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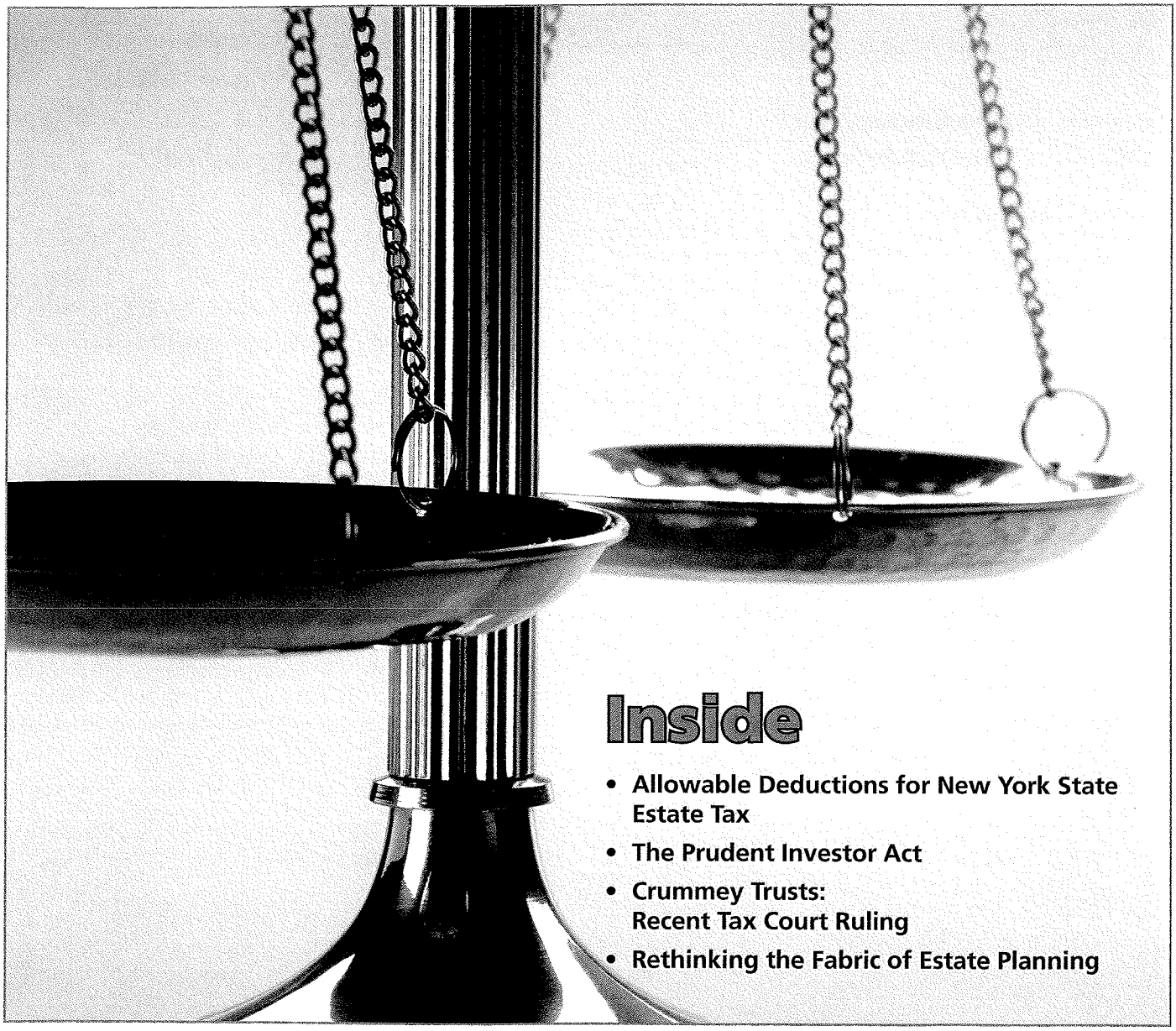

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Florida Update

By David Pratt and Jonathan A. Galler

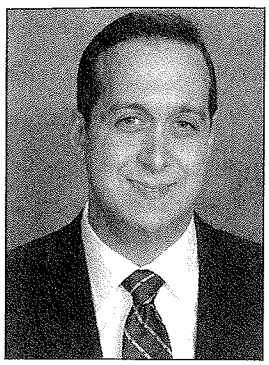
David Pratt

DECISIONS OF INTEREST

Trustee's Reasonable Compensation

Florida's Trust Code authorizes the payment of compensation to a trustee but, unlike the treatment of compensation for a personal representative, the Trust Code does not provide an actual schedule of fees that are presumed to be reasonable. Instead, the statute simply provides for "compensation that is reasonable under the circumstances." Fla. Stat. § 736.0708(1). And, in most instances, trust instruments do not include a specific provision addressing the calculation of trustee compensation. As a result, trustees in Florida are left to discern what a court may deem to be reasonable compensation under the statute. In this recent case, the decedent was, in the words of the Second District Court of Appeal, an "iconic and prolific artist and philanthropist." The sole remainder beneficiary of his trust was a foundation, which challenged an award of nearly $25 million in compensation for the trust's three individual trustees. The foundation argued that the trial court should have calculated the trustees' compensation using the lodestar method typically used in calculating attorneys' fees (*e.g.*, essentially hours reasonably expended multiplied by reasonable hourly rates). The trial and appellate courts, however, rejected that argument and held, instead, that trustee compensation is calculated by considering a series of factors outlined in the seminal case of *West Coast Hospital Ass'n v. Florida National Bank of Jacksonville*, 100 So. 2d 807 (Fla. 1958). These include factors such as the capital and income received and disbursed by the trustee, the wages customarily granted to agents for like work in the community, the success or failure of the administration of the trustee, the time consumed, and the character of the work done. Here, the appellate court held that the trial court correctly applied the various *West Coast* factors to the circumstances of the case and noted that, on the trustees' watch, the trust assets at issue had increased in value from approximately $605 million to approximately $2.1 billion.

