

**IN THE SUPREME COURT
STATE OF FLORIDA**

Case No. SC-09-1354

DANA BRIGHAM, individually and as trustee of the Defendant trusts, and
PATRICIA BRIGHAM, individually and as successor trustee of the
Defendant trusts,

Petitioners,

v.

EDWARD BRIGHAM, SANDRA FORBES BERAN, DANA FORBES,
ROBIN FORBES and ALLEN FORBES,

Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD
DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

It is indeed a sad day when an attorney having so many virtues important to the honor of the legal profession falls victim to the vice of avarice. However, neither praise of past glory and good deeds, nor mere disappointment with the frailties of humanity can substitute for our duty to properly protect the citizens of Florida. There is certainly a lesson for all lawyers to learn from these most unfortunate of circumstances: Always honor and never betray the oath that grants one the privilege to be a Florida lawyer, no matter how much or how little money may entice.

Florida Bar v. Korones, 752 So. 2d 586, 592 (Fla. 2000).

Petitioners Dana Brigham (“Dana”) and Patricia Brigham (“Patricia”) (a lawyer and his wife) willfully converted their elderly mother’s assets to themselves. Petitioners are the son and daughter-in-law of Marion Brigham (“Marion”), who died in 2002 at age 98. Dana was Marion’s lawyer and trustee of numerous trusts she established, including the EFP Trust. Patricia was Marion’s de facto trustee and her employee/bookkeeper. Prior to Marion’s death, Dana and Patricia fraudulently converted millions of dollars of their mother’s assets to themselves, without her knowledge and at the expense of Respondents, who were beneficiaries under Marion’s trusts. The assets that they fraudulently removed from Marion’s estate include 800 acres of North Carolina land called Brigham Tree Farms. Dana, as sole trustee, transferred this property to himself by creating a new trust, of which he was the sole beneficiary, and transferring the property from a separate trust, of which the Respondents were two-thirds beneficiaries. Marion

did not execute this new trust, did not execute the deed conveying the property, and did not sign a written assignment of her interest in the property as required by the clear and unambiguous terms of the EFP Trust. Dana also did not obtain prior court approval for this transfer (or any of the other illicit transfers), required by §737.403, Fla. Stat. These transfers were solely for Petitioners' benefit, and caused the substantial depletion of Respondents' inheritance.

In its Opinion ("the Opinion"), the Third District reversed the trial court's judgment in favor of Dana and Patricia and explained that "as a matter of law, the trial court should have voided [the] transfer and required Dana and Patricia to return the proceeds to the EFP Trust for distribution pursuant to that trust document." Brigham v. Brigham, 11 So. 3d 374, 381 (Fla. 3d DCA 2009). The district court held that §737.403, Fla. Stat., required Dana, as trustee, to seek prior court approval if exercising his power involved a conflict of interest.¹ Id. at 383.

The district court also found that the transfers "violated the clear and unambiguous terms of the applicable trusts which required a 'writing' and/or 'assignment' signed by the beneficiary and/or the grantor of the trusts, which was Marion." Id. at 381. In addition, the district court found that because the trust terms were unambiguous, the trial court improperly considered extrinsic evidence

¹ The Opinion is consistent with prior decisions analyzing this statute. See Keye v. Gautier, 684 So. 2d 210 (Fla. 3d DCA 1996); Bailey v. Leatherman, 615 So. 2d 810 (Fla. 3d DCA 1993); Barnhart v. Hovde, 490 So. 2d 1271 (Fla. 5th DCA 1986); Brigham v. Brigham, 934 So. 2d 544 (Fla. 3d DCA 2006).

of Marion's intent. Id. at 386. As a result, the district court held that Petitioners breached their fiduciary duties. Id. at 387.

SUMMARY OF THE ARGUMENT

The Third District correctly ruled that Dana was required to seek court approval before making the transfers to himself, and that the transfers contradicted the unambiguous terms of the trust. Petitioners fail in their attempt to conjure up a conflict of decisions as the purported conflicts Petitioners assert are all fabrications and do not even raise a colorable basis to support jurisdiction. Moreover, there is no statement within the four corners of the Opinion that indicates a conflict with any of the cases cited by Petitioners, which places the Brigham decision squarely outside the purview of this Court's discretionary review jurisdiction.

