SPRING 2014 CASE LAW UPDATE
Estate Planning Council of Greater Miami - Workshop Presentation

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"THERE'S AN APP FOR THAT" EDITION

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1. "Candy Crush Saga." Fourth DCA makes sense of the *Morgenthau/Lubee* reasonably ascertainable creditor morass. *Golden v. Jones*, ___ So. 3d ___ (Fla. 4th DCA 2013).

Ed Golden, as the curator of the Estate of Katherine Jones, appealed an order striking a claim filed against the Estate of Harry Bruce Jones. Harry Jones died in February 2007 and his estate was opened in April 2007. In June 2007, a notice to creditors was first published. In 2008, a court appointed a guardian for Harry's former wife, Katherine Jones, because she had been adjudicated to lack capacity. Neither Katherine, nor her guardian, was ever served with the written notice to creditors. In January 2009, less than two years after Harry's death, Katherine's guardian filed a Statement of Claim in the probate court. The claim related to a Marital Settlement Agreement that Harry and Katherine executed in 2002 and that the personal representative of Harry's estate was aware of. Katherine died in 2010. The personal representative of Harry's estate asserted that the claim filed by the guardian was time-barred under F.S. Secs. 733.702 and 733.710, while Golden requested a determination that the claim was timely filed or an enlargement of time to file the claim. Golden alleged that the guardianship was a known or reasonably ascertainable creditor of Harry's estate and sought a determination to that effect. The personal representative of Harry's estate asserted that Katherine was not a reasonably ascertainable creditor. At hearing, the trial court entered its Order Striking Untimely Filed Claim, ruling that the statement of claim was untimely under F.S. Secs. 733.702 and 733.710 and established case law (*Lubee v. Adams*, 77 So. 3d 882 (Fla. 2d DCA 2012), and *Morgenthau v. Estate of Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009)). The 4th DCA reversed the probate court order and held that if a known or reasonably ascertainable creditor is never served with a copy of the notice to creditors, the statute of limitations set forth in F.S. Sec. 733.702(1) never begins to run and the creditor's claim is timely if it is filed within two years of the decedent's death.

Application: This case is very helpful as it now creates a conflict in the circuits with regard to the due process required to bar known or reasonably ascertainable creditors. The case is a better reading of the applicable statutes than *Morgenthau* and *Lubee* and hopefully would be the view adopted by the Florida Supreme Court. In the meantime, it can be argued by practitioners to avoid the trap laid for reasonably ascertainable creditors by the *Morgenthau* and *Lubee* cases.

2. **"Kindle Reader." The Second DCA tees up a constitutional challenge to the prohibition of holographic wills. *Lee v. Estate of Payne*, ____ So. 3d ____ (Fla. 2d DCA 2013).**

A Colorado citizen, Payne, hand-wrote his own will. It was not witnessed. The will was valid under Colorado law and was admitted to probate in Colorado. Under F.S. Sec. 732.502(2), unwitnessed self-written (holographic) wills are invalid. A tiny majority of states (26) allows such wills to be admitted to probate so Florida is in a slight minority position on this question. The issue is about balance freedom to devise property versus avoidance of fraud and exploitation. Payne's will left Lee (his fiancé) a Florida home, plus $40,000 from the sale of two others. He devised the remainder of any sale proceeds to his father. Hope, the estate's Colorado personal representative and Payne's sister, filed a petition for probate administration in Pinellas County. Alleging that the holographic will was not executed in compliance with section F.S. Sec. 732.502(1) and, thus, was not valid under F.S. Sec. 732.502(2). Lee filed a counter-petition for administration urging the trial court to accord full faith and credit to the Colorado court order admitting the will to probate there. The probate court held the will to be invalid under F.S. Sec. 734.104(1)(a) which says that non-Florida wills accepted to probate by non-Florida courts are valid in Florida, but only if they comply with the witness requirements found in F.S. 732.502(2). Lee also made the argument that the statutory prohibition against holographic wills is unconstitutional. The Florida Supreme Court rejected that argument back in 1966 in *In re Estate of Olson*, 181 So. 2d 642 (Fla.1966). However, as I have noted in previous updates *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990) held that the testamentary disposition of property is a constitutionally protected right. Unfortunately for Lee, the Court did not buy the argument that the prohibition of holographic wills is unconstitutional and held it was bound by *Olson*. It determined that section 732.502 focuses not on the testator's choices in making a devise; but rather it operates to assure authenticity and reliability. It promotes fulfillment of the testator's intent and this is a permissible public policy choice by the legislature. The Court did certify the following question:

DO SECTIONS 732.502(2) AND 734.104(a) VIOLATE ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION BY CATEGORICALLY DEFEATING THE INTENT OF THE TESTATOR OF A HANDWRITTEN HOLOGRAPHIC WILL WITHOUT A RATIONAL RELATION TO THE FRAUD IT SEEKS TO CURE?

Application: Unless you are litigating homestead, if you are stuck making a constitutional argument in probate litigation you likely have a losing position. It's interesting the Court certified the question but fraud avoidance seems like a rational basis for the current statute. Therefore, I would argue the statute is constitutional. Whether it makes sense to change it in light of modern policy considerations is another debate.

