital was negligent in using J.B. as a transporter. The complaint does not

medical malpractice." FLA. STAT. § 766.106(1)(A) (1997). Only then can we determine whether a defendant was negligent in the rendering of those medical services by applying the section 766.102(1) professional standard of care to the conduct of the defendant.

42. *McCullough*, 590 So. 2d at 441.

43. *Id.*

44. See FLA. STAT. § 766.106(1)(a).

45. 635 So. 2d 945 (Fla. 1994).

46. *Id.* at 947.

47. *Id.* at 948-49; see also *McCullough*, 590 So. 2d at 441.

48. *J.B.*, 635 So. 2d at 949.

49. *Id.* at 946-47.

allege that the Hospital was negligent in any way in the rendering of, or the failure to render, medical care or services to J.B. Accordingly, the complaint does not state a medical malpractice claim for chapter 766 purposes, and the notice and presuit screening requirements are inapplicable.⁵⁰

The court's reasoning in *J.B.* does help to elucidate the meaning of the term "rendering of, or failure to render, medical care or services" and serves to illustrate that not every claim which arises in a medical setting is one for medical malpractice. J.B. was not a patient, and he apparently had no injuries, disease, or other condition; he did not in any way either seek or receive professional care or services from the hospital.⁵¹ Arguably, the failure of the hospital to warn J.B. that there was a risk of AIDS transmission if he came into contact with his brother's wounds was a very serious lapse in *medical* judgment. However, what appears to have been key to the court's decision was the fact that the hospital's negligence did not occur in the course of rendering medical services to the plaintiff, that is, to J.B.⁵² Conversely, if J.B. had been a patient of the hospital and he contracted AIDS through, say, an improperly sterilized instrument or needle, then his claim would undoubtedly have been one for malpractice. In such a case, the claim would clearly have arisen out of the rendering of medical services to J.B.

Another case dealing with the distinction between claims subject to presuit requirements and those which are not, is the recent decision of *Feifer v. Galen of Florida, Inc.*⁵³ In *Feifer*, the plaintiff, an elderly man, presented himself at the defendant hospital after being directed to do so by his physician.⁵⁴ The plaintiff's hands were obviously shaking, he walked with slow shuffling steps with his hand on his hip, and he openly complained to the hospital about his weakness.⁵⁵ In his complaint, the plaintiff alleged that hospital's admission employees told him that he would have to walk under his own power to the various areas of the building, down long corridors with hard floors, no handrails, no benches or chairs for sitting or resting, and with neither a wheelchair nor escort having been provided.⁵⁶ The plaintiff further alleged that the conditions of the corridor, as described above, constituted an "unsafe passageway" and a "dangerously negligent condition" of which the hospital knew or should have known.⁵⁷ Allegedly, the plaintiff then suddenly

50. *Id.* at 949 (emphasis added).

51. *Id.* at 948.

52. *Id.* at 949.

53. 685 So. 2d 882 (Fla. 2d Dist. Ct. App. 1996).

54. *Id.* at 883.

55. *Id.*

56. *Id.*

57. *Id.* at 883-84.

fell to the floor after walking to various areas of the hospital, resulting in a broken hip and other permanent and painful bodily injuries which required emergency surgery.⁵⁸ The hospital moved for a dismissal of Feifer's complaint for negligence on the ground that he had failed to comply with the presuit notice and screening requirements of chapter 766.⁵⁹ The trial court granted the motion, but the Second District Court of Appeal reversed, holding that the plaintiff had effectively alleged a cause of action for premises liability based on the breach of the hospital's duty to exercise reasonable care in the maintenance of its premises.⁶⁰ The court pointed out that this was not a case of the hospital's negligence in the rendering of "medical care" as contemplated by the Act.⁶¹ Therefore, the court reasoned it was not a claim for medical malpractice.⁶² Rather, it was negligence in the broader sense, a breach of the duty to exercise reasonable care in the maintenance of property, a duty which is incumbent upon any prudent person who owns or occupies premises.⁶³

The *Feifer* court appears to have made somewhat of a subtle distinction in arriving at its holding. Mr. Feifer's injury occurred while he was at the hospital seeking medical care and services; he was clearly in a medical setting when he fell in the hospital corridor and when the injury from the fall occurred.⁶⁴ However, the injury allegedly occurred from the way in which the hospital maintained the property—or more precisely—failed to maintain it.⁶⁵ The court characterized the negligence as being outside the sphere of the rendering of, or failure to render, medical care or services.⁶⁶

However, upon closer analysis, the reasoning of *Feifer* is somewhat questionable. Arguably, because of its specialized knowledge and

58. *Feifer*, 685 So. 2d. at 884.

59. *Id.* at 883.

60. *Id.*

61. *Id.* at 885.

62. *Id.*

63. *Feifer*, 685 So. 2d at 884. *See also* *Hicks v. Baptist Hosp., Inc.*, 676 So. 2d 1019, 1019 (Fla. 1st Dist. Ct. App. 1996) (holding that action against hospital to recover for injuries sustained by claimant when another patient, who was allegedly inebriated but allowed to keep a cigarette lighter, set fire to his bed, was a claim for premises liability and not subject to presuit requirements); *Palm Springs Gen. Hosp., Inc. v. Perez*, 661 So. 2d 1222, 1223 (Fla. 3d Dist. Ct. App. 1995) (holding that action wherein patient sued hospital for negligently placing her in room with second patient who committed homosexual attack on patient was an action for ordinary negligence/premises liability rather than medical malpractice and therefore was not subject to presuit screening requirements); *Broadway v. Bay Hosp., Inc.*, 638 So. 2d 176, 177 (Fla. 1st Dist. Ct. App. 1994) (holding that a suit based upon the collapse of claimant's hospital bed was not a claim for medical malpractice and hence not subject to presuit requirements).

64. *Feifer*, 685 So. 2d at 883–84.

65. *Id.* at 884.

66. *Id.* at 885.

experience, a hospital, unlike other property owners, is uniquely situated to foresee the dangers which could befall elderly people like Mr. Feifer. Its staff has the expertise to recognize that a patient's age or condition might render a particular patient susceptible to dangers which might not necessarily be foreseen by a layman property owner. The moment Mr. Feifer walked through the door, he entrusted himself to the hospital's care. The hospital staff directed Mr. Feifer to walk down the long corridors and provided no escort, wheelchair, handrails, or benches for resting despite his obvious frailty. In light of what it knew or should have known of the vulnerabilities of an elderly person like Mr. Feifer, who exhibited cognizable symptoms of physical illness and who complained of weakness, Galen Hospital arguably committed *medical negligence*. Arguably, at the heart of the hospital's omissions was a lapse of professional skill and judgment.⁶⁷ However, if the *Feifer* court was at all torn between ordinary negligence and medical malpractice, it should not be surprising that the court resolved the issue in favor of Mr. Feifer in finding ordinary negligence.⁶⁸ The *Feifer* court quoted the statement of policy articulated by the Supreme Court of Florida in *J.B. v. Sacred Heart Hospital* that "[i]f there is doubt as to the applicability of such a statute, the question is generally resolved in favor of the claimant."⁶⁹ Although the supreme court in *J.B.* was referring specifically to section 95.11(4)(b), the two-year medical malpractice statute of limitations, and the *Feifer* court was referring to the Act's presuit requirements, the unifying theme is that in the arena of medical malpractice, the courts have consistently

67. The distinction between medical care and ordinary or reasonable care can be somewhat amorphous and elusive. The gist of Mr. Feifer's position that his claim was for ordinary as opposed to medical negligence is captured in the following excerpt from his memorandum in opposition to the hospital's motion to dismiss in the trial court:

[D]efendant's . . . argue that, because the word "care" was used in the text of the Complaint, and because the defendant corporate entity is generally considered a health care provider, that plaintiffs' [sic] cannot pursue their claim herein under an ordinary negligence cause of action but, rather, must pursue it as a medical malpractice action with all the attendant statutory conditions precedent to the filing of such a cause of action; defendant's argument is a misconstruance of the word "care" into the context of "medical care," a construction more favorable to the defendant, when the plain meaning of the word "care" in the context used was such reasonable care as any ordinary prudent person may be required by law to take to avoid injury to others, in the classic definition of the tort of negligence.

Id. at 884 (quoting Response Brief for Appellant).

68. *Id.* at 885.

69. *Id.* (quoting *J.B. v. Sacred Heart Hosp.*, 635 So. 2d 945, 947 (Fla. 1994)).

construed statutes restricting access to the courts in a manner which favors access.⁷⁰

In light of *Feifer*, it would seem that claims arising out of a hospital's negligence when a patient is awaiting or enroute to or from receiving medical services must be distinguished from injuries which occur from the administering of the care or services themselves. Only claims based on the latter are subject to presuit requirements under the reasoning of *Feifer*.⁷¹ However, *Feifer* is not definitive because one can imagine situations where the line between the rendering of medical care or services and negligent maintenance of property could be quite blurry. It would be much harder to criticize the *Feifer* court's reasoning if, for example, Mr. Feifer had slipped on a patch of soapy water. Such a scenario would be more of a garden variety type of negligence, a failure of reasonable care in the maintenance of property; the consequence of which could befall anyone, of any age, in any type of building which has a hallway or corridor.⁷² However, because of the hospital's specialized knowledge of the frailties of the sick, elderly, and infirm, what actually happened in *Feifer* could have justifiably been considered a lapse of professional judgment which occurred in the course of rendering medical service to a patient.

To illustrate this point, assume that a patient goes to a chiropractor for treatment of a bad back. An interesting quandary would be presented if, for example, while the chiropractor was treating the patient, the treatment table collapsed. From the standpoint of time, the resultant injury occurred "during" the rendering of medical services, but the question is, did it arise out of the rendering of services from a conceptual standpoint? On one hand, one could argue that the injury did not arise out of the rendering of medical

70. See *Kukral v. Mekras*, 679 So. 2d 278 (Fla. 1996); *Patry v. Capps*, 633 So. 2d 9 (Fla. 1994); *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993); *Community Blood Ctrs., Inc. v. Damiano*, 697 So. 2d 948 (Fla. 4th Dist. Ct. App. 1997); *Melanson v. Agravat*, 675 So. 2d 1032 (Fla. 1st Dist. Ct. App. 1996). See also FLA. CONST. art. I, § 21 which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *Id.*

71. See *Feifer*, 685 So. 2d at 885.

72. But see *Neilinger v. Baptist Hosp., Inc.*, 460 So. 2d 564 (Fla. 3d Dist. Ct. App. 1984). In *Neilinger*, the plaintiff, a maternity patient, alleged that she slipped and fell on a pool of amniotic fluid while descending from an examination table under the direction and care of hospital employees. *Id.* at 566. The *Neilinger* court held that the complaint, on its face, alleged breach of a professional duty and that the action was therefore one for medical malpractice as opposed to ordinary negligence. *Id.* One might argue that *Neilinger* is distinguishable from *Feifer* in that in *Neilinger* the plaintiff slipped and fell while descending from the table at the direction and supervision of hospital employees. *Id.* However, if the negligent assistance of hospital employees in *Neilinger* was classified as medical negligence, it would seem that the allegation of a total lack of assistance by hospital employees alleged by a frail and elderly Mr. Feifer could support a finding of medical negligence in that case.

services because it was a defect in the physical object upon which the patient was being treated, rather than a defect in the treatment or care itself. On the other hand, it can be argued that the table is a tool, in effect an “instrument” of the chiropractor, and therefore in utilizing a substandard “instrument” and/or in failing to maintain it in a safe condition, the chiropractor was negligent in the rendering of medical services. In view of the policy favoring access to the courts,⁷³ most courts would probably find the patient’s claim to be for premises liability as opposed to medical malpractice, if such a finding would result in dismissal of the claim.

To further illustrate the possibilities, let us consider an example of two patients, both of whom are in the hospital. Patient A is injured as a result of a nurse’s failure to raise and secure the bed rails, while patient B is injured due to the patient’s bed collapsing. There is a respectable argument that patient A’s claim against the nurse and/or the hospital⁷⁴ is a claim for medical malpractice. We can safely assume that it is part of a nurse’s professional duties to see that the bed rails are raised for the protection of the patient—if not the nurse, who else? In the author’s view, a claim based on the nurse’s neglect to raise and secure the bed rails and the resultant injury to the patient arises out of the rendering of or failure to render medical care or services. It is a claim calling into account the exercise of her professional skill and judgment.⁷⁵ Undoubtedly, nurses are trained in many facets of bedside care of patients. A nurse must know how to put in and take out intravenous needles, wash and assist patients in excretory functions, help them in and out of bed, and even know how to make a bed with a patient still in it. Their training most likely includes the raising and securing of bed rails. We can rest assured that the risk management division of the hospital will insist upon such prophylactic measures. Indeed, the Florida courts have recognized that one of the primary professional duties of a nurse is the supervision of patients.⁷⁶ The raising of bed rails is arguably a component of

73. See, e.g., *Weinstock*, 629 So. 2d at 838.

74. Even though a hospital may not itself be directly liable, a hospital can be held vicariously liable for the negligent acts of its agents or employees. See *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368–69 (Fla. 1981); *Reed v. Good Samaritan Hosp. Ass’n, Inc.*, 453 So. 2d 229, 230 (Fla. 4th Dist. Ct. App. 1984). It should be noted that a hospital may also be found vicariously liable on an apparent agency theory. See *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983). In *Orlando Executive Park*, the Supreme Court of Florida approved the requisites necessary to establish apparent agency: “(1) a representation by the principal; (2) reliance on that representation by a third person; and (3) a change of position by the third person in reliance upon such representation to his detriment.” *Id.* at 494 (quoting *Orlando Executive Park, Inc. v. P.D.R.*, 402 So. 2d 442, 449 (Fla. 5th Dist. Ct. App. 1981)).

75. *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 440 (Fla. 2d Dist. Ct. App. 1991).

76. See *Evenson v. Miami Med. Ctr., Inc.*, 128 So. 2d 626 (Fla. 3d Dist. Ct. App. 1961).

a nurse's supervisory duties, which duties are, in turn, a constituent of the care rendered by a nurse. Thus, the practitioner should be cautioned that presuit requirements could apply in such a situation.⁷⁷

However, patient B's claim, if any, falls into more of a gray area. On one hand, the hospital could be said to have been negligent in the rendering of "medical" care or services because the provision of a bed to patients would seem to be an integral part of the services rendered by the hospital. Nevertheless, on the other hand, we must ask, does the provision of a bed by a hospital equate to the rendering of "medical" care or services? The maintenance of a bed in good mechanical working order is not something that involves medical skill or judgment. So even though in the broad sense, patient B's injuries occurred in the course of the hospital's rendering of medical care and services, it is doubtful B's claim would be construed by a court to be one for medical malpractice. In fact, in *Broadway v. Bay Hospital, Inc.*,⁷⁸ the court held that a plaintiff's claim for injuries she sustained when her hospital bed collapsed was a claim for ordinary negligence.⁷⁹ The court noted that the plaintiff's allegations that the hospital had failed to properly maintain a piece of equipment, or to warn of a dangerous condition made the claim one for negligent maintenance of the premises as opposed to medical malpractice.⁸⁰

Another thought-provoking example might be that of two patients who are injured by virtue of food they are served while in the hospital. Patient A contracts salmonella as a result of ingesting undercooked chicken contaminated with the salmonella virus while patient B, whom the hospital knows to be a diabetic, develops complications as a result of being served a diet too high in sugars. What distinguishes A's claim from B's is the fact that the breach of duty to patient A does not involve a lack of medical expertise. In the same vein as the hospital's food service staff, a chef in a restaurant, or even a social host, could be deemed negligent for causing salmonella by undercooking chicken as it is common knowledge. However, as regards patient B, because of its specialized medical knowledge and expertise, the hospital is or should be uniquely able to foresee the serious medical repercussions which could befall a patient with a disease requiring a special diet. Thus, in the case of patient B, it would seem reasonable to conclude that the hospital was negligent in the rendering of or failure to render "medical" care.

77. As we shall see and discuss in the next section of this article, the fact that a claim arises out of the rendering of or the failure to render medical care or services and is therefore a claim for medical malpractice, does not mean in and of itself, that presuit requirements apply; for the prospective defendant must also be a "health care provider." See *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993).

78. 638 So. 2d 176 (Fla. 1st Dist. Ct. App. 1994).

79. *Id.* at 177.

80. *Id.*

Consider one final example, that of a doctor, who, out of affection for a patient, brings a vase of flowers to her bedside, but injures her when he carelessly drops the vase upon her. Contrast that scenario to the doctor poking that same patient in the eye with a sharp medical instrument in the course of examining or treating her. While the former mishap exemplifies a lack of ordinary care for which any layperson could be culpable, the latter clearly involves neglect or a failure of skill in the rendering of a medical service.

Although the determination of when an action will be deemed a claim for medical malpractice for purposes of presuit is an inexact science, a review of several other Florida cases should help the practitioner to determine where the courts are likely to draw the line between actions which constitute claims for medical malpractice and those which do not.

One such case is that of *Palm Springs General Hospital, Inc. v. Perez*.⁸¹ In *Perez*, the Third District Court of Appeal upheld the denial of a hospital's motion to dismiss, holding that the plaintiff had no obligation to comply with presuit screening provisions where the hospital was allegedly negligent in placing the plaintiff in a room with another patient who attacked her.⁸² The *Perez* decision was well-reasoned in that it was not a medical risk to which the patient was exposed, but rather the risk that another might harm her because of known criminal propensities.⁸³

In *Jackson v. Biscayne Medical Center, Inc.*,⁸⁴ the plaintiff was a patient who had allegedly been wrongfully removed from the defendant hospital without medical authorization.⁸⁵ The plaintiff alleged that he was then assaulted, battered, falsely arrested, slandered, and ultimately maliciously prosecuted for trespassing at the hospital.⁸⁶ The Third District Court of Appeal reversed a dismissal of these claims notwithstanding that they arose from the same transaction as other counts which were based upon malpractice and which were properly dismissed for failure to comply with presuit requirements.⁸⁷ Although the *Jackson* decision appears to be sound,

81. 661 So. 2d 1222 (Fla. 3d Dist. Ct. App. 1995).

82. *Id.* at 1223.

83. See also *Hicks v. Baptist Hosp., Inc.*, 676 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1996). In *Hicks*, an inebriated patient at the hospital set a fire resulting in another patient's death. *Id.* The court concluded that the claim did not sound in medical malpractice but rather premises liability and therefore the claim was not subject to the presuit requirements of the Act. *Id.* at 1019. Other recent decisions have held that certain claims against hospitals or other medical care facilities can be grounded in premises liability as opposed to medical malpractice. See, e.g., *Robinson v. West Fla. Reg'l Med. Ctr.*, 675 So. 2d 226 (Fla. 1st Dist. Ct. App. 1996).

84. 347 So. 2d 721 (Fla. 3d Dist. Ct. App. 1977).

85. *Id.* at 722.

86. *Id.*

87. *Id.*

it is still somewhat questionable in that what precipitated the assault, battery, false imprisonment, etc. was the wrongful discharge from the hospital without medical authorization.⁸⁸ If a patient is discharged from the hospital before it is medically sound to do so, then arguably there has been a breach of duty arising out of the rendering of, or more precisely, the failure to render medical care or services. However, the intentionally tortious behavior, which occurred following that wrongful discharge, is distinguishable from the medical repercussions one might ordinarily expect, such as a relapse or worsening of the underlying medical condition. In that the tortious conduct in question was quite attenuated and remote from the expected consequence of a wrongful discharge of a patient, the *Jackson* decision is justifiable. If, on the other hand, the battery claim of the plaintiff were to have been based on the failure of a surgeon to disclose risks and obtain informed consent, the situation would have been altogether different, and the claim would properly have been deemed one for medical malpractice.⁸⁹

D. *Who is a "Prospective Defendant" for Purposes of Presuit?*

Section 766.106(2) of the *Florida Statutes* provides in relevant part that "[a]fter completion of presuit investigation pursuant to § 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant . . . of intent to initiate litigation for medical malpractice."⁹⁰ Since the Florida Legislature has not defined what it means by the cryptic term "prospective defendant," the question arises as to exactly who was intended to be included within this category of "prospective defendants" for purposes of section 766.106(2).

A leading case addressing this question is the Supreme Court of Florida's decision in *Weinstock v. Groth*.⁹¹ In *Weinstock*, the plaintiff filed an action against a licensed clinical psychologist.⁹² The gravamen of the complaint was that in 1985, the plaintiff, Suzanne Groth, began receiving psychotherapy and marriage counseling from the defendant psychologist, Dr. Ronda Weinstock, and that subsequently, Dr. Weinstock had entered into an affair with the plaintiff's husband who had attended several of the therapy sessions.⁹³ The complaint charged Dr. Weinstock with negligence and the intentional infliction of emotional distress.⁹⁴ Weinstock then filed a motion

88. *Id.*

89. FLA. STAT. § 766.103(3) (1997). *See also* Gassman v. United States, 589 F. Supp. 1534, 1544-45 (M.D. Fla. 1984).

90. FLA. STAT. § 766.106(2) (emphasis added).

91. 629 So. 2d 835 (Fla. 1993).

92. *Id.* at 836.

93. *Id.*

94. *Id.*

to dismiss the complaint because it failed to allege that the plaintiff had complied with the presuit notice requirements set forth in section 766.106(2) of the Act.⁹⁵ The trial court granted the defendant's motion to dismiss, but the Fifth District Court of Appeal reversed on the ground that Dr. Weinstock was not a "health care provider" under the Act and therefore the presuit notice requirements did not apply.⁹⁶ The Supreme Court of Florida noted that section 766.106(2) does not define the "prospective defendants" to whom notice must be given.⁹⁷ The court explained "[h]owever, it is only logical that the term refers to defendants in a medical malpractice action who are health care providers as defined in chapter 766 or who, although not expressly included within that class, are vicariously liable for the acts of a health care provider."⁹⁸ The court further asserted that "[i]t is clear that under § 766.102(1) 'prospective defendants' in medical negligence actions are 'health care providers as defined in [section] 768.50(2)(b).'"⁹⁹ The *Weinstock* court did not adequately explain why it was so "logical" and "clear" that the term "prospective defendants" used in section 766.106(2) was synonymous with the term "health care provider" utilized in section 766.102(1). However, the court's unspoken reasoning was likely to have been that section 766.102(1) sets forth the applicable standard of care in actions based on "the negligence of a health care provider as defined in [section] 768.50(2)(b),"¹⁰⁰ which by implication, means actions for medical malpractice.¹⁰¹ Therefore, the "prospective defendants" in an action for medical malpractice, to which section 766.106(1) refers, must mean the "health care providers" subject to the medical or professional standard of care set forth under section 766.102(1). Having posited the principle that the presuit notice requirement must be satisfied in claims against health care providers, the court then observed that if Dr. Weinstock was a "health care provider," then the plaintiff's complaint was properly dismissed because notice had not been given.¹⁰²

95. *Id.* (citing FLA. STAT. § 766.106(2)).

96. *Weinstock*, 629 So. 2d at 836.

97. *Id.*

98. *Id.* at 837-38.

99. *Id.* at 838 (quoting FLA. STAT. § 766.102(1)).

100. FLA. STAT. § 766.102(1). *See infra* text accompanying note 108.

101. The only alternative to this interpretation would be that in section 766.102(1), the legislature was referring to actions for ordinary negligence when it used the term "negligence of a health care provider." However, this reading would not make any sense in view of the fact that it is the prevailing "professional" standard of care which expressly applies under section 766.102(1). *See infra* text accompanying note 108.

102. *Weinstock*, 629 So. 2d at 836.

Was Dr. Weinstock a “health care provider?” The Supreme Court of Florida answered this question in the negative and its reasoning was as follows:

[A]s both the trial and district courts below noted, psychologists licensed under chapters 490 and 491, Florida Statutes (1991), are not included in the chapter 766 definitions of “health care provider.” We agree with the district court below that the exclusion of psychologists from the various definitions of this term indicates a legislative intent that psychologists not be classified as health care providers. This limited construction of the term precludes the absurd conclusion that clergy and others who provide counseling similar to that provided by Dr. Weinstock, but who also are not expressly defined as health care providers, might be subject to the provisions of the Act.¹⁰³

The *Weinstock* court pointed to three different sections of the Act, each of which contained a definition of the term “health care provider.”¹⁰⁴ 1) section 766.101(1)(b),¹⁰⁵ 2) section 766.105(1)(b),¹⁰⁶ and 3) section 766.102(1),¹⁰⁷ which, in turn, incorporates the definition of health care

103. *Id.* at 836–37.

104. *Id.* at 836.

105. FLA. STAT. § 766.101(1)(b) (1997) defines “health care providers” as “physicians licensed under chapter 458, osteopathic physicians licensed under chapter 459, podiatrists licensed under chapter 461, optometrists licensed under chapter 463, dentists licensed under chapter 466, chiropractors licensed under chapter 460, pharmacists licensed under chapter 465, or hospitals or ambulatory surgical centers licensed under chapter 395.” *Id.*

106. FLA. STAT. § 766.105(1)(b) states that :

[t]he term “health care provider” means any: 1) hospital licensed under chapter 395; 2) physician licensed, or physician assistant certified, under chapter 458; 3) osteopathic physician licensed under chapter 459; 4) Podiatrist licensed under chapter 461; 5) health maintenance organization certificated under part I of chapter 641; 6) ambulatory surgical center licensed under chapter 395; 7) “[o]ther medical facility” as defined in paragraph (c); 8) professional association, partnership, corporation, joint venture, or other association by the individuals set forth in subparagraphs 2., 3., and 4. for professional activity.

Id.

107. *Id.* § 766.102(1) provides:

In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider *as defined in s. 768.50(2)(b)*, the claimant shall have the burden of proving by the greater weight of evidence

provider set forth in section 768.50(2)(b).¹⁰⁸ All of these sections contain, in some cases overlapping and in some respects inconsistent, definitions of the term “health care provider.” For example, section 766.101(1)(b) defines health care providers to mean “physicians licensed under chapter 458, osteopathic physicians licensed under chapter 459, podiatrists licensed under chapter 461, optometrists licensed under chapter 463, dentists licensed under chapter 466, chiropractors licensed under chapter 460, pharmacists licensed under chapter 465, or hospitals or ambulatory surgical centers licensed under chapter 395.”¹⁰⁹ However, section 766.101 deals only with the narrow subject of immunity from liability of those serving on medical review committees and with exclusion from discovery of matters arising out of review performed by such committees.¹¹⁰

The *Weinstock* court further noted that psychologists were not included within the section 766.105(1)(b) definition of health care provider either.¹¹¹ The absence of psychologists from the section 766.105(1)(b) definition buttressed the court’s conviction that psychologists were not health care providers entitled to presuit notice.¹¹² Unlike any of the other sections the

that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider.

Id. § 766.102(1) (1997) (emphasis added).

108. Interestingly, section 766.102(1) of the *Florida Statutes* incorporates by express reference the definition of “health care provider” set forth under now-repealed FLA. STAT. § 768.50(2)(b) (1985) which has the most comprehensive definitions of what a “health care provider” is:

“Health care provider” means hospitals licensed under chapter 395; physicians licensed under chapter 458; osteopaths licensed under chapter 459; podiatrists licensed under chapter 461; dentists licensed under chapter 466; chiropractors licensed under chapter 460; naturopaths licensed under chapter 462; nurses licensed under chapter 464; clinical laboratories registered under chapter 483; physicians’ assistants certified under chapter 458; physical therapists and physical therapist assistants licensed under chapter 486; health maintenance organizations certificated under part II of chapter 641; ambulatory surgical centers . . . ; blood banks . . . ; or . . . associations for professional activity by health care providers.

Id. § 768.50(2)(b) (1985). The *Weinstock* court noted that section 768.50 had been repealed “except to the extent that it is incorporated by reference into section 766.102(1).” See *Weinstock*, 629 So. 2d at 836 n.1.

109. FLA. STAT. § 766.101(1)(b).

110. *Id.*

111. *Weinstock*, 629 So. 2d at 836.

112. *Id.* at 836–37. Note that in *P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988), the Supreme Court of Florida declared that express mention of one thing in a statute implies exclusion of another. *Id.* *Nichols* was cited by *Weinstock* for this very proposition. *Weinstock*, 629 So. 2d at 837. Thus, since the various definitions of health care provider set forth in chapter 766 expressly mention other health care professionals in their definitions of health care provider

Weinstock court reviewed, section 766.105(1)(b) includes: 1) health maintenance organizations; 2) professional associations; 3) partnerships, corporations; 4) joint ventures; and 5) “other medical facilit[ies]” within the definition of health care providers.¹¹³ However, section 766.105 deals with coverage under the “Florida Patient’s Compensation Fund,” a topic far afield from presuit requirements or the applicable standard of care.¹¹⁴

Finally, the court reviewed section 766.102(1), which incorporates the definition of health care provider set forth under section 768.50(2)(b).¹¹⁵ Psychologists, the court stated, were not included in the section 768.50(2)(b) definition of “health care provider” either.¹¹⁶ Therefore, the *Weinstock* court concluded, the legislature simply could not have intended psychologists to be health care providers for purposes of entitlement to presuit notice under section 766.106 in view of their absence from the various definitions of health care provider set forth in sections 766.101(1)(b), 766.105(1)(b), and 766.102(1).¹¹⁷ Clearly, the most crucial of the three sections examined by the court was section 766.102(1)¹¹⁸ because the court stated outright that in medical malpractice actions, the term “prospective defendants” means health care providers as defined in section 768.50(2)(b).¹¹⁹

but psychologists are not included, this is strong evidence that the Florida Legislature did not intend psychologists to be considered health care providers for any purpose under chapter 766. *See id.*

113. FLA. STAT. § 766.105(1)(b). *See supra* text accompanying note 106.

114. *See* FLA. STAT. § 766.105(1)(b). The statute is entitled “Florida Patient’s Compensation Fund.” *Id.* The only relationship between section 766.105 and the presuit provisions set forth in section 766.106 would seem to be that both statutes are part of the Act.

115. *Weinstock*, 629 So. 2d at 837. *See supra* text accompanying note 108. Again, as noted earlier, the court observed that section 768.50(2)(b) had been “repealed except to the extent that it is incorporated by reference into section 766.102(1).” *Weinstock*, 629 So. 2d at 836 n.1.

116. *Id.* at 836 (citing FLA. STAT. § 768.50(2)(b) (1985)).

117. *Id.* By negative implication, it could be argued that if psychologists were listed as health care providers under any of the three sections the *Weinstock* court examined, they would be entitled to presuit notice. This very argument was advanced quite recently in *Community Blood Ctr., Inc. v. Damiano*, 697 So. 2d 948, 951 (Fla. 4th Dist. Ct. App. 1997) and rejected by the Fourth District Court of Appeal as follows:

The blood bank argues that although the medical malpractice statute of limitations does not apply to actions against blood banks, plaintiffs nevertheless were bound to comply with the presuit requirements of chapter 766, including subsection 766.106(2). This subsection requires notice to the defendant in a medical malpractice action after completion of presuit screening, “prior to filing a claim for medical malpractice.”

Id. at 951.

118. Which incorporates section 766.50(2)(b)’s definition of “health care provider.” *See supra* text accompanying note 108.

119. *Weinstock*, 629 So. 2d at 838.

Therefore, under *Weinstock*, we can conclude that if one is included in the section 768.50(2)(b) definition of “health care provider,” then one is a health care provider and hence a “prospective defendant” for purposes of entitlement to presuit notice. However in the recent case of *Community Blood Centers v. Damiano*,¹²⁰ the Fourth District Court of Appeal did not reach that conclusion.¹²¹ In *Damiano*, the defendant, a blood bank, moved to dismiss the complaint on the ground that plaintiffs, who allegedly contracted AIDS through HIV tainted blood supplied by the blood bank, had failed to provide presuit notice to the defendant under section 766.106(2) of the *Florida Statutes*.¹²² However, the trial court denied the defendant blood bank’s motion to dismiss.¹²³ In affirming the trial court’s decision, the Fourth District Court of Appeal rejected the blood bank’s contention that it was a health care provider for purposes of presuit.¹²⁴ The defendant pointed out that blood banks were included in the section 768.50(2)(b) definition of health care provider and argued that, under *Weinstock*, it was therefore a “prospective defendant” entitled to presuit notice under section 766.106(2).¹²⁵ The appellate court responded to this argument as follows: “defendant points out that blood banks are defined as a health care provider under subsection 768.50(2)(b). While that is true, blood banks are listed nowhere else within the statutory definition of chapter 766; e.g., subsections 766.101(b) and 766.105(1)(b).”¹²⁶ This statement shows that the *Damiano* court may have misread *Weinstock*. The *Weinstock* court did indeed examine three different subsections of chapter 766.¹²⁷ Moreover, the Supreme Court of Florida did conclude in *Weinstock* that the absence of psychologists from any of the various statutory definitions of health care provider showed that the legislature could not have intended psychologists to occupy the status of health care provider.¹²⁸ However, the *Weinstock* court never indicated that one who is defined as a health care provider under section 768.50(2)(b) must also fall within the section 766.105(1)(b) and/or section 766.101(1)(b) definition(s) of that term, before one can be considered a prospective defendant for purposes of presuit notice. In fact, the court in *Weinstock* indicated just the opposite in stating unequivocally, “[i]t is clear that . . .

120. 697 So. 2d 948 (Fla. 4th Dist. Ct. App. 1997).

121. *Id.* at 949.

122. *Id.*

123. *Id.*

124. *Id.* at 952.

125. *Damiano*, 697 So. 2d at 951.

126. *Id.*

127. *Weinstock*, 629 So. 2d at 838 (examining FLA. STAT. §§ 766.101(1)(b); .102 (1), .105(1)(b) which expressly incorporates section 768.50(2)(b). *See also supra* text accompanying notes 105–08.

128. *Weinstock*, 629 So. 2d at 837.

'prospective defendants' in medical negligence actions are 'health care providers as defined in [section] 768.50(2)(b).''¹²⁹

However, even if the fourth district rendered an unduly restrictive reading of *Weinstock's* test for whether one is a health care provider, it had benevolent motives for doing so. First of all, the majority in *Damiano* observed that it was not until June 18, 1996, over four years after plaintiffs had filed the action, that the blood bank filed its motion to dismiss based on the plaintiffs' noncompliance with section 766.106(2), presuit requirements.¹³⁰ As Judge Pariente pointed out in his concurring opinion, due to the defendant's four-year delay in filing the motion to dismiss, it was too late for plaintiffs to comply with the presuit notice requirements and "plaintiffs now have no opportunity to cure the defect."¹³¹ Secondly, aside from this issue of basic fairness, the *Damiano* court, citing *Weinstock*, reiterated the principle that statutes should be construed in a manner which minimize their effect on the constitutionally protected right of access to the courts under Article I, Section 21 of the *Florida Constitution*.¹³² In any event, because the court held that the blood bank had not rendered treatment or care to plaintiffs and thus the claim was not one for medical malpractice, it would have made no difference in the outcome even if the court had deemed the blood bank to be a health care provider.¹³³ From a logical standpoint, it seems nonsensical to require, as *Damiano* seems to suggest, that one must not only be listed in section 768.50(2)(b) in order to be deemed a health care provider for presuit purposes, but also must be included in one or both of the definitions of that term set forth in section 766.105(1)(b), and 766.101(1)(b).¹³⁴

As the Fifth District Court of Appeal recently noted in *Sova Drugs, Inc. v. Barnes*,¹³⁵ in determining whether "pharmacists" were health care providers for purposes of the presuit investigation and notice requirements of section 766.106(2) of the Act:

Other parts of Chapter 766 include pharmacists in the list of "health care providers" . . . [h]owever, their inclusion in this section [766.101(b)] is for the purpose of providing them immunity when serving on medical review committees or providing information in the scope of such a committee function. This

129. *Id.* at 838 (emphasis added).

130. *Damiano*, 697 So. 2d at 951.

131. *Id.* at 952 (Pariente, J., concurring).

132. *Id.* (citing *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993)).

133. *Id.* at 949. *See also* *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184 (Fla. 1992) (holding that an action against a blood bank as a supplier of blood was not a medical malpractice action for statute of limitations purposes).

134. *See Damiano*, 697 So. 2d at 951.

135. 661 So. 2d 393 (Fla. 5th Dist. Ct. App. 1995).

provision has little or nothing to do with filing medical malpractice actions in civil courts.¹³⁶

The *Barnes* court admonished that “[t]he only sensible approach in interpreting this Chapter [766], is to limit the applicability of each section to its own definition of ‘health care provider’ if there is one provided.”¹³⁷

If the legislature did intend the term “prospective defendants” used in section 766.106(2) to mean “health care providers,” its failure to say so or to define the terms “prospective defendant” and “health care provider” for purposes of section 766.106(2) has resulted in a lot of confusion. Indeed, troubled by this confusion, the Second District Court of Appeal was prompted to observe in *NME Properties v. McCullough*¹³⁸ that “[w]e have . . . lamented the difficulty of interpreting chapter 766 because the chapter lacks comprehensive definitions. This case presents similar difficulties.”¹³⁹ In *McCullough*, the plaintiff alleged that she entered the defendant nursing home to recuperate after surgery on her fractured elbow and that agents or employees of the home negligently treated or handled the plaintiff causing her to suffer further severe injury to her previously fractured elbow.¹⁴⁰ The nursing home moved to dismiss because the plaintiff had failed to comply and plead compliance with the presuit requirements set forth in sections 766.104, 766.106, and 766.203–06.¹⁴¹ The trial court denied the motion and the appellate court affirmed the denial, noting that nursing homes were not included in the definitions of health care provider set forth in sections 768.50(2)(b), 766.101(1)(b), or 766.105(1)(b) of the *Florida Statutes*.¹⁴² Moreover, the court explained, the plaintiff had not alleged that the agents or employees of the nursing home, to whom she ascribed her negligent treatment or handling, were health care providers.¹⁴³ The court noted that the agents or employees might merely be orderlies or other employees without professional status.¹⁴⁴ Since presuit requirements can attach only when the defendant is a health care provider or alleged to be vicariously liable for the acts of a health care provider and neither situation

136. *Id.* at 395.

