

Nova Law Review

Volume 23, Issue 1

1998

Article 4

Estates, Trusts and Guardianships

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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 Tax²⁷⁵

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.