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3. **"Pandora." Third and Fourth DCA attempt to review adult adoptions in light of public policy and intent of the settlor. *Goodman v. Goodman*, 126 So. 3d 310 (Fla. 3d DCA 2013); *Dennis v. Kline*, ____ So. 3d ____ (Fla. 4th DCA 2013).**

Goodman v. Goodman

In this case, the 3d DCA overturned a trial court order allowing Goodman to adopt his 42-year old girlfriend. The adoption was alleged to be a ploy to qualify the girlfriend for a 1/3 share of a $300 million trust otherwise benefiting Mr. Goodman's two minor children from a prior marriage and part of a scheme to thwart Goodman's creditors. Under F.S. Sec. 732.608, adoptees are automatically presumed to be descendants of their adoptive parents. Florida allows adult adoptions under F.S. Sec. 63.042, so what was wrong with this adoption you might wonder? Here, there was such a lack of due process that the appellate court found it was a fraud on the court. The adoption was entered into with no notice to Goodman's minor children and the ex-wife/mother of Goodman's children. They did not find out about it until after the order was entered and no longer subject to appeal. The trial court then prohibited the minor children and their mother/guardian from intervening in the adoption proceeding on what the Third DCA found to be invalid grounds. The Court held that they were entitled to notice of the adoption (under F.S. Sec. 63.182(2)(a)), were entitled to intervene, and overturned the adoption on the grounds of fraud on the court. The adoption constituted a fraud on the court because Goodman intentionally concealed the adoption from his ex-wife, who was entitled to be made aware of the action because it "directly, immediately, and financially impacted their children." The minors were deprived of an opportunity to address the trial court and present their objections. Thus, the basis for the ruling was lack of notice and fraud, as opposed to a decision that adult adoption itself is improper or invalid. Left open to question by the opinion is how the court would have ruled on validity of the adoption and, potentially, the entitlement under the trust had the parties all received proper notice of the adoption. That issue would likely be analyzed by reviewing the intent of the trust settlor when the trust was created.

Dennis v. Kline

The *Dennis* case is useful because it addresses the settlor intent issue that *Goodman* did not reach. In this case, Dennis the settlor had five children. Dianna, one of the children adopted an adult godchild explicitly so she could inherit whatever a child of Dianna would inherit under Dennis's trust. The adoptee had no relationship with Dennis and continued maintaining relations with her biological parents. Harriet, another child, challenged the adoption. One of the settlor's other children had previously adopted an infant and there was testimony that the earlier adoption led Dennis to include an adopted persons provision in his restatement of trust. The drafting attorney testified that at the time of the Trust's restatement, he did not contemplate an adult adoption when drafting the trust language and never broached the idea with the settlor. Both the settlor's trust agreement and pour-over will contained clauses including adopted persons within the definition of the settlor's lineal descendants, which made them future

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beneficiaries of his trust. The same result is reached under law, where F.S. Sec. 732.108 treats adopted children as heirs. Here there was no issue regarding due process but rather whether adult adoption for inheritance purposes against Florida public policy. The Fourth DCA held such an adoption is not against public policy. The Court determined that adult adoptions are clearly legal and that the legislature could have addressed the inheritance issue in the Probate Code had it wanted to limit inheritance rights of adult adoptees. The next issue was then whether the trust somehow should be interpreted to exclude the adult adoptee. This is a classic issue of settlor intent. The first place to look is the language of the trust itself and the terms of the Trust do not place limitations on a "legally adopted" person becoming a beneficiary under the Trust. Harriet, to overcome the language of the trust, and application of Florida law affirming adult adoptions would have to show the existence of a latent ambiguity in the trust "where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings," noted the appellate court. The Court held that in the absence of evidence of an express opposition to adult adoptions, the Settlor's intent turns on the credibility of witnesses, the weight to be given to their testimony, and the subtle nuances of the Settlor's beliefs about the significance of family bloodlines.

Application: First, you need to provide due process of any adult adoption as required by F.S. Sec. 63.182(2)(a) to other parties (such as trust beneficiaries) having a "direct, financial, and immediate" interest in the adoption proceeding. Second, if the trust or will does not contain language specifically addressing adult adoptions, if litigation ensues the issue is whether the document suffers from a "latent ambiguity" that can only be resolved at trial. The issues at trial are the settlor's intent and "the subtle nuances of the Settlor's beliefs about the significance of family bloodlines." Third, for the planners in the audience, these cases set forth the need for adult-adoption language (whether the adoptee will benefit or not or be defined as a "child," or "descendant," or "issue," etc.) in documents.

4. "Twitter." The 4th DCA and 5th DCAs analyze enforceability of oral agreements with regard to inheritance rights. *Ferguson v. Carnes*, 89 So. 3d 114 (Fla. 4th DCA 2013); *Ferguson v. Carnes*, 113 So. 3d 976 (Fla. 5th DCA 2013).

Ferguson v. Carnes

In this case, mom made frequent threats to disinherit son (Ferguson) or daughter (Carnes) depending upon her mood or who was in favor at that moment. Ferguson and Carnes allegedly decided to sidestep this inheritance risk by agreeing to split the inheritance from mom equally no matter who ended up as the loser under mom's final estate plan. So far so good, but of course the obvious risk (the winner disavows the agreement) occurred. Mom died and Ferguson was disinherited. Ferguson asked Carnes to live up to the oral agreement and Carnes basically said, "What agreement?" Ferguson sued for breach of contract. The issue was enforceability of the oral agreement (assuming it is proved). You might think that since wills, trusts, and agreements by

beneficiaries to alter their vested beneficial rights in a probate must be in writing that this agreement would be void for lack of written agreement as well. The Fourth DCA, however, held otherwise and found that Ferguson alleged sufficient facts regarding oral contract in order to get past a summary judgment motion against him. The Fourth held that the consideration for the contract lies in the fact that each gave up the possibility of inheriting more than the other in return for insuring that neither would be disinherited in whole or in part. An oral contract must meet the requirements of a written contract, including offer, acceptance, consideration, and sufficiently specific terms. Promises have long been recognized as valid consideration in forming a contract.