137. *Id.*

138. 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991).

139. *Id.* at 440 n.1 (citing *Catron v. Roger Bohn, D.C., P.A.*, 580 So. 2d 814 (Fla. 2d Dist. Ct. App. 1991)).

140. *Id.* at 440.

141. *Id.*

142. *Id.*

143. *McCullough*, 590 So. 2d at 440.

144. *Id.*

was obtained in this case, the court reasoned that the defendant's motion to dismiss for noncompliance with presuit requirements was properly denied.¹⁴⁵

What is perplexing is that the *McCullough* court suggested that presuit requirements would have been applicable if the plaintiff had alleged that the harm was caused by a nurse employed by the nursing home.¹⁴⁶ However, nurses are not included in the definitions of health care provider set forth in sections 766.101(1)(b) or 766.105(1)(b) but only in the section 768.50(2)(b) definition.¹⁴⁷ Therefore, under *McCullough*, it would appear that inclusion of a defendant in the section 768.50(2)(b) definition of a health care provider would suffice in and of itself to confer health care provider status upon a defendant for purposes of presuit.¹⁴⁸ This view is directly at odds with the approach taken by the Fourth District Court of Appeal in *Damiano*, which holds that inclusion in the section 768.50(2)(b) definition is not enough by itself to cloak a party with the status of health care provider for purposes of presuit.¹⁴⁹

In *Goldman v. Halifax Medical Center, Inc.*,¹⁵⁰ a unique issue was raised and resolved by the Fifth District Court of Appeal.¹⁵¹ In *Goldman*, the plaintiff alleged that a hospital was vicariously liable for the negligence of its employee, a radiologic technologist.¹⁵² The plaintiff alleged that the technologist negligently applied excessive pressure and caused one of her silicone breast implants to rupture.¹⁵³ The plaintiff contended that compliance with the presuit notice requirements of chapter 766 is not necessary where the active tortfeasor is not a health care provider under any of the statutory definitions.¹⁵⁴ Does the requirement of presuit notice apply to a claim against a hospital based on the negligence of the hospital's employee who was not a health care provider? The *Goldman* court's answer to this question was "yes."¹⁵⁵ At first blush, this holding seems surprising in light of the supreme court's proclamation in *Weinstock* stating, "we conclude that the notice requirements of the Act only apply in actions against 'health care providers' as defined in chapter 766, Florida Statutes (1991), and those

145. *Id.* at 440–41.

146. *Id.* at 440.

147. *See* FLA. STAT. §§ 766.101(1)(b); .105(1)(b); 768.50(2)(b). *See supra* text accompanying notes 105–08.

148. *McCullough*, 590 So. 2d at 440.

149. *Damiano*, 697 So. 2d at 951.

150. 662 So. 2d 367 (Fla. 5th Dist. Ct. App. 1995).

151. *Id.* at 368.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Goldman*, 662 So. 2d at 368.

who are vicariously liable for the acts of a health care provider.”¹⁵⁶ Without explicitly saying so, this language suggests that there are only two situations in which presuit notice is required: 1) in a direct action against a health care provider based on the provider’s own negligence; and 2) in an action against a party (health care provider or not) based on vicarious liability for the acts of the defendant’s employee or agent who is a health care provider.

However, Goldman’s suit against the hospital was grounded in vicarious liability based upon its employee’s alleged negligence in performing a mammogram.¹⁵⁷ The employee, a radiographic technician, was not included in any of the chapter 766 definitions of health care provider.¹⁵⁸ Nevertheless, *Goldman* held that presuit notice requirements applied to the vicarious liability claim against the hospital.¹⁵⁹ Arguably, this holding flies in the face of the apparent restriction imposed by *Weinstock* that medical negligence suits founded upon vicarious liability are subject to presuit only when the underlying employee or agent is a health care provider.¹⁶⁰ However, the above quoted language from *Weinstock* is ambiguous. Again, the *Weinstock* court stated that presuit requirements “only apply in actions against ‘health care providers’ and those who are vicariously liable for the acts of a health care provider.”¹⁶¹

As the court noted in *Goldman*, the hospital was defined as a health care provider under sections 766.101(1)(b),¹⁶² 766.105(1)(b),¹⁶³ and 766.102(1) vis-a-vis 768.50(2)(b).¹⁶⁴ The *Goldman* case clearly involved an action against a health care provider; therefore, it was argued that presuit notice requirements should apply. At the same time, the *Goldman* case was predicated on vicarious liability based on the negligence of a non-health care provider. Thus, one could argue that presuit requirements were inapplicable if the language “vicariously liable, for the acts of a health care provider” was read to mean that in cases of vicarious liability presuit notice requirements apply only in instances where the underlying employee or agent is a health care provider. However, the *Goldman* court all but ignored the time-honored edict underscored in the *Weinstock*, *Damiano*, and *McCullough* cases, that

156. *Weinstock*, 629 So. 2d at 835–36.

157. *Goldman*, 662 So. 2d at 368.

158. *Id.* Just as its predecessors in *Weinstock*, *Damiano*, and *McCullough* had done, the *Goldman* court specifically examined the definitions of health care provider set forth under sections 766.101(1)(b); 766.105(1)(b); and 766.102(1) (which incorporates § 768.50(2)(b)’s definition of health care provider). *Id.* at 369. See *supra* text accompanying notes 105–08.

159. *Goldman*, 662 So. 2d at 370.

160. *Weinstock*, 629 So. 2d at 835–36.

161. *Id.*

162. *Goldman*, 662 So. 2d at 369. See *supra* text accompanying note 105.

163. *Goldman*, 662 So. 2d at 369. See *supra* text accompanying note 106.

164. *Goldman*, 662 So. 2d at 369. See *supra* text accompanying notes 107–08.

statutes restricting access to the courts must be construed in such a manner that favor access.¹⁶⁵

In essence, the court in *Goldman* read *Weinstock* to say that presuit requirements apply in *three* different scenarios: 1) where a health care provider is alleged to have been directly negligent in the rendering of medical care or services; 2) where a defendant (whether or not a health care provider) is alleged to be vicariously liable for the acts of a health care provider employee or agent; and 3) where a health care provider is alleged to be vicariously liable for the negligence of a non-health care provider employee or agent.¹⁶⁶ If scenario three is encompassed in what the *Weinstock* court had in mind when it articulated when presuit notice requirements apply, the following question might arise: If a non-health care provider is negligent in maintaining the premises, thereby resulting in a vicarious liability claim against the hospital, would the hospital then be entitled to presuit notice? Under *Goldman*, the answer to this question is “no,” because the *Goldman* court qualified its holding by restricting the application of presuit requirements in cases of vicarious liability to instances where the defendant’s employee or agent was negligent in the “rendering of medical care or services.”¹⁶⁷ Because the technician employed by the hospital in *Goldman* was engaged in the rendering of medical care or services when the injury occurred, presuit requirements were held to apply notwithstanding the fact that the technician was not a health care provider.¹⁶⁸

The problem is that the *Weinstock* court’s elocution of when a defendant is entitled to presuit notice was imprecise and misleading.¹⁶⁹ As a result, the *Goldman* court may have had too much leeway to indulge in its own interpretation of the legislative intent underlying section 766.106, the presuit notice statute, an interpretation which was somewhat speculative and which countermanded Florida’s strong policy in favor of access to the courts.¹⁷⁰ To complicate matters further, the *Goldman* holding, to the extent it embraces claims for vicarious liability based on the negligence of a non-health care

165. *Weinstock*, 629 So. 2d at 835–36; *Damiano*, 697 So. 2d at 951; *McCullough*, 590 So. 2d at 440. See also FLA. CONST. art. I, sec. 21.

166. *Goldman*, 662 So. 2d at 369-70.

167. *Id.* at 371.

168. *Id.*

169. See *infra* Part IV for a recommendation of how, inter alia, the courts and/or Florida Legislature can clear up this problem.

170. See FLA. CONST. art. I, sec. 21. The *Goldman* court believed that Mrs. Goldman’s case was more akin to the claim made in *Neilinger* where “the court held that a hospital was [engaged in] performing medical services when a patient slipped and fell on a pool of amniotic fluid while descending from an examination table under the direction and care of the hospital employees.” See *Goldman*, 662 So. 2d at 370–71 (citing *Neilinger v. Baptist Hosp., Inc.*, 460 So. 2d 564 (Fla. 3d Dist. Ct. App. 1984)).

provider within the sphere of presuit, appears to be out-of-sync with the crucial language of section 766.102(1). The *Weinstock*, *Damiano*, *McCullough*, and *Goldman* decisions all seem to suggest that the simplest test for when presuit requirements apply is “whether the defendant is directly or vicariously liable” under the medical negligence standard of care set forth in section 766.102(1) of the *Florida Statutes*.¹⁷¹ However, turning to section 766.102(1), it states that “the prevailing professional standard of care for a given health care provider shall be that level of care, . . . which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.”¹⁷² This suggests that the crux of a malpractice claim is based upon whether a *health care provider* comported with an acceptable level of care, skill, and treatment of other reasonably prudent *health care providers*. In *Goldman*, the case was not predicated upon whether a health care provider comported with the level of care, skill, and treatment that would be exercised by other reasonably prudent health care providers.¹⁷³ The employee technician was *not* a health care provider at all. The standard set forth in section 766.102(1) is incongruent and thus calls into question whether the claim was one for medical malpractice for presuit purposes. There could be no “similar health care provider” to the technician in *Goldman*; this would be a nonsequitur since the technician himself was not a health care provider.¹⁷⁴

171. See *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993); *Community Blood Ctr. of S. Fla. v. Damiano*, 697 So. 2d 948, 951 (Fla. 4th Dist. Ct. App. 1997); *Goldman v. Halifax Med. Ctr.*, 662 So. 2d 367, 369 (Fla. 5th Dist. Ct. App. 1995); *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 440 (Fla. 2d Dist. Ct. App. 1991).

172. FLA. STAT. § 766.102(1) (1997) (emphasis added).

173. *Goldman*, 662 So. 2d at 369.

174. The *Goldman* court compared the situation before it to the decision of *Broadway v. Baptist Hosp., Inc.*, 638 So. 2d 176 (Fla. 1st Dist. Ct. App. 1994) and *Neilinger v. Baptist Hosp., Inc.*, 460 So. 2d 564 (Fla. 3d Dist. Ct. App. 1984), discussed earlier in this article. *Goldman*, 662 So. 2d at 370–71. The court distinguished *Broadway* by noting that the underlying negligence in that case was not *medical* negligence. *Id.* at 370. That is, the plaintiff’s claim in *Broadway*, that she was injured when her bed collapsed, was found to be based upon ordinary negligence, to wit, premises liability, rather than upon the negligent rendering of medical care or services. *Id.* However, the claim in *Goldman*, in contradistinction to *Broadway*, was based upon the negligent rendering of *medical* services by the hospital’s radiographic technician. *Id.* The *Goldman* court also noted that “Goldman’s claim, that an improperly calibrated machine that was used on her partly caused her injury, is not unlike a claim that one was injured when a doctor used an unclean scalpel, a claim which would clearly fall within the realm of providing medical care.” *Id.*

The *Goldman* court believed that Mrs. Goldman’s case was more akin to the claim made in *Neilinger* where “the court held that a hospital was [engaged in] performing medical services when a patient slipped and fell on a pool of amniotic fluid while descending from an examination table under the direction and care of the hospital employees.” *Goldman*, 662 So. 2d at 370, 370–71 (citing *Neilinger v. Baptist Hosp., Inc.*, 460 So. 2d 564 (Fla. 3d Dist. Ct. App. 1984)).

To summarize Part II, the following observations can be made. First, for the presuit requirements of the Act to apply, the action must be a “[c]laim for medical malpractice.”¹⁷⁵ This means the claim must arise out of “the rendering of, or the failure to render, medical care or services.”¹⁷⁶ Discerning when a claim does arise out of the rendering of, or failure to render, medical care or services can be a tricky endeavor for attorneys. However, the Supreme Court of Florida and the district courts of appeal seem to be in general agreement that a claim arises out of the rendering of, or failure to render, medical care or services, when the acts or omissions of a health care provider that caused the injury to the claimant, allegedly fell below the level of care and treatment that would be considered acceptable and appropriate by reasonably prudent similar health care providers.¹⁷⁷

Second, the prospective defendants in a medical malpractice action to which section 766.106(2) refers, and who, under that section, are entitled to presuit notice of intent to initiate litigation, are those defined as health care providers under section 768.50(2)(b).¹⁷⁸ Reading *Weinstock* in conjunction with section 766.106(2), one can conclude that a two-prong test should be used in determining whether presuit requirements apply: 1) the claim must be “a claim for medical malpractice;” and 2) the defendant is a “health care provider” or vicariously liable for the acts of a health care provider.¹⁷⁹

Finally, since section 766.106(2) is a statute tending to restrict access to the courts, if there is doubt as to its application, it must be construed in a manner which favors access.¹⁸⁰ We now turn to part three and an exploration into when the two-year medical malpractice statute of limitations set forth under section 95.11(4)(b)¹⁸¹ applies to a claim.

175. FLA. STAT. § 766.106(1)(a) (1997).

176. *Id.*

177. *See generally* J.B. v. Sacred Heart Hosp., 635 So. 2d 945 (Fla. 1994); Feifer v. Galen of Florida, Inc., 685 So. 2d 882 (Fla. 2d Dist. Ct. App. 1996); Broadway v. Bay Hosp., Inc., 638 So. 2d 176 (Fla. 1st Dist. Ct. App. 1994); NME Properties, Inc. v. McCullough, 590 So. 2d 439 (Fla. 2d Dist. Ct. App. 1991).

178. *See supra* text accompanying note 108. *See also* *Weinstock*, 629 So. 2d at 836. It should be noted that in the *Damiano* court’s view, inclusion of one in the section 768.50(2)(b) definition of “health care provider” is not enough in and of itself to conclude that one is a prospective defendant for purposes of presuit. *Damiano*, 697 So. 2d at 951.

179. *See Weinstock*, 629 So. 2d at 838. *See also* FLA. STAT. § 766.106(2) (1997). The *Goldman* court would modify the second prong of this test by using words to the effect of: the defendant is a health care provider or vicariously liable for the acts of an agent or employee who was negligent in the rendering of medical care or services, regardless of whether or not the agent or employee is himself a health care provider. *See generally Goldman*, 662 So. 2d at 370.

180. *See Weinstock*, 629 So. 2d at 835; FLA. CONST. art. I, § 21.

181. *See supra* text accompanying note 6.

III. DETERMINING WHEN THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS APPLIES

A. *An Overview of the Medical Malpractice Statute of Limitations*

The statute of limitations governing claims for medical malpractice is set forth in section 95.11(4)(b) of the *Florida Statutes* and provides: "An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence . . ." ¹⁸² The leading case construing the language of section 95.11(4)(b) is *Tanner v. Hartog*. ¹⁸³ In *Tanner*, the parents of a stillborn child sued two doctors and a hospital for medical malpractice. ¹⁸⁴ The complaint alleged that on March 31, 1988, the doctors examined Mrs. Tanner and then sent her to the hospital for testing and that the following morning the baby was delivered stillborn. ¹⁸⁵ The Tanners alleged further that "in light of the testing and Mrs. Tanner's condition, the doctors and the medical staff at the hospital were negligent in failing to promptly perform a delivery by caesarian section at a time when the child could have been saved." ¹⁸⁶ Finally, it was alleged that until December 29, 1989, the plaintiffs neither knew nor should have known that the conduct of the defendants fell below the applicable medical standard of care. ¹⁸⁷

The trial court dismissed the lawsuit on the ground that it had not been filed within the two-year statute of limitations. ¹⁸⁸ On appeal, the Second District Court of Appeal affirmed the lower court's dismissal on the basis that the Tanners' claim was time-barred. ¹⁸⁹ The pivotal question presented to the Supreme Court of Florida was, when does the statute of limitations begin to run? ¹⁹⁰ The supreme court began its decision by recognizing the lack of clarity in the language of section 95.11(4)(b) and the need for definitive judicial construction. ¹⁹¹ The court then revisited its earlier proclamation in *Nardone v. Reynolds*, ¹⁹² which had been controlling for almost two decades

182. FLA. STAT. § 95.11(4)(b) (1997). *See supra* text accompanying note 6.

183. 618 So. 2d 177 (Fla. 1993).

184. *Id.* at 178.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Tanner*, 618 So. 2d at 178.

189. *Id.*

190. *Id.*

191. *Id.* at 178-79.

192. 333 So. 2d 25 (Fla. 1976).

on the issue of what triggers section 95.11(4)(b).¹⁹³ The *Tanner* court noted that *Nardone* held the statute of limitations in a medical malpractice suit begins to run either when the plaintiff has notice of the negligent act or omission giving rise to the cause of action or when the plaintiff has notice of the physical injury.¹⁹⁴ However, in *Tanner*, the supreme court placed an interpretation on the *Nardone* rule intending to ameliorate the harsh results which can sometimes occur by strict application of the rule.¹⁹⁵

We hold that the knowledge of the injury as referred to in the [*Nardone*] rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice. The nature of the injury, standing alone, may be such that it communicates the possibility of medical negligence, in which event the statute of limitations will immediately begin to run upon discovery of the injury itself. On the other hand, if the injury is such that it is likely to have occurred from natural causes, the statute will not begin to run until such time as there is reason to believe that medical malpractice may possibly have occurred.¹⁹⁶

The court reasoned that “[m]ere knowledge of a stillbirth, without more, would not suggest the possibility of medical negligence” since stillbirths often occur even in the absence of negligence.¹⁹⁷ Therefore, the supreme court reversed the dismissal of the *Tanner*’s claim, which was predicated on the assumption that the *Tanner*’s knowledge of the stillbirth alone triggered the statute.¹⁹⁸

While the *Tanner* court’s updated interpretation of the *Nardone* rule is unquestionably more equitable than its former strict application, it is far from definitive. The term “reasonable possibility” that an injury was caused by medical malpractice is a term of art woefully in need of, but perhaps incapable of, precise definition. At what point does a layman become aware of a reasonable possibility that his injury was the product of medical malpractice? Laymen rarely, if ever, read medical journals. A treating physician or surgeon is quite unlikely to refer a patient to another doctor for the purpose of ascertaining whether he made mistakes, particularly in view of

193. *Tanner*, 618 So. 2d at 179 (citing *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976)).

194. *Id.* (citing *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976)). This was commonly known as the “*Nardone* rule” and/or the “discovery rule.” See also *Barron v. Shapiro*, 565 So. 2d 1319 (Fla. 1990) (reaffirming the *Nardone* rule).

195. *Tanner*, 618 So. 2d at 181.

196. *Id.* at 181–82 (footnotes omitted).

197. *Id.* at 182.

198. *Id.* at 184.

the fear of being sued for malpractice and the modern prevalence of health management organizations which foster a reluctance to make referrals of any kind. The *Tanner* court was mindful of the difficulties involved when it observed:

We recognize that our holding will make it harder to decide as a matter of law when the statute begins to run and may often require a fact-finder to make that determination . . . [t]he point at which the statute [begins] to run can only be determined after the pertinent facts have been developed.¹⁹⁹

Since they “neither knew nor should have known ‘that the actions and inactions of the defendants fell below the standard of care recognized in the community’ until December 29, 1989” (almost two years after the stillbirth), it is reasonable to assume that some doctor(s) made the Tanners aware of the reasonable possibility that the stillbirth was the consequence of malpractice.²⁰⁰ Realistically, how else could they have achieved such awareness?

Obviously, an attorney cannot even begin to investigate or assess the viability of a potential malpractice claim until a client shows up at the attorney’s office (or at least calls) and informs the attorney that he or she has suffered an injury. It would seem logical that by that time, the client has at least an inkling of a suspicion that the injury or condition was caused by medical malpractice, but not necessarily so. For example, the client may have been in, say, an automobile accident and is merely consulting a lawyer to determine his legal rights vis-à-vis other drivers involved in the collision and their insurers. However, perhaps unbeknownst to the client, his injury may have been diagnosed incorrectly or he may have been mistreated, leading to aggravated or still further injury. Still, in such an instance, it would appear that the statute has not commenced, unless a reasonable person would be aware of the possibility of malpractice purely from the nature of the injury.²⁰¹

In any event, the most prudent course of action for a plaintiffs’ attorney (whether or not the client actually believes himself to have been the victim of malpractice) is to maintain a healthy suspicion that medical malpractice may have been at least partially responsible for the client’s injury. Hence, if the attorney believes the client was blind to what a reasonable person (albeit not this particular client) may have believed to be malpractice, the attorney can make a relatively accurate determination of when the statute began to run and

199. *Id.* at 182.

200. *Tanner*, 618 So. 2d at 178.

201. *See id.*

act accordingly. The event that triggers the statute is awareness of a “reasonable possibility” of medical malpractice²⁰² which appears to be an objective standard and counsel should not assume that his client does or does not have the awareness that a “reasonable person” would have under the same circumstances. Good faith ignorance will not erase the disastrous results of unreasonableness when it comes to malpractice statute of limitations.

As the Supreme Court of Florida pointed out in *Tanner*, there are certain injuries, the nature of which, standing alone, communicate the possibility of medical negligence in which case the statute begins to run immediately upon discovery of the injury itself.²⁰³ Since the term “reasonable possibility” is intrinsically nebulous, it is hard to predict what a fact-finder will conclude. Pointed questions in the client interview will help greatly in flushing out the possibility of malpractice. If the client reveals to the attorney that he has already been advised by a doctor that some other health care provider may have erred in diagnosing, treating, or caring for the client, then under *Tanner*, the statute would have commenced when the client acquired such knowledge.²⁰⁴ Since the hour glass has been turned, so to speak, the attorney should then act quickly to ensure the claim is filed in a timely fashion, if that is still possible.²⁰⁵ Recall that the plaintiff may petition the clerk of the court for an automatic ninety-day extension of the statute of limitations in order that before filing suit, he may conduct a reasonable investigation, obtain a corroborating opinion and prepare the notice of intent to initiate litigation for medical malpractice.²⁰⁶

In order to help illustrate how section 95.11(4)(b) will be interpreted under *Tanner*, consider the following hypothetical. Assume that on February

202. *Id.*

203. *Id.* at 180.

204. *Id.* at 178. Since the cases offer no clear-cut definition of what constitutes awareness of a reasonable possibility of malpractice, the practitioner should assume that the client has developed such awareness if there is any doubt whatsoever.

205. If however, nothing indicates that a client has knowledge, or reasonably should have knowledge of a possibility of malpractice, but is consulting a lawyer for some unrelated reason, such as an accident or food poisoning, the client should still be thoroughly interviewed regarding any medical services received to date. If it appears to the attorney that malpractice might have transpired, the attorney would be well advised to send the client to board certified specialists for the purposes of flushing out possible medical malpractice. If the consulting specialist(s) then that determines there is a reasonable possibility of malpractice, the attorney will not only have knowledge that there is a viable claim for malpractice, but an expert witness to support the claim. Most importantly, the attorney will be able to document the point in time at which the client became aware of the existence of a claim and will be in a good position to refute defense contentions that the statute began to run at an earlier date.

206. *See supra* Part II.A for a discussion on the filing of the notice of intent which will toll the statute for an additional ninety days.

15, 1995, a client consulted a chiropractor for back pain and that the chiropractor diagnosed his condition as "sciatica."²⁰⁷ Unbeknownst to the client, this diagnosis was erroneous and the client's back pain was actually due to a benign tumor which the chiropractor failed to diagnose even though a simple x-ray would have revealed the tumor. Assume that the client had no reason to know of the misdiagnosis until December 30, 1995, when she was informed by a specialist of the tumor which now required surgery due to the delay in diagnosing it. Assume further that surgery was then performed to remove the tumor on January 15, 1996, but on the day following the surgery, the client learned that the surgeon left a sponge in the client's body which, in turn, caused immediate complications.

Under *Tanner*, the statute of limitations would not have started to run on the client's misdiagnosis claim against the chiropractor until December 30, 1995. That was the day the client learned that his back pain was due to an undiagnosed tumor rather than sciatica and that because the tumor had gone undiagnosed, surgery was required. In other words, on December 30, 1995, the client became aware of his injury and of a reasonable possibility that the injury was caused by medical malpractice.²⁰⁸ However, the injury resulting from the sponge in the client's body is a different matter. This injury was of a nature, standing alone, as the *Tanner* court put it, "that it communicates the

207. Defined as "[p]ain in the lower back and hip radiating down the back of the thigh into the leg, initially attributed to sciatic nerve dysfunction." See *STEDMAN'S MEDICAL DICTIONARY* 1580 (26th ed. 1995).

208. See *Tanner*, 618 So. 2d at 180. See also *Higgs v. Florida Dept. of Corrections*, 654 So. 2d 624, 626-27 (1st Dist. Ct. App. 1995). In *Higgs*, the First District Court of Appeal applied the *Tanner* rule to a claim for malpractice based on misdiagnosis and observed:

There has been some confusion concerning what constitutes discovery of the incident under the statute. In *Barron v. Shapiro*, 565 So. 2d 1319 (Fla. 1990), the supreme court reaffirmed a principle originally stated in *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976), that the "limitation period commences when the plaintiff should have known *either* of the injury *or* the negligent act." That interpretation of *Nardone*, however, could lead to some unjust results. In *Tanner*, the supreme court further clarified the *Nardone* rule, and held that "the knowledge of the injury as referred to in the [Nardone] rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice."

Higgs, 654 So. 2d at 626-27 (quoting *Tanner v. Hartog*, 618 So. 2d. 177 (Fla. 1993) (footnotes and citations omitted)). The *Higgs* court added that "[i]t, thus, appears that the position of this court is that a misdiagnosis will constitute evidence that a plaintiff did not have knowledge that the injury was caused by negligence until the plaintiff received a correct diagnosis." *Id.* at 627.

possibility of medical negligence, in which event the statute of limitations will immediately begin to run upon discovery of the injury itself.”²⁰⁹

No matter how promising a claim for medical malpractice might be, all will be lost if the claim is dismissed for failure to meet the requirements of the applicable statute of limitations. In most civil litigation this simply means that the plaintiff must file the complaint before the limitations period expires. However, in the arena of medical malpractice it means something more. Section 766.106(4) of the *Florida Statutes* provides in pertinent part that “[t]he notice of intent to initiate litigation shall be served within the time limits set forth in [section] 95.11.”²¹⁰ Therefore, the plaintiff must not only have his complaint on file before the statute runs but also must serve the notice of intent prior to the running of the statute.²¹¹ Compliance with presuit notice requirements is a condition precedent to filing a complaint and failure to comply with the notice requirements within the limitations period justifies dismissal of the complaint with prejudice even if the complaint was otherwise timely filed.²¹² Therefore, attorneys should serve the notice of intent and the accompanying corroborating opinion prior to filing the complaint.

We now turn to the critical question of under what circumstances does the two-year statute of limitations apply to a claim. That question will be addressed through an exploration and analysis of relevant statutory and case law.

B. *Survey and Legal Analysis of Statutory and Case Law*

Under section 95.11(4)(b) of the *Florida Statutes*, there is a two-part test for determining whether an action for medical malpractice exists and thus, whether that claim is subject to the two-year statute of limitations of section 95.11(4)(b): 1) whether the action arises out of “medical . . . diagnosis, treatment, or care;” and 2) whether such diagnosis, treatment, or care was rendered by a “provider of health care.”²¹³ Two relatively recent supreme

209. *Tanner*, 618 So. 2d at 181–82.

210. FLA. STAT. § 766.106(4) (1997).

211. *Tanner*, 618 So. 2d at 181.

212. *See Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991); *Lynn v. Miller*, 498 So. 2d 1011 (Fla. 2d Dist. Ct. App. 1986).

213. *See* FLA. STAT. § 95.11(4)(b) (1997). *See also supra* text accompanying note 6. It should be noted that a cause of action against one who is not a health care provider would fall within the ambit of medical malpractice if the defendant is in privity with a health care provider who has rendered tortious medical diagnosis, treatment, or care. § 95.11(4)(b). Thus, the two-year statute of limitations and presuit requirements would also be applicable to claims against the non-health care provider in privity with a health care provider. § 95.11(4)(b).

court decisions, *Silva v. Southwest Florida Blood Bank*²¹⁴ and *Kelley v. Rice*²¹⁵ make it clear that both prongs of the test must be met before a claim may properly be considered as one for medical malpractice for purposes of the two-year statute of limitations set forth in section 95.11(4)(b) of the *Florida Statutes*.²¹⁶

C. What Constitutes an "Action for Medical Malpractice" for Purposes of the Statute of Limitations?

In *Silva v. Southwest Florida Blood Bank, Inc.*,²¹⁷ the plaintiff sued a blood bank for supplying HIV tainted blood for transfusions administered to his wife while she was in the hospital.²¹⁸ Plaintiff's wife subsequently contracted the HIV virus and died of AIDS as a result of the transfusion.²¹⁹ The blood bank argued that the suit was one sounding in medical malpractice and that it was therefore subject to the two-year statute of limitations, which had already expired.²²⁰ The Supreme Court of Florida disagreed.²²¹ First, the court concluded that under the plain and unambiguous language of section 95.11(4)(b) of the *Florida Statutes*, the blood bank had not rendered diagnosis, treatment, or care of plaintiff's decedent.²²² That is to say, the blood bank had not engaged in ascertaining the decedent's "medical condition through examination and testing" (diagnosis),²²³ "prescribing and administering a course of action to affect a cure" (treatment),²²⁴ or "meeting the patient's daily needs during the illness" (care).²²⁵ Indeed, the court noted

214. 601 So. 2d 1184 (Fla. 1992).

215. 670 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1996).

216. See *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184 (Fla. 1992); *Kelley v. Rice*, 670 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1996).

217. *Silva*, 601 So. 2d at 1184 (Fla. 1992).

218. *Id.* at 1186.

219. *Id.*

220. *Id.* at 1187-89.

221. *Id.* at 1189.

222. *Silva*, 601 So. 2d at 1189.

223. *Id.* at 1187.

224. *Id.*

225. *Id.* The *Silva* court also utilized alternative definitions for the terms diagnosis, treatment, or care, borrowing from Webster's Third International Dictionary (1981), which defines "diagnosis" as "the art or act of identifying a disease from its signs and symptoms," "treatment" as "the action or manner of treating a patient medically or surgically," and "care" as "to provide for or attend to needs or perform necessary personal services . . ." *Id.* (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1981)). The *Silva* court further stated that in medical terms, "diagnosis" means "[t]he determination of the nature of a disease;" "treatment" means "[m]edical or surgical management of a patient;" and "care" means "the application of knowledge to the

that the blood bank had not dealt with the recipient patient at all and, in reality, was nothing more than a supplier of a product.²²⁶ As such, the claim against the blood bank fell outside the definition of an action for medical malpractice under section 95.11(4)(b) and hence was not subject to section 95.11(4)(b)'s two-year limitations period.²²⁷ This section of the *Silva* court's opinion was clear, understandable, and well-reasoned.

Another recent case, *Kelley v. Rice*,²²⁸ underscores the distinction for statute of limitations purposes between claims based upon ordinary negligence and claims for medical negligence.²²⁹ In *Kelley*, the plaintiff was a former inmate of the Pinellas County Jail.²³⁰ She alleged that on June 14, 1990, she was taken into custody by the Pinellas County Sheriff, Everitt Rice, after having received emergency treatment for a leg laceration at a local hospital.²³¹ Kelley set forth two separate counts of negligence against Sheriff Rice in her complaint.²³² In Count I, Kelley alleged that Rice was vicariously liable for the medical negligence of his agent, ARA Health Services, Incorporated ("ARA").²³³ Kelley alleged that ARA and Rice had a joint venture agreement whereby ARA was to provide medical services to inmates of the jail and that ARA was negligent in its diagnosis, treatment, and care of the condition from which Kelley was suffering, to wit, infection and necrotizing fasciitis,²³⁴ resulting in injury to inmate Kelley.²³⁵

The gravamen of Count II of Kelley's complaint was that, at all material times, the plaintiff was in custody of the defendant Sheriff Rice.²³⁶ Kelley alleged that her detention was such that she was unable to care for her own well-being relative to the need for medical care and that her ability to obtain medical care was at the sole discretion of her custodian, Sheriff Rice.²³⁷ Kelley further alleged in Count II that Rice had a duty to use reasonable care in providing her access to necessary medical care, but he breached this duty

benefit of . . . [an] individual." *Silva*, 601 So. 2d at 1187 (quoting *STEDMAN'S MEDICAL DICTIONARY* 428 (25th ed. 1990)).

226. *Id.*

227. *Id.* at 1188–89; FLA. STAT. § 95.11(4)(b) (1997); *see also* *Community Blood Ctrs. of S. Fla., Inc. v. Damiano*, 697 So. 2d 948, 949–50 (Fla. 4th Dist. Ct. App. 1997) (holding that a blood bank was not a health care provider for purposes of the Medical Malpractice Reform Act).

228. 670 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1996).

229. *Id.* at 1095.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Kelley*, 670 So. 2d at 1095.

234. Defined as tissue death such as that associated with group A streptococcus infection.

See *STEDMAN'S MEDICAL DICTIONARY* 632 (26th ed. 1996).

235. *Kelley*, 670 So. 2d at 1095.

236. *Id.*

237. *Id.*

by keeping her detained, thus denying her the opportunity to receive such care.²³⁸ The trial court granted the defendant's motion to dismiss the complaint on the ground that her claims were barred by the statute of limitations governing medical malpractice.²³⁹ The Second District Court of Appeal affirmed in part and reversed in part, holding that while Count I of Kelley's complaint was clearly a claim for medical malpractice which had not been timely filed within the two-year statutory period, Count II was based upon a breach of Defendant Rice's custodial duties and was consequently subject to the four-year statute of limitations applying to claims of ordinary negligence, which had not yet expired.²⁴⁰ The *Kelley* court reasoned as follows:

[w]e conclude that paragraphs sixteen through eighteen, twenty-one and twenty-two C. allege facts that sufficiently bring into question appellee Rice's proper performance of his custodial obligations to appellant outside of any vicarious obligations arising from the medical care he contracted to be provided by ARA. In the performance of his custodial duties, appellee was not necessarily providing "diagnosis, treatment, or care" as contemplated by the medical malpractice statute of limitations, section 95.11(4)(b). We further conclude that under the reasoning of *Silva*, the essential allegations of appellant's Count II relating to appellee's alleged simple negligence do not bring appellee within the two-pronged test of the medical malpractice statute of limitations. Those allegations of Count II do not seek relief from appellee as a "health care provider," nor do they seek relief from injuries that arise out of appellee's medical, dental or surgical diagnosis, treatment or care.²⁴¹

238. *Id.*

239. *Id.*; see FLA. STAT. § 95.11(4)(b) (1997).

240. *Kelley*, 670 So. 2d at 1096-97.

241. *Id.* at 1096-97 (citing *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184 (Fla. 1992)). The *Kelley* court noted that it found the reasoning of its prior decision in *NME Properties, Inc. v. McCullough*, 590 So. 2d 439, 440 (Fla. 2d Dist. Ct. App. 1991) controlling. *Kelley*, 670 So. 2d at 1097. In *NME Properties*, the court made the following distinction:

[a]lthough a nursing home is not itself a health care provider for purposes of section 766.102, it may be vicariously liable under that higher standard of care for the acts of some of its agents or employees. For example, East Manor probably employs nurses who are licensed under chapter 464. Under *respondeat superior*, East Manor may be liable under the higher professional standard of care when its agent, who is actively involved in the incident, is a health care provider rendering medical care or service. On the other hand,

The teaching of decisions like *Silva* and *Kelley* is that although injury may occur in a medical setting, a health care provider may nevertheless wear two different hats: one being that of a health care provider who has rendered negligent diagnosis, treatment, or care; the other being that of one who happens to be a health care provider, but who has breached a duty to exercise reasonable care independent of his duty to render diagnosis, treatment, or care in accordance with the applicable medical standard of care.²⁴² Of course, if there are distinct and severable claims, as was the case in *Kelley*, each claim can be pursued with the medical standard of care applying to one and an ordinary negligence standard applying to the other.²⁴³ Ultimately, the complaint will either be tested by a defense motion to dismiss one or both claims, or the plaintiff may have to make an election at trial and present proof in accordance with the appropriate legal standard.²⁴⁴

For example, very recently in *Lynn v. Mount Sinai Medical Center, Inc.*,²⁴⁵ the Third District Court of Appeal held that a hospital's mislabeling of a urine sample used to screen for drugs did not constitute medical malpractice for purposes of section 95.11(4)(b).²⁴⁶ The court noted that the labeling of a urine sample under a detailed collection protocol supplied by Dade County did not constitute the rendering of "medical diagnosis, treatment, or care."²⁴⁷ The *Lynn* court reasoned as follows:

East Manor may be liable under an ordinary negligence standard of care when other nonprofessional employees commit alleged negligence, or when an incident does not involve medical care.

