PROBATE & TRUST LITIGATION COMMITTEE MEETING

Thursday, July 24, 2008

3:00 p.m. to 5 p.m.

Breakers, Palm Beach, Florida

AGENDA

I. **Call Meeting to Order**

II. **Administrative Matters and Announcements**

- A. **Introduction of Persons Present**
- B. **Recognition of Sponsor**
- C. **Approval of Minutes of May 2008 meeting in Bonita Springs, Florida [ITEM 1]**
- D. **Time and Place of Next Meeting: September 18 or 19, 2008 in Key Biscayne, Florida**
- E. **2009 Estate and Trust Symposium- Discussion of Topics and Speakers**

III. **Subcommittee Reports**

- A. **Status of Committee legislation, William Hennessey III,** *Chair*
  1. **Payment of trustee's fees from trust assets- House Bill 435 [ITEM 2]**

B. **Spousal Rights in Marriages Procured by Fraud, Undue Influence, and Duress** *John Moran, Bill Hennessey, Laura Sundberg, Russ Snyder* **[ITEM 3]**

C. **Application of Rule 1.525, Concerning 30 Day Time Limit for Filing a Motion for Attorneys' Fees, in Probate and Trust Proceedings [ITEM 4]***Angela Adams, Eric Virgil,Laura Sundberg*

D. **Appellate Rule on Appeal of Orders in Probate Proceedings.** *Sean Kelley, Tom Karr, Peter Sachs* **[ITEM 5]**

E. **Jury Trials in Breach of Trust Actions.** *Shane Kelley, Laura Sundberg*

F. **ACTEC Model Arbitration Legislation.** *Bob Goldman*

IV. **Adjourn**

WPB 945799.5

ITEM 1

MINUTES
Probate & Trust Litigation Committee Meeting
Bonita Springs May 22, 2008

Call to Order. The meeting of the Committee was called to order by the Chair, Bill Hennessey, at approximately 2:00 p.m.

Approval of Minutes. The Minutes of the meeting of the Committee held in Gainesville in April, 2008, were approved as presented without correction or amendment.

Preliminary Discussion. The Committee Roster was circulated and updated and the members introduced themselves. The Chair announced that the next committee meeting would be held in July 2008 at the Breakers in Palm Beach in connection with the Executive Council meeting.

Recognition of Sponsor. Bill Hennessey thanked Tim Bronza and Business Valuation Analysts, LLC for their decision to renew their sponsorship of the Probate and Trust Litigation Committee. Tim Bronza could not be present at the meeting. Committee members were encouraged to support Tim and personally thank him for his sponsorship.

CLE Credit. The Chair informed the members that CLE credit will be applied for following each meeting. The course numbers for the CLE credit will be forwarded by e-mail.

2009 Estate and Trust Symposium. The Chair encouraged persons interested at speaking at the 2009 Estate and Trust Symposium to submit proposed topics for consideration. It is anticipated that the 2009 Symposium will consist of a number of panels. The first set of panels will consist of a drafting attorney and a litigator to discuss various drafting/litigation issues in probate. The second set will discuss will and trust contest

proceedings and model examinations of drafting lawyers, expert witnesses, and treating physicians.

House Bill 435- Payment of Trustee Attorney's Fees. A copy of the latest draft of House Bill 435 addressing Florida Statutes § 736.0802(10) was circulated. Hennessey led a discussion concerning the changes to the statute and the status of the bill, which is expected to pass this year.

Appellate Rule Project. Subcommittee members: Tom Karr, Peter Sachs, Shane Kelley. The final version of the appellate rule submitted by the Appellate Rule Project Subcommittee was approved by the full Committee. The subcommittee was asked to contact the Appellate Rules Committee of the Florida Bar to begin their review of the proposed rule. Before submitting the rule to the Executive Council, the subcommittee will work with Appellate Rules Committee to gauge their support for the proposal.

Collateral attack on spousal rights based upon undue influence, fraud, or duress in procuring marriage. Bill Hennessey, John Moran, Laura Sundberg, Larry Miller, and Russ Snyder. Bill Hennessey and John Moran led a lengthy discussion concerning the legislation proposed by the subcommittee. The Committee focused on the scope of the proposed statute. One suggestion was that the statute should be revised so that it applies to "any and all rights that inure solely by virtue of the marriage," but that specific exceptions should be listed. The majority of the Committee favored an approach that lists the inheritance and property rights of the surviving spouse that are affected. It was also suggested that a surviving spouse's immunity from the presumption of undue influence be removed as a right.

The Committee also discussed the applicable burden of proof. A majority of the Committee was of the opinion that a "clear and convincing" burden of proof would be too difficult to

apply to the often secretive and clandestine instances of undue influence that this statute targets.

In addition, concerns arose regarding the statute's application to notice to and liability of insurance companies, banks or other obligors. It was suggested that the subcommittee consider adding F.S. § 733.802's notice provisions.

The subcommittee will work on an updated draft for consideration at the Palm Beach meeting.

Time limit for seeking attorneys' fees and costs after final order in probate and trust proceedings. Angela Adams, Eric Virgil, Laura Sundberg. The subcommittee's White Paper was circulated. The Committee discussed whether legislation or a fix to the Florida Probate Rules is appropriate to address when motions to tax fees and costs must be filed in probate and trust proceedings. The Committee discussed the types of cases in which a motion for fees and costs can be filed and the potential application of Rule of Civil Procedure 1.525 to each instance. The Committee ultimately decided that this is a worthwhile project and that we should consider options to either exempt probate and trust proceedings from the application of Rule 1.525 or better define when it is applicable. The subcommittee was charged with leading and facilitating further discussion on these issues by putting together proposals for consideration.

Arbitration in Probate Proceedings. Bob Goldman gave a brief presentation on the status of the ACTEC Model Arbitration Statute. A full presentation will be made in the future and consideration will be given to the model statute.

Adjournment. The meeting was adjourned at 4:00 p.m.

ITEM 2

PAYMENT OF TRUSTEE ATTORNEYS' FEES WHEN DEFENDING BREACH OF DUTY CLAIMS

A trustee generally has the right to retain an attorney to assist in the administration of the trust and to pay that attorney from trust assets. However, assume your trustee client is engaged in a suit with the beneficiaries of the trust. The beneficiaries are seeking surcharge and removal of your client, individually and as trustee, for mismanagement of the trust. Your trustee client faces individual liability in the lawsuit. Can the trustee use trust funds to pay attorneys' fees during the litigation?

In Shriner v. Dyer, 462 So. 2d 1122 (Fla. 4th DCA 1984), the Fourth DCA held that it was a conflict of interest for trustees to use estate funds to defend themselves from individual liability without court approval. The trustees in Shriner were originally sued for surcharge in their individual capacities. The trial court entered judgment in favor of the trustees. Following the initial suit, the trustees paid their attorneys' fees and costs from the assets of the trust without court approval.

The beneficiaries later filed a second suit against the trustees. In the second case, the beneficiaries sought to surcharge the trustees for paying their legal fees and costs associated with the previous action from the assets of the trust. Even though the trustees had prevailed in the first suit, the court held that the trustees had a conflict of interest in paying their legal fees from trust assets. The court noted that since the trustees "defended against individual liability for trust mismanagement in the previous action, their personal interests conflicted with their position as trustees." The court held that the trustees should have obtained court approval prior to paying their fees and costs. The court cited Florida Statutes § 737.403(2) which provides that when "the duty of the trustee and his individual interest . . . conflict in the exercise of a trust power, the power may be exercised only by court authorization." The decision in Shriner appeared to imply that the Trustees could not seek subsequent court approval of their fees even though they had prevailed in the underlying litigation.

The Third DCA in Brigham v. Brigham, 934 So. 2d 544 (Fla. 3d DCA 2006) took a similar approach. The Brigham court affirmed the trial court's ruling that the trustee had a conflict of interest because of the allegations of breach of fiduciary duty and had no right to use trust funds to defend such allegations. The fees paid to trustee's counsel were ordered to be refunded and payment from trust assets was prohibited.

In recognition of the problem facing fiduciaries in litigation where a breach of trust is alleged, the Florida Bankers Association proposed an amendment to § 737.403(2), which was adopted by the Florida Legislature in 2005. Section 737.403(2)(e), Fla. Stat. (2005), provided that court authorization is not required for:

(e) Payment of costs or attorney's fees incurred in any trust proceeding from the assets of the trust unless an action has been filed or defense asserted against the trustee based upon a breach of trust. Court authorization is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

This amendment was also adopted as part of the new trust code in Florida Statutes § 736.0802(10).

Interestingly while this amendment was making its way through the legislative process, another case was working its way through the judicial system which had a significant impact of the scope of the Shriner decision. In JP Morgan Trust Company, N.A. v Siegel, 965 So. 2d 1193 (Fla. 4th DCA 2007), the court held that JP Morgan had a conflict of interest in paying its attorneys' fees in an action to approve its accounting, after it received detailed interrogatory answers alleging breaches of fiduciary duty, *even though a formal pleading alleging those breaches had not been filed*. The court noted that the 2005 amendment to Florida Statutes § 737.403(2) would have resolved the issue in favor of JP Morgan (because no pleading had been filed alleging a breach of trust) but that the new statute was not yet in effect. JP Morgan and its attorneys were required to disgorge all of the fees which had been paid.

For a number of years of the Probate and Trust Litigation Committee for the RRPTL Section of the Florida Bar considered the application and practical effective of the Shriner decision and its progeny, including the amendment adopted by the Florida Bankers. The Committee was particularly concerned about the inconsistent application of Shriner by the trial courts and the scant guidance on how to address the payment of fees from trust assets in litigation where an allegation of breach of duty is made. The key questions were:

(a) Should the trustee have the burden of filing a motion for court authorization to pay fees or should the beneficiaries have the burden of filing a motion to prevent the payment of fees;

(b) What standard should the court use in ruling upon such a motion; and

(c) What proof would be required?

The Committee's final proposal, with a few modifications by the Florida Justice Association, was adopted as part of House Bill 435. Florida Statues 736.0802(10) was amended to read as follows:

736.0802 Duty of loyalty.--

(10) Payment of costs or attorney's fees incurred in any ~~trust~~ proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in paragraph (b). ~~except that court authorization shall be required if an action has been filed or defense asserted against the trustee based upon a breach of trust. Court authorization is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.~~

(a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. The written notice shall be delivered by sending a copy by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process. The written notice shall inform each qualified beneficiary of the trust, whose share of the trust may be affected by the payment of attorney's fees and costs, of the right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, then the trustee and the trustee's attorneys who have been paid attorneys' fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).

(b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court may, in its discretion, defer ruling on the motion pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order that attorney's fees or costs previously paid from assets of the trust be refunded. An order entered under this paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs pursuant to this paragraph, the trustee may pay costs or attorneys' fees incurred in the proceeding from the assets of the trust without further court authorization.

(c) If the court orders a refund under paragraph (b), the court may enter such sanctions as are appropriate if a refund is not made as directed by the court, including, but not limited to, striking defenses or pleadings filed by the trustee. Nothing in this subsection shall limit the other remedies and sanctions the court may employ for the failure to refund timely.

(d) Nothing in this subsection shall limit the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting or after conclusion of the litigation.

(e) Notice under paragraph (a) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

The new statute, effective July 1, 2008, authorizes a trustee to pay its attorneys' fees and costs in all litigation proceedings. See Fla. Stat. 736.0802(10). However, if a claim for breach of trust is made against the trustee, the trustee is required to notify all "qualified beneficiaries", who are impacted by the payment of fees and costs, that the trustee intends to pay attorneys' fees and costs from trust assets. The written notice must inform the beneficiaries of the right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. See Fla. Stat. 736.0802(10)(a). The notice is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust. Fla. Stat. 736.0802(10)(e).

The amended statute sets forth the procedures for obtaining an order to prevent the payment of attorneys' fees and costs in breach of trust proceedings in subsection (b). The beneficiary is required to apply for an order from the court preventing the payment of fees and costs. At the hearing, the beneficiary must make a reasonable showing by "evidence in the record or by proffering evidence" that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court may, in its discretion, defer ruling on the motion pending discovery to be taken by the parties. Fla. Stat. 736.0802(10)(b).

If the court finds that "there is a reasonable basis to conclude that there has been a breach of trust", the court is required to enter an order preventing payment of attorneys' fees and costs relating to the proceeding from trust assets and requiring the trustee and its attorneys to disgorge any fees and costs paid after the filing of the motion or application by the beneficiary unless "good cause" is shown by the trustee. Id. If the refund is not made, the court may enter appropriate sanctions, including, but not limited to, striking defenses or pleadings filed by the trustee. Fla. Stat. 736.0802(10)(c).

This new procedure is intended to permit the court to make a ruling on the issues presented in a summary fashion without the necessity of protracted evidentiary hearings. To that end, an order entered pursuant to subsection (10)(b) is without prejudice to the rights of a trustee to seek payment of the fees which have been disgorged or incurred in the litigation. Fla. Stat. 736.0802(10)(b). Further, if the claim or defense based upon a breach of trust is withdrawn, dismissed or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs, the trustee may pay costs or attorneys' fees incurred in the proceeding from the assets of the trust without further court authorization. Id.

The revised statute does not limit the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting or after conclusion of the litigation. Fla. Stat. 736.0802(10)(d).

ITEM 3

Probate and Trust Litigation Committee
Palm Beach, Florida
Thursday, July 24, 2008

SUBCOMMITTEE REPORT ON MARRIAGES PROCURED BY FRAUD, UNDUE INFLUENCE, OR DURESS

I. Introduction

The mere status of surviving spouse affords a myriad of significant financial benefits under Florida law, including the right to homestead property (at least a life estate in the decedent's homestead residence), an elective share (30% of the decedent's augmented elective estate), to take as a pretermitted spouse (up to 100% of the estate under the laws of intestacy), family allowance, exempt property, and priority in preference in selecting a personal representative. In addition, Florida courts have held that a presumption of undue influence in a will contest "cannot arise in the case of a husband and wife" because the requirement of active procurement would almost always be present. Jacobs v. Vaillancourt, 634 So. 2d 667, 672 (Fla. 2d DCA 1994); Tarsagian v. Watt, 402 So. 2d 471, 472 (Fla. 3d DCA 1981).

Most of these benefits are well deserved. It has often been said that Florida has a strong public policy in favor of protecting a decedent's surviving spouse. *See, e.g.,* Via v. Putnam, 656 So. 2d 460, 462 (Fla. 1995). However, what happens when a marriage is procured by undue influence, fraud or exploitation? Is Florida's public policy furthered in such an instance? This report will discuss the current state of Florida law on the ability to challenge the validity of a marriage after the death of one of the parties to the marriage. It will also examine how other states have addressed this issue.

II. Current State of the Law in Florida

Presently, there are no Florida Statutes that authorize a challenge to the validity of a marriage after the death of one of the spouses. However, a number of Florida cases have addressed this issue. Under existing Florida case law, an invalid marriage may be **void**, or it may be merely **voidable**, depending on the cause and nature of the invalidity. The definitions of void versus voidable become critical because the ability to challenge a marriage after death turns on the distinction between the two.

Florida case law has made it clear that an action can be maintained after the death of a spouse challenging a marriage that is ***void***.

> "Under ordinary circumstances the effect of a void marriage so far as concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place, and therefore being good for no legal purpose, its invalidity can be maintained in any proceedings in which the fact of marriage may be material, either direct or collateral in any civil court

between any parties at any time." Kuehmsted v. Turnwall, 103 Fla. 1180, 138 So. 775 (1932).

However, a marriage that is merely **voidable** may not be attacked by a deceased spouse's heirs.

> "Although the invalidity of a void marriage may be asserted in either a direct or collateral proceeding and at any time, either before or after the death of the husband, the wife, or both, a voidable marriage is good for every purpose and can only be attacked in a direct proceeding during the life of the parties." Arnelle, 647 So. 2d at 1048-49 (citing Kuehmsted).

