

DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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BRIAN FREEMAN, as Successor Trustee of The Fiddlesticks Land  
Trust U/A/D September 25, 1984,

Appellant,

v.

ROZ BERRIN a/k/a ROSLYN BERRIN, ROBERT BERRIN, and  
STEVEN ROBINSON,

Appellees.

No. 2D21-1885

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December 2, 2022

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for  
Lee County; Joseph C. Fuller, Jr., Judge.

John Charles Coleman and Thomas G. Coleman of Coleman &  
Coleman, Fort Myers, for Appellant.

Mark C. Anderson of Anderson Law, PLLC, Fort Myers, for  
Appellees.

LaROSE, Judge.

Brian Freeman appeals the trial court's nonfinal order entering  
a temporary injunction that removed him as successor trustee of

The Fiddlesticks Land Trust U/A/D September 25, 1984 (hereinafter, the Fiddlesticks Trust). The trial court improperly applied the Florida Trust Code, ch. 736, Fla. Stat. (2020), to an action involving a land trust governed by the Florida Land Trust Act, § 689.071, Fla. Stat. (2020). Nevertheless, the trial court permissibly granted the temporary injunction in favor of Roz Berrin, Robert Berrin, and Steven Robinson (collectively, the Beneficiaries) because they demonstrated entitlement to injunctive relief under the common law.

### **I. Background**

In 1984, Mr. Freeman's father, Jeffrey Freeman, joined with the Beneficiaries and others to invest in two adjacent parcels of land in Lee County. They executed separate Certificates of Participation and related documents to create two land trusts. Jeffrey Freeman was the trustee of both, with the "power and authority to protect and conserve, and to sell or lease or to encumber or otherwise to manage and dispose of the real property described in this instrument, as more specifically set forth in Florida Statute 689.071."

The Certificates of Participation were virtually identical. They authorized the trustee to sell, mortgage, or lease the trust property with "the written consent of a majority in interest of the beneficial owners of the property." The trustee was also authorized to sell the property without consent if presented with a bona fide offer to purchase the property within five years. The Certificates of Participation provided that "[n]either the [trustee] nor the [b]eneficiaries will engage in any form of trade or business with respect to the [p]roperty." The Certificates of Participation did not provide for removal of the trustee or mention chapter 736 or a predecessor trust code.

In 1997, the Beneficiaries combined the two trusts into a single land trust, the Fiddlesticks Trust, under an amended Certificate of Participation. The terms of the prior Certificates of Participation remained in force unless expressly modified by the amendment.

The Beneficiaries held minority beneficial interests, and Jeffrey Freeman held the majority interest, in the Fiddlesticks Trust. Upon his death in 2011, Jeffrey Freeman's interest passed to his estate; Brian Freeman became the successor trustee.

In 2018, Mr. Freeman, as successor trustee, sued the Beneficiaries. He sought to foreclose on liens against their beneficial interests for failure to pay their pro rata shares of expenses pursuant to the terms of the Certificates of Participation.

The Beneficiaries filed counterclaims against Mr. Freeman. They alleged that he breached his fiduciary and contractual duties by failing to provide an accounting and access to trust records upon demand; failing to provide records verifying the amount, source, and reason for advancements made by Mr. Freeman and his father's estate on behalf of the Fiddlesticks Trust; charging unreasonable management fees; and failing to advise the Beneficiaries of a condemnation action by the county. The Beneficiaries asked the trial court to remove Mr. Freeman as trustee and to order an accounting of trust assets and liabilities.

In December 2020, the Beneficiaries moved for a temporary injunction to remove Mr. Freeman as the successor trustee based on section 736.0706(2)(a) and irreparable harm caused by Mr. Freeman's alleged ongoing breaches of his contractual and fiduciary duties. As in their counterclaims, the Beneficiaries alleged that Mr. Freeman breached various fiduciary and contractual obligations.

After a hearing, the trial court granted the Beneficiaries' motion and removed Mr. Freeman as trustee.

## **II. Discussion**

### *A. Application of Chapter 736 to a Land Trust*

Mr. Freeman asserts that the trial court erroneously applied chapter 736's removal provision to a chapter 689 land trust. The Beneficiaries urge us to apply chapter 736 to the Fiddlesticks Trust because land trusts are essentially the same as ordinary trusts.

We review questions of statutory interpretation *de novo*. See *Page v. Deutsche Bank Tr. Co. Ams.*, 308 So. 3d 953, 958 (Fla. 2020) (citing *Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 145 n.2 (Fla. 2019)). "[T]he supremacy-of-the-text principle" guides our determination of the meaning of the statute: "[T]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021) (quoting *Page*, 308 So. 3d at 958).

The Fiddlesticks Trust is a section 689.071 land trust. See § 689.071(12)(b)1 (providing that a trust created before June 28, 2013, is a land trust governed by the Florida Trust Act if "a recorded instrument confers on the trustee the power and authority

described in s. 689.073(1)" and the recorded instrument or the trust agreement either "expressly provides that the trust is a land trust" or indicates that the parties intended "that the trust be a land trust . . . without regard to whether the trustee's duties under the trust agreement are greater than those limited duties described in paragraph (2)(c)"); *see also* § 689.071(1), (2)(c).