The arguments raised by Petitioners supporting conflict jurisdiction fail because there is no conflict regarding: (1) the difference between the duties of trustees of land trusts and ordinary trusts since the Opinion held that the trusts at issue were not land trusts under Florida law; (2) the retroactivity of §689.071, Fla. Stat., as the statute's own terms provide for its retroactive application; (3) in rem jurisdiction since the decisions cited by Petitioners are inapplicable to this case and because the district court did not determine the validity of a deed; (4) the admissibility of extrinsic evidence in construing a trust since the district court did not resolve any ambiguities in interpreting the trust's provisions and because

Petitioners misstate the holding of the decisions they rely upon; and (5) substitution of the district court's judgment for that of the trial court because the district court acted properly under its *de novo* standard of review.

ARGUMENT

I. Conflict Jurisdiction Does Not Exist Because The Opinion Resolved a Different Question of Law Than Those Decided in Petitioners' Cases.

This Court does not have conflict jurisdiction over this case. Article V, Section 3(b)(3) permits this Court to review a district court decision when it “expressly and directly” conflicts with another decision. Petitioners seek this Court's jurisdiction, claiming that the rules of law in the Opinion conflict with decisions of this Court or another district court of appeal.²

Fatal to Petitioners' claim of jurisdiction is that none of the purported conflicts raised by Petitioners appear within the four corners of the Opinion. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The only facts relevant to determining whether the Court has jurisdiction to review the Opinion are “those facts contained within the four corners of the decisions allegedly in conflict.” Id. Therefore, this Court should disregard any arguments to issues outside of the four corners of the Opinion. For this reason, along with the others raised below, this Court does not have conflict jurisdiction to review the Opinion.

² Despite seeking rehearing *en banc* from the district court, Petitioners did not seek certification that the Opinion conflicts with other decisions.

A. There is No Conflict Regarding Trustee Duties.

Petitioners argue that the Opinion conflicts with Florida Bar v. Hughes, 824 So. 2d 154 (Fla. 2002), Taylor v. Richmond's New Approach Ass'n, Inc., 351 So. 2d 1094 (Fla. 2d DCA 1977), and Janien v. Janien, 939 So. 2d 264 (Fla. 2007), because they claim the district court held that trustees of land trusts and ordinary trusts have the same fiduciary duties. No conflict exists because the district court held that the EFP Trust was **not** a land trust under Florida law "because Dana . . . failed to include the formalities in the Deed required to create a Florida Land Trust" and is therefore subject to §737.403. Brigham, 11 So. 3d at 384. This Court should not accept jurisdiction on this basis as the district court never made a holding related to the duties of a trustee of a land trust.

Even if the EFP Trust was a land trust, it would still be subject to § 737.403. See Svadbik v. Svadbik, 776 So. 2d 968, 970 (Fla. 3d DCA 2000)(§737.402 applies to land trusts); Brevard County v. Ramsey, 658 So. 2d 1190, 1196 (Fla. 5th DCA 1995)(applying §737.401 to a land trust and stating "Perhaps all trusts are supplied with any absent provisions of the duties and powers by Chapter 737."). Also, §689.071(5) of the Florida Land Trust Act directly refers to Chapter 737.

Moreover, the district court did not expressly decide that a trustee of a land trust is subject to the same fiduciary duties as a trustee of an ordinary trust, as Petitioners argue. The similarities between the duties of these trustees, which the

district court mentioned by quoting from In re Saber, 233 B.R. 547 (Bkrctcy. S.D. Fla. 1999),³ formed the basis of its reasoning that the EFP Trust is subject to 737.403 **even if** it were a land trust. Brigham, 11 So. 3d at 384. Under Gibson v Maloney, 231 So. 2d 823, 824 (Fla. 1970), such conflicts of reason do not give rise to jurisdiction.