Browning v. Poirier

Browning involved a couple who allegedly agreed to split the proceeds of any winning lottery ticket. Poirier purchased a winning ticket. Browning claimed half the jackpot and, predictably, the dispute ended the couple's relationship. Browning and Poirer were living together since 1991 and made their agreement in 1993. The agreement was an oral agreement to split the proceeds of any lottery tickets they may purchase so long as they remained romantically involved. Fourteen years later and while the parties were still romantically involved, Poirier purchased the winning ticket but then refused Browning's request for half of the proceeds. Browning sued for breach of contract and unjust enrichment. Poirier denied the existence of any agreement and raised the defense of the statute of frauds. However, there are exceptions to the statute of frauds. One exception is if it's possible for the oral agreement to be performed within one year, the statute of frauds doesn't apply. Here, there was nothing in the agreement to show that it could not be performed within one year or which required performance for a period of time exceeding one year. So Browning's suit for breach of contract is not barred by the statute.

Application: You might think that oral agreements will not be enforceable in inheritance contexts, especially where the oral agreement was made years ago. However, under certain circumstances these cases show that oral agreements can factor into inheritance disputes and pass an initial motion to dismiss or summary judgment hurdle.

5. "**Shazam." The Third DCA slaps litigant and counsel who disregarded law regarding durable powers of attorney. *Albelo v. Southern Oak Ins. Co.*, ____ So. 3d ____ (Fla. 3d DCA 2013).**

Albelo, a 78-year old woman executed a valid DPOA in favor of her son. Acting under the authority of the DPOA, son sued mom's property-insurance company, Southern Oak, seeking to recover damages to mom's home caused by a burglary. When the suit was filed, it is undisputed that Albelo suffered from some incapacity issues. Southern Oak argued that since mom had capacity issues, mom's claim could only be prosecuted by a court-appointed guardian. The trial court judge agreed and dismissed mom's lawsuit. Son appealed and the 3d DCA overturned the erroneous decision. It also granted Albelo's (via son as agent) motion for 57.105 fees against Southern Oak and its counsel. The Court noted that F.S. Sec. 709.2119 provides explicit protection to Southern Oak in the circumstances of this case. Southern Oak did not contest the

formalities of execution of the DPOA and did not allege or attempt to have it rescinded the ground Albelo was incompetent at the time she executed the document. Therefore, the Court held that Southern Oak's and its counsel's persistence in arguing Albelo was required to petition for appointment of a guardian for herself in order to continue the lawsuit was frivolous. A main use of DPOAs is to enable incapacitated adults to provide for management of their legal and property rights without court supervision. DPOAs are recognized "less restrictive alternatives" to guardianships.

Application: This is a great case for enforceability of durable powers. The court makes it clear that if you are faced with accepting a power that unless you challenge the power as provided by statute, you are protected in accepting it and you will not be protected (and may pay dearly) if you refuse to otherwise act in reliance on the power.

6. **"TomTom." The Second and Fourth DCA discuss the duty to provide a planning file pursuant to subpoena. *Patrowicz v. Wolff*, 110 So. 3d 973 (Fla. 2d DCA 2013); *Bennett v. Berges*, 84 So. 3d 373 (Fla. 4th DCA March 14, 2012).**

Patrowicz v. Wolff

Patrowicz involved a case where the same lawyer (Linde) was the estate planner for the decedent and counsel for the personal representative of his estate. Wolff, the plaintiff in what appeared to be a will contest (the opinion is unclear), subpoenaed Linde's entire estate planning file, including communications, related to the decedent. Linde objected to the subpoena on multiple grounds including attorney-client privilege. The trial court improperly held a hearing on the objection prior to any deposition and at that hearing ordered Linde to produce the entire file. The 2d DCA quashed the order holding that the trial court departed from the essential requirements of the law by ordering the production of allegedly privileged documents without first conducting an *in camera* inspection to determine whether privilege applies. A party claiming that documents sought by an opposing party are protected by the attorney-client privilege is entitled to have those documents reviewed *in camera* by the trial court prior to their disclosure. The Court further noted that it was unusual to hold a hearing on the written objection filed pursuant to rule 1.351(c) because the rule is self-executing. The correct procedure would have been for the parties to proceed to a deposition and then have the court hear any issues that arose from that deposition.

Bennett v. Berges

Bennett involved an appeal of a probate court order directing an attorney to produce certain documents for an *in camera* review. A dispute arose with regard to a settlement agreement and one party subpoenaed the file of the other party's former counsel. The subpoena was objected to on the grounds that the documents subject to the subpoena were protected by the attorney-client privilege. The probate court held a hearing on a motion to compel, which included the parties' arguments with respect to whether or not the documents subpoenaed were protected by the attorney-client privilege. At the conclusion of the hearing, the trial court ordered the documents in the attorney's

privilege log to be produced for an *in camera* inspection within ten days. The 4th DCA held the probate court properly ordered an *in camera* review of the relevant documents claimed to be privileged. The order did not compel Petitioners to produce the documents to Respondents. After an *in camera* inspection, the trial court may determine that the documents are privileged and uphold Petitioners' objection to the discovery request. Accordingly, the appeal was held premature because no irreparable harm had been demonstrated and no discovery had yet been ordered.