The legislature passed the Florida Land Trust Act to permit the use of land trusts, also known as Illinois Land Trusts, in Florida.<sup>1</sup> *Lawyers' Title Guar. Fund v. Koch*, 397 So. 2d 455, 457 (Fla. 4th DCA 1981). In contrast, the Florida Trust Code, codified in chapter

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<sup>1</sup> Curiously, if a trust created *on or after* June 28, 2013, assigns the trustee duties that exceed the limited duties listed in section 689.071(2)(c), the trust is not considered a "land trust," and it is an express trust governed by chapter 736, including section 736.0706, Florida Statutes (2020)'s removal provisions. § 689.071(2)(c), (12); *see also* Fla. H.R. Comm. on the Judiciary, HB 229 (2013) Staff Analysis (final May 16, 2013), *available on* Westlaw at FL Staff An., H.B. 229, 5/16/2013 ("If the trustee's duties exceed the foregoing limited duties and the trust is created after the effective date of the proposed amendment, then the trust will not be treated as a land trust and will not be excluded from the operation of [chapter 736]."). Yet, similar trusts, like the one in this case, created *before* June 28, 2013, are considered "land trusts" and not governed by chapter 736. § 689.071(12). It is unclear why the legislature made this distinction.

736,<sup>2</sup> governs "express trusts . . . and trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust." § 736.0102(1).

But for exceptions not applicable here, section 689.071(12) provides that the Florida Trust Code does not apply to land trusts. See § 689.071(7), (12)(b)2. Even before the legislature added subsection (12), the statute indicated that the Florida Trust Code, generally, did not apply to land trusts. § 736.0102, Fla. Stat. (2007-2020) (explaining that the Florida Trust Code does not generally apply to land trusts); § 731.201(33), Fla. Stat. (1997) (excluding land trusts under section 689.05 from the definition of "trust" in chapter 737 "unless the context requires otherwise"); § 731.201(32), Fla. Stat. (1984) (same).

To support Mr. Freeman's removal, the Beneficiaries want us to insert the provisions of section 736.0706 into land trust law. This, we cannot do. The legislature is the proper branch of government to alter the statutory text. See *State v. Lewars*, 259 So. 3d 793, 798 (Fla. 2018) (explaining that courts may not "construe

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<sup>2</sup> The predecessor to the Florida Trust Code—Trust Administration—was codified in chapter 737.

an unambiguous statute in a way which would extend, modify, or limit[] its express terms or its reasonable and obvious implications"; and that "[s]uch a construction 'would be an abrogation of legislative power' " (first alteration in original) (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984), *abrogated on other grounds by Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) (stating that the courts may consider the statutory context and canons of statutory interpretation to determine "whether a term has a 'plain' or 'clear' meaning")))).

The case law upon which the Beneficiaries and the trial court rely is inapposite. *Brigham v. Brigham*, 11 So. 3d 374 (Fla. 3d DCA 2009), did not involve a land trust. *See id.* at 384 (holding that because the attorney failed to "to create a Florida Land Trust under section 689.071, [the trust at issue] is a trust regulated by chapter 737"). Any suggestion in *Brigham* that the Florida Trust Code applies to section 689.071 is dicta. *See generally Lewis v. State*, 34 So. 3d 183, 186 (Fla. 1st DCA 2010) ("When a court makes a pronouncement of law that is ultimately immaterial to the outcome of the case, it cannot be said to be part of the holding in the



case. . . . Consequently, in the context of the instant case, the statements are *dicta* and not binding on this court.").

Further, *In re Saber*, 233 B.R. 547 (Bankr. S.D. Fla. 1999), a case quoted in *Brigham* and relied on by the Beneficiaries, is also off the mark. That case involves a bankruptcy case and addresses the common law merger doctrine, an issue not before us. *See In re Saber*, 233 B.R. at 549, 553 ("Well-established Florida case law dictates that the legal and equitable interests are merged where nothing remains to be done to carry out the intention of the settlor.").<sup>3</sup>

*B. Removal of a Land Trustee Under the Common Law*

Despite the inapplicability of section 736.0706, the Beneficiaries asserted irreparable harm caused by Mr. Freeman's alleged ongoing breaches of his duties.<sup>4</sup> Although the order before

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<sup>3</sup> The legislature amended section 689.071 in 2013 to "prohibit[] the operation of the doctrine of merger to execute a land trust or to vest the trust property under certain conditions." Ch. 2013-240, §§ 1-2 Laws of Fla.; *see also* § 689.071(5).

<sup>4</sup> Many of the fiduciary duties listed in chapter 736 derive from the common law. *Cf.* Galler, 18 Fla. Prac., Law of Trusts § 18:8 (2022 ed.) ("In a series of separate sections, the [Florida Trust] Code codifies many of the foundational common law duties of a trustee as well as several other more specifically targeted duties relating to the

us is peppered with references to the fiduciary duties listed in chapter 736, we cannot ignore that the trial court separately found

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collection, management, and distribution of trust property."). To the extent that a statute does not explicitly override common law, the land trustee is subject to the same fiduciary duties imposed by the common law on all trustees. *See generally United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) ("[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. 'One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.' " (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 572 (1985))); *Quinn v. Phipps*, 113 So. 419, 421 (Fla. 1927) ("Stripped of all embellishing verbiage, it may be confidently asserted that every instance in which a confidential or fiduciary relation in fact is shown to exist will be interpreted as such. The relation and duties involved need not be legal; they may be moral, social, domestic or personal. If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial."); *Home Fed. Sav. & Loan Ass'n of Chicago v. Zarkin*, 432 N.E.2d 841, 845 (Ill. 1982) ("Land trustees in Illinois, therefore, are subject to the fiduciary duties imposed by the law on all trustees; and the general principles of trust law regarding these duties govern the decision of this case."), *superseded by* 765 Ill. Comp. Stat. 415/1-4 (1982), *as recognized in Sanelli v. Glenview State Bank*, 483 N.E.2d 226, 228 (Ill. 1985).

