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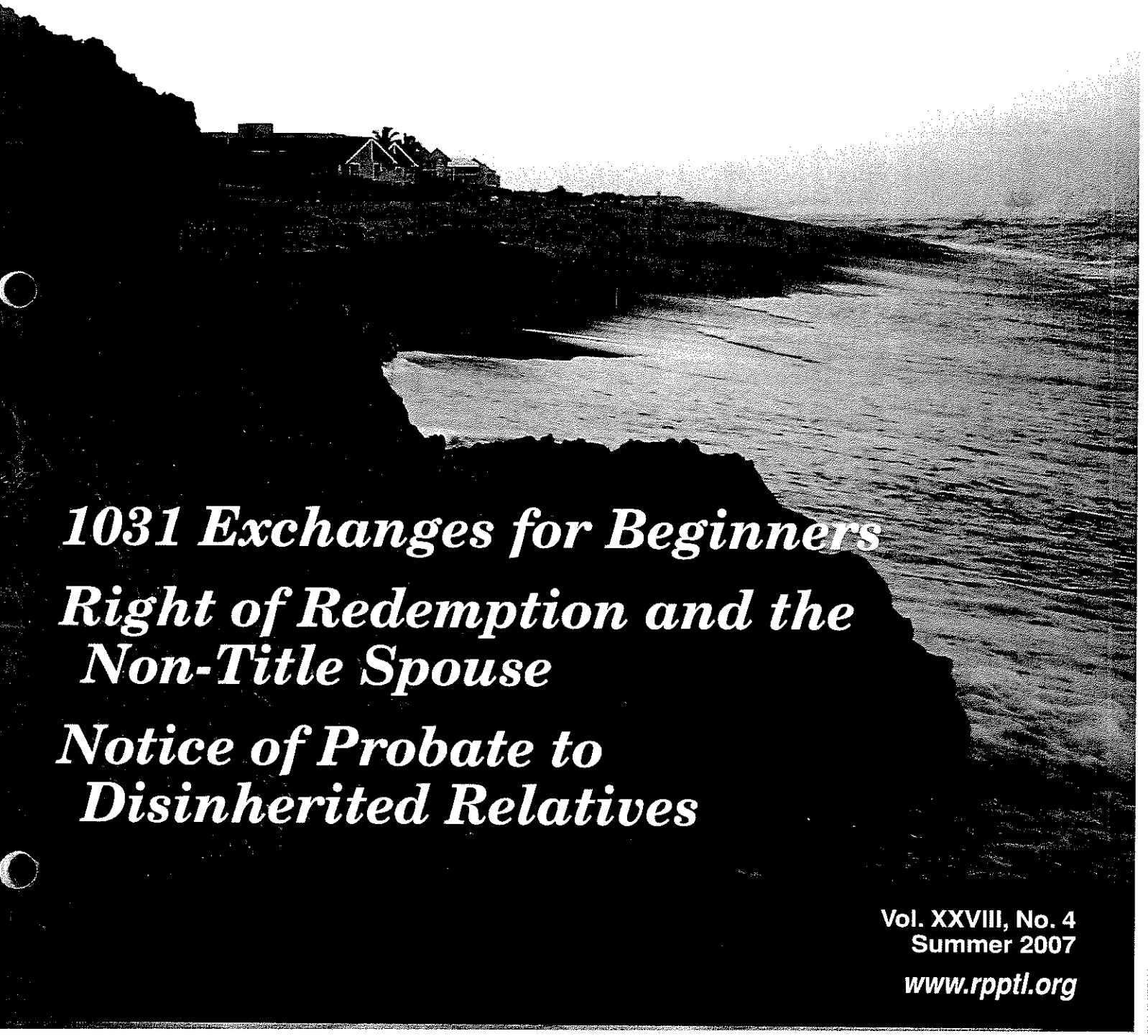

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Notice of Probate to Disinherited Relatives

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The Right to Know: Advice Regarding Notice of Probate to Disinherited Relatives

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With increasing frequency in Florida, family members of a decedent discover that they are the last to know of the completion of the probate administration of their relative's estate. They are usually informed by the attorney for the fiduciary that the estate is under no legal obligation to provide notice of the probate proceedings to persons who are not named in the will, even blood relatives.[1] Consequently, once the probate process is complete, the right to challenge a will is lost.

