

Offensive Measures in Probate and Trust Litigation
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1. **Temporary Injunctions:**

- a. **Purpose:** Maintain the status quo for disputing parties until court can resolve their dispute; prevent a threatened injury.
- b. **Requirements:**
 - i. Party seeking injunction must specifically request one.
 - ii. The trial court must make clear, definite and unequivocally sufficient factual findings supporting each of the required elements before entering a temporary injunction. Fla.R.Civ.P. 1.610(c).
 - iii. Party seeking temporary injunction must prove:
 - (1) That the plaintiff will suffer irreparable harm absent the entry of the injunction;
 - (2) That no adequate legal remedy exists;
 - (3) That the plaintiff enjoys a clear legal right to the relief sought; and
 - (4) That the injunction will serve the public interest.
 - iv. Notice is not required if:
 - (1) Attorney certifies in writing any efforts made to give notice or reasons why notice should not be required; and
 - (2) Order gives the reasons why the order was granted without notice if notice was not given.
- c. **Recent Trust Cases:**
 - i. *McKeegan v. Ernst*, 84 So.3d 1229 (Fla. 4th DCA 2012):
 - (1) Confirms that the traditional standards controlling the issuance of temporary injunctions apply in *trust* litigation.
 - (a) Note: Traditional standards controlling the issuance of temporary injunctions do *not* constrain a probate judge in estate litigation. *See In re Estate of Barsanti*, 773 So.2d 1206 (Fla. 3d DCA 2000). Instead, probate judge has broad discretion to monitor the administration of an estate and to take such appropriate action as it may deem necessary to preserve the assets of the estate for the benefit of the ultimate beneficiaries. *Estate of Conger*, 414 So.2d 230 (Fla. 3d DCA 1982).
 - (2) Judge is required to enter detailed findings of fact based on the evidence and reasons for not giving notice before granting the injunction.
 - ii. *Saunders v. Butler*, — So.3d —, 2013 WL 514057 (Fla. 2d DCA 2013):
 - (1) Ward's guardian sought temporary injunction against ward's step-daughter to prevent step-daughter from withdrawing assets of ward's trust and to suspend step-daughter as trustee of ward's trust.

- (2) Is an evidentiary hearing necessary? No- a verified motion with sworn testimony is enough.
 - (a) Veracity of the allegations is subject to challenge by a motion to dissolve the temporary injunction.
- (3) BUT: Still need detailed factual findings in order.
- iii. *McKinnon v. Weinstein*, — So. 3d —, 2013 WL 3237839 (Fla. 5th DCA 2013):
 - (1) Temporary injunction entered freezing trust assets. Beneficiaries brought action against trustee to force distributions.
 - (2) Have to appeal the initial injunctive order to preserve your objections. A later motion asking to set aside the injunction is not sufficient.
 - (3) Again, the order *must* state detailed factual findings.

2. **Receivership:**

- a. **Purpose:** Receiver will take custody of trust or estate funds which are the subject of the litigation and will preserve the property, and receive rents, issues and profits; Receiver is an officer of the court.
- b. **Requirements:**
 - i. Notice requirements are the same as for temporary injunctions, above. Fla.R.Civ.P. 1.620(a).
 - (1) Note: Actual notice, rather than service of process *may* be enough. *Overseas Dev., Inc. v. Krause*, 323 So. 2d 679 (Fla. 3d DCA 1975).
 - ii. Party seeking receivership must have sufficient connection to the subject property- the owner, individual with clear legal right to it, judgment and other lien creditors (but not mere contract creditors).
 - (1) Must have clean hands! *Johnson v. McKinnon*, 45 Fla. 388 (1903).
 - iii. Decision lies within the court's discretion (cannot be secured by agreement/stipulation of the parties), but court must follow the following rules:
 - (1) Exercise great circumspection;
 - (2) Claimant must appear to have title or a lien on the property;
 - (3) Court is satisfied that a receiver is necessary to preserve the property;
 - (4) Court finds that fraud or imminent danger will occur, if immediate possession is not taken by the court; and
 - (5) Applicant must show that he or she is likely to succeed in recovering the property or a portion thereof in the underlying litigation and that no other remedy is adequate.
 - (a) Factors court may consider: whether the property owner fraudulently obtained the property, whether the property owner was unlawfully disposing of the property, and whether the property was susceptible to deterioration.
 - iv. Is a hearing required? Typically, but applications without a hearing may be granted if they out, through verified allegations, specific facts justifying the