Regarding fiduciary duties, section 689.071 specifies that a land trustee does not breach a fiduciary duty where the land trustee is or "become[s] a secured or unsecured creditor of the land trust, the beneficiary of the land trust, or a third party whose debt to such creditor is guaranteed by a beneficiary of the land trust." § 689.071(10)(b).

that Mr. Freeman's alleged conduct constituted a "serious breach of trust." The trial court listed Mr. Freeman's duties in its order:

1. The Trustee holds "legal title to the Property as an agent for the Beneficiaries, and solely for the convenience of the Beneficiaries, in order to facilitate the management and disposal of the Property . . . ."
2. The Trustee "will take no action with respect to the Property . . . without the written consent of a majority in interest of the beneficial owners of the Property except for sales of the Property pursuant to Article 13 of this Agreement."
3. "Neither the [Trustee] nor the Beneficiaries will engage in any form of trade or business with respect to the Property."
4. "The [Trustee] has the authority and the discretion to incur any and all reasonable expenses, in connection with the management of the trust property."

The trial court recognized that the Beneficiaries were entitled to have the Fiddlesticks Trust managed in the manner specified by the trust documents, i.e., the Certificates of Participation. In rendering a temporary injunction, the trial court found that Mr. Freeman abdicated his fiduciary and contractual obligations.

Even though section 736.0706 does not apply to the Fiddlesticks Trust and section 689.071 does not explicitly provide a mechanism to remove Mr. Freeman, section 689.071, on its face, does not bar application of equitable remedies to stave off harms

caused by a trustee's dereliction of duties. See § 689.071(14) ("This act is remedial in nature and shall be given a liberal interpretation to effectuate the intent and purposes hereinabove expressed."); see also *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990) ("The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." (citations omitted)).

The trust statutes involved in this case emerge from a rich common law history of equitable relief to preserve the status quo pending a final determination of the merits of a trust case. See generally *Nickels v. Philips*, 18 Fla. 732, 734-35 (1882) (recognizing that to preserve the trust property, courts of equity have removed trustees "who have abused their trust"; where "the danger to the due execution of the trust and the due disposition of the trust fund requires such an interposition to prevent irreparable mischief"; where "the acts or omissions [sic] . . . endanger the trust property, or . . . show a want of honesty, or a want of proper capacity, or a

want of reasonable fidelity"; and "in all cases where there is a failure of suitable trustees to perform the trust, either from accident, or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause" (quoting Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* §§ 1287, 1289 (Charles C. Little & James Brown eds., A. Maxwell & Son 4th ed. 1846)); cf. *Becker v. Dulberg*, 176 So. 2d 583, 584 (Fla. 3d DCA 1965) ("Appellants filed their complaint in equity seeking removal of the appellee as trustee of a certain land trust."). And, there can be no question but that trial courts may order equitable relief if the moving party has alleged and proved facts entitling it to relief. See *Morgan v. Herff Jones, Inc.*, 883 So. 2d 309, 313 (Fla. 2d DCA 2004) (explaining that a trial court should grant a temporary injunction "after the moving party has alleged and proved facts entitling it to relief" (citing *Liberty Fin. Mortg. Corp. v. Clampitt*, 667 So. 2d 880, 881 (Fla. 2d DCA 1996))); see also *Chase Med. Grp. v. Palmetto Clinic Ctr.*, 549 So. 2d 1111, 1112 (Fla. 3d DCA 1989) (agreeing that the trial court could grant the temporary injunction under both statutory and common law).

Admittedly, prevailing on a motion for temporary injunction is no small task. *See Duryea v. Slater*, 677 So. 2d 79, 81 (Fla. 2d DCA 1996) ("A temporary injunction is an extraordinary remedy that should be granted sparingly and only after the moving party has alleged and proven facts which entitle him to relief." (citing *Liberty Fin. Mortg. Corp.*, 667 So. 2d at 880)).

As movants, the Beneficiaries had to demonstrate "(1) a likelihood of irreparable harm" and the lack of an adequate remedy at law; (2) "substantial likelihood of success on the merits"; (3) the harm to the Beneficiaries outweighs any potential harm to Mr. Freeman; and (4) the grant of a temporary injunction will not disserve the public interest. *See Manatee County v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d DCA 2012) (quoting *Polk County v. Mitchell*, 931 So. 2d 922, 926 (Fla. 2d DCA 2006)); *e.g.*, *State Inv. Holding, Inc. v. Merrick P'ship, LLC*, 103 So. 3d 232, 234 (Fla. 3d DCA 2012) (holding that the appellant failed to show irreparable injury where "the appellees represented both to the trial court and this Court that they will not transfer or encumber the property without court approval and they have not sought such approval").