B. There Is No Conflict on the Retroactivity of the Florida Land Trust Act.

Petitioners argue that by retroactively applying §689.071 of the Florida Land Trust Act to the 1991 EFP Trust, the Opinion conflicts with Metropolitan Dade County v. Chase Fed. Housing Corp., 737 So. 2d 494, 503 (Fla. 1999), which decided whether the legislature intended that another statute be applied retroactively. Petitioners are incorrect for several reasons.

Again this issue is not contained within the four corners of the Opinion. Moreover, the rules of law regarding retroactivity applied in Metropolitan do not apply here. An amended version of §689.071, Fla. Stat., explicitly states that the Act “*applies to all land trusts whether created before, on, or after October 1, 2006.*” Thus, by its terms, the Florida Land Trust Act applies to the 1991 EFP Trust. Thus, conflict jurisdiction does not exist and this Court should decline jurisdiction.

³ Petitioners’ overemphasis on Saber’s isolated quote discussing the similarities between trustees’ duties confuses the district court’s decision with its reasoning.

C. Conflict Jurisdiction Does Not Arise Regarding Applicability of Florida Law to the Transfer of the Brigham Tree Farms.

Petitioners contend that the Opinion conflicts with Thomson v. Kyle, 23 So. 12, 16 (Fla. 1897), and Ruth v. Dept. of Legal Affairs, 684 So. 2d 181, 185-86 (Fla. 1996) because: (1) the laws of the state where real property is situated governs the transfer of the property; and (2) a court with in personam jurisdiction cannot enter a final judgment affecting the title of the realty unless it also has in rem jurisdiction. This issue does not appear within the four corners of the Opinion. Moreover, these decisions are inapplicable to this case as the EFP Trust provides that Florida law governs the construction and enforceability of the trust, including the trustee's power to transfer real property out of the trust. Thus, the EFP Trust provides that Florida law must govern the transfer of Brigham Tree Farms. Similarly, Petitioners' reliance upon Grammer v. Roman, 174 So. 2d 443, 446 (Fla. 2d DCA 1965), to assert that §689.071 does not apply to the transfer, as it only applies to deeds which transfer an interest in Florida realty, is also inapplicable.

Ruth also does not apply since the Opinion does not affect title to the Brigham Tree Farms. The district court held that Dana wrongfully transferred the property to himself, in violation of §737.403 and in contradiction of the terms of the trust documents.⁴ This finding is not a basis for conflict jurisdiction as the

⁴ In fact, the district court could not enter a final judgment affecting the title of Brigham Tree Farms since Dana had sold the property to a non party in 2001.

district court merely adjudicated the parties' rights. See Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958).

D. Westerman and Cripe do not Provide a Basis for Jurisdiction Because the Lower Court did not Re-Weigh Evidence or Substitute its Judgment for that of the Trial Court.

Petitioners argue that the Opinion conflicts with Westerman v. Shell's City, Inc., 265 So. 2d 43, 44 (Fla. 1962), and Cripe v. Atlantic First Nat'l Bank of Daytona Beach, 422 So. 2d 820, 821 (Fla. 1982), which they contend hold that appellate courts cannot not re-weigh evidence and substitute their judgment for that of the trier of fact. This argument fails. Petitioners raise this argument for the first time in this appeal which bars the Court's consideration of the argument.⁵

Moreover, the Opinion does not hold that the district court re-weighed the evidence, nor did it. The district court did not re-weigh evidence and acted within the scope of its *de novo* review in holding that Petitioners owed fiduciary duties to Marion and breached these duties.⁶ The court appropriately found that the trial court improperly applied the law to the case and held that the trial court "erred by requiring [Respondents] to prove undue influence to maintain their breach of

⁵ This Court cannot review newly raised arguments which were not raised in the trial court or district court. See Metropolitan, 737 So. 2d at 499; Dober v. Worrell, 401 So. 2d 1322, 1323-24 (Fla. 1981).