McCullough, 590 So. 2d at 441.

242. See generally FLA. STAT. § 766.102 (1997).

243. See *Kelley*, 670 So. 2d at 1095.

244. In *Feifer v. Galen of Fla., Inc.*, 685 So. 2d 882 (Fla. 2d Dist. Ct. App. 1996), the court made the following admonition:

[w]e would caution plaintiffs in those actions where they allege that a medical care provider has committed an act of ordinary negligence that they will not be allowed, in presenting their case, to slide back and forth between the standards of care and proof required to show ordinary negligence as opposed to medical negligence.

Id. at 885. This pronouncement strongly suggests that plaintiffs will have to elect between two inconsistent theories and that plaintiffs will not be permitted to attribute the knowledge and skill that a health care provider should have in assessing whether the defendant breached his duty under ordinary negligence standards. The problem with proceeding on two different theories arising out of the same identical set of facts is that the jury would have to apply two diametrically opposed standards of care. This would hopelessly blur the distinction between ordinary negligence and medical negligence and render absurd results under Florida's Medical Malpractice Reform Act.

245. 92 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1997).

246. *Id.* at 1002; see FLA. STAT. § 95.11(4)(b) (1997).

247. *Lynn*, 692 So. 2d at 1004.

Merely because a wrongful act occurs in a medical setting does not necessarily mean that it involves medical malpractice. The wrongful act must be directly related to the improper application of medical services, and the use of professional judgment or skill.²⁴⁸

Mt. Sinai did not engage in any medical skill or judgment by collecting and shipping out urine specimens to an independent laboratory, because it only functioned as an intermediary following the strict guidelines set by the County. Moreover, Mt. Sinai did not even test the samples they collected. Additionally, a “diagnosis” under the statute [§ 95.11(4)(b)] is interpreted as “ascertaining a patient’s medical condition through examination and testing, prescribing and administering a course of action to effect a cure, and meeting the patient’s daily needs during the illness.” This applies to patients submitting to tests in order to diagnose illnesses. By contrast, the urine samples were not analyzed at all, but only screened for drugs as per the hospitals agreement with the county.

Consequently, as no professional skill or judgment was performed by Mt. Sinai, the collection of the urine sample was not a medical service as defined by the statute . . . Therefore, the liability of the hospital stems from a breach of the duty of ordinary care in not following the protocol required by Dade County.²⁴⁹

The *Lynn* court’s reasoning is sound. The court noted that in *Silva*, the supreme court defined “diagnosis” to mean “ascertaining a patient’s medical condition through examination and testing.”²⁵⁰ The court noted that Mt. Sinai collected Ms. Lynn’s urine and then capped, labeled, and sealed the specimen.²⁵¹ In merely collecting the samples and sending them off to an independent laboratory for testing, Mt. Sinai performed no diagnosis, treatment, or care under section 95.11(4)(b) or *Silva*.²⁵² However, using this rationale, if Mt. Sinai had performed the test on the sample of urine it collected from the plaintiff and made an error in analyzing it, which then led to her loss of employment, the claim should clearly be deemed one for medical malpractice. Testing and analyzing urine for the presence of drugs is

248. *Id.* at 1003.

249. *Id.* at 1004 (citations and parentheticals omitted).

250. *Id.* (quoting *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1187 (Fla. 1992)).

251. *Id.* at 1003.

252. *Id.* at 1004; see *Silva*, 601 So. 2d at 1184 (Fla. 1992); see also FLA. STAT. § 95.11(4)(b) (1997).

a diagnostic process in that its end goal is the ascertainment of the testee's condition.

J.B. v. Sacred Heart Hospital,²⁵³ which was discussed in Part II of this article in reference to the applicability of presuit requirements, also provides an excellent example of a claim which falls outside the ambit of a claim for medical malpractice for purposes of the medical malpractice statute of limitations.²⁵⁴ In *J.B.*, it was alleged that a hospital requested the plaintiff to transport his brother, a patient of the hospital, to another medical facility.²⁵⁵ Unknown to the plaintiff, his brother had AIDS, and the hospital failed to warn the plaintiff that if he came into contact with his brother's open wounds he could become HIV positive.²⁵⁶ The plaintiff's hands, which had cuts on them, then came into contact with his brother's wound and consequently, the plaintiff became HIV positive.²⁵⁷ The *J.B.* court addressed, inter alia, the issue of whether the two year statute of limitations for medical malpractice set forth in section 95.11(4)(b) barred the plaintiff's claim for negligence against the hospital.²⁵⁸ The court began its analysis by noting that, to be subject to section 95.11(4)(b), a claim must constitute "an action for medical malpractice."²⁵⁹ The court then took note of the definition of an action for medical malpractice set forth in section 95.11(4)(b), which provides: "[a]n 'action for medical malpractice' is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care."²⁶⁰

The "key inquiry" for the court was whether the plaintiff's action "ar[ose] out of any medical, dental, or surgical diagnosis, treatment, or care."²⁶¹ Noting that it had recently addressed the issue of whether a suit constituted medical malpractice for statute of limitations purposes in *Silva*, the *J.B.* court reiterated the definition of the terms "diagnosis," "treatment," and "care" that it had articulated in *Silva*.²⁶²

First, there is no ambiguity to clarify in the words "diagnosis," "treatment," or "care," and we find that these words should be

253. 635 So. 2d 945 (Fla. 1994).

254. *Id.* at 946.

255. *Id.*

256. *Id.*

257. *Id.* at 947

258. *J.B.*, 635 So. 2d at 946.

259. *Id.* at 947 (citing FLA. STAT. § 95.11(4)(b) (1997)).

260. *Id.* (quoting FLA. STAT. § 95.11(4)(b) (1997)).

261. *Id.*

262. *Id.* at 948 (citing *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1184 (Fla. 1992)).

accorded their plain and unambiguous meaning. In ordinary, common parlance, the average person would understand “diagnosis, treatment, or care” to mean ascertaining a patient’s medical condition through examination and testing, prescribing and administering a course of action to effect a cure, and meeting the patient’s daily needs during the illness. This parallels the dictionary definitions of those terms. According to *Webster’s Third International Dictionary* (1981) “diagnosis” means “the art or act of identifying a disease from its signs or symptoms.” “Treatment” means “the action or manner of treating a patient medically or surgically.” “Care” means “provide for or attend to needs or perform necessary personal services” Likewise, in medical terms, “diagnosis” means “[t]he determination of the nature of a disease.” “Treatment” means “[m]edical or surgical management of a patient.” And “care” means “the application of knowledge to the benefit of . . . [an] individual.”²⁶³

Finding *Silva* to be “dispositive,” the *J.B.* court held that just as the blood bank in *Silva* had rendered no diagnosis, treatment, or care to the plaintiffs there, Sacred Heart Hospital had rendered no diagnosis, treatment, or care to *J.B.*, who was the injured party in the case before it.²⁶⁴

The *J.B.* decision places an important limitation on the definition of diagnosis, treatment, or care. After all, in the broad sense, the injury in *J.B.* did arise out of the treatment, diagnosis, and care of *someone*. However, that “someone” was *J.B.*’s brother, who was the hospital’s patient, not *J.B.* The hospital diagnosed *J.B.*’s brother’s condition to the extent it had ascertained that he had the condition of AIDS and determined that he would need to be sent to another hospital. Sacred Heart treated *J.B.*’s brother by dressing and putting a heparin lock on his wounds.²⁶⁵ Arguably, Sacred Heart was engaged in care even in the very process of transferring *J.B.*’s brother to another hospital. The hospital gave *J.B.* instructions on how to handle the heparin lock covering his brother’s infectious wounds,²⁶⁶ and in a sense, it made *J.B.* its proxy for the rendering of care. Arguably, but for the diagnosis, treatment, and/or care rendered by the hospital to *J.B.*’s brother, *J.B.* would not have been in a car in close contact with his brother during the transfer. Nevertheless, the crux of the *J.B.* holding is that the hospital had simply not rendered diagnosis, treatment, or care to *J.B.*²⁶⁷ Therefore, *J.B.*’s

263. See *J.B.*, 635 So. 2d at 948 (quoting *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1187 (Fla. 1992)) (citations omitted).

264. *Id.*

265. *Id.* at 946.

266. *Id.* at 947.

267. *Id.* at 948.

claim was not “an action for medical malpractice” that would be barred under section 95.11(4)(b).²⁶⁸

One of the most interesting legal aspects of the *J.B.* decision is that it also addressed the issue of whether *J.B.*'s claim was a “claim for medical malpractice” for purposes of whether the presuit notice requirements of section 766.106 of the *Florida Statutes* applied to *J.B.*'s claim.²⁶⁹ In so doing, the court utilized not the definition of “an action for medical malpractice” set forth in section 95.11(4)(b),²⁷⁰ but the definition of “a claim for medical malpractice” embodied in section 766.106(1)(a).²⁷¹ The latter section defines “a claim for medical malpractice” as “a claim arising out of the rendering of, or the failure to render, medical care or services.”²⁷² The *J.B.* court's resolution of this issue was perfunctory. As noted earlier, in Part II of this article, the court observed that the complaint did not allege that Sacred Heart Hospital was negligent in any way in the rendering of, or the failure to render, medical care, or services.²⁷³ Accordingly, the court went on to conclude that “the complaint does not state a medical malpractice claim for chapter 766 purposes, and the notice and presuit screening requirements are inapplicable.”²⁷⁴

In light of *J.B.*, several questions come to mind. First, is there any difference between an “action” for medical malpractice as per the section 95.11(4)(b)²⁷⁵ definition, and a “claim” for medical malpractice, the term used in the section 766.106(1)(a)²⁷⁶ definition? Although there is a legal distinction between the two terms, it does not appear to be a material one. Is there any reason for this subtle terminology? Generally, an “action” in its usual legal sense means a “lawsuit brought in court” wherein one or more claims can be asserted, while a claim is one particular “cause of action” alleged in an action.²⁷⁷ While a claim is then a subset of an action in which potentially there could be many claims asserted, there is nothing in the legislative history of section 95.11(4)(b) and 766.106(1)(a) or the case law to explain why (if indeed there was any reason) the legislature chose to phrase the respective definitions as it did.

268. *J.B.*, 635 So. 2d at 947; see FLA. STAT. § 95.11(4)(b) (1997).

269. *J.B.*, 635 So. 2d at 948–49.

270. FLA. STAT. § 95.11(4)(b)(1997). See *supra* text accompanying note 6.

271. *J.B.*, 635 So. 2d at 948 (citing FLA. STAT. § 766.106(1)(a) (1997)).

272. *Id.* (quoting FLA. STAT. § 766.106(1)(a) (1997)). See *supra* Part II.A for a comprehensive discussion of this definition and its application.

273. *Id.*

274. *Id.* at 949. See § 766.106(1)(a).

275. See FLA. STAT. § 95.11(4)(b). See *supra* text accompanying note 6.

276. See *id.* § 766.106(1)(a).

277. BLACK'S LAW DICTIONARY 28, 247 (6th ed. 1990).

Second, assuming for purposes of a comparative discussion, the terms “claim” and “action” are synonymous, there is no apparent reason why a claim for medical malpractice under section 766.106(1)(a) should be defined in different terms than it is under section 95.11(4)(b). The question is, if a claim arises out of “the rendering of, or failure to render medical care or services,”²⁷⁸ does it arise out of “medical, dental, or surgical diagnosis, treatment, or care by any provider of health care?”²⁷⁹ While at times, the answer to this question would surely have to be “yes,”²⁸⁰ this question has never been addressed, no less definitively resolved. Under section 95.11(4)(b), it appears that a claim for malpractice cannot arise out of negligent diagnosis, treatment, or care of one who is *not* a health care provider.²⁸¹ Thus, under the holding of *Lynn*, for purposes of section 766.106’s presuit provisions, the negligence of a radiographic technician (who was clearly not a health care provide under any chapter 766 definition) can serve as the predicate of a claim for medical malpractice against the hospital for whom he worked.²⁸² However, for purposes of section 95.11(4)(b), the medical malpractice statute of limitations, a claim based upon the technician’s negligence might not be considered an action for medical malpractice because the action did not arise out of the negligent diagnosis, treatment, or care of a “health care provider” as mandated by the section 95.11(4)(b) definition.²⁸³ Is there any rational basis for a distinction whereby a claim could be characterized as one for “medical malpractice” for purposes of presuit requirements, but not for statute of limitations purposes? Not in this writer’s view. To add to the confusion, we know that under both subsections (sections 95.11(4)(b) and 766.106(1)(b)), neither presuit requirements nor the malpractice statute of limitations apply unless the claim is against a “health care provider” (or in the case of presuit, one who is vicariously liable for the acts of a “health care provider”). Yet, as will become apparent in the following subsection of this article, the definition of “health care provider” is radically different for purposes of determining whether presuit requirements apply than it is in cases where the issue is whether the medical malpractice statute of limitations applies. Indeed, we shall see that there is currently nothing to indicate, either in the *Florida Statutes*, the underlying legislative history, or the case law precisely who

278. See FLA. STAT. § 766.106(a)(1).

279. See FLA. STAT. § 95.11(4)(b). See *supra* text accompanying note 6.

280. For example, when a physician negligently misdiagnosis a patient resulting in injury to the patient, “diagnosis” is clearly a type of “medical service.”

281. See FLA. STAT. § 95.11(4)(b) (1997). See *supra* text accompanying note 6.

282. *Lynn v. Mount Sinai Med. Ctr., Inc.*, 629 So. 2d 1002, 1003 (Fla. 3d Dist. Ct. App. 1997).

283. FLA. STAT. § 95.11(4)(b). See *supra* text accompanying note 6.

and/or what is considered to be a health care provider for purposes of section 95.11(4)(b).

One thing we can glean from the case law is that unless a claim arises out of negligence in the exercise of professional judgment and skill it will not be considered one for medical malpractice either within the meaning of section 766.106(1)(a) or 95.11(4)(b).²⁸⁴ Still, the fact that practitioners may, at times, be able to clearly identify when a claim is *not* a claim for medical malpractice does not alleviate the need to know when a claim *is* one for medical malpractice. Under section 95.11(4)(b) and *Silva*, before a claim is subject to the medical malpractice statute of limitations it must satisfy a two prong test: 1) it must arise out of “medical diagnosis, treatment, or care;” and 2) “whether such diagnosis, treatment, or care was rendered by a ‘provider of health care.’”²⁸⁵ Accordingly, we shall now turn to the subject of the second prong of the test, to wit, what is the meaning of the term “health care provider” for purposes of section 95.11(4)(b) of the *Florida Statutes*?

D. *Who is a “Health Care Provider” for Purposes of the Medical Malpractice Statute of Limitations?*

Although the *Silva* court deemed the finding that the blood bank had not rendered medical diagnosis, treatment, or care to the plaintiff to be dispositive, it seized the opportunity to address and reject the blood bank’s contention that it was a “provider of health care” within the meaning of section 95.11(4)(b).²⁸⁶ The defendant argued that it was a health care provider because section 768.50(2)(b) expressly characterized blood banks as such.²⁸⁷ However, the court concluded that the blood bank was not a “health care provider,” reasoning that the plaintiffs’ claim was not governed by the Act or the accompanying two-year statute of limitations.²⁸⁸ Instead, the court held, the four-year statute governing claims for ordinary negligence applied.²⁸⁹

What is most interesting is that in *Silva*, the Supreme Court of Florida had eschewed the section 768.50(2)(b) definition of “health care provider,” that it embraced in *Weinstock* two years later, noting that section 768.50(2)(b) pertained only to collateral sources of indemnity and had been

284. See §§ 95.11(4)(b), 766.106.

285. *Silva v. Southwest Fla. Blood Bank Inc.*, 601 So. 2d 1184, 1186 (Fla. 1992); FLA. STAT. § 95.11(4)(b).

286. *Silva*, 601 So. 2d at 1188.

287. *Id.*

288. *Id.*

289. *Id.* (citing FLA. STAT. § 95.11(3)(a) (1989)).

repealed in 1986.²⁹⁰ The *Silva* court held that for purposes of whether an action is governed by the section 95.11(4)(b) statute of limitations for claims of medical malpractice, the legislature could not have intended the section 768.50(2)(b) definition of health care provider to apply because that section did not exist when section 95.11(4)(b) was promulgated.²⁹¹

How, if at all, can the holdings of *Silva* and *Weinstock*, neither of which has been disapproved by the court, be reconciled? Reading between the lines, the answer, while somewhat cryptic, if not totally anomalous, would appear to be that, for purposes of the issue of whether a claim is subject to the presuit requirements of the Act, the section 768.50(2)(b) definition of health care provider is still relevant, while for purposes of whether the two-year statute of limitations for medical malpractice of section 95.11(4)(b) applies, the section 768.50(2)(b) is inapplicable.²⁹² The only thing that emerges as clear is that both the statutory scheme and the court's interpretation of it are sadly in need of legislative overhaul and clarification. While telling us the section 768.50(2)(b) is inapposite in the determination of who is a "health care provider" for purposes of section 95.11(4)(b), *Silva* gives us no clue whatsoever as to what section of the Act to look to or what the legislature (or indeed the *Silva* court itself) meant when it required that in order for section 95.11(4)(b) to apply, the diagnosis, treatment, or care be rendered by a "provider of health care."²⁹³ We only know that one may not look to the section 768.50(2)(b) definition in order to determine whether a given defendant is a health care provider for statute of limitations purposes.

It is true, as *Silva* points out, that section 768.50(2)(b) had been repealed and originally dealt with collateral sources, a topic not germane to the issues of health care providers or the rendering of diagnosis, treatment, or care.²⁹⁴ However, the *Weinstock* court noted that section 768.50(2)(b) had survived to the extent that it supplied the definition of health care provider for purposes of section 766.102(1), a section which sets forth the applicable medical standard of care as it pertains to health care providers.²⁹⁵ Thus, the *Silva* court's rejection of section 768.50(2)(b) as a source of the definition of health care provider for purposes of the medical malpractice statute of limitations seems illogical and ill-conceived.²⁹⁶ Therefore, as Justice Grimes

290. *Id.* at 1188–99.

291. *Silva*, 601 So. 2d at 1189.

292. *Id.*; see also *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993).

293. See FLA. STAT. § 95.11(4)(b); see also *Silva*, 601 So. 2d at 1188.

294. *Silva*, 601 So. 2d at 1189.

295. *Weinstock v. Groth*, 629 So. 2d 835, 836 (Fla. 1993) (citing FLA. STAT. §§ 766.102(1) (1997), 768.50(2)(b) (1997)).

296. As pointed out in the preface to the official 1989 *Florida Statutes*: specific cross-references to a statute are unaffected by later repeal of that statute. *Preface to the Florida Statutes*, FLA. STAT. (1997). See also *Silva*, 601 So. 2d at 1189 (Grimes, J., dissenting).

pointed out in his dissent in *Silva*, “[t]he fact that section 768.50 was repealed in 1986 does not invalidate the reference to that statute because as noted by the 1989 statutory reviser to section 766.102 ‘generally a specific cross-reference is unaffected by subsequent amendments to or repeal of the statute.’”²⁹⁷ This point is particularly compelling in light of the fact that no section of the Act is as intimately involved with the subject of medical malpractice claims against health care providers as section 766.102(1), which in turn, expressly incorporates the section 768.50(2)(b) definition of that term.

Since the supreme court has not modified, clarified, amplified, or overruled *Silva* since it was decided in 1992, practitioners are left with very little guidance in resolving the vital issue of whether their clients’ claims are against health care providers for purposes of whether section 95.11(4)(b) applies to those claims. The best one can do is to look to other definitions of health care provider set forth in various sections of chapter 766.²⁹⁸ However, undeniably, those sections bear no more relevancy to this issue of who is a health care provider for statute of limitations purposes than section 768.50(2)(b), which the *Silva* court noted deals with collateral sources of indemnity.²⁹⁹ In fact, the section 768.50(2)(b) definition is far more relevant to the issue of the rendering of diagnosis, treatment, or care by health care providers because its definition of health care provider is expressly incorporated into section 766.102(1) which sets forth the medical standard of care for *health care providers* and uses the term “health care provider(s)” fully five times in one short paragraph.³⁰⁰ The one thing that the *Silva* decision does share in common with *Weinstock* is the view that statutes restricting access to the courts (which a statute of limitations obviously qualifies as) must be strictly construed so as not to deprive litigants of their causes of action.³⁰¹ Aside from that commonality, however, the two decisions are inconsistent and hopelessly irreconcilable at the present time. In this writer’s opinion, the time for change is now.

297. *Silva*, 601 So. 2d at 1190 (Grimes, J., dissenting).

298. See *supra* text accompanying notes 105–08.

299. *Silva*, 601 So. 2d at 1189.

300. See generally FLA. STAT. § 766.102 (1997).

301. See *Silva*, 601 So. 2d at 1187. See also *Baskerville Donovan Eng’rs, Inc. v. Pensacola Executive House Condominium Ass’n, Inc.*, 581 So. 2d 1301 (Fla. 1991). The *Baskerville* court stated, “[w]here a statute of limitations shortens the existing period of time the statute is generally construed strictly, and where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time.” *Id.* at 1303.

IV. RECOMMENDATIONS AND SUGGESTIONS: CLARITY, CONSISTENCY, AND CONFORMITY

From the foregoing, it will come as no surprise that the law relating to the applicability of presuit requirements and to the medical malpractice statute of limitations needs to be reformed. The key elements for which the Florida Legislature and/or courts should strive are clarity, consistency, and conformity. The good news is that this can be achieved with a modicum of thought and effort.

First, in the area of presuit, the legislature should clearly define exactly what it means by the term "prospective defendants" in section 766.106(2) of the *Florida Statutes*.³⁰² If the term is intended to be synonymous with "health care provider" as *Weinstock* suggests,³⁰³ the legislature should clearly state as much. Furthermore, the legislature could precisely define the term(s) "prospective defendant" and/or "health care provider" in the body of section 766.102(2). The Florida Legislature did take the trouble to state under what circumstances the claimant must notify, by certified mail, the Department of Business and Professional Regulation of his intent to initiate litigation.³⁰⁴ Therefore, there is no good reason why the legislature could not specifically identify the precise individuals and/or entities who are entitled to presuit notice under 766.106(2) in claims for medical malpractice. This would obviate the need for courts to speculate or to jump from one subsection of chapter 766 (none of which relate to presuit), to another in the vain hope of determining who the legislature was referring to when it used the term "prospective defendant" in section 766.106(2).

Second, the legislature and/or Supreme Court of Florida should clarify the meaning of the phrase, "the rendering of, or the failure to render, medical care or services."³⁰⁵ If that term is intended to mean instances where medical skill and judgment is required, the legislature should not only say so, but to the extent possible, define what types of negligence fall within the sphere of medical skill and judgment and what types do not, perhaps even setting forth

302. FLA. STAT. § 766.106(2).

303. *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993).

304. Section 766.106(2) of the Florida Statutes provides:

After completion of presuit pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant and, if any prospective defendant is a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466, the Department of Business and Professional Regulation by certified mail, return receipt requested, of intent to initiate litigation for malpractice.

Id.

305. FLA. STAT. § 766.106(1)(a).

examples. The distinction between an obstetric patient who slips on amniotic fluid while getting off a treatment table³⁰⁶ versus a frail and elderly patient who slips and falls in a hospital corridor due to a failure to provide a wheelchair, handrails, or supervisory attendants³⁰⁷ is tenuous at best. The writer does not believe that the case law interpreting the term “the rendering of, or the failure to render, medical care or services”³⁰⁸ to mean instances where the conduct in question fell below the standard of care set forth in section 766.102³⁰⁹ is logical or practical. The threshold question here should be, did the act or omission resulting in injury to the claimant constitute a lapse in professional/medical skill and judgment or only a lapse in the ordinary care any layman would be duty-bound to exercise in the same or similar circumstances. Only then, for purposes of determining liability, not coverage, does it make sense to inquire further whether the rendering or failure to render medical care or services fell below what reasonably prudent professionals would deem acceptable or appropriate in such a circumstance.³¹⁰ The definition of “an action for medical malpractice” set forth in section 95.11(4)(b)³¹¹ is more precise and workable than the more general definition of a “claim for medical malpractice” set forth in section 766.106(1)(a)³¹² because it pinpoints the three specific areas out of which culpability for medical malpractice can have its genesis (i.e. “diagnosis,” “treatment,” and “care”).

Furthermore, the Supreme Court of Florida has at least defined those terms with a reasonable degree of precision, thereby facilitating their application.³¹³ Why not synchronize the two definitions by making the section 766.106(1)(a) definition identical to the definition set forth in section 95.11(4)(b)? This would go a long way toward fostering clarity, consistency, and conformity in the statutory scheme.

Third, concerning the issue of what constitutes “an action for medical malpractice” for purposes of section 95.11(4)(b), the scope of the language “by any provider of health care” following the language “medical, dental or surgical diagnosis, treatment, or care . . .”³¹⁴ is undefined and unclear. If a

306. See *Neilinger v. Baptist Hosp. of Miami, Inc.*, 460 So. 2d 564, 565 (Fla. 3d Dist. Ct. App. 1984) (holding defendant’s conduct gave rise to a claim for medical malpractice).

307. See *Feifer v. Galen of Fla, Inc.*, 685 So. 2d 882, 838 (Fla. 2d Dist. Ct. App. 1996) (holding defendant’s conduct give rise to a claim sounding solely in ordinary negligence).

308. FLA. STAT. § 766.106(1)(a) (1997).

309. FLA. STAT. § 766.102.

310. *Id.*

311. FLA. STAT. § 95.11(4)(b) (1997).

312. *Id.* § 766.106(1)(a).

313. *Silva v. Florida Blood Bank*, 601 So. 2d 1184, 1187 (Fla. 1992) (borrowing from the medical definitions of “diagnosis” “treatment” and “care”).

314. See FLA. STAT. § 95.11(4)(b).

non-health care provider, like the employee/technician in *Lynn*,³¹⁵ is negligent, then on one hand, it could be argued that neither the resultant suit against the technician or against the hospital is “an action for medical malpractice” within the meaning of section 95.11(4)(b) because the culpable acts were not committed by a “health care provider,” nor in that instance, would either of the claims be against one who is vicariously liable for the acts of a health care provider. On the other hand, it is axiomatic in tort law that the acts of the employee or agent are deemed to be the acts of the employer or principal respectively.³¹⁶ Therefore, one could argue that the claim against the hospital indeed arose out of medical treatment by a health care provider, to wit, the hospital, because the culpable acts of the hospital’s employee in the rendering of treatment are tantamount to the acts of the hospital. The potential confusion could be eliminated if 95.11(4)(b) were to clearly state whether or not the acts and omissions of an employee non-health care provider in rendering diagnosis, treatment, or care are deemed to be the acts and omissions of the health care provider employer or principal for purposes of section 95.11(4)(b).

Finally, it is the utter lack of any definition of the term “health care provider” as it is used in section 95.11(4)(b) that is most troubling, particularly in view of how *Silva* handled this issue and the conflicting manner in which the court has defined the term “health care provider” for purposes of section 766.106(2) and section 95.11(4)(b) respectively. In *Weinstock*, the court expressly stated that for purposes of presuit, the term “health care provider” means those individuals and entities listed as health care providers under section 768.50(2)(b),³¹⁷ while in *Silva* the court expressly rejected section 768.50(2)(b) as a source of the definition of health care provider for purposes of 95.11(4)(b), the medical malpractice statute of limitations.³¹⁸ Not only does this seem arbitrary and inexplicably inconsistent, but there remains a big gap in the fabric of section 95.11(4)(b), because although the supreme court has told us which subsections *cannot* be used to define the term “health care provider” for purposes of section 95.11(4)(b),³¹⁹ we are left clueless as to what that term means. This problem could easily be solved if the legislature (preferably right in section 95.11(4)(b)) or the court, simply told us exactly who is a health care provider for purposes of section 95.11(4)(b). Furthermore, there is no apparent reason

315. *Lynn v. Mount Sinai Med. Ctr., Inc.*, 629 So. 2d 1002, 1003 (Fla. 3d Dist. Ct. App. 1997).

316. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, 499–501 (5th ed. 1984).

317. See *Weinstock v. Groth*, 629 So. 2d 835, 836 (Fla. 1993). See also *supra* text accompanying note 108.

318. *Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1189 (Fla. 1992).

319. *Id.*

why the definition of health care provider should be any different for purposes of who is entitled to presuit notice under section 766.106(2) from the definition of health care provider for purposes of section 95.11(4)(b). Again, clarity, consistency, and conformity are the keys to a statutory scheme which would be more comprehensible and easier to apply.

In the meantime, it is recommended that attorneys who have made a determination regarding the status of their clients' claims file a lawsuit as early on as possible. If, for example, an attorney concludes as best he or she can that a given claim is for ordinary negligence, he should try to have at least a bare-bones complaint on file well within the date the client discovered or should have discovered the claim.³²⁰ That way, in the event the attorney's assessment may have been wrong, this would, in all likelihood, be flushed out by a responsive pleading seeking dismissal for failure to satisfy presuit requirements. Then, even if the motion is granted, there will still be time to prepare, serve, and file a notice of intent and accompanying corroborating opinion. Indeed, as long as the two-year statute has not run, the plaintiff can obtain an automatic extension in order to buy time and conduct the required presuit investigation and also, as discussed earlier, enjoy the benefit of the automatic ninety-day tolling period that engages upon service of the notice of intent.

V. CONCLUSION

One can only hope that the Florida Legislature and/or the courts resolve the vagarite and inconsistencies brought to light in this article. Until then, practitioners must wander into that "labyrinth" of the Medical Malpractice Reform Act and the medical malpractice statute of limitations and do their best to avoid the "minotaurs" and "ugly treasors" lurking therein.³²¹ Badly needed revision and clarification in the areas of coverage and the malpractice statute of limitations by the legislature and/or the courts will result in a clear and consistent set of rules and guidelines for practitioners and their clients to rely upon and will greatly serve the ends of justice in the arena of medical malpractice.

320. *Tanner v. Hartog*, 618 So. 2d 177, 181 (Fla. 1993).

321. See John A. Grant, *Florida's Presuit Requirements for Medical Malpractice Actions*, 68 FLA. B.J. 12, 12 (Feb. 1994).

Protecting the Ties that Bind: Kinship Relative Care in Florida

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I. BACKGROUND

In the past two years a proliferation of grandparent support groups, loosely called the "Grandparents Raising Grandchildren Coalition,"¹ has sprung up across Florida. They receive support from national organizations such as the AARP Grandparent Information Center in Washington, D. C. and the Grandparent Caregiver Law Center in New York City. Their mission is fueled by a common plight, i.e., the unexpected and often burdensome responsibility of raising yet another generation of children.² Theirs is a common agenda: the desire to do more for these grandchildren so that they will escape the dangers of drug abuse, teenage pregnancy, HIV/AIDS, and

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1. Leslie Casimir, *Coalition Wants to Help Struggling Grandparents*, MIAMI HERALD, Oct. 30, 1997, (Neighbors) at 9.

2. Jill Duerf Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, THE FUTURE OF CHILDREN, Spring 1998, at 72, 73.

criminal involvement that beset the children's parents.³ Estimates are that nearly four million children nationally,⁴ 231,000 in Florida,⁵ live with their grandparents. High poverty rates, a retirement population, and ethnic cultural values that put a premium on keeping children with kin make Florida a hot spot for the "grandparents raising grandchildren" phenomenon.⁶ Forty-four percent of these relative caretakers are raising children due to parental drug abuse, twenty-eight percent due to child abuse or abandonment, and twenty-eight percent due to teen pregnancy.⁷ Many live on fixed incomes and suffer extreme financial hardship in meeting the needs of these children.⁸ Some are at the brink of relinquishing them to state custody.⁹

Among these grandparents is Eartha Walker of Miami, who is raising a family of fourteen children (down from sixteen a year ago) from three sets of families.¹⁰ Two of the children are Ms. Walker's great-grandchildren, the children of her incarcerated granddaughter.¹¹ Four are the children of her deceased daughter, the victim of a drug deal gone bad.¹² One of the grandchildren has emotional problems and has attempted suicide four times.¹³ Another is mentally handicapped.¹⁴ "Walker raises them on a combination of Social Security, WAGES benefits, and food stamps — not enough to make ends meet. She gets subsidized child care, but transportation to and from the childcare center costs [her] \$120 a month."¹⁵ The \$800 she spends each month on groceries is \$230 more than her monthly food stamp allotment.¹⁶ Ms. Walker says she used to go out into the fields to

3. River Ginchild & Melinda Perez-Porter, *State Initiatives Slowly Respond to Kinship Care*, 30 CLEARINGHOUSE REV. 521, 521-23 (1996); see Laurie Hansen and Irene Opsahl, *Kinship Caregiving: Law and Policy*, 30 CLEARINGHOUSE REV. 481, 482-83 (1996).

4. Faith Mullen, *Welcome to Procrustes' House: Welfare Reform and Grandparents Raising Grandchildren*, 30 CLEARINGHOUSE REV. 511, 511 (1996) (citing U.S. BUREAU OF THE CENSUS, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1994 (1994) (Series No. P.20-44)).

5. Christina Zawisza, *Help These Grandparents Raise 231,000 Florida Children*, THE MIAMI HERALD, Apr. 20, 1998, at 9A.

6. *Id.*

7. John Barry, *Granny As Nanny*, THE MIAMI HERALD, Aug. 3, 1997, at 1A.

8. Zawisza, *supra* note 5, at 9A.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Zawisza, *supra* note 5, at 9A.

14. *Id.*

15. *Id.*

16. *Id.*

pick vegetables, but her health will no longer allow her to do so.¹⁷ She must rely on food pantries and free food distribution centers to feed her family.¹⁸ She negotiates extended payment plans for her telephone and electric bills, and yet somehow she copes.¹⁹

The unexpected and rapid growth of the population of relative care givers, exemplified by Ms. Walker, has created a huge new client base of heads of households needing expert legal advice and assistance in order to maneuver a myriad of legal custodial options, sources of financial assistance, and eligibility for support services.²⁰ Yet because this population group has crept up on the Florida Legislature, straight paths to each family's receipt of assistance are elusive. Florida has a hodge podge of legal provisions favoring grandparents and other relatives. Most recent of these is the 1998 legislation, which created a funded Relative Caregiver Program for children temporarily placed with relatives through the juvenile courts.²¹ But Florida lacks a cohesive and continuous framework of laws related to relative care givers and a consistent set of principles guiding policy.

This article will discuss the child welfare framework in which the "Granny as Nanny" phenomenon has arisen, both through social policy and the law. The goals of protection, family preservation and support, and permanence guiding these policies will be emphasized. Next, this article will explore beneficial ways in which other state laws have responded to assist relative care givers. Finally, it will analyze Florida law and suggest needed improvements to provide the necessary consistent framework.

II. THE PLACE OF KINSHIP CARE IN CHILD WELFARE POLICY

Kinship care is defined as "[a]ny form of residential caregiving provided to children by kin, whether full-time or part-time, temporary or permanent, and whether initiated by private family agreement or under the custodial supervision of a state child welfare agency."²² "Relatives have no legal obligation to become children's care-givers," but choose to do so either voluntarily or at the request of the state child welfare agency or juvenile court.²³ A 1998 Florida study revealed that approximately 8126 children under the protective supervision of Florida's child welfare agency, the

17. *Id.*

18. *Zawisza, supra* note 5, at 9A.

19. *Id.*

20. Hanson & Opsahl, *supra* note 3, at 486-501.

21. Relative Caregiver Program, ch. 98-403, § 70, 1998 Fla. Laws 2114, 2182 (codified as amended at FLA. STAT. § 39.5085 (Supp. 1998)).

22. Marianne Takas, *Kinship Care and Family Preservation: Options for States in Legal and Policy Development*, ABA Center on Children and the Law, Sept. 1994, at 3.

23. Berrick, *supra* note 2, at 73.

Department of Children and Families, were living with a relative.²⁴ Unknown numbers live with relatives under informal arrangements.