Despite the dissent's statement otherwise, the parties addressed the trial court's authority to grant a temporary injunction. Indeed, they discussed, at length, the common-law elements required for a temporary injunction. *See generally REV Recreation Grp., Inc. v. LDRV Holdings Corp.*, 259 So. 3d 232, 237 (Fla. 2d DCA 2018) (recognizing that sufficient findings to support a common law temporary injunction requires "(1) a likelihood of irreparable harm; (2) unavailability of an adequate legal remedy; (3) a substantial likelihood of success on the merits; and (4) considerations of the public interest support the entry of the injunction" (quoting *Salazar v. Hometeam Pest Def., Inc.*, 230 So. 3d 619, 621 (Fla. 2d DCA 2017))).

The trial court found that the Beneficiaries satisfied their burden. Our record supports that finding. For instance, the trial court found and the record supports that Mr. Freeman "is operating a cattle business on the Trust property which is specifically prohibited by the terms of the Certificate of Participation." Mr. Freeman incorrectly believes that paragraph 5(1)(A) of the Certificates of Participation permits the cattle business. That paragraph permits the trustee to incur reasonable expenses,

including "compensation for accounting, administrative, legal, technical and management or brokerage services rendered to the Trust and the TRUSTEE." A cattle business is not in that paragraph's scope.

The trial court also found that Mr. Freeman failed to administer the Fiddlesticks Trust in good faith and in the Beneficiaries' interest, charged high administrative fees, failed to provide accountings and an explanation of the expenses, incurred unreasonable expenses, and failed to disclose to the Beneficiaries a condemnation action filed against the trust property by Lee County.<sup>5</sup>

Further, the record contradicts the dissent and Mr. Freeman's belief that the order for temporary injunction failed to address Mr. Freeman's affirmative defenses relating to the Beneficiaries' alleged failure to pay their pro rata share of expenses and taxes for over ten years. The trial court's findings and the record reflect that the

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<sup>5</sup> Notably, the condemnation action began in July 2020, about five months before the Beneficiaries sought injunctive relief. The county voluntarily dismissed the case shortly after the Beneficiaries moved to intervene. Mr. Freeman failed to communicate about a lawsuit potentially impacting the res of the Fiddlesticks Trust.



Beneficiaries repeatedly demanded, to no avail, accountings and records for expenses that Mr. Freeman sought to recoup. The trial court found that Mr. Freeman did not "provide evidence that he has proper[ly] accounted for partnership/beneficiary contributions or expenditures by utilizing the [Fiddlesticks Trust] bank account which was established for such purpose." We cannot and will not reweigh the evidence or substitute our judgment for that of the trial court where there is evidence to support the judgment. *See E-Racer Tech, LLC v. Off. of Att'y Gen. Dep't of Legal Affs.*, 198 So. 3d 1107, 1111 (Fla. 4th DCA 2016) (explaining that on appeal of a temporary injunction, "[t]he standard of review on appeal does not call for a reweighing of the evidence").

We cannot ignore the trial court's inherent authority to grant equitable relief as may be appropriate, an issue raised on appeal. *See generally Rosen v. Rosen*, 167 So. 2d 70, 72 (Fla. 3d DCA 1964) ("Trustees are accountable to equity, and their performance may be directed and controlled by a court of equity. Thus, in [33 Fla. Jur. *Trusts* § 111], it is said: 'Courts of equity have original, general, and inherent jurisdiction over trusts and the administration thereof. All trusts, whether express or implied, are within the jurisdiction of the

chancellor, even though the relief demanded is for the recovery of money. Proceedings involving trusts are ordinarily within the exclusive jurisdiction of equity. The aid of equity may at any time be invoked in the interest of a particular trust when the subject matter thereof is put in jeopardy or when other good cause is shown. This jurisdiction embraces authority in a proper case to impress a resulting or constructive trust on property, assuming that no adequate remedy exists at law, or to compel an accounting by the trustee.' "). The trial court made the findings necessary to grant a temporary injunction, a common law equitable remedy not displaced by section 736.0706 or section 689.071. *See generally REV Recreation Grp., Inc.*, 259 So. 3d at 238 (stating that a temporary injunction is "a common law equitable remedy").

We affirm the trial court's order.

KHOUZAM, J., Concurs.

ATKINSON, J., Concurs in part and dissents in part with opinion.

ATKINSON, Judge, Concurring in part and dissenting in part.

Although I concur in part II.A of the majority opinion, I nonetheless conclude that the trial court's entry of the order removing Freeman as trustee of a land trust was erroneous and must be reversed. Therefore, I respectfully dissent as to part II.B of the majority opinion and dissent from the result.

Additionally, perhaps due to the alternative rationale upon which it relied, the majority opinion elides analysis necessary to resolve the question of the applicability of chapter 736 to land trusts and does not address arguments raised by the parties with respect to the retroactive application of the 2013 version of section 689.071 and the merits of the trial court's order entering a temporary injunction in the Beneficiaries' favor. Therefore, I address those issues and arguments below.

**I. Application of the Florida Land Trust Act, § 689.071, Florida Statutes**

The majority correctly explains that chapter 736 generally does not apply to land trusts created pursuant to section 689.071. See § 736.0102(1), (3) (providing that chapter 736 governs express trusts and "does not apply to any land trust under s. 689.071,

except to the extent provided in s. 689.071(7), s. 721.08(2)(c)4., or s. 721.53(1)(e)"). The majority also correctly concludes that the Fiddlesticks Trust is a land trust created pursuant to section 689.071. However, the opinion does not fully explain how it arrived at the latter conclusion.

