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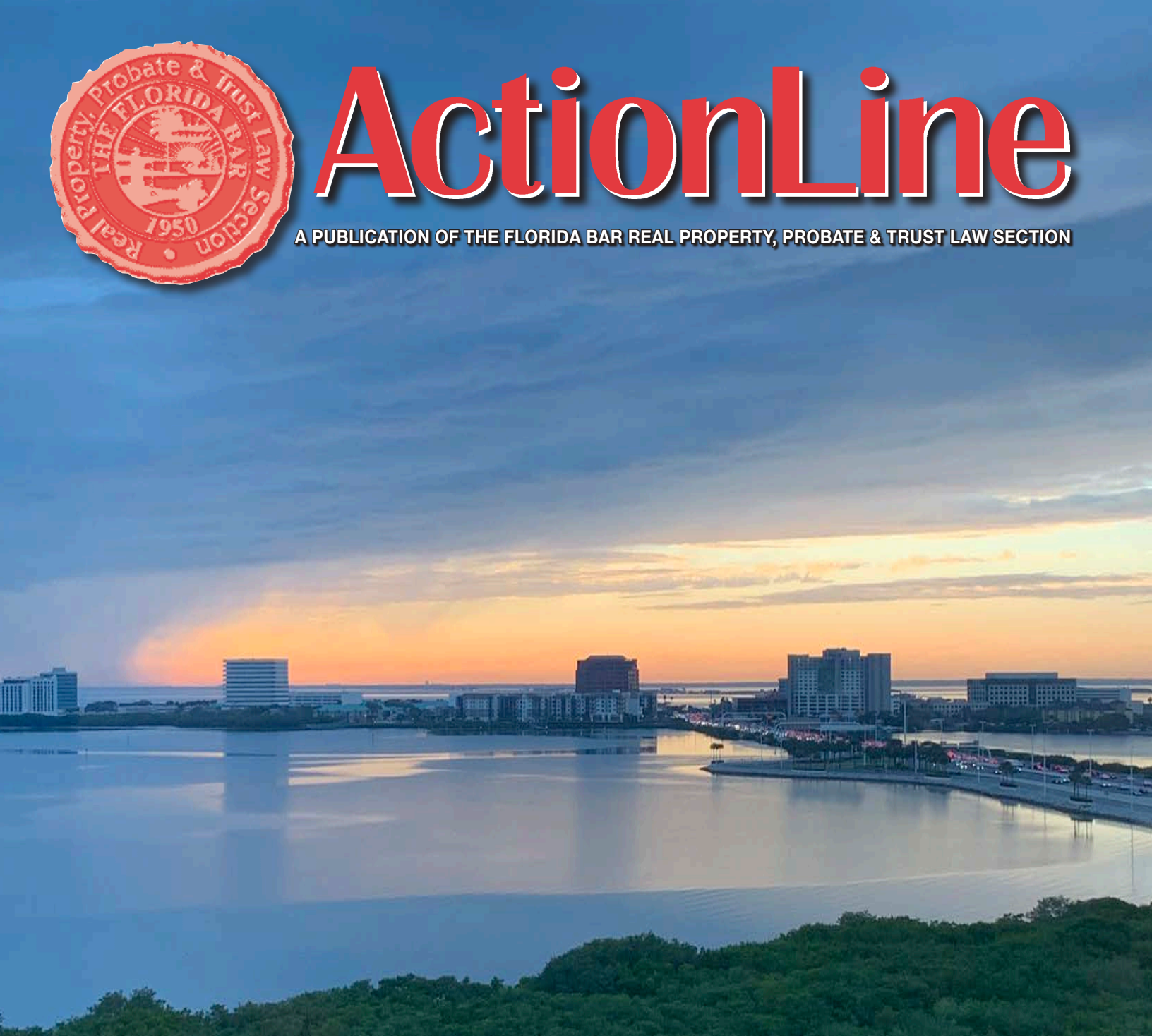
A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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Sunset by Michael J. Gelfand

IN THIS ISSUE:

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ARTICLES: Forward any proposed article or news of note to Jeff Baskies at jeff.baskies@katzbaskies.com. Deadlines for all submissions are as follows:

VOLUME NO.	ISSUE	DEADLINE
1	Fall	July 15
2	Winter	October 15
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PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Janellen Green, at jane@emeraldgreenconsulting.com.

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

Probate And Trust Case Summaries

Joseph M. Percopo, Esq., LLM. Mateer & Harbert, P.A.

A later executed foreign Will with only one witness fails to comply with the Florida requirements for a Will to be valid and therefore does not revoke the earlier executed valid Florida Will.