In the past ten years, child welfare systems have increasingly come to depend on the placement of dependent children²⁵ with relatives because of the inability of the public systems to absorb the numbers of children needing care outside the home of their birth parents.²⁶ This toll on the child welfare system comes both from a shrinking supply of foster homes and an escalating demand for out-of-home care. Factors such as the growth of single parent households, the number of women employed outside the home, increasing divorce rates, and the rising costs of child rearing, contribute to the decline of available foster homes.²⁷ At the same time, the entrance of more infants and young children into the foster care system, due to factors such as crack cocaine²⁸ and other substance abuse, HIV/AIDS, homicide related to domestic violence, incarceration of one or both parents, or mental illness has swollen its ranks.²⁹

The child welfare system has three major goals: protection for children, family preservation and support, and assuring permanent homes for children.³⁰ Kinship care is being used around the country as a means to achieve each of these goals, with varying degrees of success.³¹

The primary goal of the child welfare system is to “*protect children from harm at the hands of their parents or other caregivers.*”³² This goal allows a state to intervene in family life and remove children from their homes despite the parents’ right to family integrity.³³ For years, child welfare workers and judges have been ambivalent about achieving the goal of child protection by placing children with relatives. They believed that these relatives would simply perpetuate the maltreatment that the parent

24. FLORIDA DEP’T OF CHILDREN & FAMILIES, “ISSUES RELATED TO KINSHIP CARE” A REPORT TO THE FLORIDA LEGISLATURE, 3 (Jan. 1998).

25. In Florida, dependent children are defined as those who have been found by the court to be abused, abandoned, or neglected. FLA. STAT. § 39.01(11)(a) (1997).

26. James P. Gleeson, *Kinship Care as a Child Welfare Service: The Policy Debate in an Era of Welfare Reform*, 75 CHILD WELFARE 419, 419–20 (1996).

27. Berrick, *supra* note 2, at 74.

28. *Id.*

29. Beatrice Yorker et al., *Results of a Home-Based Intervention Study*, JUV. & FAM. CT. J. 15, 16 (1998).

30. Berrick, *supra* note 2, at 73.

31. *Id.* at 73. See Mark E. Courtney, *Kinship Foster Care and Children’s Welfare: The California Experience* (unpublished manuscript, on file with the *Nova Law Review*); see also Marla Gottlieb Zwas, Note, *Kinship Foster Care: A Relatively Permanent Solution*, 20 FORDHAM URB. L.J. 343 (1993).

32. Berrick, *supra* note 2, at 77.

33. *Santosky v. Kramer*, 455 U. S. 745 (1982).

grew up with, fostering a cycle of dependency.³⁴ This thinking, however, has been replaced in recent years by a recognition that these extended families are a way to “protect the ties that bind.”³⁵ An increased focus on family strengths rather than deficits through improved, family centered, community based service technology that has demonstrated results is largely responsible for this shift in attitude.³⁶

Recent research studies have demonstrated that relatives typically do provide safe and nurturing environments for children equal to those provided by licensed, non-kin foster homes.³⁷ Relatives, however, need supports, resources, and training to be able to successfully care for these children.³⁸ The emotional rewards experienced by relatives caring for children are “accompanied by personal sacrifice, concern about safety of the neighborhoods,” and “competing demands of other family members.”³⁹ They need services such as child care, respite care, parenting programs, financial assistance, legal counseling, job counseling, drug addiction education, and health care.⁴⁰ Most relatives find the availability of such services to be inadequate.⁴¹

The second goal of the child welfare system, family preservation and support, also appears to be enhanced through relative care giving. Historically, both in this country and around the world, extended families have served as a resource during times of family distress.⁴² This has been particularly true in the African-American, Hispanic, and Haitian communities which are so heavily represented in Florida.⁴³ Kinship foster care “provides continuity, lessens the trauma of [family] separation, preserves family ties, and offers growth and development within the context of a child’s culture and community.”⁴⁴ Again, however, improvement is needed in the types of services and supports that help make kinship care a positive experience for the child, the care giver, and the other family members.⁴⁵

34. Berrick, *supra* note 2, at 77.

35. *Id.* at 80.

36. *Id.*

37. *Id.* at 79–80.

38. *Id.*

39. Yorker, *supra* note 29, at 15, 17.

40. *Id.*

41. *Id.*

42. *See id.*

43. Barry, *supra* note 7, at 1A.

44. Charlene Ingram, *Kinship Care: From Last Resort to First Choice*, 75 CHILD WELFARE 550, 552 (1996).

45. Berrick, *supra* note 2, at 81. *See also* Julia Danzy & Sondra M. Jackson, *Family Preservation and Support Services: A Missed Opportunity for Kinship Care*, 76 CHILD WELFARE 31 (1997).

The third goal of the child welfare system is permanence for the child. Movement from placement to placement is unsettling to children. Multiple placements are associated with disruptive behavior in children and with poor life outcomes.⁴⁶ Research has shown that children in kinship care have more stable placements and are reunited with their natural families just as frequently as children placed in regular foster care.⁴⁷ But while children's personal relationships with relative care givers are fairly secure, their legal relationships are not. They are more likely to grow up in informal custody relationships or temporary custody than in legal guardian or adoptive relationships, the preferred permanency options.⁴⁸ This is due primarily to public policy decisions, federal and state, which encourage financial assistance in temporary situations but not in more permanent arrangements.⁴⁹ The tension between a child welfare policy that favors permanency, and a fiscal policy that favors short-term, low level support, creates the greatest ambivalence in kinship care policy to date.⁵⁰

III. THE EFFECT OF FEDERAL SUBSTANTIVE LAW IN PROMOTING KINSHIP RELATIVE CARE

The child welfare system goals of protection for children, family preservation and support, and permanence have been fostered by federal legislation. The first federal law to endorse the family preservation and support goal of the child welfare system was the 1978 Indian Child Welfare Act,⁵¹ which requires that Native American children be placed in the least restrictive setting within reasonable proximity to their homes, taking into account their special needs.⁵² This law also mandates that preference be given to extended family members when securing a placement for a Native American child in foster care or a preadoption.⁵³

The Indian Child Welfare Act is limited to a specific population of children. The Adoption Assistance and Child Welfare Act of 1980 ("AACWA"),⁵⁴ the federal blueprint for today's child welfare system,

46. Berrick, *supra* note 2, at 72, 81.

47. *Id.*

48. *Id.* at 82.

49. *Id.* at 81–84.

50. *Id.*; see Courtney, *supra* note 31, at 46.

51. 25 U.S.C. §§ 1901–03 (1994).

52. *Id.* § 1915(b).

53. *Id.*

54. 42 U.S.C. §§ 620–27, 670–75 (1991). The AACWA is contained within the Social Security Act, Subchapter IV, which contains five Titles. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42

applies to all children and supplies the details for implementing the goals of protection, family preservation and support, and permanence.⁵⁵ Under the AACWA, the protection goal is to be achieved by creating, in each state, a continuum of child welfare and foster care services and by requiring case plans and case reviews for all dependent children.⁵⁶ Permanence is to be achieved by requiring case reviews by a judge or administrative body to take place no less frequently than once every six months.⁵⁷ These mechanisms are used to determine the continued necessity for, and appropriateness of, out-of-home placement and the extent to which circumstances requiring out-of-home care are alleviated.⁵⁸ The law also requires dispositional hearings no later than eighteen months after placement,⁵⁹ and provides funds for adoption assistance.⁶⁰

The family preservation and support goal is to be achieved through the case plan and case review procedures cited above which provide services to families to correct their identified deficiencies. It is also achieved by requiring that children removed from birth families be "plac[ed] in the least restrictive[,] most family like . . . setting available in close proximity to the parents' home, consistent with the best interests and special needs of the child."⁶¹ The original AACWA does not specifically mention kinship relative placements in carrying out these goals.

It has been argued that the AACWA's emphasis on providing substantial federal dollars for foster care maintenance through Title IV-E of the Act served as a disincentive to preserve and support families.⁶² In 1993 the Act was amended to intensify the family preservation and support goal.⁶³ Congress appropriated one billion dollars to states through a grant program to encourage the development of family centered, community based services to support and preserve families.⁶⁴ These services include: 1) programs designed to return children to their natural families or to be placed for adoption; 2) preplacement preventative services such as intensive

U.S.C.). Title IV-B deals with child welfare services and Title IV-E deals with foster care maintenance and services. 42 U.S.C. §§ 620-27, 670-75 (1991).

55. 42 U.S.C. §§ 620-27, 670-75 (1991).

56. *Id.* §§ 625, 671-72, 675.

57. *Id.* § 675(5).

58. *Id.*

59. *Id.*

60. 42 U.S.C. § 673.

61. *Id.* § 675(5)(a).

62. *Id.* § 672. United States General Accounting Office, *Foster Care: Services to Prevent Out-of-Home Placements Are Limited by Funding Barriers*, GAO-HRD 93-76 (1993).

63. Marc Katz, *New Legislation Pours \$1 Billion into Family Preservation*, 8 YOUTH L. NEWS, Sept.-Oct. 1993, at 8.

64. *Id.*

family preservation; 3) follow up care to a family to whom a child has been returned; 4) respite care to provide temporary relief for care givers; 5) services designed to improve parenting skills; and 6) community based services to promote child well being.⁶⁵ There is no restriction on the availability of these services to relative care givers.

In 1996, the United States Congress for the first time made explicit a recognition that kinship care serves both permanence and family preservation and support goals.⁶⁶ To be eligible for federal Title IV-E foster care maintenance funds, Congress ordered states to consider giving preference to an adult relative over a nonrelative care giver.⁶⁷ Still assuring the child protection goal, the 1996 amendment requires the relative to meet all relevant state child protection standards.⁶⁸

The AACWA was again amended in 1997 through the Adoption and Safe Families Act to strengthen the goals of protection, family preservation and support, and permanence.⁶⁹ Now, in order to implement the protection goal, the child's health and safety is to take precedence over family reunification.⁷⁰ But the family preservation and support program is extended with additional appropriations for five more years.⁷¹ Permanence is to be achieved by requiring a dispositional hearing within twelve months rather than the previous eighteen, by prescribing certain conditions under which termination of parental rights petitions must be filed, and by creating additional adoption incentives.⁷² These incentives include payment of adoption expenses and monthly adoption subsidies.⁷³ The 1997 amendments do not change the preference for relative placements, nor preclude relatives from taking advantage of the adoption incentives. On the other hand, no explicit financial incentives are provided to relatives to encourage them to assume the care of dependent children, contrary to the result were they to adopt.⁷⁴

65. 42 U.S.C. § 629(1)(A)–(E) (1993).

66. 42 U.S.C. § 671(a)(19) (Supp. 1996).

67. *Id.*

68. *Id.*

69. 42 U.S.C. § 671 (1997).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* §§ 671, 673.

74. Berrick, *supra* note 2, at 82. In certain ethnic communities, there is a cultural norm that does not favor adoption because it goes against the grain of "being there" for the extended family members. *Id.*

IV. THE EFFECT OF FEDERAL FISCAL LAW IN PROMOTING KINSHIP RELATIVE CARE

The two main sources of federal maintenance support for relatives caring for dependent children have been Aid to Families with Dependent Children ("AFDC") and foster care maintenance payments under Title IV-E.⁷⁵ Prior to 1996, AFDC provided a monthly stipend to any relative home (within certain required degrees of consanguinity) in which a parent was absent or had abandoned the child.⁷⁶ Both the care giver and the dependent child were considered members of the AFDC assistance unit and received financial assistance.⁷⁷ The relative could alternatively apply for a maintenance payment through Title IV-E, which required foster care licensing.⁷⁸

Landmark welfare reform legislation enacted in 1996 changed the ability of the care giver to be included in the AFDC grant, ended any entitlement to services, and imposed a host of new hurdles to overcome.⁷⁹ AFDC was replaced with Temporary Assistance to Needy Families ("TANF") under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").⁸⁰ Time limits and work requirements were imposed upon any adult who wished to accept welfare assistance.⁸¹ The only alternative for relative care givers now is a "child-only" category of assistance, at a substantially reduced benefit level.⁸² This supports children in assistance units in which the care giver is ineligible for benefits or chooses not to request them.⁸³ Under TANF, the only alternative for relative care givers now is a "child-only" category of assistance, at a substantially reduced benefit level. The child-only category supports children in assistance units in which the care giver is ineligible for benefits or chooses not to request them. Because many already poor care giver relatives are unable to partake of work requirements due to age, health, or the number of children in their care, their households have suffered a substantial loss of monthly income. The ill-fitting TANF requirements were

75. Other sources include Medicaid, which provides health insurance for very low income children, and Supplemental Security Income (SSI), which provides additional support for children who are disabled or medically impaired.

76. 42 U.S.C. § 606 (1991).

77. *Id.*

78. 42 U.S.C. § 672 (c) (1991).

79. 42 U.S.C. § 672 (Supp. 1996).

80. *Id.* § 601.

81. *Id.* § 615.

82. *Id.*

83. 42 U.S.C. §§ 607, 608 (1991) (stating that child only cases in Florida are limited to a maximum of \$180 per month in assistance).

never designed for the vast cadre of impoverished grandparents caring for another generation of children.⁸⁴ Fiscal policy under TANF does not consider the critical role relative care givers have assumed in caring for children who would otherwise end up in foster care and thus discourages relative care giving. Thus, fiscal policy under TANF conflicts with the provisions of the AACWA.

Currently, the only other major source of financial assistance for relative care givers is foster care maintenance payments under Title IV-E.⁸⁵ Under PRWORA, the child's eligibility for such assistance is based on 1996 AFDC eligibility rules: 1) the child was eligible for AFDC benefits before placement into foster care; 2) a state or county agency has placement responsibility for the child; and 3) the foster home meets state licensing standards.⁸⁶

In 1979, the United States Supreme Court ruled in *Miller v. Youakim*⁸⁷ that the State of Illinois could not exclude relative care givers from foster care maintenance stipends.⁸⁸ The Court held that Congress never meant to differentiate among neglected children based on their relationship to their foster parents and noted that an exclusionary policy against relatives conflicted with congressional intent to provide the best available care to children.⁸⁹ Some relatives have chosen to become licensed foster parents to take advantage of *Miller*. Many others, however, have custody through informal arrangements not involving the state child welfare agency. Many cannot meet the stringent space requirements necessary for state licensing, or are unable or unwilling to participate in intensive foster parent training not designed to address issues pertaining to kin.⁹⁰ Thus for them, foster parent licensing, in order to obtain the financial assistance necessary to sustain these children's needs, is not a viable option.

Unlike AFDC, Title IV-E's foster care maintenance program survived 1996 federal welfare reform intact as an uncapped federal entitlement.⁹¹ That occurrence provided states with incentives to shift expenditures for relative custodians from AFDC to Title IV-E at a higher federal reimbursement rate, particularly where states had created funded kinship relative care giving programs.⁹² Not coincidentally, the 1996 amendments to the AACWA requiring states to give preference to an adult relative over a

84. Mullen, *supra* note 4, at 511-12.

85. See 42 U.S.C.A. § 672 (West Supp. 1998).

86. *Id.* § 608(a).

87. 440 U.S. 125 (1979).

88. *Id.* at 146.

89. *Id.* at 138-39.

90. See, e.g., FLA. ADMIN. CODE ANN. r. 65C-13.011 (1997).

91. 42 U.S.C.A. § 672 (West Supp. 1998).

92. *Id.*

nonrelative when determining a placement for a child, were contained within the same congressional act, PRWORA.⁹³ This enables an interpretation that Congress intended Title IV-E funds to be used to enforce the relative preference. Legal disincentives to making such a shift, however, include the requirement of foster care licensing, the need for child welfare agency oversight in each case, and state matching dollar mandates.⁹⁴

Some states, however, have found their way around these impediments through creative applications for federal waivers of regulatory requirements.⁹⁵ In June of 1996, the Children's Bureau of the Administration for Children, Youth and Families in the Department of Health and Human Services, granted ten waivers to states to conduct demonstration projects to test out innovations in service delivery and financing strategies using Title IV-E dollars.⁹⁶ Several states have used their waivers to support relative care givers.⁹⁷ California, for example, subsidizes relatives who are willing to assume legal guardianship for children over thirteen who are in stable placements, and for whom reunification or adoption is not feasible.⁹⁸ They receive payments up to the foster care basic payment rate. Delaware does the same, without an age requirement.⁹⁹ Maryland serves this population without regard to age but limits benefits to \$300 per month.¹⁰⁰ Illinois provides payments ranging from \$343 to \$415 per month, regardless of age.¹⁰¹

These innovative state projects are certainly laudable. However, the best means at the federal level to assure the goals of protection, family preservation and support, and permanence, while recognizing the vastly

93. Rob Geen and Shelley Waters, *The Impact of Welfare Reform on Child Welfare Financing*, NEW FEDERALISM: ISSUES AND OPTIONS FOR STATES (The Urban Institute, Washington, D.C.), Series A, No. A-16, Nov. 1997, at 1.

94. *Id.* at 4-5. It has been estimated that Florida stands to gain an increase of \$195 per month per child if this shift were made. The shift, however, requires the appropriation of general revenue matching dollars that are not already committed to match another federal program. *Id.* at 6. Title IV-E provides to Florida approximately 57% of foster care room and board costs, 50% for DCF staff and administrative costs, and 75% for training foster and adoptive parents. UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: GREEN BOOK, 454-55 (1996).

95. Lorrie L. Lutz, *An Overview of the Title IV-E Waivers*, 1 CHILDREN'S VANGUARD (Child Welfare League of America, Gettysburg, Pa.) Feb., 1998 at 1 (stating that the states are: California, Delaware, Illinois, Indiana, Maryland, Michigan, New York, North Carolina, Ohio, and Oregon).

96. *Id.*

97. *Id.* at 3-5.

98. *Id.* at 3.

99. *Id.*

100. Lutz, *supra* note 95, at 4.

101. *Id.*

changed composition of households in which dependent children are successfully being raised, is for Congress to enforce the relative placement preference with specific authorization to the states to use Title IV-E funds to establish relative care giver financial assistance programs. The prohibitive restrictions regarding foster care licensing and case specific child welfare agency oversight would also have to be eased to make this a viable option for relatives.

V. WAYS OTHER STATES SUPPORT KINSHIP RELATIVE CARE GIVERS

Supporting kinship relative care givers through the use of Title IV-E waivers is a relatively new policy development. Some states have operated kinship relative care giver programs by statute for years, most through qualifying relatives as licensed foster parents. In New York, prompted by litigation in *Eugene F. v. Gross*,¹⁰² relative care givers receive the same financial assistance and services as foster parents, but children remain in the legal custody of the child welfare agency.¹⁰³ Foster care licensing requirements have been reduced for these care givers, and they do not need to meet the same physical space and size requirements pertaining to foster parents.¹⁰⁴ In addition, relatives can receive emergency approval within twenty-four hours to receive a child, thus avoiding the child's trauma of removal to the home of strangers.¹⁰⁵

In the wake of *Miller*, Illinois extended full foster care benefits to relative care givers regardless of their licensing status or Title IV-E eligibility in the early 1980's.¹⁰⁶ But in the early 1990's, faced by the largest increase in foster care caseloads in the country, Illinois sought to reduce its administrative costs for operating these programs.¹⁰⁷ By administrative rule, Illinois created a new permanency option called Delegated Relative Authority ("DRA") in 1995.¹⁰⁸ A child with DRA status continues in the legal custody of the child welfare agency and retains eligibility for medical care and foster care board payments, but casework services and administration are reduced to the minimum necessary to maintain Title IV-E eligibility.¹⁰⁹ Illinois also succeeded in encouraging twenty-one percent of

102. No. 86-1125 (N. Y. Sup. Ct. filed Feb. 23, 1990).

103. Zwas, *supra* note 31, at 357.

104. *Id.*

105. *Id.*

106. *Miller v. Youakim*, 440 U.S. 125 (1979).

107. *Id.*

108. Mark F. Testa et al., *Permanency Planning Options for Children in Formal Kinship Care*, 75 CHILD WELFARE 451, 466 (Sept.-Oct. 1996).

109. *Id.* at 459.

its relative care givers to adopt the children in their custody through the subsidized adoption program.¹¹⁰

Dissatisfied that its relative care giver program did not yet sufficiently address the permanency goal of the child welfare system,¹¹¹ Illinois further refined the program through its federal waiver application in 1996.¹¹² It created a subsidized guardianship option which terminates state custody for children who have been in care for at least two years, have been in their current home for at least one year, and for whom adoption or reunification with parents within one year is unlikely.¹¹³ By statute, also in 1996, Illinois' child welfare agency was authorized to create an informational pamphlet for relative care givers to inform them about their legal options, benefits and services available, and the location of support groups and resources.¹¹⁴

California, with the largest substitute care population of any state, has adopted legislation to promote greater permanency for children placed with relatives by establishing year long-term kinship care pilot projects in five counties.¹¹⁵ Children in these pilots receive the same monthly foster care board rate as other children, but their dependency cases in juvenile court are dismissed, and they are freed from ongoing court hearings and supervision by the child welfare agency.¹¹⁶

Following the example of large states such as New York, Illinois, and California, other states have added funded kinship relative care programs to their arsenal of permanency options for foster children. In 1995, Arkansas created a funded kinship foster care program which provides the full foster care board rate to relatives who have successfully completed an investigation to ascertain criminal history and personal qualifications.¹¹⁷ Arkansas does not require relatives to meet foster care licensing requirements, but maintains the child in the custody of its child welfare agency.¹¹⁸ Oklahoma adopted identical statutory language in 1996.¹¹⁹ Nebraska, in contrast, bypassed state custody and passed legislation in 1997 which provided funds to guardians for maintenance costs, medical and surgical expenses, and other

110. *Id.* at 462.

111. *Id.* at 468.

112. *HHS Approves Child Protection Waiver for Illinois*, HHS NEWS (U.S. Dept. Of Health and Human Services, Washington, D.C.) Sept. 18, 1996 at 1.

113. *Id.*

114. 20 ILL. COMP. STAT. 505/34.11 (West 1996).

115. CAL. WELF. & INST. CODE § 11465.5 (Deering 1994 & Supp. 1997).

116. *Id.*

117. ARK. CODE ANN. § 9-28-501 (Michie 1998).

118. *Id.* § 9-28-503.

119. OKLA. STAT. ANN. tit. 10, § 7004-1.5 (West 1996).

incidentals for any child who has been a ward of the state and for whom the guardianship would not be possible without financial aid.¹²⁰

Missouri created a "Grandparents as Foster Parents Program" in 1997 for grandparents who are fifty-five years of age or older, the legal guardian of a grandchild placed in the grandparent's custody, and who participate in parent skills training, foster parent training, childhood immunizations, and other health screenings.¹²¹ Missouri grandparents must meet a needs test in order to receive reimbursement at the current foster care rate.¹²² Minnesota has established a somewhat limited program. It authorizes placement of a child in the permanent physical custody of the relative and provides a monthly relative custody assistance payment for relatives whose incomes do not exceed 200% of the poverty level, as long as the child is either a member of a sibling group placed together or has a physical, mental, emotional, or behavioral disability that requires financial support.¹²³

Wisconsin has taken a different approach to supporting kinship relative care givers, recognizing that relatives who raise children under informal arrangements are often just as needy of services and financial assistance as are relatives who raise children under child welfare agency supervision.¹²⁴ In 1995, Wisconsin created a kinship care program that provides payments of \$215 per month to relatives who apply through the child welfare agency, regardless of legal status.¹²⁵ The agency is required to determine that: 1) there is a need for the child to be placed with the kinship care relative; 2) it is in the best interest of the child to be so placed; 3) the child meets dependency criteria or is at risk of meeting dependency criteria; and 4) the relative passes criminal background checks.¹²⁶ Strikingly, the child need only be at risk of dependency, but does not have to be under any juvenile court scrutiny.¹²⁷ The child welfare agency must review the child's placement at least once a year to determine whether the above conditions still exist.¹²⁸

In 1997, Wisconsin enhanced its permanency options by creating the Long-Term Kinship Care Program,¹²⁹ which reduced its administrative costs.¹³⁰ For relatives who obtain legal guardianship of a child, payments of

120. NEB. REV. STAT. § 43-284.02 (1998).

121. MO. ANN. STAT. § 208.029 (Supp. 1998).

122. *Id.*

123. MINN. STAT. § 257.85 (1998).

124. *See* WIS. STAT. ANN. § 48.57(3) (West 1998).

125. *Id.* § 48.57(3m)(am).

126. *Id.* § 48.57(3m)(am)1,2,4,4m.

127. *Id.* § 48.57(3m)(am)2.

128. *Id.* § 48.57(d).

129. WIS. STAT. § 48.57(3n) (West 1998).

130. *Id.*

\$215 per month continue, but the child welfare agency is no longer required to conduct an annual review of the child's circumstances, other than to assure that the child is still living in the home, has not yet turned eighteen, the guardianship has not terminated, or similar factors.¹³¹

In addition to supporting relatives through financial assistance and concrete services, some states have provided special supports to encourage relatives in thinking through various legal options and connecting with community support services. Such efforts further reduce state expenditures on caseworkers, court time, supervision, financial disbursement, reporting functions, and overhead. Oregon operates Project Connect, which advises relatives about permanency options, assists in family decision making, provides ambivalence counseling to encourage guardianship or adoption, and expands support services for care givers.¹³² The Pennsylvania Department of Public Welfare together with the Philadelphia Society for Services to Children operates the "Kids 'n' Kin" Program.¹³³ This program assists family members to access necessary services and entitlements and to make decisions about permanent custody or adoption through the provision of home-based social work intervention services, home-based family therapy, and legal advocacy and representation.¹³⁴ In 1997, the Philadelphia program diverted ninety-four percent of its clients from the foster care system, secured a permanent plan for eighty-eight percent of the children living with relative care givers, returned six percent of children to biological parents, and closed seventy-seven percent of the children's child welfare agency cases.¹³⁵

The efforts of these states illustrate a growing national recognition that the phenomenon of children being raised by relatives is here to stay and that public policy must respond. Although there are advantages and disadvantages to the various state options chosen, all have in common a recognition that financial assistance and support services provided to relatives are essential to forestall greater numbers of children entering the foster care system. Some states now have sufficient experience to know that legal custody retained in the public agency thwarts the goal of permanence. These states secure greater permanence through creative encouragement of guardianships or adoptions, thus benefiting the child while also saving public dollars.

131. *Id.* § 48.57(5r)-(6).

132. Oregon's State Office for Services to Children and Families, *Kinship Care* (last modified May 1998) <<http://www.scf.hr.state.or.us/kinshipcare.htm>>.

133. KIDS 'N' KIN PROGRAMS (Phila. Soc'y for Servs. to Children, Phila., Pa.), 1998, at 1.

134. *Id.*

135. *Id.*

VI. FLORIDA'S CHOICES TO SUPPORT KINSHIP RELATIVE CARE

Florida law supporting kinship relative care has developed piecemeal beginning in 1978, and does not exhibit a cohesive policy framework.¹³⁶ Whether the legislature, prior to 1998, was cognizant of this new phenomenon of "grandparents raising grandchildren" or that kinship relative care giver placements meet the child welfare system's goals of child protection, family preservation and support, and permanence¹³⁷ is not ascertainable through legislative intent language.

The first major effort to address kinship care giver custody occurred in 1993 when the legislature gave the circuit court general jurisdiction to award temporary legal custody to an extended family member.¹³⁸ This statute applies only when the child's parents consent.¹³⁹ If a relative wishes to claim that the parent is unfit, the case must be resolved in juvenile court.¹⁴⁰ This statute recognizes that many children are well cared for by extended family members.¹⁴¹ But these relatives need a legal document that explains and defines their relationship to the child, to consent to care provided to the child by third parties, and to obtain the child's medical, educational, and other records.¹⁴² No financial support, however, is available to relatives who hold custody of a child under these provisions.

Apart from the above circuit court family law procedures, a more common venue for relative care givers to obtain custody of a child is through

136. The first prominent legislative effort to respond to the growing grandparent movement occurred in 1990 and addressed kinship care in the context of visitation rights. FLA. STAT. § 752.01 (Supp. 1990). It established the right of grandparents to petition for visitation of children when their parents were deceased, when the parents divorced, when the child was deserted by the parent, or when the child was born out of wedlock. *Id.* This statute was amended in 1993 to include situations where the natural parents are married to each other but have used their parental authority to prohibit a relationship between the child and the grandparents. FLA. STAT. § 752.01(1)(e) (1993).

137. JUNE M. MICKENS & DEBRA R. BAKER, ABA CENTER ON CHILDREN AND THE LAW, MAKING GOOD DECISIONS ABOUT KINSHIP CARE 2 (1997). The general hierarchy of permanency options recognized in the literature in order of least to most permanent are: 1) informal arrangements with no custodial provision; 2) informal arrangements with power of attorney; 3) informal arrangements with permission to consent to medical treatment; 4) court ordered emergency placement in the home of a relative under protective supervision; 5) court ordered temporary legal custody to a relative; 6) long-term relative custody; 7) legal guardianship; and 8) adoption. *Id.*

138. FLA. STAT. §§ 751.01(1)–(2) (1997).

139. *Id.* § 751.03(8).

140. *Id.* § 751.05(3).

141. *Id.* § 751.01(3).

142. *Id.* §§ 751.01(1)–(3).

Florida's dependency statute, chapter 39 of the *Florida Statutes*.¹⁴³ Since 1978, chapter 39 has expressed a preference for relative placements over nonrelatives and has authorized the juvenile judge to release a child to a responsible adult relative upon taking an alleged dependent child into custody.¹⁴⁴ This forestalls the child's placement in shelter care.¹⁴⁵

Chapter 39 further provides that after a child has been adjudicated dependent, the court can place the child in the home of a relative with or without the protective supervision of the Department of Children and Families.¹⁴⁶ Protective supervision may be terminated by the court whenever the court determines the child's placement is stable or that supervision is no longer needed.¹⁴⁷ Alternatively, the juvenile judge may choose to place the child in the temporary legal custody of the relative.¹⁴⁸ There are no legislative guidelines as to when the court should choose one disposition over another. Regardless of either status, the law requires that case plans be developed and services provided by the Department of Children and Families, and regular judicial reviews held to determine whether the child should be reunited with the natural parent or moved on to a more permanent legal option.¹⁴⁹ These other options include adoption, long-term foster care, independent living, custody to a relative on a permanent basis with or without legal guardianship, or custody to a foster parent with or without legal guardianship.¹⁵⁰

Creating even greater confusion for relatives, the 1994 Florida Legislature established another permanency option for dependent children, long-term relative custody.¹⁵¹ This option applies when the child's parents have failed to comply with a case plan and the court determines that neither reunification, termination of parental rights, or adoption are in the best interest of the child.¹⁵² It also provides that the court may relieve the Department of Children and Families from protective supervision if the court determines that the placement is stable and that such supervision is no longer needed.¹⁵³ In that case the court must set forth the powers of the custodian, which ordinarily include the powers of the guardian of the person of the

143. FLA. STAT §§ 39.39–418 (1997).

144. *Id.*

145. *Id.* § 39.401(2)(a). However, the law does not provide guidelines as to when either of these dispositions should be used. *See id.*

146. *Id.* § 39.41(2)(a)3.

147. FLA. STAT. § 39.41(2)(a)3.

148. *Id.* § 39.41(2)(a)4.

149. *Id.* § 39.45(2).

150. *Id.*

151. FLA. STAT § 39.41(2)(a)5.a (Supp. 1994).

152. *Id.*

153. *Id.* § 39.41(2)(a)5.b.

minor unless otherwise specified.¹⁵⁴ No financial supports accompany the status of long-term relative custodian, although the Department is instructed to provide services to ensure the long-term stability of the relationship.¹⁵⁵

In 1994, the legislature also materially strengthened this state's focus on family preservation by requiring the child welfare agency to diligently search for relatives with whom the child might be placed.¹⁵⁶ The court was instructed to affirmatively indicate in each disposition order why the child was not placed with a relative.¹⁵⁷

Totally apart from juvenile dependency and family court custody processes, however, the legislature in 1990 completely revamped Florida's guardianship law and established proceedings for individuals, including relatives, to petition to establish guardianship of a minor.¹⁵⁸ This legislation forced relatives who received custody of a child through juvenile dependency proceedings to file a separate petition for guardianship in yet another court, the probate court, at considerable legal costs and time delays.¹⁵⁹

In 1998, the legislature partially corrected this situation by authorizing the juvenile court to exercise general and equitable jurisdiction over guardianship proceedings pursuant to chapter 744 as well as over proceedings for temporary custody of minor children by extended family members under chapter 751.¹⁶⁰ The relative, however, is still required to file a petition for guardianship and follow the requirements of these chapters.¹⁶¹ The legal guardian in Florida, unlike in other states, is not eligible for financial assistance.¹⁶²

Florida has long operated a subsidized adoption program, which makes financial aid available to potential adoptive families in which a child has: 1) established significant emotional ties with a foster parent; or 2) is not likely to be adopted because she or he is eight years of age or older, mentally retarded, physically or emotionally handicapped, or a member of a sibling group.¹⁶³ This law, however, establishes that adoption without subsidy is the placement of choice.¹⁶⁴ State regulations require a series of medical, mental

154. *Id.*

155. *Id.* § 39.41(2)(a)5.a.

156. FLA. STAT. § 39.41(4)(a) (Supp. 1994).

157. *Id.*

158. FLA. STAT. § 744.3021 (Supp. 1990).

159. *Id.*

160. FLA. STAT. § 39.013(3) (Supp. 1998) (defines, for the first time, legal guardianship in the context of juvenile dependency law).

161. *Id.* § 39.013.

162. FLA. STAT. § 409.166 (1997).

163. *Id.*

164. *Id.* § 409.166(1).

health, and other professional evaluations prior to adoptive placement in order to determine if the statutory conditions are met. The amount of adoption subsidy is to be determined through negotiations with the prospective adoptive family.¹⁶⁵ A basic subsidy is calculated based on the family's income. This is supplemented by a subsidy based on family size and another subsidy based on the age of the child.¹⁶⁶ In addition, a family may receive a supplemental maintenance payment up to the amount the child would have received in foster care if there are documented mental, physical, emotional, or behavioral conditions which require extraordinary care, supervision, or structure.¹⁶⁷ Subsidies must be redetermined annually.¹⁶⁸ This complicated formula results in a payment as low as \$154 per month and as high as \$425 per month, with the average payment being \$267 per month.¹⁶⁹

The 1998 Florida Legislature presented relatives with a new opportunity when it created a funded Relative Caregiver Program within the Department of Children and Families.¹⁷⁰ This law provides financial assistance to relatives within the fifth degree of relationship to a parent or step-parent of the child who are caring full-time for a child in the role of substitute parent.¹⁷¹ The child must have been abused, neglected, or abandoned, and placed with the relative under chapter 39. The law also allows relatives to receive family preservation and support services, flexible funds,¹⁷² subsidized child care, and Medicaid coverage.¹⁷³ Unfortunately, financial assistance is limited to placements under court ordered temporary legal custody to the relative under section 39.508(9) of the *Florida Statutes* or court ordered placement in the home of a relative under protective supervision of the Department under section 39.508(9).¹⁷⁴ Children in more permanent kinship arrangements, such as long-term relative placement or legal guardianship, will not benefit from this legislation. Relatives must also participate in the case planning process and periodic judicial reviews, presumably until the child reaches eighteen, even after protective supervision is terminated.¹⁷⁵

165. FLA. ADMIN. CODE ANN. r. 65C-16.013(3) (1997).

166. *Id.* r. 65C-16.013(4)(a), (b), (c) (1997).

167. *Id.* r. 65C-16.013(5) (1997).

168. *Id.* r. 65C-16.013(10) (1997).

169. Telephone Interview with Gloria Walker, Adoption Specialist, Fla. Dep't of Children & Families (Sept. 23, 1998).

170. FLA. STAT. § 39.5085 (Supp. 1998).

171. *Id.*

172. *Id.* § 409.165.

173. *Id.* § 39.5085(2)(f).

174. *Id.* § 39.5085(2).

175. FLA. STAT. § 39.5085(2) (Supp. 1998).

Relatives who qualify for the Relative Caregiver Program are not required to meet foster licensing standards,¹⁷⁶ but a home study must be completed.¹⁷⁷ The home study must ascertain that the relative is capable of providing a physically safe environment and a stable, supportive home for the children and must assure that the child's well-being is met, including, but not limited to the provision of immunizations, education, and mental health services.¹⁷⁸

The benefit amount is to be set by the Department of Children and Families and is to be based on the child's age, subject to available funding.¹⁷⁹ The amount of funding available for the relative care giver program is not to exceed eighty-two percent of the statewide average foster care rate, nor may the cost of providing such benefits exceed the cost of providing out-of-home care in emergency or shelter care.¹⁸⁰ As a result, the Department of Children and Families has decided upon a rate this year of seventy percent of the average statewide foster care rate. This will result in the following payment levels: \$242 per month for a child zero to five; \$249 per month for a child six to twelve; \$298 per month for a child thirteen to eighteen.

Funding of approximately twenty-six million dollars to establish the Relative Caregiver Program was obtained by allocating unencumbered TANF block grant funds,¹⁸¹ not through Title IV-E, the funding source in most other states. The effect of this funding source, according to the Department of Children and Families, is to subject relatives not only to the provisions of chapter 39 but also to the requirements of the Work and Gain Economic Self-sufficiency ("WAGES") law.¹⁸² WAGES requires semiannual eligibility redeterminations and sanctions which amount to loss of the monthly payment if the child has sufficient unexcused absences so as

176. *Id.* § 39.5085(2)(c).

177. *Id.* § 39.5085(2)(b).