Section 689.071 in relevant part, defines a land trust as

any express written agreement . . . by which a . . . trust is declared of any land . . . under which the title to real property . . . is vested in a trustee by a recorded instrument that confers on the trustee the power and authority prescribed in s. 689.073(1) and under which the trustee has no duties other than the following:

1. The duty to convey, sell, lease, mortgage, or deal with the trust property, or to exercise such other powers concerning the trust property as may be provided in the recorded instrument, in each case as directed by the beneficiaries[;] . . . .
2. The duty to sell or dispose of the trust property at the termination of the trust; [or]
3. The duty to perform ministerial and administrative functions delegated to the trustee in the trust agreement or by the beneficiaries[;] . . . .

. . . .

However, the duties of the trustee of a land trust created before June 28, 2013, may exceed the limited duties listed in this paragraph to the extent authorized in subsection (12).

§ 689.071(2)(c). The power and authority of a trustee of a land trust prescribed in section 689.073(1) are "to protect, to conserve, to sell, to lease, to encumber, or otherwise to manage and dispose of the [trust] property." § 689.073(1).

As explained by the majority, "chapter 736 does not apply to [section 689.071] land trust[s]" except as otherwise expressly stated in section 689.071. § 689.071(12). The only provisions of the Florida Trust Code made applicable to land trusts by section 689.071(7) are irrelevant to this case. *See* § 689.071(7) (providing that sections 736.08125<sup>6</sup> and 736.1013<sup>7</sup> apply to all land trusts otherwise created pursuant to section 689.071); .071(2)(c)4 (acknowledging that certain provisions of chapter 736 may apply to land trusts that are timeshare estate trusts or vacation club trusts by operation of chapter 721).

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<sup>6</sup> Section 736.08125 provides that successor trustees are not personally liable for actions taken by prior trustees and do not have a duty to institute claims against a prior trustee or the prior trustee's estate for the prior trustee's actions under certain circumstances. § 736.08125(1).

<sup>7</sup> Section 736.1013 outlines the personal liability of the trustee for contract and tort claims against the trust. § 736.1013(1)–(4).

Section 689.071(12)(a) provides that "[a] trust is not a land trust governed by this section if there is no recorded instrument that confers on the trustee the power and authority prescribed in s. 689.073(1)." Section 689.071(12)(b)1 provides that "a trust created before June 28, 2013," is a land trust governed by the Florida Trust Act "if a recorded instrument confers on the trustee the power and authority described in s. 689.073(1) and . . . [t]he recorded instrument or the trust agreement [either] expressly provides that the trust is a land trust" or indicates that the parties intended "that the trust be a land trust . . . without regard to whether the trustee's duties under the trust agreement are greater than those limited duties described in paragraph (2)(c)."<sup>8</sup>

The Fiddlesticks Trust meets the statutory requirements for a land trust under section 689.071. The deeds for the two parcels that make up the Fiddlesticks Trust were recorded and confer on

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<sup>8</sup> Section 689.071(12)(b)2 provides that a trust created after June 28, 2013, is *not* a land trust governed by that section if the recorded deed or the trust agreement either "expressly provides that the trust is to be governed by chapter 736, or by any predecessor trust code or other trust law other than" section 689.071 or indicates that the parties intended for "the trust [to] be governed by chapter 736, or by any predecessor trust code or other trust law."

the trustee the "power and authority to protect and to conserve, and to sell or lease or to encumber or otherwise to manage and dispose of the real property described in this instrument, as more specifically set forth in Florida Statute 689.071 . . . ." *See* § 689.073(1) (enumerating "the power[s] and authority [of a trustee] to protect, to conserve, to sell, to lease, to encumber, or otherwise to manage and dispose of the real property described in the recorded instrument"); *see also* § 689.071(2)(c), (12)(b)1. The deeds expressly cite to section 689.071 when outlining the duties of the trustee of the Fiddlesticks Trust properties; therefore, "[t]he intent of the parties that the trust be a land trust is discern[ible] from the trust agreement or the recorded instrument." *See* § 689.071(12)(b)1.b.

Although they do not expressly reference section 689.071, the Certificates of Participation provide that the trustee has the power to sell, lease, encumber, and otherwise manage or dispose of the property—the powers of a trustee, *see* §§ 689.073(1); 689.071(2)(c)—subject to the requirement that the trustee obtain the consent of a majority in interest of the beneficiaries. *Cf.* § 689.071(2)(c)1–3, (12)(b)1.b. The amendment to the Certificates of Participation provides that the Fiddlesticks Trust is a "land trust."

*Cf.* § 689.071(12)(b)1.a. In addition to satisfying section 689.071(12)(b)1, the Fiddlesticks Trust does not meet the criteria in section 689.071(12)(b)2, which outlines when a trust is *not* a land trust governed by the Florida Land Trust Act. Neither the deeds, the Certificates of Participation, nor the amendment "expressly provide[]" or indicate that the parties intended for the Fiddlesticks Trust to "be governed by chapter 736, or by any predecessor trust code or other trust law other than" the Florida Land Trust Act. See § 689.071(12)(b)2.a–b.

For the foregoing reasons, the Fiddlesticks Trust is a land trust governed by section 689.071. Unlike the Florida Trust Code, section 689.071 does not provide that a court may remove a trustee. Likewise, the deeds, Certificates of Participation, and amendment to the Certificates of Participation governing the Fiddlesticks Trust do not include any provisions relating to removal of a trustee.