Application: For estate planners, it's only a matter of time until someone asks you to turn over a deceased client's estate planning file. Required reading when this occurs is Florida Bar Advisory Opinion 10-3, which walks you through the decisions and considerations involved. If you represent fiduciaries, you need to review F.S. Sec. 90.5021, the evidentiary privilege rule relating to fiduciaries. If there's a dispute about privilege, the probate court judge gets to decide which documents, if any, are privileged. That review will be done *in camera*.

7. **"Temple Run." First DCA Court enforces religious arbitration agreement, over objection of the personal representative. *Spivey v. Teen Challenge of Florida, Inc.*, 122 So. 3d 986 (Fla. 1st DCA 2013).**

In this case Spivey's son, Ellison, then age 19, "enrolled in a year-long program at Teen Challenge's substance abuse facility," which "assist[s] young men in overcoming addiction through the application of biblical principles." Ellison fell out of rehab several times, and eventually died from a drug overdose. Spivey sued in a wrongful death action, claiming Teen Challenge essentially committed malpractice in its treatment of Ellison. When Ellison entered into the Teen Challenge program, he signed an arbitration agreement that provided for Christian-related arbitration of disputes related to the program. The 1st DCA held that the personal representative (Spivey) was bound by the arbitration agreement that the decedent had signed. Spivey raised two arguments against arbitration: (1) that she hadn't entered into the arbitration agreement, and (2) that it would violate the First Amendment (prohibiting government-imposed religion) to require her to go through religious arbitration, which may involve prayer and other religious activity. The Court did not buy these arguments and held that a personal representative generally cannot object that fulfilling the deceased's wishes offends the religious sensibilities of the personal representative. Personal representatives serve the estate's interest, not vice-versa. If Spivey's personal beliefs do not allow her to participate in duties called for as a personal representative she can resign her appointment. She cannot, however, remain personal representative but refuse to carry out her duties and attempt to thwart the decedent's agreement. She must comply (despite her religious objections) to the agreement or resign and have a replacement appointed as personal representative.

Application: The role of the personal representative is to advance the decedent's expressed desires, subject to the rights of interested parties in the estate. If a PR is unwilling or unable to fulfill this role, the PR must pass along their responsibilities to others. No one is forced to be PR and fiduciaries are free to resign and those not yet appointed may ask the probate court to appoint suitable individuals who can carry out

the decedent's wishes.

8. "Facebook." First DCA reviews undue influence standards in light favorable to caregiver child. *Estate of Kester v. Rocco*, ____ So. 3d ____ (Fla. 1st DCA 2013).

Barbara Kester (Mom) died testate on January 21, 2011. In addition to her will, executed in 2004, Mom had executed two codicils to her will, each in December, 2010. The codicils specifically named her children: Glenna, Pamela, Cynthia, Monte, and David as beneficiaries of the estate and designated Glenna and David as personal representatives. Shortly after Mom's death, Glenna took possession of two financial accounts as either a Payable on Death beneficiary or a joint account holder with right of survivorship. Glenna also took possession of a third account on which Mom had listed Glenna, Monte and David as beneficiaries. The non-probate asset beneficiary designations were made by Mom outside the presence of Glenna. Because of the beneficiary designations on the three non-probate assets, Glenna did not list them as estate assets in the probate inventory and Pamela and Cynthia, the other two daughters, did not receive any distributions from these assets. Pamela and Cynthia challenged the inventory of estate assets Glenna filed with the court. They petitioned the court to compel Glenna to return the value of the three financial accounts at issue to the estate for distribution. Pamela and Cynthia further alleged that Glenna thwarted their mother's wishes and misappropriated these assets for her own benefit using the DPOA, in breach of her fiduciary duty to the estate and beneficiaries. After hearing the petition to compel production of the assets, the probate court agreed and found that Glenna's authority to take possession of the accounts from the financial institutions was procured by undue influence over her mother. The court found that Glenna had breached her fiduciary duty, created by both her durable power of attorney and appointment as personal representative, to carry out her mother's wishes. The ruling relied heavily on the fact that Glenna had not followed an unsigned, undated spreadsheet with notes she and her mother made about Mrs. Kester's property. The court ordered Glenna (but not her brothers) to return the proceeds from the accounts at issue to the estate and pay damages to Pamela and Cynthia from Glenna's share of the estate for the litigation and other expenses incurred in correcting Glenna's wrongdoing in connection with the probate of the estate. Finally, the court revoked the letters of administration appointing Glenna and David the personal representatives and substituted Pamela as the interim personal representative. The 1st DCA overturned these rulings and explained that evidence merely that a parent and an adult child had a close relationship and that the younger person often assisted the parent with tasks is not enough to show undue influence. It further held that where communications and assistance are consistent with a "dutiful" adult child towards an aging parent, there is no presumption of undue influence. Finally, the Court held that to the extent the trial court relied on the spreadsheet and notes as evidence of Glenna's active procurement of Mrs. Kester's changes to the financial accounts at issue, the unsigned, undated, unwitnessed document was not referenced in the codicils prepared around the same time and was insufficient to overcome the bank documents providing Glenna's authority to take possession of the assets after Mrs. Kester's death. The notes are legally insufficient to constitute an agreement to make a devise.

Application: It is already common and will become more common that one child will undertake the ongoing care for an elderly parent in place of less available siblings. There are financial, physical, and psychological costs to the caretaker child in doing this. This case will give the caretaker child some arguments to make when they likely are given more in the parent's estate plan and the siblings object. Undue influence law currently sets the caretaker child up for litigation risks and this decision is a good counterpoint to the presumptions of undue influence.