Robert Rauschenberg Found. v. Grutman, 2016 WL 56456 (Fla. 2d DCA Jan. 6, 2016) (not yet final).



Jonathan A. Galler

Elective Share Not Reduced by Estate's Attorneys' Fees

In the words of Florida's Fourth District Court of Appeal, reiterated in this recent case, a "surviving spouse's elective share is purely a creature of statute created by Florida's Legislature as a replacement for the common law doctrine of dower and curtesy." The purpose of that statutory creature is "to ensure provision for a surviving spouse's needs." With that public policy interest in mind, the appellate court was called upon to decide whether a spouse's elective share can be reduced by a portion of the attorneys' fees incurred by the personal representative in litigating claims against the estate. The Fourth District held that the elective share may not be reduced by such attorneys' fees. Florida's elective share statute provides that the elective share consists of an amount equal to 30 percent of the fair market value of all assets identified in the statute, computed after deducting (i) all valid claims against the estate, and (ii) all mortgages, liens or security interests on the assets. Fla. Stat. § 732.207. Because the statute does not include attorneys' fees among the types of expenses or costs that are to be deducted from the value of those assets, the Fourth District held that it is improper for the personal representative to reduce the elective share by a portion of the attorneys' fees incurred in litigating claims against the estate.

Blackburn v. Boulis, 2016 WL 231405 (Fla. 4th DCA Jan. 20, 2016) (not yet final).

Renunciation Not Always Required in Trust Contest

The equitable doctrine of renunciation demands that before a plaintiff will be permitted to contest a trust in which he or she has a beneficial interest, the contestant must renounce any such interest in the trust. Under Florida law, a contestant satisfies this requirement by making a qualified or conditional renunciation, typically in the pleading itself, through which he or she renounces any interest in the trust that is under attack; but if the trust contest fails, that renunciation is automatically withdrawn, and the contestant reverts to his or her original position. The Fourth District Court of Appeal, however, recently re-

versed a trial court's decision to dismiss a trust contest in which the contestant failed to renounce his interest in the trust. The trust at issue had been amended five times. The plaintiff contested the validity of the fourth and fifth amendments but did not renounce his interest in the trust and did not return the trust assets that had already been distributed to him. The trial court dismissed the complaint on that basis, but the appellate court reversed because under the third amendment to the trust—the document that the plaintiff was seeking to reinstate—the plaintiff would have been entitled to a greater interest than that which he was entitled to under the trust amendments he was challenging. The appellate court held that, under these factual circumstances, the policy behind the renunciation rule did not mandate that the plaintiff renounce his interests or return the assets already received.

Gossett v. Gossett, 182 So. 3d 694 (Fla. 4th DCA 2015).

Personal Representative Not Always an Indispensable Party

In Florida, the personal representative of an estate is an indispensable party to a will contest and nearly every other type of contested and uncontested probate proceeding. An indispensable party is one who is so essential to a suit that no final orders can be rendered without the party's participation as a party to the proceeding. It may be surprising, then, to learn that the personal representative is not an indispensable party to a lawsuit challenging a series of transfers made during a decedent's lifetime. In this recent case, the plaintiffs filed a complaint after the decedent's death seeking to set aside the decedent's lifetime transfer of property on grounds of tortious interference with an inheritance and unjust enrichment. The trial court dismissed the complaint because the plaintiffs failed to name the decedent's personal representative as a party to the lawsuit. The trial court relied, in part, on section 733.607(1), Florida Statutes, which provides that a personal representative has the right to and shall take possession of the decedent's property. The appellate court reversed, holding that the statute gives the personal representative rights only to property that remains in the decedent's possession at death. Because the properties at issue were not in the decedent's possession at the time of his death, the appellate court held that the personal representative was not an indispensable party to a lawsuit challenging the lifetime transfers of those properties.

Parker v. Parker, 2016 WL 404636 (Fla. 4th DCA Feb. 3, 2016) (not yet final).

Beneficiaries' Right to Intervene in Trust Proceedings

Florida Rule of Civil Procedure 1.230 provides that anyone claiming an interest in a pending litigation may be permitted to assert his or her rights by intervening in the litigation. This can be an important procedure in Florida trust proceedings, which are governed by the rules of civil procedure, because many people can often claim an interest of one sort or another in such a proceeding. For example, in a recent case decided by the Fourth District Court of Appeal, the beneficiaries of a trust moved to intervene in an attorneys' fees dispute that was being waged between the current trustee and the attorney for the predecessor trustee. As the appellate court stated, on a motion to intervene, a trial court must first determine if a person's interest is of such a direct and immediate character that the intervenor will either gain or lose by direct operation and effect of the judgment. Further, if the court allows intervention, it must then determine the parameters of the intervention. Notably, courts have held that the intervention should be limited to the extent necessary to protect the interests of all parties. The issue before the appellate court in this case was whether the trial court's order, which granted intervention but prohibited the beneficiaries from filing papers or engaging in discovery, had limited the intervention to such an extent that it effectively constituted an improper denial of the motion. The appellate court held that the beneficiaries were proper intervening parties because they stood to lose $150,000 of their inheritance if the attorney for the predecessor trustee was successful, but the appellate court held that the trial court erred in limiting the beneficiaries' participation to such an extent that they would be unable to effectively protect their own interests.

Genauer v. Downey & Downey, P.A., 41 Fla. L. Weekly D136 (Fla. 4th DCA Jan. 6, 2016) (not yet final).

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