Accordingly, the question of whether a suit to annul a marriage can be maintained after the death of one of the parties to the marriage depends on whether the marriage is void in the true sense, or merely voidable. *See also* 4 Am. Jur. 2d Annulment of Marriage § 59 (2006); 47 A.L.R. 2d 1393, Right to Attack Validity of Marriage After Death of Party Thereto (2007 update).

A. Void Marriage

A void marriage is an absolute nullity and its invalidity may be shown either during the lifetime of the parties to the marriage, or after their deaths. Kuehmsted, 138 So. at 778. Upon proof of facts rendering a marriage void, the marriage will be disregarded or treated as nonexistent by the court. Id.; Bennett v. Bennett, 26 So. 2d 650 (Fla. 1946).

The invalidity of a void marriage may be maintained in any proceeding in which the fact of marriage may be material, either directly or collaterally, between any parties at any time, whether before or after the death of the husband, wife, or both. Arnelle, 647 So. 2d 1047 at 1048 (citing Kuehmsted, 138 So. at 777); *see also* Woginiak v. Kleiman, 523 So. 2d 1209 (Fla. 3d DCA 1988)(decedent's son had standing to seek relief from order declaring alleged wife to be surviving spouse).

A marriage is void ab initio, and will be treated as if no marriage had taken place, when:

(1) it is a bigamous marriage, § 826.01, et al. Fla. Stat.;

(2) it is an incestuous marriage, § 741.21, Fla. Stat., § 826.04, Fla. Stat.;

(3) it is a marriage between persons of the same sex, § 741.212, Fla. Stat.;

(4) it is a common-law marriage entered into after January 1, 1968, § 741.211, Fla. Stat.;

(5) there is a prior existing marriage that is undissolved at the time the parties enter the marriage, Smithers v. Smithers, 765 So. 2d 117 (Fla. 4th DCA 2000); or

(6) one or both parties lack the requisite mental capacity at the time the marriage is actually contracted, Kuehmsted, 138 So. at 778.; Bennett, 26 So. 2d at 651.

Because an essential element for marriage is the possession of sufficient mental capacity to consent to the marriage, the marriage of a person who is insane or otherwise mentally incompetent to consent to the marriage is void ab initio. Kuehmsted, 138 So. at 778; Arnelle, 647 So. 2d at 1048; *see also* 82 A.L.R. 2d 1040, Mental Capacity to Marry (2007 update).

Thus, mental incapacity, one of the most frequent grounds for contesting a will, is available as a ground for contesting the validity of a marriage after the death of a spouse.

B. Voidable Marriage

A voidable marriage, on the other hand, may be attacked only in a direct proceeding during the life of the parties. Arnelle, 647 So. 2d at 1048 (citing Kuehmsted, 138 So. at 777). When dealing with a voidable marriage, upon the death of either party, the marriage is deemed valid from the outset. Id. Consequently, a voidable marriage cannot be attacked after the death of either party to the marriage. Id. at 1048-49; s*ee also* 91 A.L.R. 414, Marriage to Which Consent of One of Parties Was Obtained by Duress as Void or Only Voidable (2007 update).

The right to annul a voidable marriage has been held to be a personal right, and an action to annul such a marriage can only be maintained by a party to the marriage contract, or where the spouse seeking annulment is under legal disability, by someone acting on his or her behalf. *See* Kuehmsted at 777; 25A Fla. Jur. 2d Family Law § 497 (2006).

A marriage has been held to be voidable when:

(1) consent to the marriage was obtained by undue influence, Arnelle, 647 So. 2d at 1048-49; Hoffman v. Kohns, 385 So. 2d 1064, 1069 (Fla. 2d DCA 1980);

(2) consent to the marriage was obtained by duress, In re Ruff's Estate, 32 So. 2d 840, 842 (Fla. 1947)(where party alleged that he was forced to marry under threats of prosecution and violence, the marriage was voidable); Tyson v. State, 90 So. 622, 623 (Fla. 1922)(evidence showed that marriage was procured by fraud and effected as a result of coercion); or

(3) consent to the marriage was obtained by fraud, Cooper v. Cooper, 163 So. 35 (Fla. 1935)(marriage voidable where the marriage ceremony was procured by fraud).

The above cases suggest that the three of the most common methods for exploiting an elderly and infirm (but competent) person, to wit: undue influence, fraud, and duress, would only render a marriage voidable, possibly leaving the remaining family members and heirs without a remedy.

C. Savage v. Olsen

However, in Savage v. Olsen, 9 So. 2d 363 (Fla. 1942), the Florida Supreme Court created some uncertainty by suggesting that fraud can serve as a ground for finding a marriage void. In Savage, the decedent's surviving blood relatives and heirs at law brought an action to annul a marriage between the decedent and her husband. Id. at 363. Some time before the marriage, the decedent, Hannah Ford, was in a car accident and suffered a serious concussion. According to the Court, Hannah was mentally defective and lacked her normal faculties. Id. at 364.

At some point after the accident, the Defendant, Charles Savage, showed an unusual interest in Hannah. He subsequently proposed marriage, which was performed, but never consummated. Id. Savage lived apart from Hannah after the ceremony, held himself out as a single person, and executed mortgages on property belonging to Hannah without her knowledge. Id. The Court also noted that Savage had a long criminal record. Id. Savage lived and cohabitated with another woman before and after his wedding to Hannah. Id.

Sixty days after they were married, Hannah died in a car accident when the automobile in which she was a passenger, driven by Savage, plunged into a canal. Id. at 365. Savage escaped unharmed and when talking to officers and the funeral director after the accident, he referred to Hannah as a "friend." Id. The funeral was held before Hannah's relatives were informed, and two days after her death, Savage became the administrator of Hannah's estate and immediately emptied her safe-deposit box. Id.

The Florida Supreme Court affirmed the lower court's ruling that the marriage was void, and stated that Hanna's mental condition, as well as Savage's "artful practices" justified the decision. Id. The Court stated:

> "It is true that much of the testimony was in conflict, but it was abundantly shown that the mental condition of Hannah Ford, although she would not be said to be actually insane, made her easy prey to the machinations of Charles B. Savage. Examining together her plight and his artful practices, we think the chancellor was fully justified in the decision he rendered declaring the marriage void. The testimony which he elected to give credit fully substantiated the allegations of the bill of complaint anent fraud of one and incapacity of the other."

Id. (internal citations omitted).

The Savage decision appeared to say that fraud alone could serve as a basis to challenge a marriage after death. Other courts, under different circumstances, have held that undue influence is a species of fraud. See, e.g., In re Guardian of Rekasis, 545 So. 2d 471, 473 (Fla. 2d DCA 1989)(noting that undue influence is a species of

fraud and is treated as fraud in general); O'Hey v. Van Dorn, 562 So. 2d 405, 405 (Fla. 4th DCA 1990)(agreeing that undue influence is a species of fraud in the inducement). Does that mean that the Florida Supreme court has blessed challenges to marriage on these additional grounds? That was precisely the argument made by the parties in Arnelle, 647 So. 2d at 1049, under the factual circumstances quoted earlier in these materials.

In Arnelle, the court discussed the Florida Supreme Court's decision in Savage and opined that it was the combination of fraud and diminished mental capacity that rendered the marriage void. 647 So. 2d at 1049. The Arnelle court noted that the holding in Savage "at least suggests that where the *combination* of fraud and mental incapacity are present, the marriage is void and can be annulled after the death of one of the parties." Id. The Arnelle court declined to find that fraud or undue influence alone could support a challenge to a marriage after death absent at least some showing of mental incapacity. Accordingly, despite finding that Ms. Fortson was "conniving and exhibited undue influence over Mr. Fisher", the court refused to permit the decedent's heirs to challenge the marriage. Id.

However, diminished mental capacity is frequently present in almost every case of undue influence. When is the threshold set forth in Arnelle of diminished mental capacity plus fraud (or undue influence) met? Must a person lack the requisite mental capacity to marry or merely be of some level of diminished mental capacity? These questions currently remain unanswered under Florida law.

III. Florida Case Law Summary

The following Florida cases have addressed challenges to a marriage on the grounds of lack of capacity, fraud, and undue influence:

A. Tyson v. State, 90 So. 622 (Fla. 1922)

- This case involved a criminal prosecution against Enoch Tyson for deserting his wife and withholding alimony and child support payments.

- Tyson argued that the marriage was void because that marriage was involuntary, and that he entered into it as the result of coercion upon him by his wife and her mother.

- The Court affirmed Tyson's conviction and noted that a marriage to which the consent of one of the parties is obtained by undue influence is merely voidable.

B. Kuehmsted v. Turnwall, 138 So. 775 (Fla. 1932)

- This was a suit in equity to annul a marriage on the basis of mental incapacity. The lower court took evidence and declared the marriage to be null and void.

- The evidence at trial showed that, at the time of the marriage, the decedent was of unsound mind, memory, insane, wholly incompetent, and unable to understand or realize the marriage contract, which was entered into willfully, fraudulently, and maliciously.

- The question before the Court was: "Can a marriage alleged to be void for want of mental capacity be annulled by a court of equity after the death of one of the spouses, and may the heirs at law of the dead spouse maintain a bill in equity for that purpose?"

- The answer to both questions stated above is yes. In answering these inquiries, the Florida Supreme Court affirmed the lower court's judgment.

- The Court held that (a) the deceased spouse's lack of mental capacity served as grounds to declare the marriage void, and (b) that the decedent's heirs had a right to maintain a cause of action for annulment of the marriage.

- The Court noted that the effect of a void marriage is as though no marriage had ever taken place.

C. Cooper v. Cooper, 163 So. 35 (Fla. 1935)

- "It is well settled that party who has been the victim of a marriage ceremony procured by fraud and deception of the other party, and where such marriage has not been consummated by cohabitation, may maintain suit and procure decree of annulment of such marriage; provided, of course, such action is taken by such party before condemnation of the fraud and any affirmance of the marriage has occurred on the part of such victim."

- A marriage procured by fraud or while one of the parties thereto is actually under legal duress is voidable only, and therefore valid and binding upon the parties until annulled by a court of competent jurisdiction.

- This case suggests that a case for annulment based on fraud may be had when a spouse, having no intention to consummate the marriage, marries for financial benefits.

D. Savage v. Olson, 9 So. 2d 363 (Fla. 1942)

- This case is discussed at length in Section II(C) above.

- The Court held that a deceased wife's heirs had standing to seek annulment of the marriage after the wife's death.

- The Court analyzed the effect of fraud, undue influence and mental incapacity on a marriage. The Court ultimately opined that the marriage between Hannah Ford and Charles Savage was void.

E. Bennett v. Bennett, 26 So. 2d 650 (Fla. 1946)

- This case involved a lawsuit to reform a deed and declare a marriage void based on incapacity. The Court found the evidence of incapacity to be insufficient.

- The Court's opinion recognizes the maxim that upon proof of the facts rendering such marriage void, the marriage will be disregarded or treated as nonexistent by the courts.

F. In re Ruff's Estate, 32 So. 2d 840 (Fla. 1947)

- A marriage in which the husband was forced to enter into by threats of prosecution and violence was voidable only, and not void.

- The Court held that children of a marriage, following annulment, are not illegitimate and are heirs of the decedent.

G. Rubenstein v. Rubenstein, 46 So. 2d 602 (Fla. 1950)

- In this case, the Court suggested that concealment of a party's intentions not to have children may be grounds for an annulment, at least if the marriage has not been consummated.

- Under these circumstances, the judgment for fraud against the wife was reversed based on the evidence presented.

H. Eden v. Eden, 130 So. 2d 887 (Fla. 3d DCA 1961)

- This case involved a suit for an annulment of marriage brought by an alleged "next friend."

- The Third DCA held that suit for annulment of marriage (based on incapacity) of an adult may not be maintained by an alleged next friend.

I. Sack v. Sack, 184 So. 2d 434 (Fla. 1966)

- Where a marriage is voidable and subject to annulment because of fraud or misrepresentation of one party, the right to annul belongs to the innocent party.

J. Hoffman v. Kohns, 385 So. 2d 1064 (Fla. 2d DCA 1980)

- The Second DCA held that a marriage to which the consent of one of the parties is obtained by undue influence is merely voidable. The court took the position that undue influence is not a proper ground for the heir of a decedent to bring a case to annul a marriage after death of one of the parties.

- However, a marriage may be posthumously set aside as being void because of the mental incompetence of one of the marriage partners.

- Here the evidence was sufficient to support the conclusion that the decedent was competent to marry.

- Even though the will was procured by undue influence, the surviving spouse inherited as a pretermitted spouse under Florida Statutes § 732.301.

K. Woginiak v. Kleiman, 523 So. 2d 1209, 1210 (Fla. 3d DCA 1988)

- In this case, the decedent's son had standing to seek relief where an order declaring the alleged wife to be the decedent's surviving spouse was obtained without notice to the son in a fraudulent attempt to moot the issue of survivorship in a pending probate proceeding.

- "Relief from an order or judgment is appropriate where, as here, the movant is a victim of fraud or other misconduct by an adverse party."

L. Arnelle v. Fisher, 647 So. 2d 1047 (Fla. 5th DCA 1994)

- The Fifth DCA held that an allegedly voidable marriage could not be challenged after death by the decedent's heir (in this case, a cousin).

- "Although the invalidity of a void marriage may be asserted in either a direct or collateral proceeding at any time, either before or after the death of the husband, wife, or both, a voidable marriage is good for every purpose and can only be attacked in a proceeding during the life of the parties."

- Here, where the collateral attack is based on allegations of undue influence only, a deceased's heir cannot attack the marriage after death of one of the parties.

- The court distinguished Savage v. Olson, 9 So. 2d 363 (Fla. 1942), suggesting that fraud alone is insufficient to declare a marriage void. The Fifth DCA stated that Savage "suggests that where the combination of fraud and mental incapacity are present the marriage is void and can be annulled after the death of one of the parties."

V. Survey of Other Jurisdictions

At common law, a marriage which is merely voidable, including one procured by fraud or undue influence, must be challenged during the lifetimes of the parties to the marriage. *See also* 4 Am. Jur. 2d Annulment of Marriage § 59 (2006); 47 A.L.R. 2d 1393, Right to Attack Validity of Marriage After Death of Party Thereto (2007 update). Most jurisdictions (like Florida) continue to follow the common law rule either by statute or case law. However, a number of states have enacted statutes that specifically authorize a challenge to the validity of marriage after death.

A. States with Statutes that Permit Challenges after Death for Fraud or Duress

1. New York

An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by force or duress may be maintained at any time by the party whose consent was so obtained. An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by fraud may be maintained by the party whose consent was so obtained within the limitations of time for enforcing a civil remedy of the civil practice law and rules. Any such action may also be maintained during the life-time of the *other party* by the parent, or the guardian of the person of the party whose consent was so obtained, or by any relative of that party who has an interest to avoid the marriage, provided that in an action to annul a marriage on the ground of fraud the limitation prescribed in the civil practice law and rules has not run. But a marriage shall not be annulled on the ground of force or duress if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud. N.Y. Domestic Relations Law § 140 (McKinney 2005).

Bennett v. Thomas, 38 A.D.2d 682, 327 N.Y.S.2d 139 (4th Dept. 1971)

- Children of deceased wife brought action to annul marriage on grounds of fraud after death to prevent husband from taking elective share.

- The court noted that New York law permits challenges to marriage after death on the grounds of fraud. However, New York's elective share laws contain specific provisions requiring the annulment to be obtained prior to death.

2. Vermont

A marriage may be annulled during the lifetime of the parties, *or one of them*, on the basis that the consent of one of the parties was obtained by force or fraud. Such action for annulment may be instituted by the innocent party, the parent or guardian of

such party, or some relative interested in contesting the validity of the marriage. Vt. Stat. Ann. tit.15, § 516 (2005).