9. **"Minecraft." The 1st DCA says intent trumps fairness. *Cody v. Cody*, ___ So.3d ___ (Fla. 1st DCA 2013).**

This case involved a will contest just waiting to happen as soon as the ink dried on the execution signatures. Mr. and Mrs. Martin both executed wills in favor of their three sons (the Cody's, don't ask me why the last names are different). The wills devised their home, surrounding acreage, and residue to one of their three sons, Buford Cody, to divide among their heirs "as he sees fit and proper." What could possibly go wrong?? As you might suspect, once the parents died Buford's brothers filed an action to construe dad's (the second to die parent) will to divide the estate "into roughly three equal shares" for the three sons. They made a procedural mistake by filing their construction suit before the will was even admitted to probate. The 1st DCA held as an initial point that "[a] will may not be construed until it has been admitted to probate." Further, the court held that if I make a will leaving everything to one of my children to divide among my heirs as he sees fit, that he can see fit to keep it all for himself. "[T]he will's lack of restrictions on Buford Cody's discretion to share the property with his brothers gave him the authority to divide it in any way he saw 'fit,' including no division at all." The court concluded that: "The court may not alter or reconstruct a will according to its notion of what the testator would or should have done.... It is not the purpose of the court to make a will or to attempt to improve on one that the testator has made. Nor may the court produce a distribution that it may think equal or more equitable."

Application: This case holds that a probate court cannot re-write a decedent's will to suit a subjective sense of fairness or equity. However, this result came after expensive and time-consuming adversary proceedings in probate and on appeal. Planners and clients should carefully consider how to draft documents to lessen obvious issues of contest. One approach to consider is to provide an explanation for non-standard or unequal dispositions to heirs. An explanation in the will of the reasons motivating the disposition may reduce the chance of a contest. It may certainly help the will stand up to the contest at trial. However, an explanation can also engender ill will or give rise to challenges for other reasons (influence, capacity, insane delusion). This is a balancing act and a conversation to have with the client who can then make a call with regard to what to include in the will.

10. **"Swagbucks." Fifth DCA confirms spendthrift trusts are constitutional. *Zlatkiss v. All America Team Concepts, LLC*, 125 So. 3d 953 (Fla. 5th DCA 2013).**

Zlatkiss loaned Steinmetz $350,000 after receiving assurances from Steinmetz that he was creditworthy due to his $6.9 million trust. Unfortunately for Zlatkiss, the trust was created by Steinmetz's parents and contained a spendthrift clause in favor of Steinmetz and against Steinmetz's creditors. Under the Florida Trust Code, the trust was therefore exempt from creditors' claims. Zlatkiss challenged the spendthrift statute itself on constitutional grounds. Both the trial court and the 5th DCA held against the creditor. The constitutional challenge was premised on article I, section 21 of the Florida Constitution, which provides in its entirety that: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Zlatkiss contended that F.S. Secs. 736.0501–.0507 abolished a "common law" right "to execute a monetary judgment against any beneficial interest held by a debtor," without providing a reasonable alternative or demonstrating an overpowering public necessity for the statute. The Court held that the "glaring flaw in Plaintiffs' argument" is that the creditor-protection provisions of a properly drafted spendthrift trust were recognized as legally valid at common law, before the adoption of the trust statutes in question. As such, these statutes cannot be considered as a legislative act abolishing a common law right, but rather, recognizing one. The creditor was also found to be confusing his right to bring a legal action with their means of collecting a judgment. Article I, section 21 guarantees access to courts (ability to file legal claims). It does not guarantee the ability to enforce a judgment.

Application: Don't waste your time trying to invalidate spendthrift provisions in trusts.

11. **"Words with Friends." Fifth DCA explains that manipulating the conduct of a beneficiary with a conditional gift is not an invalid "no-contest" clause. *Dinkins v. Dinkins* 125 So. 3d 968 (Fla. 5th DCA 2013).**

The estate in this case was "estimated at $24–55 million." The decedent did not want his wife to file for elective share so he included the following $5 million conditional-gift clause in his trust:

> *Conditional Specific Bequest of Cash. If my spouse, JEANETTE M. DINKINS, survives me, and if she or her legal representative makes a valid disclaimer of all of her interest in the QTIP Trust created under Article VII of this Trust Agreement, and also makes a valid waiver of her right … to elect the elective share in my estate, then the Trustee shall distribute five million dollars ($5,000,000.00) to JEANETTE M. DINKINS, outright and free of trust.… My objective is to provide five million dollars ($5,000,000.00) of assets to JEANETTE M. DINKINS, in addition to … any … property to which JEANETTE M. DINKINS is entitled as a result of my death, except for the Elective Share.*

The clause does not prevent the wife from taking the elective share but rather rewards her for not taking it. The wife, however, argued that the provision was an unlawful no-contest (*in terrorem*) clause that penalized her for taking her elective share by causing her to forfeit the $5 million conditional bequest. The probate court and 5th DCA rejected this argument. The Court held that availability of elective share was not thwarted by

providing an optional alternative bequest, because wife was free to reject it for any reason, including that it is less valuable than the statutory benefit. The wife had the ability to choose an option at least as valuable as the elective share. This is unlike a no-contest clause. Under a no-contest clause, in order to receive the devise, the beneficiary must forfeit the right to contest the instrument. Courts and the legislature have found that right is essential to the integrity of the estate disposition process. A beneficiary cannot be forced to choose between the right to contest an instrument and the right to take under it and this conditional gift did not put the wife to such a choice.

Application: Many clients desire to incorporate no-contest clauses in documents and are disappointed the law prohibits them. Much the same result can be accomplished by making a rewards-based conditional bequest in the document to which the client wants to avoid a challenge. The court found such an incentive to be valid here and not an invalid no-contest clause.