178. *Id.* The 1998 law also mandates a home study for any out-of-home placement for a child under chapter 39. *Id.* § 39.508(2)(g). The home study must include: 1) criminal background checks; 2) an assessment of the physical environment of the home; 3) a determination of the financial security of the caregivers; and 4) a determination that suitable child care arrangements are available for a caregiver employed outside the home. FLA. STAT. § 39.508(3)(a) (Supp. 1998).

179. *Id.* § 39.5085(2)(d).

180. *Id.* The 1998 Legislature increased the foster care board rate for licensed foster parents to levels that range from \$345-\$425 per month. Telephone Interview with Carolyn Glynn, Foster Care Specialist, Florida Department of Children and Families (Sept. 16, 1998).

181. STAFF OF SENATE COMM. ON CHILDREN, FAMILIES & SENIORS, COMM. SUBSTITUTE FOR S.B. 1540, STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, 15th Leg. Sess., Reg. Sess., at 2, (Fla.1998).

182. FLA. STAT. § 414.015-.55 (1997). The Work and Gain Economic Self-sufficiency Program is Florida's version of TANF.

not to make satisfactory school progress.¹⁸³ No other state imposes such harsh penalties on kinship families. Taking away a dependent child's monthly subsistence benefit for failure to attend school is a questionable method to achieve the child welfare system's protection and permanence goals. Although a blessing for many relatives caring for dependent children, the burdens of home studies, eligibility redeterminations, sanctions, case plans, and court hearings may deter many needy kinship family units from taking advantage of this new program.

VII. OPPORTUNITIES FOR FLORIDA TO IMPROVE ITS SUPPORT FOR KINSHIP RELATIVE CARE

It is time for Florida to revisit and revamp its policy for kinship relative care givers. Public policy needs to encourage the most stable of custody arrangements, i.e., legal guardianship or adoption, through financial assistance, not the least permanent, i.e., temporary custody or protective supervision.¹⁸⁴ The complexity, inconsistency, redundancy, and lack of goals in Florida law bedevils the most skillful advocate, not to mention the struggling grandparent.

Now is the time for Florida to establish a cohesive kinship relative care giver framework based on the following principles: 1) Consistency; 2) Simplicity; 3) Goal orientation: child protection, family preservation and support, and permanence for the child; 4) Experience: Florida's history as well as the experience of other states; and 5) Maximization of federal funding opportunities.

Florida can address these principles while giving long awaited recognition of recognizing its social and fiscal dependence upon relative care givers to raise the next generation of Floridians by taking the following steps:

1. **TRIAGE FISCAL POLICY.** Recognize that there are two types of relative care givers: those who are financially able to support children on their own and those who are struggling on the margins of basic subsistence. Leave the financially able to raise their kin alone, unencumbered by unnecessary government oversight. Support those financially unable in the least intrusive, least administratively costly method available. Always ask: Is it more cost beneficial to support this relative or to maintain this child in the foster care system? Provide the same level of support for relatives regardless of legal status by equalizing the Relative Caregiver benefit and

183. *Id.* § 414.125(7).

184. Helaine Hornby et. al, *Kinship Care in America: What Outcomes Should Policy Seek?*, 75 CHILD WELFARE 397, 416 (1996).

the adoption subsidy.¹⁸⁵ Appropriate sufficient general revenue to enable Florida to apply for a federal Title IV-E waiver to finance this legislative scheme.

2. **TRIAGE CHILD WELFARE POLICY.** Recognize that there are several types of relative care givers. There are those who are caring temporarily for children who ultimately can be successfully reunited with their natural families. For these relatives, financial assistance coupled with temporary legal custody under protective supervision of the child welfare agency and the courts, while parents are working on case plans for reunification, makes sense. Next, there are those small numbers of relatives for whom reunification of children with the natural parent is not an option, yet the relative's history or circumstances is such that there are some questions about the safety or stability of the arrangement. These relatives need financial assistance and also need temporary custody and child welfare agency and court supervision to protect the children. Third, there are relatives caring for children for whom reunification is not an option, who provide safe and stable homes, who have cultural or family values opposed to adoption, but who need financial assistance in order to provide for the child's needs. They do not need agency and court oversight. Legal guardianship is an appropriate option for them. Finally, there are relatives who would adopt were it not for the financial inability to make ends meet. Subsidizing adoptions at the same rate as the Relative Caregiver Program will eliminate any bartering among these options based on financial levels.¹⁸⁶

3. **SIMPLIFY THE STATUTES.** The current multiplicity of placement options is not necessary and causes confusion. Florida should enact only four options: 1) permanent custody with an extended family member without subsidy;¹⁸⁷ 2) temporary custody under protective supervision with subsidy and court oversight; 3) legal guardianship with subsidy;¹⁸⁸ or 4) subsidized adoption at the same rate as legal guardianship.

4. **PILOT KIN SUPPORT PROGRAMS.** Establish pilot programs modeled after those of Oregon and Philadelphia to assist relatives financially, legally, and socially so that more Florida relative caregivers can

185. Both relative care givers and adoptive parents should be eligible for a supplemental maintenance payment for children with specialized physical, emotional, mental, or behavioral needs.

186. Wisconsin's legislative scheme comes closest to these recommendations. WIS. STAT. § 48.57(3m) (1998).

187. This can be accomplished either in circuit court or juvenile court, although centralizing all children's cases in one court has merit.

188. This would best be accomplished if legal guardianship were a dispositional option in dependency proceedings, not requiring the filing of a separate petition, and if guardianship procedures were simplified and customized to address the specific needs of the dependency population.

move to the ranks of unsubsidized legal guardians or adoptees through maximization of community resources including mortgage assistance, medical insurance, and other means of family support.

All of these proposals will better address the desired child welfare system goals of assuring that children are protected, that their families are preserved and supported, and that they are in permanent homes, at the same time freeing court and administrative resources to serve more pressing needs.

VIII. CONCLUSION

Eartha Walker and thousands of relatives like her have experienced a slight ease in their child-caring burden through the Florida Legislature's creation in 1998 of the Relative Caregiver Program. But to take advantage of this Program they must forego a permanent legal relationship with the child and subject themselves to layers of supervision, reporting, assessment, documentation, and possible sanctions by the child welfare agency and the juvenile court. Such hurdles make no policy sense.

If the Florida Legislature is sincere in its desire to protect children, assure them permanence, and foster family preservation and support, it will look to other states' experiences and dramatically simplify its statutory scheme. Through appropriating general revenue funds to match federal Title IV-E funds, extending the Relative Caregiver Program to legal guardianship, promoting adoption subsidies at the same dollar level, and piloting relative support initiatives, the Florida Legislature can truly "protect the ties that bind," while still protecting its coffers.

J.A.S. v. State: Striking a Balance Between a Minor's Right of Privacy and Florida's Interest in Protecting Minor's Adolescent Development

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I. INTRODUCTION

Until 1980, the State of Florida was without any textual provision that afforded its citizens a right of privacy. However, the Supreme Court of Florida, at least to some degree, recognized that a right of privacy was protected in some manner by the state constitution.¹ Since the introduction of Article I, Section 23,² the right of privacy amendment to the *Florida Constitution*, the Supreme Court of Florida has had many opportunities to replace the arguably vague and ambiguous language of the amendment with more concrete terms. *J.A.S. v. State*,³ decided in February of 1998, is one recent Supreme Court of Florida decision in which the court had an opportunity to express its views on privacy rights and, in particular, how those rights relate to minors.⁴ Fundamentally, the *J.A.S.* decision is premised upon a minor's right of privacy and how far the government may out stretch its arm to limit that right.⁵ In order to understand the basis for the right to privacy argument, it is important to consider the origin of the right to privacy in the State of Florida.

1. David C. Hawkins, *Florida Constitution Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693, 826 (1990).

2. FLA. CONST. art I, § 23.

3. 705 So. 2d 1381 (Fla. 1998).

4. *Id.*

5. *Id.*

Unlike the right of privacy that the United States Constitution provides, which emanates from the Fourteenth Amendment,⁶ the *Florida Constitution* specifically sets forth a right to privacy in Article I, Section 23.⁷ Article I, Section 23 states that “[e]very natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”⁸ It seems important to mention that this amendment, proposed by the state legislature and approved by Florida voters, apparently evidenced a strong commitment on the part of Florida voters to protect privacy rights.⁹

This seemingly strong commitment on the part of Florida voters is consistent with the Supreme Court of Florida’s ruling in *Winfield v. Division of Pari-Mutuel Wagering*,¹⁰ where the court recognized the importance of Article I, Section 23 by extending the highest standard of review to cases in which the right of privacy is implicated.¹¹ The court in *Winfield* set the standard by which all subsequent cases dealing with the right of privacy would be adjudicated.¹² The right of privacy was recognized by the court as a “fundamental right,” and as such, one that could only be limited based upon a “compelling” state interest.¹³ The court then set the test by which an alleged governmental intrusion into an individual’s right of privacy would be measured.¹⁴ Once a right of privacy is implicated the burden of proof shifts to the state.¹⁵ “The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.”¹⁶ The *Winfield* court noted that the right of privacy was not absolute and was subject to the compelling interest of the state, which further cemented the power of both the individual

6. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

7. FLA. CONST. art. I § 23.

8. FLA. CONST. art. I § 23.

9. Hawkins, *supra* note 1 at 826–27. “With the adoption of the privacy amendment, Florida became the fourth state to create an express textual basis for the right of privacy. In so doing, Floridians demonstrated a ‘deeply protectionistic attitude’ and assured themselves an ‘independent, freestanding [and] fundamental’ right of privacy.” David C. Hawkins, *Florida Constitution Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693, 826 (1990). (quoting *Florida Bar v. Schreiber*, 407 So. 2d 595, 598 (Fla. 1981); *Winfield v. Division Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985)).

10. 477 So. 2d 544 (Fla. 1985).

11. *Id.* at 547.

12. *Id.* at 548.

13. *Id.* at 547.

14. *Id.*

15. *Winfield*, 477 So. 2d at 547.

16. *Id.*

and the state in this area.¹⁷ Arguably, it was the suggestion of the court that the mere implication of the right to privacy would not easily overcome the potential strength of the state's interest.¹⁸

It is difficult to determine when an individual's right to privacy is implicated, given the vagueness of Article I, Section 23. However, the *Winfield* court stated that "before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist."¹⁹ "A reasonable expectation of privacy"²⁰ and "the right to be let alone"²¹ give little guidance with regard to the implication of privacy rights. However, the court in *Winfield* was willing to say that:

Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.²²

Whenever the court determines whether privacy rights exist in any given situation, based upon a "reasonable expectation of privacy," a broad or narrow reading of Article I, Section 23 will result. Consequently, Article I, Section 23 might be a vehicle for judicial legislation when the legislature drafts imprecise laws that implicate an individual's right of privacy. Regardless, the court has found privacy rights implicated in a diverse array of areas from financial records to abortion.²³

In *J.A.S.*, the court was essentially being asked whether these previous findings supported the conclusion that a minor's right of privacy includes a right to "consensual" sexual activity that outweighs the states compelling interest in protecting minors from such activity.²⁴ Specifically, the question certified to the Supreme Court of Florida in *J.A.S.* was:

WHETHER THE POTENTIAL PENALTY FOR VIOLATION
OF SECTION 800.04, FLORIDA STATUTES, BY A MINOR
UNDER THE AGE OF SIXTEEN FURTHERS A COMPELLING

17. *Id.*

18. *Id.*

19. *Id.*

20. *Winfield*, 477 So. 2d at 547.

21. FLA. CONST. art. I § 23.

22. *Winfield*, 477 So. 2d at 548.

23. *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989).

24. *J.A.S v. State*, 705 So. 2d 1381, 1382 (Fla. 1998).

STATE INTEREST THROUGH THE LEAST INTRUSIVE
MEANS?²⁵

Briefly stated, *J.A.S.* involved two fifteen-year-old boys who had "consensual" sexual intercourse²⁶ with two twelve-year-old girls.²⁷ These facts triggered serious constitutional questions and raised doubts about the consistency of prior court decisions.²⁸

Part II of this article will focus on the cases which underscore the *J.A.S.* decision. Part III of this article will dissect the *J.A.S.* decision, including the district court opinion and the concerns outlined by the trial court. Part IV will attempt to offer some rationale for *J.A.S.* and its progeny.

II. CASE LAW OVERVIEW

A. In re T.W.—A Minor's Right to Abortion

*In re T.W.*²⁹ was one of the first opportunities the Supreme Court of Florida had to explore the right of privacy with regard to minors.³⁰ T.W., a fifteen-year-old minor, sought an abortion as a result of an unwanted pregnancy.³¹ Pursuant to section 390.001(4)(a) of the *Florida Statutes*,³² T.W., as a minor, was required to obtain "written informed consent of a parent, custodian, or legal guardian" or seek a judicial bypass in order to

25. *Id.* at 1382.

26. "Intercourse" is generally used to refer to any act which would constitute a violation of sections 800.04 (Supp. 1991) and 794.05 (Supp. 1996) of the *Florida Statutes*.

27. *J.A.S.*, 705 So. 2d at 1382.

28. *See id.* at 1385-87.

29. *T.W.*, 551 So. 2d at 1192.

30. *Id.*

31. *Id.* at 1189.

32. *Florida Statutes* section 390.001(4)(a)(1) (Supp. 1988) provides:

If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the physician shall obtain the written informed consent of a parent, custodian, or legal guardian of such unmarried minor, or the physician may rely on an order of the circuit court, on petition of the pregnant unmarried minor or another person on her behalf, authorizing, for good cause shown, such termination of pregnancy without the written consent of her parent, custodian or legal guardian. The cause may be based on: a showing that the minor is sufficiently mature to give an informed consent to the procedure; the fact that a parent, custodian, or legal guardian unreasonably withheld consent; the minor's fear of physical or emotional abuse if her parent, custodian, or legal guardian were requested to consent; or any other good cause shown.

Id.

obtain an abortion.³³ T.W. sought a judicial bypass on the grounds that “(1) she was sufficiently mature to give an informed consent to the abortion, (2) she had a justified fear of physical or emotional abuse if her parents were requested to consent, and (3) her mother was seriously ill and informing her of the pregnancy would be an added burden.”³⁴ Using the standard of review set forth in *Winfield v. Pari-Mutuel Wagering*,³⁵ the court found the statute unconstitutional because the state’s interests were not “sufficiently compelling under Florida law to override Florida’s privacy amendment.”³⁶ The court began its analysis of the case by citing *Roe v. Wade*,³⁷ noting that this landmark case announced “a right to privacy implicit in the fourteenth amendment [which] embraces a woman’s decision concerning abortion.”³⁸ The court stated that for section 390.001(4)(a)³⁹ to pass judicial scrutiny, it must be reconciled with both the United States Constitution and the *Florida Constitution*.⁴⁰ However, the court reasoned that review under the *Florida Constitution* was the most prudent starting point because unless the statute could be held constitutional within the meaning of the *Florida Constitution*, there would be no reason to determine whether it would pass scrutiny under the United States Constitution.⁴¹

The court started with the premise that a woman’s decision to have an abortion is a fundamental right, which is undoubtedly supported by the right of privacy amendment in the *Florida Constitution*.⁴² More important to the discussion of a minor’s right of privacy, the court stated that the “freedom of choice concerning abortion extends to minors . . . based on the unambiguous language of the amendment: The right of privacy extends to ‘[e]very natural person.’”⁴³ The court did, however, add the caveat that “[c]ommon sense dictates that a minor’s rights are not absolute.”⁴⁴ Nevertheless, the court declared that for section 390.001(4)(a) to pass judicial scrutiny and be held constitutional, it must serve a compelling state interest by the least intrusive means.⁴⁵

33. T.W., 551 So. 2d at 1189.

34. *Id.*

35. 477 So. 2d 544 (Fla. 1985).

36. T.W., 551 So. 2d at 1194.

37. 410 U.S. 113 (1973).

38. T.W., 551 So. 2d at 1190 (citing *Roe v. Wade* 410 U.S. 113 (1973)).

39. FLA. STAT. § 390.001(4)(a) (Supp. 1988).

40. T.W., 551 So. 2d at 1190.

41. *Id.*

42. *Id.*

43. *Id.* at 1193.

44. *Id.*

45. T.W., 551 So. 2d at 1195.

With regard to the interests of the state, the court was quick to note that “protecting minors” and “preserving family unity are worthy objectives” yet the court did not believe that these objectives were “compelling.”⁴⁶ This assertion relied upon other decisions holding that the above objectives were not strong enough state interests to justify the imposition of a parental consent requirement when minors sought other medical procedures, some of which were potentially “life-or-death” decisions.⁴⁷ The court found it interesting that a minor may place a child up for adoption without parental consent, a decision the court stated was “fraught with intense emotional and societal consequences.”⁴⁸

The court also found that neither parental consent nor a judicial bypass was the least intrusive means to protect the state’s interests and, therefore, was contrary to the test set forth in *Winfield*.⁴⁹ The court seemed to suggest that the procedural pitfalls of the statute rendered the statute unconstitutional with regard to its intrusiveness.⁵⁰ Specifically, the Court found “[i]n proceedings wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required under our state constitution.”⁵¹ Therefore, statute 390.001(4)(a) did not seek the interests of the state by the least intrusive means because it neither made a “provision for a lawyer for the minor or for a record hearing.”⁵²

It might be argued, that the decision of the Supreme Court of Florida in *T.W.* expressed strong support for a minor’s right of privacy, especially in the area of personal autonomy. When the court ruled that a minor could access abortions, free of parental consent or judicial intervention, via a judicial by-pass,⁵³ it seemingly indicates a commitment by the court to advance increased freedom for minors within the realm of intimate personal relations. The *T.W.* holding opened the door for future litigants to assert their contention that minors may consent to intercourse. Arguably, if the court was willing to allow a minor to deal with the possible ramifications of sexual intercourse, for example, abortion or adoption, it would also seem logical that the court would allow a minor to legally consent to sexual intercourse, which could lead to those consequences.⁵⁴

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *T.W.*, 551 So. 2d at 1195.

51. *Id.* at 1196.

52. *Id.*

53. *Id.*

54. *See infra* note 71.

B. Jones v. State— “Adult-Minor” Statutory Rape

Clearly, the defendant in *Jones v. State*⁵⁵ believed the decision in *T.W.* afforded expansive privacy rights for minors, when he argued that the holding in *T.W.* supported the conclusion that minors may consent to sexual relations.⁵⁶ Jones, an eighteen-year-old, was charged with statutory rape⁵⁷ under section 800.04 of the *Florida Statutes*,⁵⁸ which states in relevant part that an individual may not, among other things, have “sexual intercourse” with a “minor under the age of 16” and that “the victim’s consent” is not a defense.⁵⁹ Jones was charged and convicted of violating section 800.04, as a result of having sexual intercourse with a minor under the age of sixteen.⁶⁰

Jones appealed and questioned the constitutionality of section 800.04 because it made no provision for consent on the part of the minor in violation of the minor’s privacy rights.⁶¹ Essentially, he argued that because *T.W.* afforded a minor the unrestricted right to an abortion, it was only logical that a minor could consent to sexual intercourse.⁶² The Supreme Court of Florida disagreed with Jones’s reading of the *T.W.* decision and

55. 640 So. 2d 1084, 1084 (Fla. 1994).

56. *Id.* at 1087.

57. *Id.* at 1085.

58. FLA. STAT. § 800.04 (1991) Lewd, lascivious, or indecent assault or act upon or in presence of child.—Any person who:

- (1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;
- (2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;
- (3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or
- (4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years, without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim’s lack of chastity nor the victim’s consent is a defense to the crime proscribed by this section.

Id.

59. *Id.*

60. *Jones*, 640 So. 2d at 1085.

61. *Id.* Jones had standing to make his assertion because of precedent, which stated “sellers of obscene materials had vicarious standing to raise the privacy rights of their customers.” *Id.*

62. *Id.* at 1086–87.

found section 800.04 constitutional.⁶³ The court stated that “*T.W.* did not transform a minor into an adult for all purposes.”⁶⁴

Though the plurality opinion of the court never addressed the question directly, the opinion suggested that a minor’s privacy rights did not extend to sexual relations.⁶⁵ However, the court did say “Florida has an obligation and a compelling interest in protecting children from ‘sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe and healthy for them.’”⁶⁶ The use of the phrase “compelling interest” with respect to privacy rights should arguably have led to a *Winfield* analysis, yet the court never spoke in terms of privacy rights and, thus, one might conclude that no such privacy right exists with regard to minors and “consensual” sex.

For more guidance, Justice Kogan, in his concurring opinion, stated quite clearly that “*T.W.*, in sum, does *not* create a right for young adolescents to ‘consent’ to sex.”⁶⁷ Kogan illuminated the heart of section 800.04, something the plurality had trouble doing, when he pointed out that the purpose of section 800.04 was to “prevent children and young adolescents from being exposed to the wide-ranging risks associated with sexual exploitation and premature sexual activity.”⁶⁸ Kogan also reasoned that in *T.W.* the court found the irrational application of section 390.001(4)(a)⁶⁹ problematic because minors could consent to certain types of dangerous medical procedures but they could not consent to abortion without running a procedural maze.⁷⁰ He found it ridiculous to suggest that the *T.W.* decision, one designed to help minors deal with the consequences of sexual activity, supported the conclusion that minors could consent to intercourse.⁷¹

By contrast, Kogan explained that the purpose of section 800.04,⁷² to protect minors from “predatory exploitation,” “clearly outweighs whatever

63. *Id.* at 1087.

64. *Jones*, 640 So. 2d at 1087.

65. *Id.*

66. *Id.* at 1087 (quoting *Jones v. State*, 619 So. 2d 418, 424 (Fla. 5th Dist. Ct. App. 1993)(Sharp, J., concurring specially)).

67. *Id.* at 1087 n.5 (Kogan J., concurring).

68. *Id.* at 1088 (Kogan, J., concurring).

69. FLA. STAT. § 390.001(4)(a) (1988).

70. *Jones*, 640 So. 2d at 1087 (Kogan, J., concurring).

71. *Id.* Some have argued that recognizing a minor’s right to an abortion, however limited that right may be, necessarily means there is a corresponding right for minors to engage in “consensual” sex. Such an argument is no different than saying that, because minors have a right to consent to alcohol-and drug-abuse treatment, § 397.601, FLA. STAT. (1991), they also must have a right to consume alcohol and ingest drugs in the first instance. This is an unsupportable brand of logic. *Jones*, 640 So. 2d at 1087 n.5.

72. FLA. STAT. § 800.04 (1991).

'right' children may have in consenting" to sexual activity.⁷³ Justice Kogan then went on to explain the effects of such exploitation, highlighting studies indicating the pervasive nature of sexual abuse of children and the far reaching results such abuse has on children who are affected by it.⁷⁴ Further, Kogan explained the merits of the legislature's "bright-line cut-off at a specific age" with regard to an individual's ability to give consent to intercourse.⁷⁵ So long as that age is "within a range that bears a clear relationship to the objectives the legislature is advancing," he reasoned that the legislature must choose an age at which an individual can understand the ramifications of certain critical and life long decisions, such as consenting to intercourse.⁷⁶

The plurality opinion in *Jones* clearly expressed the view that section 800.04 is constitutional, albeit with little clear-cut reasoning. Justice Kogan's concurrence offered a lengthy explanation with regard to the soundness of section 800.04, but his reasoning did not gain the full support of the court.⁷⁷ Though the rationale of the Supreme Court of Florida was not clear from the *Jones* decision, it appeared that the court was committed to protecting minors from sexual activity by not recognizing any right to engage in "consensual" intercourse.⁷⁸ This might have been a fair assessment of the court's reasoning had *Jones* been the final word on whether a minor could "consent" to intercourse.

C. *B.B. v. State*— "*Minor-Minor*" Statutory Rape

The court's decision in *B.B. v. State*⁷⁹ appeared to call into question whether the court was truly committed to preventing minors from participating in consensual intercourse.⁸⁰ The facts in *B.B.* are strikingly similar to those of *Jones*, yet the result was completely opposite.⁸¹ *B.B.*, a sixteen-year-old, was charged with having sexual intercourse with another

73. *Jones*, 640 So. 2d at 1088 (Kogan, J., concurring) (quoting *Schmitt v. State*, 590 So. 2d 404, 418-19 n.17 (Fla. 1991) (Kogan, J., concurring in part, dissenting in part)). "Some studies, for example, indicate that 5 to 9 percent of males and 8 to 28 percent of females in the general population report that they were sexually exploited as youths." *Jones*, 640 So. 2d at 1088 (Kogan, J., concurring).

74. *Id.* at 1088-89 (Kogan, J., concurring).

75. *Id.* at 1089.

76. *Id.* at 1090.

77. *Id.* at 1087.

78. *Jones*, 640 So. 2d at 1087.

79. 659 So. 2d 256 (Fla. 1995).

80. *Id.* at 257.

81. Compare *B.B. v. State*, 659 So. 2d 256 (Fla. 1995), with *Jones v. State*, 640 So. 2d 1084 (Fla. 1994).

sixteen-year-old.⁸² B.B. was charged under section 794.05 of the *Florida Statutes*,⁸³ which states in relevant part, “[a]ny person who has unlawful carnal intercourse with any unmarried person, of previous chaste character, who at the time of such intercourse is under the age of 18 years, shall be guilty of a felony”⁸⁴ B.B. beckoned the court to find section 794.05⁸⁵ “unconstitutional as violative of his right to privacy.”⁸⁶ The court seemingly agreed with the assertion of the petitioner, finding section 794.05 unconstitutional.⁸⁷

In both *Jones* and *B.B.*, the court was dealing with statutory rape statutes.⁸⁸ It was undisputed that the individuals had intercourse with minors under the statutory age, yet in *Jones* the court held the statute constitutional and thus upheld the conviction⁸⁹ and in *B.B.* the court held the statute unconstitutional and remanded the decision.⁹⁰ It seems quite logical to conclude, “the court arrived at diametrically opposed results.”⁹¹ Practically speaking, this conclusion seems sound. However, the court’s decisions, when examined, indicate that the court had little choice given the language of section 794.05 and the factual distinction between *B.B.* and *Jones*.

In both cases the court clearly stated that it would not and was not endorsing consensual intercourse between minors.⁹² In *Jones*, the court

82. *B.B.*, 659 So. 2d at 257.

83. *Florida Statute* section 794.05 (1991) provides:

Carnal intercourse with unmarried person under 18 years.—

(1) Any person who has unlawful carnal intercourse with any unmarried person, of previous chaste character, who at the time of such intercourse is under the age of 18 years, shall be guilty of felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) It shall not be a defense to a prosecution under this section that the prosecuting witness was not of previous chaste character at the time of the act when the lack of previous chaste character in the prosecuting witness was caused solely by previous intercourse between the defendant and the prosecuting witness.

FLA. STAT. § 794.05 (1991).

84. *Id.*

85. FLA. STAT. § 794.05 (1991).

86. *B.B.*, 659 So. 2d at 258.

87. *Id.* at 260. “Thus, we do not hold that section 794.05 is facially unconstitutional but only that it is unconstitutional as applied to this 16-year-old as a basis for a delinquency proceeding.” *Id.*

88. *Id.* at 257, 259.

89. *Jones*, 640 So. 2d at 1087.

90. *B.B.*, 659 So. 2d at 260.

91. Mark M. Dobson, *Criminal Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 67, 108 (1995).

92. See *B.B.*, 659 So. 2d at 258; *Jones*, 640 So. 2d at 1087.

stated that “*T.W.*, in sum, does *not* create a right for young adolescents to ‘consent’ to intercourse.”⁹³ In *B.B.*, the court maintained, in dictum, that “if [their] decision were based upon whether minors could consent to sexual activity as though they were adults, [their] decision would be ‘no.’”⁹⁴ This quote raises the obvious question, upon what was their decision based?

The answer to this question appears to lie within the somewhat subtle differences between the factual circumstances giving rise to each case. First, the court framed the issue in *B.B.* so that they would not have to reach the question of whether minors may consent to intercourse.⁹⁵ Second, as previously stated, Jones and *B.B.* were charged under different statutes, a fact that would prove extremely important.⁹⁶ Next, the court in *B.B.* unequivocally stated that section 794.05 implicated *B.B.*’s privacy rights and therefore required a thorough *Winfield* analysis, a step not truly taken in *Jones*.⁹⁷ Finally, the defendant and the victim in *B.B.* were both minors, whereas the defendant in *Jones* was an adult.⁹⁸ These factors coalesced and led the court to its conclusion; a conclusion one might argue was manufactured to avoid a question the court did not want to answer.⁹⁹

The question certified to the Supreme Court of Florida, by the Second District Court of Appeal, was whether “Florida’s privacy amendment, article I, section 23 of the Florida Constitution, render section 794.05 . . . unconstitutional as it pertains to a minor’s consensual sexual activity?”¹⁰⁰ However, the Supreme Court of Florida stated the issue to be “whether a minor who engage[d] in ‘unlawful’ carnal intercourse with an unmarried minor of previous chaste character can be adjudicated delinquent of a felony of the second degree in light of the minor’s right to privacy guaranteed by the Florida Constitution.”¹⁰¹ The difference between the question certified and the issued ruled upon, seemingly infinitesimal, was actually infinite. The court removed the question of “consensual activity” and refocused the issue toward the nature and language of the statute as it pertains to the right of privacy in Florida with regard to minors.¹⁰² This essentially allowed the court to withhold judgment on the issue of consensual intercourse between minors. Having changed the question presented, the court set out to answer

93. *Jones*, 640 So. 2d at 1087 n.5 (Kogan J., concurring).

94. *B.B.*, 659 So. 2d at 258.

95. *Id.* at 257.

96. *Id.* at 258.

97. *Id.* at 260.

98. *Id.* at 259.

99. After *B.B.* it was truly unclear how courts were going to deal with minors engaging in sexual intercourse and subsequently being charged with statutory rape.

100. *State v. B.B.*, 637 So. 2d 936, 937 (Fla. 2d Dist. Ct. App. 1994).

101. *B.B.*, 659 So. 2d at 258.

102. *Id.*

its own contrived question. It should be noted that Justice Harding dissented based on the court's failure to reach the actual question presented.¹⁰³ He also suggested that the court would have had to find the statute constitutional if it had answered the certified question.¹⁰⁴

Having first reiterated the court's assertion in *T.W.*, that the right of privacy extends to minors, the court then moved to the question they failed to definitively opine upon in *Jones*, that is, whether a right of privacy is implicated with regard to minors and "consensual" intercourse.¹⁰⁵ It would seem that the court's position with regard to whether a right of privacy exists in "consensual" intercourse between minors is clearly stated in their assertion "that Florida's clear constitutional mandate in favor of privacy is implicated in *B.B.*, a sixteen-year-old, engaging in carnal intercourse."¹⁰⁶ Thus, the court was willing to say that a minor's right to privacy was implicated when that minor engaged in consensual sexual activity.¹⁰⁷ However, the court went no further with this line of thought.¹⁰⁸

Rather, the court then focused upon two key distinctions between *B.B.* and *Jones*, which allowed them to dodge the broader issue of minor's "consenting" to intercourse.¹⁰⁹ First, the court explained that the compelling state interest in *Jones* was protecting a minor from the sexual exploitation of an adult.¹¹⁰ By contrast, the court held that the interest in *B.B.* could not be sexual exploitation because both the defendant and victim in *B.B.* were minors.¹¹¹ Rather, the court recognized the state's asserted interest was "protecting the minor from the sexual activity itself for reasons of health and quality of life."¹¹²

Having placed the interest of the state in these terms, the court concluded "that the State ha[d] failed to demonstrate in this minor-minor situation that the adjudication of *B.B.* as a delinquent through the application of section 794.05 [was] the least intrusive means of furthering what we have determined to be the State's compelling interest."¹¹³ To reach this conclusion the court pointed to the archaic language of the statute, which essentially created a preferred class of minors.¹¹⁴ The court found it

103. *Id.* at 262 (Harding, J., dissenting).

104. *Id.*

105. *Id.* at 258.

106. *B.B.*, 659 So. 2d at 259.

107. *Id.*

108. *Id.*

109. *Id.* at 258-59.

110. *Id.* at 259.

111. *B.B.*, 659 So. 2d at 259.

112. *Id.*

113. *Id.*

114. *Id.*

impossible to reconcile the fact that the alleged purpose of the statute was to protect minors from the dangers of sexual activity, yet the statute only extended to those minors of "chaste" character.¹¹⁵ As a point of clarity, the court wished to add, "[w]e do say that if our decision was what should be taught and reasoned to minors, the unequivocal text of our message would be abstinence."¹¹⁶ The court was restrained by what it reasoned was constitutionally sound, not wanting their opinion to be based upon their own moral or political views, a noble approach for Florida's high court, yet a confusing notion for most.

Some perspective on the potential pitfalls of adjudicating minors delinquent in minor-minor statutory rape cases might be gained by the assertions of Justice Kogan's concurring opinion and Chief Justice Grime's dissent. These opinions have particular weight with respect to the *J.A.S.* court's decision and arguably strike at the heart of the minor-minor statutory rape debate. Justice Kogan offered, with respect to who should be charged in minor-minor statutory rape cases, that "[a]ttempting to brand one as the aggressor and the other as the victim raises very serious questions of equal protection, especially where prosecutors always assume that one type of child—such as 'the boy,' or the one who is 'unchaste'—must be the aggressor."¹¹⁷ Chief Justice Grime's fear of events to come might easily be

115. *Id.*

Thus, by its own terms the statute at issue here does not protect unmarried minors who had lost their virginity through a liaison with a third party prior to the act in question. This singularly odd state of affairs indicates that the real objective of this statute is not to protect children as a class, but to prevent the loss of chastity of those not already 'despoiled'. Any person—child or adult—thus does not violate this particular statute by a sexual liaison with an unchaste minor.

B.B., 659 So. 2d at 260 (Kogan, J., concurring).

116. *Id.*

117. *Id.* at 261 (Kogan, J., concurring). Justice Kogan's statement raises serious concerns about the inherent potential for equal protection violations when one minor is singled out and charged with statutory rape in minor-minor situations. *Id.* Although Justice Kogan raised the equal protection issue, he did not analyze this potential problem under either the Florida or United States Constitution. However, the United States Supreme Court has opined with respect to equal protection and statutory rape statutes. *See also*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), which held a statutory rape statute, which only applied to males, constitutional despite the argument that the statute violated the equal protection clause because "the gender classification [was] not invidious, but rather realistically reflect[ed] the fact that the sexes [were] not similarly situated in certain circumstances" particularly, "that the consequences of sexual intercourse and pregnancy [e]ll more heavily on the female than on the male." *Id.* at 464. However, *Michael M.* dealt with a statute that facially discriminated against males, whereas, Florida's statutory rapes statutes are facially neutral. *See also*, *Washington v. Davis*, 426 U.S. 229, 239 (1976) (asserting that "our

evidenced by his response that “holding section 794.05 unconstitutional as applied, the majority appears to be saying that a sixteen-year-old child has a constitutional right to engage in sex with another sixteen-year-old child, though an older person would not have such a right.”¹¹⁸ The Chief Justice also noted that, if convicted, B.B. might have a viable challenge based upon cruel and unusual punishment.¹¹⁹ Further, Chief Justice Grime’s fears might not have been assuaged when the Florida Legislature changed the language of section 794.05. The relevant change came by way of removing any language relating to “chaste character” and clearly prohibiting an adult over the age of twenty-four from having sexual relations with a sixteen or seventeen-year-old.¹²⁰

In many ways the trepidation found in both Chief Justice Grime’s dissent and Justice Kogan’s concurrence are in essence the true problems when dealing with statutory rape, where both victim and accused are minors claiming consent. The court must deal with the problem of who is the victim

cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact”). Applying this line of thought, it might be argued that the mere fact that boys are charged more often might not be sufficient to sustain an equal protection claim. Rather, the party challenging the statute on equal protection grounds would apparently have to demonstrate purposeful activity on the part of the State of Florida to charge males. *Davis*, 426 U.S. at 239.

118. *B.B.*, 659 So. 2d at 262 (Grimes, C.J., dissenting).

119. *Id.*

120. FLA. STAT. § 794.05 (1996).

Unlawful sexual activity with certain minors.

(1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. As used in this section, “sexual activity” means oral, anal, or vaginal penetration by, or in union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose.

(2) The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under chapter 743.

(3) The victim’s prior sexual conduct is not a relevant issue in a prosecution under this section.

(4) If an offense under this section directly results in the victim giving birth to a child, paternity of that child shall be established as described in chapter 742. If it is determined that the offender is the father of the child, the offender must pay child support pursuant to the child support guidelines described in chapter 61. *Id.* (It seems that this change does in fact allow a sixteen-year-old to engage in sexual intercourse with another sixteen-year-old.)