3. Louisiana

A marriage is relatively null when the consent of one of the parties to the marriage is not freely given. Such marriage may be declared null upon application by the party whose consent was not freely given. La. Civ. Code. art. 95 (2006)

Succession of Ricks, 893 So. 2d 98 (La. App. 2004).

- Children of the decedent challenged the validity of the marriage between the decedent and his wife. They alleged that the decedent was incompetent at the time of the marriage and that his wife "took advantage of [his] infirmity to regain her status as a legatee when she remarried him hours before his death."

- The court held that the above statute permitted a court appointed administrator to bring an action to challenge a marriage.

4. New Jersey

A marriage may declared a nullity where either of the parties "lacked capacity to marry due to want of understanding because of mental condition, or the influence of intoxicants, drugs, or similar, agents, or where there was a lack of mutual assent to the marital relationship; duress; or fraud as to the essentials of marriage" and the injured party has not subsequently ratified the marriage. N.J. Stat. 2A:34-1 (2007).

In re Estate of Santolino, 895 A.2d 506 (N.J. 2005)

- The court held that the sister of the decedent could bring a claim after death on the grounds that the decedent's marriage was void due to fraud.

- The court reasoned that the sister of the decedent had standing to challenge the validity of the marriage because New Jersey Statute 2A:34-1(b) did not explicitly provide that marriages may not be challenged after the death of one of the parties.

B. States with Statutes, which Prohibit Challenges to Marriage After Death for Fraud or Duress

1. Alaska

A marriage may be declared void on the ground that the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting fraud, cohabitated with the other as husband and wife. A marriage may be declared void on the ground that the consent of either party was obtained by force, unless such party afterwards freely cohabitated with the other as husband and wife. If

the consent of either party is obtained by fraud or force, the marriage is voidable, but only at the suit of the party upon whom the force or fraud is imposed. Alaska Stat. §§25.24.030, 25.05.031.

Riddell v. Edwards, 76 P. 3d 847 (Alaska 2003)

- Probate court could not declare a marriage void after the wife had died even though the estate sought to invalidate the marriage because the wife was incompetent and the husband had fraudulently induced her to enter into marriage.

2. Colorado

A marriage may be declared invalid where "one party entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act goes to the essence of the marriage" or when "one or both parties entered into the marriage under duress exercised by the other party or a third party". However, "*in no event under such circumstances may a declaration of invalidity be sought after the death of either party to the marriage,*" except in the cases of marriages which are prohibited by law such as bigamous and incestuous marriages Colo. Rev. Stat. §14-10-111 (2005)).

In re the Estate of Fuller, 862 P.2d 1037 (Co. App. 1993)

- Children of the decedent challenged the validity of the decedent's marriage on the grounds that decedent lacked capacity to consent to the marriage.

- Colorado Statute §14-10-111(2) provides, "In no event may a declaration of invalidity be sought after the death of either party to the marriage."

- Because the action for annulment was not brought until after the decedent's death and no exception applied, the court held that the children lacked standing to challenge the validity of decedent's marriage.

- The court noted the exceptions under which a marriage may be attacked posthumously. Fraud and duress are not among the exceptions.

3. Illinois

A marriage may be declared invalid where a party lacked the capacity to consent or where a party was "induced to enter into a marriage by force or duress or by fraud involving the essentials of the marriage". A declaration of invalidity may be sought by either party or by the legal representative of the party who lacked the capacity to consent, no later than 90 days after the petitioner obtained knowledge of the described condition. In no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage. 750 Ill. Comp. Stat. §§301-302 (2006).

In re Estate of Crockett, 728 N.E.2d 765 (Ill.App. 2000)

- Notwithstanding this statute, the Court permitted children to challenge to marriage after death where the wife obtained marriage license, husband was mute and barely conscious during ceremony and was unable to sign marriage certificate, and representative spoke for the husband during the exchange of vows.

4. Minnesota

An action to annul a marriage, where a party lacked capacity to consent to the marriage or where consent was obtained by force or fraud and there was no subsequent voluntary cohabitation of the parties, may be brought by either party to the marriage or by the legal representative of the innocent party. However, "in no event may an annulment be sought after the death of either party to the marriage." Minn. Stat. §§518.05, 518.02 (2006).

5. Montana

A marriage may be declared invalid for lack of capacity to consent or if a party was induced to enter into a marriage by force or duress or by fraud, but such relief must be sought no later than 2 years after the petitioner obtained knowledge of the described condition. A declaration of invalidity may not be sought after the death of either party to the marriage. Mt. Stat. §40-1-402.

6. Ohio

A marriage may be annulled on the basis that the consent of either party was obtained by fraud, unless such party thereafter, with full knowledge of the facts constituting fraud, cohabitated with the other as husband or wife. An action for annulment may be brought by the aggrieved party, but must be instituted within two years after the discovery of the facts constituting fraud. A marriage may be annulled on the basis that either party has been adjudicated to be mentally incompetent, unless such party after being restored to competency cohabitated with the other as husband or wife. An action for annulment may be brought by the party aggrieved or the relative or guardian of the party adjudicated to be mentally incompetent at any time prior to the death of either party. Ohio Stat. §§3105.31-3105.32.

Hall v. Nelson, 534 N.E.2d 929 (Ohio 1987)

- The son of the decedent sought to annul the marriage between the decedent and his surviving wife on the grounds that the decedent lacked mental capacity to marry, that the marriage was obtained by fraud and that the marriage was not consummated.

- Pursuant to Ohio Statute §3105.32, the court found that only an aggrieved party may sue to have a marriage annulled because of mental incapacity, fraud or

failure to consummate. Furthermore Ohio Statute §3105.02(C) permitted a relative or guardian of an incompetent to sue for annulment only while the incompetent was alive. Because the son was not a party to the marriage and the action for annulment was not brought while the decedent was alive, the court held that the son lacked standing to challenge the marriage.

7. Pennsylvania

A marriage is voidable and subject to annulment where one party was induced to enter into the marriage by fraud, duress, coercion or force attributable to the other party, provided that there has been no subsequent voluntary cohabitation after knowledge of the fraud or release from the effects of fraud, duress, coercion or force. Either party may obtain an annulment to a voidable marriage. The validity of a voidable marriage, however, may not be attacked or questioned by any person if either party to the marriage has died. 23 Pa. Cons. Stat. § 3305.

8. Texas

A court may annul a marriage if the other party used fraud, duress or force to induce the petitioner to enter into the marriage, and petitioner has not voluntarily cohabited with the other party after becoming apprised of the fraud or being released from the duress of force. A marriage subject to annulment may not be challenged in a proceeding instituted after the death of either party to the marriage. Tx. Fam. Code §§ 6.107, 6.111.

9. Wisconsin

A court may annul a marriage if a party was induced to enter into the marriage by force, duress or fraud involving the essentials of marriage. A suit for annulment may be brought by either party, or by the legal representative of the innocent party, no later than one year after the petitioner obtained knowledge of the described condition. However, a marriage may not be annulled after the death of a party to a marriage. Wis. Stat. § 767.313 (2007).

C. States where Challenges on the Grounds of Fraud, Duress, or Undue Influence are Prohibited After Death by Case Law

1. Alabama

Rickard v. Trousdale, 508 So.2d 260 (Ala. 1987)

- The court held that a marriage allegedly induced by fraud is merely voidable and cannot be attacked after the death of one of the parties to the marriage. Therefore, even if the putative husband fraudulently induced the decedent to consent to marriage, the daughter of the decedent could not attack the validity of the marriage.

2. Arizona

Davis v. Industrial Commission of Arizona, 353 P.2d 627 (Ariz. 1960)

- In this case, the employer of the decedent denied the surviving spouse death benefits on the basis that the decedent and surviving spouse fraudulently procured a marriage license.

- The court held that the denial of benefits amounted to a collateral attack upon the validity of the marriage, which was not permitted after the death of one of the spouses.

3. Arkansas

Where the consent of either party was obtained by force or fraud, the marriage shall be void from the time its nullity is declared by the court. Ark. Stat. 9-12-201.

Vance v. Hinch, 261 S.W.2d 412 (Ark. 1953).

- In construing the identical predecessor to Arkansas Statute 9-12-201, the court held that a marriage induced by fraud was voidable (despite the fact that the statute referred to such a marriage as "void"). Because voidable marriages are only vulnerable to attack during the lifetime of the spouses, the granddaughters of the decedent could not challenge the validity of the marriage.

4. California

A marriage may be annulled when the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting fraud, freely cohabitates with the other as husband or wife. An action for annulment based upon fraud may be brought by the injured party, but must be instituted within four years after the discovery of the facts constituting the fraud. Cal. Fam. Code §§2210-2211 (2005).

Greene v. Williams, 88 Cal. Rptr. 261 (Cal. App. 197)

- Action to annul marriage does not survive the death of a party to the marriage.

5. Mississippi

Ervin v. Bass, 160 So. 568 (Miss. 1935)

- The court noted that a marriage induced by fraud or coercion was voidable. As a result, the marriage remains valid until dissolved by court decree, which can only be rendered during the lifetime of the parties.

6. New Hampshire

Patey v. Peaslee, 111 A.2d 194 (N.H. 1955)

- The heirs-at-law of the decedent sought to annul the marriage between the decedent and the surviving spouse on the basis fraud. The court held that the heirs-at-law did not state a cause for annulment because the marriage was voidable and not brought during the lives of both parties to the marriage.

7. Nebraska

Where the consent of one of the parties is obtained by force or fraud, and the parties have not subsequently voluntarily cohabitated, the marriage shall be deemed voidable. Neb. Stat. §42-118.

Christensen v. Christensen, 14 N.W.2d 613 (Neb. 1944)

- The court held that the marriage was voidable, where spouses knew of the husband's physical condition prior to the marriage, but fraudulently concealed such condition in order to obtain a marriage license.

- A voidable marriage may only be inquired into during the lives of the parties to the marriage.

8. North Dakota

A marriage may be annulled when the consent of either party was obtained by fraud, unless such party, with full knowledge of the facts constituting fraud, subsequently freely cohabitates with the other as husband or wife. An action to annul a marriage on the grounds of fraud may be brought by the injured party within 4 years after discovery of the facts constituting fraud. N.D. Stat. § § 14-04-01, 14-04-02 (2005).

Gibbons v. Blair, 376 N.W.2d 22 (N.D. 1985)

- The court held that the father of the decedent did not have standing to bring an action to annul the marriage between the decedent and his widow on the grounds of fraud.

- The court explained that under North Dakota Statute §14-01-01, the marriage was voidable and thus could only be annulled on the basis of fraud by an action brought by the defrauded spouse while both parties to the marriage were living.

9. Oregon

A marriage is voidable where the consent of either party is obtained by force or fraud. Such marriage may be annulled, provided that the marriage was not later ratified. Or. Stat. §106.030, 107.015.

In re Estate of Hunter, 588 P.2d 617 (Or.App. 1978), reversed on other grounds, Hunter v. Craft, 600 P.2d 415 (Or. 1979).

- The court held that the decedent's marriage was not subject to collateral attack by decedent's son in a will contest proceeding.

- There was insufficient evidence to support son's claim that surviving spouse exerted undue influence over the decedent.

- Pursuant to Oregon Statute §107.015, either party may seek an annulment on the ground of fraud, not just the injured party. However, a suit for annulment does not survive death. Because the marriage at issue was not annulled prior to the decedent's death, such marriage was valid and not subject to collateral attack

10. Washington

A marriage where the consent of either party is obtained by force or fraud is voidable, but only at the suit of the innocent party. Wash. Stat. §26.04.130.

In re Hollingsworth's Estate, 261 P. 403 (Wash. 1927)

- The court dismissed a petition seeking to annul the marriage between the decedent and surviving spouse on the basis that the surviving spouse fraudulently procured the marriage license by falsely swearing she was not feeble-minded.

- "A voidable marriage is valid for all purpose until annulled, and can be attacked only in a direct proceeding during the lifetime of both spouses; hence on the death of either party the marriage cannot be impeached."

In re Romano's Estate, 246 P.2d 501 (Wash. 1952).

- In this case, the executrix and legatees alleged that the newly employed housekeeper coerced the decedent into marriage.

- Applying Washington Statute §26.04.130, the court held that the marriage at issue was voidable and thus could not be set aside in a collateral attack after the death of one of the parties.

- The court, however, citing Savage v. Olsen, 9 So.2d 363 (Fla. 1942), noted that "under exceptional circumstances indicating fraud of the grossest kind, without apparent opportunity to detect or correct the inequity during the lifetime of the deceased spouse, a collateral attack after death has been permitted."

D. North Carolina Allows Challenge If There Are No Children

North Carolina law provides that a marriage followed by cohabitation and the birth of issue may not be declared void after the death of either of the parties to the marriage.

A marriage where either party is incapable of contracting due to lack of will or understanding is void. Such marriage may be declared void upon application by either party to the marriage. No marriage followed by cohabitation and the birth of issue may be declared void after the death of either of the parties. N.C. Stat. 51-3, 50-4.

Ivery v. Ivery, 129 S.E.2d 457 (N.C. 1963)

- In this case, the brother of the decedent challenged the validity of the marriage between the decedent and surviving spouse on the grounds that the decedent was incompetent and the surviving spouse "persuaded and induced" the decedent to enter into marriage.

- The court recognized that at common law the marriage of a person incapable of contracting for want of understanding was voidable. Accordingly, such marriage could only be attacked during the lifetime of both parties to the marriage.

- The court noted, however, that under the above statute, marriages are immune from attack after the death of either party only when the marriage was followed by cohabitation and the birth of issue. Because the marriage was followed by cohabitation, but not the birth of issue, the court held that the marriage was subject to collateral attack by the decedent's brother.

VI. Conclusion

In sum, Florida follows the common law and majority rule which only allows **void** marriages to be challenged after death. In most instances, Florida courts have held that marriages procured by fraud, duress, and undue influence are merely voidable, affording potential heirs no ability to challenge a marriage after death. Given the extensive rights available to a surviving spouse, a wrongdoer can profit significantly by simply inducing or influencing an elderly person to enter into a marriage. The Subcommittee recommends that the full committee consider and discuss legislation to address this issue.

VII. Proposed Statute for Discussion at July 24, 2008 Palm Beach Meeting

Over the last several meetings, the Probate and Trust Litigation Committee has discussed and debated a legislative change to permit a challenge to spousal rights that inure as the result of a marriage procured by fraud, undue influence, or duress. The proposal is closely patterned on the slayer statute, F.S. § 732.802. It carves out certain property and inheritance rights that would inure to a surviving spouse solely by virtue of the marriage. It also implements a "subsequent ratification" component borrowed from

N.J. Stat. 2A:34-1 and N.Y. Domestic Relations Law § 140. In addition, it implements a "preponderance of the evidence" standard coupled with an attorneys' fee provision to combat specious claims.

The following revised proposal is submitted for consideration:

732.803. Marriages procured by fraud, duress, or undue influence

(1) A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or their status as surviving spouse of the decedent, unless both spouses subsequently ratify the marriage with full knowledge of the facts constituting the fraud, duress, or undue influence:

(a) any rights or benefits under the Florida Probate Code, including but not limited to entitlement to elective share, preference in appointment as personal representative, family allowance, inheritance by intestacy, homestead, exempt property, or inheritance as a pretermitted spouse;

(b) any rights or benefits under a bond, life insurance policy, or other contractual arrangement of which the decedent was the principal obligee or the person upon whose life the policy is issued.

(c) any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is specifically mentioned or provided for by name in the will, trust, or power of appointment.

(d) any immunity from the presumption of undue influence which the surviving spouse may have under Florida law.

(e) any other rights to the decedent's property which inure to a surviving spouse solely by virtue of the marriage.

(2) Any property which would have passed to a surviving spouse, who is found to have procured the marriage by fraud, duress, or undue influence pursuant to this section, shall pass as if the spouse had predeceased the decedent.

(3) An action to challenge a surviving spouse's rights under this section may be maintained by any interested person after the death of the husband, the wife, or both, in any proceeding in which the fact of marriage may be material, either directly or indirectly.