12. **"Angry Birds." Third DCA finds fault with trustee who failed to account and who charged an excessive fee. *McCormick v. Cox*, 121 So. 3d 1052 (Fla. 3d DCA 2013).**

McCormick, an attorney, prepared the last will and testament, as well as a revocable family trust agreement, for his friend Cox. Cox passed away in January 2001, leaving his wife as the lifetime beneficiary of the "Robert W. Cox Family Trust," and Mrs. Cox's four children as the primary beneficiaries of the companion "Robert W. Cox Bypass Trust." McCormick was the trustee of each of the trusts when Cox died. The Cox trusts owned a single asset—a property of approximately 100 acres then operated as a golf course. In early 2002, McCormick arranged for a date of death appraisal of the property for estate tax purposes. In a report to Cox dated March 6, 2002, the appraiser reported a fair market value of the property, as an operating golf course and at the date of death, of $2,500,000.00. A month later, that value was used on the federal estate tax return filed on behalf of Cox. The 3d DCA noted that the evidence at trial was in sharp contrast regarding that value and the trustee's reasons for adopting it. There was a variety of evidence suggested that the golf course could have a much higher market value, as of the date of Cox's death, because of its suitability for residential development. The trustee's appraiser's March 2002 report stated that "the highest and best use of the subject property would be for residential development to the maximum intensity [sic] that the physical characteristics of the site would allow." However, the evidence did not reflect efforts by McCormick as trustee or by the appraiser (before that appraisal was prepared and the estate tax return filed) to ascertain a market value of the property at its highest and best use. McCormick did not promptly alert the beneficiaries that the property might have a much greater value or advise that the estate tax return might be amended to reflect such a value. At trial, the trust beneficiaries' appraiser testified that the fair market value based on "highest and best use" of the property at the time of Cox's death was $10,500,000.00. The property was sold in 2005 for $12,000,000.00. The sale created a potential immediate and adverse capital gains tax to the family trust and beneficiaries, forcing McCormick to structure a like-kind exchange under section 1031 of the Internal Revenue Code. The trusts incurred $2,146,812 in professional and other expenses (exclusive of the trustee's own claims for fees) in order to consummate the

section 1031 transaction. McCormick did not provide a trust accounting report to the beneficiaries of either trust until April 2005. When the sale of the property closed in August 2005, McCormick paid himself "trustee's fees" totaling at least $1,217,528 in four payments from September 2005 through December 2005. The beneficiaries filed suit, ultimately demanding, among other things: (1) a statutory review of trustee's fees taken or claimed; (2) a review of the trustee's attorney's fees taken or claimed; (3) a surcharge against the trustee and his family law firm for breach of fiduciary duties; (4) resolution of the beneficiaries' objections to the 2005 accountings; and (5) and removal of the trustee. The trial court entered a final judgment granting relief to the beneficiaries under each count and awarding money damages (including prejudgment interest) totaling approximately $5,300,000.00 as against McCormick and related parties. The 3d DCA upheld the trial court ruling. The Court held that a fiduciary is obligated not only to make prudent decisions, but also to file the annual accountings to keep the beneficiaries informed of income, expenses, and fluctuations in value of the trust assets. Each beneficiary had an enforceable right to receive an accounting from the trustee unless that right is waived in writing. No waiver took place here. Further, the trustee's unilateral payment to himself of a seven-figure fee from trust monies—without prior disclosures of alleged entitlement and amount to the beneficiaries or the court—also was found to be a flagrant breach of duty.

Application: Trustees must account annually to beneficiaries or obtain written waivers of the accounting. Trustees should disclose up front the basis for their fees so this does not become a litigation issue.

13. **"Reeder." The Fourth DCA confirms the importance of the settlor's intent with regard to trusts. *Jervis v. Tucker*, 82 So. 3d 126 (Fla. 4th DCA 2012).**

Meikle executed a trust agreement in 1991. She later amended this trust agreement. This first trust amendment contained language providing for the suspension of Meikle's power to revoke or amend the trust "[i]f, at any time during the continuance of [the] trust, Grantor is adjudicated incapacitated by a court of appropriate jurisdiction." Further, the trust amendment stated that "The Grantor's powers and those of Grantor/Trustee may be restored either by virtue of [1] an order of an appropriate court having jurisdiction over Grantor, or [2] upon the issuance and receipt by the Trustee of a written opinion from . . . two . . . licensed physicians who have examined the Grantor." In 2000, Meikle was adjudicated incapacitated. On December 27, 2001, Meikle executed a second amendment to her trust without obtaining a court order authorizing the amendment or restoring her capacity to amend the trust and without 2 written opinions from two licensed physicians. Meikle died in 2007 and the second amendment to her trust was challenged. Based on her adjudication of incapacity in 2000, Meikle was presumed incapacitated when she executed her second amendment in 2001. This evidentiary presumption can, however, be overcome at trial so the beneficiary of the trust argued that Meikle had sufficient capacity to execute the second amendment. The contestants argued her capacity was irrelevant because the amendment was not made in compliance with the terms of the trust. The trial court agreed with the contestants and the Fourth DCA affirmed. The Court held that intent of the settlor must be honored and

under the terms of the trust and its first amendment Meikle did not have the power to execute the second amendment to the trust.

Application: The starting point in reviewing any trust controversy is the language of the trust itself. If that language is clear it may allow the court to resolve the dispute without a trial being necessary. This case, which was resolved through a summary judgment hearing, is an example.