One school of thought believes that the deliberate failure to provide notice of probate to disinherited relatives gives priority to the stated intent of the decedent as reflected in his or her will, and discourages frivolous litigation initiated by disgruntled relatives. Alternatively, others take the position that the failure to notify disinherited relatives of the commencement of probate proceedings deprives the decedent's family the opportunity to challenge a fraudulently-procured will, while at the same time rewards the undue influencer(s) with the chance to probate an invalid will without being required to notify those family members who would most likely initiate an objection to probate.

The issue of whether it is constitutionally permissible to open an estate without ever giving notice to a person who would be an "heir" under Florida's laws of intestacy but who was disinherited under an allegedly invalid will has never been addressed by the Florida Supreme Court.

It is undisputed that the legislature has clearly issued a mandatory duty on the estate fiduciary to promptly make a diligent search of all known or reasonably ascertainable creditors.[2] Why then should the personal representative not have a duty to notify known family members who have been disinherited of the commencement of probate proceedings?

While the issue of whether it is constitutionally permissible to open an estate without ever giving notice to a person who would be an "heir" under Florida's laws of intestacy but who was disinherited under an allegedly invalid will has never been addressed by the Supreme Court, recent case law provides some prudent guidelines for practitioners to follow in helping their clients, who may likely be grieving family members, through the probate process.

After the probate process has been completed, practitioners may face litigation from disgruntled relatives who did not receive notice of the probate administration. Invariably, the litigation is an attempt to collaterally attack a will after the probate proceedings are concluded through bringing a tortious interference claim. The Restatement (Second) of Torts defines this cause of action as follows:

> § 774B Intentional Interference with Inheritance or Gift. One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

This general formulation of the tort allows claims under a variety of circumstances when the tortfeasor's conduct deprives another of a beneficial interest in a gift or inheritance, and includes, but is not limited to, interference with a testator's existing will. Florida and eleven other states have adopted this general formulation.[3]

Probate litigators usually can defend against an action for intentional interference with an inheritance by showing that the disgruntled family member at one time had an adequate probate remedy and that the remedy was lost through the plaintiff's own inaction. This defense was outlined by the Florida Supreme Court in answering a certified question from a federal district court in *DeWitt v. Duce*.[4]

In *DeWitt* the plaintiffs attempted to bring a claim for intentional interference more than two years following the probate of the decedent's will. The Florida Supreme Court stated that "[t]he rule is that if adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued."[5] The Court also noted that "[c]ases which allow the action for tortious interference with a testamentary expectancy are predicated on the inadequacy of probate remedies[.]"[6] The court further held:

> "In sum, we find that [plaintiffs] had an adequate remedy in probate with a fair opportunity to pursue it. Because they lacked assiduity in failing to avail themselves of this remedy, we interpret section 733.103(2) as barring [plaintiffs] from a subsequent action in tort for wrongful interference with a testamentary expectancy . . . ."[7]

The practice of purposefully not notifying a disinherited relative of the probate administration, and then relying on *DeWitt's* adequate probate remedy defense, was recently challenged in *Schilling v. Herrera*.[8] Mr. Schilling, the decedent's brother, was the only heir at law but had been disinherited by a will executed just months prior to the decedent's death. Mr. Schilling did not learn of his sister's death, or of the administration of her estate, until after a petition for discharge had been filed. Thereafter, Mr. Schilling filed a lawsuit against his deceased sister's former caregiver, requesting money damages and alleging that the caregiver had procured the will through fraud and

undue influence.