(4) In all actions brought under this section, the contestant shall have the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. Thereafter, the surviving spouse shall have the burden of establishing, by a preponderance of the evidence, a subsequent ratification of the marriage by both spouses with full knowledge of the facts constituting

the fraud, duress, or undue influence.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorneys' fees. When awarding taxable costs and attorneys' fees under this section, the court, in its discretion, may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied from other property of the party, or both.

(6) Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligations is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

ITEM 4

REVISIONS TO RULE 1.525, F.R.C.P. – 30 DAY TIME LIMIT FOR SERVICE OF MOTION FOR ATTORNEY'S FEES

Revised 7/18/08

SUBCOMMITTEE REPORT

(Angela Adams, Laura Sundberg, Eric Virgil)

I. Background

Initially, Laura Sundberg raised the issue of the applicability of Rule 1.525 to trust proceedings in the Trust Law Committee.

The current rule is as follows:

> **Rule 1.525. Motions for Costs and Attorneys' Fees**
>
> **Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.**

Laura and Angela Adams were asked to review the issue and report to the Trust Law Committee. They concluded that the applicability of Rule 1.525 in trust actions depends upon the specific nature of the trust action. In other words, Rule 1.525, by its specific language, only applies in proceedings where one party is seeking to tax attorney's fees against another party. Using the specific language of the Rule, they considered various types of trust actions and the applicability of the Rule to those actions.

The attached chart was created to analyze the applicability of the Rule to various types of trust proceedings. It was Sundberg and Adams' conclusion, and the consensus of the Trust Law Committee, that Rule 1.525 should be made inapplicable to all trust proceedings except those to which F.S. 737.627 (an action challenging the proper exercise of a trustee's power, i.e., surcharge) is applicable. The Trust Law Committee, in concept, approved the following proposed revision to Rule 1.525:

> ***Proposed Rule 1.525. Motions for Costs and Attorneys' Fees***
>
> ***Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of***

dismissal, or the service of a notice of voluntary dismissal. This rule shall not apply to trust proceedings unless the judgment taxing costs, attorneys' fees, or both is sought pursuant to F. S. Section 737.627.

However, the Trust Law Committee recognized the difficulty of trying to amend the Rules of Civil Procedure and was debating whether an amendment to F.S. 737.205 (which states that trust proceedings are governed by the Florida Rules of Civil Procedure) would accomplish the desired goal without the necessity of amending the Rule. The new Trust Code statute 736.0201 similarly applies the Rules to trust proceedings, with some limited exceptions not applicable here. At this point, the Chair of the Trust Law Committee concluded that this issue should be transferred to the Probate and Trust Litigation Committee for review and action since it is clearly related to litigation.

In the course of their review for the Trust Law Committee, Laura and Angela considered the following rules and statutes:

R. 1.525 Motions for Costs and Attorneys' Fees (No trust cases cited in the annotations.)
R. 1. 010 Scope of Rules
F.S. 737.2041 Trustee's Attorney's Fees
F.S. 727.2035 Costs and Attorney's Fees in Trust Proceedings
F.S. 737.205 Trust Proceedings; Commencement
F.S. 737.627 Costs and Attorney's Fees

Although not directly on point, they also reviewed The Florida Bar Journal article by Jeffrey M. James, "Moving for Attorneys' Fees and Costs - Do It Right and Do It on Time" (January 2006 issue.).

Since that time, the Florida Legislature enacted the new Florida Trust Code, Chapter 736. The provisions of the new code that relate to the issue are analyzed below.

II. What the Rule Does

Prior to 2000, the rule required a party to file and serve fee and cost motions "within a reasonable time" after judgment. The discretionary language of the old rule led to uncertainty regarding what was a "reasonable time." Rule 1.525 was adopted to establish an explicit time requirement for service of fee and cost motions in order to resolve the uncertainties caused by the "reasonable time" standard. The party seeking fees may serve a motion as soon as entitlement is established. The motion, however, must be served no later than 30 days after filing of

the judgment. See Barco v. School Board of Pinellas County, _____ So.2d _____, No. SC07-261 (Fla. 2008).
The Florida Supreme Court, in Barco, set forth in detail the situations that gave rise to the Rule:

> "Further, regarding the purpose, rule 1.525 was created to replace the "reasonable time" requirement established by prior case law with a "within 30 days after" requirement primarily to accomplish two goals: first, to cure the "evil" of uncertainty created by tardy motions for fees and costs, see Norris, 907 So. 2d at 1218; and second, to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court...
>
> In fact, as the Court explained in Stockman, "[t]he existence or nonexistence of a motion for attorney's fees may play an important role in decisions affecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle." 573 So. 2d at 837."

III. Current Status of Subcommittee – State of Current Law

This subcommittee has since done research of all state court decisions, including Florida, to determine if any state courts have addressed the application of Rule 1.525, or similar rule, to trust proceedings. There are no Florida decisions related to trust proceedings and the subcommittee could not find any trust decisions applying a similar rule in other states. The Barco case, cited above, is the latest Florida Supreme Court case analyzing the Rule. The case of Estate of Paris, 699 So.2d 301 (Fla. 2d DCA 1997), which relates to taxing litigation attorney's fees in probate is also of interest. The Paris case is support from the probate experience for the limited application of the Rule. The court in that case found that the provision of the probate code relating to attorney's fees for benefiting the estate (F.S. Sec. 733.106) allowed for the taxing of fees in spite of the failure of the attorney to seek taxation of fees at the outset of the case, as is generally required under Stockman v. Downs, 573 So.2d 835 (Fla. 1991).

IV. Provisions of the Trust Code Potentially Affected

The subcommittee reviewed the application of the Rule to the new Trust Code. The provisions of the Trust Code that may be affected or implicated are:

736.1004 Attorney's fees and costs.--

(1)(a) In all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers; and

(b) In proceedings arising under ss. 736.0410-736.0417,

the court shall award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.

(2) When awarding taxable costs under this section, including attorney fees and guardian ad litem fees, the court, in its discretion, may direct payment from a party's interest, if any, in the trust or enter a judgment that may be satisfied from other property of the party, or both.

736.1005 Attorney's fees for services to the trust.--

(1) Any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust. The attorney may apply to the court for an order awarding attorney's fees and, after notice and service on the trustee and all beneficiaries entitled to an accounting under s. 736.0813, the court shall enter an order on the fee application.

(2) Whenever attorney's fees are to be paid out of the trust, the court, in its discretion, may direct from what part of the trust the fees shall be paid.

(3) Except when a trustee's interest may be adverse in a particular matter, the attorney shall give reasonable notice in writing to the trustee of the attorney's retention by an interested person and the attorney's entitlement to fees pursuant to this section. A court may reduce any fee award for services rendered by the attorney prior to the date of actual notice to the trustee, if the actual notice date is later than a date of reasonable notice. In exercising this discretion, the court may exclude compensation for services rendered after the reasonable notice date but prior to the date of actual notice.

736.1006 Costs in trust proceedings.--

(1) In all trust proceedings, costs may be awarded as in chancery actions.

(2) Whenever costs are to be paid out of the trust, the court, in its discretion, may direct from what part of the trust the costs shall be paid.

736.1007 Trustee's attorney's fees.--

(1) If the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to

reasonable compensation for those legal services, payable from the assets of the trust without court order. The trustee and the attorney may agree to compensation that is determined in a manner or amount other than the manner or amount provided in this section. The agreement is not binding on a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney's fees and costs.

(2) Unless otherwise agreed, compensation based on the value of the trust assets immediately following the settlor's death and the income earned by the trust during initial administration at the rate of 75 percent of the schedule provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable total compensation for ordinary services of all attorneys employed generally to advise a trustee concerning the trustee's duties in initial trust administration.

(3) An attorney who is retained to render only limited and specifically defined legal services shall be compensated as provided in the retaining agreement. If the amount or method of determining compensation is not provided in the agreement, the attorney is entitled to a reasonable fee, taking into account the factors set forth in subsection (6).

(4) Ordinary services of the attorney in an initial trust administration include legal advice and representation concerning the trustee's duties relating to:

(a) Review of the trust instrument and each amendment for legal sufficiency and interpretation.

(b) Implementation of substitution of the successor trustee.

(c) Persons who must or should be served with required notices and the method and timing of such service.

(d) The obligation of a successor to require a former trustee to provide an accounting.

(e) The trustee's duty to protect, insure, and manage trust assets and the trustee's liability relating to these duties.

(f) The trustee's duty regarding investments imposed by the prudent investor rule.

(g) The trustee's obligation to inform and account to beneficiaries and the method of satisfaction of such obligations, the liability of the trust and trustee to the settlor's creditors, and the advisability or necessity for probate proceedings to bar creditors.

(h) Contributions due to the personal representative of the settlor's estate for payment of expenses of administration and obligations of the settlor's estate.

(i) Identifying tax returns required to be filed by the trustee, the trustee's liability for payment of taxes, and the due date of returns.

(j) Filing a nontaxable affidavit, if not filed by a personal representative.

(k) Order of payment of expenses of administration of the trust and order and priority of abatement of trust distributions.

(l) Distribution of income or principal to beneficiaries or funding of further trusts provided in the governing instrument.

(m) Preparation of any legal documents required to effect distribution.

(n) Fiduciary duties, avoidance of self-dealing, conflicts of interest, duty of impartiality, and obligations to beneficiaries.

(o) If there is a conflict of interest between a trustee who is a beneficiary and other beneficiaries of the trust, advice to the trustee on limitations of certain authority of the trustee regarding discretionary distributions or exercise of certain powers and alternatives for appointment of an independent trustee and appropriate procedures.

(p) Procedures for the trustee's discharge from liability for administration of the trust on termination or resignation.

(5) In addition to the attorney's fees for ordinary services, the attorney for the trustee shall be allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size of the trust. Extraordinary services may include, but are not limited to:

(a) Involvement in a trust contest, trust construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceedings, apportionment of estate taxes, or other adversary proceedings or litigation by or against the trust.

(b) Representation of the trustee in an audit or any proceeding for adjustment, determination, or collection of any taxes.

(c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 303 and 6166 privileges, deduction of last illness expenses, distribution planning, asset basis considerations, throwback rules, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release from personal liability for payment of tax.

(d) Review of an estate tax return and preparation or review of other tax returns required to be filed by the trustee.

(e) Preparation of decedent's federal estate tax return. If this return is prepared by the attorney, a fee of one-half of 1 percent up to a value of $10 million and one-fourth of 1 percent on the value in excess of $10 million, of the gross estate as finally determined for federal estate tax purposes, is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.

(f) Purchase, sale, lease, or encumbrance of real property by the trustee or involvement in zoning, land use, environmental, or other similar matters.

(g) Legal advice regarding carrying on of decedent's business or conducting other commercial activity by the trustee.

(h) Legal advice regarding claims for damage to the environment or related procedures.

(i) Legal advice regarding homestead status of trust real property or proceedings involving the status.

(j) Involvement in fiduciary, employee, or attorney compensation disputes.

(k) Considerations of special valuation of trust assets, including discounts for blockage, minority interests, lack of marketability, and environmental liability.

(6) Upon petition of any interested person in a proceeding to review the compensation paid or to be paid to the attorney for the trustee, the court may increase or decrease the compensation for ordinary services of the attorney for the trustee or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. In determining reasonable compensation, the court shall consider all of the following factors giving such weight to each as the court may determine to be appropriate:

(a) The promptness, efficiency, and skill with which the initial administration was handled by the attorney.

(b) The responsibilities assumed by, and potential liabilities of, the attorney.

(c) The nature and value of the assets that are affected by the decedent's death.

(d) The benefits or detriments resulting to the trust or the trust's beneficiaries from the attorney's services.

(e) The complexity or simplicity of the administration and the novelty of issues presented.

(f) The attorney's participation in tax planning for the estate, the trust, and the trust's beneficiaries and tax return preparation or review and approval.

(g) The nature of the trust assets, the expenses of administration, and the claims payable by the trust and the compensation paid to other professionals and fiduciaries.

(h) Any delay in payment of the compensation after the services were furnished.

(i) Any other relevant factors.

(7) The court may determine reasonable attorney's compensation without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, an expert witness fee may be awarded by the court and paid from the assets of the trust. The court shall direct from what part of the trust the fee is to be paid.

(8) If a separate written agreement regarding compensation exists between the attorney and the settlor, the attorney shall furnish a copy to the trustee prior to commencement

of employment and, if employed, shall promptly file and serve a copy on all interested persons. A separate agreement or a provision in the trust suggesting or directing the trustee to retain a specific attorney does not obligate the trustee to employ the attorney or obligate the attorney to accept the representation but, if the attorney who is a party to the agreement or who drafted the trust is employed, the compensation paid shall not exceed the compensation provided in the agreement.

(9) Court proceedings to determine compensation, if required, are a part of the trust administration process, and the costs, including fees for the trustee's attorney, shall be determined by the court and paid from the assets of the trust unless the court finds the attorney's fees request to be substantially unreasonable. The court shall direct from what part of the trust the fees are to be paid.

(10) As used in this section, the term "initial trust administration" means administration of a revocable trust during the period that begins with the death of the settlor and ends on the final distribution of trust assets outright or to continuing trusts created under the trust agreement but, if an estate tax return is required, not until after issuance of an estate tax closing letter or other evidence of termination of the estate tax proceeding. This initial period is not intended to include continued regular administration of the trust.

736.0201 Role of court in trust proceedings.--

(1) Except as provided in subsection (5) and s. 736.0206, proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

(2) The court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person or as provided by law.

(3) A trust is not subject to continuing judicial supervision unless ordered by the court.

(4) A judicial proceeding involving a trust may relate to the validity, administration, or distribution of a trust, including proceedings to:

(a) Determine the validity of all or part of a trust;

(b) Appoint or remove a trustee;

(c) Review trustees' fees;

(d) Review and settle interim or final accounts;

(e) Ascertain beneficiaries; determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments; instruct trustees; and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;

(f) Obtain a declaration of rights; or

(g) Determine any other matters involving trustees and beneficiaries.

(5) A proceeding for the construction of a testamentary trust may be filed in the probate proceeding for the testator's estate. The proceeding shall be governed by the Florida Probate Rules.

736.0206 Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.--

(1) After notice to all interested persons, the court may review the propriety of the employment by a trustee of any person, including any attorney, auditor, investment adviser, or other specialized agent or assistant, and the reasonableness of any compensation paid to that person or to the trustee.

(2) If the settlor's estate is being probated, and the settlor's trust or the trustee of the settlor's trust is a beneficiary under the settlor's will, the trustee, any person employed by the trustee, or any interested person may have the propriety of employment and the reasonableness of the compensation of the trustee or any person employed by the trustee determined in the probate proceeding.

(3) The burden of proof of the propriety of the employment and the reasonableness of the compensation shall be on the trustee and the person employed by the trustee. Any person who is determined to have received excessive compensation from a trust for services rendered may be ordered to make appropriate refunds.

(4) Court proceedings to determine reasonable compensation of a trustee or any person employed by a trustee, if required, are a part of the trust administration process. The costs, including attorney's fees, of the person assuming the burden of proof of propriety of the employment and reasonableness of the compensation shall be determined by the court and paid from the assets of the trust unless the court finds the compensation paid or requested to be substantially unreasonable. The court shall direct from which part of the trust assets the compensation shall be paid.

(5) The court may determine reasonable compensation for a trustee or any person employed by a trustee without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the trust. The court shall direct from which part of the trust assets the fee shall be paid.

(6) Persons given notice as provided in this section shall be bound by all orders entered on the complaint.

(7) In a proceeding pursuant to subsection (2), the petitioner may serve formal notice as provided in the Florida Probate Rules, and such notice shall be sufficient for the court to acquire jurisdiction over the person receiving the notice to the extent of the person's interest in the trust.