14. **"Word." The Florida Supreme Court confirms that homemade wills merely make for more legal fees. *Aldrich v. Basile*, ____ So. 3d ____ (Fla. 2014).**

This case came before the Florida Supreme Court on the following certified question from the 1st DCA:

WHETHER SECTION 732.6005, FLORIDA STATUTES (2004) REQUIRES CONSTRUING A WILL AS DISPOSING OF PROPERTY NOT NAMED OR IN ANY WAY DESCRIBED IN THE WILL, DESPITE THE ABSENCE OF ANY RESIDUARY CLAUSE, OR ANY OTHER CLAUSE DISPOSING OF THE PROPERTY, WHERE THE DECEDENT ACQUIRED THE PROPERTY IN QUESTION AFTER THE WILL WAS EXECUTED?

Most probate lawyers also draft wills for clients. The fees attorneys charge for wills are usually very reasonable in relation to fees attorneys charge for hourly probate work and court proceedings. Many times laypeople decide to save a couple of bucks and do their own wills. Usually, this leads to disaster as happened in this case. In 2004 Aldrich wrote her will on an "E–Z Legal Form." In Article III, entitled "Bequests," just after the form's boilerplate language "direct[ing] that after payment of all my just debts, my property be bequeathed in the manner following," she hand wrote specific gifts of specifically described property to her sister. She then stated that all the specifically devised property to sister should go to Relative A if sister did not survive Aldrich. Unfortunately, Aldrich did not include residuary clause language and so her will only made specific devises with no residuary bequest. This would have worked had Aldrich died only owning the specifically devised property but the sister predeceased Aldrich and Aldrich inherited sister's property before Aldrich died. The issue before the court was whether Relative A would receive the property not specifically devised (i.e., the residue of the estate) or whether the residue would pass by intestacy. The probate court interpreted the will to pass the residue to Relative A by applying F.S. Sec. 732.6005 to construe Aldrich's intent. The First DCA reversed and held that F.S. Sec. 732.6005 was inapplicable and that the residue passed by intestacy. The reason is that Aldrich's will was not ambiguous and her intent was clear. Unfortunately, her intent was incomplete as she stated nothing about her residue and the Court held that a probate court cannot fill in that intent afterwards. The Florida Supreme Court affirmed the 1st DCA and noted that "[a]court's role is to enforce the stated intentions of the testator, not to discern the reasonableness of one potential devise over another."

Application: The intent of the testator is a key factor in any court review of a will.

However, the court is not free to guess the testator's intent when there is no ambiguity to the will and there is a provision completely missing from the will. The law allows people to have the property pass by intestacy and if your will does not fully provide for disposition of your property, that is what will happen. The case is a good anecdote for estate planning attorneys to discuss with their potential clients as the costs and consequences of these proceedings far outweighed what Aldrich would have paid an attorney for a proper will.

15. **"Minion Run." The Second DCA holds *Bacardi* still applies to discretionary trusts. *Berlinger v. Casselberry*, ___ So. 3d ____ (Fla. 2d DCA 2013).**

In 1985 the Florida Supreme Court, in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985), held that under certain circumstances Florida spendthrift trusts or discretionary trusts were not exempt from child-support or alimony claims. When Florida adopted the Florida Trust Code in 2006, it included separate statutes for spendthrift trusts (F.S. 736.0502) and discretionary trusts (F.S. 736.0504). With regard to spendthrift trusts, the trust code codified the *Bacardi* holding in F.S. 736.0503. However, there wasn't a comparable statute for discretionary trusts. This led to some confusion regarding the status of the law with regard to discretionary trust exemption from these claims.

In this case Berlinger, the beneficiary of several large trusts, agreed to pay his ex-wife, Casselberry, $16,000 a month in permanent alimony. They had been married for 30 years. Their divorce was finalized in 2007. Although he enjoyed a lavish lifestyle funded by trust distributions, in 2011 Berlinger stopped paying his alimony. The Second DCA found that although financially able to pay, Berlinger and his attorneys went to extraordinary lengths to avoid his support obligation to Casselberry. On appeal Berlinger argued that F.S. Sec. 736.0504 overrides *Bacardi* as applied to discretionary trusts. The 2d DCA did not agree and held that if an ex-spouse was entitled to a writ of garnishment against a discretionary trust under *Bacardi*, new F.S. Sec. 736.0504 does not change that result. Discretionary trusts are not afforded greater creditor protection under the Trust Code according to the court. It explained that "[a]ccording to section 736.0504(2), a former spouse may not compel a distribution that is subject to the trustee's discretion or attach or otherwise reach the interest, if any, which the beneficiary may have. The section does not expressly prohibit a former spouse from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion. As a result, it makes no difference that the instant trusts are discretionary. Casselberry is not seeking an order compelling a distribution that is subject to the trustee's discretion or attaching the beneficiary's interest. Instead, she obtained an order granting writs of garnishment against discretionary disbursements made by a trustee exercising its discretion. Sections 736.0503 and 736.0504 codify the Florida Supreme Court's holding in *Bacardi*. Neither section protects a discretionary trust from garnishment by a former spouse with a valid order of support."

Application: Assuming legislation is not passed with regard to the Trust Code in the near future to change the *Berlinger* result, families desiring maximum protection for their descendants may want to consider creating and administering discretionary trusts in

Alaska, Nevada or South Dakota, rather than Florida. Florida has a good track record for progressive trust legislation so perhaps this issue will be addressed. An alternative where a claim is not immediately pending may be to consider drafting trusts that incentivize beneficiaries to enter marital agreements prior to marriage.

