

**RISSMAN, BARRETT, HURT,
DONAHUE & McLAIN, P. A.
ATTORNEYS AT LAW**

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS

OF COUNSEL
ROBERT J. JACK
JOHN P. DALY

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

709 SEBASTIAN BOULEVARD
SUITE B
SEBASTIAN, FLORIDA 32958
TELEPHONE (772) 228-3228
TELECOPIER (772) 228-3229
SEBASTIAN@RISSMAN.COM

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

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AMY L. BAKER
AMANDA L. BRUS
STEVEN B. BURRES
DEREK J. BUSH
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
SARAH E. EGAN
JAMES E. FAVERO III
SUSAN R. FULLER
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D. BLAKE REHBERG
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CHRISTINE V. ZHAROVA

CERTIORARI REVIEW OF NONFINAL ORDERS

Under Florida law, the three-part standard of review for certiorari proceedings involving nonfinal is the order must evince a "departure from the essential requirements of the law, the order must cause material injury throughout subsequent proceedings and the injury must be one for which there will be no adequate remedy after final judgment." *See Haines City Community Development v. Heggs*, 65 So. 2d 523 (Fla. 1995). Critics of *Heggs* opine that the test is inherently flawed because the above legalese fails to yield an objective standard that can be applied uniformly in every case. As a result, inconsistent rulings have become common as judges have begun injecting their own unstated policies into these proceedings.

For over three decades, the Florida Supreme Court has tried to clarify what constitutes a "departure from the essential requirements of the law." The problem seems to be that concepts like "departure," "essential requirements," "material injury," and "adequate remedy" are all subjective terms that defy definition. For instance, many appellate judges have tried to define "departure from the essential requirements of law" to mean something far beyond a legal error. One judge defines it

as "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements resulting in a gross miscarriage of justice."

While this flowery language may sound poetic, it is unlikely that many appellate judges would limit their review only to "an act of judicial tyranny." If the goal of the judicial system is to provide the best and most cost effective forum for dispute resolution, then limiting review to acts that are illegal or are gross miscarriages of justice would not achieve this goal.

In light of the subjective difficulties in the application of the **Heggs** test, Florida courts should attempt to rethink the **Heggs** test by simplifying the three-pronged **Heggs** test into two central issues that the **Heggs** test attempts to address. The focus should be the nature and degree of the trial court error and whether there is an adequate justification for the reviewing court to exercise its discretionary jurisdiction.

For the purposes of debate, one might consider the nature and degree of the trial court error with the following policies:

- 1) a reviewing court should not conclude that an order contains an error unless the record establishes an error that would result in reversal on direct appeal with little or no debate among appellate judges;
- 2) such a non-debatable error will normally require a showing that the lower court violated due process, failed to follow binding precedent or failed in the application of unambiguous statutory law; and
- 3) if the challenged order involves a discretionary decision by the trial court and not an error of law, the abuse of discretion would need to rise to the level of an ongoing deprivation of due process.

In regard to the second central issue that the **Heggs** test attempts to address, a reviewing court should not determine that an error will be so detrimental to the goal of providing an

adequate trial court dispute resolution process that it warrants appellate court interference unless the error:

- 1) deprives a party of a statutorily mandated pre-litigation process;
- 2) involves an ongoing due process violation;
- 3) places burdens on a party that are so extreme that the public would perceive the trial court as an illegitimate forum for fair decision making;
- 4) places burdens on a party so extreme that they will compel a party to settle a case prior to final judgment;
- 5) violates privacy rights;
- 6) the appellate court should not intervene in an ongoing trial unless it is convinced the benefits of intervention outweigh the cost of intervention; and
- 7) a reviewing court should provide the narrowest available holding.

The above proposals illustrate that certiorari rules can be written in a way that allows them to be applied in a more objective and uniform manner. Moving forward, the Florida judiciary should begin to shy away from the three-pronged **Heggs** test and create a more coherent decision making structure that generates objective results instead of subjective rhetoric.

JLH/GRS/smm/tsr