The Beneficiaries moved for the temporary injunction to remove Freeman as the successor trustee of the Fiddlesticks Trust, and the trial court granted the injunction, based explicitly on section 736.0706(2), which provides that "[t]he court may remove a



trustee if . . . [t]he trustee has committed a serious breach of trust." § 736.0706(2)(a). However, section 736.0706 does not apply to the trust in this case because it is not among the provisions of the Florida Trust Code made applicable by section 689.071 to land trusts like the Fiddlesticks Trust. *Cf.* §§ 689.071(7), (12); 736.0102(3). Therefore, the trial court erred by granting the motion for a temporary injunction to remove Freeman as trustee of the Fiddlesticks Trust based on section 736.0706.

## **II. Retroactivity and Impairment of the Obligations of Contract**

My conclusion that chapter 736 generally does not apply to the Fiddlesticks Trust—a land trust—except as otherwise specifically provided in section 689.071 is based on the most recently amended version of section 689.071. *See* Ch. 2013-240, § 2, Laws of Fla. The Beneficiaries argue that applying the 2013 version of section 689.071 improperly gives retroactive application to the statutory amendment that impairs the obligations of their preexisting contracts which were executed in 1984. Presumably because the majority concludes that the common law of trusts provides a mechanism by which the trial court could have removed

the trustee of the land trust, it declined to address this argument. Nonetheless, the Beneficiaries' argument is unavailing.

The remedy the Beneficiaries sought in their motion for preliminary injunction—removal of the trustee for a serious breach of trust pursuant to section 736.0706(2)(a)—did not exist at the time the Fiddlesticks Trust was created by recording the deeds and execution of the Certificates of Participation. The Florida Land Trust Act was enacted in 1963. Ch. 63-468, §§ 1–6, Laws of Fla. The 1963 version of the statute was silent regarding the applicability of other statutes and trust law to land trusts created and governed under the statute. *See id.* Over a decade after the section 689.071 was enacted, the legislature enacted chapter 737, Florida Statutes, governing trust administration. *See* ch. 74-106, § 1, Laws of Fla. Chapter 737 was the predecessor to chapter 736, which was not enacted until 2006. *See* Ch. 2006-217, § 1, Laws of Fla.. In 1984, the legislature amended section 689.071 to apply one section of chapter 737 to land trusts: "In addition to any other limitations on personal liability existing pursuant to statute or otherwise, the provisions of s. 737.306 [governing personal liability of a trustee for the trust's obligations] shall apply to the trustee of a

land trust created pursuant to this section." Ch. 84-31, § 1, Laws of Fla.

Chapter 737 did not itself create a cause of action for removal of a trustee; instead, it merely acknowledged parties' contractual or common law rights to remove the trustee if the contract or the common law so provided. *Cf.* § 737.201(1)(a), Fla. Stat. (1984) ("The proceedings that may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of any other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to: (a) Appoint or remove a trustee."); .402(4)(e) ("A person who has the right to remove or to replace a trustee does not possess nor may that person be deemed to possess, by virtue of having that right, the powers of the trustee that is subject to removal or to replacement."). In 2006, when the legislature enacted chapter 736 to replace chapter 737 it created a statutory right to removal of a trustee who "has committed a serious breach of trust." § 736.0706(2)(a). No similar statutory right existed in chapter 737, which was in effect at the time of the execution of the Certificates of Participation.

Therefore, the Beneficiaries did not have a statutory right to remove the trustee for a serious breach of trust based on either section 736.0706 or chapter 737 at the time that the Fiddlesticks Trust deeds were recorded and the Certificates of Participation were executed. The Beneficiaries argue that retroactive application of the 2013 amendment to section 689.071 would be erroneous, but the statutory remedy in section 736.0706 on which they seek to rely—over against the amended version of section 689.071 they contend must *not* be retroactively applied—would itself not even be applicable *but for* retroactive application of chapter 736. In other words, even if this court were to decline to retroactively apply the current statutory scheme, that would mean the statutory removal remedy they seek to invoke was not available to the Beneficiaries in 1984, because it was not enacted until 2006, long after the deeds were recorded and the Certificates of Participation were executed in 1984 and the amendment to the Certificates of Participation was executed in 1997.

For these reasons, the Beneficiaries' argument that retroactive application would violate the constitutional prohibition on the impairment of the obligation of contracts fails. "[A]rticle I, section

10, of the Florida Constitution mandates that '[n]o . . . law impairing the obligation of contracts shall be passed.' " *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1190 (Fla. 2017) (second alteration in original) (quoting art. I, § 10, Fla. Const.). "To impair a preexisting contract, a law must 'have the effect of rewriting antecedent contracts' in a manner that 'chang[es] the substantive rights of the parties to existing contracts.' " *Id.* (alteration in original) (quoting *Manning v. Travelers Ins. Co.*, 250 So. 2d 872, 874 (Fla. 1971)).