Zidman v. Zidman, 45 Fla. L. Weekly D820a (Fla. 3d DCA 2020)

In 2012, the Decedent executed a will in Florida (the "Florida Will") in compliance with statutory formalities. In 2015 the Decedent executed a new will in Belgium revoking the earlier Florida Will (the "Belgium Will"); however, the Belgium Will only had one witness. The Decedent's Surviving Spouse attempted to probate the Florida Will, which left the entire estate to her. Children of the Decedent submitted the 2015 Belgium Will, which left the entire estate to the children. The Trial Court had to review the two competing wills and determine whether the Belgium Will could properly revoke the Florida Will. The Trial Court granted Surviving Spouse's motion to strike the children's counter-petition attempting to probate the 2015 Belgium Will.

On appeal, the Children argued that the Belgium Will was a validly executed handwritten will under Belgium law. Surviving Spouse argued that, even if it were validly executed in Belgium, because the Belgium Will only had one witness it was not valid in Florida and therefore could not properly revoke the 2012 Florida Will. Fla. Stat. §732.502(2) (2015) provides that a handwritten will must comply with the statutory formalities of Fla. Stat. §732.502(1) (2015), which requires the execution to be in the presence of two witnesses. The Third District Court of Appeal held that the Belgium Will was not executed in compliance with Florida statutory formalities and therefore the Decedent's revocation of the 2012 Florida Will was ineffective.

Despite 3 out of 4 bedrooms of homestead property being rented out, the entirety of the property was subject to Florida's Constitutional homestead protection because the property was a single-family residence that was not severable.

Anderson v. Letosky and Precious Pets, 45 Fla. L. Weekly D1266a (Fla. 2d DCA 2020)

Following the death of the Decedent, his son filed a petition seeking an exempt homestead determination for property his father owned and occupied at the time of his death. A statement of creditor claim was filed in the probate action. The trial court held a hearing on the homestead petition and determined that the Decedent occupied one bedroom while the other three bedrooms were rented out via valid leases. The trial court, in relying on *In Re Bornstein, 335 B.R. 462* (Bankr. M.D. 2005), held that the portion of the home that was rented lost its homestead protection and therefore 75% of the homestead was subject to creditor claims.

The Second District Court of Appeal first reviewed Article X, Section 4, of the Florida Constitution pertaining to the Florida homestead protection and reiterated the Florida Supreme Court's position to liberally construe homestead protection. The court reviewed a series of cases. The first two cases involved a triplex and a duplex where the court found that homestead was lost on the portions not used by the homeowner and rented out. This resulted from the application of a two-part test: (1) "whether the debtor's residence is a fraction of the entire property" and (2) "whether the property can be severed –that is, by using an imaginary line the residence can be severed

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from the remainder of the property." The next two cases dealt with single-family residences where the court found that despite portions being rented out, the entire property was still protected homestead since it could not be severed. The appellate court determined that the homestead at issue was also a single-family residence and therefore the entirety of the property was entitled to homestead protection.

While the trust document may contain other and supplemental methods to remove a trustee, it cannot eliminate or curtail the probate court's power and responsibility under the Trust Code to remove a trustee when necessary in the interests of justice to protect the interests of the beneficiaries.

Wallace v. Comprehensive Personal Care Services, Inc., 15 Fla. L. Weekly D1318a (Fla. 3d DCA 2020)

Grantor and his wife entered into a marital agreement and created an irrevocable trust. After the death of Grantor's spouse, and while the Grantor continued to serve as the trustee, a lawsuit was initiated to have the Grantor comply with the terms of the trust agreement and to remove the Grantor as trustee due to alleged lack of mental capacity. The irrevocable trust had provisions for the removal of a trustee, however, the action sought removal instead under Fla. Stat. §§736.105(2)(e), 736.0706, and 736.1001(2). Grantor moved to dismiss that count citing to provisions of the trust as the proper method for removal unless Grantor was otherwise determined by a court of law to be incapacitated. The trial court agreed with Grantor stating that relief could not be sought that was contrary to the terms of the trust and guardianship procedural safeguards under Fla. Stat. §744.331.

On appeal, the Grantor argued that the Florida Trust Code removal provisions should not apply to his unique situation (since he was the grantor and majority lifetime beneficiary) and that removing him as trustee was "tantamount to declaring him a ward and depriving him of control over his own property," which should only occur if the standards of Fla. Stat. §744.331 are met. The Third District Court of Appeal disagreed with the Grantor, explaining that a trial court, in the interest of justice, may remove a trustee as provided in the Florida Trust Code and the standard established to do so in Fla. Stat. §736.0706 is "less exacting than the standard for imposing a guardianship under section 744.331 of the Guardianship Code." In further support of its position, the Court stated an individual may lack "accounting, business, legal, or mental acumen" preventing him from serving as trustee but not arising to guardianship over the individual.