⁶ The existence of a fiduciary duty is a question of law appropriate for appellate review. Gracey v. Eaker, 837 So. 2d 348, 354 (Fla. 2002).

fiduciary duty claims.” See State v. O’Daniels, 911 So.2d 247, 251 (Fla. 3d DCA 2005) (finding that under *de novo* review, courts may decide whether the trial court improperly applied the law). The court then properly applied the facts already found by the lower court to the law and concluded that Dana improperly transferred the Brigham Tree Farms out of the trust and to himself,⁷ without court approval pursuant to §737.403 and contrary to the express terms of the trust,⁸ thereby reversing the trial court’s findings that Petitioners did not breach their fiduciary duties. Brigham, 11 So. 3d at 386-87. Thus, there is no conflict between this case and Westerman or Cripe that supports accepting jurisdiction.

E. There is no Basis for Jurisdiction for Resolving Ambiguities in the Trust Documents as the Opinion Properly Interprets the Trust.

Petitioners assert that by resolving ambiguities in a trust, the Opinion conflicts with Miller v. Kase, 789 So. 2d 1095 (Fla. 4th DCA 2001). Petitioners’ contention fails because the district court properly interpreted the EFP Trust. The Opinion properly determines that: (1) the trust’s terms were not ambiguous; and (2) the trust required a written directive by Marion to transfer property out of the

⁷ The finding that Dana improperly transferred the Brigham Tree Farms out of the EFP Trust rested on the legal determination that: (1) §737.403(2) required Dana, as trustee, to seek court approval for the exercise of a trust power when it conflicted with his own interests; and (2) the terms of the EFP Trust required a written directive by Marion before Dana could transfer property out of the trust.

⁸ The misinterpretation of Florida statute is a matter of law subject to *de novo* review. Gordon v. Regier, 839 So. 2d 715, 718 (Fla. 1st DCA 2002).

trust. Brigham, 11 So. 3d at 385-86. The construction of unambiguous language in a document is a matter of law that appellate courts may determine *de novo*. See Kase, 789 So. 2d at 1098; Escobar v. United Auto. Ins. Co., 898 So.2d 952, 954-55 (Fla. 3d DCA 2005). Thus, Miller does not apply to the present case. This Court also cannot review this argument as Petitioners raise it for the first time on appeal.

F. Conflict Jurisdiction does not Exist Between the Opinion and Watkins Since Watkins' Holding is Consistent with the Opinion.

Petitioners argue that the Opinion conflicts with Watkins v. First Nat'l Bk in Ft. Myers, 183 So. 2d 575 (Fla. 2d DCA 1966), which purportedly holds that a deceased testator's intent is *always* determined from extrinsic evidence. Petitioners argue that the district court improperly held that extrinsic evidence was impermissible. Watkins, however, does not hold what Petitioners contend⁹ and is consistent with decisions relied upon by the district court. Bryan v. Dethlefs, 959 So. 2d 314, 317 (Fla. 3d DCA 2007); In re Estate of Benson, 548 So. 2d 775, 777 (Fla. 2d DCA 1989); Dutcher v. Estate of Dutcher, 437 So. 2d 788, 789 (Fla. 2d DCA 1983). This Court should not accept jurisdiction on this issue.

Conclusion

For the above mentioned reasons, this Court should decline to exercise conflict jurisdiction under Article V, Section 3(b)(3) over this case.

⁹ Watkins resorted to extrinsic evidence to construe a document because the court found that terms of the trust at issue were ambiguous. Watkins, 183 So. 2d at 577.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via US Mail on this ____ day of September, 2009 upon Wm. Fletcher Belcher, *Law Offices of Wm. Fletcher Belcher*, 540 Fourth Street North, P.O. Drawer T, St. Petersburg, FL 33731, Counsel for Petitioners; Arthur J. England, Esq., *Greenberg Traurig, P.A.*, 1221 Brickell Avenue, Miami, Florida 33131, Co-Counsel for Petitioners; Dana Brigham and Patricia Brigham, *c/o Brigham & Brigham*, 9807 25th Street East, Parrish, Florida 34219, Co-Counsel for Petitioners; and David R. Carlisle, Esq., *Duane Morris, LLP*, 200 South Biscayne Boulevard, Suite 3400, Miami, FL 33131-5323, Co-Counsel for Petitioner Patricia Brigham.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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