16. **"4 Pics 1 Word." The First DCA holds firm on specificity with regard to exercise of powers of appointment. *Cessac v. Stevens*, ___ So.3d ____ (Fla. 1st DCA 2013).**

In this case trusts were created in 1970 which contained testamentary powers of appointment exercisable by the settlor's daughter, Sally. Sally died in 2011. The language of the powers of appointment stated:

Upon the death of my daughter, SALLY, the Trustees shall transfer and deliver the remaining principal of this share of the trust, together with any accumulated or undistributed income thereon to or for the benefit of such one or more persons, corporations or other organizations, in such amounts and subject to such trusts, terms and conditions as my daughter may, by her will, appoint, making specific reference to the power herein granted.…

Sally had a falling out with her children and apparently intended to exercise her power of appointment to disinherit them. If she did not exercise the powers to disinherit her children they were the default beneficiaries under her father's trusts. Here's where the problems began. According to the 1st DCA, "[T]he [drafting] attorney testified that he made no effort to ensure that [Sally's] will complied with the trusts' requirements when preparing the decedent's final will in 2009 even though he had previously been provided a copy of at least one of the trusts." The will did not include language making a specific reference to the trust powers of appointment. The will did have a clause that stated:

Included in my estate assets are the STANTON P. KETTLER TRUST, FBO, SALLY CHRISTIANSEN, under will dated July 30, 1970, currently held at the Morgan Stanley Trust offices in Scottsdale, Arizona, and two (2) currently being held at Northern Trust of Florida in Miami, Florida.

The issue was whether there is some equitable exception to a will's failure to correctly exercise a power of appointment. The 1st DCA held there is no equitable exception that applied to these facts. There is authority in other states for an equitable exception to salve an incorrect exercise of powers of appointment but the attempted appointment under that exception has to approximate the manner of appointment prescribed by the donor. However, because Sally's will did not contain any reference to the power of appointment at all the court was unwilling to apply an equitable exception doctrine. The court held that a donee's intent to exercise a power of appointment must be evident from the document itself. So if the donee's will makes no reference at all to any power and the donor required specific reference to the power the will cannot exercise the power of appointment, even under an equitable exception. The court also held that F.S. Sec. 732.607 did not save the purported exercise of the power. The statute provides:

A general residuary clause in a will, or a will making general disposition of all the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intent to include the property subject to the power.

The court held that nothing in section 732.607 limits the power of an individual to place specific requirements on the disposition of his property and where a settlor of a trust places specific restrictions on the exercise of a power of appointment, the "indication of intent" language of section 732.607 is inapplicable. Sally had to at least make reference in her will to the powers of appointment she held and she failed to do so. Mere reference to one of the trusts and to the location of the property of the other two trusts was not sufficient to comply with the "specific reference" requirements in the trusts.

Application: Certain things in probate and trust law are subject to equitable fixes or post-death modification. Powers of appointment, however, have been more strictly construed and can be a trap for the unwary. When planning for clients, you should not only review their prior documents but also request copies of estate planning documents to which the client is a beneficiary or donee of a power of appointment. The client may not understand the issue when initially raised but that is part of the planning educational process.

17. **"Vine." The First DCA clarifies review and validity of preneed designations of guardian. *Koshenina v. Buvens*, ___ So.3d ___ (1st DCA 2014).**

In 2010 Linda Koshenina executed a designation of preneed guardian designating her husband James Koshenina to be her preneed guardian. Sometime that year, Linda began showing signs of mental deterioration and dementia. There was a falling out between James Koshenina and Linda's two siblings, who in 2012 successfully petitioned for appointment of themselves as Linda's emergency temporary guardians. In response to the ETG, James filed a notice of "Designation of Preneed Guardian." There then was a contested evidentiary hearing at which the siblings sought to prove the Designation was invalid due to lack of capacity or undue influence. The probate court found that although Linda executed the Designation naming James her preneed guardian, it was executed only "after the dementia process had seriously compromised her ability to understand what she was doing" and the court "seriously questioned" whether Linda understood what she was doing when she executed the document. The court did not, however, find Linda incapacitated at the time she executed the Designation. The court further held it was not in Linda's "best interest" to honor Linda's designation "because of the [c]ourt's findings regarding events subsequent to the execution of this document." The 1st DCA on appeal first analyzed the capacity issue. The court held that capacity standard for validity of a designation is analogous to that applied to wills. In other words, did she have the capacity to generally understand the nature of the decision she made and its practical implications. The court then analyzed what would be the appropriate test under F.S. Sec. 744.312(4) for disregarding a person's preneed guardianship designation. The court held that a probate court is not to attempt to determine in a "generalized" way what is in the designating person's best interest but

rather whether the designation is contrary to the person's best interests. This means that there is rebuttable presumption of the designee's entitlement to serve as guardian which can only be overcome by a specific, factually-supportable finding that appointing the designee is "contrary to the best interests of" the person making the appointment. Overriding the intent of the individual and the statutory presumption in favor of the individual's appointment is therefore a significant hurdle to a challenger. A finding that someone else could do a better job is not enough.

Application: One of the key components of any well-considered estate plan is planning for incapacity. This is especially true as people are now experiencing longer life spans due to better nutrition, fitness, and medical care. One element of incapacity planning is a written designation of a preneed guardian pursuant to F.S. Sec. 744.3045. A person's right to designate an intended guardian is protected by F.S. Sec. 744.312(4), which requires the court to appoint the designee unless the court determines that the appointment of that person is contrary to your best interests. This case is helpful because it sets forth the test for determining whether a person was competent at the time of execution of a preneed guardianship designation and how to apply the standard under section 744.312(4) for disregarding the designation.