The 2013 amendment did not "chang[e] the substantive rights of the parties," *see id.* (quoting *Manning*, 250 So. 2d at 874), as they existed when the deeds were recorded and the Certificates of Participation were executed in 1984 and when the amendment to the Certificates of Participation was executed in 1997. Chapter 737—the statute governing trust administration in effect at the time the parties recorded the deeds and executed the 1984 Certificates of Participation and the 1997 amendment to the Certificates of Participation for the Fiddlesticks Trust—did not provide a substantive statutory right to remove a trustee for a serious breach of trust. *See* § 737.201(1)(a); .402(4)(e). Therefore, application of

provisions of the Florida Land Trust Act that were not in effect at the time that the deeds were recorded and the Certificates of Participation were executed would not impair any obligations of the Certificates of Participation and the 1997 amendment. The only obligation created by the Certificates of Participation and the 1997 amendment would be for the trustee to subject himself or herself to any remedies the beneficiaries had under the applicable trust code, but chapter 737 did not provide such a removal remedy in 1984 or 1997.<sup>9</sup>

Further, since it was first enacted in 1963, section 689.071, has provided that the "act is remedial in nature and shall be given a liberal interpretation to effectuate the intent and purposes hereinabove expressed." Ch. 63-468, § 5, Laws of Fla; *see also* § 689.071(14), Fla. Stat. (2013) ("This act is remedial in nature and

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<sup>9</sup> Moreover, the fact that, in 1984, the legislature had amended the Florida Land Trust Act to specifically provide that the limited liability provisions of section 737.306 applied to land trusts suggests that at the time the parties executed the Certificates of Participation, none of chapter 737 applied to land trusts created under section 689.071. However, this court need not rely on such an inference to conclude that application of the 2013 amendment does not impair any obligations of the Certificates of Participation and the 1997 amendment.

shall be given a liberal interpretation to effectuate the intent and purposes hereinabove expressed."). In 2013, section 689.071 was amended to expressly provide that the Florida Trust Code does not apply to land trusts. *See* ch. 2013-240, § 2, Laws of Fla.

Generally, "statutes are addressed to the future, not the past"; however, "[r]emedial statutes are exceptions to" this general rule. *See Grammer v. Roman*, 174 So. 2d 443, 446 (Fla. 2d DCA 1965) ("Remedial statutes do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes."); *see also Liebman v. City of Miami*, 279 So. 3d 747, 750 (Fla. 3d DCA 2019) ("If it is a substantive change in the law, a presumption *against* retroactive application follows, but if it is procedural/remedial, that presumption does not follow." (emphasis in original) (citing *Smiley v. State*, 966 So. 2d 330, 334 (Fla. 2007))). Therefore—consistent with the legislative pronouncement regarding the remedial nature of the Act—at least with regard to the question of which remedial provisions of the Florida Land Trust Act apply to land trusts, the 2013 amendment to section 689.071 applies to the Fiddlesticks Trust even though the Certificates of Participation and the amendment to the Certificates

of Participation were executed prior to its passage. *See Grammer*, 174 So. 2d at 446 (concluding that the 1963 version of the Florida Land Trust Act applied in the case even though the deed and contract governing the trust were executed before its passage because the Florida Land Trust Act is remedial in nature).

### **III. Failure to Establish Elements of a Temporary Injunction**

Although not raised by the parties, the majority concludes that the trial court had common law authority to grant temporary injunctive relief removing Freeman as the trustee of the Fiddlesticks Trust. *Cf. Railey v. Skaggs*, 220 So. 2d 689, 690 (Fla. 3d DCA 1969); Restatement 3d Trusts § 37 ("A trustee may be removed (a) in accordance with the terms of the trust; or (b) for cause by a proper court."). While the parties discuss the elements generally applicable to temporary injunctions, the appellees' answer brief does not even include the phrase "common law," much less argue in the alternative that the statutory temporary injunction entered by the trial court could be supported by common law authority.

While the Florida Trust Code provides that "[t]he common law of trust and principles of equity supplement this code, except to the extent modified by this code or another law of this state,"



§ 736.0106, the Land Trust Act does not include any provision explicitly stating that the common law of trusts applies, *see generally* § 689.071. Courts have held that statutes are presumed not to change common law unless the statute clearly and explicitly states that it is in derogation of the common law. *See Thornber*, 568 So. 2d at 918. However, Florida land trusts are a creature of statute, *cf. Brigham*, 11 So. 3d at 384 ("An Illinois land trust is a unique creature of Illinois law whereby real estate is conveyed to a trustee under an arrangement reserving to the beneficiaries the full management and control of the property." (quoting *LaSalle Nat'l Bank v. Fed. Emergency Mgmt. Agent*, No. 84 C 9006, 1985 WL 2081, at \*5 (N.D. Ill. 1985))). Therefore, the common law of trusts should not be presumed to apply to land trusts—a creature of state law created to operate differently from common law trusts.

Conspicuously absent from the chapter creating land trusts is a provision that appears in the Florida Trust Code—one providing that the common law of trusts and principles of equity apply to trusts govern by the code unless modified or abrogated by law.

When the legislature expresses something in one provision but omits it in another related provision, courts should avoid reading it

into the latter. *L.C. v. State*, 283 So. 3d 442, 444 (Fla. 2d DCA 2019) ("When the legislature has included a provision in one statute but omitted it in a related statute, courts should not read it into the statute from which it has been excluded."); *see also Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) (declining to "imply [a term] where it has been excluded" when the term was used in one section governing the implied warranty for developers but not another implied-warranty section governing contractors).

In light of the foregoing, an argument could be made that the common law remedy of trustee removal by temporary injunction is not available in the context of a land trust. However, that argument was not made by the parties, who did not anywhere in their briefs discuss the alternative of common law authority to support the injunctive relief that the majority acknowledges is not supported by the statutory provisions invoked by the trial court.

That argument need not be resolved, however, because even assuming *arguendo* that the trial court had the power to issue a temporary injunction removing Freeman as the successor trustee of the Fiddlesticks Trust based on the common law of trusts, the trial

court erred by issuing the temporary injunction because the Beneficiaries did not establish all four of the elements required for issuance of a temporary injunction. *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld *if there is any basis which would support the judgment in the record.*" (emphasis added)).