736.0410 Modification or termination of trust; proceedings for disapproval of nonjudicial acts.--

(1) In addition to the methods of termination prescribed by ss. 736.04113-736.0414, a trust terminates to the extent the trust expires or is revoked or is properly distributed pursuant to the terms of the trust.

(2) A proceeding to disapprove a proposed modification or termination under s. 736.0412 or a trust combination or division under s. 736.0417 may be commenced by any beneficiary.

(3) A proceeding to disapprove a proposed termination under s. 736.0414(1) may be commenced by any qualified beneficiary.

736.04113 Judicial modification of irrevocable trust when modification is not inconsistent with settlor's purpose.--

(1) Upon the application of a trustee of the trust or any qualified beneficiary, a court at any time may modify the terms of a trust that is not then revocable in the manner provided in subsection (2), if:

(a) The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill;

(b) Because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or

(c) A material purpose of the trust no longer exists.

(2) In modifying a trust under this section, a court may:

(a) Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust;

(b) Terminate the trust in whole or in part;

(c) Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust; or

(d) Prohibit the trustee from performing acts that are permitted or required by the terms of the trust.

(3) In exercising discretion to modify a trust under this section:

(a) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.

(b) The court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.

(4) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

736.04115 Judicial modification of irrevocable trust when modification is in best interests of beneficiaries.--

(1) Without regard to the reasons for modification provided in s. 736.04113, if compliance with the terms of a trust is not in the best interests of the beneficiaries,

upon the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable as provided in s. 736.04113(2).

(2) In exercising discretion to modify a trust under this section:

(a) The court shall exercise discretion in a manner that conforms to the extent possible with the intent of the settlor, taking into account the current circumstances and best interests of the beneficiaries.

(b) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.

(c) The court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.

(3) This section shall not apply to:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if:

1. Under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f).

2. The terms of the trust expressly prohibit judicial modification.

(4) For purposes of subsection (3), a revocable trust shall be treated as created when the right of revocation terminates.

(5) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

736.04117 Trustee's power to invade principal in trust.--

(1)(a) Unless the trust instrument expressly provides otherwise, a trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to in this section as the "first trust," to make distributions to or for the benefit of one or more persons may instead exercise the power by appointing all or part of the principal of the trust subject to the power in favor of a trustee of another trust, referred to in this section as the "second trust," for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument; provided:

1. The beneficiaries of the second trust may include only beneficiaries of the first trust;

2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust; and

3. If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code of 1986, as amended, the second trust shall not contain any provision which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction.

(b) For purposes of this subsection, an absolute power to invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.

(2) The exercise of a power to invade principal under subsection (1) shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust.

(3) The exercise of a power to invade principal under subsection (1) shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate, and shall be subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(4) The trustee shall notify all qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the trustee's exercise of the trustee's power to invade principal pursuant to subsection (1), of the manner in which the trustee intends to exercise the power. A copy of the proposed instrument exercising the power shall satisfy the trustee's notice obligation under this subsection. If all qualified beneficiaries waive the notice period by signed written instrument delivered to the trustee, the trustee's power to invade principal shall be exercisable immediately. The trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee's power to invade principal except as provided in other applicable provisions of this code.

(5) The exercise of the power to invade principal under subsection (1) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(6) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of a trustee not exercising the power to invade principal conferred under subsection (1).

(7) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another provision of law or under common law.

736.0412 Nonjudicial modification of irrevocable trust.--

(1) After the settlor's death, a trust may be modified at any time as provided in s. 736.04113(2) upon the unanimous agreement of the trustee and all qualified beneficiaries.

(2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.

(4) This section shall not apply to:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification.

(c) Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

(5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

736.0413 Cy pres.--

(1) If a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply the doctrine of cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(2) A proceeding to modify or terminate a trust under this section may be commenced by a settlor, a trustee, or any qualified beneficiary.

736.0414 Modification or termination of uneconomic trust.--

(1) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than $50,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(2) Upon application of a trustee or any qualified beneficiary, the court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(3) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. The trustee may enter into agreements or make such other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and the trustee and to carry out the intent and purposes of the trust.

(4) The existence of a spendthrift provision in the trust does not make this section inapplicable unless the trust instrument expressly provides that the trustee may not terminate the trust pursuant to this section.

(5) This section does not apply to an easement for conservation or preservation.

736.0415 Reformation to correct mistakes.—

Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument.

736.0416 Modification to achieve settlor's tax objectives.—

Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent. The court may provide that the modification has retroactive effect.

736.0417 Combination and division of trusts.--

(1) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trusts or trust, respectively.

(2) Subject to the terms of the trust, the trustee may take into consideration differences in federal tax attributes and other pertinent factors in administering the trust property of any separate account or trust, in making applicable tax elections, and in making distributions. A separate trust created by severance must be treated as a separate trust for all purposes from the date on which the severance is effective. The effective date of the severance may be retroactive to a date before the date on which the trustee exercises such power.

V. Approach of Other Sections

The Family Law Rules Committee filed a petition with the Florida Supreme Court to eliminate the application of Rule 1.525 to family proceedings. That petition was granted pursuant to new Family Law Rule 12.525. A copy of the Supreme Court decision implementing the rule and explaining the decision is attached. Much of the logic applicable to the family law rule may be applicable to trust proceedings, as well.

VI. Issues for Discussion

The issue addressed at Bonita Springs was as follows:

> With regard to trust law, should a change be sought to exempt trust proceedings from the application of the Rule unless the order taxing costs, attorneys' fees, or both is sought pursuant to F. S. Section 736.1004? The initial issue is whether this is really a problem worth devoting the time and energy of this Committee to solving.

The committee decided that a fix should be discussed, so here are some proposals for review:

1. Amendment of F.S. 736.0201 of the Trust Code to remove the application of the Rule from trust proceedings completely. This was done by rule for family law proceedings (see attached Family Law Rule 12.525):

That might look like this:

736.0201 Role of court in trust proceedings.--

(1) Except as provided in subsection (5) and s. 736.0206, proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure, *other than as set forth below in (a).*

(a) Rule 1.525 of the Florida Rules of Civil Procedure shall not apply to proceedings concerning trusts.

2. Amendment to Rule 1.525 as suggested by the Trust Law Committee. This keeps Rule 1.525 applicable in the surcharge context;

That might look like this:

Rule 1.525. Motions for Costs and Attorneys' Fees

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. *This rule shall not apply to trust proceedings unless the judgment taxing costs,*

attorneys' fees, or both is sought pursuant to F. S. Section 736.1004 (1)(a).

3. Establish the Probate Rules as the mechanism for governing trust proceedings. This may not solve the problem without further changes to the Probate Rules since the Probate Rules also incorporate the Rules of Civil Procedure in adversary proceedings. See Rule 5.025.

TYPE OF CLAIM OR PROCEEDING	WILL FLA. R. CIV. P. 1.525 APPLY SO AS TO REQUIRE A MOTION SEEKING TO TAX COSTS, ATTORNEY'S FEES, OR BOTH, TO BE SERVED WITHIN 30 DAYS AFTER THE FILING OF THE JUDGMENT?
Action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers (i.e., breach of trust claim against trustee) Prevailing party (whether trustee or non-trustee) seeks an award of attorney's fees and costs pursuant to F.S. 736.1004(1)(a)	Yes. Clearly, a motion seeking to tax attorney's fees and/or costs pursuant to F.S. 736.1004(1)(a), must comply with the requirements of R. 1.525.
Proceedings under F.S. 736.0410 - 736.0417 for modification or termination of trust, invasion of principal by trustee, reformation, combining or dividing trusts, etc., under F.S. 736.1004(1)(b) Prevailing party (whether trustee or non-trustee) seeks an award of attorney's fees and costs pursuant to F.S. 736.1004(1)(b)	Yes. Clearly, a motion seeking to tax attorney's fees and/or costs pursuant to F.S. 736.1004(1)(b), must comply with the requirements of R. 1.525.

Proceeding where no breach of trust by the trustee is alleged (e.g., construction, determination of beneficiaries, trust contest): 1. Trustees or trustee's attorney seeks to be paid from assets of the trust	No. These fees and costs should be ordinary or extraordinary expenses of administration payable without court order under 736.1007(1) and (5).
2. Trustee seeks to charge its fees and expenses of litigation against the interest of a non-prevailing beneficiary who is a party to the litigation pursuant to F.S. 736.1005(2) (or to charge costs only pursuant to F.S. 736.1006(2))	Probably. For example, if a trust beneficiary brings an action contesting the validity of the trust and the beneficiary does not prevail under F.S. 736.1005(2), the court may charge the trustee's attorney's fees against the interest of the non-prevailing beneficiary. Although no judgment for fees and costs will be entered against the non-prevailing beneficiary, the effect of charging the trustee's attorney's fees against his or her share of the trust is a taxation of fees and costs against the non-prevailing beneficiary.
3. Attorney for non-trustee party seeks to recover attorney's fees from trust assets pursuant to F.S. 736.1004(1) (having rendered services to the trust)	The result is unclear. The attorney is not a "party" and would not fall within the scope of R. 1.525. However, Barry Spivey has successfully argued that R. 1.525 does apply in such circumstances.
4. Non-trustee prevailing party in litigation seeks award of costs from trust assets under F.S. 736.1006(1)	Yes.
Proceeding for review of compensation of trustee and persons employeed by trustee pursuant to F.S. 736.0206(4) Prevailing trustee seeks to recover attorney's fees and costs from the trust pursuant to F.S. 736.0206(4)	Probably. F.S. 736.0206(4) states that "costs, including attorney's fees, of the person assuming the burden of proof of . . . reasonableness of the compensation shall be determined by the court and paid from the assets of the trust," unless the compensation is found to be unreasonable. Therefore, the trustee's attorney's fees and costs are not paid as part of the administration of the trust until the court determines the amount of fees and costs.
Non-trustee renders services to trust but no court proceeding is filed	No. If there is no litigation, R. 1.525 never comes into play.

Supreme Court of Florida

No. SC04-1652

AMENDMENTS TO THE FLORIDA FAMILY LAW RULES OF PROCEDURE (RULE 12.525)

[March 3, 2005]

PER CURIAM.

The Family Law Rules Committee has filed an out-of-cycle petition proposing the creation of a new Florida Family Law Rule of Procedure. We have jurisdiction. See art. V, § 2(a), Fla. Const.; Fla. R. Jud. Admin. 2.130(e).

The committee proposes creating new rule 12.525, Motions for Costs and Attorneys' Fees, which succinctly provides, "Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules." The proposal was published by the The Florida Bar and the Court in the March 1, 2004, and the October 1, 2004, editions of The Florida Bar News, respectively, and comments were invited. Three comments were filed, all in favor of the proposed new rule.

ANALYSIS

Currently, under Florida Family Law Rule of Procedure 12.020, the Florida Rules of Civil Procedure apply in all family law matters except as otherwise provided in the family law rules. Rule of Civil Procedure 1.525, Motions for Costs and Attorneys' Fees, provides:

> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

The committee states it is proposing new rule 12.525 because rule 1.525 is ill-fitting to family law matters, and this ill fit may be causing the circuit courts and the district courts of appeal to apply or interpret the rule inconsistently in the context of family law proceedings. Compare Wentworth v. Johnson, 845 So. 2d 296 (Fla. 5th DCA 2003) (rejecting an argument in a family law matter that a reservation of jurisdiction to award attorneys' fees and costs in a final judgment entitles a party to an automatic extension of the 30-day time period to file a motion seeking to tax attorneys' fees), with Fisher v. John Carter & Associates, Inc., 864 So. 2d 493 (Fla. 4th DCA 2004) (holding that in a civil case a reservation of jurisdiction in a final judgment extends the time for filing a motion for attorneys' fees).

We agree that rule 1.525 should not apply in family law proceedings. The method of taxation of attorneys' fees and costs in family law cases is quite

different from that in civil litigation. Whereas the former is based on need and ability of the parties to pay, the latter is based on prevailing party considerations. Moreover, section 61.16, Florida Statutes (2004), already governs the award of attorneys' fees and costs in family law cases. See also Rosen v. Rosen, 696 So. 2d 697, 699 (Fla. 1997) (noting that "[a]ny determination regarding an appropriate award of attorney's fees in proceedings for dissolution of marriage, support, or child custody begins with section 61.16, Florida Statutes").

Because the application of rule 1.525 in family law cases could be creating confusion among the courts, and because there already is a well-established body of statutory and case law authority regarding the award of attorneys' fees and costs in family law matters, we agree with the committee's proposal. Accordingly, we hereby adopt new Florida Family Law Rule of Procedure 12.525 as reflected in the appendix to this opinion. In adopting this rule, we express no opinion as to its constitutionality. As all of the language is new, we forego the usual underlining and strike-through type format. The new rule shall become effective immediately.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS AMENDMENT

Original Proceeding – The Florida Family Law Rules of Procedure (Rule 12.525)

Jeffrey P. Wasserman, Chair, Family Law Rules Committee, Boca Raton, Florida and John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida,

for Petitioner

Evan Marks of Marks and West and Scott L. Rubin of Fogel, Rubin and Fogel on behalf of the Family Law Section of The Florida Bar, Miami, Florida; Cynthia Stump Swanson, Pro se, Gainesville, Florida; and Scott R. McHenry, Pro se, Maitland, Florida,

Responding with comments

APPENDIX

RULE 12.525 MOTIONS FOR COSTS AND ATTORNEYS' FEES

Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules.

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PAUL J. BARCO, Petitioner,
v.
SCHOOL BOARD OF PINELLAS COUNTY, Respondent.
No. SC07-261.
Supreme Court of Florida.
February 7, 2008.

Application for Review of the Decision of the District Court of Appeal — Certified Direct Conflict of Decisions Second District — Case No. 2D05-4915, (Pinellas County)

Samuel R. Mandelbaum of Mandelbaum, Fitzsimmons, Hewitt, and Metzger, P.A., Tampa, Florida, for Petitioner.

Matthew C. Lucas and Brian A. Bolves of Bricklemyer, Smolker, and Bolves, P.A., Tampa, Florida, for Respondent.

PARIENTE, J.

Paul Barco seeks review of the decision of the Second District Court of Appeal in Barco v. School Board of Pinellas County, 946 So. 2d 1244 (Fla. 2d DCA 2007), in which the court certified conflict with the decisions of the other district courts of appeal in Martin Daytona Corp. v. Strickland Construction Services, 941 So. 2d 1220 (Fla. 5th DCA 2006), Byrne-Henry v. Hertz Corp., 927 So. 2d 66 (Fla. 3d DCA), review dismissed, 945 So. 2d 1289 (Fla. 2006), Swift v. Wilcox, 924 So. 2d 885 (Fla. 4th DCA 2006), review denied, 949 So. 2d 199 (Fla. 2007), and Norris v. Treadwell, 907 So. 2d 1217 (Fla. 1st DCA 2005), review dismissed, 934 So. 2d 1207 (Fla. 2006). The conflict issue involves the proper interpretation of the time deadlines governing the service of motions for costs and attorneys' fees pursuant to Florida Rule of Civil Procedure 1.525 as it existed in 2004.1 All of the district courts of appeal, except the Second District, have construed the rule as setting an outside deadline in which the motion for costs or fees is untimely only if served more than thirty days after the filing of the judgment. The Second District, however, has held that the rule creates a narrow window for serving the motion that begins only after the filing of the judgment and closes thirty days later. We have jurisdiction. See art. V, § 3(b)(3), Fla. Const. For the reasons discussed, we conclude that the rule sets only an outside deadline and accordingly quash the decision of the Second District.

BACKGROUND

Barco owned real property that was the subject of an eminent domain proceeding instituted by the School Board of Pinellas County ("School Board") pursuant to chapters 73 and 74, Florida Statutes. The property was needed for expansion of an elementary school. The issue of compensation for the property taken was resolved through mediation, with the agreement that the court would retain jurisdiction to resolve attorneys' fees and costs, although no final judgment was entered at that time. Disputes arose between the parties that resulted in Barco serving a "Motion to Enforce Settlement, with Request for Interest, Attorneys Fees & Costs." As its name indicates, in addition to seeking an order enforcing the settlement, the motion also set forth the attorney's fees and costs to which Barco asserted he was entitled.