Further, Mr. Schilling alleged that the caregiver, who was also the estate fiduciary, *deliberately failed to notify him of his sister's death and the probate proceedings* as part of a "calculated scheme" to prevent Mr. Schilling from contesting the estate of his sister. However, the trial court, relying on *DeWitt v. Duce,* found that Mr. Schilling was barred from bringing an action for intentional interference with an expectancy because he failed to exhaust his probate remedies.

The Third District Court of Appeal reversed the trial court and distinguished *DeWitt* in a manner that gives some practical guidance for probate practitioners. The Third District held:

> "We find that *DeWitt* is factually distinguishable, and therefore inapplicable. A review of the amended complaint reflects that Mr. Schilling has alleged two separate frauds. The first alleged fraud stems from Ms. Herrera's undue influence over the deceased in procuring the will, whereas the second alleged fraud stems from Ms. Herrera's actions in preventing Mr. Schilling from contesting the will in probate court. We acknowledge that pursuant to *DeWitt*, if only the first type of fraud was involved, Mr. Schilling's collateral attack of the will would be barred. However, language contained in *DeWitt* clearly indicates that a subsequent action for intentional interference with an expectancy of inheritance may be permitted where the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court."[9]

The *Schilling* decision is critical because it creates a categorical exception to *DeWitt's* prohibition of tort claims when there has been a probate remedy available. It also suggests a break from the long standing rule in Florida that "[f]raud cannot be inferred or deduced from the nonperformance of acts which by law the accused is not required to do whatever may be his motive, design or purpose either in doing or not doing the acts complained of."[10] It also raises the question of whether, as simply a matter of prudence, probate practitioners should *always* notice family members, even those who have been disinherited, of the administration of the probate estate.[11]

Endnotes:

1 Fla.Prob.R. 5.240(a) requires the notice of administration to be served on the decedent's surviving spouse, the beneficiaries of the decedent's estate, the trustee of any trust described in Fla.Stat. Section 733.707(3) and persons who may be entitled to exempt property.

2 Fla.Stat.§733.2121(3)(a).

3 See *DeWitt v. Duce*, 408 So.2d 216 (Fla. 1981); *Minton v. Sackett*, 671 N.E.2d 160 (Ind.App. 1996); *Nemeth v. Banhalmi*, 99 Ill.App.3d 493, 425 N.E.2d 1187, 55 Ill. Dec. 14 (Ill. App. 1981); *Huffy v. Lea*, 491 N.W.2d 518 (Iowa 1992); *Plimpton v. Gerrard*, 668 A.2d 882 (Me. 1995); *Estate of Doyle v. Doyle*, 177 Mich. App. 546, 442 N.W.2d 642 (Mich.App. 1989); *Hammons v. Eisert*, 745 S.W.2d 253 (Mo.App.1988); *Doughty v. Morris*, 117 N.A. 284, 871 P.2d 380 (N.M. App. 1994); *King v. Acker*, 725 S.W.2d 750 (Tex. App. 1987); *Harris v. Kritzik*, 166 Wis. 2d 689, 480 N.W. 2d 514 (Wis.App. 1992). Five other states recognize a similar cause of action, however, unlike Restatement section 774B and *DeWitt*, the laws of those states do not provide grounds for recovery on the basis of *inter vivos* transfers alleged to diminish an eventual bequest. Rather, those states have limited the parameters of potential claims to instances involving demonstrable interference with the testamentary scheme the decedent had sought to create by making changes in an existing will.

4 408 So.2d 216 (Fla. 1981).

5 *Id.* at 218.

6 *Id.* at 219.

7 *Id.* at 221

8 32 Fla.L. Weekly D882 (Fla. 3rd DCA April 4, 2007)

9 *Id.* at D884.

10 *State Board of Medical Examiners v. Morlan*, 147 Fla. 695, 3 So.2d 402 (Fla. 1941)

11 The issue of whether a disinherited family member has due process rights under the Fourteenth Amendment of the United States Constitution and the Florida Constitution to receive notice of probate proceedings is beyond the scope of this article.