FLA. STAT. § 794.05 (1996).

and who is the victimizer, but remain mindful of the equal protection implications. The court must also balance on the very thin line between constitutionally entitled activity and endorsing intercourse between minors. Essentially, the three cases outlined above, *T.W.*, *Jones*, and *B.B.*, placed the court squarely in the middle of this very confusing and sensitive problem and set itself up to ultimately decide the issue of “consensual” intercourse between minors. After *B.B.* was decided, the court’s record on the issue of a minor’s right to privacy was not quite clear. They had allowed minors the unrestrained right to abortion,¹²¹ then failed to recognize any consensual right to intercourse with respect to minors and adults,¹²² and finally struck down a statute that allowed a minor to be charged with statutory rape of another minor.¹²³

III. *J.A.S. v. STATE*—A CRITICAL ANALYSIS

A. *The Trial and District Court*

*State v. J.A.S.*¹²⁴ may have been the court’s opportunity to finally determine the issue of adjudicating minors delinquent of so called “minor-minor” consensual intercourse. The facts surrounding the case were relatively simple. Two fifteen-year-old boys had “consensual” intercourse with two twelve-year-old girls and were charged with statutory rape under section 800.04, the same statute applied in *Jones*.¹²⁵ Perhaps relying upon the *B.B.* decision, the trial judge mirrored the sentiments of the concurrence and dissent. He found section 800.04 unconstitutional as applied to both minors in *J.A.S.*, because section 800.04 “violated their right to privacy and equal protection under the law” and because “the potential sanction was grossly disproportionate to the crime and would constitute cruel and unusual punishment.”¹²⁶ The trial court’s line of thought might seem predictable, given the suggestions of the *B.B.* court. However, the district court was unmoved. The district court was quick to dismiss the assertions of equal protection and cruel and unusual punishment, but could not be as dismissive with the right of privacy issue.¹²⁷

The court first found it unreasonable for the trial judge to have assumed, based solely on his “experience of five years as juvenile judge,”

121. *In re T.W.*, 551 So. 2d 1186, 1188 (Fla. 1989).

122. *Jones v. State*, 640 So. 2d 1084 (Fla. 1994).

123. *B.B. v. State*, 659 So. 2d 256 (Fla. 1995).

124. *State v. J.A.S.*, 686 So. 2d 1366 (Fla. 5th Dist. Ct. App. 1997).

125. *Id.* at 1367.

126. *Id.*

127. *Id.* at 1367, 1369.

that “whenever sexual misconduct is charged between the opposite sexes, the boys are always charged by the state.”¹²⁸ Further, because the defense presented no evidence to support such a conclusion, the State had nothing tangible to dispute.¹²⁹ The State did, however, present evidence that one of the juveniles charged had had extensive juvenile “referrals” and “previously engaged in intercourse with the victim’s [thirteen-year-old] sister.”¹³⁰ Apparently, this was the court’s way of saying the State had accurately charged the victimizer and therefore there were no equal protection problems. Regardless, the court stated that choosing who would be charged was a matter of the prosecutor’s discretion.¹³¹

The court then moved to the issue of cruel and unusual punishment.¹³² Essentially, the court said that they could not say whether the juveniles would be subject to cruel and unusual punishment because the trial court dismissed the charges against the juveniles.¹³³ Further, they stipulated that it might be appropriate for the juveniles to be punished harshly if the crime they committed warranted such punishment.¹³⁴

The court finally addressed the question of privacy rights when both the defendant and the victim are minors.¹³⁵ The court did not apply the *Winfield* test, which they recognized was the proper means to address a right to privacy question.¹³⁶ Rather, the court focused upon whether it was proper to charge a minor under section 800.04.¹³⁷ The court recognized the inherent problem a court faced when adjudicating one minor a delinquent in “minor-minor” statutory rape cases.¹³⁸ However, the court had both precedent and the indecision of the state legislature to rely upon.¹³⁹

128. *Id.* at 1367.

129. *J.A.S.*, 686 So. 2d at 1368.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *J.A.S.*, 686 So. 2d at 1368.

135. *Id.*

136. *Id.* at 1369.

137. *Id.* at 1368.

138. *Id.* at 1369 n.2. The court in *J.A.S.* recognized:

[t]he potential incongruity of punishing one under 16 who is supposed to be protected from the sexual advances of others because of his or her age and inability to fully consent to sex, equally with one 16 or 60, who is presumed to be of an age and maturity to understand his sexual decisions.

J.A.S., 686 So. 2d at 1369 n.2.

139. *Id.* at 1369 “The failure to enact any legislation before retiring from the 1996 session indicates to us that the members of the legislature have no better idea of how to deal with problem than that adopted by *L.L.N.*” The fact that the debate in the legislature existed

Citing precedent set forth in *L.L.N. v. State*,¹⁴⁰ the court denied any attempt to claim that section 800.04 was constitutionally vague with respect to minors.¹⁴¹ In *L.L.N.*, a minor, charged under section 800.04, unsuccessfully claimed that the statute was unconstitutionally vague because it was being used to “prosecute a member of the protected class.”¹⁴² The court was quick to note that the Supreme Court of Florida denied certiorari in *L.L.N.*, implying that the high court was satisfied that *L.L.N.* was decided properly.¹⁴³ The court also suggested that the failure on the part of the legislature in the previous term to decide whether it is proper for minors to be charged under section 800.04 was proof that the legislature realized a problem existed and that they, too, had no better solution than that used by the courts.¹⁴⁴ However, the court recognized in *B.B.* that the Supreme Court of Florida found it problematic to adjudicate a minor delinquent in a statutory rape case because of the potential penalties involved.¹⁴⁵ Regardless, the court believed that the *B.B.* decision was inconclusive with regard to the potential penalty and therefore suggested that the Supreme Court of Florida wished to leave the question to the legislature.¹⁴⁶

The court seemed to endorse the view that minors can be constitutionally charged and convicted under section 800.04 because of the strength of the statutory language and the apparent commitment on the part of the Supreme Court of Florida to prevent “consensual” intercourse between minors.¹⁴⁷ Although the district court did vacate the dismissal of the trial court, it is difficult to grasp the rationale that motivated their findings. Particularly, because the court certified the following question to the Supreme Court of Florida:

suggested to the court that “the legislature [was] aware of the serious problem of sexual activity among minors.” *Id.*

140. 504 So. 2d 6 (Fla. 2d Dist. Ct. App. 1987).

141. *J.A.S.*, 686 So. 2d at 1368 (citing *L.L.N. v. State*, 504 So. 2d 6 (Fla. 2d Dist. Ct. App. 1987)).

142. *L.L.N.*, 504 So. 2d at 7.

143. *J.A.S.*, 686 So. 2d at 1368.

144. *Id.* at 1369.

145. *Id.*

146. *Id.*

[T]he current supreme court was unable to accept the potential penalty appropriate for an adjudication of guilt of a second degree felony in *B.B.* The result attained in *B.B.* was to refer the matter back to a legislature that was unable to resolve the matter during its entire 1996 session.

Id.

147. *J.A.S.*, 686 So. 2d at 1368. “The conclusion to be drawn from the supreme court’s statements in *B.B.* and the legislature’s statement in section 800.04 is that sexual activity between minors is prohibited whether or not each of the participants believe that they have ‘consented.’” *Id.*

WHETHER THE POTENTIAL PENALTY FOR VIOLATION OF SECTION 800.04, FLORIDA STATUTES, BY A MINOR UNDER THE AGE OF SIXTEEN FURTHERS A COMPELLING STATE INTEREST THROUGH THE LEAST INTRUSIVE MEANS.¹⁴⁸

B. *The Supreme Court of Florida*

The factual circumstances of *B.B.* and *J.A.S.* are similar because they both deal with minors charged with statutory rape based upon "consensual" intercourse with other minors.¹⁴⁹ The court's conclusion in *B.B.*, that the state's compelling interest was not furthered by the least intrusive means by adjudicating *B.B.*, a minor delinquent,¹⁵⁰ might lead one to reason that *J.A.S.*, a minor, would not be adjudicated delinquent. However, in *J.A.S.* the court "conclude[d] that section 800.04, as applied herein, furthers the compelling interest of the State in the health and welfare of its children, through the least intrusive means, by prohibiting such conduct and attaching reasonable sanctions through the rehabilitative juvenile justice system."¹⁵¹ Support for the court's conclusion was essentially derived from distinguishing *B.B.* from *J.A.S.* and explaining the similarities between *J.A.S.* and *Jones*.¹⁵²

The court began its discussion by outlining their holdings in both *Jones* and *B.B.* and explaining why those holdings support the *J.A.S.* decision.¹⁵³ The court stated that section 794.05,¹⁵⁴ the statute used to charge *B.B.*, was designed to protect minors from adults.¹⁵⁵ Because *B.B.* was a minor, prosecuting *B.B.* was not furthering the purpose of the legislation.¹⁵⁶ Though both defendant and victim in *J.A.S.* were minors, the court found a distinction between *J.A.S.* and *B.B.* in the fact that *B.B.* dealt with two sixteen-year-olds, while *J.A.S.* dealt with two fifteen-year-olds (the defendants) and two twelve-year-olds (the victims).¹⁵⁷ This factual distinction between the cases proved extremely important because the court found that "twelve-year-old children are entitled to considerable protection

148. *Id.* at 1370.

149. Compare *J.A.S. v. State*, 705 So. 2d 1381, 1382 (Fla. 1998) with *B.B. v. State*, 659 So. 2d 256 (Fla. 1995).

150. *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995).

151. *J.A.S.*, 705 So. 2d at 1386.

152. *Id.*

153. *Id.* at 1383-85.

154. FLA. STAT. § 794.05 (Supp. 1996).

155. *J.A.S.*, 705 So. 2d at 1384.

156. *Id.* at 1385.

157. *Id.* at 1386.

by the State, even when some of them resist its extension to them.”¹⁵⁸ Of course, one wonders if the court was suggesting that a sixteen-year-old was not entitled to the same protection.

In *B.B.*, the court explained that “[s]ection 794.05 is not being utilized as a shield to protect a minor, but rather, it is being used as a weapon to adjudicate a minor delinquent.”¹⁵⁹ In *J.A.S.*, the court summarily found that “section 800.04 is being primarily utilized as a shield to protect the twelve-year-old girls.”¹⁶⁰ The court offered no explanation for this distinction, yet there is little doubt that the family of the sixteen-year-old female victim in *B.B.* was equally confused by the court’s failure to “shield” her from the defendant, instead choosing to “shield” him from punishment.¹⁶¹

The court then reiterated that *Jones*, among other things, stood for the proposition that minors should be protected from sexual exploitation, which the court deemed to be a compelling state interest.¹⁶² It appears that one of the similarities between *J.A.S.* and *Jones* rests in the notion of exploitation as a compelling state interest. In *Jones*, the court was dealing with an adult-minor situation, where the court found it easy to see the propensity for sexual exploitation.¹⁶³ Similarly, the age disparity in *J.A.S.* seemingly led the court to conclude that the state had a compelling interest.¹⁶⁴ Therefore, it might be argued that the court reasoned if the minor victim was quite young or if the age disparity was significant, the danger of sexual exploitation would rise to a level that supported adjudicating the older minor delinquent. This statement is supported by the court’s conclusion that “whatever privacy interest a fifteen-year-old minor has in carnal intercourse is clearly outweighed by the State’s interest in protecting twelve-year-old children from harmful sexual conduct.”¹⁶⁵

The court also opined on several other issues raised by statutory rape cases dealing with minors.¹⁶⁶ The court made it clear that “minors under sixteen have no unfettered right to engage in recreational intercourse with others under sixteen.”¹⁶⁷ Further, *T.W.* gave the court the power to take steps

158. *Id.* at 1385.

159. *B.B.*, 659 So. 2d at 260.

160. *J.A.S.*, 705 So. 2d at 1386.

161. *Id.*

162. *Id.* at 1384. “We noted that *Jones* implicated an adult-minor situation where ‘the crux of the State’s interest . . . [was] the prevention of exploitation of the minor by the adult.’” *Id.* (quoting *B.B.*, 659 So. 2d at 259).

163. *Jones*, 640 So. 2d at 1086 (quoting *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991)).

164. *J.A.S.*, 705 So. 2d at 1384.

165. *Id.* at 1386.

166. *Id.*

167. *Id.*

necessary to prevent minors from participating or being lured into sexual activity.¹⁶⁸ Also, the court reasoned that the vast amount of legislation aimed at protecting minors from sexual exploitation supported the conclusion that adjudicating a minor delinquent for statutory rape was consistent with the intent of the legislature.¹⁶⁹

The court also found that punishment could be achieved through the least intrusive means because of the “rehabilitative” nature of the juvenile justice system.¹⁷⁰ Particularly, the court pointed to the fact that the defendants in *J.A.S.* were not charged as adults and therefore could not be sentenced to the possible “maximum fifteen-year prison sentence.”¹⁷¹ The rationale that the defendants were not charged as adults begs the question whether the court would have found differently if the defendants were charged as adults.

As dictum, the court offered, “[i]f we blinded ourselves to the unique facts of each case, we would render decisions in a vacuum with no thought to the serious consequences of our decisions for the affected parties and society in general.”¹⁷² This appears to be an attempt to reconcile the court’s arguably inconsistent holdings with respect to privacy rights of minors found in *T.W.*, *Jones*, *B.B.*, and *J.A.S.* It is also likely that the court is illustrating the difficulty they encounter when trying to fashion a workable and clear-cut test to deal with statutory rape where the defendant and victim are both minors and the activity was “consensual.”

IV. CONCLUSION

Certain conclusions may safely be drawn from the somewhat confusing line of cases cited above. Perhaps the safest conclusion can be drawn from the court’s hard-line stance with respect to adult-minor “consensual” intercourse. It seems clear that the court will not recognize any privacy right to “consensual” intercourse between an adult and minor because of the overwhelming propensity for sexual exploitation of children.¹⁷³ Though less clear, it might also be argued that the court is willing to adjudicate delinquent minors who engage in “consensual” intercourse with young children or where the age disparity is significant. The most confusing question is whether the court is willing to allow a minor to be charged when the age between the consenting minors is the same or very close.

168. *Id.* at 1386; *see also T.W.*, 551 So. 2d at 1193 (holding “a minor’s rights are not absolute”).

169. *J.A.S.*, 705 So. at 1385.

170. *Id.* at 1386.

171. *Id.* at 1386–87 n.15.

172. *Id.* at 1387.

173. *Jones v. State*, 640 So. 2d 1084, 1086 (Fla. 1994).

The failure on the part of the legislature to craft statutes that finally determine these issues has forced the court to make difficult choices with respect to a minor's right of privacy. The fear of endorsing behavior the court clearly finds reprehensible, coupled with the court's need to decide issues based upon constitutionality rather than moral beliefs, has left the court in the difficult quandary of deciding between rights, morals, and political views. These are not easy choices, especially because the court is supposed to be apolitical, leaving its own political, moral, and religious predilections behind when stepping onto the bench.

Regardless, the fact remains, the court is dealing with an intimately sensitive subject that calls into question present day values and beliefs concerning an individual's sexuality. At what age does one begin to understand and comprehend the potential life long decisions arising from sexual activity? Does the existence of deadly sexually transmitted diseases such as AIDS allow more leeway for the court to restrict privacy rights to protect younger people who might not have the capacity to understand the ramifications of their actions? Having raised these questions, it seems logical to ask whether these are questions the court should be answering. If these questions, which go to the heart of an individual's personal autonomy, should not be answered by a panel of judges, then it is the duty of Floridians, who have already made a commitment to privacy rights, to force their legislators to craft statutes that clearly address and reflect the sentiments of people of the State of the Florida.

Gregory R. Beck

Florida's Hormonal Control Statute: Arguments for Constitutionality Under Florida's Right of Privacy

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I. INTRODUCTION

Florida's new law,¹ which proscribes the administration of medroxyprogesterone acetate ("MPA")² to sexual battery offenders, became effective in October of 1997. More than one hundred, out of one hundred and twenty members of the House of Representatives, voted for the law, with virtually no debate.³ The lawmakers' vote was bold because, although other states have similar statutes,⁴ none have been challenged.⁵ Therefore, the constitutionality of a law that mandates MPA treatment is still in question. As with any new and untraditional method of crime prevention or rehabilitation,⁶ constitutional challenges are expected. The list of challenges will probably include equal protection,⁷ cruel and unusual punishment,⁸

1. FLA. STAT. § 794.0235 (1997).

2. See discussion *infra* Part IV.

3. Jeremy Wallace, *Chemical Castration Bill Passes in House*, BRADENTON HERALD, Apr. 25, 1997, at L1 (stating that 108 of 120 House of Representatives members voted for the MPA statute).

4. CAL. PENAL CODE § 645 (West 1997); GA. CODE ANN. § 42-9-44.2 (1982); LA. REV. STAT. ANN. § 538 (West 1998); MONT. CODE ANN. § 45-5-512 (1997).

5. Bryan Keene, Note, *Chemical Castration: An Analysis of Florida's New "Cutting-Edge" Policy Towards Sex Criminals*, 49 FLA. L. REV. 803, 804 (1997) (discussing MPA legislation).

6. See generally Kenneth B. Fromson, Note, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 313-17 (1994) (discussing case and legislative history of castration in the United States).

7. Whether or not MPA statutes violate the Equal Protection Clause is an issue because, although a statute may be gender neutral, the drug affects men and women differently. Recent Legislation, *Constitutional Law—Due Process and Equal Protection—California Becomes First State to Require Chemical Castration of Certain Sex Offenders—Act of Sept. 17, 1996, ch. 596, 1996, Cal. Stat. 92 (to be Codified at Cal. Penal Code § 645)*, 110 HARV. L. REV. 799, 801-04 (1997) (arguing that California's hormonal control statute violates the Equal Protection Clause because MPA sterilizes women).

8. See Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 31 (1990) (explaining the history of the Eighth Amendment and why MPA treatments are not cruel and unusual punishment); Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117, 130-31 (1998) (contending that hormonal control is cruel and unusual punishment); Jodi Berlin, Note, *Chemical Castration of Sex Offenders: "A Shot in the Arm" Towards Rehabilitation*, 19 WHITTIER L. REV. 169, 188-94, 212 (1997) (discussing the history and legal tests for cruel and unusual punishment and explaining that MPA treatment is not cruel and unusual punishment). MPA is not inherently cruel because the side effects are minimal and reversible. *Id.* at 212. It "is proportional to the offense because it is" sentenced for the same period of time as probation leaving "no arbitrary and excessive use" of MPA. *Id.* It is

double jeopardy,⁹ due process,¹⁰ First Amendment,¹¹ and the right to privacy.¹² Constitutional challenges were apparently anticipated, as evidenced by the inclusion of a clause that protects the statute if part of it is held invalid by providing that the parts that are not invalidated are still good law.¹³

the least restrictive means of accomplishing “deterrence and rehabilitation” because physical castration is more restrictive. *Id.*

9. Spalding, *supra* note 8, at 133–35 (arguing that the statute violates the Double Jeopardy Clause of the Fifth Amendment because a defendant’s withdrawal from treatment results in a violation of probation and a second-degree felony).

10. Due process requires that a condition of probation be reasonably related to the crime that the defendant was convicted of, the prevention of future criminality, or public safety. *Id.* at 131–32 (urging that MPA statute fails the reasonable relationship test required of all probation conditions). “[W]ith regard to non-paraphiliacs and involuntarily-treated paraphiliacs” MPA is not reasonably related to the goals of the statute because incarceration is a “more narrowly tailored means” of accomplishing the state interest of protecting its citizens. *Id.* at 132. The statute indiscriminately mandates MPA, and the statute does not “necessarily prevent future criminality” because it does not address violent tendencies unrelated to sexual drive. *Id.* at 132–33. This analysis is incomplete because it does not incorporate the “medically appropriate” requirement, which will presumably ensure that MPA sentenced defendants are likely to experience a decreased likelihood of re-offense when treated. *See* discussion *infra* Parts III.B, IV.B.

11. Mandatory MPA treatments implicate the issue of whether an individual’s First Amendment right to mental autonomy is violated because MPA decreases sexual fantasies in its recipients. Fitzgerald, *supra* note 8, at 26–31 (discussing the right to mental autonomy and its relation to statutes that proscribe administration of a drug that decreases sexual thoughts). Whether a statute interferes with the mental autonomy guaranteed by the First Amendment depends on the degree of the intrusion. *Id.* Administration of MPA is not so intrusive so as to violate the First Amendment. *Id.* at 28 (detailing an analysis of MPA treatment and the test for determining whether an intrusion violates the First Amendment right to mental autonomy). *See also* Berlin, *supra* note 8, at 186–88, 210–12 (concluding that First Amendment rights are not violated); G.L. Stelzer, Note, *Chemical Castration and the Right to Generate Ideas: Does the First Amendment Protect the Fantasies of Convicted Pedophiles?*, 81 MINN. L. REV. 1675, 1704–09 (1997) (proposing that a new test is needed to determine whether MPA statutes violate the First Amendment).

12. Spalding, *supra* note 8, at 128–30 (arguing that the statute violates the federal right to privacy); Keene, *supra*, note 5, at 813–17 (arguing that the statute violates the right to privacy in the *Florida Constitution*).

13. Ch. 97-184, § 2, 1997 Fla. Laws 3455, 3457 (codified at FLA. STAT. § 794.0235 (1997)). Section two of Chapter 97-184 of the *Laws of Florida* reads as follows:

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

The department of corrections anticipates that no more than three persons will be eligible for the MPA treatment within the next year.¹⁴ This is probably because not all defendants are medically appropriate for the treatment.¹⁵ Additionally, prison officials do not anticipate the first treatments to begin for years.¹⁶ Defendants sentenced to MPA treatment are not eligible to receive it until approximately one week before the expiration of their prison sentences.¹⁷ It is possible that, by the time the Florida Statute is challenged, there will be a United States Supreme Court opinion addressing a similar statute on a federal right to privacy challenge.¹⁸ Florida courts could then use such an opinion as a guide. In the meantime, however, this is uncharted territory deserving of a constitutional debate.

This article analyzes the new hormonal control statute's validity under Article I, section 23 of the *Florida Constitution*, Florida's right to privacy, and offers non-frivolous arguments for the application and extension of existing law in advancing the proposition that the statute is constitutional. Part II explains why the treatment should not be referred to as chemical castration. Part III provides an overview of the statute. Part IV describes the MPA drug and explains how it decreases recidivism. Part V discusses the federal right to privacy, and Part VI explains Florida's constitutional right to privacy while proposing arguments for its constitutionality.

II. "CONTROL" NOT "CASTRATION"

The administration of medroxyprogesterone acetate is properly phrased "hormonal control" not "chemical castration." The word "castrate" suggests removal of all sexual function. It is of paramount importance to understand that MPA does not castrate, but rather controls and decreases the level of testosterone in the brain, thereby causing the recipient to experience a diminished sex drive.¹⁹

Id.

14. *Drug Castrations May be Years Away*, ORLANDO SENTINEL, June 2, 1997, at C6.

15. See discussion *infra* Parts III.B, IV.B.

16. *Castration Legal, but Not Practiced—Yet*, BRADENTON HERALD, June 2, 1997, at L3.

17. FLA. STAT. § 794.0235(2)(b) (1997) (stating that MPA injections "shall commence not later than one week prior to the defendant's release from prison or other institution.").

18. See Wallace, *supra* note 3.

19. See discussion *infra* Part IV.

A common myth of MPA treatment is that it causes impotence.²⁰ Although the frequency of spontaneous erections may decrease,²¹ MPA recipients are still able to achieve an erection,²² have sex,²³ and father children.²⁴ The phrase “chemical castration” encourages the myth that MPA prevents its recipients from committing a sexual offense by imposing impotence.

The word “castration” conjures up images of medieval ceremonies involving bloody torture tools.²⁵ A medication that controls hormone levels bears no relation to such torture. Yet, those torturous images cannot be separated from the word “castration.” Opponents of MPA, while cleverly using it to create emotional dishevel, correctly define “castration” as “to deprive of the testes,” but fail to establish how decreasing sexual fantasy by controlling levels of testosterone fits that definition.²⁶ The statute does not mention the phrase “chemical castration,” and that phrase should not be used in its description.²⁷ The use of the phrase is prejudicial because it causes emotional uncertainty, and is inaccurate because it does not properly describe MPA treatment. Further, the use of the phrase is unnecessary because the procedure can be called “hormonal control” in order to eliminate this prejudice.

Conceivably, either “hormonal control therapy” or “hormonal control” more accurately and less prejudicially describes the treatment. The role of MPA in treating or “controlling” sexual offenders is to lower sexual libido and the likelihood of a repeat offense by controlling the body’s ability to produce and process testosterone.²⁸ If physical sexual dysfunction, which does not occur in all recipients,²⁹ appears as a side effect, adjusting the

20. Fitzgerald, *supra* note 8, at 7.

21. *Id.* at 7.

22. *Id.*

23. *Id.*

24. Daniel L. Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments*, 15 J. LEGAL MED. 279, 285 (1994).

25. See *Weems v. United States*, 217 U.S. 349, 404 (1910) (explaining that the cruel and unusual punishment clause of the Eighth Amendment was “intended to prohibit the barbarities of . . . castration”).

26. Keene, *supra* note 5, at 803 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 349 (1993)).

27. See FLA. STAT. § 794.0235 (1997).

28. See discussion *infra* Part IV.

29. See discussion *infra* Part IV.

dosage can reverse it.³⁰ Clearly, “hormonal control” is the correct way to describe MPA treatment.

III. THE HORMONAL CONTROL STATUTE

A. *The MPA Sentence*

Section 794.0235 of the *Florida Statutes* alters sentencing guidelines for sexual battery defendants to include weekly injections of medroxyprogesterone acetate.³¹ The injections are in addition to, not instead of, any prison sentence incurred by the same offense.³² Depending on the particular defendant’s past criminal history, the judge “may” or “shall” sentence the defendant to undergo the treatment after release from prison.³³ For first-time sexual battery offenders, the judge has discretionary power to impose the injections.³⁴ If the offender, however, has a prior sexual battery conviction, MPA treatment is mandatory.³⁵ In either case, when the judge is determining the duration of the treatment, he or she can specify a specific number of years or has discretion to order the treatment to continue for the life of the defendant.³⁶

B. *The Medical Expert and Medically Appropriate Requirement*

Judges do not retain complete autonomy in sentencing offenders to hormonal control. The requirement that a medical expert must determine the defendant to be an appropriate candidate for the MPA treatment significantly reduces the judge’s power to impose the sentence.³⁷ Any defendant sentenced to MPA must be a medically appropriate candidate at the start of the treatment and throughout the course of the injections.³⁸ In other words, a defendant must be a medically appropriate candidate at all times to be eligible for MPA.³⁹ Unfortunately, the lawmakers did not define “medically

30. Berlin, *supra* note 8, at 181 (citing AMERICAN HOSPITAL FORMULARY SERVICE, 96 DRUG INFORMATION 2333, 2333 (Gerald K. McEvoy ed., 1996)).

31. FLA. STAT. § 794.0235 (1997).

32. *Id.* § 794.0235(1)(b).

33. *Id.* § 794.0235(1)(a)(b).

34. *Id.* § 794.0235(1)(a).

35. *Id.* § 794.0235(1)(b).

36. FLA. STAT. § 794.0235(2)(a) (1997).

37. *Id.*

38. *Id.* § 794.0235(2)(a), (3).

39. *Id.* § 794.0235(3).

appropriate.”⁴⁰ The logical interpretation is that a defendant is a medically appropriate candidate if the medical expert determines that MPA will produce the desired effect if administered. The desired effect is a decrease in the recipient’s sexual libido.⁴¹ This interpretation would exclude women completely because MPA is a widely used female contraceptive and does not significantly affect a woman’s libido.⁴² ;

C. *The Alternatives*

The statute permits defendants to refuse the treatment by allowing two alternatives.⁴³ First, a defendant may submit a motion to the court for physical castration instead of hormonal control.⁴⁴ This motion gives the judge the power to levy a physical castration sentence in lieu of the MPA.⁴⁵ The second option is to simply refuse hormonal control and stay in jail.⁴⁶ Refusal by a sentenced offender to undergo treatment is a second-degree felony.⁴⁷ This option to refuse treatment remains available throughout the course of treatment, and the defendant may at any time choose to discontinue the hormone control therapy and return to prison.⁴⁸

The Department of Corrections provides the services needed to administer the treatment to the defendant.⁴⁹ The weekly injections begin one week prior to the defendant’s release from prison, and continue through the duration of the term specified by the sentencing judge.⁵⁰ It is estimated that the treatments will cost the Department of Corrections \$2000 per year for each defendant, plus any incidental costs of staffing and additional facilities.⁵¹

40. *Id.*

41. *See* discussion *infra* Part IV.

42. Recent Legislation, *supra* note 7, at 800.

43. FLA. STAT. § 794.0235(2)(a), (5) (1997).

44. *Id.* § 794.0235(1)(b).

45. *Id.*

46. *Id.* § 794.0235(5).

47. *Id.*

48. *See* FLA. STAT. § 794.0235 (1997).

49. *Id.* § 794.0235(3).

50. *Id.* § 794.0235(2)(a).

51. *Drug Castrations May Be Years Away*, *supra* note 14.

IV. MEDROXYPROGESTERONE ACETATE

A. MPA Therapy Generally

Proper analysis of the hormonal control statute requires an understanding of what MPA is, on whom it will work, how it works, and how it affects its recipient. When analyzing a statute calling for mandatory medical treatment, issues such as effectiveness and adverse side effects are important to determine whether the treatment is the least intrusive means of accomplishing the statute's goal.⁵² For example, if the drug does not accomplish the desired effects, it fails the least intrusive method requirement because the least intrusive means of achieving nothing is nothing. Accordingly, if a drug capable of achieving the desired results on certain individuals is mandated for individuals not within that class, the drug, in effect, does nothing, and is not the least intrusive means of producing that result. In essence, if the drug does not accomplish the purported goal of the law, it is not necessarily related to the state interest involved. Understanding possible and probable side effects is required to fully anticipate the degree to which administration of a drug will infringe on a person's private life and make a decision as to whether other methods are less invasive in accomplishing the government's goal.

MPA, more commonly known as Depo-Provera, a non experimental⁵³ synthetic hormone, is the most commonly used hormonal control drug.⁵⁴ When administered to males intravenously on a weekly basis, it decreases uncontrollable sexual libidos by controlling testosterone levels.⁵⁵ MPA alleviates the amount of testosterone in the body by increasing testosterone metabolism in the liver and reducing the amount of testosterone produced by the testes.⁵⁶ This induces a tranquilizing effect on the brain, relieving the recipient of his unmanageable sexual impulses by decreasing the frequency of sexual fantasies.⁵⁷

52. See discussion *infra* Parts VI.C.4, IV.D.4.

53. Fitzgerald, *supra* note 8, at 6.

54. Icenogle, *supra* note 24, at 284.

55. *Id.* at 284.

56. Stelzer, *supra* note 11, at 1683–84. See generally Icenogle, *supra* note 24, at 283–84 (explaining the “physiology of male sex hormones”).

57. Stelzer, *supra* note 11, at 1684.

B. *The Paraphiliac*

Research shows that MPA reduces recidivism for sexual offenders suffering from a paraphiliac disorder.⁵⁸ Paraphiliacs exhibit “a pattern of sexual arousal, erection and ejaculation,” commonly formalized by a “specific fantasy or its actualization.”⁵⁹ This means that the individual achieves sexual excitement from a particular fantasy or by acting out that fantasy in real life.⁶⁰ For example, a pedophile with a paraphiliac disorder would become sexually aroused by a fantasy involving sexual relations with a child or by actually having sexual relations with a child.⁶¹

When attempting to diagnose a paraphiliac disorder, a doctor typically relies on whether “persistent fantasies about some type of deviant sex” are present.⁶² If these fantasies are not satisfied, the individual experiences “intense cravings” which, if left unfulfilled, will cause the individual to suffer “negative feelings.”⁶³ In other words, paraphiliacs have a fantasy about some type of non conventional, possibly illegal, sexual act.⁶⁴ The fantasy is beyond the individual’s control, in so far as he cannot change it or prevent himself from having it.⁶⁵ If the individual fails to act out the fantasy in real life, he suffers some degree of mental anguish.⁶⁶ If the pedophile from the earlier example resisted the urge to have sexual relations with a child, as dictated by his fantasy, he would suffer “intense cravings” to fulfill the fantasy, which would ultimately cause him mental suffering.⁶⁷

The paraphiliac’s past probably includes “manifested stereotyped sexual activity because satisfaction of these cravings requires precise recreation of the fantasy.”⁶⁸ This means that, at some point, the individual has probably acted out his exact fantasy in real life because the cravings suffered as a result of the fantasies can only be satisfied if the fantasy is

58. Icenogle, *supra* note 24, at 285 (discussing research conducted by the Johns Hopkins Sexual Disorders Clinic).

59. Fitzgerald, *supra* note 8, at 4.

60. *Id.*

61. *See id.*

62. Icenogle, *supra* note 24, at 281 (citing Berlin & Meincke, *Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities and Preliminary Findings*, 138 AM. J. PSYCHIATRY 601, 601 (1981)).

63. *Id.*

64. *Id.*

65. *See id.*

66. *See id.*

67. *See* Icenogle, *supra* note 24, at 281.

68. *Id.*

precisely recreated.⁶⁹ In terms of the pedophile example, only a child partner can fulfill the urges imposed by the fantasy of having sexual relations with a child.⁷⁰ An adult partner would prevent precise recreation of the fantasy and would not temper the unmanageable “intense cravings.”⁷¹ The fantasies and the corresponding behavior remain for an indefinite period and tend to stay the same over time.⁷² In terms of paraphiliacs experiencing an illegal fantasy, this is bad news because it makes them extremely likely to commit the crime in the same manner yet again.⁷³

In the case of a paraphiliac, his fantasy is his enemy because his fantasy is the catalyst that causes him to engage in the fantasized sexual activity, which might be illegal.⁷⁴ Denied of his fantasy, he would have “intense cravings,” requiring real life actualization of the sexual acts depicted in the fantasy and his future would be less likely to include “manifested stereotyped sexual activity.”⁷⁵ MPA denies the fantasy.⁷⁶ By decreasing the amount of testosterone in the body, MPA sedates the brain and interrupts sexual fantasies, including those perpetuating the cravings for illegal sex, causing the sex drive and accompanying cravings to decrease.⁷⁷ This increases the offenders ability to control otherwise uncontrollable sexual impulses.⁷⁸

Because not all sexual offenders are paraphiliacs,⁷⁹ the hormonal control statute accounts for this discrepancy in effectiveness by allowing administration of the drug to only those defendants deemed medically appropriate for treatment by a medical expert.⁸⁰ The inclusion of such a requirement ensures that defendants are not indiscriminately sentenced to MPA treatment.⁸¹

69. *Id.*

70. *See id.*

71. *See id.*

72. Icenogle, *supra* note 24, at 281.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*; *see also* Stelzer, *supra* note 11, at 1684.

77. Stelzer, *supra* note 11, at 1684.

78. *Id.*

79. Fitzgerald, *supra* note 8, at 4-5 (discussing the types of sexual offenders).

80. FLA. STAT. § 794.0235(2)(a) (1997). *See* discussion *supra* Part III.B. (proposing that “medically appropriate” requires that the defendant be the type of person that would be less likely to commit the crime again if administered MPA).

81. *See* discussion *supra* Part III.B.

C. *Side Effects*

Some recipients report side effects including “weight gain, mild lethargy, cold sweats, hot flashes, nightmares, hypertension, elevated blood sugar, shortness of breath, and lessened testis size.”⁸² Recipients rarely suffer anything but minimal side effects.⁸³ The list of side effects may seem extensive, but it is important to note that whenever a drug is used for a new or different objective, all of its potential side effects, no matter how remote, must be documented and registered.⁸⁴

MPA does not cause an inability to achieve erection or ejaculation.⁸⁵ Although the body’s ability to experience spontaneous erections and ejaculations does decrease, recipients of the treatment do retain the physical and mental ability necessary to engage in sexual activity when stimulated by a partner.⁸⁶ In fact, MPA recipients concede that the treatment minimally affects consensual sexual activity.⁸⁷ Furthermore, men have fathered children while undergoing MPA treatment.⁸⁸ Hypothetically, adverse effects on one’s sex drive can be adjusted by changing the MPA dosage.⁸⁹ In any case, effects of the drug cease upon discontinuation of treatment.⁹⁰

V. FEDERAL RIGHT TO PRIVACY

A. *The Implied Right to Privacy*

Although the “Constitution does not explicitly mention any right of privacy,”⁹¹ the right to privacy implicit in the Fourteenth Amendment of the United States Constitution has been interpreted by the United States Supreme Court to protect areas such as contraception⁹² and abortion.⁹³ The

82. Icenogle, *supra* note 24, at 285. *See generally* Fitzgerald, *supra* note 8, at 7 (discussing additional “possible” side effects).

83. Fitzgerald, *supra* note 8, at 7.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Icenogle, *supra* note 24, at 285.

89. Fitzgerald, *supra* note 8, at 7.

90. Icenogle, *supra* note 24, at 285.

91. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (discussing the history of the implied right to privacy).

92. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating a statute that forbade contraceptive use because it infringed upon the right of marital privacy).