At the hearing on Barco's motion to enforce settlement, the trial court ruled that the School Board should pay the agreed sums, including statutory attorneys' fees, and that the court would reserve jurisdiction on any contested costs and on the question of interest, which the School Board also contested. The trial court then entered a final judgment which required the School Board to pay both the compensation that had been agreed to in the Mediated Settlement Agreement and statutory attorneys' fees.2 The judgment reserved jurisdiction to determine any and all issues regarding reasonable costs, interest and any additional attorneys' fees.

More than three months after the filing of the judgment, Barco filed and served a Motion to Tax Costs in the amount of $12,411.21 relating to costs of real estate appraisers, court reporters, plats, maps, express delivery, and document services. These were the same costs sought in the earlier motion, with the addition of a court reporting bill related to the motion to enforce the mediated settlement agreement. A hearing was held on the Motion to Tax Costs at which the School Board objected to the award of any costs on the ground that the motion to tax costs was served more than thirty days after the judgment. Barco countered with the explanation that his first motion for costs had been included in the Motion to Enforce Settlement, which was served November 9, 2004—twenty-three days prior to entry of the final judgment on December 2, 2004. The School Board then contended that the early motion was not timely under Florida Rule of Civil Procedure 1.525. The trial court agreed with the School Board and followed Second District precedent holding that rule 1.525 creates a bright-line requirement that, to be timely, the motion for fees and costs must be served within the thirty-day window after a judgment, not preceding it. Barco appealed to the Second District, resulting in the decision now before the Court, in which the district court adhered to its precedent in Swann v. Dinan, 884 So. 2d 398 (Fla. 2d DCA 2004), and certified conflict with the four other district courts in Martin Daytona, Byrne-Henry, Swift, and Norris.

We first discuss the impetus for the adoption of the rule at issue setting a time requirement for service of motions for attorneys' fees or costs. We then discuss how the conflict cases have interpreted and applied the rule at issue. Finally, we analyze the language and intent of the rule, applying it to the instant case and concluding that the rule does not create a limited thirty-day window following the judgment in which the motion for attorneys' fees or costs must be served in order to be timely.

ANALYSIS

The version of rule 1.525 at issue in this case states:

Rule 1.525. Motions for Costs and Attorneys' fees

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

The 2004 version of the rule is identical in its text to the 2001 rule. Prior to the adoption of rule 1.525 in 2001, "Florida case law permitted motions for attorney's fees to be filed within a reasonable time of the plaintiff's abandonment of the claim or within a reasonable time after final judgment is entered." E & A Produce Corp. v. Superior Garlic Int'l, Inc., 864 So. 2d 449, 451 (Fla. 3d DCA 2003) (citing Stockman v. Downs, 573 So. 2d 835, 838 (Fla. 1991)). We are unable to locate any case that has held under the law in effect before the 2001 rule that a motion filed before judgment would be untimely or unreasonable. Furthermore, under Stockman, a unanimous Court held that, despite the requirement that motions for attorneys' fees be filed within a reasonable time after the entry of judgment, a party seeking attorneys' fees also had to plead entitlement to fees in the complaint or answer. Id. at 838. As this indicates, the overriding intent of the filing and pleading requirements appeared to be provision of timely, adequate notice to the opposing party. It was for this same reason that the "reasonable time" standard came under criticism—because in some cases it did not provide prompt enough notification of the specifics of the claim for fees. In adopting rule 1.525, this Court did not overrule Stockman's pleading requirement or the underlying objective of early, detailed notification of claims for fees and costs.

Rule 1.525 was adopted to establish an explicit time requirement for service of fee and cost motions in order to resolve the uncertainties caused by the "reasonable time" standard. See Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 600 (Fla. 2006). The Court is now asked

to decide whether the time requirement of rule 1.525 established only a narrow window of thirty days following the judgment in which to serve the motion for fees and costs or whether, instead, it prescribed only the latest point at which the motion may be served.

THE CONFLICT CASES

The Second District held in Barco that a motion served before entry of the judgment was not timely under rule 1.525, based on the premise that the rule sets forth only a thirty-day window following the judgment in which the motion may be served. In so doing, the Second District certified conflict with decisions of the First District in Norris, the Fourth District in Swift, the Third District in Byrne-Henry, and the Fifth District in Martin Daytona. Each of these decisions involves the service of a motion for fees and costs before the filing of the judgment in the case. Importantly, each court found the early motion to be timely according to its interpretation of the intent of the rule.

In Norris, the First District held that a motion for fees and costs served after the jury verdict but before the personal injury judgment was timely under the 2004 version of rule 1.525, reasoning:

In our view, the primary evil to be addressed by the supreme court's adoption of Rule 1.525 was the uncertainty created by excessive tardiness in the filing of motions for fees and costs [under the pre-2001 "reasonable time" requirement]. Decisions in which the courts found a motion untimely under the "reasonable time" standard generally note prejudice or unfair surprise.

In contrast, we have found no cases where an appellate court applied the "reasonable time" standard to a motion served before entry of judgment, and found prejudice or unfair surprise to a party, so as to conclude the motion was untimely. In fact, it is hard to imagine a situation where a motion for fees and costs, filed after an adverse jury verdict, but before filing the judgment, could ever be prejudicial or cause unfair surprise to the losing party.

. . . .

We conclude the purpose of Rule 1.525 is fully accomplished by an interpretation that establishes the latest point at which a prevailing party may serve a motion for fees and costs. The party seeking fees may serve a motion as soon as entitlement is established. The motion, however, must be served no later than 30 days after filing of the judgment.

Norris, 907 So. 2d at 1218-19 (citations omitted). The First District went on to certify conflict with the Second District's decision in Swann and this Court initially accepted review. Norris v. Treadwell, 919 So. 2d 435 (Fla. 2006). However, the Court ultimately discharged jurisdiction and dismissed review, noting that the rule had been amended in 2006 to provide that the motion must be served "no later than" thirty days after the judgment. See Norris v. Treadwell, 934 So. 2d 1207, 1207 (Fla. 2006).

In the year following the First District's decision in Norris, the Fourth District in Swift, a breach of contract action, held that a motion for fees and costs served before judgment was timely under rule 1.525. The Swift court cited Norris and reasoned that the rule does not specify the earliest time when a motion for costs and fees may be served but instead "establishes the latest point at which a prevailing party may serve a motion for fees and costs." 924 So. 2d at 887 (quoting Norris, 907 So. 2d at 1218). The court in Swift explained:

This interpretation is consistent with the language of the rule, which provides that the motion must be served "within 30 days after filing of the judgment." Fla. R. Civ. P. 1.525 ([Emphasis] supplied). "When used relative to time," the preposition "within" has been defined as meaning "any time before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than."

924 So. 2d at 887 (citing Black's Law Dictionary 1437 (5th ed. 1979)). The Fourth District also certified conflict with Swann but this Court denied review. See Swift v. Wilcox, 949 So. 2d 199 (Fla. 2007).

Shortly after the Fourth District's decision in Swift, the Third District decided Byrne-Henry, which also held that a motion served before the filing of a notice of voluntary dismissal was timely under the 2004 version of rule 1.525. Byrne-Henry, 927 So. 2d at 67. The Third District agreed with the First District's decision in Norris, which it described as holding that, although the rule does create a bright-line test, it is only to establish the latest date a motion may be served. Id. at 68.

In Martin Daytona, the issues were whether rule 1.525 applies to motions filed in the circuit court based on awards emanating from arbitration and, if so, whether a motion served before entry of the judgment is timely under the rule. 941 So. 2d at 1221-22. The Fifth District resolved the issues by finding that the rule applies under those circumstances and that the motion was timely, explaining that rule 1.525 establishes a deadline "to eliminate the reasonable time rule and establish a time requirement to serve motions for costs and attorney's fees." Id. at 1225 (quoting Carter v. Lake County, 840 So. 2d 1153, 1156 (Fla. 5th DCA 2003)). Aligning itself with the First, Third and Fourth Districts, the Fifth District opined that the "reasonable time" standard was vague and that the original enactment of the rule in 2001, requiring service of the motion within thirty days after the filing of the judgment, was intended to and did establish an outside deadline of thirty days after the judgment, beyond which a motion will be untimely. Id. Noting that the rule had been amended effective 2006 to clearly state that the deadline for service of the motion is thirty days after the filing of the judgment, thereby eliminating all doubt, the Fifth District held that this clear statement was also the intended meaning of the earlier version of rule 1.525. Id. at 1226.

The conflict cases all generally hold that the 2001 enactment of rule 1.525 (which contains the same language as the 2004 version) was intended only to create a final deadline for service of the motion, in order to avoid the tardiness that occurred in filing a motion under the preexisting "reasonable time" filing requirement. The conflict courts generally agree that the "reasonable time" requirement created the potential for prejudice to the opposing party, which is not present under the rule because it eliminates tardy motions. Several of the conflict courts also opine that the intent of the 2006 amendment in removing the word "within" from the rule was to effect the original intent of the 2001 amendment—that being elimination of tardy motions. None of the conflict decisions identify any possible prejudice in an early prejudgment filing, as opposed to a late postjudgment filing.

INTERPRETATION OF THE RULE

As this Court explained in Saia, appellate courts apply a de novo standard of review when the construction of a procedural rule, such as rule 1.525, is at issue. 930 So. 2d at 599. Further, "[i]t is well settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction." Id. "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)); accord Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 454 (Fla. 1992). If, however, the language of the rule is ambiguous and capable of different meanings, this Court will apply established principles of statutory construction to resolve the ambiguity. See, e.g., Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 948 So. 2d 599, 606 (Fla. 2006).

The word "within" as used in rule 1.525 appears to be the critical term in interpreting the time deadline in the rule. It is appropriate to refer to dictionary definitions when construing statutes or rules. See Reform Party of Fla. v. Black, 885 So. 2d 303, 312 (Fla. 2004) (citing Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201, 204-05 (Fla. 2003)). Indeed, this is what the Fourth District did in

Swift, when it construed the word "within" to mean "not later than." The court explained: "'When used relative to time,' the preposition 'within' has been defined as meaning 'any time before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than.'" Swift, 924 So. 2d at 887 (quoting Black's Law Dictionary 1437 (5th ed. 1979)). Merriam-Webster's Collegiate Dictionary 1359 (10th ed. 1999) defines the word "within" as including both "before the end of" and "being inside." Accordingly, the definition of the word "within" has not been restricted to only one meaning.

The word "within" has also been variously defined by different courts. See, e.g., Taxpayers Against Congestion v. Regional Transp. Dist., 140 P.3d 343, 347 (Colo. Ct. App. 2006) (stating that "'within' means, in the context of a temporal restriction, 'not longer in time than . . . before the end or since the beginning of'" based on Webster's Third New International Dictionary 2627 (1986), and concluding that an act to be done "within ten days after" certification of election results must be done during the ten days following the certification of the election); Brown v. Kindred, 608 N.W.2d 577, 579 (Neb. 2000) (reaffirming holding that "within" means "inside of"); Glaze v. Grooms, 478 S.E.2d 841, 844 (S.C. 1996) ("If an action is required by statute within a certain time 'after' an event, the general rule is that the action may be taken before the event, since the statute will be considered as fixing the latest, but not the earliest, time for taking the action.") (citing 86 C.J.S. Time § 8).

The Supreme Court of Iowa summarized the differing meanings of the word "within" when it explained:

In fixing time, this word is fairly susceptible of different meanings. . . . It may be taken to fix both the beginning and end of the period of time in which a specified act must be done. In this sense "within" means "during."

However, "within" frequently means "not beyond, not later than, any time before, before the expiration of." In this sense" within" fixes the end but not the beginning of the period of time.

Iowa State Dept. of Health v. Hertko, 282 N.W.2d 744, 751 (Iowa 1979) (quoting Jensen v. Nelson, 19 N.W.2d 596, 598 (Iowa 1945)).

This Court has also had occasion to construe the word "within," albeit in a statutory context, stating:

"Within" means "during the time of." Black's Law Dictionary 1602 (6th ed. 1991). In common usage, "within" simply is not synonymous with "no later than." The term "within" implies a measurement fixed both at its beginning and its end, whereas "no later than" implies only a fixed end.

Jeffries v. State, 610 So. 2d 440, 441 (Fla. 1992). However, the Court had earlier construed the word "within" in Chatlos v. Overstreet, 124 So. 2d 1 (Fla. 1960), differently. There, in construing a statute, the Court said that the word "within" was susceptible of differing meanings—including "not longer in time than" and "not later than"—and concluded that the word "does not fix the first point of time, but the limit beyond which action may not be taken." Id. at 3. Interestingly, in 1963, the Second District cited Chatlos for this very principle in construing a rule of procedure that authorized the filing of a petition for rehearing "within 10 days after the recording of the decree." Bradford Builders, Inc. v. Phillips Petroleum Co., 154 So. 2d 189, 190 (Fla. 2d DCA 1963).3 There, the Second District found that the word "within" means "not later than" and that a petition was timely even though filed before the decree was final. Id.

Because the word "within" is clearly susceptible of several different and somewhat contrary meanings, we look to the purpose of the rules of civil procedure as well as the purpose behind the enactment of rule 1.525. See Fla. Birth-Related Neurological Injury Compensation Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997) ("[C]onsideration must be accorded not only to the literal and

usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment."). The general guide to construction of the procedural rules is set forth in Florida Rule of Civil Procedure 1.010, which states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." See also Singletary v. State, 322 So. 2d 551, 555 (Fla. 1975) ("Procedural rules should be given a construction calculated to further justice, not to frustrate it.").

Further, regarding the purpose, rule 1.525 was created to replace the "reasonable time" requirement established by prior case law with a "within 30 days after" requirement primarily to accomplish two goals: first, to cure the "evil" of uncertainty created by tardy motions for fees and costs, see Norris, 907 So. 2d at 1218; and second, to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court. There is no indication that the purpose behind the rule was to create a narrow window to begin only after the filing of the judgment.

In fact, as the Court explained in Stockman, "[t]he existence or nonexistence of a motion for attorney's fees may play an important role in decisions affecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle." 573 So. 2d at 837. This principle is equally applicable to our determination that rule 1.525 should be construed in a manner that does not prevent the service of an early motion for such fees or costs.

Because the word "within" in the 2004 version of the rule is ambiguous and because procedural rules are to be construed to effect a speedy and just determination of the cause on the merits, we construe the word "within" in accord with those courts that have found it to mean "not later than" thirty days after the filing of the judgment, as the current rule now provides. The 2006 amendment to the rule clarifies that the intent of the rule is to establish only an outside deadline for service of the motion, by substituting the words "no later than" for the more ambiguous word "within." The rule, effective January 1, 2006, now reads: "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after the filing of the judgment . . . ." See In re Amendments to the Fla. Rules of Civil Pro. (Two Year Cycle), 917 So. 2d 176, 177, 186 (Fla. 2005).

Therefore, we conclude that the prior version of rule 1.525 in effect in 2004 was not intended to create a limited thirty-day window for service of a motion for attorneys' fees or costs or both. The rule in effect in 2004, just like the rule amended effective 2006, requires only that the motion be served no later than thirty days following the filing of the judgment.4

CONCLUSION

For all the reasons stated, we agree with the conclusions reached by the First, Third, Fourth and Fifth Districts, which hold that rule 1.525 does not mandate service of a motion for attorneys' fees or costs only within a thirty-day window following the filing of the judgment. We also conclude that the timely service requirement of rule 1.525 in effect in 2004, which established only an outside deadline for service of Barco's motion for attorneys' fees and costs, was met when Barco served his first motion for attorney's fees and costs prior to the filing of the judgment. Accordingly, we quash the decision of the Second District in Barco, disapprove the decision in Swann, and approve the decisions in Norris, Byrne-Henry, Swift, and Martin Daytona. We remand for proceedings consistent with this opinion.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, QUINCE, CANTERO, and BELL, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Notes:

1. Rule 1.525 has been amended, effective January 1, 2006, to make clear that the motion must now be served no later than thirty days after judgment. Thus, effective 2006, the question of whether a motion for attorneys' fees or costs served prior to judgment is untimely has been eliminated by the 2006 amendment clarifying that the rule dictates only the latest date for service of the motion and did not intend for there to be only a narrow window of thirty days following the judgment.