To obtain a temporary injunction, the movant must establish four elements: "(1) a substantial likelihood of success on the merits, (2) the unavailability of an adequate remedy at law, (3) irreparable harm absent entry of an injunction, and (4) that the injunction would serve the public interest." *Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1110 (Fla. 2021) (first citing *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 485 (Fla. 2001); and then citing *Reform Party of Fla. v. Black*, 885 So. 2d 303, 305 (Fla. 2004)). If the movant fails to establish any one of the four elements, "the injunction must be denied." *Id.* at 1111.

To establish a likelihood of success on the merits, a movant must also "demonstrate likelihood of success on the merits as to asserted affirmative defenses as well as . . . elements of [the

movant's] prima facie case." *Bradley v. Health Coal., Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997) (omission in original) (quoting *Cordis Corp. v. Prooslin*, 482 So. 2d 486, 490 (Fla. 3d DCA 1986)). Freeman raised several affirmative defenses to the Beneficiaries' counterclaims and the motion for a temporary injunction, including prior material breach, unclean hands, and laches. Freeman presented evidence to support the existence of these affirmative defenses, but the Beneficiaries did not present evidence establishing a likelihood of success on the merits as to the affirmative defenses.

The defenses of prior material breach and unclean hands prevent a party from "enjoin[ing a] breach of a contract by another, unless he himself has performed what the contract requires of him so far as possible; if he himself is in default or has given cause for nonperformance by defendant, he has no standing in equity." *Id.* (quoting *Seaboard Oil Co. v. Donovan*, 128 So. 821, 824 (Fla. 1930)). The Certificates of Participation provided that each beneficiary must pay his or her pro rata share of expenses and taxes for the trust. Both Freeman and Robert Berrin testified that the Berrins had not paid their share of taxes and expenses on the property since 2006.

Freeman and Robinson testified that Robinson had not paid his share since 2008. Therefore, Freeman presented sufficient evidence to support his defenses of prior material breach and unclean hands; the Beneficiaries did not present any evidence to establish a substantial likelihood of success on the merits as to these affirmative defenses raised by Freeman.

"Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Ticktin v. Kearin*, 807 So. 2d 659, 663 (Fla. 3d DCA 2001). Freeman testified that he managed the trust property in the same manner as his father had before him and the Beneficiaries had not complained about his father's management practices or policies. Robinson's testimony that the last bill he paid that was sent by the father was for expenses and taxes incurred over a three-year period—2006 to 2008—corroborates Freeman's testimony that he continued his father's billing practices. Freeman also testified that the Beneficiaries never brought claims against the father for his conduct in managing the Fiddlesticks Trust property. Thus, according to the testimony from the hearing on the motion for temporary injunction, the Beneficiaries chose not to assert that

their rights under the Certificates of Participation had been violated for years *during both Freeman and his father's tenures as trustee.*

The Beneficiaries did not present any evidence that they had a substantial likelihood of success as to Freeman's laches defense.

"The general function of a temporary injunction is to preserve the status quo for disputing parties until the court is able to resolve the underlying dispute on its merits." *Coscia v. Old Fla. Plantation, Ltd.*, 828 So. 2d 488, 490 (Fla. 2d DCA 2002) (citing *State Agency for Health Care Admin. v. Cont'l Car Servs., Inc.*, 650 So. 2d 173 (Fla. 2d DCA 1995)). The status quo is "the last, actual, peaceable, noncontested condition which preceded the pending controversy." *Nazia, Inc. v. Amscot Corp.*, 275 So. 3d 702, 705 (Fla. 5th DCA 2019) (quoting *Chic. Title Ins. Agency of Lee Cnty. v. Chi. Title Ins. Co.*, 560 So. 2d 296, 297 (Fla. 2d DCA 1990)).

In addition to failing to establish a substantial likelihood of success on the merits of Freeman's laches defense, the facts established at the hearing regarding Freeman's continuity of his father's practices when he became the trustee of the Fiddlesticks Land Trust also suggest that granting the temporary injunction and removing Freeman as the trustee did not preserve the "last, actual,

peaceable, noncontested condition which preceded the pending controversy." *Id.* (quoting *Chi. Title Ins. Agency of Lee Cnty.*, 560 So. 2d at 297). Far from preserving the status quo, the temporary injunction changes the status quo, not only by changing the trustee, but also by altering the manner of administering the trust that persisted throughout Freeman's trusteeship and before it.

Because the Beneficiaries failed to establish a substantial likelihood of success on the merits of Freeman's affirmative defenses and the injunction alters instead of preserves the status quo, it is unnecessary to discuss whether they established the other elements necessary for a temporary injunction. *See Florigrown*, 317 So. 3d at 1110–11. The trial court erred by granting the motion for temporary injunction. *See id.* at 1119 (concluding that the trial court erred by granting the movant's request for a temporary injunction because the movant failed to establish a substantial likelihood of success on the merits); *Bradley*, 687 So. 2d at 333 (reversing the temporary injunction and remanding for a hearing on the defendant's affirmative defense because the plaintiff did not demonstrate a substantial likelihood of success on the merits of the

defendant's affirmative defense). The trial court reversibly erred by entering the injunction, and I therefore respectfully dissent.

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Opinion subject to revision prior to official publication.