Court appointed counsel for an alleged incapacitated person is required to represent the expressed wishes of the alleged incapacitated person and where the alleged incapacitated person objects to the guardianship, the appointed counsel is obligated to defend against the guardianship petition.

Erlandsson v. Erlandsson, 45 Fla. L. Weekly D1102a (Fla. 4th DCA 2020)

Appellant's parents filed a petition for a limited guardianship seeking to remove their daughter's rights except for her right to vote and marry. The basis of the petition was that the daughter was not able to attend to her basic medical and psychiatric needs and was unable to manage her own finances. The trial court appointed an examining committee who reported unanimously that the daughter lacked capacity to exercise her basic rights and recommended a plenary guardian be appointed.

The trial court appointed counsel to represent the daughter in the guardianship hearings. Throughout the entirety of his representation, the daughter objected to the appointed counsel and the guardianship. The trial court denied her request to discharge her lawyer. The appointed counsel did not believe the daughter had the capacity to make a decision to fire her and agreed with the parents that the daughter needed a guardianship. The trial court ordered a plenary guardianship and appointed the parents.

On appeal, the daughter argued that she had a constitutional right to discharge her counsel and represent herself or require a new appointed lawyer, in the same manner as permitted under the 6th Amendment in criminal proceedings. The daughter also argued she had a constitutional right to challenge the effective assistance of her appointed counsel. The Fourth District Court of Appeal disagreed with daughter on both points, stating that the 6th Amendment only applies to criminal matters and that she did not have a constitutional right to challenge the effective assistance of her counsel. However, the appellate court did find it necessary to determine whether the trial court should have recognized that a conflict of interest existed between the daughter and her appointed counsel and whether the trial court had a statutory duty to appoint new counsel. Upon review of Fla. Stat. §744.102 (2019), the Florida Bar Rules, and other similarly situated jurisdictions, the appellate court determined that the appointed attorney was required to "represent the expressed wishes of the alleged incapacitated person" and was obligated to defend against the guardianship petition.

Provided the consent of all settlors and beneficiaries is obtained, an irrevocable trust may be modified or terminated at common law and such rule is neither abrogated nor controlled by the Florida Trust Code. Additionally, generally only the trustee, settlor, and beneficiaries are indispensable parties to a trust action, and where the terms of the trust provide for indemnification a Trial

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Court does not have discretion under the Florida Trust Code to deny such fees.

Demircan v. Mikhaylov, 45 Fla. L. Weekly D1201a (Fla. 3d DCA 2020)

The settlor created an irrevocable trust, with an initial corpus of $25,000,000, to invest in a complex business venture for a shopping mall. The trust was for the benefit of settlor's children (only one being an adult) and it designated an initial trustee and special power holder (who could remove or appoint trustees). The settlor disagreed with the initial trustee and special power holder on the projects development plan and halted all funding by the trust. The settlor, with the beneficiaries, brought suit seeking to modify the trust to remove the initial trustee and special power holder. After filing and dismissing initial complaints, the settlor brought the action in probate court without including the special power holder as a party. The trustee argued at the court hearing that the special power holder was an indispensable party, "that the beneficiaries' consent was not sufficiently shown, and that common law modification required consideration of factors other than consent, as reflected in chapter 736, Florida Statutes." The trial court allowed the common law modification noting that the settlor and all beneficiaries' consented.[1]

There were four issues on appeal: (1) whether the trustee had standing to appeal the trust's modification, (2) whether the special power holder was an indispensable party, (3) whether the trial court erred as a matter of law in modifying the trust, and (4) whether the trial court erred in denying attorney fees for the trustee. The Third District Court of Appeal found that a trustee was an interested person and had standing in a trust reformation action, and that the special power holder was not an indispensable party. Further, the appellate court found that the trial court did not err in allowing the trust modification because at common law, the settlor and beneficiaries may revoke or amend an irrevocable trust and Fla. Stat. §736.04113 (2016) "neither abrogated, nor controlled" the common law rule. It was argued that the settlor waived his right to revoke or amend the trust and therefore the common law rule could not apply. However, the appellate court rejected this argument, stating that because such waiver would only be valid if it was conditioned on the trustee's assent, and that such condition was not contained in the trust. Lastly, the appellate court concluded that the trial court did have discretion to deny attorney fees under the Florida Trust Code but it could not do so when the trust provided that the trustees be held harmless and indemnified for "attorney's fees, expenses, and costs incurred as a result of its service as Trustee." However, such indemnification was limited to the trust assets or beneficiary distributions, and not from the personal assets of settlor.

Endnotes

1 *Preston v. City National Bank of Miami*, 294 So. 2d 11 (Fla. 3d DCA 1974).