2. These fees are not at issue here. Under section 73.091(1), Florida Statutes (2004), the condemning authority was required to pay attorneys' fees and reasonable costs incurred in the circuit court eminent domain proceedings. Section 73.092(1), Florida Statutes (2004), provides for calculation of statutory attorneys' fees on the basis of the benefits achieved for the client, except under certain circumstances set forth in the chapter that are not pertinent here.

3. Similar to the change in rule 1.525, the current rule 1.530 providing for motions for new trial, rehearing and amendment of judgments now requires those motions to be served "not later than 10 days" after the verdict or the filing of the judgment in a non-jury action.

4. This decision does not alter the pleading requirements for claims for attorneys' fees that have been established by prior case law. See Stockman, 573 So. 2d at 837. However, it is not sufficient for a party to plead entitlement to fees or costs only in their pretrial pleadings, such as in a complaint or an answer. A timely motion is also required. Further, a court's reservation of jurisdiction to determine fees and costs does not extend the time for service of a motion under rule 1.525. See Saia, 930 So. 2d at 600.

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In re ESTATE OF Marjorie PARIS, a/k/a Marjorie White Paris.
Carl E. LINDENMAYER, Sr., Appellant,
v.
Kathryn M. HARPER, Appellee.

No. 97-01408.
District Court of Appeal of Florida,
Second District.
Sept. 17, 1997.

Clifford R. Rhoades, Sebring, for appellant.

Clifford M. Ables, III, Sebring, for appellee.

PARKER, Chief Judge.

Carl E. Lindenmayer, personal representative of the estate of Marjorie Paris, challenges the trial court's nonfinal order denying his petition to tax litigation attorney's fees against Kathryn M. Harper in this probate case. We reverse.

In September 1994, Ms. Harper filed a petition for administration in the estate. Harper offered for administration a will dated June 7, 1993 (1993 will). Ten days later, Lindenmayer filed a caveat by interested person in the estate objecting to the petition for administration that Harper filed. The caveat listed Clifford R. Rhoades, Esquire, as Lindenmayer's agent, stating that Rhoades was a member of the Florida Bar. Two days later, Harper gave Lindenmayer formal notice of petition for administration. In October 1994, Lindenmayer filed a response to petition for administration denying that the 1993 will was the Last Will and Testament of Marjorie Paris. He alleged that Harper procured

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the 1993 will by overreaching, fraud, or undue influence, or all of the above. Lindenmayer's response also stated that he intended to file a petition for administration of a will executed by Marjorie Paris on January 31, 1985 (1985 will), in which he was named the personal representative. Lindenmayer did not request attorney's fees from the estate in this response. After the hearing on the petition for administration filed by Harper, the trial court denied the petition because Harper could not rebut the presumption that she procured the 1993 will by her exercise of undue influence on Marjorie Paris.

Thereafter, Lindenmayer filed a petition for establishment and probate of lost or destroyed will and appointment of personal representative. Lindenmayer offered the 1985 will for administration. The 1985 will was admitted to probate, and the court appointed Lindenmayer as personal representative of the estate.

Lindenmayer then filed a petition to tax litigation attorney's fees against Harper. The petition asked for the payment of attorney's fees incurred in the contest of the petition for administration that Harper filed. The petition requested that the fees awarded be taxed against Harper's interest in the 1985 will first, and then pro-rata against the other beneficiaries' shares of the estate. The basis for the petition for attorney's fees was that the personal representative incurred legal fees in preventing the probate of the 1993 will and that those fees benefited the estate by allowing the 1985 will to be probated. The taxing of the fees against a certain beneficiary's share of the estate was based on the fees being incurred due to Harper's conduct in attempting to probate an "ill-gotten

will." The circuit court did not reach the issue of the propriety of taxes for attorney's fees against Harper's share of the estate due to its finding that the attorney's fees incurred in contesting the probate of the 1993 will should not be an expense of the estate. The court relied on Stockman v. Downs, 573 So.2d 835 (Fla.1991), in holding that an interested party to a probate proceeding must plead that party's entitlement to attorney's fees in the initial pleading filed in probate.

Lindenmayer argues that he is allowed, pursuant to section 733.106(3), Florida Statutes (1995), to apply for an order awarding fees when he has rendered services to the estate. We agree. Section 733.106(3) requires Lindenmayer to give informal notice to the personal representative and to all persons who would be impacted by the award. Lindenmayer complied with these requirements. Section 733.106(3) allows the attorney to apply for these fees at any time during the pendency of the estate.

In Carman v. Gilbert, 615 So.2d 701 (Fla. 2d DCA 1992), rev'd on other grounds, 641 So.2d 1323 (Fla.1994), this court upheld the award of attorney's fees in a similar case. While the attorney's initial attempts at establishing a right to fees did not meet the requirements of Stockman, this court found that the petition filed pursuant to section 733.106(3) did meet the requirements. Id. at 704. This court reasoned:

Because the fees sought were predicated on having provided a benefit to the estate, which could encompass more than merely having defended the petition to revoke probate, and section 733.106 permits an attorney to make such an application at any time during the pendency of the estate, we determine that the petition provided timely notice of the request for fees to all affected parties.

Id. The Florida Supreme Court reversed this case on other grounds, but specifically noted that the trial court awarded fees pursuant to section 733.106(3), and that the trial court should make a new determination of only from what part of the estate the attorney's fees should be paid. Carman v. Gilbert, 641 So.2d 1323, 1326 (Fla.1994).

Accordingly, we conclude that the trial court erred in denying the petition to tax litigation attorney's fees against the estate. Upon remand, the trial court is directed to grant the petition and to determine from which part of the estate the fees should be paid.

Reversed and remanded.

DANAHY and BLUE, JJ., concur.

January, 2006
Volume 80, No.1

Moving for Attorneys' Fees and Costs: Do It Right and Do It on Time

by Jeffrey M. James

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In 2000, the Florida Supreme Court adopted Fla. R Civ. P. 1.525, which states: "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal." Courts have noted that the rule's plain language was drafted and intended "to create predictability and consistency in postjudgment requests for attorneys' fees."[1] Prior to the enactment of this rule, the courts generally held that a party could file a motion for fees and costs within a reasonable time after the date the final judgment was entered.[2]

While simple on its face, Rule 1.525 has led to numerous controversies and appeals across the state. In its brief history, it has been the subject of dozens of appellate decisions issued by district courts attempting to establish the parameters of the rule's language and applicability. This rule, which was meant to bring uniformity to an area of the law which had up to that point been governed by judges' discretionary "reasonableness" inquiries, has so far accomplished just the opposite. Depending on which jurisdiction you are practicing in, the "plain language" of the rule can mean very different things.

Reservation of Jurisdiction — Does It Eliminate the Deadline?

The primary disagreement among the district courts regarding the applicability of Rule 1.525 deals with the effect of a court expressly reserving jurisdiction to resolve the issue of attorneys' fees and costs at some later date. This reservation is often included by the courts in orders granting final judgment or dismissal. Prior to the adoption of Rule 1.525, such a reservation of jurisdiction by a court would toll the time period for filing a motion for attorneys' fees and costs based on the following rationale. In *Gulliver Academy, Inc. v. Bodek*, 694 So. 2d 675 (Fla. 1997), the Florida Supreme Court held that time limits found in statutes entitling a party to fees and costs were procedural and thus governed by the Florida Rules of Civil Procedure.[3] Specifically, a party could invoke Rule 1.090(b)[4] to enlarge the time period in which to file an appropriate motion.[5] The court held that a reservation of jurisdiction in a final judgment is procedurally an enlargement of time under Rule 1.090(b).[6] Thus, a party could be allowed to file a motion for fees after 30 days had passed as long as the court reserved jurisdiction over the issue before the time limit for filing had expired.[7]

Following the enactment of Rule 1.525 in 2001, however, the state's district courts have been unable to uniformly reconcile the reasoning of *Gulliver Academy* with the plain language of the new rule. As discussed below, while the Third and Fourth districts allow reservations of jurisdiction to toll the time period, the First, Second, and Fifth districts have refused to allow such reservations, adhering to a more strict interpretation of the rule.

• *The First, Second, and Fifth Districts*

The Fifth District Court of Appeal was the first district court to rule on this issue after the enactment of Rule 1.525. In *Wentworth v. Johnson*, 845 So. 2d 296 (Fla. 5th DCA 2003), a divorce proceeding,[8] the Fifth District held that the Supreme Court's ruling in *Gulliver Academy* had been superseded by the rule.[9] *Wentworth* dealt with a motion for fees filed by the former wife after a judgment of dissolution of marriage was entered by the trial court. Prior to the trial court's order, the husband sought production of the wife's attorney's billing statements for the litigation.[10] The trial court denied the husband's request, but ordered that neither party could proceed with a claim for attorneys' fees until that party produced his or her billing records.[11] The court further reserved jurisdiction over the issue of entitlement to fees and costs.[12]

Subsequently, the parties retried various aspects of the case and a final order resolving the claims was entered on January 24, 2002.[13] At this point, neither party had produced billing records nor filed a motion for fees and costs.[14] On March 26, 2002, over 60 days after the entry of the final order, the former wife served her motion for attorneys' fees along with her billing records.[15] In response, the former husband asserted that she had failed to abide by the 30 day limit set forth in Rule 1.525.[16] The Fifth District affirmed the trial court's decision that the motion was served late under the mandatory time limit of the rule.[17] However, the appellate court held that the "excusable neglect" provision of Rule 1.090(b) still applies to the time limit in Rule 1.525, and remanded the case back to the trial court to determine if that provision entitled the wife to relief.[18] The impact of the "excusable neglect" provision is discussed below.

In an opinion filed a week after the *Wentworth* opinion was issued, the Second District also established a strict interpretation of the language of Rule 1.525 with regard to this issue. In *Gulf Landings Association, Inc. v. Hershberger*, 845 So. 2d 344 (Fla. 2d DCA 2003), the trial court reserved jurisdiction over the issue of attorneys' fees in a final declaratory judgment rendered in favor of the plaintiff, Hershberger, against his homeowners' association.[19] Hershberger never filed a motion for fees but rather noticed a hearing on the issue.[20] The association asserted that fees could not be awarded without a timely

motion.[21] The trial court granted the plaintiff fees and costs concluding that the plaintiff did not need to comply with Rule 1.525 due to the reservation of jurisdiction.[22]

The Second District reversed the trial court's order, albeit reluctantly, despite the fact that the defendant was aware of the claim for fees and could not have been prejudiced by the procedures used by the plaintiff.[23] The court held that a reservation of jurisdiction could not overrule the plain language of Rule 1.525 and that creating "[s]pecial rules for such circumstances would simply return the courts to an era in which the time for the filing of these motions would again be uncertain."[24]

Recently, the First District Court of Appeal also established its interpretation of the rule in *Braxton v. Morris*, 2005 Fla. App. LEXIS 8112 (Fla. 1st DCA June 1, 2005). In that case, the court sided with the Second District, finding Judge Altenbernd's reasoning in *Lyn v. Lyn*, 884 So. 2d 181 (Fla. 2d DCA 2004), persuasive:

Indeed, if a provision in a final judgment reserving jurisdiction to determine the issue of attorneys' fees were to act as an automatic but indefinite extension of time for filing a written motion, courts would again be faced with determining on a case-by-case basis what length of time thereafter was reasonable for filing a motion for fees, or whether motions for fees filed long after entry of judgment were unreasonably delayed and should be denied. This would undermine the intent of rule 1.525.[25]

The First District agreed with *Lyn* while recognizing that "applying the 30-day requirement under rule 1.525 in such a strict manner may seem harsh or inequitable."[26]

- *The Third and Fourth Districts*

While the First, Second, and Fifth districts have adopted a strict interpretation of Rule 1.525, the Third and Fourth districts allow reservations of jurisdiction to eliminate the 30-day requirement. In *Fisher v. John Carter & Associates, Inc.*, 864 So. 2d 493 (Fla. 4th DCA 2004), the defendant filed a motion for attorneys' fees pursuant to F.S. §57.105 after the various claims against the defendant were dismissed by the trial court.[27] The defendant filed its motion more than three months after the entry of final judgment, and judgment reserved jurisdiction to award fees to the defendant.[28] Despite the plaintiff's argument that the motion was untimely, the trial court entered a final judgment awarding attorneys' fees in favor of the defendant.[29] On appeal, the Fourth District expressly extended the holding in *Gulliver Academy* to the application of Rule 1.525, noting that the rule's language is closely analogous to the time provisions of the two statutes

at issue in that case.[30] Thus, the appellate court allowed the reservation of jurisdiction to extend the time for filing a motion for attorneys' fees.[31]

In *Saia Motor Freight Line, Inc. v. Reid*, 888 So. 2d 102 (Fla. 3d DCA 2004), the Third District adopted the Fourth District's reasoning in *Fisher*, holding that the trial court "may award costs pursuant to a final judgment's reservation of jurisdiction despite a party's failure to comply with the 30-day time period set forth in [Rule] 1.525."[32]

Other Situations in Which Rule 1.525 May Not Apply

In addition to the reservation of jurisdiction exception previously discussed, there are a number of other situations in which Rule 1.525 may not apply.