extraordinary relief sought. *Phillips v. Greene*, 994 So.2d 371 (Fla. 3d DCA 2008); *DeSilva v. First Cmty. Bank of America*, 42 So. 3d 285 (Fla. 2d DCA 2010).

3. **Administrator Ad Litem:**

- a. **Purpose:** Ad Litem will protect the interests of the estate when the personal representative is or may be interested adversely to the estate or is enforcing his or her own debt to claim against the estate.
- b. **Requirements:**
 - i. Estate must be represented and personal representative is unable to do so. Fla. Stats. § 733.308.
 - ii. No bond or notice requirement. Rule 5.120, FPR.

4. **Curator:**

- a. **Purpose:** Typically used when there is a delay in the appointment of a personal representative and a fiduciary is needed to take charge of the estate assets.
- b. **Requirements:**
 - i. Formal notice to persons entitled to letters of administration, unless there is great danger that property is likely to be wasted, destroyed or removed beyond the jurisdiction of the court and if the appointment of a curator would be delayed by giving notice. Fla. Stats. § 733.501(1).
 - ii. By order of the court, can perform any duty or function of a personal representative. Rule 5.122, FPR.
 - iii. In limited circumstances, court may refuse to appoint the personal representative named in the will- but need evidentiary hearing and/or proof of allegations showing extraordinary measure of appointing curator is necessary. *In re Estate of Miller*, 568 So.2d 487 (Fla. 1st DCA 1990).

5. **Prohibition on Payment of Attorney's Fees:**

- a. **Purpose:** Attempts to prohibit trustee from paying his or her attorney's fees or costs when a claim or defense based on breach of trust is made against that trustee.
- b. **Requirements:**
 - i. Party must obtain a court order to prohibit the trustee from taking fees from the trust. Fla. Stats. § 736.0802(10)(b).
 - ii. 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. Fla. Stats. § 736.0802(10)(b).
 - iii. What do you have to show? Breach of trust sufficient to prohibit a trustee from paying his or her fees from the trust assets is a "violation of either the trust's terms or the trustee's general fiduciary obligations." *Covenant Trust Co. v. Guardianship of Ihrman*, 45 So.3d 499 (Fla. 4th DCA 2010), citing BLACK'S LAW DICTIONARY 201 (8th ed. 2004).
 - iv. How much evidence is appropriate?
 - (1) Unclear! But Fla. Stats. § 768.72(1), dealing with claims for punitive damages, contains similar language to Fla. Stats. § 736.0802.
 - (a) Under Fla. Stats. § 768.72(1), must do more than merely set forth conclusory allegations. *See T.W.M. v. American Medical*

- Sys., Inc.*, 886 F.Supp. 842, 845 (N.D. Fla. 1995)
- (b) Could include depositions, interrogatories, and requests for admissions that have been filed with the court, but an evidentiary hearing with testifying witnesses and evidence is not necessary. *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637 (Fla. 5th DCA 2005).
 - (c) Make a showing of “specific acts committed by a defendant.” See *Bankest Imports, Inc. v. ISCA Corp.*, 717 F.Supp.1537 (S.D. Fla. 1989).
- (2) What is a “proffer”? An offer of evidence; does not require an adjudication of the veracity of the evidence nor countervailing evidence. *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637, 642 (Fla. 5th DCA 2005).