Supreme Court has never held that hormonal control of sexual offenders is unconstitutional.⁹⁴ However, the right to privacy granted by the United States Constitution is not at issue here. The right to privacy contained in Florida's Constitution is broader and provides more comprehensive protection against governmental intrusion than its federal counterpart.⁹⁵

B *Supreme Court Treatment of Biological Alteration*

It is important to examine how the United States Supreme Court has treated biological alteration in the past, so that a foundation can be laid for litigation in the future.⁹⁶ In *Jacobson v. Massachusetts*,⁹⁷ the Court upheld a criminal sentence imposed for refusing to submit to a smallpox vaccination.⁹⁸ The Court, in *Buck v. Bell*,⁹⁹ upheld a law as constitutional which called for involuntary sterilization of mental defectives for the welfare of society.¹⁰⁰ In *Skinner v. Oklahoma*,¹⁰¹ the Court invalidated a law mandating sterilization of defendants convicted of two felonies without addressing the biological alteration issue on the grounds that the law violated the Equal Protection Clause by not including white collar crimes.¹⁰² The *Washington v. Harper*¹⁰³ decision upheld forcible administration of antipsychotic drugs that alter the chemistry of the brain.¹⁰⁴

It is clear that, under certain circumstances, what might be unconstitutional if applied to the general public may be constitutional with respect to certain groups of individuals when their special circumstances call for special treatment. The Court in *Buck* articulated this thought by providing that its ruling was "confined to the small number who are in the

93. *Roe*, 410 U.S. at 152–53 (invalidating a state law permitting abortion only to save a mother's life).

94. Recent Legislation, *supra* note 7, at 799.

95. See, e.g., *Winfield v. Division of Pari-Mutuel Wagering*, Dep't of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985).

96. See generally Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203, 1204–15 (1995) (analyzing Supreme Court decisions regarding biological alteration).

97. 197 U.S. 11 (1905).

98. *Id.* at 31.

99. 274 U.S. 200 (1927).

100. *Id.* at 207.

101. 316 U.S. 535 (1942).

102. *Id.* at 538.

103. 494 U.S. 210 (1990).

104. *Id.* at 227.

institutions named” and did not apply “to the multitudes outside.”¹⁰⁵ The Supreme Court’s treatment of cases involving the invasion of bodily autonomy reveal that a state’s compelling interest in mandating a particular procedure can override an individual’s right to maintain complete control over his or her body.

VI. FLORIDA’S RIGHT OF PRIVACY

A. *Article I, Section 23 of the Florida Constitution*

In 1980, Florida amended its constitution to include a statute providing an explicit right to privacy ensuring that “[e]very natural person has the right to be let alone and free from governmental intrusion into his private life.”¹⁰⁶ Section 23 of the *Florida Constitution* is broader and encompasses protection of a greater number of privacy interests than the implied right to privacy in the United States Constitution.¹⁰⁷

B. *Statutory Construction of the Right to Privacy*

The Supreme Court of Florida, in *Traylor v. State*,¹⁰⁸ held that Florida courts should look first to the text of the *Florida Constitution* to determine the nature and scope of personal rights of Florida residents.¹⁰⁹ The lawmakers struck the words “unwarranted” and “unreasonable” from the preceding phrase “governmental intrusion” in order to make the *Florida Constitution* sweep more broadly.¹¹⁰ The “phrase ‘right to be let alone’ from government intrusion” was intentionally chosen to distinguish “Florida’s broad privacy right from the limited federal right.”¹¹¹ This is clear evidence that the lawmakers and the citizens who voted for the statute intended it to

105. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

106. FLA. CONST. art. I, § 23.

107. *See, e.g., Winfield v. Division of Pari-Mutuel Wagering, Dep’t of Bus. Regulation*, 477 So. 2d 544, 548 (Fla. 1985).

108. 596 So. 2d 957 (Fla. 1992).

109. *Id.* at 962.

110. *See, e.g., Winfield*, 477 So. 2d at 548.

111. *Mozo v. State*, 632 So. 2d 623, 632 (Fla. 4th Dist. Ct. App. 1994). The federal right to privacy was significantly narrowed by the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967), when the Court announced that “protection of a person’s general right to privacy . . . is . . . left largely to the law of the individual States.” *Id.* at 350–51. (refusing to allow federal right to privacy protection for government’s listing and recording an individual’s telephone conversation at a public pay phone).

provide more comprehensive protection from government interference than that which the national constitution provides.¹¹²

C. *The Right to Privacy Test*

Florida's privacy amendment does not explicitly provide a standard for reviewing a governmental intrusion into an individual's private life.¹¹³ In *Winfield v. Division of Pari-Mutuel Wagering, Department of Business Regulation*,¹¹⁴ the Supreme Court of Florida articulated the accepted test for Florida's right to privacy challenges.¹¹⁵ The test can be broken down into four simple parts.¹¹⁶ First, the challenger must have had a legitimate expectation of privacy.¹¹⁷ Second, if a legitimate expectation of privacy exists, the individual is found to have a fundamental right.¹¹⁸ Third, since a fundamental right is at issue, the state must show that it has a compelling interest to warrant the abridgement of the individual's privacy.¹¹⁹ Last, the state must prove that it is utilizing the least intrusive method available to accomplish its goal.¹²⁰ Florida's right to privacy provides comprehensive protection from governmental intrusion, but it does not act as an unwavering warrant against all intrusion into an individual's private life.¹²¹

Defendants may claim protection under Article I, section 23 of the *Florida Constitution* because, although some constitutional rights of prisoners are abridged or alienated completely during incarceration, the right to privacy guaranteed by the *Florida Constitution* remains intact.¹²² Since the right to privacy protects those to whom the hormonal control statute applies, the statute must pass muster under the *Florida Constitution*.

112. See e.g., *Mozo*, 632 So. 2d at 633.

113. *Id.*

114. 477 So. 2d 544 (Fla. 1985).

115. *Id.* at 547. See also, Jon Mills, *Sex, Lies, and Genetic Testing: What Are Your Rights to Privacy in Florida?* 48 FLA. L. REV. 813, 823-24 (1996) (discussing the "legal test" for Florida's right to privacy).

116. Mills, *supra* note 115, at 823-24.

117. *Id.* at 823.

118. *Id.* at 824.

119. *Id.*

120. *Id.*

121. *North Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995).

122. *Singletary v. Costello*, 665 So. 2d. 1099, 1105 (Fla. 4th Dist. Ct. App. 1996).

1. Legitimate Expectation of Privacy

Florida courts use a “legitimate” expectation of privacy test to determine the interests protected by Florida’s constitutional right to privacy.¹²³ The courts have held that the words “unreasonable” and “unwarranted” are reminiscent of the narrower federal expectation of privacy test.¹²⁴ The federal test provides protection of an individual’s expectation of privacy only if society recognizes it as reasonable to do so.¹²⁵ Florida’s right to privacy deliberately omitted the words “unreasonable” and “unwarranted.”¹²⁶ This omission “makes it clear that the Florida right of privacy was intended to protect an individual’s expectation of privacy regardless of whether society recognizes that expectation as reasonable.”¹²⁷ This is consistent with the fact that the lawmakers intended Florida’s right to privacy to provide broader protection against governmental intrusion than its federal counterpart.¹²⁸

The test for determining whether an individual has an expectation of privacy is easily broken down into three parts: 1) the individual must have a subjective expectation of privacy;¹²⁹ 2) the expectation must not be spurious or false;¹³⁰ and 3) the expectation must not conflict with society’s values.¹³¹ First, the existence and scope of an individual’s subjective expectation of privacy as determined by consideration of all of the circumstances must be established by placing emphasis on the “objective manifestations of that

123. *Mozo v. State*, 632 So. 2d 623, 633 (Fla. 4th Dist. Ct. App. 1994) (providing an excellent description and explanation for the legitimate expectation of privacy test).

124. *Id.* The federal expectation of privacy test was articulated by the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967) to determine whether an individual qualified for Fourth Amendment protection against having his telephone conversations at a public phone booth listened to and recorded. *Id.* at 361. That case developed a two-prong test for determining an individual’s expectation of privacy. *Id.* at 361. The person must have an “actual (subjective) expectation of privacy,” and the expectation must be such that society is willing to accept it as being reasonable. *Id.* (internal quotations omitted). The test turns on “whether the defendant was reasonable in his belief of privacy,” while the legitimate expectation of privacy test recognizes an individual’s expectation of privacy even if it is not reasonable. *Mozo*, 632 So. 2d at 633–34.

125. *Katz*, 389 U.S. at 361; *see also Mozo*, 632 So. 2d at 633–34 (distinguishing the federal and Florida expectation of privacy tests).

126. *See, e.g., Mozo*, 632 So. 2d at 634.

127. *Id.* at 633–34.

128. *See, e.g., In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989).

129. *See infra* note 132 and accompanying text.

130. *See infra* note 133 and accompanying text.

131. *See infra* note 137 and accompanying text.

expectation.”¹³² Defendants do not manifest an expectation that future sexual fantasies will be within the protected zone of privacy because they implicitly invited the state to intrude into such activity by committing sexual battery. Knowledge that the commission of a crime gives rise to a governmental duty to punish and prevent the crime involved should be imputed. The state needs to intrude into a defendant’s sex life to prevent an offense from occurring again, because sex is the offender’s weapon of choice. Defendants constructively forfeit an expectation of privacy with respect to sexual activity when they commit a sexual battery, knowing that criminal activity mandates governmental intrusion to the extent that it is necessary to punish and prevent future offenses.

Next, the expectation of privacy must not be “spurious” or “false.”¹³³ A sexual battery offender’s claim of an expectation of privacy for sexual fantasies is “spurious” and “false” because, while perpetrating a sexual offense, sexual offenders are aware of the government’s duty to prevent him from doing it again.¹³⁴ In addition, he is cognizant of the fact that this duty necessitates an intrusion by the government into an offender’s sexual fantasy, a component of an individual’s private life, when that component is prompting the illegal activity.¹³⁵ The government is seeking to intrude upon the sexual fantasies of offenders whose fantasies cause them to commit sexual offenses. The offenders’ awareness that the government’s duty reasonably warrants such an intrusion negates the truth of subsequent claims of privacy over the sexual fantasies that prompted him to perpetrate the sexual battery, making any such claims “spurious” and “false.”¹³⁶

Finally, these expectations must then be placed “in the context of a society and the values that the society seeks to foster” because each person is not an “island of self-determination.”¹³⁷ Society seeks to discourage sexual offenders from committing sexual batteries. Society does not support

132. *North Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) (citing *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) (holding that a legitimate expectation of privacy does not exist for visiting retail establishments selling obscene materials)) (finding that job applicant did not have legitimate expectation of privacy against the City’s requiring her to reveal whether or not she smoked, because smokers disclose whether they smoke on a regular basis).

133. *Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, J., concurring specially).

134. *Id.*

135. *Id.*

136. *See id.*

137. *State v. Conforti*, 688 So. 2d 350, 359 (Fla. 4th Dist. Ct. App. 1997) (finding that erotic dancers did not have a legitimate expectation of privacy while performing lewd acts in front of a paying customer at a publicly patronized location).

releasing a paraphilic sexual offender from prison without additional safeguards because it is probable that he will commit another sexual battery upon an innocent person. A sexual offender's expectation of privacy for sexual activity and fantasies after incarceration is not legitimate with respect to the values that society seeks to support. If the court finds that a legitimate expectation does exist, that interest is presumptively protected from governmental intrusion,¹³⁸ and the right to privacy is invoked.¹³⁹

The privacy issue is best stated as whether an offender retains a legitimate expectation of privacy for sexual fantasies after being released from prison, not whether the defendant enjoys an expectation of privacy for future sexual batteries. The latter is not at issue because it has been held that there is no legitimate expectation of privacy while committing a sex crime.¹⁴⁰

A sexual battery defendant's subjective expectation of privacy towards his future sexual activity is limited. Whenever the state attempts to punish or rehabilitate, a defendant impliedly loses some of the privacy he or she enjoys.

In *Fosman v. State*,¹⁴¹ the Fourth District Court of Appeal limited a defendant's expectation of privacy by allowing the state's invasion into a situation derived from his alleged sexual battery.¹⁴² The court held that a defendant did not have a reasonable expectation of privacy interest in refusing to take a blood test in order to inform the victim of the defendant's HIV status.¹⁴³ This case demonstrated that a criminal act might forfeit the legitimacy of the expectation of privacy not only during the criminal act but also in subsequent circumstances stemming from the criminal act.¹⁴⁴ The defendant's HIV status had no relevance to his guilt or innocence.¹⁴⁵ His act

138. *Mozo v. State*, 632 So. 2d 623, 634 (Fla. 4th Dist. Ct. App. 1994) (holding that private conversations over a cordless telephone are "presumptively protected" from government intrusion because it is not "spurious or false" for a person to expect that the government will not, "without cause or suspicion," listen and record telephone conversations).

139. *See, e.g., Winfield v. Division of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

140. *Shapiro v. State*, 696 So. 2d 1321, 1326 (Fla. 4th Dist. Ct. App. 1997) (finding no legitimate expectation of privacy for a therapist's unlawful sexual activity with a patient).

141. 664 So. 2d 1163 (Fla. 4th Dist. Ct. App 1995).

142. *Id.* at 1166.

143. *Id.* (reasoning that "where there is probable cause to believe that a person has committed sexual battery and transmitted bodily fluids to the victim" the defendant does not have a privacy interest in refusing a HIV test when the results of the test will be "disclosed only to the victim and to public health authorities" because he does not have a legitimate expectation of privacy).

144. *See id.*

145. *See id.*

of sexual battery warranted special circumstances rendering him incapable of maintaining the required expectation of privacy.¹⁴⁶

Thus, by committing a sexual battery, a defendant implicitly extends an invitation to the state to prevent future sexual batteries by intruding on his sexual fantasies when those fantasies prompt the illegal sexual activity. That invitation precludes defendants from having a legitimate expectation of privacy with respect to sexual fantasies. If the defendant does not have a legitimate expectation of privacy with respect to his sexual fantasies, then the right to privacy does not apply to the hormonal control statute.

2. Fundamental Right

If a court finds that an individual's legitimate expectation of privacy exists, a fundamental right to protect that privacy interest also exists.¹⁴⁷ A fundamental right qualifies for strict scrutiny, requiring the state to prove that the law is necessarily related to a compelling state interest.¹⁴⁸ Assuming that the defendant has a legitimate expectation of privacy in sexual fantasies, a fundamental right to protect that interest exists. This right can only be infringed upon by the least intrusive method to achieve a compelling state interest.¹⁴⁹

3. Compelling Interest

Florida courts have approached the compelling interest issue differently depending on whether the government was intruding on private information or private decisions.¹⁵⁰ When the state seeks to discover private information, the courts have balanced the individual's right to privacy against the state's compelling interest.¹⁵¹ However, when a private decision is being infringed

146. See *Fosman*, 664 So. 2d at 1166.

147. *Winfield v. Division of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

148. *Id.* at 547.

149. *Id.* The test employed "shifts the burden of proof to the state to justify an intrusion on privacy." *Id.* The burden is met when the state establishes that "the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Id.*

150. *Mills*, *supra* note 115, at 825.

151. *Id.* (citing *Florida v. Rolling*, 22 Media L. Rep. (BNA) 2264, 5 (Fla. 8th Cir. Ct., July 27, 1994) (holding the public's "right to information" is paramount to an individual's interest in preventing the release of crime scene photos after balancing the public's right against the victim's families right to privacy)).

upon, the court applies the traditional strict scrutiny test, which requires the state to demonstrate that the law is necessarily related to a compelling state interest.¹⁵² Administration of MPA deals with a private decision, not private information, because the state is not seeking to compel disclosure of anything from the defendant.¹⁵³ Since the statute infringes on a private decision, the traditional strict scrutiny analysis, as opposed to the balancing test, is appropriate. Although Florida courts have developed a different way of articulating this test by stating that the state must demonstrate that the law “serves a compelling state interest and accomplishes its goal through the use of the least intrusive means,”¹⁵⁴ this test is the same as traditional strict scrutiny, requiring that the law be necessarily related to a compelling government interest.¹⁵⁵

The state has a compelling interest in protecting its citizens.¹⁵⁶ The legislators who wrote and passed the law intended it to be both a deterrent and a rehabilitative tool.¹⁵⁷ Thus, the purpose of the law is to protect innocent third parties from being the victims of sexual batteries.

4. Least Intrusive Method

After the state establishes that the statute serves a compelling interest in protecting innocent third parties, it must establish that chemical castration is the least intrusive method for accomplishing that goal.¹⁵⁸ The hormonal control statute seeks to prevent sexual crimes against its citizens. It purports to accomplish this through hormonal control. Although hormonal control may not be an effective treatment for all defendants because the law does not

152. *Id.* (citing *Beagle v. Beagle*, 678 So. 2d 1271, 1273 (Fla. 1996) (deciding whether grandparent visitation could be granted over a parent’s objections)).

153. *Id.*

154. *Winfield v. Division of Pari-Mutuel Wagering*, Dep’t of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985).

155. *See id.* at 547 (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973) (fundamental rights may only be limited by a regulation that is narrowly drawn to accomplish a compelling state interest)).

156. *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990).

157. Mark Silva, *Chemical Castration Approved*, MIAMI HERALD, May 3, 1997, at 6B (quoting Senator Al Gutman, Senate Criminal Justice Committee Chairman, as saying that MPA treatment “will assist those who can not assist themselves because of high testosterone”); Jeremy Wallace, *Chemical Castration Bill Becomes Law on Oct. 1*, BRADENTON HERALD, May 31, 1997, at L1 (stating that Representative Mark Ogles, co-author of the law, said “the new law will be a deterrent for many would-be sex offenders”).

158. *Winfield v. Division of Pari-Mutuel Wagering*, Dep’t of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985).

apply to all defendants.¹⁵⁹ The law only applies to defendants when a medical expert determines them to be medically appropriate for MPA treatment.¹⁶⁰ Medically appropriate is taken to mean that MPA treatment will produce the desired effect of decrease in sexual libido,¹⁶¹ which will by implication lower the probability that the defendant will commit another sexual battery.

Hormonal control is the least intrusive method of preventing medically appropriate defendants from committing future sexual batteries against innocent third parties. Those deemed medically appropriate will experience a decrease in libido resulting in a decreased chance of recidivism by the defendant, which will ultimately cause a decrease in sexual crime against citizens of the state. No other treatment prevents future sexual batteries and allows the defendant all the other liberties of living a free life. The only other alternative is incarceration, which is more intrusive than MPA because it involves a forfeiture of physical liberty.

D. *Florida's Right to Refuse Medical Treatment*

Unlike the federal constitutional right to refuse medical treatment, which is in the Due Process Clause,¹⁶² the Supreme Court of Florida found the right to refuse medical treatment guaranteed by Florida's Constitution.¹⁶³ A defendant retains this right during and after incarceration.¹⁶⁴ The right to refuse medical treatment is not dependent on a determination of a "medical procedure as major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise."¹⁶⁵ Thus, under this definition, the administration of MPA falls within this right regardless of the fact that it is a minor and safe therapy.

159. *See supra* Part III.B.

160. FLA. STAT. § 794.0235(2)(a) (1997). The hormonal control statute only applies to those defendants that are "appropriate candidate[s] for treatment." *Id.*

161. *See supra* Part III.B.

162. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 262 (1990).

163. *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990).

164. *Singletary v. Costello*, 665 So. 2d 1099, 1105 (Fla. 1996) (finding that a prisoner had the right to refuse food and water while incarcerated).

165. *Id.* at 1104 (quoting *In re Guardianship of Browning*, 568 So. 2d 4, 12 (Fla. 1990)).

1. Consent

A defendant “may not forcibly [be] given medical treatment without express or implied consent.”¹⁶⁶ Under the hormonal control statute, a defendant is never forcibly injected with MPA without consent.¹⁶⁷ The defendant may expressly consent to the treatment, but it is more probable that the defendant will protest its administration. However, by accepting probation, when hormonal control is a condition of probation, he will impliedly consent to the treatment.¹⁶⁸ Consent is also implied when defendants appear for and submit to weekly MPA injections. Any protest to administration should be irrelevant so long as the defendant’s outward manifestations of agreeing to the probation and appearing for the injections are present. All defendants retain the right, at all times, to refuse this medical treatment and opt for incarceration or physical castration.¹⁶⁹ Any defendant may refuse MPA treatment, at any time.

2. “Voluntary” Consent

Opponents of the statute argue that consent can not be voluntary because refusal to consent results in a second-degree felony.¹⁷⁰ There is no reason to think that any defendant will be forced or coerced to accept probation. Moreover, it is unlikely that the department of corrections is going to hold defendants down and forcibly administer the weekly injections. The defendant will voluntarily accept probation and the conditions of probation and voluntarily submit to weekly injections. Again, a defendant at all times reserves the right to refuse treatments and return to jail or be physically castrated.¹⁷¹

166. *Id.* (quoting *Metropolitan Dade County v. P.L. Dodge Foundations, Inc.*, 509 So.2d 1170, 1172 (Fla. 3d Dist. Ct. App. 1987) (stating prisoner’s rights in dicta)).

167. FLA. STAT. § 794.0235(2)(a), (5) (1997); *see supra* Part III.C.

168. FLA. STAT. § 794.0235(2)(a), (5) (1997).

169. *Id.* § 794.0235(1)(b), (5). *See* discussion *infra* Part III.C.

170. Spalding, *supra* note 8, at 128 (arguing that refusing treatment “is no option at all” because the “choice cannot be held to be made freely, knowingly, or voluntarily” due to the fact that refusal results in incarceration).

171. *See supra* note 43 and accompanying text.

3. Compelling Interest

Even if a court finds voluntary and informed consent is lacking, the statute does not violate a defendant's right to refuse medical treatment because the state is utilizing the least intrusive method available to accomplish a compelling state interest. The Supreme Court of Florida has articulated four compelling state interests that should be weighed against an individual's right to refuse medical treatment.¹⁷² They are the preservation of life, the protection of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession.¹⁷³ The court in *Singletary v. Costello*¹⁷⁴ added that where the individual happens to be a prisoner, the "state interest in . . . the rehabilitation of prisoners is implicated."¹⁷⁵

Of the interests identified, the protection of innocent parties and the rehabilitation of defendants serve as compelling state interests for the hormonal control statute.¹⁷⁶ The protection of innocent persons interest "arises when the refusal of medical treatment endangers public health."¹⁷⁷ MPA refusal endangers the public because it increases the chances that a member of the public will be a victim of a sexual battery, an inherently violent crime. Hormonal control decreases the chances that the defendant will commit a sexual battery.¹⁷⁸ The statute protects the public by seeking to rehabilitate defendants by providing them with the medication they need to control their sexual impulses and resist the urge to commit sexual batteries.¹⁷⁹

4. Least Intrusive Method

MPA treatment is the least intrusive method of protecting the public against the sexual offenses perpetrated by paraphiliacs.¹⁸⁰ The only other

172. *Browning*, 568 So. 2d at 14 (holding that the state interest should be "balanced . . . against an individual's right to refuse medical treatment").

173. *Id.*

174. 665 So. 2d 1099 (Fla. 1996).

175. *Id.* at 1105 (quoting *Commissioner of Corrections v. Myers*, 399 N.E. 2d 452, 457 (Mass. 1979)).

176. *See supra* note 157.

177. *Singletary*, 665 So. 2d at 1105.

178. *See discussion supra* Part IV.A-B.

179. *See supra* Part IV.A-B. and note 157.

180. *See discussion supra* Part VI.C.4.

method, incarceration, is more intrusive into the private lives of offenders because it calls for deprivation of the liberty of freedom.¹⁸¹

VII. CONCLUSION

The lawmakers carefully drafted Florida's new hormonal control statute to ensure constitutionality. The law's opponents challenge its constitutionality with bald conclusions. Although medical technology restricts the statutes' effectiveness by only allowing its success within certain people, the lawmakers narrowly tailored the statute to apply to that group, the paraphiliac. Upon careful analysis, however, it is clear that the law does not violate Florida's Right to Privacy Amendment. The statute is the first step towards a modern, more humane criminal justice system that seeks public protection and actual rehabilitation rather than the illusory rehabilitative benefits provided by the present prison system.

Mary E. Clarke

181. See discussion *supra* Part VI.C.4.

Drug Trafficking Sentencing in Florida: Can Seven Pills Turn a Defendant into a First-Degree Felon?

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I. INTRODUCTION

Florida has been associated with illegal drugs since the television show *Miami Vice* and the “Cocaine Cowboys” of the 1980’s. Marijuana, cocaine, heroin, crack, and LSD have fallen from the lips and pens of newscasters and newspaper writers throughout the Sunshine State. However, Vicodin¹

1. Vicodin is “indicated for the relief of moderate to moderately severe pain.” PHYSICIANS DESK REFERENCE 1367–68 (Medical Economics Co. 52d ed. 1998). Its chemical make-up is typically 7.5 milligrams of hydrocodone bitartrate combined with 750 milligrams of acetaminophen. *Id.* Under the manufacturer’s specifications, it is stated that the tablets are classified as a SCHEDULE III substance. *Id.*

may be the next drug to become a household name, not because of its prolific use, but because of its impact on the Florida State drug laws. The technical name for Vicodin is hydrocodone,² which is referred to in sections 893.03 (drug schedules) and 893.135(1)(c)(1) (trafficking) of the *Florida Statutes*.³ Two Florida District Courts of Appeal have interpreted these statutes in conflicting ways.⁴ When this happens, it creates a somewhat chaotic situation due to the construction of the Florida court system.⁵

In Florida, the trial courts, otherwise known as the circuit courts, are bound by the decisions of the district court of appeal in that particular district.⁶ However, if there is no case on point in that district, and there is a case on point in another district, the trial court is bound by the other district's decision.⁷ Nonetheless, decisions of the district court of appeal in one district are merely persuasive authority in another district court of appeal.⁸ Therefore, the other district courts of appeal are free to disagree. When this happens, trial courts are not bound by either of the conflicting districts,⁹ unless the trial court happens to be located in one of the districts, and then would, consequently, be bound by it anyway.⁹ As such, until the situation with these two district courts of appeal is resolved, trial courts in Florida have no authority from which to seek guidance.¹⁰

This article will examine the discordant interpretations of the drug statutes and attempt to reach a conclusion on which is the best reading. Part II of this article will discuss the background of the statutes and the holdings and rationale behind the two conflicting cases. Part III will discuss other jurisdictions and their similar drug statutes. Part IV will discuss other controlled substances and how they are regulated under the *Florida Statutes*. Part V will suggest what should be done to resolve these inconsistencies. Part VI will conclude this article.

2. See *State v. Holland*, 689 So. 2d 1268–69 (Fla. 1st Dist. Ct. App. 1997).

3. FLA. STAT. §§ 893.03, .135(1)(c)(1) (1997).

4. See *State v. Baxley*, 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996); *Holland*, 689 So. 2d at 1268.

5. See *Pardo v. State*, 596 So. 2d 665, 666–67 (Fla. 1992).

6. *Id.* at 666–67 (citing *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976)).

7. *Id.* at 666.

8. *Id.* at 667 (citing *State v. Hayes*, 323 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976)).

9. *Id.*

10. An exception, however, would be trial courts in the First and Fifth District Courts of Appeal, since those courts are still bound to follow their particular district court.

II. BACKGROUND

A. *Hydrocodone Statutes*

Section 893.135(1)(c)(1) of the *Florida Statutes* mandates that:

Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any . . . hydrocodone . . . or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs."¹¹

Because hydrocodone is listed as a SCHEDULE II drug,¹² it is considered to have a "high potential for abuse."¹³ However, pursuant to section 893.03(3)(c)(4) of the *Florida Statutes*, if a tablet contains "not more than 15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients, which are not controlled substances," then the substance is considered a SCHEDULE III substance.¹⁴ This would make the charge punishable as a third-degree felony,¹⁵ bringing a lighter sentence. Reading these two statutes together, it may be possible to reach several conclusions. The first may be that if a defendant is caught with four grams of pills that contain hydrocodone, even if each pill contains less than fifteen milligrams, punishment as a first-degree felony is proper. Perhaps this should be labeled as the aggregation theory. This is the conclusion that Florida's Fifth District Court of Appeal reached in *State v. Baxley*.¹⁶ Another way to read the statutes is as the Florida First District Court of

11. FLA. STAT. § 893.135(1)(c)(1) (1997).

12. *Id.* § 893.03(2)(a)(1)(i).

13. *Id.* § 893.03(2). SCHEDULE I drugs are considered to have "a high potential for abuse" and have "no currently accepted medical use in treatment in the United States and in its use under medical supervision does not meet accepted safety standards." *Id.* § 893.03(1). SCHEDULE II drugs have a "high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States." *Id.* § 893.03(2). SCHEDULE III drugs have "a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use in treatment in the United States." FLA. STAT. § 893.03(3) (1997).

14. *Id.* § 893.03(3)(c)(4).

15. *Id.* § 893.13(1)(a)(2).

16. 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996).

Appeal did in *State v. Holland*,¹⁷ which will lead to the conclusion that if a person is caught with pills that contain hydrocodone, but each pill contains less than fifteen milligrams, punishment is only proper as a SCHEDULE III substance, and thus as a third-degree felony.¹⁸ This apparent ambiguity in the statutes has created a conundrum in the legal world and, likewise, caused a split in the appellate courts of the State of Florida.

B. *State v. Baxley*

“Michael Baxley was charged with [both] conspiracy to traffic and trafficking in hydrocodone” under section 893.135(1)(c)(1) of the *Florida Statutes*.¹⁹ His charges were dismissed in the lower court and the State appealed.²⁰ The appellate court acknowledged several arguments made by Baxley, the first of which was that if the tablets in question contain less than fifteen milligrams, then they are considered a SCHEDULE III drug.²¹ The court doused this argument, however, by stating that “only a small amount of hydrocodone is a SCHEDULE III substance.”²² Instead, the court held that it did not matter if the amount involved was four grams of pure hydrocodone or four grams of a mixture of hydrocodone; either one would suffice to make it a SCHEDULE II substance and therefore punishable as a first-degree felony.²³

Baxley also argued that hydrocodone is listed in both SCHEDULE II and SCHEDULE III, but both schedules provide an exemption if listed in another schedule.²⁴ The court, however, stated that this gave its reading of the statute more credence because it proves that SCHEDULE III substances are only those limited by section 893.03(3)(c)(4),²⁵ and all other hydrocodone is considered a SCHEDULE II substance.²⁶ In reaching this

17. 689 So. 2d 1268 (Fla. 1st Dist. Ct. App. 1997).

18. *Id.* at 1270; *see also* § 893.03(3)(c)(4) (1997).

19. *Baxley*, 684 So. 2d at 832.

20. *Id.*

21. *Id.*

22. *Id.* (emphasis omitted).

23. *Id.*

24. *Baxley*, 684 So. 2d at 832.

25. FLA. STAT. § 893.03(3)(C)(4) (1997). Section 893.03(3)(C)(4) of the *Florida Statutes* states that “any material, compound, mixture, or preparation containing limited quantities of . . . [n]ot more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances” are SCHEDULE III substances. *Id.*

26. *Baxley*, 684 So. 2d at 832.

conclusion, the court cited *Lareau v. State*,²⁷ and *Mack v. Bristol-Myers Squibb Co.*,²⁸ both of which stand for the proposition that when two laws of the same subject seem to be ambiguous, they should be read *in pari materia*²⁹ in order to give effect to them both.³⁰ In sum, the *Baxley* court held that “[i]f the number of tablets aggregates [four] grams or more of hydrocodone or a mixture of hydrocodone, then we agree with the State that prosecution is proper under section 893.135.”³¹ The Supreme Court of Florida denied review of the *Baxley* case.³²

C. *State v. Holland*

In 1997, the Florida First District Court of Appeal certified conflict with the *Baxley* court in *State v. Holland*.³³ Holland had been charged with five counts of trafficking in hydrocodone.³⁴ He subsequently filed a motion to dismiss pursuant to an affidavit given by a pharmacist asserting that the drug alleged in the information was in fact a SCHEDULE III drug as opposed to a SCHEDULE II drug, and therefore did not fall within the parameters of the trafficking statute.³⁵ The lower court dismissed the information, and the State appealed.³⁶

The *Holland* court, in reading section 893.135(1)(c)(1) together with section 893.03(3)(c)(4), held that “if a mixture containing the controlled substance falls within the parameters set forth in [Schedule] III, the amount of the controlled substance per dosage unit, not the aggregate amount or weight, determines whether the defendant may be charged with violating section 893.135(1)(c)1, of the Florida Statutes.”³⁷ Therefore, in its case *sub judice*, the court found that, since the Vicodin tablets that were allegedly sold by Holland had less than fifteen milligrams per dosage unit of

27. 573 So. 2d 813 (Fla. 1991).

28. 673 So. 2d 100 (Fla. 1st Dist. Ct. App. 1996).

29. *In pari materia* is defined as: “[u]pon the same matter or subject.” BLACK’S LAW DICTIONARY 791 (6th ed. 1990). Statutes “*in pari materia*” relate to the same person or thing and have a common purpose. *Id.*

30. *Baxley*, 684 So. 2d at 832–33 (citing *Lareau v. State*, 573 So. 2d 813 (Fla. 1991); *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. 1st Dist. Ct. App. 1996)).

31. *Id.*

32. *Baxley v. State*, 694 So. 2d 737 (Fla. 1997).

33. 689 So. 2d 1268 (Fla. 1st Dist. Ct. App. 1997).

34. *Id.* at 1269.

35. *Id.*

36. *Id.*

37. *Id.* at 1270; *see also* FLA. STAT. § 893.135(1)(c)(1) (1997).

hydrocodone, his violation did not fall within the trafficking statute.³⁸ The court went on to hold that regardless of the number of tablets sold, the concentration of hydrocodone per dosage unit will remain below the threshold of fifteen milligrams.³⁹ In other words, even if the amount of milligrams in each pill equals four grams when added together, if each pill contained less than fifteen milligrams, the defendant would escape the trafficking statute.

D. Criticism of Both Decisions

The largest problem with the *Baxley* decision is that it is extremely harsh in its punishment. Consider this example: a defendant is illegally in possession of ten Vicodin tablets. Each tablet contains 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen, which is the typical make-up.⁴⁰ Therefore, the defendant is in possession of a total of 7575 milligrams of Vicodin.⁴¹ After converting from milligrams to grams, it brings the total to 6.575 grams of Vicodin.⁴² However the defendant is only in possession of 0.075 grams of hydrocodone.⁴³ In order to be sentenced under the trafficking statute,⁴⁴ the defendant has to be in possession of four grams of hydrocodone or a mixture containing hydrocodone. Therefore, if the *Baxley* court were followed, the hypothetical defendant would be subject to prosecution under the trafficking statute, and thus charged with a first-degree felony. It is hard to fathom that the legislature intended for a person to be sentenced for a first-degree felony for the possession of ten Vicodin pills. In essence, it appears that the *Baxley* court would be over-inclusive in its approach.

The *Holland* case is also not without fault. It appears from that decision that aggregation of the weight or the amount of any SCHEDULE III controlled substances under any circumstances is not permitted.⁴⁵ Therefore, if an individual illegally sold, delivered, possessed, or manufactured a large

38. *Holland*, 689 So. 2d at 1270.

39. *Id.*

40. See *supra* note 1.

41. Calculations are as follows: $750 + 7.5 = 757.5$. Then 757.5×10 (pills) = 7575 milligrams.

42. There are 1000 milligrams in one gram.

43. This is because there is only 7.5 milligrams of hydrocodone in one Vicodin tablet. See *supra* note 1. $7.5 \times 10 = 75$ milligrams. To convert to grams, divide by 1000, thus the total grams are 0.075.

44. FLA. STAT. § 893.135(1)(c)(1) (1997).

45. *Holland*, 689 So. 2d at 1270.

quantity of pills containing a SCHEDULE III controlled substance, and the pills contained less than the requisite fifteen milligrams, that person could never be charged with trafficking. This follows even if the accused possessed 1000 pills. This theory fails because, most likely, if a person has that many pills in his or her possession, he or she would be attempting to traffic them, and thus should be subject to the trafficking statute. Further, there are no Vicodin pills that contain more than fifteen milligrams per dosage unit. Therefore, the holding in the *Holland* case is weak because it is under-inclusive. It would render meaningless the provision of SCHEDULE II as it applies to hydrocodone.

III. HYDROCODONE STATUTES IN OTHER JURISDICTIONS

A. *Other States*

Most states have drug trafficking statutes similar to Florida's. Some, however, only list hydrocodone in SCHEDULE II, while some list hydrocodone solely in SCHEDULE III.⁴⁶ Notwithstanding, no other state has decided a case on point with *Holland* or *Baxley*.

B. *Federal Statute*

Title 21, section 812 of the *United States Code*⁴⁷ provides the schedules of controlled substances.⁴⁸ The construction of the hydrocodone statute in the federal version is very similar to the Florida Statute, with two exceptions. The first is an insignificant one, in that the *United States Code* refers to hydrocodone as "dihydrocodeinone."⁴⁹ The second, however, may be considered quite consequential, and is found in the sentencing guidelines.