- *Family Law Cases*

First, Rule 1.525 no longer applies to cases governed by the Florida Family Law Rules of Procedure. Recently, the Florida Supreme Court adopted Rule 12.525 of the Family Law Rules of Procedure, which states: "Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules." This rule went into effect on May 3, 2005. In its analysis, the Supreme Court noted that the Family Law Rules Committee proposed the new rule because "rule 1.525 is ill-fitting to family law matters, and this ill fit may be causing the circuit courts and the district courts of appeal to apply or interpret the rule inconsistently in the context of family law proceedings."[33] There is some controversy, however, over whether Rule 12.525 applies retroactively or to pending cases.[34] It is worth noting that the Fourth District had already carved out an exception to Rule 1.525 in cases involving post-decretal orders in marital dissolution actions.[35]

- *Rule 1.090(b) and the Excusable Neglect Standard*

As mentioned above, the courts have generally held that Rule 1.525 must be construed together with Rule 1.090(b). This allows a party to move for enlargement of time to file a motion for fees prior to the expiration of the 30-day time period outlined in Rule 1.525.[36] Rule 1.090(b) also permits the party seeking fees to move for an enlargement of time to file the proper motion upon a showing of excusable neglect after the deadline has passed.[37] Where excusable neglect is cited by a party as its basis for enlargement of time, the court must still determine whether such neglect has been proven. The Second District has stated that, generally, "excusable neglect cannot be based upon an attorney's misunderstanding or ignorance of the law, but instead must relate to a breakdown in mechanical or operational practices or procedures within the attorney's office."[38]

- *Objection by Opposing Counsel*

The time limit of Rule 1.525 also cannot be invoked to strike an untimely motion where the party opposing the motion fails to make an appropriate objection. Both the Second and Third district courts of appeal have refused to enforce the 30-day time limit when the opposing party failed to object to the late serving of the motion for fees until the issue was brought up on appeal.[39]

- *Stipulations Are Permitted*

The parties may stipulate to an extension of time in which to file a motion for attorneys' fees and costs, thereby circumventing Rule 1.525.[40]

Other Issues to Consider

In addition to all of the uncertainty surrounding the issues discussed above, several questions loom that the courts have yet to clearly decide or even discuss. One issue that has been dealt with on a case-by-case basis is what constitutes a judgment which triggers the time limit in Rule 1.525. The text of the rule states that the time period starts at the time of "filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal." But what constitutes a judgment in this situation? There are various actions that could feasibly end a particular case that are not necessarily judgments.[41]

A common cause for confusion is when a party moves for rehearing following the entry of a judgment. In *Manimal Land Co. v. Randall E. Stofft Architects, P.A.*, 889 So. 2d 974 (Fla. 4th DCA 2004), the trial court had filed a final judgment in favor of the defendant, and subsequently the plaintiff filed a motion for rehearing.[42] Following the trial court's denial of the rehearing, the defendant moved for fees and costs.[43] The trial court denied that motion as it had not been filed within 30 days after the filing of the final judgment.[44] On appeal, the defendant argued that the judgment only became final after rehearing was denied, although providing no case support for that position.[45] The Fourth District affirmed the denial, noting that the Florida Rules of Appellate Procedure state that an order or judgment is rendered when filed with the clerk.[46] Thus, it appears that a motion for rehearing will not extend the deadline of Rule 1.525. The Second District has also adopted this rule.[47]

In some cases, there will be more than one judgment. So which one triggers the rule? In *Doug Hambel's Plumbing, Inc. v. Conway*, 883 So. 2d 375 (Fla. 4th DCA 2004), the Fourth District reversed a trial court's denial of fees and costs where the moving party's statutory basis for fees had not ripened at the time the first judgment was entered. In that case, an initial judgment was entered for the plaintiff awarding damages, but denying a mechanic's lien.[48] The plaintiff appealed the lien denial and the Fourth District reversed and remanded.[49] A second

judgment was then entered by the trial court granting the lien.[50] The plaintiff filed a motion for attorneys' fees less than 30 days after the second judgment, pursuant to F.S. §713.29, which provides for attorneys' fees in mechanic's lien actions.[51] Though the motion was filed more than 30 days after the initial judgment, the Fourth District concluded that denial on that basis was improper because the plaintiff did not have a right to fees until it was awarded the lien in the second judgment.[52]

Another issue that has not been remarked upon by the courts, yet is a plausible scenario in these cases, is the situation where a motion for fees is filed prior to judgment, and a supplemental motion is filed within the 30-day limit. If the supplemental motion does not request the fees discussed in the initial motion, there is the possibility that a court will only award those fees and costs referred to in the supplemental motion. This will likely preclude recovery of a large portion of fees and costs billed early in the litigation. Since no court has issued a written opinion on this issue, it is a good rule of thumb to always ask for the amounts referred to in the initial motion, as well as any additional fees and costs incurred subsequently in the supplemental motion.

Finally, a party may also encounter an issue regarding what kind of document will satisfy the Rule 1.525 requirement that a motion be served. At least one district court has encountered an argument that a hearing notice should be treated as a motion for fees and costs under the rule. In *Hershberger* the plaintiff won a declaratory judgment in which the trial court reserved jurisdiction to determine the plaintiff's entitlement to and the amount of attorneys' fees and costs.[53] Less than a week after the entry of judgment, the plaintiff noticed a hearing on the issue but never filed a formal motion.[54] Despite the protests of the defendant that a motion was never filed, the trial court awarded the plaintiff fees and costs.[55] On appeal, one of the plaintiff's arguments was that the hearing notice satisfied the requirement of a motion under Rule 1.525.[56] The Second District held, however, that the notice did not comply with Rule 1.100(b), which requires that motions "state with particularity the grounds therefor" and "set forth the relief or order sought."[57] The court held that the notice failed to set forth or state either of those things, and thus could not be considered a motion.[58] According to this case, courts will read Rule 1.525 in conjunction with Rule 1.100(b) to decide the issue of what constitutes a motion.

Conclusion

As is evident from the numerous appellate opinions issued discussing Rule 1.525 during its short lifetime, the rule, which was designed to create predictability and stability with regard to the matter of attorneys' fees, has created nothing but headaches for litigators and judges across the state. While the language of the rule seems easy enough to

understand, attorneys have attempted to create various loopholes to either defend against or employ Rule 1.525. A successful litigator, however, will bear in mind the issues discussed above so as not to be blindsided by a court ruling that would appear to be directly contrary to the "plain language" of the rule. Although the state appellate courts have interpreted Rule 1.525 differently, it is clear that a party seeking attorneys' fees can avoid this issue by promptly serving any motions for fees and costs within 30 days after final judgment is entered, regardless of which jurisdiction that party is in.

[1] *Lyn v. Lyn*, 884 So. 2d 181, 183 (Fla. 2d D.C.A. 2004).
[2] *Carter v. Lake County*, 840 So. 2d 1153, 1156 (Fla. 5th D.C.A. 2003).
[3] *Id.* at 676-77.
[4] **Fla. R. Civ. P.** 1.090(b) states: "When an act is required or allowed to be done at or within a specified time by order of court, by these rules, or by notice given thereunder, for cause shown the court at any time in its discretion (1) with or without notice, may order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made and notice after the expiration of the specified period, may permit the act to be done when failure to act was the result of excusable neglect, but it may not extend the time for making a motion for new trial, for rehearing, or to alter or amend a judgment; making a motion for relief from a judgment under rule 1.540(b); taking an appeal or filing a petition for certiorari; or making a motion for a directed verdict."
[5] *Gulliver Academy*, 694 So. 2d at 676-77.
[6] *Id.* at 677.
[7] *Id.*
[8] As discussed *infra*, Rule 1.525 no longer applies to family law proceedings under Fla. R. Fam. Law Proc. 12.525 (2005). *Wentworth v. Johnson*, 845 So. 2d 296 (Fla. 5th D.C.A. 2003), was decided prior to the enactment of Rule 12.525.
[9] *Wentworth*, 845 So. 2d 296, 299 (Fla. 5th D.C.A. 2003).
[10] *Id.* at 298.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 299-300.

[19] *Hershberger*, 845 So. 2d 344, 345 (Fla. 2d D.C.A. 2003).
[20] *Id.* For further discussion regarding what constitutes a motion for the purposes of Rule 1.525, and whether a hearing notice is sufficient, see *infra* section "Other Issues to Consider."
[21] *Id.*
[22] *Id.*
[23] *Id.* at 345-46.
[24] *Id.* at 346 (citing *Wunderle v. Fruits, Nuts & Bananas, Inc.*, 715 So. 2d 325 (Fla. 2d D.C.A. 1998)).
[25] *Lyn*, 884 So. 2d 181, 185 (Fla. 2d D.C.A. 2004).
[26] *Braxton*, 2005 Fla. App. LEXIS 8112, at *7.
[27] *Fisher*, 864 So. 2d 493, 494 (Fla. 4th D.C.A. 2004).
[28] *Id.*
[29] *Id.*
[30] *Id.* at 495-96.
[31] It should be noted, however, that the Fourth District is not without its loyal dissenters on this issue. In *Manimal Land Co. v. Randall E. Stofft Architects, P.A.*, 889 So. 2d 974 (Fla. 4th D.C.A. 2004), Judge Larry Klein stated that in his opinion, *Fisher* could not be reconciled with Rule 1.525. *Id.* at 976 (Klein, J., concurring). He specifically noted: "A reservation of jurisdiction in a final judgment to award attorney's fees is not a logical basis on which to make an exception to rule 1.525, because such a reservation of jurisdiction is unnecessary and accordingly of no effect." *Id.* (citing *Finkelstein v. North Broward Hosp. Dist.*, 484 So. 2d 1241 (Fla. 1986)).
[32] *Saia*, 888 So. 2d 102, 104 (Fla. 3d D.C.A. 2004), on review, 903 So. 2d 190 (Fla. 2005).
[33] *Amendments to the Florida Family Law Rules of Procedure (Rule 12.525)*, 897 So. 2d 467, 467 (Fla. 2005). The court further stated: "The method of taxation of attorneys' fees and costs in family law cases is quite different from that in civil litigation. Whereas the former is based on need and ability of the parties to pay, the latter is based on prevailing party considerations." *Id.*
[34] *Compare Smith v. Smith*, 902 So. 2d 859 (Fla. 1st D.C.A. 2005) with *Reddell v. Reddell*, 900 So.2d 670 (Fla. 5th D.C.A. 2005); *compare Gosselin v. Gosselin*, 869 So. 2d 667 (Fla. 4th D.C.A. 2004), *with Nicoletti v. Nicoletti*, 902 So.2d 215 (Fla. 2d D.C.A. 2005).
[35] *Gosselin,* 869 So. 2d 667 (Fla. 4th D.C.A. 2004).
[36] **Fla. R. Civ. P.** 1.090(b)(1); *see also Southtrust Bank*, 886 So. 2d at 395; *Lyn*, 884 So. 2d at 185; *Carter*, 840 So. 2d at 1156.
[37] **Fla. R. Civ. P.** 1.090(b)(2); *see also Wentworth*, 845 So. 2d at 299-300 (noting that Rule 1.090 specifically lists the types of motions to which it does not apply).
[38] *Lyn*, 884 So. 2d at 185; *see also Carter*, 840 So. 2d at 1156 (noting that the plaintiff contended that the "missed deadline was the result of

excusable neglect based on a breakdown of the tickler and calendar systems in his office").

[39] *See Moss v. Moss*, 2005 Fla. App. LEXIS 3225, at *2 (Fla. 2d D.C.A. March 11, 2005); *Brungart v. Smallwood*, 901 So.2d 247 (Fla. 3d D.C.A. 2005).

[40] *Lyn*, 884 So. 2d at 185.

[41] *See id.* at 185 n.3 ("We note that rule 1.525 refers to a 'judgment' and not a 'final judgment' or a 'final order.' It is not entirely clear that these terms are interchangeable in the context of the rule.").

[42] *Manimal Land. Co.*, 889 So. 2d 974, 975 (Fla. 4th D.C.A. 2004).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* (citing **Fla. R. App. P.** 9.020(h)).

[47] *See Clampitt v. Britts*, 897 So. 2d 557, 557 (Fla. 2d D.C.A. 2005).

[48] *Conway*, 883 So. 2d 375, 376 (Fla. 4th D.C.A. 2004).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Hershberger*, 845 So. 2d 344, 345 (Fla. 2d D.C.A. 2003).

[54] *Id.*

[55] *Id.*

[56] *Id.* at 346.

[57] *Id.*

[58] *Id.*

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[Updated: 07-01-2005]

MINUTES
Probate & Trust Litigation Committee Meeting
Bonita Springs May 22, 2008

Call to Order. The meeting of the Committee was called to order by the Chair, Bill Hennessey, at approximately 2:00 p.m.

Approval of Minutes. The Minutes of the meeting of the Committee held in Gainesville in April, 2008, were approved as presented without correction or amendment.

Preliminary Discussion. The Committee Roster was circulated and updated and the members introduced themselves. The Chair announced that the next committee meeting would be held in July 2008 at the Breakers in Palm Beach in connection with the Executive Council meeting.

Recognition of Sponsor. Bill Hennessey thanked Tim Bronza and Business Valuation Analysts, LLC for their decision to renew their sponsorship of the Probate and Trust Litigation Committee. Tim Bronza could not be present at the meeting. Committee members were encouraged to support Tim and personally thank him for his sponsorship.

CLE Credit. The Chair informed the members that CLE credit will be applied for following each meeting. The course numbers for the CLE credit will be forwarded by e-mail.

2009 Estate and Trust Symposium. The Chair encouraged persons interested at speaking at the 2009 Estate and Trust Symposium to submit proposed topics for consideration. It is anticipated that the 2009 Symposium will consist of a number of panels. The first set of panels will consist of a drafting attorney and a litigator to discuss various drafting/litigation issues in probate. The second set will discuss will and trust contest

proceedings and model examinations of a drafting lawyer, expert witnesses, and treating physicians.

House Bill 435- Payment of Trustee Attorney's Fees. A copy of the latest draft of House Bill 435 addressing Florida Statutes § 736.0802(10) was circulated. Hennessey led a discussion concerning the changes to the statute and the status of the bill, which is expected to pass this year.

Appellate Rule Project. Subcommittee members: Tom Karr, Peter Sachs, Shane Kelley. The final version of the appellate rule submitted by the Appellate Rule Project Subcommittee was approved by the full Committee. The subcommittee was asked to contact the Appellate Rules Committee of the Florida Bar to begin their review of the proposed rule. Before submitting the rule to the Executive Council, the subcommittee will work with Appellate Rules Committee to gauge their support for the proposal.

Collateral attack on spousal rights based upon undue influence, fraud, or duress in procuring marriage. Bill Hennessey, John Moran, Laura Sundberg, Larry Miller, and Russ Snyder. Bill Hennessey and John Moran led a lengthy discussion concerning the legislation proposed by the subcommittee. The Committee focused on the scope of the proposed statute. One suggestion was that the statute should be revised so that it applies to "any and all rights that inure solely by virtue of the marriage," but that specific exceptions should be listed. The majority of the Committee favored an approach that lists the inheritance and property rights of the surviving spouse that are affected. It was also suggested that a surviving spouse's immunity from the presumption of undue influence be removed as a right.

The Committee also discussed the applicable burden of proof. A majority of the Committee was of the opinion that a "clear and convincing" burden of proof would be too difficult to

apply to the often secretive and clandestine instances of undue influence that this statute targets.

In addition, concerns arose regarding the statute's application to notice to and liability of insurance companies, banks or other obligors. It was suggested that the subcommittee consider adding F.S. § 733.802's notice provisions.

The subcommittee will work on an updated draft for consideration at the Palm Beach meeting.

Time limit for seeking attorneys' fees and costs after final order in probate and trust proceedings. Angela Adams, Eric Virgil, Laura Sundberg. The subcommittee's White Paper was circulated. The Committee discussed whether legislation or a fix to the Florida Probate Rules is appropriate to address when motions to tax fees and costs must be filed in probate and trust proceedings. The Committee discussed the types of cases in which a motion for fees and costs can be filed and the potential application of Rule of Civil Procedure 1.525 to each instance. The Committee ultimately decided that this is a worthwhile project and that we should consider options to either exempt probate and trust proceedings from the application of Rule 1.525 or better define when it is applicable. The subcommittee was charged with leading and facilitating further discussion on these issues by putting together proposals for consideration.

Arbitration in Probate Proceedings. Bob Goldman gave a brief presentation on the status of the ACTEC Model Arbitration Statute. A full presentation will be made in the future and consideration will be given to the model statute.

Adjournment. The meeting was adjourned at 4:00 p.m.

ITEM 5

Proposed Rule 9-110(a)(2)

(a) Applicability. This rule applies to those proceedings that

(2) Seek review 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, and include, but are not limited to the following orders:

(A) determining a petition or motion to revoke letters of administration or letters of guardianship;

(B) determining a petition or motion to revoke probate of a will;

(C) granting or denying a petition for administration pursuant to section 733.2123;

(D) determining heirship, succession, entitlement, or the persons to whom distribution should be made;

(E) removing or refusing to remove a fiduciary;

(F) refusing to appoint a personal representative or guardian;

(G) determining a motion or petition to restore capacity;

(H) determination of apportionment or contribution of estate taxes;

(I) determining an estate's interest in any property;

(J) making distributions to any beneficiary;

(K) determining entitlement to elective share;

(L) determining amount and ordering contribution in satisfaction of elective share;

(M) determining a motion or petition for enlargement of time to file a claim against an estate;

(N) determining a motion or petition to strike an objection to a claim against an estate;

(O) determining a motion or petition to extend the time to file an objection to a claim against an estate;

(P) determining a motion or petition to enlarge the time to file an independent action on a claim filed against an estate;

(Q) settling an account of a personal representative, guardian, or other fiduciary;

(R) discharging a fiduciary or discharging the fiduciary's surety;

(S) approving a settlement agreement on any of the matters listed above in (A) through (R) or authorizing a compromise pursuant to Florida Statutes § 733.708.