46. The states that list hydrocodone in both SCHEDULES like the Florida statute are: Georgia, GA. CODE ANN. § 16-13-26, 27 (1996); Hawaii, HAW. REV. STAT. § 329-18 (1993); Iowa, IOWA CODE ANN. § 124.206 (West 1997); Mississippi, MISS. CODE ANN. § 41-29-115, 117 (1972); Missouri, MO. REV. STAT. § 195.017 (WEST 1996); Montana, MONT. CODE ANN. § 50-32-224, 226 (1997); Nebraska, NEB. REV. STAT. § 195.017 (1995); New York, N.Y. PUB. HEALTH LAW § 3306 (McKinney 1998); North Dakota, N.D. CENT. CODE § 1903.1-07, 09 (1997); Texas, TEX. HEALTH & SAFETY CODE ANN. § 481.104 (West 1998); West Virginia, W. VA. CODE § 60A-2-208 (1998); and Wisconsin, WIS. STAT. ANN. § 961.18 (1997).

47. 21 U.S.C. § 812 (1994).

48. *Id.*

49. *See id.* § 812(d)(3)-(4) SCHEDULE III. Dihydrocodeine and hydrocodone are used interchangeably. *Id.* Some states even list them like this: "dihydrocodeine (hydrocodone)." *See, e.g.*, MONT. CODE ANN. § 41-29-117 (1997).

Section 2D1.1 of the United States Sentencing Guidelines sets forth the Federal Sentencing Guidelines for federal drug trafficking offenses.⁵⁰ In order to obtain uniformity throughout the country, drug offenders are sentenced according to a base offense level.⁵¹ The requisite amount for each level is very specific, with a range of only ten to twenty grams,⁵² as opposed to Florida's degree-oriented felonies where the range may be four to 400 grams.⁵³ The most important difference in these sentencing guidelines may be "Note A" inserted by the legislature that reads: "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."⁵⁴

IV. DECISIONS INTERPRETING OTHER DRUG STATUTES

A. Florida

1. State v. Yu

In *State v. Yu*,⁵⁵ the defendants attempted a constitutional attack on section 893.135 of the *Florida Statutes*.⁵⁶ The lower court held that using the weight of "any mixture containing cocaine" instead of the weight of the pure cocaine was "arbitrary, unreasonable, and a violation of due process and equal protection of the law."⁵⁷ Relying on *People v. Mayberry*,⁵⁸ an Illinois case, and *United States ex rel. Daneff v. Henderson*,⁵⁹ a federal case, the Supreme Court of Florida disagreed.⁶⁰ In *Daneff*, the court noted that dangerous drugs are typically marketed in a diluted or impure state.⁶¹ It also stated that "[t]he State cannot be expected to make gradations and differentiations and draw distinctions and degrees so fine as to treat all law violators with the precision of a computer."⁶² Relying on the *Daneff* case,

50. 18 U.S.C.A. § 2D1.1 (West Supp. 1998).

51. *Id.*

52. *Id.*

53. *See id.*; FLA. STAT. § 893.135 (1997).

54. 18 U.S.C.A. § 2D1.1 Notes to Drug Quantity Table (A).

55. 400 So. 2d 762 (Fla. 1981).

56. *Id.* at 763.

57. *Id.* at 764.

58. 345 N.E.2d 97 (Ill. 1976).

59. 501 F.2d 1180 (2d Cir. 1974).

60. *Yu*, 400 So. 2d at 764.

61. *Daneff*, 501 F.2d at 1184.

62. *Id.*

the Supreme Court of Florida opined that it was reasonable for the legislature to conclude that a mixture containing cocaine could be disbursed to a larger amount of people than the same amount of pure cocaine and therefore could create a greater likelihood for harm to the public.⁶³

The United States Supreme Court almost had an opportunity to decide this question when one of the defendants from the *Yu* case appealed the decision of the Supreme Court of Florida to this nation's highest court in *Wall v. State*.⁶⁴ This appeal, however, was denied for jurisdictional reasons.⁶⁵ Justice Brennan noted in the denial that he would have heard the case on its merits and postponed the question of jurisdiction.⁶⁶ It is unfortunate that he was not allowed to do so.

2. After *Yu*

Since the *Yu* case, other Florida courts have had to apply its principles. In *Asmer v. State*,⁶⁷ the defendant was convicted of trafficking in methaqualone in an amount exceeding 200 grams.⁶⁸ At trial, the expert witness for the State testified that she had weighed the tablets, and their total weight was 795.7 grams, well above the requisite 200 grams.⁶⁹ However, she admitted that she had only tested one of the tablets at random for methaqualone, and that particular tablet contained the drug.⁷⁰ The defendant appealed his conviction and argued that the State failed to prove that he sold 200 grams of methaqualone alone, since it only tested one tablet.⁷¹

The court found no merit in this argument.⁷² Instead, it referred to *Yu*, remarking that the State is not "expected to draw distinctions so fine as to treat all law violators with the precision of a computer."⁷³ It went on to state that it would be "patently unreasonable" to require the state to test each of the 1000 tablets to prove that there were enough tablets that contained pure

63. *Yu*, 400 So. 2d at 765 (citing United States *ex rel.* Daneff v. Henderson, 501 F.2d 1180, 1184 (2d Cir. 1974)).

64. 454 U.S. 1134 (1981).

65. *Id.* at 1134.

66. *Id.*

67. 416 So. 2d 485 (Fla. 4th Dist. Ct. App. 1982).

68. *Id.* at 486.

69. *Id.* at 486-87.

70. *Id.*

71. *Id.* at 487.

72. *Asmer*, 416 So. 2d at 487.

73. *Id.* (citing *State v. Yu*, 400 So. 2d 762, 764 (Fla. 1981)).

methaqualone to satisfy the statute.⁷⁴ Therefore, the court upheld Asmer's conviction on the testing of one tablet.⁷⁵

In *Ross v. State*,⁷⁶ the court distinguished the holding in the *Asmer* case as it did not apply to the random testing of only one of several separately wrapped packages of cocaine.⁷⁷ The defendant in *Ross* was caught with a brown paper bag that contained two bundles.⁷⁸ The first bundle had thirty-six separately wrapped plastic bags of white powder.⁷⁹ The second bundle had fifty-six separately wrapped plastic packets of white powder.⁸⁰ The laboratory technician in the Dade County Crime Laboratory tested one of the plastic bags from each of the bundles, and found that they both contained cocaine.⁸¹ The technician then emptied the contents of the baggies in the first bundle into one envelope and then emptied the contents of the second bundle into another envelope.⁸² The envelope with the first bundle weighed 12.6 grams,⁸³ and the envelope with the second bundle weighed 26.2 grams, totaling 38.8 grams.⁸⁴ The defendant was then charged with trafficking in cocaine under section 893.135(1)(b) of the *Florida Statutes*.⁸⁵

The court found this testing to be inadequate.⁸⁶ It held that simply visually examining the separately wrapped packets was not sufficient.⁸⁷ Instead, the court suggested that each packet (baggie) of the white powder should have been chemically tested by random sample.⁸⁸ Furthermore, the court opined that there are a vast number of white substances that could

74. *Id.*

75. *Id.*

76. 528 So. 2d 1237 (Fla. 3d Dist. Ct. App. 1988).

77. *Id.* at 1240.

78. *Id.* at 1238.

79. *Id.*

80. *Id.*

81. *Ross*, 528 So. 2d at 1238.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* See also FLA. STAT. § 893.135(1)(b) (1997). Section 893.135 (1)(b) of the *Florida Statutes* states:

Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)(4), or any mixture containing cocaine . . . commits a felony of the first degree, which felony shall be known as "trafficking in cocaine."

Id.

86. *Ross*, 528 So. 2d at 1239.

87. *Id.*

88. *Id.*

easily appear to be cocaine due to their white powdery appearance.⁸⁹ Therefore, although one of the packets contained cocaine, the others could very well be just a white powdery substance that looks like cocaine.⁹⁰

The court noted that random testing of separate bags containing similar looking materials is distinguishable from the random testing of pills, which was the case in *Asmer*.⁹¹ This is because the random sample of pills is taken from a single packet or bag, and thus the substance is commingled with the similar looking material.⁹² From that, the court opines, one can infer that the substances are the same.⁹³ The court states, however, that one cannot make that inference where the “untested material is not commingled with the random sample.”⁹⁴ Therefore, since the bags in the *Ross* case were not commingled, the supposition could not be made, and the defendant’s charge was reduced to simple possession.⁹⁵

Chief Judge Schwartz dissented in the opinion.⁹⁶ He disagreed with the majority because he found that it was reasonable to conclude that the material in the packet was representative of the other packages.⁹⁷ He thought that the fact that there were separate envelopes was simply a difference, rather than a distinction between *Asmer* and *Ross*.⁹⁸ The Chief Judge found that: “a reasonable person could conclude beyond a reasonable doubt that all of the packages in the two bundles contained cocaine.”⁹⁹ He observed that since the defendant possessed both bundles at the same time, they were properly added together.¹⁰⁰

In *State v. Clark*,¹⁰¹ the Florida Third District Court of Appeal upheld its decision in the *Ross* case.¹⁰² In *Clark*, the State’s chemist had randomly tested capsules of cocaine contained in separate packages in one defendant’s case, and in a single bag in another defendant’s case.¹⁰³ The capsules that

89. *Id.*

90. *Id.* at 1239–40.

91. *Ross*, 528 So. 2d at 1240 (citing *Asmer v. State*, 416 So. 2d 485 (Fla. 4th Dist. Ct. App. 1982)).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Ross*, 528 So. 2d at 1241 (Schwartz, C.J., dissenting).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. 538 So. 2d 500 (Fla. 3d Dist. Ct. App. 1989).

102. *Id.* at 501.

103. *Id.*

were tested did contain heroin, but it was less than the statutory requirement.¹⁰⁴ The chemist then mixed the contents of the capsules that were taken from each package before they were weighed, and concluded that the mixture contained enough heroin to violate section 893.135(1)(c) of the *Florida Statutes*.¹⁰⁵

The court held that capsules that contained a white powdery substance are not distinguishable from the plastic packets (baggies) in the *Ross* case.¹⁰⁶ Since *Ross* requires the testing of samples from each packet, it similarly requires the testing of the capsules.¹⁰⁷ The *Ross* decision also dictates that the randomly tested material must add up to at least four grams.¹⁰⁸ The court went on to hold that the chemist in this case did not follow these methods, and therefore the defendant's charges should be reduced from trafficking to possession.¹⁰⁹

Chief Judge Schwartz, again, did not agree entirely with the majority, and filed a concurring opinion.¹¹⁰ He stated, again, that he disagreed with the decision in the *Ross* case, but since its holding represented the law and it applied to the case at hand, he was bound to follow it.¹¹¹ He agreed with the State that the capsules in this case were more analogous to the packets in *Ross* than the pills in *Asmer*.¹¹² However, he stated that "both the untested capsules and the untested pills in *Asmer* may just as easily contain harmless substances—the other capsules may be Contac; the other pills may be aspirin—as the untested powdery substance in *Ross* may be flour or sugar."¹¹³ "Since the possibility that the untested materials are innocent is the very foundation of *Ross*," the judge reluctantly agreed that the decision of the majority was the correct one.¹¹⁴ In short, he says, "since we are stuck with *Ross*, we are stuck with ruling with the appellees [defendants] in this case as well."¹¹⁵

104. *Id.*

105. *Id.* See also FLA. STAT. § 893.135(1) (1997). Section 893.135(1) of the *Florida Statutes* is the same statute under which Holland and Baxley were convicted. *Id.*

106. *Clark*, 538 So. 2d at 502 (Schwartz, C.J., concurring).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 500.

111. *Clark*, 538 So. 2d at 501 (Schwartz, C.J., concurring).

112. *Id.* (citing *Ross v. United States*, 528 So. 2d 1237 (Fla. 3d Dist. Ct. App. 1988); *Asmer v. State*, 416 So. 2d 485 (Fla. 4th Dist. Ct. App. 1982)).

113. *Clark*, 538 So. 2d at 501–02 (Schwartz, J., concurring).

114. *Id.* at 502.

115. *Id.*

B. *Federal*1. *Chapman v. United States*

In 1991, the United States Supreme Court came down with a landmark decision in *Chapman v. United States*.¹¹⁶ In delivering the majority opinion of the Court, Justice Rehnquist held that “Note A”¹¹⁷ required blotter paper to be counted for sentencing purposes in the total weight of lysergic acid diethylamide (“LSD”).¹¹⁸ In that case, the defendants were convicted of selling ten sheets of blotter paper, which contained 1000 doses of LSD.¹¹⁹ The pure weight of the LSD itself was only fifty milligrams; however, combined with the blotter paper, the total weight came to 5.7 grams.¹²⁰ Since 42 U.S.C. § 841(b)(1)(B)(v) mandates a minimum sentence of five years for distributing more than one gram of LSD, the defendants were imposed with this sentence.¹²¹ This aggregate weight “was also used to determine the base offense level under the United States Sentencing Commission Guidelines Manual.”¹²²

The defendants argued that the blotter paper should not be used to determine the total weight of the LSD because it is only a carrier medium and should not be included when calculating a sentence for LSD distribution.¹²³ They reasoned that construing 42 U.S.C. § 841(b)(1)(B)(v) in such a manner would lead to aberrant results, and disparity in the sentencing practices.¹²⁴

In order to combat this argument, the Court relied on two things: the construction of the statute and its legislative history.¹²⁵ First, the Court

116. 500 U.S. 453 (1991).

117. 18 U.S.C.A. § 2D1.1 (West Supp. 1998). Notes to Drug Quantity Table (A).

118. *Chapman*, 500 U.S. at 468.

119. *Id.* at 455.

120. *Id.*

121. *Id.* at 455–56. See also 21 U.S.C. § 841(b)(1)(B)(v).

122. *Id.* at 456.

123. *Chapman*, 500 U.S. at 458.

124. *Id.* The court summarized petitioners’ argument as follows:

a major wholesaler caught with 19,999 doses of pure LSD would not be subject to the 5-year mandatory minimum sentence, while a minor pusher with 200 doses on blotter paper, or even one dose on a sugar cube, would be subject to the mandatory minimum sentence. Thus, they contend, the weight of the carrier should be excluded, the weight of the pure LSD should be determined, and that weight should be used to set the appropriate sentence.

Id.

125. *Id.* at 453–55.

pointed out that the statute provides for different sentences for an offender caught with a “mixture or substance containing a detectable amount” of the drugs and one who is caught with a pure amount of the drug.¹²⁶ The Court exemplified this by referring to the phencyclidine (“PCP”) statute found in 42 U.S.C. § 841(b)(1)(B)(v).¹²⁷ The Court’s thought process is founded in the belief that the legislature could have provided for different sentences for the pure amounts of all the drugs if it so desired.¹²⁸ The fact that it did not do this means that the legislature intended for carrier mediums to be included in calculating the weight.¹²⁹

The Court next looked to the legislative history of the statute to provide insight into the situation.¹³⁰ The Court stated that “[t]he current penalties for LSD distribution originated in the Anti-Drug Abuse Act of 1986.”¹³¹ In the Act, “Congress adopted a ‘market-oriented’ approach to punishing drug trafficking.”¹³² This means that the total quantity of what is distributed is the means for calculating the length of a sentence, not the amount of the pure drug involved.¹³³ The Court deemed from the legislative history that the purpose behind this was to keep from punishing the retail traffickers less severely, even though they deal in lesser quantities of the pure drug, because they are the people that “keep the street markets going.”¹³⁴ This would explain why a wholesaler caught with 19,999 doses of LSD might be punished less severely than a street trafficker caught with only 200 doses.¹³⁵

The defendants made one last argument. They asserted that the terms “mixture” or “substance” cannot be given their dictionary meaning, as the Court implied, because then the statute could be interpreted to embody carriers such as a glass vial or a car in which the drugs are being transported, which would make the statute senseless.¹³⁶ The Court, however, defrayed this argument as well.¹³⁷ It contended that blotter paper qualified because, when combined with LSD, “the particles of one are diffused among the

126. *Id.* at 459.

127. *Chapman*, 500 U.S. at 459.

128. *See id.*

129. *Id.* at 459.

130. *Id.* at 460.

131. *Id.* at 461.

132. *Chapman*, 500 U. S. at 461.

133. *Id.* at 461.

134. *Id.*

135. *See id.* at 458.

136. *Id.* at 462.

137. *Chapman*, 500 U.S. at 462–63.

particles of the other.”¹³⁸ Therefore, the “term does not include LSD in a bottle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a ‘container.’”¹³⁹

2. Beyond *Chapman*

Lower federal courts have had trouble applying the *Chapman* guidelines to other drug situations.¹⁴⁰ In *United States v. Mahecha-Onofre*,¹⁴¹ the defendant chemically bonded cocaine to several suitcases in an attempt to elude customs officials.¹⁴² The district court sentenced Mahecha-Onofre to a ten-year mandatory minimum sentence under 42 U.S.C. § 841(b)(1)(B)(v).¹⁴³ The court based its calculations for sentencing purposes on the weight of the cocaine and the suitcase material, as opposed to the pure weight of the cocaine.¹⁴⁴ The court rejected the idea that if the material with which a substance is mixed can not be ingested with the controlled substance, then it cannot be added to the weight for sentencing purposes.¹⁴⁵ Instead, the Court found that the suitcase material should be included in the total weight for sentencing purposes.¹⁴⁶

The Eleventh Circuit decided to go another way.¹⁴⁷ In *United States v. Rolande-Gabriel*,¹⁴⁸ the court held that the term “mixture,” for the purposes of the Sentencing Guidelines, “does not include unusable mixtures.”¹⁴⁹ The defendant in this case was intercepted at Miami International Airport and found with sixteen plastic bags filled with a liquid substance containing

138. *Id.* at 462 (citing 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989)).

139. *Id.* at 462–63.

140. Thomas J. Meier, *A Proposal to Resolve the Interpretation of “Mixture or Substance” Under the Federal Sentencing Guidelines*, 84 J. CRIM. L. & CRIMINOLOGY 377, 395 (1993). For a more detailed discussion of *United States v. Chapman* and the progression of the interpretations of Section 841 of the *United States Code*, see Thomas J. Meier, *A Proposal to Resolve the Interpretation of “Mixture or Substance” Under the Federal Sentencing Guidelines*, 84 J. CRIM. L. & CRIMINOLOGY 377 (1993).

141. 936 F.2d 623 (1st Cir. 1991).

142. *Id.* at 624.

143. *Id.* at 625.

144. *Id.* The weight of the cocaine combined with the weight of the suitcase totaled 12 kilograms, while the pure cocaine weighed only 2.5 kilograms. *Id.*

145. *Mahecha-Onofre*, 936 F.2d at 626.

146. *Id.*

147. *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991).

148. *Id.* at 1231.

149. *Id.* at 1238.

cocaine.¹⁵⁰ Based on scientific evidence, the court stated that the cocaine found in Rolande-Gabriel's bags was not in a usable form, since it would have had to be extracted from the liquid to be sold on the streets, and the cocaine could not be ingested or consumed in that form.¹⁵¹ The court argued that the cocaine in the mixture was "easily distinguished from, and separated from" the liquid.¹⁵² Therefore, the court held that it would be irrational to include the liquid in the total weight for sentencing purposes.¹⁵³

The Sixth Circuit took yet another approach in *United States v. Jennings*.¹⁵⁴ The defendants in that case were interrupted in the process of "cooking" methamphetamine, and argued that if they had not been disturbed, the weight of the drug would have been much less.¹⁵⁵ The court agreed with the *Chapman* interpretation that "Congress did not want to punish retail traffickers of drugs less severely," even when dealing with smaller amounts of the pure drugs, because they are the people who "keep the street markets going."¹⁵⁶ However, following that line of thinking, the court held that "the defendants [in this case] were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestible byproducts of its manufacture."¹⁵⁷ Therefore, the court held that the total weight was not to be used.¹⁵⁸

Another case that is more comparable to the hydrocodone situation is *United States v. Young*.¹⁵⁹ The defendant in the case, John Ed Young, Sr., was convicted of possession of Dilaudid¹⁶⁰ with intent to distribute, in

150. *Id.* at 1232.

151. *Id.* at 1237.

152. *Rolande-Gabriel*, 938 F.2d at 1237 (citing *Chapman v. United States*, 500 U.S. 453 (1991)).

153. *Id.* at 1237.

154. 945 F.2d 129 (6th Cir. 1991), *opinion clarified by* 966 F.2d 184 (6th Cir. 1992).

155. *Id.* at 134. Testimony at the trial revealed that the total amount in the mixture was 4180 grams but contained only 1.67% methamphetamine. *Id.* The government's chemist testified that if the chemicals had been able to react entirely, the solution would have yielded over 100 grams of methamphetamine. *Id.*

156. *Id.* at 136 (citing *Chapman v. United States*, 500 U.S. 453 (1991)).

157. *Jennings*, 945 F.2d at 137.

158. *Id.*

159. 992 F.2d 207 (8th Cir. 1993).

160. Dilaudid is a painkiller similar to morphine. DRUGS IN LITIGATION 394, 394 (Richard M. Patterson, J.D. ed., Law Publishers, 1996 ed.) (1996). Its active ingredient is called hydromorphone, which is a Schedule II substance under the federal statute. *Id.* at 208 n.2. Also note that hydromorphone and hydrocodone are listed together in all the same

violation of 42 U.S.C. § 841(b)(1)(B)(v).¹⁶¹ On appeal, he argued that the district court erred by sentencing him based on the entire weight of the Dilaudid tablets, instead of the hydromorphone alone.¹⁶² Young argued that the *Chapman* case is distinguishable here because it involved 42 U.S.C. § 841(b)(1)(B),¹⁶³ which states that the offense is distributing a mixture of the substance, while he was convicted under 42 U.S.C. § 841(b)(1)(B),¹⁶⁴ which does not include the mixture language.¹⁶⁵ The defendant claimed that Congress only intended for the pure substance to be used as the weight for sentencing purposes.¹⁶⁶

The court cited to several cases that had addressed, and subsequently dispelled, that argument.¹⁶⁷ In so doing, the court stated that there was no statutory rule of construction that would exact that reading of the statute. Therefore, Congress meant to use the same method for computing the weights of pharmaceutical drugs and the “street drugs” listed in 42 U.S.C. § 841(b)(1)(A), (B).¹⁶⁸ Thus, the court upheld Young’s conviction.¹⁶⁹

Judge Bright, however, disagreed.¹⁷⁰ He opined that Young’s sentence should have been calculated according to the pure weight of the hydromorphone, rather than the gross weight of the Dilaudid.¹⁷¹ He states that in “street weight” cases, such as cocaine and heroin, the weight, dose, and purity are in the control of the defendant.¹⁷² However, “in pharmaceutical drug cases, the pharmaceutical manufacturer controls the weight and quantity of the drug.”¹⁷³ Therefore, the legislative intent to prevent drugs from being diluted and distributed to more people than non-diluted drugs is without merit.¹⁷⁴ The judge summed up his argument as follows:

statutes, including the trafficking statute, but hydromorphone is not listed in SCHEDULE III.

See FLA. STAT. §§ 893.03, .135 (1997).

161. *Young*, 992 F.2d at 208; *see also* 21 U.S.C. § 841(a)(1), (b)(1)(C) (1994).

162. *Young*, 992 F.2d at 208.

163. *Id.* at 209.

164. *Id.* *See also* § 841(b)(1)(C).

165. *Young*, 992 F.2d at 209.

166. *Id.* at 209–10.

167. *Id.*

168. *Id.*

169. *Id.* at 211.

170. *Young*, 992 F.2d at 211 (Bright, J., dissenting).

171. *Id.* (Bright, J., dissenting).

172. *Id.*

173. *Id.*

174. *Id.*

In my view, a defendant should be held responsible for the weight of inert materials in substances containing a proscribed controlled drug only to the extent he or she in some way has control over its content. Here, Young clearly had no control over the weight or proportion of inert material contained in the Dilaudid tablets, and, thus, his sentence should be calculated according to the pure weight of the controlled substance hydromorphone.¹⁷⁵

C. *Applicability to Baxley and Holland*

After examining the other jurisdictions, a question now remains as to how these apply to the *Baxley* and *Holland* cases. First, one of the big concerns of the Supreme Court of Florida in *Yu* was burdening the State to “make gradations and differentiations” between the drugs with the “precision of a computer.”¹⁷⁶ However, this was referring to street drugs such as cocaine, LSD, etc., which all have differing degrees of fillers or cutting agents. As stated earlier, Vicodin pills all have the same amount of hydrocodone in them.¹⁷⁷ Further, it is also easy to distinguish those pills from each other since each pill is marked with its dosage.¹⁷⁸ Following the same analysis, the worry of disparate sentencing should also be quelled. Since Vicodin pills all use the same “carrier medium” or filler—acetaminophen—there is no fear that a sentence could be based on the weight of different fillers with the same amount of pure hydrocodone.

Next, looking at the ingestible approach adopted by the court in *Rolande-Gabriel*,¹⁷⁹ acetaminophen could be labeled as such. Acetaminophen is a “usable” substance, taken by most of us at some time or another in the form of Tylenol. Therefore, this approach would most likely call for aggregating the amount of the entire Vicodin pill as opposed to just weighing the hydrocodone.¹⁸⁰

Further, in following the majority opinion in the *Young* case, the total amount of the Vicodin pill would be calculated, since hydrocodone and hydromorphone are so similar.¹⁸¹ However, if courts were to follow Judge Bright’s dissenting opinion,¹⁸² the total weight should not be used for

175. *Young*, 992 F.2d at 212.

176. *State v. Yu*, 400 So. 2d 762, 764 (Fla. 1981).

177. *See supra* note 1.

178. *Id.*

179. 938 F.2d 1231 (11th Cir. 1991).

180. *Id.* at 1232.

181. *See Young*, 992 F.2d at 209.

182. *See id.*

sentencing purposes because the defendant does not have control over how much hydrocodone is contained in each Vicodin pill.

V. SUGGESTIONS FOR FURTHER SENTENCING

A. *Finding a Middle Road*

One suggestion to clear up the ambiguity may actually be very simple: use only the pure hydrocodone to determine whether it falls under the trafficking statute. This seems logical because the statute refers to hydrocodone, not Vicodin. It does not say that possession of four grams of Vicodin should be known as trafficking in controlled substances. Therefore, the amount of hydrocodone in the substance would be the determining factor. Though the statute does say hydrocodone or a substance containing hydrocodone,¹⁸³ the legislature surely could not have meant to sentence someone as a first-degree felon for ten pills of Vicodin.

This approach would also settle the dispute in *Holland* because it would allow the amount of the pure hydrocodone to be aggregated, regardless of the amount per dosage unit. Therefore, people with 1000 pills would not escape the trafficking statute. Using this interpretation, it would take approximately 533 pills to equal four grams.¹⁸⁴ Therefore, it would be more difficult to charge someone with trafficking in hydrocodone than it would be under the *Baxley* decision, but, at least, it could be accomplished.

Furthermore, the Florida Legislature has mandated that penal statutes must be strictly construed in favor of defendants.¹⁸⁵ Section 775.021(1) of the *Florida Statutes* mandates that “[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.”¹⁸⁶ This statute is most definitely capable of differing constructions, as evidenced by two Florida District Courts of Appeal giving two entirely different interpretations.¹⁸⁷ Therefore, under this rule of construction, the statute should be interpreted in favor of the defendant. This would mean that the *Holland* case would prevail, since it

183. FLA. STAT. § 893.135(1)(c)(1) (1997).

184. Calculations are done as follows: 4000 (amount of milligrams in four grams) divided by 7.5 (amount of milligrams of pure hydrocodone in Vicodin) = 533.

185. FLA. STAT. § 775.021(1) (1997). *See also* *Thompson v. State*, 695 So. 2d 691 (Fla. 1997); *Trotter v. State*, 576 So. 2d 691 (Fla. 1990).

186. FLA. STAT. § 775.021(1).

187. *Compare* *State v. Holland*, 689 So. 2d 1268 (Fla. 1st Dist. Ct. App. 1997) *with* *State v. Baxley*, 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996).

would classify hydrocodone as a SCHEDULE III drug, making the offense a third-degree felony, as opposed to *Baxley*, which would make possession of ten pills of Vicodin a first-degree felony.¹⁸⁸

B. *A Proposal by Thomas J. Meier*

In his article, entitled *A Proposal to Resolve the Interpretations of "Mixture or Substance" Under the Federal Sentencing Guidelines*,¹⁸⁹ Thomas J. Meier proposes a method for interpreting "mixture or substance" considering the inconsistencies created by the *Chapman* case.¹⁹⁰ Under his design, the weight of the pure drug should be added together with the weight of any non-drug substance *only if all* of the following elements are met.¹⁹¹

- (1) [t]he substance cannot be easily distinguished or separated from the pure drug;
- (2) the substance is commonly ingested with the pure drug by street market level consumers; and
- (3) the substance dilutes the pure drug in order to increase the total quantity of the drug available for distribution at the street market level.¹⁹²

As Meier suggests, the first element is taken from the *Chapman* decision and does not include "the weights of containers and other packaging materials which are clearly not 'mixed or otherwise combined with the pure drug.'"¹⁹³ This would exclude materials such as glass vials.¹⁹⁴ The second element excludes any materials that are not ingestible,¹⁹⁵ such as suitcases.¹⁹⁶ The third element diverges from the *Chapman* decision. Meier suggests that "[i]t distinguishes between cutting agents that dilute the pure drug in order to increase the amount of the drug available to the consumer,

188. *Holland*, 689 So. 2d at 1268. See also *State v. Baxley*, 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996).

189. Meier, *supra* note 140, at 403.

190. *Id.* at 403.

191. *Id.*

192. *Id.* at 403–04.

193. Meier, *supra* note 140, at 404 (citing *Chapman v. United States*, 500 U.S. 453 (1991)).

194. Meier, *supra* note 140, at 404.

195. *Id.*

196. See *United States v. Mahecha-Onofre*, 936 F.2d 623 (1st Cir. 1991).

and carrier mediums that simply facilitate distribution of the pure drug.”¹⁹⁷ Thus, blotter paper would not be weighed because adding more does not further dilute the drug.¹⁹⁸ There will still be one dose of LSD regardless of how much blotter paper is added.¹⁹⁹

Applying this test to hydrocodone or Vicodin might be a little more difficult. The first element may not exclude Vicodin because hydrocodone and acetaminophen are mixed together and not easy to physically separate. However, there is a prescribed amount of hydrocodone in every Vicodin tablet. Therefore, in that respect, it would be easy to separate the amount of hydrocodone from the acetaminophen, even if not physically.

Vicodin would meet the second element, however, because the entire pill is obviously ingestible and is normally ingested by the street market consumer. However, there is some question as to the term “street market level consumers,” which calls into question the third element as well. Hydrocodone is not a drug similar to cocaine or LSD. It is typically not manufactured illegally, only sold or possessed illegally.²⁰⁰ Therefore, the substance is not meant to dilute the drug in order to increase the quantity of distribution, but is used as part of the entire drug. Acetaminophen is a painkiller similar to hydrocodone, just not as potent, and not illegal. Further, it would be practically impossible to dilute the hydrocodone any more unless you were a pharmaceutical manufacturer, seeing as it is mixed together chemically. Therefore, Vicodin would most likely fail the third prong of the test. Since the test is conjunctive, the amount of acetaminophen cannot be calculated into the total weight under this test.

VI. CONCLUSION

Overall it appears that the prior Florida cases offer little insight into what to do about the *Baxley* and *Holland* situation. The federal cases may present some guidance, but do not have a great effect since the federal laws and sentencing structure are set up differently than those of Florida. It comes down to the fact that section 893.135(1)(c)(1),²⁰¹ read with section 893.03 of the *Florida Statutes*,²⁰² is susceptible to differing meanings. This

197. Meier, *supra* note 140, at 405.

198. *Id.* at 405–06.

199. *Id.*

200. It is only illegal to possess Vicodin without a prescription, or with a prescription given under false circumstances.

201. FLA. STAT. § 893.135(1)(c)(1) (1997).

202. *Id.* § 893.03.

being the case, the statute has to be read, for now at least, in favor of the accused.²⁰³ This commands following the *Holland* decision over the *Baxley* decision.

The ultimate solution would be for the Florida Legislature to revise these statutes so as to clarify its intent. With such a split in the Florida District Courts of Appeal, the alternative is for the Supreme Court of Florida take a position and answer these questions. Until then, defendants in the first district will be leaving the courtroom as third-degree felons and defendants charged with the same crime will leave the Fifth District classified as first-degree felons.

VII. ADDENDUM

On September 23, 1998, the Fourth District Court of Appeal of Florida aligned itself with *State v. Baxley*,²⁰⁴ a Fifth District Court of Appeal decision, by allowing aggregation of the total weight of a substance containing hydrocodone, in *State v. Hayes*.²⁰⁵ In *Hayes*, the defendant called in a fake prescription of Lorcet²⁰⁶ to a pharmacy, under the guise of being the employee of a doctor.²⁰⁷ The drug store was not able to verify the prescription and thus called the police.²⁰⁸ When Hayes went to pick up the prescription, the police were waiting.²⁰⁹ They arrested her and recovered forty tablets of the drug Lorcet.²¹⁰ Hayes was charged under the trafficking statute,²¹¹ since the aggregate weight of the tablets was more than twenty-eight grams.²¹² The trial court dismissed the case, based on *State v. Holland*.²¹³

The Fourth District Court of Appeal disagreed.²¹⁴ In reaching its decision, the court looked to some of the legislative history of section

203. FLA. STAT. § 775.021(1) (1997).

204. 684 So. 2d 831 (Fla. 5th Dist. Ct. App. 1996). See *supra* notes 19–24 for a discussion of the *Baxley* case.

205. 23 Fla. L. Weekly D2184 (4th Dist. Ct. App. Sept. 23, 1998).

206. Lorcet is a painkiller similar to Vicodin. See *supra* note 1. Its make-up is mostly acetaminophen with a small amount of hydrocodone. *Id.*

207. *Hayes*, 23 Fla. L. Weekly at D2185.

208. *Id.*

209. *Id.*

210. *Id.*

211. FLA. STAT. § 893.135(1)(c)(1) (1997).

212. *Hayes*, 23 Fla. L. Weekly at D2185.

213. 689 So. 2d 1268 (Fla. 1st Dist. Ct. App. 1997). See *supra* notes 33–38 for a discussion of the *Holland* case.

214. *Hayes*, 23 Fla. L. Weekly at D2185.

893.135(1)(c)(1) of the *Florida Statutes*.²¹⁵ The court noted that section 893.135(1)(c)(1) of the *Florida Statutes* was amended in 1995 to include hydrocodone within the ambit of the trafficking statute.²¹⁶ In its interpretation of the legislative history, the court opined that this amendment was due to the increasing amount of defendants who had been avoiding conviction for trafficking because of the absence of the substance in the statute.²¹⁷ Therefore, the court concluded, Hayes was exactly the kind of person that the legislature was trying to allow the state to prosecute when it broadened the statute.²¹⁸

The court recognized, however, that the statute is still not clear as to which quantities fall under the SCHEDULE II classification and which are merely SCHEDULE III substances, keeping them from the reach of the trafficking statute.²¹⁹ Due to the absence of clear authority in Florida, the court looked to the federal cases in search of an answer to this question, and was the first Florida Court to do so.²²⁰ The court examined *Chapman v. United States*²²¹ and *United States v. Rolande-Gabriel*²²² in its opinion.²²³ Using the analysis from these two opinions, the court opined that, with respect to the Lorcet tablets in the instant case, “[t]he hydrocodone has been mixed, or commingled, with the acetaminophen, and the two are ingested together. The acetaminophen facilitates the use, marketing, and access of the hydrocodone.”²²⁴ Based on this analysis, along with the legislative intent and the Supreme Court’s “mixture” definition,²²⁵ this court concluded that the “aggregate weight of the tablets seized from Hayes, and not the amount

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Hayes*, 23 Fla. L. Weekly at D2185.

220. *Id.*

221. 500 U.S. 453 (1991).

222. 938 F.2d 1231 (11th Cir. 1991).

223. *Hayes*, 23 Fla. L. Weekly at D2185.

224. *Id.*

225. The United States Supreme Court stated in *Chapman* that “mixture” is defined as: “matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence.” *Chapman*, 500 U.S. at 461 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986)). The *Chapman* Court also looked to another dictionary for a definition: “A ‘mixture’ may also consist of two substances blended together so that the particles of one are diffused among the particles of the other.” *Id.* at 461 (citing 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989)).

of hydrocodone per dosage unit, is the determinative weight for prosecution under section 893.135(1)(c)(1) for trafficking in a SCHEDULE II drug."²²⁶

Though this court at least attempted to look to other sources for its information, this analysis fails for the same reasons that the case with which it aligned itself did; it is too over-inclusive. The defendant in this case is now a first-degree felon for the possession of forty pills. Granted, punishment for forty pills is more conceivable than being sentenced as a first-degree felon for possession of ten pills. Yet, this decision would uphold a prosecution for as little as ten pills. So, essentially, this decision just serves to render more confusion across the state. Until either the Supreme Court of Florida or the Florida Legislature takes notice of this discord, the quandary survives.

Heather A. Perry

226. *Hayes*, 23 Fla. L. Weekly at D2185.

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Last year, Mr. Berman and CDT coordinated the Citizens Internet Empowerment Coalition (CIEC) – 47 online publishers, communications firms, and public interest groups – that challenged the Communications Decency Act. CIEC attorneys argued this landmark First Amendment case in the Supreme Court (*Reno v. ACLU*).

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